# ATTACHMENT 2

Full Text of the Public Comments
Received on the Proposed Rules

# Rule 1.0.1 – Public Comment – File List

Y-2010-532 Peter Liederman [1.0.1]

Y-2010-542 Phillip Feldman [1.0.1]

Y-2010-553a OCTC [1.0.1]

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 23, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Peter H. Liederman

*** City** Berkeley

*** State** California

*** Email address** (You will receive a copy of your comment submission.) berkeleylawfirm@gmail.com

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]

Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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

1.0.1 Terminology [1-100]

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

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ◉ AGREE ONLY IF MODIFIED

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

regarding e-1 the rule: if I read it correctly, it imposes written disclosure as an essential and non-explicit component of "informed written consent." First, this creates a trap for the unwary who might reasonably believe that "written consent" is only what its plain English suggests it is; second without evident good cause it burdens any attorney in every circumstances from giving oral advice and obtaining a written consent on which he can rely, even when it is otherwise completely reasonable, mutually agreeable, and (except by your definition) ethical to do so. When there are circumstances where both written advice and written consent are necessary these should be specified. Further, the drafters should consider that handing unsophisticated clients written warnings or disclaimers about a legal question may actually impair informed consent compared to a patient oral explanation without the formidable-looking piece of paper.
PHL

**LAW OFFICES OF PHILLIP FELDMAN**
**14401 Sylvan Street, Suite 208**
**Van Nuys, California 91401**
**(818) 986-9890**

Phillip Feldman *

*Of Counsel*
Robert S. Ackrich
James Wesley Smith, Jr.

Ms. Audrey Hollins, Office of Professional Competence
Planning & Development, State Bar of California
By Fax Only to 415-538-2171

Re: Comment Requesting that the Supreme Court modify Proposed Definition of "Informed Consent" as set forth in Commission's Proposed California Rule of Professional Conduct1.0 (e) (terminology) and appurtenant Comment [6] to more closely conform to the national standard (ABA Rule of Professional Conduct 1.0 (e). )

Informed consent is relevant to multiple existing and proposed California Rules of Professional Conduct and a discussion thereof is not pertinent to the specific objections and criticisms raised herein.

ABA terminology reads: " *'Informed Consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*"

**The Commission's proposed language inappropriately deletes "ADEQUATE INFORMATION AND EXPLANATION"** which enables factual application narrowed down to adequacy of the communication from the lawyer to a lay client. The Commission proposes to replace the plain English, national language with "the relevant circumstances and the actual and reasonably foreseeable material risks of the proposed conduct". In addition the Commission proposes to qualify retained ABA language "reasonably available alternatives" by adding the modifier "appropriate".

It's apparent that ABA language simply describes a lawyer's duty to provide a client with a RISK-BENEFIT analysis. It is equally apparent that the Commission proposes to do away with an either/or "black letter" determination of ADEQUACY with a four element test to determine whether or not a client has received informed consent. This was done by adding superfluous modifiers RELEVANT, ACTUAL, REASONABLY FORESEEABLE and APPROPRIATE.

To many, it is equally apparent that by complicating that which is simple, well understood and applied nationally in both ethical/disciplinary and professional liability contexts that the Commission proposes California remain anachronistic.

LAW: Although informed consent duties of professionals to provide clients or patients with enough information to make intelligent decisions runs through the common law applicable to physicians everywhere, published decisions specifically pertaining to lawyers has lagged behind. An unsupported statement that ALL PROFESSIONALS and not just physicians owe their patients/clients a duty of providing enough information to make intelligent decisions never seems to be challenged as axiomatic since the same rationale applicable to physicians applies to attorneys as well.

The concept that every human being of sound mind and adult years has a right of self determination appears to have been re-articulated by Justice Cardozo in Schloendorff v Society of New York hospital (1914) 211 N.Y. 125, 105 N.E. 92 after review of Illinois and other authority. Cantebury v Spence and Washington Hospital Center (DC 1972) 464 F. 2d 772 re-birthed it and Cobbs v Grant (1978) 8 Cal 3d 229 made the standard independent of the average reasonable professional's notion of full and fair informed consent but determinable as a matter of law. Arato v. Avedon (1993) 5 Cal. 4th 1172, 1182 analyzing Cobbs, identified the rationale for physicians as fourfold: patients are unlearned in medical sciences and have less knowledge than the professional; and "a person of adult years and a sound mind has the right in the exercise of control over his own body, to determine whether or not to submit to a lawful medical treatement"; and "the patient's consent to treatment to be effective, must be an informed decision"; and "the patient being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, this raising an obligation in the physician that transcends arms-length transactions".

It's apparent that replacing medical science with "the law", physicians with "attorneys", body with "legal affairs" and, as pertinent, substituting "course of conduct" for medical procedures, suggests there ought be and is no difference in the rationale for informed consent duties of lawyers.

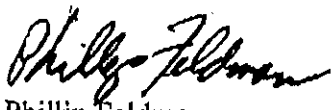
Although the Commission cites Sharp v Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410 to support its proposed deviation from the ABA rule, Sharp's language is in full accord with the above. *"Once the client has been provided with sufficient information about the situation, the client can make a rational choice, based upon full disclosures as to the risks of the representations, the potential conflicts involved, and the alternatives available as required by particular circumstances."*

**In it's proposed comments, the Commission inappropriately deleted the ABA language:** *"In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek advice of other counsel."*

Looking to the medical model, does a general surgeon who never performed any thoracic procedure have a duty to inform her open-heart surgery patient he might wish to seek the advice of other physicians? Substitute family law practitioner for general surgeon, jury trial for thoracic procedure , and medical malpractice trial for open-heart surgery. Don't they both yield the same response.

Respectfully Submitted,

Law Offices of Phillip Feldman



by Phillip Feldman

*Certified, American Board of Professional Liability Attorneys in and for the American Bar Association et. al. in Legal Malpractice. Ten years ago the writer participated in ABA's Ethics 2000 plan to revise the ABA Rules of Professional Conduct after national inquiry. Although "informed consent" wasn't included in terminology then, the writer proposed that "it is inconsistent for rule of behavior for lawyers to require less than that which would make a lawyer liable under each state's common law. " It was proposed that language be added to the communication rule: "When appropriate, a lawyer shall explain the advantages and risks of alternative courses of action to the client to accomplish the above objectives." A comment [5] to the revised rule advises that when informed consent is required, it's "as defined in 1.0 (e).

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**Rule 1.0.1. Terminology/Definitions.**

1. OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.

   The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.

   Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for

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

informed consent.

2. OCTC remains concerned with the definition in proposed rule 1.0.1(e)(2). Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature's authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4th 40.)

   Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition. The Commission has stated that it is not defining the statute, only providing attorneys with guidance. However, that is not what the rule states. Rule 1.0.1(e)(2) states: "'Information protected by Business & Professions Code section 6068(e)' is *defined* in Rule 1.6, Comments [3] – [6]." [Emphasis added.]"

   In addition, the rules lack authority to provide "guidance" about the definition of a term in a statute.

3. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule's definition of tribunal. The Commission's proposed rule excludes from the definition of tribunal legislative bodies *acting in an adjudicative capacity*. However, there is no valid reason to exclude legislative bodies when they are acting in an adjudicative capacity. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.

   The Commission's definition, especially when used in proposed rule 3.3, is confusing in that the State Bar Act already prohibits attorneys from engaging in dishonesty to a court and others and does not separate dishonesty in front of legislative bodies acting in an adjudicative capacity from misrepresentations to courts or others. For instance, it is the duty of an attorney "[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Business & Professions Code section 6068(d).) Likewise, "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." (Business & Professions Code section 6106.) These statutes do not carve out an exception for misrepresentations to legislative bodies acting in an adjudicative capacity and neither should the new rules. Any attempt to distinguish misrepresentations when made in front of legislative bodies acting in a adjudicative capacity from misrepresentations to courts or others is, thus, misleading, confusing, and could present problems for enforcement of the State Bar Act and the Rules of Professional Conduct. OCTC supports the ABA's version of this definition.

4. OCTC supports the definition for a signed writing in rule 1.0.1(n), but believes it should be a separate definition and not in the same paragraph as the definition for writing or written.

5. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

# Rule 2.1 – Public Comment – File List

Y-2010-534a COPRAC [2.1]

Y-2010-553b OCTC [2.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 2.1

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 2.1– Advisor. COPRAC supports the adoption of proposed Rule 2.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
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August 27, 2010

Audrey Hollins, Director
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rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

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- Several of the Comments are in our opinion legally incorrect;
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- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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informed consent.

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   Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition. The Commission has stated that it is not defining the statute, only providing attorneys with guidance. However, that is not what the rule states. Rule 1.0.1(e)(2) states: "'Information protected by Business & Professions Code section 6068(e)' is *defined* in Rule 1.6, Comments [3] – [6]." [Emphasis added.]"

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   The Commission's definition, especially when used in proposed rule 3.3, is confusing in that the State Bar Act already prohibits attorneys from engaging in dishonesty to a court and others and does not separate dishonesty in front of legislative bodies acting in an adjudicative capacity from misrepresentations to courts or others. For instance, it is the duty of an attorney "[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Business & Professions Code section 6068(d).) Likewise, "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." (Business & Professions Code section 6106.) These statutes do not carve out an exception for misrepresentations to legislative bodies acting in an adjudicative capacity and neither should the new rules. Any attempt to distinguish misrepresentations when made in front of legislative bodies acting in a adjudicative capacity from misrepresentations to courts or others is, thus, misleading, confusing, and could present problems for enforcement of the State Bar Act and the Rules of Professional Conduct. OCTC supports the ABA's version of this definition.

4. OCTC supports the definition for a signed writing in rule 1.0.1(n), but believes it should be a separate definition and not in the same paragraph as the definition for writing or written.

5. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

**Rule 2.1. Advisor.**

1. OCTC is concerned about the new Comment 1 to this rule. It seems unnecessary. Further, the second sentence is ambiguous, confusing, and vague. That sentence reads: "Independent professional judgment is judgment not influenced by the duties, relationships or interests that are not properly part of the lawyer-client relationship." OCTC does not know what is meant by the term "not properly part of the lawyer-client relationship." This term is vague and ambiguous. It could cause problems for attorneys in complying with this rule and problems for OCTC in enforcing the rule in a fair manner.

2. Likewise, OCTC is concerned about Comment 2, especially the third sentence in Comment 2: "In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits." This comment, and particularly the third sentence, appears to impermissibly permit an attorney to balance the attorney's concern with client morale with the attorney's duty of candor, straightforward plain talking, and honesty to the client. This comment also seems to be at odds with proposed rules 1.4 and 1.2.

   At the very least, the comment is confusing and suggests that attorneys can be less than fully candid and forthright with clients and can hold back on, color, or limit their advice to the clients because of the "attorney's concern with client moral." Attorneys, however, owe more than not lying to their clients; they owe their clients full candor and must disclose all significant facts to the clients unless prohibited by law.

   They also owe the clients their untarnished advice. One of the attorney's basic functions is to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. (See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684.) Thus, this comment appears to be contrary to the lawyer's obligation to his or her clients and could impair the client's ability to make fully informed and reasoned decisions. It will also likely make enforcement of this important rule more difficult.

3. Comments 1, 2 and 3 seem more appropriate for treatises, law review articles, and ethics opinions.

~~**Rule 3.3. Candor Toward the Tribunal.**~~

~~1. OCTC is concerned about the changes to rule 3.3(d) because the new proposal strikes out the term "knows or reasonable should know" and replaces it with the term "known." Rule 1.0 defines knowingly, known, or knows as "actual knowledge of the fact in question." However, requiring actual knowledge in order to establish a disciplinable offense is contrary to established California law regarding misrepresentations to tribunals.~~

~~For example, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) It is also well established that California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807 and 808 [gross negligence in representation to third party];*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the*~~

# Rule 3.3 – Public Comment – File List

Y-2010-534b COPRAC [3.3]

Y-2010-538 LACBA [3.3]

Y-2010-545b CPDA [3.3]

Y-2010-548a OCBA [3.3]

Y-2010-551 Ellen Pansky [3.3]

Y-2010-553c OCTC [3.3]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 3.3

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 3.3 – Candor Towards Tribunal. COPRAC supports the adoption of proposed Rule 3.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**LACBA**

**LOS ANGELES COUNTY BAR ASSOCIATION**

MAILING ADDRESS:
P.O. Box 90055-2020
Los Angeles, CA 90055-2020

TELEPHONE: 213.627.2727
FACSIMILE: 213.833.6717
WEB SITE: www.lacba.org



August 23, 2010

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

Re: Public Comment on Proposed Rule 3.3 from The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) offers the following comments on proposed Rule 3.3 of the Proposed Rules of Professional Conduct.

PREC is one of the oldest and most experienced legal ethics committees in the United States. It has a long history of publishing ethics opinions. Its membership is highly diverse, representing many different areas of legal practice. Many PREC members have been active on the committee for decades. PREC committee members include three members of the Rules Revision Commission, present and former members and officers of the Los Angeles County Bar Association's Board of Trustees, numerous present and former members (and former chairs) of COPRAC, two past presidents of the Association of Professional Responsibility Lawyers, present and former members of the Editorial Board of the ABA/BNA Manual of Professional Responsibility and a member of the American Law Institute.

The Committee is concerned regarding potential confusion that will arise among members of the bar by the statements in Subsection (a)(3) and (b), that the lawyer is required to take remedial steps to make various disclosures to the tribunal, except as limited by Business and Professions Code Section 6068(e).

There are competing ethical concerns between California's strict adherence to the duty of confidentiality and the proposed rule's requirement that remedial measures be taken to inform the tribunal if the lawyer comes to know that false evidence has been presented, or a person, potentially including a client, has engaged in or is about to engage in fraudulent or criminal conduct in the proceedings.

These are difficult concepts for most lawyers to wrestle with, and we generally believe that the rule could be improved by a more concise statement as to what the lawyer is not permitted to do, rather than merely directing the lawyer to Section 6068(e). The concept is well stated in the last sentence to Comment 10, which reads: "Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code Section 6068(e)."

By a unanimous vote with two abstentions, PREC supports the view that the language of the last sentence of Comment 10 should be made a part of the body of the rule itself, in place of the references to Section 6068(e) contained in Subsections (a)(3) and (b) of the rule as presently drafted.

PREC is also of the view that Subsection (d) of the proposed rule overstates the concept of disclosure to the tribunal in an ex parte proceeding, and omits the necessary reference to avoid disclosure of client confidential information. Thus a similar revision should be made to temper the overly broad statement as to required disclosure of material facts in an ex parte proceeding.

Perhaps one way to implement these suggestions might be to add a subsection (e) to the rule, which reads more or less as the last sentence of Comment 10.

We thank you for the opportunity to comment on the draft rule.

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

Robert K. Sall, Vice Chair

Cc: Alan K. Steinbrecher, Esq., President
Evan Jenness, Esq., Committee Chair
Grace Danziger, LACBA Staff

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** California Public Defenders Association

**Commenting on behalf of an organization**
(•) Yes
( ) No

*** Name** Garrick Byers

*** City** Fresno

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** gbyers@co.fresno.ca.us

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]
Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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*** Select the Proposed Rule that you would like to comment on from the drop down list.**
3.3 Candor Toward the Tribunal [5-200]

*****
**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
( ) AGREE with this proposed Rule
( ) DISAGREE with this proposed Rule
(•) AGREE ONLY IF MODIFIED

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

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

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

CPDA is grateful to the Commission for having added the following sentence in Comment [4]:

"Whether a criminal defense lawyer is required to disclose directly adverse legal

**ENTER COMMENTS HERE.**

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

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

CPDA is grateful to the Commission for having added the following sentence in Comment [4]:

"Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules."

