

TO: Members of the Board of Governors
Members of the Board Committee on Regulation and Admissions

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RE: Proposed California Rules of Professional Conduct 3.8(d), 4.2, and 8.4(c)

DATE: September 17, 2010

We want to again thank the Rules Revision Commission (“the Commission”) and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. Having reviewed the now-completed set of proposed rules forwarded by the Commission, including in particular the seven that were referred out for additional public comment at the Board committee’s meeting on July 23, 2010, we write to endorse specific portions of three of the proposed rules as adopted by the Commission at its August 25, 2010 meeting, namely, portions of Proposed Rules 3.8(d), 4.2, and 8.4(c). As discussed in greater detail below, we believe these specific portions of these proposed rules, all of which have been the subject of extensive debate and reasoned consideration by the Commission, are carefully drafted to avoid unnecessary conflicts with existing law while striking appropriate balances among a variety of public interests. We urge the Board not to excise these portions of the proposed rules, as we believe doing so could have a substantial negative impact on the work of attorneys in our offices and the United States Department of Justice.

A. Proposed Rule 3.8(d)

As proposed by the Commission, Proposed Rule 3.8(d) requires prosecutors to “comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense” The emphasized introductory clause

has been added by the Commission. As explained by the Commission, Proposed Rule 3.8(d) “is based on [ABA] Model Rule 3.8(d) but clarifies [through the addition of the introductory clause] that the requirement of a prosecutor’s timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law.” As the Commission has explained, this approach is based on the Commission’s determination that ABA Model Rule 3.8(d) “was in conflict with California statutory law,” in particular, “California statutory law that had been approved with the passage of Proposition 115 in 1991.”

We agree with the Commission’s proposal and strongly urge the Board to adopt Proposed Rule 3.8(d) as drafted by the Commission rather than adopting the language of ABA Model Rule 3.8(d), as has been urged in a number of public comments from the defense bar. We will not further comment on the conflicts between ABA Model Rule 3.8(d) and California statutory law, which have been recognized by the Commission and discussed at length in public comments from the California District Attorneys Association; the District Attorneys for Los Angeles and San Diego Counties; and the Los Angeles City Attorney. Rather, we write because ABA Model Rule 3.8(d) also poses a conflict with federal law and unfairly exposes prosecutors to potential discipline even where they have timely produced all material exculpatory and impeaching information.

A federal prosecutor’s disclosure obligations are defined by federal constitutional and statutory law and the Federal Rules of Criminal Procedure. *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, require the timely disclosure of exculpatory and impeachment information that, if not disclosed, would create a reasonable probability of altering the outcome of the case. *Brady* requires disclosure of exculpatory information to the accused where the information is material to either guilt or punishment. *Giglio v. United States*, 405 U.S. 150 (1972), clarified that information that could be used to impeach witnesses also must be disclosed. Exculpatory and impeachment information need only be disclosed, however, if it is material, that is, if its suppression would deprive the defendant of a fair trial. *United States v. Ruiz*, 536 U.S. 622 (2002); *United States v. Bagley*, 473 U.S. 667 (1985). Ultimately, the question is whether the information could “put the whole case in such a different light as to undermine confidence in the verdict,” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Federal statutes also set forth discovery requirements for criminal matters. Most notable is the Jencks Act, 18 U.S.C. § 3500, which provides that statements or reports by a government witness that are in the possession of the United States are subject to discovery, but only after the witness has testified on direct examination at trial. The timing of witness statement disclosure set forth in the Jencks Act reflects an intentional policy choice by Congress, and is not subject to modification by court order. See *United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986) (court’s discovery order requiring earlier production of agent notes “was itself inconsistent with the express provision of the Jencks Act and therefore unenforceable”). This remains true even when the witness statement contains *Brady* information. See *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) (“When the defense seeks evidence which qualifies as both Jencks Act and Brady material, the Jencks Act standards control.”). Federal Rule of Criminal Procedure 16(a) further delineates a federal

prosecutor's disclosure obligations, outlining which information in the government's possession is subject to disclosure and providing that discovery of "internal government documents" made by a government attorney or agent is not authorized except as provided in the Rule.

The constitutional, statutory, and rule-based discovery obligations of federal prosecutors are well-defined and reflect a careful balancing, by Congress and the courts, of competing public interests. Ensuring that federal prosecutors comply with these discovery obligations is a priority of the Department of Justice. See Memorandum, *Guidance for Prosecutors Regarding Criminal Discovery*, Deputy Attorney General David W. Ogden at 11 (January 4, 2010) ("Ogden Memo") ("Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution."). Indeed, the Department has issued internal policies and guidance that, under most circumstances, require prosecutors to disclose more information than the law requires. See *USAM 9-5.001(C), (E)* (ordinarily prosecutors should disclose "information beyond that which is material to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)," "should err on the side of disclosure in close questions of materiality," and should "favor greater disclosure in advance of trial"); Ogden Memo at 9 ("Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations.").

As drafted by the Commission, Proposed Rule 3.8(d) is appropriately tied to the discovery obligations imposed by *Brady* and its progeny and the applicable federal statutes and rules. It thus provides an additional incentive for prosecutors to comply with these well-established obligations by subjecting them to potential discipline if they fail to do so.

Adoption of ABA Model Rule 3.8(d), on the other hand, would subject prosecutors to discipline based on newly-created and ill-defined disclosure obligations that differ from those imposed by constitution, statute, and rule. These differences pose significant issues, and unnecessarily disrupt the careful balancing of interests reflected in the existing constitutional, statutory, and rule-based discovery obligations.

In particular, ABA Model Rule 3.8(d) creates a free-standing obligation for prosecutors to disclose favorable information regardless of whether it is material. It provides no guidance, however, for prosecutors to assess whether information, even though it is not material (that is, unlikely to affect the outcome of the case and insufficient to call into question confidence in a guilty verdict) should nevertheless be viewed as sufficiently favorable that its disclosure is required. It therefore poses the risk of a prosecutor being subjected to discipline based on an after-the-fact judgment, based on undefined standards, that a particular piece of immaterial information that was not disclosed was favorable, even when the prosecutor has scrupulously complied with all constitutional, statutory, and rule-based discovery obligations, the defendant has as a result been provided with all material exculpatory and impeaching information, and confidence in the outcome of the case is therefore not subject to question.

We endorse the soundness of encouraging prosecutors to err on the side of disclosure as a means of ensuring compliance with discovery obligations. The Supreme Court has suggested that

prosecutors should follow this approach. *Kyles v. Whitley*, 514 U.S. at 439-440 (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.”) (citations omitted). And, as noted above, the Department of Justice has adopted internal policies that accord with this approach. We cannot, however, endorse a rule that will subject to discipline a prosecutor whose only error has been a failure to disclose an immaterial item of information. As compared to the Commission’s Proposed Rule 3.8(d), ABA Model Rule 3.8(d) does nothing more than enable discipline in these circumstances. For this reason as well the Board should not simply adopt ABA Model Rule 3.8(d) but should instead approve Proposed Rule 3.8(d) as drafted by the Commission.

B. Proposed Rule 4.2: Comments 18 & 19

Proposed Rule 4.2 addresses communications with represented “persons.” The use of the term “person” represents a change from current Rule 2-100, which uses the term “party.” This change has been the subject of extensive public comment from both state prosecutors and the criminal defense bar. As noted by the Commission, after careful consideration of these comments and extensive discussion, it determined to retain the change from “party” to “person,” but added comments 17-20 to implement a “reasonable compromise between protecting attorney-client relationships of *all* persons involved in a matter and permitting law enforcement agencies and the criminal defense bar to conduct their investigations.”

We strongly agree with the Commission’s recommendation to retain, in particular, comments 18 and 19 (previously numbered as comments 19 and 20), both of which have been the subject of recent public comment from the criminal defense bar. These comments do not change the law. Rather, they simply confirm that the change from “party” to “person” is not intended to alter existing case law, developed by California and federal courts, confirming that certain investigative contacts with represented persons, though otherwise within the scope of Proposed Rule 4.2’s prohibition, nevertheless remain permissible because public policy concerns dictate that they be considered “authorized by law.” Removing these comments would pose the risk that the change from “party” to “person” will be used as a basis to call into question this well-established case law, unduly chilling investigatory contacts currently recognized as “authorized by law,” and engendering extensive litigation, the likely result of which will be simply to reestablish the current state of the law recognized by comments 18 and 19.

Comments 18 and 19 do not change the law. Both comments address the “authorized by law” exception contained in Proposed Rule 4.2(c)(3). This exception is also included in current Rule 2-100(c)(3). Both comments make clear that they are not re-interpreting this exception to expand the scope of investigatory contacts that fall within it. To the contrary, the comments clearly state that they are simply acknowledging the exception for investigatory contacts that “courts have recognized” based on “public interest” and the need “to promote legitimate law enforcement functions that would otherwise be impeded” and confirming that the change from “party” to “person” is not intended to “expand or limit existing law that permits or prohibits communications under paragraph (c)(3).” There can be no dispute that existing law recognizes that, for legitimate public policy reasons, certain investigative contacts fall within the “authorized by law” exception. See *United States v. Talao*, 222 F.3d 1133, 1138-39 (9th Cir. 2000) (rule to be

applied through “case-by-case adjudication” while “keeping in mind that prosecutors are ‘authorized by law’ to employ legitimate investigative techniques in conducting or supervising criminal investigations”) (internal quotations omitted); *Grievance Committee v. Simels*, 48 F.3d 640, 649 (2d Cir. 1995) (court has urged “restraint in applying the Rule in the pre-indictment context so as not to unduly hamper legitimate law enforcement investigations”); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (“we have held the duty to avoid ex parte contacts does not apply to preindictment, noncustodial conversations with a suspect”) (citing *United States v. Kenney*, 645 F.2d 1323, 1339 (9th Cir. 1981)). Far from changing the law, Comments 18 and 19 simply recognize the state of existing law and confirm that the change from “party” to “person” is not intended to alter this law.¹