CPDA remains concerned, however, that this does not always provide a bright line, and, in effect, may sometimes require the criminal defense lawyer to "violate" the rule to find out whether it applies in that case.

A teaching of the Court of Appeal concerning current Rule 2–100 [contact with a represented party] applies equally to this Proposed Rule 3.3: "... [A] bright line test is essential.... [A]n attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client." Snider v. Superior Court (2003) 113 Cal.App.4th 1187, 1197-1198, quoting Nalian Truck Lines, Inc. v. Nakano Warehouse & International Corp. (1992) 6 Cal.App.4th 1256, 1264.

Because the added sentence in Comment [4] of Proposed Rule 3.3 does not always provide a bright line, CPDA believes that one more sentence should also be added. The additional sentence should be similar to the first sentence of Comment [4] to Proposed Rule 1.16 [Declining or Terminating Representation]. That first sentence reads "A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong."

The sentence that CPDA requests be added to Comment [4] of this Proposed Rule 3.3, uses the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:

"A criminal defense lawyer is not subject to discipline for not disclosing directly adverse authority in the controlling jurisdiction under paragraph (a)(2) if the lawyer reasonably believed that the lawyer was not required to do so by controlling constitutional principles, even if that belief is later shown to have been wrong."

Thank you for your consideration,

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

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

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

OCBA

ORANGE COUNTY BAR ASSOCIATION



P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: August 18, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 3.3 – Candor to Tribunal**

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

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

**Improving the Language of Paragraphs (a) and (b)**

The OCBA is concerned about the lack of guidance in paragraphs (a)(3) and (b) of the draft rule, which impose an obligation to take remedial measures, but then refer to the limitations of Rule 1.6 and Business and Professions Code Section 6068(e). These are conflicting obligations. The average lawyer will have difficulty interpreting how he or she is supposed to take remedial measures, as indicated in the Rule, when limited by the mere reference to Section 6068(e).

If client confidentiality is to take precedence over the obligation to pursue remedial measures in correcting false information provided to the tribunal, the Rule needs to be more explicitly drafted. The bottom line is that if you don't have the client's permission, or some other exception to the duty of confidentiality, you can't take any remedial measures that involve disclosure of confidential information. This isn't plainly stated until the end of Comment [10], where it provides that remedial measures do not include the disclosure of client confidential information which the lawyer is required to maintain inviolate.

The clarity of the Rule would be enhanced if the last sentence of Comment [10] were actually moved into the body of the Rule, modifying the language of

paragraphs (a)(3) and (b), to avoid the inconsistent or confusing treatment of these competing professional obligations.

This change would make it clearer to practitioners (without having to wade through all the Comments) that they are not to reveal confidential client information without the client's consent, or some other exception to the duty of confidentiality. The Rule should explicitly say so.

**Excess Verbiage in Comment [4]**

Line 6 of Comment [4] has an "and" between "directly adverse" and "legal authority." The OCBA believes the "and" should be deleted, because the Comment pertains to directly adverse legal authority, and the conjunctive is unnecessary.

PANSKY MARKLE HAM LLP
ATTORNEYS

1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
Telephone: 213 626-7300
Fax: 213 626-7330

August 25, 2010

**VIA E-MAIL TO: audrey.hollins@calbar.ca.gov**
**AND U.S. FIRST CLASS MAIL**

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

*Re: Public Comment on Proposed Rules of Professional Conduct*

Dear Ms. Hollins:

Please accept this as my public comment regarding the proposed Rules of Professional Conduct which are currently being considered by the California State Bar Board of Governors.

As a preliminary matter, I wish to reiterate some of the observations that were recently made in the Daily Journal by attorneys Kurt Melchior and Jerome Sapiro, Jr. As Messrs. Melchior and Sapiro commented in the four part series published during the last few weeks, there are many flaws in the proposed rules as currently drafted. Although the Herculean effort made by the Rules Revision Commission is commendable and is to be lauded, the final product is fraught with problems. Most notably, I sincerely recommend that the Comments to the Rules be separated from the rules themselves, and published separately as a California Restatement of The Law Governing Lawyers. The Comments are convoluted, confusing, sometimes contradictory, and difficult to interpret in some instances. Without criticizing particular comments, it would be far more useful to simply publish them in a separate guidebook, to provide aspirational guidance, rather than using them to create disciplinary sanctions.

In addition, although the charge provided to the Rules Revision Commission was to harmonize California's Rules of Professional Conduct with the ABA Model Rules unless there was a compelling reason to deviate from the Model Rules, the Rules as currently proposed are a unique hybrid, in many instances constituting a new standard not previously seen either in the California Rules of Professional Conduct or in the ABA Model Rules. By way of one example, California cases interpreting current rule 2-200 permit lawyers to comply with the rule governing division of attorneys fees, so long as the writing is provided to the client and executed by the client before the division of fees actually occurs. (See, *Cohen v. Brown* (2009) 173 Cal. App. 4th 302 and *Mink v. Maccabee* (2004) 121 Cal. App. 4th 835.) As currently proposed, Rule 1.5.1 (a) (2) would make it a disciplinary offense to fail to obtain the client's consent to a division of fees agreement at the time the attorneys first agree to divide the fee. Not only does the new rule contradict current case law, it is illogical, since the lawyers will not know their relative contributions to the client's matter until representation is complete.

Similarly, proposed Rule 1.5 (e)(2) purports to create a disciplinary offense where a lawyer collects a flat fee to which the client has agreed, which by definition is not based on a calculation of the number of hours times an hourly rate. Flat fees have always been recognized as alternatives to the billable hour arrangement and provides great certainty to both the lawyer and the client, since the total amount of fees will be capped. The concept that a portion of a flat fee may be required to be retroactively refunded, even if all of the services have been completed, is an entirely novel disciplinary rule.

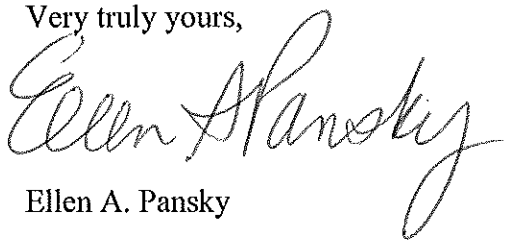
As a member of the Los Angeles County Bar Association Professional Responsibility and Ethics committee for approximately 18 years, I am personally aware that concerns about inconsistencies between existing law and the proposed new rules were brought to the attention of the RRC over the past 9 years. Regrettably, some of these genuine concerns were apparently given short shrift by the RRC. Although I appreciate the extreme expenditure of resources this process has already consumed, some of the rules simply require additional consideration.

Regarding the rules currently out for public comment, Proposed Rule 3.3 subsections (a)(3) and (b) can be read to suggest that lawyers have a duty to reveal client confidences at an ex parte hearing, in order to correct a judge's misunderstanding of facts. There is no known authority for this proposition, which seems to directly contradict the duty to maintain client secrets, set forth in Business & Professions Code § 6068(e). It seems to me that the purpose of Model Rule 3.3 is to require a lawyer to make sure that no misrepresentations occur with respect to ex parte notice, so that ex parte relief is not given on faulty procedural grounds. This point is not clear in proposed California Rule 3.3.

I wish to reiterate my sincere appreciation for the nine years of dedicated work conducted by the RRC members, as well as the hundreds, if not thousands of hours contributed by numerous Bar Association ethics committees and individual lawyers throughout California. All of the State Bar stakeholders in this process have an identical goal: the adoption of a workable, fair and clear set of Rules of Professional Conduct. I urge the Board of Governors to carefully consider whether the current proposed rules, as currently organized and in light of the manner in which the Comments have been structured, will serve the legal community and the pubic better than a set of rules which more closely follow the format of the ABA Model Rules.

Thank you for the opportunity to comment on this rule.

Very truly yours,



Ellen A. Pansky

EAP/rk

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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

~~**Rule 2.1. Advisor.**~~

1. ~~OCTC is concerned about the new Comment 1 to this rule. It seems unnecessary. Further, the second sentence is ambiguous, confusing, and vague. That sentence reads: "Independent professional judgment is judgment not influenced by the duties, relationships or interests that are not properly part of the lawyer-client relationship." OCTC does not know what is meant by the term "not properly part of the lawyer-client relationship." This term is vague and ambiguous. It could cause problems for attorneys in complying with this rule and problems for OCTC in enforcing the rule in a fair manner.~~

2. ~~Likewise, OCTC is concerned about Comment 2, especially the third sentence in Comment 2: "In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits." This comment, and particularly the third sentence, appears to impermissibly permit an attorney to balance the attorney's concern with client morale with the attorney's duty of candor, straightforward plain talking, and honesty to the client. This comment also seems to be at odds with proposed rules 1.4 and 1.2.~~

   ~~At the very least, the comment is confusing and suggests that attorneys can be less than fully candid and forthright with clients and can hold back on, color, or limit their advice to the clients because of the "attorney's concern with client moral." Attorneys, however, owe more than not lying to their clients; they owe their clients full candor and must disclose all significant facts to the clients unless prohibited by law.~~

   ~~They also owe the clients their untarnished advice. One of the attorney's basic functions is to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. (See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684.) Thus, this comment appears to be contrary to the lawyer's obligation to his or her clients and could impair the client's ability to make fully informed and reasoned decisions. It will also likely make enforcement of this important rule more difficult.~~

3. ~~Comments 1, 2 and 3 seem more appropriate for treatises, law review articles, and ethics opinions.~~

**Rule 3.3. Candor Toward the Tribunal.**

1. OCTC is concerned about the changes to rule 3.3(d) because the new proposal strikes out the term "knows or reasonable should know" and replaces it with the term "known." Rule 1.0 defines knowingly, known, or knows as "actual knowledge of the fact in question." However, requiring actual knowledge in order to establish a disciplinable offense is contrary to established California law regarding misrepresentations to tribunals.

   For example, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) It is also well established that California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807 and 808 [gross negligence in representation to third party];*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the*

*Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rtpr. 80; and *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.)

In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." FRCP rule 11 is similar to CCP 128.7. We should not be allowing lawyers to make material false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may often be a defense to a charge of misrepresentation, this is because it is currently a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar, supra,* 64 Cal.2d at 793.)

Further, this proposed change to the rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is and should be a basis for discipline. Further, even if this rule were adopted, OCTC could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently parts of proposed rule 8.4). Thus, this change creates inconsistent and confusing rules or duties for attorneys and could mislead attorneys into believing that actual knowledge is required for discipline in these situations when gross negligence can and will support discipline for this conduct.

2. OCTC also remains concerned with the use of the term "knowingly" in rule 3.3(a). Our concern is for the same reasons stated in our June 15, 2010 letter and in our expressed concerns about the change in rule 3.3(d).

3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule. Further, that term is used in Business & Professions Code section 6068(d).

4. OCTC remains concerned that the proposed rule omits without Comment the following language in the current rule: 1) "Shall not intentionally misquote to a tribunal the language of a book, statute or decision;" and 2) "Shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional." (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1) and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. The excluded language serves an important public purpose and provides guidance to the attorneys in this state. OCTC requests at the very least a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2).

5. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney "[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness." The courts have noted that this can be an attempt to get around the evidence rules and that jurors are likely to give attorney statements more credibility as being based on outside knowledge. (See e.g. *People v. Tyler* (1991) 233 Cal.App.3d 1456, 1459-1460; see also generally *People v. Hill* (1998) 17 Cal.4th 827-828; *People v. Bolton* (1979) 23 Cal.3d 208, 213.) OCTC knows of no

reason to omit the language in rule 5-200(E) and believes that it serves an important public purpose. OCTC has observed attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. Attorneys have properly been disciplined for this conduct. (See e.g. *In the Matter of Philip E. Kay, Case No. 01-O-193.* The hearing department finding and recommendation in Mr. Kay's case was adopted by the California Supreme Court on July 14, 2010, Supreme Court Case No. S180405, when it denied Mr. Kay's petition and ordered Mr. Kay suspended.) OCTC recommends that this language be included in the rule.

6. OCTC is also concerned that the proposed rules do not specifically provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see *Hawk v. Superior Court, supra,* 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders or rulings of a court. OCTC recognizes that arguably these rules could be included in proposed rule 3.4, but they are not there either. They should be somewhere.

7. Comment 3 is too long. If "knowingly" is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or FRCP rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."] ) It is reasonable foreseeable that laypersons will offer selective or incomplete recitation of the facts. An attorney has a duty to make a reasonable inquiry before making a statement to a tribunal.

~~**Rule 3.8. Special Responsibilities of a Prosecutor.**~~

~~1. OCTC generally supports the proposed changes to rule 3.8(d). The change in the rule adopts the ABA's language making the rule broader than the *Brady v. Maryland* (1963) 373 U.S. 83 and *U.S. v. Bagley* (1985) 473 U.S. 667 requirements. This seems appropriate, fair, and is consistent with California law. (See e.g. *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171. On August 11, 2010, the California Supreme Court denied Mr. Field's petition and ordered him suspended in Supreme Court Case No. S182452.)~~

~~While OCTC agrees with the proposed change to broaden the rule beyond the technical requirements of *Brady* and *Bagley*, OCTC is concerned that the language of this rule appears to permit gross carelessness or gross negligence in complying with this duty. The rule requires a prosecutor to "make timely disclosure to the defense of all evidence or information k*nown* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense … " [Emphasis added.] Rule 1.0.1(f) defines knowingly, known, or knows as "actual knowledge of the fact in question."~~

~~By requiring that the information be "known" to the prosecutor, the rule seems to be permitting a prosecutor to fail to comply with his or her duty to search for exculpatory evidence and permits a "see no evil or hear no evil" approach to this obligation. However, it is well established that a prosecutor not only has the duty to disclose exculpatory evidence he or she knows about, a prosecutor has an affirmative 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; *U.S. v. Hanna* (9th Cir. 1995)~~

# Rule 3.8 – Public Comment – File List

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

Y-2010-534c COPRAC [3.8]

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

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

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

Y-2010-545c CPDA [3.8]

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

Y-2010-548b OCBA [3.8]

Y-2010-544b Evan Jenness [3.8]

Y-2010-552 LA City Attorney [3.8]

Y-2010-553d OCTC [3.8]

Y-2010-554 San Diego DA [3.8]

# OFFICE OF THE DISTRICT ATTORNEY
## County of Ventura, State of California

**GREGORY D. TOTTEN**
District Attorney

**JAMES D. ELLISON**
Chief Assistant District Attorney

**MICHAEL K. FRAWLEY**
Chief Deputy District Attorney
Criminal Prosecutions

**GREGORY W. BROSE**
Chief Deputy District Attorney
Special Prosecutions

**MICHAEL D. SCHWARTZ**
Special Assistant District Attorney

**ROBERT A. BRINER**
Chief Investigator


August 3, 2010

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

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

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

Dear Ms. Hollins:

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

**COMPLIANCE WITH *BRADY* LAW**

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

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

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

**DISCLOSURE OF INFORMATION TO THE TRIBUNAL**

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

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

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

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

**CONCLUSION**

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

Very truly yours,

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

MDS/ck

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

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 3.8

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 3.8 – Special Responsibilities of a Prosecutor. COPRAC supports the adoption of proposed Rule 3.8 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

# County of Santa Cruz

**District Attorney's Office**

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

**BOB LEE**
**DISTRICT ATTORNEY**


August 16, 2010

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

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

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

Dear Ms. Hollins:

Rule 3.8(d)

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

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

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

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

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

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

~~Rule 4.2~~

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

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

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

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

General Observations

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

Sincerely,

BOB LEE
DISTRICT ATTORNEY

STEVE COOLEY
LOS ANGELES COUNTY DISTRICT ATTORNEY

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

August 17, 2010

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

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

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

Los Angeles County District Attorney's Office

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

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

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

Background

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

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

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

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

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

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

Discussion

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

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

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

> SECTION 1. (a) We the people of the State of California hereby find that the rights and crime victims are too often ignored by our courts and by our State Legislature, ... and that comprehensive reforms are needed in order to restore *balance* and *fairness* to our criminal judicial system.
>
> (b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the laws as developed in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.
>
> (c)The goals of the people in enacting this measure are to restore *balance* to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods and schools.

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

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

---

[3] Penal Code section 1054.1 states:

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

(Pen. Code, § 1054.1.)

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

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

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

The Constitution of the State of California provides that:

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

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

(Cal. Const., Art. III, §3.)

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

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

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

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

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

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

Very truly yours,

STEVE COOLEY
District Attorney

ss

c: Scott Thorpe, Executive Director, CDAA

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** Los Angeles County Public Defender

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Michael P. Judge and Janice Y. Fukai

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rrc.publiccomments@calbar.ca.gov

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]
Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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*** Select the Proposed Rule that you would like to comment on from the drop down list.**
3.8 Special Responsibilities of a Prosecutor [5-110] (Public comment is being solicited only as to paragraph (d).)

*****
**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
- (•) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

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

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

**MICHAEL P. JUDGE**
PUBLIC DEFENDER

**EXECUTIVE OFFICE**

August 23, 2010

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

Re: Proposed Rule of Professional Conduct 3.8(d)

Dear Ms. Hollins,

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

**Proposed Rule 3.8(d)**

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

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

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

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

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

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

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

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

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

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

**Comment 2[A] to Proposed Rule 3.8**

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

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

**Conclusion**

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

Very truly yours,

MICHAEL P. JUDGE
Public Defender
of Los Angeles County

JANICE Y. FUKAI
Alternate Public Defender
of Los Angeles County

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

**MICHAEL P. JUDGE**
Public Defender

July 22, 2010

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

Re: Proposed Rule of Professional Conduct 3.8(d)

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

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

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

The aforementioned ABA committee stated as follows:

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

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

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

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

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

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

Very truly yours,

Michael P. Judge
Public Defender

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 09-454** **July 8, 2009**

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

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

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

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

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

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

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

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

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

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

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

The Committee undertakes its exploration by examining the following hypothetical.

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

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

**The Scope of the Pretrial Disclosure Obligation**

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

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

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to violating [Rule 3.8]").

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

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

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

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

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

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

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

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

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

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

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

[13] Rule 3.8, cmt. [1].

[14] *Id.*

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

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

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

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

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

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

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

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

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

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

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

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

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

**The Knowledge Requirement**

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

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

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

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

[24] Rule 1.0(f).

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

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

**The Requirement of Timely Disclosure**

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

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

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

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

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

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

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

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

[32] Rule 3.8, Comment [3].

**Defendant's Acceptance of Prosecutor's Nondisclosure**

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

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

**The Disclosure Obligation in Connection with Sentencing**

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

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

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

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

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

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

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

[36] *See* Rules 1.2(a) and 1.4(b).

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

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

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

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

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

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

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

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

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

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

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** California Public Defenders Association

**Commenting on behalf of an organization**
(•) Yes
( ) No

*** Name** Garrick Byers

*** City** Fresno

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** gbyers@co.fresno.ca.us

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]
Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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*** Select the Proposed Rule that you would like to comment on from the drop down list.**
3.8 Special Responsibilities of a Prosecutor [5-110] (Public comment is being solicited only as to paragraph (d).)

*****
**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
( ) AGREE with this proposed Rule
( ) DISAGREE with this proposed Rule
(•) AGREE ONLY IF MODIFIED

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

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

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

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

**ENTER COMMENTS HERE.**

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

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

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

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

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

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

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

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

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

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

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

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

Conduct.

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

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

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

Thank you for your consideration,

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

Address information:

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

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

# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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




August 23, 2010

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

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

Dear Ms. Hollins:

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

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

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

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

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

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

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

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

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

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

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

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

**A. Conflict with California Criminal Discovery Law**

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

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

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

**B. Disclosure Before Entry of Plea**

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

**C. Defense Waiver of Compelling Disclosure**

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

**D. Disclosure of Sentencing Evidence to "the tribunal."**

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

**E. Obligation of Supervisory Prosecutors**

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

**F. Conclusion as to Proposed Rule 3.8(d)**

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

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

## H. Proposed Rule 4.2 (Communication with a Represented Person)

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

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

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

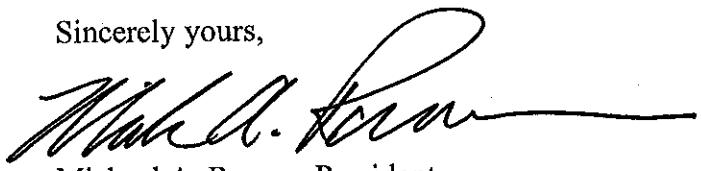
Finally, we note that the division within the Bar Committee itself (this proposal received only seven affirmative votes on a thirteen member committee, and was categorized as "Very Controversial") suggests there are likely many unanticipated and unintended ramifications of the rule change for both criminal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

## III. Conclusion

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

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

Sincerely yours,



Michael A. Ramos, President
California District Attorneys Association

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

# MEMORANDUM

Date: August 18, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 3.8 – Special Responsibilities of a Prosecutor**

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

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

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

# LAW OFFICES OF EVAN A. JENNESS

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

August 25, 2010

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

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

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

Dear Ms. Hollins:

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for considering my views.

Very truly yours,

*Evan A. Jenness*

EVAN A. JENNESS

EAJ:dfm

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

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


**CARMEN A. TRUTANICH**
**City Attorney**

August 25, 2010

**BY FACSIMILE (415) 538-2171**

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

Re: Comments to Proposed State Bar Rule No. 3.8

## I.

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

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

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

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

The Los Angeles City Attorney's Office files thousands of misdemeanor cases each year that in other jurisdictions would be filed as felonies. More specifically, the Los Angeles City Attorney's Office annually reviews well over 10,000 misdemeanor referrals from the Los Angeles County District Attorney, which but for its limited resources, would be filed as felonies. Of the more than 10,000 District Attorney referrals reviewed each year by the City Attorney's Office, the office files over 10,000-15,000 wobbler[3] cases. This is in addition to the more than 70,000 misdemeanor cases filed per year. These figures do not include the over 50,000 infractions filed each year by the City Attorney's office. Very few prosecutorial offices in California have a caseload as extensive as the Criminal Branch of the Los Angeles City Attorney's Office.

**II.**

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

Proposed Rule 3.8(b) provides:

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

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

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

Penal Code section 860 provides in pertinent part:

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

Penal Code section 987, subdivision (a) provides:

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

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

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

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

## III.

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

Penal Code section 1054.1 provides:

> "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> "(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> "(b) Statements of all defendants.
>
> "(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> "(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> "(e) Any exculpatory evidence.
>
> "(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

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

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

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

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

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

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

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

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

Second, proposed Rule 3.8(d), as originally submitted to the Board of Governors, takes into consideration California's discovery statutes[5]; the current proposed rule does not consider California law.

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

## IV.

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

### A. Pitchess Motion Principles

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

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

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

**B. California's Unique Statutory Scheme**

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

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

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

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

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

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

## V.

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

Proposed Rule 3.8 (f) provides:

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

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

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

## VI.

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

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

Proposed Rule 3.8(g) provides:

> "When a prosecutor knows of new credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> "(1) promptly disclose that evidence to an appropriate court or authority, and

"(2) If the conviction was obtained in the prosecutor's jurisdiction,

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

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

Much is also wrong with this proposed rule. First, this proposed section is highly controversial among the members of the Commission. The minority correctly stated that proposed Rule 3.8(g)(1) creates a lack of clarity as to how a prosecutor located in a jurisdiction that did not obtain a conviction would know whether the information is "new, credible, and material creating a reasonable likelihood . . ." The majority of the Commission erroneously responded that this provision was added to create a higher standard and to cause prosecutors to err on the side of disclosure. The majority's reasoning is further flawed because the rule does not appear to take into consideration the practical realities of both the geographic size and population of California. For example, in California, there are 58 counties[6] and 480 cities.[7] To impose a sanctionable ethical burden upon prosecutors requiring them to know of exculpatory post-conviction evidence in stranger jurisdictions is simply unrealistic. This is especially true where a prosecutor, who is a stranger to a case, can have no meaningful way of evaluating the importance of the supposedly exculpatory evidence.

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

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

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

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

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

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

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

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

## VII.

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

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

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

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

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

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

## CONCLUSION

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

Sincerely,

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

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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

~~reason to omit the language in rule 5-200(E) and believes that it serves an important public purpose. OCTC has observed attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. Attorneys have properly been disciplined for this conduct. (See e.g. *In the Matter of Philip E. Kay, Case No. 01-O-193.* The hearing department finding and recommendation in Mr. Kay's case was adopted by the California Supreme Court on July 14, 2010, Supreme Court Case No. S180405, when it denied Mr. Kay's petition and ordered Mr. Kay suspended.) OCTC recommends that this language be included in the rule.~~

6. ~~OCTC is also concerned that the proposed rules do not specifically provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see *Hawk v. Superior Court, supra,* 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders or rulings of a court. OCTC recognizes that arguably these rules could be included in proposed rule 3.4, but they are not there either. They should be somewhere.~~

7. ~~Comment 3 is too long. If "knowingly" is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or FRCP rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."] ) It is reasonable foreseeable that laypersons will offer selective or incomplete recitation of the facts. An attorney has a duty to make a reasonable inquiry before making a statement to a tribunal.~~

**Rule 3.8. Special Responsibilities of a Prosecutor.**

1. OCTC generally supports the proposed changes to rule 3.8(d). The change in the rule adopts the ABA's language making the rule broader than the *Brady v. Maryland* (1963) 373 U.S. 83 and *U.S. v. Bagley* (1985) 473 U.S. 667 requirements. This seems appropriate, fair, and is consistent with California law. (See e.g. *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171. On August 11, 2010, the California Supreme Court denied Mr. Field's petition and ordered him suspended in Supreme Court Case No. S182452.)

   While OCTC agrees with the proposed change to broaden the rule beyond the technical requirements of *Brady* and *Bagley*, OCTC is concerned that the language of this rule appears to permit gross carelessness or gross negligence in complying with this duty. The rule requires a prosecutor to "make timely disclosure to the defense of all evidence or information k*nown* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense … " [Emphasis added.] Rule 1.0.1(f) defines knowingly, known, or knows as "actual knowledge of the fact in question."

   By requiring that the information be "known" to the prosecutor, the rule seems to be permitting a prosecutor to fail to comply with his or her duty to search for exculpatory evidence and permits a "see no evil or hear no evil" approach to this obligation. However, it is well established that a prosecutor not only has the duty to disclose exculpatory evidence he or she knows about, a prosecutor has an affirmative 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; *U.S. v. Hanna* (9th Cir. 1995)

55 Fed.3d 1456, 1461.)

In *In the Matter of Halsey, Jr.*, Case No. 02-O-10196, the State Bar Court rejected a prosecutor's claim that he did not know about certain exculpatory evidence. The court stated: "Even assuming arguendo that respondent did not know the full extent of Dr. Gill's coaching, 'we can only conclude this is so because he adhered to an approach unlikely to uncover this information ... [A] prosecutor cannot adopt a practice of 'see or hear no evil.' Under these circumstances, the prosecution has an affirmative duty and cannot – by looking the other way – shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury." (*People v. Kasim, supra*, 56 Cal.App.4th at p. 1386.) As the State Bar noted, like the prosecutor in Kasim, respondent purposely made himself ignorant of the details by taking a 'see no evil or hear no evil' approach. Such a conscious decision to look the other way is no defense. " (Decision, at p. 16. Mr. *Halsey* did not appeal that decision and, on December 13, 2006, the Supreme Court filed its order suspending him in Case No. S147283.)

A prosecutor's recklessness or gross negligence should support misconduct. Other jurisdictions appear to be in agreement. (See e.g. *In the Matter of Carpenter* (Ka. 1991) 808 P2d 1341.) While OCTC does not believe mere negligence should support a finding of misconduct for discipline purposes, we believe gross negligence should be a sufficient basis to support a finding of misconduct by a prosecutor for discipline purposes.

2. OCTC remains concerned about subparagraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor, control this process. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. *People v. Jacinto* (2010) 49 Cal.4th 263[finding that the Sheriff's deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor? The same concern applies to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. OCTC is also concerned with subparagraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment has the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.

4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor addresses a waiver of the privilege or the work product doctrine.

5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.

6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 1A defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should

be in the rule, not a Comment.

**Rule 4.2. Communication with a Person Represented By Counsel.**

1. OCTC supports the changes to Comment 20.

2. OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. In *Dale*, the Review Department failed to find an attorney culpable of violating current rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney, because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the *Dale* type of situation. Even the court in *Dale* appeared to encourage that. While the rule now states "person" and not "party" so that the Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a comment should be added to clarify that the *Dale* type of situation is covered by this rule.

3. There are far too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

**Rule 4.4. Respect for the Rights of Third Persons.**

1. The new proposal is to omit rule 4.4 in its entirety. OCTC respectfully disagrees with omitting rule 4.4. OCTC supports rule 4.4(a) of the Model Rules, which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted its concern regarding the vagueness and overbreadth of such terms as "embarrass, delay, or burden" a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and, when balanced against the need to prevent litigation abuse and promote professional civility and public protection, OCTC believes the ABA and the jurisdictions which have adopted this rule have struck the appropriate balance.

   The State Bar Act prohibits counseling or maintaining actions, proceedings, or defenses only as appear to an attorney legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct prohibit an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.)

   In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive

BONNIE M. DUMANIS
SAN DIEGO COUNTY DISTRICT ATTORNEY

August 26, 2010

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

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

Dear Ms. Hollins:

As the elected District Attorney of San Diego County, I strongly oppose the proposed version of Rule 3.8(d) of the California Rules of Professional Conduct ("Rule 3.8(d)") set forth in the Discussion Draft of July 2010, which is currently being circulated for public comment. This proposed version is inconsistent with both constitutional and statutory law related to criminal discovery in California.

Rule 3.8(d) deals with the ethical obligation of a prosecutor to disclose to the defense all evidence or information known by the prosecutor, which tends to negate the guilt of the accused or mitigate the offense. In September 2009, original proposed Rule 3.8(d) mandated that prosecutors "comply with all constitutional obligations, as defined by relevant case law" with regard to the disclosure of such information. This original proposal was appropriate insofar as it imposed ethical duties on prosecutors commensurate with those required by the United States Constitution as interpreted by the United States Supreme Court in the case of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny. On the other hand, the language of ABA Model Rule 3.8(d), now being circulated for consideration, imposes obligations on the part of prosecutors that are inconsistent with the law.

Every day, prosecutors must delicately balance the obligation to ensure that the defendant's due process rights are met while maintaining the safety of witnesses, the integrity of criminal investigations, and the protection of confidential information. Well established case law relating to the duty to disclose and to the time requirements of such disclosure allow a prosecutor to achieve this balance. Rule 3.8(d) as currently proposed, however, will interfere with the prosecutor's ability to fairly balance these interests and may result in a prosecutor who complies with the discovery laws being, nonetheless, subject to sanctions by the State Bar.

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

Based on the foregoing, I urge that the Bar adopt Rule 3.8(d) as it was originally proposed in September 2009.

Sincerely,

BONNIE M. DUMANIS
District Attorney of San Diego County

BMD/tjg

# Rule 4.2 – Public Comment – File List

Y-2010-534d COPRAC [4.2]

Y-2010-535b Bob Lee Santa Cruz DA [4.2]

Y-2010-536 Barry Tarlow [4.2]

Y-2010-539 Kay Otani [4.2]

Y-2010-541 Becky Walker James [4.2]

Y-2010-543 John Vandevelde [4.2]

Y-2010-544a Evan Jenness [4.2]

Y-2010-545a CPDA [4.2]

Y-2010-546 Carlton Gunn [4.2]

Y-2010-547a California DA Association [4.2]

Y-2010-549 David McGowan [4.2]

Y-2010-550 William Genego [4.2]

Y-2010-553e OCTC [4.2]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 4.2

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 4.2 (as revised on June 30, 2010), and is generally supportive of the rule.

However, COPRAC has the following concern regarding the language of proposed Comment [15]. We believe the language of the two sentences in the comment may be contradictory and may not be easily reconciled. The language in the second sentence of the comment appears to bar communications with in-house lawyers if: (1) outside counsel has been engaged; (2) the in-house lawyer is not an officer of the organization; and (3) either (a) the in-house lawyer's acts or omission relate to the subject of the communication or (b) the in-house lawyer's statements may constitute an admission on behalf of the entity. We are generally in agreement that that formulation is acceptable as long as such in-house lawyer is not involved in a representative capacity in the matter. However, where such in-house lawyer is acting in a representative capacity in the matter, there's no reason to bar communications with such lawyer.

As a result, we propose that the comment be modified by adding the following to the end of the second sentence of Comment [15]: ", unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication."

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

# County of Santa Cruz

**District Attorney's Office**

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

**BOB LEE**
**DISTRICT ATTORNEY**


August 16, 2010

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

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

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

Dear Ms. Hollins:

~~Rule 3.8(d)~~

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

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

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

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

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

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

Rule 4.2

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

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

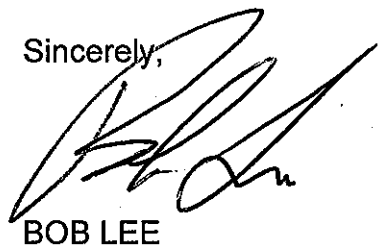
burdensome to have to seek court orders in order to speak with represented witnesses. More importantly, it would unconstitutionally grant the judiciary oversight over the prosecution's investigations and case preparation in violation of the separation of powers doctrine.

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

General Observations

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

Sincerely,



BOB LEE
DISTRICT ATTORNEY

TARLOW & BERK PC

BARRY TARLOW*
BLAIR BERK
MARK O. HEANEY
MI KIM
DAVID HARRIS

*CERTIFIED SPECIALIST - CRIMINAL LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

9119 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA 90069

(310) 278-2111
FAX (310) 550-7055

August 20, 2010

**Via Email: audrey.hollins@calbar.ca.gov**
**and Federal Express**

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

Re: Comments Re Proposed Revision California Rules of Professional Conduct - Proposed Rules 4.2, Comments 19-20 [permitting government lawyers and defense lawyers to secretly interview individuals represented by counsel in civil and criminal cases]

Dear Ms. Hollins:

## I. INTRODUCTION

I am a criminal defense lawyer who has represented individuals accused of crimes in federal and state trial and appellate courts throughout the country. Prior to entering private practice, I served as a prosecutor for the Justice Department, as an Assistant United States Attorney for the Central District of California, Criminal Division. I was certified as a specialist in criminal law by the California Board of Legal Specialization in 1975 and have been re-certified every five years since that time. Throughout my time in private practice, I have been extensively involved in writing, lecturing, litigating, and consulting about matters in which rogue prosecutors or their investigators or informers have secretly approached and interviewed individuals represented by counsel, who were charged or not yet charged with criminal offenses.

The following fact pattern illustrates the disturbing consequences of the "authorized by law" exception in Proposed Rule 4.2, the expansive interpretation of that exception in Comments 19-20, and the latest amendment to Comment 20 that essentially authorizes criminal defense lawyers to interview any individual represented by counsel:

> Under this novel exemption, defense counsel, in USA v. Jones, can visit the jail and interview a potential witness indicted in a separate case. He can do so without informing the witness's lawyer, who has sent a letter to the prosecutor directing that he or she not contact his client. Jones's defense lawyer obtains incriminating evidence against the witness and some evidence useful to Jones's case. The witness/defendant does not advise his own lawyer about this conversation. On the eve of Jones's criminal trial, the defense lawyer's surreptitious conversation with the witness surfaces. Some of it is admitted but Jones is convicted. At the witness's separate trial, the prosecution calls Jones's defense lawyer to testify about critical evidence, against the witness/defendant originally secretly interviewed in jail, resulting in a conviction and a 20 year non-parolable sentence.

The Board of Governors ("BOG") should seriously consider whether this disturbing scenario, created by proposed CRPC 4.2, and the conduct of lawyers seeking to take advantage of the Rule, has any appropriate place in our criminal justice system.

Proposed Rule 4.2 is an anti-contact rule, which generally prohibits *ex parte* communications with represented persons. Comments 19-20 are lengthy provisions creating a special exemption for government lawyers, and would have the effect of holding prosecutors and other government lawyers to lower standards of professional conduct than those which apply to other members of the California Bar. In material part, the Comments state that the "authorized by law or a court order" exception in 4.2(c)(3) "recognizes that prosecutors . . . as authorized by relevant . . . law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. . . . [T]he 'authorized by law' exception . . . is necessary to promote legitimate law enforcement functions that would otherwise be impeded . . . . [The change from "party" to "person"] is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law." It is important to emphasize that this exemption does not only apply to criminal matters; according to the Comments, government lawyers can also contact represented individuals in civil matters.

Comment 20, in a new provision, also exempts criminal defense attorneys from the Rule, but not attorneys opposing the government in civil matters. The only theoretical limit placed on the new exception for defense lawyers in Comment 20 is the "Sixth Amendment or other constitutional right." Proposed CRPC Rule 4.2, Comment 20. Since the Fifth and Sixth Amendments control only the government's conduct, the Comment in essence places no limit on the right of defense lawyers to contact any individual represented by counsel.

The special-interest carve-out for prosecutors and their agents in the proposed ethics Rule is unprincipled, will endorse conduct that is prohibited in almost every state in the country and by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of prosecutors, defense lawyers, and civil practitioners. This analysis of the proposed Rule and Comments is not intended to disparage the work of the many decent and honorable people who have chosen to serve as government lawyers, but to acknowledge that there are government lawyers, as well as defense attorneys, who will certainly take advantage of the conduct that may be permitted by this Rule.

## II. THORNBURG REDUX

### A. The Thornburgh Memo and Rejection by the Federal Courts

The expansive interpretation of the "authorized by law" exemption for government lawyers in Comments 19-20 is an effort to revive the discredited 1989 Thornburgh Memorandum, and to end-run Congressional intent that government lawyers be held to the same ethical standards as all other members of the bar. The Justice Department has a long history of vigorously arguing that state ethics rules should not be applied to federal prosecutors, despite the fact that government lawyers are expected to abide by higher, not lower, ethical standards.[1] For over 20 years, the federal courts, Congress, and state Bar Associations have consistently and emphatically rejected attempts by government lawyers to create an exception to firmly established ethical principles. Despite this long history, the new proposed Rule would codify the ability of government lawyers to avoid the ethical duties that all attorneys should share.

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[1] *See, e.g., U.S. v. Berger*, 295 U.S. 78, 88 (1935).

In the Thornburgh Memorandum, then-Attorney General Richard Thornburgh directed that Department of Justice prosecutors and their agents were always "authorized by law" to contact represented individuals. The Thornburgh Memorandum was not promulgated by a rogue prosecutor or agent, but by the Attorney General of the United States. It launched one of the most distasteful episodes in the recent history of the federal courts and the Justice Department. The Memorandum permitted all the Assistant United States Attorneys and agents and informers under their supervision to apply the principles in the memo to interview individuals represented by counsel.

The Thornburgh Memorandum declared that the "authorized by law" exception "applies to *all* communications with represented individuals by Department attorneys or by others acting at their direction."[2] This flew in the face of existing law which assumed without discussion that the "authorized by law" exception did not permit this type of contact. *See U.S. v. Hammad*, 858 F.2d 834, *modifying* 846 F.2d 854 (2nd Cir. 1988) (government prosecutor not permitted to direct pre-indictment contacts between represented targets of a grand jury investigation and an informer).

Federal courts throughout the country consistently rejected the view that government attorneys were "authorized by law," that is, by the Thornburgh Memorandum, to contact individuals represented by counsel, whether or not they had been charged, if it served a law enforcement interest.[3]

### B. Prior Proposed and Rejected California Rule

In the past, California also rejected the expansive interpretation of the "authorized by law" exception in the Rules of Professional Conduct. In 1992, the California Attorney General issued an opinion (which was relied on by supporters of the current proposed exception to the Rule) that would have authorized prosecutors to communicate with represented persons. 75 Ops. Cal.Atty. Gen. 223 (1992). However, an amendment proposed in 1993 to CRPC 2-100 that would have codified the Attorney General's position, by creating an exception for prosecutors to communicate with represented persons, was soundly rejected, possibly by the BOG, though it is unclear at this time if BOG considered the amendment. "Stealth California Ethics Amendment Intercepted by Defense Bar," *in* RICO Report, by Barry Tarlow, *The Champion*, Sept./Oct. 1993, at 42.[4]

This amendment was rejected for good reason – like the discredited Thornburgh Memorandum, the California Attorney General's opinion did not actually cite any law saying that there is a right by prosecutors

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[2] Richard Thornburgh, Memorandum to All Justice Department Litigators Re Communications with Persons Represented by Counsel ("Thornburgh Memorandum") (unpublished office memorandum, June 8, 1989) at 7 (emphasis added).

[3] *See United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998) (government attorneys not "authorized by law," despite general enabling statutes, to contact employees of represented firm without consent of the firm's counsel); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court's "trenchant analysis of the inefficacy of the" Thornburgh Memorandum [which referred to the Thornburgh Memorandum as "[m]ak[ing] a mockery of the court's...powers" and involving "tortured logic," United States v. Lopez, 765 F. Supp. 1433, 1463, 1447, (N.D. Cal. 1991)]).

[4] If the prior amendment was submitted to the BOG at that time, it would create a serious problem if the current BOG had not been advised of the prior proposed amendment.

to interview persons represented by counsel during the investigative stage; it merely cited cases saying that the prosecutor has a duty to investigate, and concluding that that duty requires that prosecutors be included under the "authorized by law" exception. Were this reasoning to prevail, it could justify egregious behavior by government lawyers "in civil, criminal, or administrative law enforcement investigations." Proposed CRPC Rule 4.2, Comment 19. This conclusion clearly cannot and should not stand. The current proposed Rule and Comments 19 and 20 once again attempts to permit government lawyers and their agents to interview individuals represented by counsel and should be rejected.

### C. State Rejection of the Thornburgh Memo and the Expansive "Authorized By Law" Exception

What is so troubling about this proposed Rule is that other states also rejected the idea that the expansive interpretation of the "authorized by law" exception would permit prosecutors to contact individuals represented by counsel even after they have been charged with a crime. Shortly after the Thornburgh Memorandum was announced, the Ethics Committee of the Florida Bar rejected it in an advisory opinion. Ethics Committee, Florida Bar, Opinion 90-4 (July 15, 1990). In 1994, "the Conference of Chief Justices for all 50 state supreme courts passed a resolution in which they affirmed their intention to enforce all ethical provisions upon all members of their respective state bars, 'without regard to' the DOJ rule." "Son of Thornburgh Rears Its Ugly Head," *in* RICO Report, by Barry Tarlow, *The Champion*, Dec. 1994, at 21.

For several years, the State Bar of New Mexico vigorously fought to discipline a Justice Department lawyer who had secretly communicated with a represented defendant, and resisted great pressure and an extraordinary effort by the Justice Department. Ultimately, the State Bar of New Mexico prevailed in the Supreme Court of New Mexico. The prosecutor facing ethical violations, supported by the Justice Department, sought to block discipline by the New Mexico Supreme Court by seeking removal of his case to the federal courts and filing two different federal lawsuits challenging New Mexico's jurisdiction.[5] Both courts rejected these challenges and ruled that the Supreme Court of New Mexico retained jurisdiction to discipline the prosecutor. The Supreme Court of New Mexico found the prosecutor's actions, that did not violate the Constitution, were not "authorized by law" by the Thornburgh Memorandum. *In the Matter of G. Paul Howes, Esq.*, 940 P.2d 159 (N.M. Sup. Ct. 1997).

### D. Congressional Response

Although the Thornburgh Memorandum had already been thoroughly discredited in the courts, Congress inflicted what should have been a death blow to the principles it embraced and the disgraceful course of conduct that resulted. Congress enacted the 1998 McDade Amendment, 28 U.S.C. 530B.[6] However, the expansive interpretation of the vague term "authorized by law" is yet another attempt to create an exemption to the rules that govern the conduct of all other lawyers. The Comments 19-20 attempt to skirt the McDade Amendment by embedding a special prosecutorial exemption within Rule 4.2. Given that federal courts and state bars throughout the country condemned this special exemption, why should the California Bar implement it once again?

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[5] *See In Re Doe*, 801 F.Supp. 478 (D.C.N.M. 1992); *United States v. Ferrera*, 874 F.Supp. 964 (D.C.D.C. 1993), *aff'd*, 54 F.3d 825 (App. D.C. 1995).

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

## III. VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS AND EROSION OF THE ATTORNEY CLIENT RELATIONSHIP

Proposed Rule 4.2, and the Comments accompanying it, would certainly lead to the systematic violation of the rights of the accused by government lawyers using the expansive 'authorized by law' exception to interrogate clients represented by counsel. Importantly, while Comment 19 recognizes that the exception implicates "a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal.Const., Art. I § 15), that are beyond the scope of this Comment," it does nothing to clarify that rogue prosecutors' violations of the 5th and 6th Amendment are ethically reprehensible, as is some conduct that does not rise to the level of a constitutional violation.

The confusing language in the proposed Comments to the Rule does little to clarify what prosecutorial conduct is allowed and what is not. The description in Comment 19 that government lawyers in civil as well as criminal cases may engage in investigative activities vaguely described "as authorized by relevant federal and state, constitutional, decisional and statutory law," Proposed CRPC Rule 4.2, Comment 19, is so broad as to be virtually meaningless. History has demonstrated that rogue prosecutors can be expected to push the boundaries of what is "authorized by law," Proposed CRPC Rule 4.2(c)(3), to the extent that the ethical prohibition of contacting represented parties will not apply, as they did with the Thornburgh Memorandum.

It is necessary for ethics rules to go beyond the bare minimum of requiring government lawyers to comply with the Constitution. There are many situations in which prosecutors may secretly communicate with those suspected of crimes that do not violate the 5th and 6th Amendments, but that nevertheless take unfair advantage of the individuals involved and their lawyers. Because the 5th Amendment right to counsel only attaches during custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), and the 6th Amendment only attaches after the initiation of adversarial judicial proceedings, *Kirby v. Illinois*, 406 U.S. 682, 689, there are many situations in which a prosecutor is not constitutionally prohibited from contacting a represented suspect. For example, there is case law establishing that the right to counsel does not attach at the filing of a criminal complaint because the right only attaches with formal proceedings, *U.S. v. Alvarado*, 440 F.3d 191, 199-200 (4th Cir. 2006); *Beck v. Bowersox*, 362 F.3d 1095 (8th Cir. 2004); that it does not attach at arrest or at extradition hearings because these are not the inception of adverse criminal proceedings, *Anderson v. Alameida,* 397 F.3d 1175, 1180 (9th Cir. 2005); and that it does not attach during plea negotiations because negotiations are not formal judicial proceedings. *U.S. v. Moody*, 206 F.3d 609, 613-15 (6th Cir. 2000).

Even where a defendant has been indicted for one offense, prosecutors are permitted to contact him in the absence of counsel about other uncharged related offenses without violating the 6th Amendment, so long as those uncharged crimes do not constitute the same offense for double jeopardy purposes. *Tex v. Cobb*, 532 U.S. 162, 168. There is no constitutional violation even when federal prosecutors interview a defendant, without counsel, about his state murder charge, where the right to counsel has not yet been attached to the theoretically separate federal murder charge. *U.S. v. Avants*, 278 F.3d 510, 518 (5th Cir. 2002). In state court as well, the right to counsel does not attach until "formal judicial proceedings, such as a formal charge, preliminary hearing, indictment, information, or arraignment, have been initiated against him." *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984). Additionally, even if the defendant's attorney has requested to be involved in any contact, the prosecution is constitutionally allowed to secretly contact the defendant without counsel if the defendant has not yet been indicted. *U.S. v. Muick*, 167 F.3d 1162, 1165 (7th Cir. 1999).

State ethics rules that go beyond the protections granted in the Constitution are necessary precisely because there is so much potential for prosecutors to abuse their position of power over people accused of crimes without violating the Constitution. Even where contact between prosecutors and criminal defendants in the absence of retained counsel does not reach the level of a constitutional violation, it should not be

theoretically permitted by the expansive interpretation of the "authorized by law" exception to the state's ethics rules.

## IV. INADEQUACY OF DEFENSE EXCEPTION

The most recent revision to Rule 4.2 modifies Comment 20 to include a single sentence at the end of the Comment which purports to permit criminal defense lawyers to communicate with represented individuals without the permission of their counsel. This additional special interest exemption does not remedy the injustice that would result from Comments 19-20. Since the exemption for government lawyers applies to civil matters as well as criminal matters, it is incomprehensible why criminal defense lawyers have been granted an exemption to this rule, but other lawyers involved in civil cases opposing the government have not.

This minor carve-out for criminal defense lawyers appears to be a response to those who pointed out that Comments 19-20 create a special interest exemption for only a discrete segment of the bar – government attorneys. With all due respect to the competent and experienced criminal defense attorneys that advocated for this exception, their reasoning is misguided.[7] The revision appears to be based on the mistaken assumption that permitting criminal defense lawyers to have *ex parte* communications with represented persons would somehow remedy the injustice of exempting prosecutors from the anti-contact rule. Unfortunately the criminal defense bar would be far less persuasive since, unlike the prosecutors, they cannot offer significant benefits, such as money, immunity, freedom, or green cards, to the interviewees. In fact, if a defense lawyer offers a potential witness benefits for truthful information or testimony, this would amount to at least an ethical violation and is potentially the criminal offense of Obstruction of Justice.

The fact that, as a criminal defense lawyer, I would be permitted to participate in this reprehensible conduct and interview represented persons without their lawyers' permission does not remedy the disturbing problem of government lawyers or criminal defense lawyers interfering with your attorney-client relationship, or mine, while seeking to extract uncounseled information or confessions from our clients. The ethical rules should not permit or condone this unnecessary interference with the attorney-client relationship in civil or criminal matters, whether it comes from a government lawyer or criminal defense lawyer, seeking to have a secret conversation with a person represented by counsel.

## V. CONCLUSION

Edwin Meese, while serving as Attorney General of the United States, once observed that the problem with constitutional rulings that permit defense lawyers to be present is that the lawyers make it very difficult to obtain confessions. Fortunately, that is the price we pay for having a criminal justice system in which honorable people battle fiercely but fairly to protect and preserve the rights of those accused of crimes. The "dirty business"[8] that will inevitably result from the proposed Rule and Comments, and the actions of some defense lawyers and prosecutors under this Rule, have no place in our legal system.

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[7] The fact that some supporters of the comment limit their practice primarily to state criminal defense may explain our conflicting opinions. These types of violations have occurred far too often in the federal courts during the time I have practiced. Although I have also practiced extensively in state court, my experience is that that these types of violations occur far less frequently in state court. This may well explain our reasoned difference in perspectives.

[8] *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (Trott, J. author) (citing *On Lee v. United States*, 343 U.S. 747, 757 (1952)).

Sincerely,

TARLOW & BERK PC

Barry Tarlow

BT/sew

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** Office of the Federal Public Defender

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Kay Otani

*** City** Riverside

*** State** California

*** Email address** (You will receive a copy of your comment submission.) Kay_Otani@fd.org

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]

Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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

4.2 Communication with a Person Represented by Counsel [2-100]

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

- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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

Although the Supreme Court has curtailed the rights of criminal defendants to be free from state intrusion in the form of questioning by agents of the state, that DOES NOT MEAN there should be any change to the ethical duties of attorneys in the criminal law areana.

Clients are always free to speak with opposing parties whether in civil or criminal cases. Attorneys are NOT free to approach or speak to opposing parties in either civil or criminal cases. If anything, there should be STRONGER protections against contact with criminal defendants because of the constitutional issues involved.

This is a TERRIBLE rule change and diminishes the protections of criminal defendants as compared to civil parties. Furthermore, there is no ethical justification for the change. There is even LESS ethical justification for an attorney to contact a party in a criminal action than in a civil action. The dangers of convincing a criminal defendant to act against her legal interest are if anything GREATER than

**ENTER COMMENTS HERE.**

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** Former federal prosecutor

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Becky Walker James

*** City** Los Angeles

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** becky@walkerjameslaw.com

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**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ◉ AGREE ONLY IF MODIFIED

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

I'm a former federal prosecutor who now practices criminal defense. I object to comments 19-20 insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. Persons accused of crimes have the greatest need for and the most fundamental right to counsel. Contact by prosecutors or law enforcement represents the serious intrusion on that right. This exception is also not necessary. In the 12 years I spent as a prosecutor, I never found it necessary to any investigation or prosecution to have contact with a represented person without counsel present or without counsel's consent. Federal prosecutors have long been trained on the rules restricting contacts with represented persons and there is no reason prosecutors cannot continue to follow those rules. Moreover, the exemption for criminal defense lawyers does not cure the problem. It does nothing to lessen the intrusion by law enforcement to have other defendants' lawyers also contact the represented person. And again, criminal defense lawyers have long worked within the confines of ethical rules restricting their access to represented persons and no change in those rules is needed.

crowell moring

515 South Flower Street, 40th Floor, Los Angeles, CA 90071-2258 ▪ p213 622-4750 ▪ f213 622-2690

John D. Vandevelde
213.443.5580
jvandevelde@crowell.com

August 24, 2010

Ms. Audrey Hollins [email: audrey.hollins@calbar.ca.gov]
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Disagreement with Comments 19 and 20 to Proposed Rule 4.2 of the California Rules of Professional Conduct

Dear Ms. Hollins:

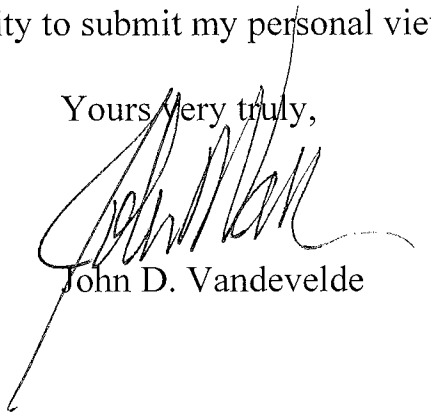
I write to express my personal view disagreeing with Comments 19 and 20 to Proposed Rule 4.2 of the California Rules of Professional Conduct. I do so with a background in both prosecution and defense of criminal matters. I was a federal prosecutor in Los Angeles and am currently a criminal defense counsel. I spend much of my time on complex white collar investigations, often with multiple parties involved, usually with retained counsel. I have the benefit of being involved as prosecutor or defense counsel in hundreds of investigations during a career that spans more than 35 years. I have the added benefit of having served on numerous bar and professional committees, including serving as a Vice Chair of the American Bar Association's White Collar Crime Committee and other groups when we dealt with the Thornburgh memorandum. I am a fellow of the American College of Trial Attorneys. I have served as a lawyer delegate to the Ninth Circuit Judicial Conference and on the Attorney Advisory Council to the Ninth Circuit.

The referenced comments are an ill-advised attempt to eviscerate the right to retain and benefit from the advice of counsel in criminal matters, especially complex white collar matters. The reality is that those matters almost always involve lengthy periods of investigation, often years, in which the subjects or targets of the investigation are represented by counsel. Those matters also often involve substantial factual and legal issues about whether the purported conduct even constitutes a crime. Criminal liability very often turns on issues of knowledge and intent. Enabling government counsel and their agents to

communicate with persons represented by counsel will invite abuse. No matter how well-intentioned government counsel may believe themselves to be, counsel and agents will have an unfair advantage over the represented person in eliciting admissions that will be designed to go behind the back of counsel in order to further the investigation and prosecution of the person under investigation. Especially when combined with case law that permits deception and ruse by investigators, the conduct condoned by these comments would be grossly unfair to the person who is represented. And that could, and in my experience would, occur with the prosecutors and their agents having carefully planned how to take advantage of exactly that kind of unfairness. They will plan and even script out how to direct a conversation without defense counsel present so as to have the client unwittingly give them the evidence they think they are missing. Being able to bypass counsel in that way will undermine what I view as a cornerstone of our legal system, the right to seek and have the benefit of legal counsel. Indeed, it is ironic that these comments would deny such contacts in civil cases, where money is mostly at issue, yet permit it in criminal cases, where a person's very freedom is at stake. If anything, government counsel should be held to a higher standard of ethics than the rest of the bar in carrying out their duties, not a lower standard. These proposed comments to Rule 4.2, and the conduct they condone, should not be permitted.

Thank you for the opportunity to submit my personal view on this issue.

Yours very truly,



John D. Vandevelde

# LAW OFFICES OF EVAN A. JENNESS

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

August 24, 2010

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

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

Re: Comments Regarding Proposed Revision to the California Rules of Professional Conduct - Proposed Rule 4.2, Comments 19-20

Dear Ms. Hollins:

I am a criminal defense attorney in private practice, and write in a personal capacity to advise that Comments 19-20 be removed from Proposed Rule 4.2 (CRPC 2-100, Communication With a Person Represented by Counsel). By way of background, I am the current Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee; Co-Chair of the National Association of Criminal Defense Lawyers' (NACDL) Ethics Advisory and a NACDL Board Member; Treasurer of the Federal Bar Association's Los Angeles Chapter; and Co-Chair of the Lawyer Representatives of the Judicial Conference of the U.S. District Court, Central District of California.

Proposed Rule 4.2 is an anti-contact rule, which generally prohibits *ex parte* communications with represented persons. Comments 19-20 are lengthy provisions creating a special exemption for government lawyers. These provisions would have the effect of holding prosecutors and other government lawyers (including those in civil proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, may endorse conduct that is prohibited by

the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers.

Comments 19-20 are novel, and not part of the ABA Model Rules, or the rules of professional conduct of any other jurisdiction as far as I am aware. However, the principle they seek to revive is old. It was thoroughly discredited nationwide in the context of the notorious Thornburgh Memorandum, which purported to exempt federal prosecutors from states' rules of professional conduct, and was rejected by the State Bar Board of Governors in 1993 in the context of a proposed amendment to Rule 2-100 of the Rules of Professional Conduct.

The most recent revision to Rule 4.2 modifies Comment 20 to include a single sentence at the end of the Comment which purports to permit criminal defense lawyers to communicate with represented persons without the permission of such persons' counsel. This additional special interest exemption does not remedy the injustice that would be effected by Comments 19-20. This minor carve-out for criminal defense lawyers appears to be a response to those who previously pointed out that Comments 19-20 create a special interest exemption for only government lawyers. However, the revision appears to be based on the mistaken assumption that permitting criminal defense lawyers to have *ex parte* communications with represented persons would somehow remedy the injustice of exempting government lawyers from the anti-contact rule. The fact that I, as a criminal defense lawyer, would be permitted to interview represented persons without their lawyers' permission does not remedy the iniquity of prosecutors' interfering with my relationships with my clients and seeking to extract uncounseled admissions from them. Additionally, the special interest exemption for criminal defense lawyers references only lawyers representing an "accused," thus suggesting it would apply only *after* a client was charged with a crime, and not during the often lengthy precharging investigation stage of a matter.

Comments 19-20 are challenging to comprehend. However, they are clear in one regard: they describe a special carve-out applicable to government lawyers and those acting at their direction. In material part, they state, that the "authorized by law or a court order" exemption in 4.2(c)(3) "recognizes that prosecutors . . . as authorized by relevant . . . law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. . . . [T]he 'authorized by law' exception . . . is necessary to promote legitimate law enforcement functions that would otherwise be impeded . . . . [The change from "party" to "person"] is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law."

The special-interest exemption for government lawyers in Comments 19-20 appears to be an effort to revive the (thoroughly) discredited 1989 Thornburgh Memorandum,[1] and to end-run Congressional intent that government lawyers be held to the same ethical standards as all other members of the bar. Specifically, Comments 19-20 would evade the 1998 McDade Amendment, 28 U.S.C. § 530B,[2] by which Congress put an end to the Thornburgh Memorandum. In that document, then-Attorney General Richard Thornburgh had contended that Justice Department attorneys were not required to comply with states' rules of professional conduct where such rules conflicted with the government lawyers' "federal responsibilities, as determined by federal law and the Attorney General," because the Supremacy Clause would "forbid the states from regulating the attorneys' conduct" in such cases. *Matter of Doe*, 801 F. Supp. at 492-93 (*quoting* Thornburgh Memorandum).[3] In relevant part, the Thornburgh Memorandum purported to authorize DOJ attorneys to communicate with represented individuals behind their lawyers' backs under various circumstances - a view rejected by courts even prior to Congress' intervention via the McDade Amendment. *See United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court's "trenchant analysis of the inefficacy of the" Thornburgh Memorandum); *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (Attorney General not authorized by law to exempt federal prosecutors from rules of professional conduct). Comments 19-20 skirt the McDade Amendment by embedding a special exemption within Proposed Rule 4.2.

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

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

[3] The Thornburgh Memorandum states: "In sum, it is the Department [of Justice]'s position that contact with a represented individual in the course of authorized law enforcement does not violate DR 7-104. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques."

In addition to the preceding, a special interest exemption to the anti-contact rule for *any* sub-group of the bar is unnecessary. The general exemption applicable to *all* lawyers with respect to communications that are "authorized by law or court order" (Proposed Rule 4.2(c)(3)) addresses the only reasonable concern expressed by Comments 19-20 – that a lawyer not be subjected to discipline for engaging in conduct that is authorized by law or a court order.

Thank you for considering my views.

Very truly yours,

*Evan A. Jenness*

EVAN A. JENNESS

EAJ:dfm

Enclosure

## Rule 4.2: Communication with a Represented Person

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

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) For purposes of this Rule, a "person" includes:

(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or

(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.

(c) This Rule shall not prohibit:

(1) Communications with a public official, board, committee or body; or

(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or

(3) Communications authorized by law or a court order.

(d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.

(g) As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

**COMMENT**

*Overview and Purpose*

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

*Communications Between Represented Persons*

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

*Knowledge of Representation and Limited Scope Representation*

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. ~~(~~See Rule 1.0.1(f).~~)~~

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. ~~(~~See Comment [6].~~)~~ In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

*Represented Organizations and Constituents of Organizations*

[11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. ~~(~~See Evidence Code section 1222.~~)~~

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.

*Represented Governmental Organizations*

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented

in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

*Represented Person Seeking Second Opinion*

[17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. ~~(~~See, e.g., Rules ~~7.3~~ 1.7 and 7.3~~1.7.~~)

*Communications Authorized by Law or Court Order*

[18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be

prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

*Prohibited Objectives of Communications Permitted Under This Rule*

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. ~~(See [Rule 4.4.])~~ Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules ~~[4.4]~~, 8.4(c) and 8.4(d).

[24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** California Public Defenders Association

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Garrick Byers

*** City** Fresno

*** State** California

*** Email address** (You will receive a copy of your comment submission.) gbyers@co.fresno.ca.us

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]

Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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

4.2 Communication with a Person Represented by Counsel [2-100]

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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

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

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

CPDA is grateful to the Commission for having added the following sentence in Comment [20]: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right."

**ENTER COMMENTS HERE.**

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

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

CPDA is grateful to the Commission for having added the following sentence in Comment [20]: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right."

CPDA remains concerned, however, that this does not always provide a bright line, and, in effect, may sometimes require the criminal defense lawyer to "violate" the rule to find out whether it applies in that case.

It has been said of Current Rule 2–100 (although concerning a different aspect of the rule) that "a bright line test is essential.... [A]n attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client." Snider v. Superior Court (2003) 113 Cal.App.4th 1187, 1197-1198, quoting Nalian Truck Lines, Inc. v. Nakano Warehouse & International Corp. (1992) 6 Cal.App.4th 1256, 1264.

Because the added sentence about criminal defense lawyers does not always provide a bright line, CPDA believes it is appropriate to add one more sentence similar to the first sentence of Comment [4] to Proposed Rule 1.16 [Declining or Terminating Representation]. That first sentence reads "A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong."

The additional new sentence that CPDA requests be added to Comment [4] of this Proposed Rule 3.3, uses the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:

"A criminal defense lawyer is not subject to discipline for communicating with a represented person on the subject of that representation without the consent of the other lawyer under paragraph (a) if the criminal defense lawyer reasonably believed that the lawyer was not communicating on the subject of the representation, or if the criminal defense lawyer reasonably believed that he or she was not required to obtain the consent of the other lawyer by controlling constitutional principles, even if that belief later is shown to have been wrong."

Thank you for your consideration,

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

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

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

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Carlton F. Gunn

*** City** Los Angeles

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** Carlton_Gunn@fd.org

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]
Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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*** Select the Proposed Rule that you would like to comment on from the drop down list.**
4.2 Communication with a Person Represented by Counsel [2-100]

*****
**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
- ○ AGREE with this proposed Rule
- ◉ DISAGREE with this proposed Rule
- ○ AGREE ONLY IF MODIFIED

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

I am an attorney who has been practicing with a Federal Public Defender office for over 25 years and have acted as a supervisor for most of those years. I believe Comments 19-20 should be deleted from the proposed rule because they would have the effect of holding prosecutors and other government lawyers (including those in civil and administrative proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers. The reference at the end of Comment 20 to "lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment . . ." does not remedy these flaws and adds to the interference with attorney-client relationships that is invited by Comments 19-20.

# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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




August 23, 2010

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

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

Dear Ms. Hollins:

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

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

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

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

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

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

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

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

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

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

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

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

**A. Conflict with California Criminal Discovery Law**

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

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

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

**B. Disclosure Before Entry of Plea**

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

**C. Defense Waiver of Compelling Disclosure**

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

**D. Disclosure of Sentencing Evidence to "the tribunal."**

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

**E. Obligation of Supervisory Prosecutors**

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

**F. Conclusion as to Proposed Rule 3.8(d)**

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

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

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

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

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

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

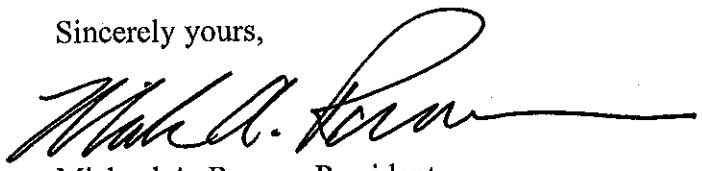
Finally, we note that the division within the Bar Committee itself (this proposal received only seven affirmative votes on a thirteen member committee, and was categorized as "Very Controversial") suggests there are likely many unanticipated and unintended ramifications of the rule change for both criminal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

## III. Conclusion

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

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

Sincerely yours,



Michael A. Ramos, President
California District Attorneys Association

# THE STATE BAR OF CALIFORNIA
## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

**Professional Affiliation** University of San Diego School of Law

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** David McGowan

*** City** San Diego

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** dmcgowan@sandiego.edu

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]
Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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*** Select the Proposed Rule that you would like to comment on from the drop down list.**
4.2 Communication with a Person Represented by Counsel [2-100]

*****
**From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**
- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ◉ AGREE ONLY IF MODIFIED

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

David McGowan
Lyle L. Jones Professor of
Competition and Innovation Law
University of San Diego School of Law
5998 Alcala Park, San Diego CA 92110
619.260.7973 / dmcgowan@sandiego.edu

August 25, 2010

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

Re: Proposed Rule 4.2(e)

Dear Ms. Hollins:

This letter offers some comments on proposed Rule 4.2 for the Commission's consideration.

Proposed Rule 4.2(e) is vague and, taken at face value, changes the law in a way likely to multiply discovery practice and disadvantage one class of clients in favor of another. It is not clear to me that the Commission considered these aspects of the rule and endorses such changes, so I write to bring them to the commission's attention.

Rule 4.2 governs contact with represented parties. It excludes from its scope former employees and current employees who do not fall within the class defined by Rule 4.2(b). These persons are covered by Rule 4.3(a), which suffers from the same problems I discuss here.

The proposed rule states:

> In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Many lawyers conduct informal discovery through interviews with former employees or current employees not within the scope of 4.2(b). Many if not most such employees will have signed non-disclosure agreements restricting their ability to discuss their employment. Such agreements are very broad, and in general would restrict

employees from discussing most matters of interest to interviewing lawyers. Such NDAs create contractual duties running to "another"—the employer.

This provision changes the law. The most similar ABA Rule is 4.4(a), which provides that lawyers may not use "methods of obtaining evidence that violate the legal rights of such a person." Proposed Rules 4.2(e) and 4.3 change this rule in three ways. First, the proposed rules are not limited to "methods," as is the ABA rule. Second, the ABA rule limits its scope to "legal rights" of third persons. The Restatement (Third) of the Law Governing Lawyers interprets its similar provision to extend to rights granted by law, such as privilege and work product, but not rights granted by contract. So far as I know, case law is consistent with this interpretation. Third, and relatedly, Rule 4.2(e) goes beyond "privileged" information to cover "other confidential information."

These changes are significant and will tend to impede informal discovery. That change implies greater resort to formal discovery procedures, and possibly to more discovery motion practice. The rules also tilt in favor of one class of clients and against at least two other classes: The favored class includes entities who employ NDAs and are owed duties under them. Disfavored classes include those who litigate against such entities, such as employment discrimination plaintiffs or securities plaintiffs; lawyers for both types of plaintiffs rely on informal interviews in their investigations.

In other jurisdictions relying on the traditional understanding, such informal discovery is permitted and not grounds for discipline. The New York Court of Appeal made that point clear in *Siebert & Co., Inc. v. Intuit Inc*., 8 N.Y. 3d 506 (2007), a decision that conflicts with the text of the proposed rule. The lawyers in that case interviewed a former corporate officer prior to his deposition. The officer not only had privileged information, he had helped manage the very case at issue. The lawyers cautioned the officer against revealing privileged information and proceeded with the interview. The Court of Appeal found the lawyers had acted properly and reversed an order disqualifying them from the case.

Under proposed Rule 4.2(e), however, the lawyers in *Siebert* would seem to be subject to discipline. The officer almost certainly had contractual confidentiality obligations running to his former employer, and while discovery rules trump contractual obligations Rule 4.2(e) seems to signal that lawyers may not seek such information outside discovery.

This impression is strengthened by the language ending both Rule 4.2(e) and Rule 4.3, which subjects lawyers to discipline for seeking information "which the lawyer is not otherwise entitled to receive." I do not know what this means. Insofar as I know lawyers are not *entitled* to receive any information outside discovery, but traditionally they have been able to seek it. If the language means that lawyers may seek whatever information they could obtain through discovery, then it conflicts with the preceding language, because lawyers may obtain through discovery even trade secret information or other information a person may have a duty not to disclose.

In short, the language of both Rule 4.2(e) and 4.3 seems to change relatively settled law, which the commission has in other cases tried to avoid, and to change it in a way that will have different effects for different lines of practice, which is a change not highlighted by the comments or in any discussion I have seen. If the commission intends to make that change, I encourage it to do so more explicitly and to consider fully comments on the substance of the change. If the commission does not intend to make the change, I urge revision of the language to track the ABA's Rule 4.4(a).

Very truly yours,

/s/

David McGowan

NASATIR, HIRSCH, PODBERESKY, KHERO & GENEGO
A PROFESSIONAL LAW CORPORATION
MAIN STREET LAW BUILDING
2115 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
WWW.NASATIRHIRSCH.COM

MICHAEL D. NASATIR*
RICHARD G. HIRSCH*
VICKI I. PODBERESKY
WILLIAM J. GENEGO
TARIQ A. KHERO

*CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

TELEPHONE
(310) 399-3259
FACSIMILE
(310) 392-9029
(310) 3928260

August 25, 2010

**By electronic mail**

Audrey Hollins
audrey.hollins@calbar.ca.gov
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Comments on Proposed Revision to Rule 4.2 of the California Rules of Professional Conduct

Dear Ms. Hollins,

I am writing to comment on the Proposed Revision to Rule 4.2 of the California Rules of Professional Conduct, and specifically Comments 19 and 20. Comments 19 and 20 broaden the scope of the actual text of the rule, will encourage government lawyers to interfere with the right to counsel and they conflict with Comment 22.

Subparagraph (c)(3) exempts certain communications from those that are otherwise prohibited by Rule 4.2 - "[c]ommunications authorized by law or a court order." That provision makes clear that the "communication" must be authorized by law or a court order, *i.e.*, the law must authorized the lawyer to communicate with the represented person. Comment 19, however, seems to say that as long as the investigative activity is "authorized by law," communications with a person represented by counsel in the course of that investigative activity are not prohibited by the Rule. Indeed, that would seem to be the most plausible reading, given that the sources of law referenced in the comment do not expressly "authorize" government lawyers (or their agents) to communicate with represented persons. If the Comment were read in that manner, as government lawyers will no doubt urge it should be, it will dramatically broaden what the Rule intends.

At a minimum, the Comment creates confusion with the text of the Rule by referencing the federal and state constitutions and decisional law as sources of

authority for subparagraph (c)(3)'s exemption. Neither the federal or state constitutions authorize government lawyers or their agents to communicate with a person who is represented, nor may decisional law interpreting the federal or state constitutions authorize such conduct. The most a court could say is that, based on the facts before it, a communication by a government lawyer (or his or her agent) with a represented person did not violate the person's constitutional rights. The Comment's specific reference to these sources, however, seem to suggest that what is not prohibited by the constitution is permitted by the Rule. This has the effect of turning subparagraph (c)(3) from an exemption to what the Rule otherwise prohibits, to a positive source of authority for government lawyers to communicate with represented persons, as long as, in their view, it does not violate the constitution, or as long as there is no decision that says it violates the federal or state constitution.

Further, the expansive reading that Comment 19 gives to subparagraph (c)(3) conflicts with Comment 22, which requires that "[a] lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e)."[1] In particular, compliance with paragraph (d) cannot be reconciled with the broad investigatory activity that Comment 19 suggests subparagraph (c)(3) would allow in the interest of effective law enforcement.

The solution to all of these problems is to avoid them in the first place by not including Comments 19 and 20.

Thank you for your time and consideration.

Sincerely,

WILLIAM J. GENEGO

WJG/

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[1] Because the Rule does not itself "authorize" a lawyer to communicate with a represented person, Comment 22 should be modified to state that a lawyer whose communication with a represented person is not prohibited under this Rule must comply with paragraphs (d) and (e).

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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

~~be in the rule, not a Comment.~~

**Rule 4.2. Communication with a Person Represented By Counsel.**

1. OCTC supports the changes to Comment 20.
2. OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. In *Dale*, the Review Department failed to find an attorney culpable of violating current rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney, because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the *Dale* type of situation. Even the court in *Dale* appeared to encourage that. While the rule now states "person" and not "party" so that the Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a comment should be added to clarify that the *Dale* type of situation is covered by this rule.
3. There are far too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

~~**Rule 4.4. Respect for the Rights of Third Persons.**~~

~~1. The new proposal is to omit rule 4.4 in its entirety. OCTC respectfully disagrees with omitting rule 4.4. OCTC supports rule 4.4(a) of the Model Rules, which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted its concern regarding the vagueness and overbreadth of such terms as "embarrass, delay, or burden" a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and, when balanced against the need to prevent litigation abuse and promote professional civility and public protection, OCTC believes the ABA and the jurisdictions which have adopted this rule have struck the appropriate balance.~~

~~The State Bar Act prohibits counseling or maintaining actions, proceedings, or defenses only as appear to an attorney legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct prohibit an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.)~~

~~In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive~~

# Rule 5.4 – Public Comment – File List

Y-2010-531 Thomas Quinn [5.4]

Y-2010-534e COPRAC [5.4]

Y-2010-553g OCTC [5.4]

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 23, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Thomas C. Quinn

*** City** Lower Lake

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** tcquinn2@live.com

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**The following proposed rules can be viewed by clicking on the links below:**

Rule 1.0.1 [1-100(B)] | Rule 2.1 [n/a] | Rule 3.3 [5-200] | Rule 3.8 [5-110]

Rule 4.2 [2-100] | Rule 5.4 [1-310, 1-320, 1-600] | Rule 8.4 [1-120] | Discussion Draft [All Rules]

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

5.4 Financial and Similar Arrangements With Nonlawyers

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

- ○ AGREE with this proposed Rule
- ○ DISAGREE with this proposed Rule
- ◉ AGREE ONLY IF MODIFIED

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

I saw much discussion about this issue previously, particularly as it relates to accountants and attorneys. There are many cases and areas of the law that involve accounting issues. Thus it seems arbitrary to not allow lawyers and accountants to become partners if that relationship is strictly regulated. Otherwise attorneys will simply farm out these services to accountants as hired experts and pass the cost along to the client, itself an accounting device to avoid "fee sharing" with the bottom line to the client being the same but the service and process provided being more cumbersome. By allowing accountants and lawyers to work together in firms would provide for greater efficiency in service and would potentially keep accountants working under greater legal oversight on a higher ethical basis. Moreover, correct me if I am wrong, it seems I saw somewhere that the rule as currently iterated places limitations on how those persons who are both accountants and lawyers present themselves to clients. Surely they should be able to represent clients in that dual capacity without fictional shifts or walls between their two professional personas, something that creates unneeded administrative and clerical

**ENTER COMMENTS HERE.**

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**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

August 9, 2010

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

RE: Proposed Rule 5.4

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers. COPRAC supports the adoption of proposed Rule 5.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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~~personality." In addition, the rule would prohibit attorneys from obtaining evidence that violates the legal rights of third persons.~~

~~While some of the misconduct prohibited in ABA rule 4.4(a) can be handled under other rules, not all of it can or should be. Adopting this rule would provide better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that ABA's paragraph (a) should be adopted.~~

~~2. OCTC also opposes the rejection of rule 4.4(b). OCTC believes that California, like the rest of the country, needs a rule regarding inadvertently transmitted documents. OCTC believes both the Commission's previous language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable. We believe there is a need for this rule.~~

~~3. Previously proposed Comments 1 and 3, however, seem more appropriate for a treatise, law review article, or ethics opinion. Comment 2 is too long and covers at least two distinct concepts. It could be two comments.~~

**Rule 5.4. Financial and Similar Arrangements with Nonlawyers.**

1. OCTC supports the new changes to the rule.
2. Many of the comments, especially Comment 1, more appropriately belong in a treatise, law review article, or ethics opinion.

~~**Rule 8.3. Reporting Professional Misconduct.**~~

~~1. The new proposal is to omit rule 8.3 (reporting professional misconduct) in its entirety from the rules. OCTC disagrees with excluding any reporting requirement and believes that public protection requires that California have some form of mandatory reporting professional misconduct.~~

~~OCTC appreciates that many attorneys had problems or issues with the previous proposal and the ABA's rule. However, that does not mean California should abandon the effort to have a narrow reporting requirement for lawyers. It is a legitimate and appropriate means for the State Bar and the Supreme Court to learn of significant misconduct, especially misconduct that affects clients. It protects clients and is an important part of lawyers being professionals and officers of the court. Not only have most states adopted some version of the reporting requirement, but, in California, judges have reporting requirements regarding other judges and attorney misconduct. (See Canon 3D of the Code of Judicial Ethics; Business & Professions Code sections 6086.7 and 6086.8 ; Rothman, "California Judicial Conduct Handbook," sections 5.65-5.68; *Dodds v. Comm. on Judicial Performance* (1995) 12 Cal.4th 163.)~~

~~OCTC would, therefore, recommend that the Commission draft a rule that requires attorneys to report other attorneys [in their office] who appear to have engaged in financial [and billing] misconduct, especially violations of the trust account rules. This is necessary for public protection.~~

~~2. OCTC also believes that Comments 1, 3, and 4 to the previous proposal are more appropriate for treatises, law review articles, and ethics opinions.~~

# Rule 8.4 – Public Comment – File List

Y-2010-534f COPRAC [8.4]

Y-2010-553i OCTC [8.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

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TELEPHONE: (415) 538-2161

August 9, 2010

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COPRAC has reviewed the provisions of proposed Rule 8.4 – Misconduct. COPRAC supports the adoption of proposed Rule 8.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

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cc: Members, COPRAC

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**Rule 8.4. Misconduct.**

1. OCTC generally supports this rule. However, OCTC still believes that the Model Rules version of subparagraph (a) is less ambiguous, clearer, and better. The Model Rules also prohibit an attorney from violating or attempting to violate the Rules of Professional Conduct. There is no sound reason to exclude this language, which protects clients and the public. An attempt to violate a rule goes to the character of an attorney and his or her fitness to practice law. The ABA's version better protects clients, the public, and the courts. It ensures that attorneys are and remain of good moral character.

2. OCTC still believes that subparagraph (f) should "prohibit an attorney from soliciting or inducing a judge or judicial officer to engage in conduct that is a violation of applicable rules of judicial conduct or other law." This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no sound reason for the differences between the language in subsections (a) and (f).

3. Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. OCTC supports Comments 2A, 2B and 6.

4. OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) Thus, the comment appears to be at odds with established law and the Supreme Court's position on this. OCTC recommends that this Comment be stricken or clarified.

5. OCTC disagrees with the last sentence of Comment 6, which states "This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act." This comment is beyond the scope of the Rules and Comments. There is no comparable comment in the ABA rule and no need for it in our rules.

   This Comment invades the prosecutorial discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. The Supreme Court rejected the notion that it objected to duplicative charging. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 fn. 2 ["We do not wish to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence."])

   Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges after a hearing, but other times it does not, although it gives them no additional weight. (See *In the Matter of Wolf* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.

6. OCTC is very concerned about new Comment 2C, which attempts to address the difficult and

thorny issue of the attorney's role in undercover investigations in light of the attorney's ethical obligations, especially the prohibition against dishonesty, fraud, deceit, or misrepresentation. It attempts to codify by comment a controversial area of law that has no consensus and is still evolving. (See NYCLA Committee on Professional Ethics Formal Opinion No. 737 issued May 23, 2007.)

This comment may be the most controversial comment in the entire set of rules. It attempts to carve out an exception to rule 8.4(c) not specifically stated in the rule. It creates an overly broad exception to rule 8.4(c)'s honesty rule. It also attempts to simplify in one paragraph a complicated and very controversial area of ethics law.

Further, the proposed rule gives no guidance as to the limits of covert investigations or an attorney's advice and supervision of such activities; whether private lawyers and their investigations may behave like government investigations; how far these activities can violate law, people's privacy rights and their rights under attorney-client privilege; and how far attorneys can be involved in such activities. Whether lawyers should have any involvement in such activities is a disputed and controversial issue.

The Comment begins by stating: "Paragraph (c) [forbidding an attorney to engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation] does not apply where a lawyer advises clients or others about or supervises lawful covert activity in the investigation of violations of civil or criminal or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules." The proposed comment does not, however, take into account those situations where the conduct would violate the State Bar Act or other law.

While the comment uses the term "lawful covert activity," the rule does not define that term. The comment also does not define that term. The term "lawful covert activity" and its limitations are vague. The comment may not address issues such as trespass, illegal tape recording, using pretense or deceit to obtain non-public records or serve subpoenas on witnesses, access to people's computer records without consent, the rights of other persons, and the obligation to avoid seeking that clients waive their attorney-client communications.

OCTC recognizes that this comment is in Oregon's rule. (See Oregon's Rules of Professional Conduct, rule 8.4(b).) However, in Oregon, this is the rule, not a comment. OCTC believes that if there is to be a rule regarding covert activities or an exception to rule 8.4(c) it should be in the rule, not a comment.

Further, the Commission's comment does not even address how to address these activities if the lawyer's conduct violates the State Bar Act or other law. The comment only addresses the Rules of Professional Conduct. It does not even explain how to incorporate this exception or make it consistent with the dishonesty rules in the State Bar Act or other law.

The comment does not even directly address how this rule is to be interpreted. Is it along the parameters discussed in Oregon's Ethics Opinion 2005-173? Oregon's Ethics Opinion 2005-173 opines that covert activities can include issues involving intentional or negligent breaches of legal standards, but not situations in which no breach of any recognized duty is evident or alleged. Will California have the same interpretation? Will our comment permit covert activities investigating torts or breaches of contract? Will California's comment be interpreted to exclude, as Oregon's Ethics Opinion 2005-173 does, the attorney as a direct participant? Will California's comment exclude, as Oregon's Ethics Opinion 2005-173 does, the requirement that

the attorney have probable cause or reasonable suspicion of a violation, and only require an honest subjective belief? OCTC assumes that our rule's comment is to be interpreted as Oregon does, but it is not clear and unambiguous and that is necessary both as a matter of fairness to the attorneys and for the rule to be enforceable.

Further, does this comment exclude from the rule any misrepresentation, not just a misrepresentation about the identity and purpose of the investigation made in the course of the covert activity? Moreover, what are the implications for the duty of honesty by allowing this exception to the duty of honesty? This comment could be interpreted to allow dishonest conduct beyond supervising covert activities.

Thus, for example, might the comment allow:

- a prosecutor or other attorney to pretend or instruct an investigator to pretend to a criminal defendant that the prosecutor or the prosecutor's investigator was a public defender (*In re Pautler* (Co. 2002 ) 47 P3d 1175 [attorney disciplined for pretending to be a public defender] );
- an attorney or the attorney's investigator lead a non-client into believing that an attorney (or his investigator) was representing or would represent the non-client in the future in order to obtain evidence for a civil case against another person (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [attorney disciplined for befriending a criminal defendant represented by counsel and offering to represent him at a parole hearing and giving him legal advice in order to obtain confession to be used by attorney in civil case for other clients]);
- a prosecutor to order an investigator or other person to testify falsely in court (*In re Friedman* (Ill 1979) 392 N.E.2d 1333 [attorney ordered investigator to lie to court in order to obtain evidence regarding an attempt at bribery]; *In the Matter of Malone* (NY. 1984) 480 NYS2d 603 [attorney ordered correctional officer to lie to court in order to protect officer from retaliation]);
- a prosecutor to file a false criminal complaint against an undercover investigator to preserve the undercover investigator's cover (*People v. Reichman* (Colo 1991) 819 P2d 1035 [misconduct for filing a false complaint against an undercover investigator to preserve the undercover investigator's cover);
- civil attorneys pretending (or supervising others pretending) to be interviewing a judge's law clerk for employment when the attorneys are seeking information to recuse a judge and overturn a court order (*In the Matter of Crossen* (Mass. 2008) 880 N.E.2d 352); *In the Matter of Curry* (Mass. 2008) 880 N.E.2d 388);
- attorneys using an investigator to obtain a defendant's private insurance records by pretending to be the defendant (*In re Woods* (Wis 1995) 526 NW2ds 513);
- attorneys or investigators using ruses to subpoena witnesses (Hearing Officer's Report in *In the Matter of Cynthia A. Levh* (Ariz 2007), Case No. 06-0600, [attorney disciplined for developing a "ruse" to serve two witnesses vital to her client's criminal defense by telling one of the witnesses that she represented a company trialing a fictitious beer and presenting this witness with a coupon

entitling her to a free sample of the fictitious beer] or

- a lawyer condoning his employee photocopying privileged documents taken from an adverse party at a discovery conference without consent. (*In re Wisehart* (N.Y. 2001) 721 N.Y.S.2d 356.)

Even what this Comment seems to prohibit, may not be prohibited. For example, the Comment appears to prohibit communications with others represented by attorneys by using the phrase "provided the lawyer's conduct is otherwise in compliance with these rules." However, that may not always be apparent or known when the investigation is commenced. The comment also appears to allow pretexting, which is very controversial.

Further, to what extent does the comment allow attorneys to use covert activities to obtain information that is obtainable by non-covert methods or is already covered by law, such as the discovery statutes for obtaining financial records. Can an attorney instruct an investigator to obtain records without complying with the applicable protections provided by the discovery statute? This is particular of concern given that the Commission and the Board of Governors have proposed omitting ABA rule 4.4(a) that, among other things, prohibits an attorney from using methods of obtaining evidence that violate the legal rights of third persons.

There are too many unexplored issues with this comment. It does not seem to provide the guidance or the limitations that need to be addressed. OCTC believes that there should be a difference between government covert activities and private attorneys. However, we also believe there is a role for some private covert activities, but it needs strict rules, including that the lawyer is not going to make the misrepresentations. Likewise, we believe that government attorneys may not cause misrepresentations to courts or be directly involved in misrepresentations or violate law. An exception to an attorney making a misleading statement should be if the attorney is employed as an investigator, such as a FBI agent. (See e.g. Va. Ethics Op. 1765 (2003) and Va Ethics Op. 1738 (2000).) Even then the attorney should not be permitted to lie to a court. Further, we do not believe there should be a broad blanket exception to the honesty rules. Instead we believe a more limited exception would be appropriate.

OCTC believes the Commission should consider a rule imposing limits on covert actions similar to those limits suggested by NewYork's ethics opinion on this subject. We believe this is necessary before we can even consider a rule or comment carving out an exception to the misrepresentation rules. New York's ethics opinion states:

"Non-governmental attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to DR-7-104, the no-contact rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege. (New York Ethics Opinion NYCLA Committee on Professional Ethics Formal Opinion No. 737, pp. 5-6.)

New York's opinion would have to be tailored to our rules, the State Bar Act, and California law. The Commission might want to cover more subjects than the New York opinion covers, but that opinion seems like a good starting point for a discussion on this subject. The current comment is just too vague, uncertain, and creates too many problems regarding the rights of third persons. It is too broad in its exception to the honesty rule. It also creates too many problems regarding the enforcement of the rule.

We, again, thank the Commission for the opportunity to present our views. We also thank the members of the Commission for the considerable efforts they made in crafting the proposed rules of conduct for California attorneys. If you have any questions, please feel free to contact us.

Very truly yours,

James E. Towery
Chief Trial Counsel

# General/Miscellaneous Public Comments – File List

Y - General – Office of Chief Trial Counsel

Y - General - Ellen Pansky

Y - General - Nelson Wild

**General/Miscellaneous Rule Comments**
**[Sorted by Commenter]**

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 1 | Office of Chief Trial Counsel | D | Yes | 4.4(a) | OCTC respectfully disagrees with omitting Proposed Rule 4.4. OCTC supports rule 4.4(a) of the Model Rules, which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted its concern regarding the vagueness and overbreadth of such terms as "embarrass, delay, or burden" a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and, when balanced against the need to prevent litigation abuse and promote professional civility and public protection, OCTC believes the ABA and the jurisdictions which have adopted this rule have struck the appropriate balance. | Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third person. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission has two primary concerns with the entire paragraph (a) of this rule. First, the Commission is concerned about the vagueness and overbreadth of the terms "embarrass, delay, or burden a third party." The lack of clarity has the potential of leading to inconsistent enforcement of the Rule. Second, the Commission is concerned that the Rule will have a chilling effect on legitimate advocacy, in part because many proper litigation tactics may result in embarrassing an opposing party or delaying litigation. The Commission notes that under existing California statutory law, a lawyer who engages in extreme delay of a client's case for personal gain may be subject to a misdemeanor charge under Business and Professions Code section 6128(b). |
| | | | | 4.4(b) | OCTC also opposes the rejection of Proposed Rule 4.4(b). OCTC believes that California, like the rest of the country, needs a rule regarding inadvertently transmitted documents. OCTC believes both the | Model Rule 4.4(b) provides that a lawyer who receives a document relating to the lawyer's representation of a client and "knows or reasonably should know" that the document was inadvertently sent shall promptly notify the sender. The |

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

## General/Miscellaneous Rule Comments
## [Sorted by Commenter]

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | Commission's previous language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp.* We find either acceptable. We believe there is a need for this rule. | Commission also recommends against adoption of paragraph (b) of Model Rule 4.4 and the related comments, in part, because a lawyer's duties concerning inadvertently transmitted writings often are fact-bound inquiries and therefore are difficult to specify in a rule that will have disciplinary consequences. In addition, case law may continue to evolve in this area of lawyer conduct in response to variations in factual situations. |
| | | | | Rule 4.4 Comments [1], [2] & [3] | Previously proposed Comments [1] and [3] seem more appropriate for a treatise, law review article, or ethics opinion. Comment [2] is too long and covers at least two distinct concepts. It could be two Comments. | The Commission is not recommending adoption of Model Rule 4.4. |
| | | | | 8.3<br><br>Rule 8.3 Comments [1], [3] & [4] | OCTC disagrees with excluding any reporting requirements and believes that public protection requires that California have some form of mandatory reporting professional misconduct. OCTC would recommend that the Commission draft a rule that requires attorneys to report other attorneys [in their office] who appear to have engaged in financial [and billing] misconduct, especially violations of the trust account rules. This is necessary for public protection. OCTC also believes that Comments [1], [3], and [4] to the previous proposal are more appropriate for | At its meeting on July 22 – 24, 2010, the Board of Governors decided not to recommend the adoption of a California counterpart to Model Rule 8.3. The proposal considered by the Board was a Commission recommendation for a rule that was partly permissive and partly mandatory. The Commission's proposed rule would have set a standard of permissive reporting for general misconduct that implicates a lawyer's fitness to practice but, in circumstances where a lawyer knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness |

**General/Miscellaneous Rule Comments**
**[Sorted by Commenter]**

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | treatises, law review articles, and ethics opinions. | or fitness, the Rule would have imposed a mandatory reporting obligation. The Commission's proposal differed from Model Rule 8.3, which mandates reporting of any violation of the Rules (not just felonious conduct) "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<br><br>The Board's action appeared to reflect two concerns. First, the Board seemed to be concerned that lawyers might find it difficult to comply with a rule that appears to assume expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of the Commission that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. |

## General/Miscellaneous Rule Comments
## [Sorted by Commenter]

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 2 | Pansky, Ellen A. | D | No | | I wish to reiterate some of the observations that were recently made in the Daily Journal by attorneys Kurt Melchior and Jerome Sapiro, Jr. Most notably, I sincerely recommend that the Comments to the Rules be separated from the Rules themselves, and published separately as a California Restatement of the Law Governing Lawyers. The Comments are convoluted, confusing, sometimes contradictory, and difficult to interpret in some instances. Without criticizing particular Comments, it would be far more useful to simply publish them in a separate guidebook, to provide aspirational guidance, rather than using them to create disciplinary sanctions.<br><br>In addition, although the charge provided to the Rules Revision Commission was to harmonize California's Rules of Professional Conduct with the ABA Model Rules unless there was a compelling reason to deviate from the Model Rules, the Rules as currently proposed are a unique hybrid, in many instances constituting a new standard not previously seen either in the California Rules of Professional Conduct or in the ABA Model Rules. | See response to Nelson Wild who expresses similar concerns. In addition, the Commission observes that the suggestion to separate the comments from the Rules would offer little, if any, benefit and likely would make it cumbersome for lawyers to research and analyze individual rules. |

## General/Miscellaneous Rule Comments
## [Sorted by Commenter]

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | 1.5.1(a)(2) | California cases interpreting Current Rule 2-200 permit lawyer to comply with the rule governing division of attorney's fees, so long as the writing is provided to the client and executed by the client before the division of fees actually occurs. As currently proposed, Rule 1.5.1(a)(2) would make it a disciplinary offense to fail to obtain the client's consent to a division of fees agreement at the time the attorneys first agree to divide the fee. Not only does the new rule contradict current case law, it is illogical, since the lawyers will not know their relative contributions to the client's matter until representation is complete. | As explained in Comment [4] to Rule 1.5.1, there are three client concerns associated with this rule: 1) whether the client is actually retaining the lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee, 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee, and 3) whether the client may prefer to negotiate a more favorable arrangement.<br><br>These concerns cannot be address if the client's consent is not required until the fee is divided. If the division affect's the lawyer's performance or client decides that the lawyer was not appropriate, it is too late to do anything about it. The rule was drafted to give the client the opportunity to address the issues in advance rather than after the fact. The proposed Rule recognizes that the agreement to divide a fee may not occur until after the client has signed a fee agreement. The Commission concluded that tying client consent to the time that the lawyers enter into the agreement affords the most client protection. |

## General/Miscellaneous Rule Comments
## [Sorted by Commenter]

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | 1.5(e)(2) | Proposed Rule 1.5(e)(2) purports to create a disciplinary offense where a lawyer collects a flat fee to which the client has agreed, which by definition is not based on a calculation of the number of hours times an hourly rate. Flat fees have always been recognized as alternatives to the billable hour arrangement and provide great certainty to both the lawyer and the client, since the total amount of fees will be capped. The concept that a portion of a flat fee may be required to be retroactively refunded, even if all the services have been completed, is an entirely novel disciplinary rule. | The commenter's concern is moot because Rule 1.5(e)(2) has been removed from the proposed Rule. |
| 3 | Wild, Nelson H. | D | No | | I wholeheartedly endorse the comments of attorneys Kurt W. Melchior and Jerome Sapiro, Jr., set forth in the four-part series in the San Francisco Daily Journal, and urge the Board of Governors to reject the proposed new rules of professional conduct.<br><br>I see little benefit in enacting the proposed overly complex, often befuddling and wordy rules, explanations and interpretations.<br><br>The Board would be wise to update, to the extent necessary, the current rules, which have worked well in California, rather than to adopt the new set of ABA rules for the sake of conformity. | The Commission disagrees with the commenter's assertion that there is "little benefit" in enacting rules that are patterned on the ABA Model Rules of Professional Conduct. The Commission also disagrees that the comments to the proposed Rules are "overly complex" or "befuddling." The Commission was charged in part to take into account work that had occurred at local, state and national levels with respect to multijurisdictional practice and to "eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues" Adopting a set of rules patterned on the Model Rules responds to the concerns reflected in that charge. Moreover, as to the commenter's concerns |

**General/Miscellaneous Rule Comments**
**[Sorted by Commenter]**

***TOTAL* = 3** **Agree = 0** **Disagree = 3** **Modify = 0** **NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | | with the length of the comments, the Commission notes that they provide important clarification of the Rules and guidance to lawyers to assist them in complying with their duties to clients and courts. |

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
James E. Towery, Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

August 27, 2010

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

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

Dear Ms. Hollins:

As you know, the Board of Governors requested additional public comment on seven proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The comments of the Office of the Chief Trial Counsel (OCTC) to the seven proposed new or amended Rules of Professional Conduct are as follows:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would again like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we continue to have the concerns we expressed about the proposed new rules in our June 15, 2010 letter. We also have some additional concerns about the seven amended proposed new rules. Our disagreement to the latest proposals is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. We hope you find our thoughts helpful.

**SUMMARY**

We reiterate our main concerns with the proposed rules as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are far too many Comments to the rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the

rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect;
- One of the Comments invades OCTC's prosecutorial discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- The proposed rules unnecessarily exclude rules that are in the ABA Model Rules and have been adopted by other jurisdictions (i.e. ABA rule 4.4); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9 and 8.4).[1]

We also incorporate and reiterate our June 15, 2010 letter and the concerns and comments we expressed in that letter.

**~~Rule 1.0.1. Terminology/Definitions.~~**

1. ~~OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: "'informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct." Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.~~

   ~~The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term "reasonable available alternatives." The term "where appropriate" is unnecessary, duplicative, and confusing.~~

   ~~Consequently, using the term "where appropriate" makes any rule that requires "informed consent" unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the "alternative" was appropriate. Likewise, it makes these rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" to the definition for~~

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

New York's opinion would have to be tailored to our rules, the State Bar Act, and California law. The Commission might want to cover more subjects than the New York opinion covers, but that opinion seems like a good starting point for a discussion on this subject. The current comment is just too vague, uncertain, and creates too many problems regarding the rights of third persons. It is too broad in its exception to the honesty rule. It also creates too many problems regarding the enforcement of the rule.

We, again, thank the Commission for the opportunity to present our views. We also thank the members of the Commission for the considerable efforts they made in crafting the proposed rules of conduct for California attorneys. If you have any questions, please feel free to contact us.

Very truly yours,

James E. Towery
Chief Trial Counsel

PANSKY MARKLE HAM LLP
ATTORNEYS

1010 Sycamore Avenue, Suite 308
South Pasadena, California 91030
Telephone: 213 626-7300
Fax: 213 626-7330

August 25, 2010

**VIA E-MAIL TO: audrey.hollins@calbar.ca.gov**
**AND U.S. FIRST CLASS MAIL**

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

*Re: Public Comment on Proposed Rules of Professional Conduct*

Dear Ms. Hollins:

Please accept this as my public comment regarding the proposed Rules of Professional Conduct which are currently being considered by the California State Bar Board of Governors.

As a preliminary matter, I wish to reiterate some of the observations that were recently made in the Daily Journal by attorneys Kurt Melchior and Jerome Sapiro, Jr. As Messrs. Melchior and Sapiro commented in the four part series published during the last few weeks, there are many flaws in the proposed rules as currently drafted. Although the Herculean effort made by the Rules Revision Commission is commendable and is to be lauded, the final product is fraught with problems. Most notably, I sincerely recommend that the Comments to the Rules be separated from the rules themselves, and published separately as a California Restatement of The Law Governing Lawyers. The Comments are convoluted, confusing, sometimes contradictory, and difficult to interpret in some instances. Without criticizing particular comments, it would be far more useful to simply publish them in a separate guidebook, to provide aspirational guidance, rather than using them to create disciplinary sanctions.

In addition, although the charge provided to the Rules Revision Commission was to harmonize California's Rules of Professional Conduct with the ABA Model Rules unless there was a compelling reason to deviate from the Model Rules, the Rules as currently proposed are a unique hybrid, in many instances constituting a new standard not previously seen either in the California Rules of Professional Conduct or in the ABA Model Rules. By way of one example, California cases interpreting current rule 2-200 permit lawyers to comply with the rule governing division of attorneys fees, so long as the writing is provided to the client and executed by the client before the division of fees actually occurs. (See, *Cohen v. Brown* (2009) 173 Cal. App. 4th 302 and *Mink v. Maccabee* (2004) 121 Cal. App. 4th 835.) As currently proposed, Rule 1.5.1 (a) (2) would make it a disciplinary offense to fail to obtain the client's consent to a division of fees agreement at the time the attorneys first agree to divide the fee. Not only does the new rule contradict current case law, it is illogical, since the lawyers will not know their relative contributions to the client's matter until representation is complete.

Ellen A. Pansky
epansky@panskymarkle.com ■ R. Gerald Markle (1950-2004) ■ James I. Ham
■ jham@panskymarkle.com

Similarly, proposed Rule 1.5 (e)(2) purports to create a disciplinary offense where a lawyer collects a flat fee to which the client has agreed, which by definition is not based on a calculation of the number of hours times an hourly rate. Flat fees have always been recognized as alternatives to the billable hour arrangement and provides great certainty to both the lawyer and the client, since the total amount of fees will be capped. The concept that a portion of a flat fee may be required to be retroactively refunded, even if all of the services have been completed, is an entirely novel disciplinary rule.

As a member of the Los Angeles County Bar Association Professional Responsibility and Ethics committee for approximately 18 years, I am personally aware that concerns about inconsistencies between existing law and the proposed new rules were brought to the attention of the RRC over the past 9 years. Regrettably, some of these genuine concerns were apparently given short shrift by the RRC. Although I appreciate the extreme expenditure of resources this process has already consumed, some of the rules simply require additional consideration.

~~Regarding the rules currently out for public comment, Proposed Rule 3.3 subsections (a)(3) and (b) can be read to suggest that lawyers have a duty to reveal client confidences at an ex parte hearing, in order to correct a judge's misunderstanding of facts. There is no known authority for this proposition, which seems to directly contradict the duty to maintain client secrets, set forth in Business & Professions Code § 6068(e). It seems to me that the purpose of Model Rule 3.3 is to require a lawyer to make sure that no misrepresentations occur with respect to ex parte notice, so that ex parte relief is not given on faulty procedural grounds. This point is not clear in proposed California Rule 3.3.~~

I wish to reiterate my sincere appreciation for the nine years of dedicated work conducted by the RRC members, as well as the hundreds, if not thousands of hours contributed by numerous Bar Association ethics committees and individual lawyers throughout California. All of the State Bar stakeholders in this process have an identical goal: the adoption of a workable, fair and clear set of Rules of Professional Conduct. I urge the Board of Governors to carefully consider whether the current proposed rules, as currently organized and in light of the manner in which the Comments have been structured, will serve the legal community and the pubic better than a set of rules which more closely follow the format of the ABA Model Rules.

Thank you for the opportunity to comment on this rule.

Very truly yours,

Ellen A. Pansky

EAP/rk

LAW OFFICE OF
NELSON H. WILD

332 PINE STREET, SUITE 710
SAN FRANCISCO, CALIFORNIA 94104-3230

TELEPHONE 415. 399.1600
FACSIMILE 415.399.1664

nwildlaw@aol.com

MARGARET A. BURGON
ADMINISTRATOR

August 9, 2010

Randall Difuntorum, Esq., Director
Department of Professional
Responsibility
State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Mr. Difuntorum:

I wholeheartedly endorse the comments of attorneys Kurt W. Melchior and Jerome Sapiro, Jr., set forth in the four-part series in the San Francisco Daily Journal, and urge the Board of Governors to reject the proposed new rules of professional conduct.

I have been in practice in California for over 40 years, and see little benefit in enacting the proposed overly complex, often befuddling and wordy, rules, explanations, and interpretations.

The Board would be wise to update, to the extent necessary, the current rules, which have worked well in California, rather than to adopt the new set of ABA rules for the sake of conformity.

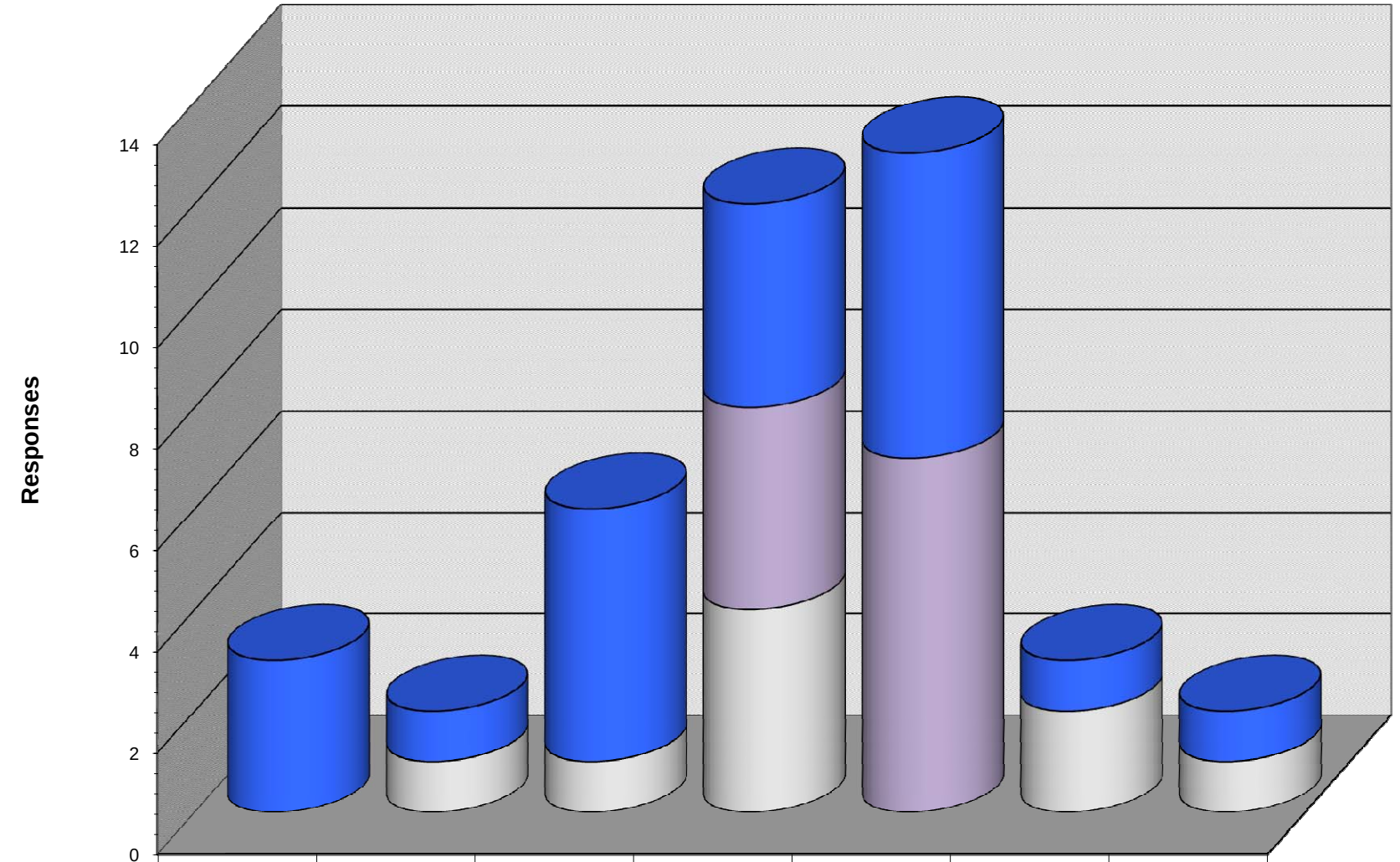
Sincerely,

Nelson H. Wild

WILD\STATE BAR.L-1

# Position Taken on Proposed Rules (Batch Y)

**Figure 1**




| | 1.0.1 | 2.1 | 3.3 | 3.8 | 4.2 | 5.4 | 8.4 |
|---|---|---|---|---|---|---|---|
| Agree if Modified | 3 | 1 | 5 | 4 | 6 | 1 | 1 |
| Disagree | 0 | 0 | 0 | 4 | 7 | 0 | 0 |
| Agree | 0 | 1 | 1 | 4 | 0 | 2 | 1 |

**Rule**