Comments 18 and 19 also do not create an unjustified special interest carve-out from application of Proposed Rule 4.2 for lawyers engaging in criminal and civil law enforcement. As an initial matter, objections to the change from “party” to “person” were voiced by both the defense and prosecution, and Comment 19 includes a sentence recognizing that this change is also not 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.” Moreover, as discussed above, it is not the comments, but existing law that, for valid public policy reasons, recognizes that application of the “authorized by law” exception contained within the rule justifies certain investigative contacts. Finally, as the Commission has noted, that existing law recognizes a difference in how the rule applies to certain investigative contacts engaged in by prosecutors and government attorneys conducting civil or administrative law enforcement investigations is not inconsistent with the overall structure of the rules themselves, which recognize the need, on occasion, to apply different treatment to different types of lawyers. Proposed Rule 3.8, for example, imposes additional obligations only on prosecutors. And, Proposed Rule 3.3, comments 6 and 7, implement case law recognizing that a criminal defense attorney should be treated differently from other attorneys when confronted with a client who insists on providing testimony known to be false. The recognition by Comments 18 and 19 that courts have held that differing treatment for law enforcement investigative contacts is appropriate does not reflect a special interest carve-out from application of the rule, but rather a correct acknowledgment of existing law recognizing that application of the rule must take into account the particular circumstances in which it is applied.²

¹ The Commission has repeatedly disavowed any intent to change the law that authorizes certain investigatory contacts. If the Board were to differ, and conclude that the change from “party” to “person” is intended to change this law, we would vehemently object, as it would significantly negatively affect our attorneys’ ability to investigate some of the most serious illegal conduct we address, including organized crime, narcotics cartels, wide-ranging ponzi schemes, and civil rights and health care fraud violations, by enabling early retention of counsel to serve as a shield from undercover investigations of ongoing illegal conduct.

² Relatedly, a number of comments from the criminal defense bar have suggested that Comments 18 and 19 reflect an attempt to “revive the (thoroughly) discredited 1989 Thornburgh Memorandum, and to end-run Congressional intent [as implemented by 28 U.S.C. § 530B] that government lawyers be held to the same ethical standards as all other members of the bar.”

C. Proposed Rule 8.4(c): Comment 2C

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to “engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation.” In response to an earlier public comment from us, the Commission has included Comment 2C, which states:

Paragraph (c) 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 law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules. “Covert activity,” as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

We strongly endorse the inclusion of comment 2C. It mirrors Oregon Rule of Professional Conduct 8.4(b), and accurately reflects well-established law that government attorneys may supervise investigations that require informants and agents to conceal their identities or engage in other subterfuges to infiltrate criminal organizations or uncover criminal activity. *See, e.g., United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). Indeed, a standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. *See* Ninth Circuit Model Criminal Jury Instruction 4.10 (2010) (“Government’s Use of Undercover Agents And Informants”). Government attorneys engaged in civil or administrative enforcement investigations involving consumer frauds or civil rights violations also may in some circumstances validly use individuals who conceal their identities while posing as customers or renters to uncover evidence of violations of law. Additionally, the rule should also accommodate the fact that a government attorney’s direct participation in subterfuge may be essential to rooting out criminal conduct in special and limited circumstances, such as the investigation of public officials and judicial corruption. *See United States v. Martino*, 825 F.2d 754, 760-61 (3d Cir. 1987) (prosecutor who issued pseudonymous grand jury subpoena directed to cooperative federal agent for the purpose of protecting agent’s identity in ongoing investigation did not engage in misconduct, even though court was unaware that subpoena was sham); *United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985) (prosecutors who brought

Public Comment, Evan A. Jenness, August 24, 2010. This hyperbole is unwarranted. The Department of Justice does not seek an exemption from application of Proposed Rule 4.2, and, as the Commission has noted, Comments 18 and 19 do not create any such exemption: “The Commission’s Rule, which is based on the Model Rule counterpart adopted in the vast majority of jurisdictions, is distinguishable from the ‘Thornburgh Memo’ because the Rule does not include a complete exemption for prosecutors. Rather, paragraph (c)(3) recognizes the applicability of the Rule to prosecutors and provides only a limited exception to its application where such exception is authorized by relevant federal and state, constitutional, statutory, or decisional law.”

phantom cases to catch corrupt judges taking bribes did not violate any ethical rules); *United States v. Marcy*, No. 90 CR 1045, 1991 WL 237833, at *1 (N.D. Ill. Aug. 14, 1991) (approving government lawyer’s “use of mock cases to ferret out judicial corruption”). We believe it essential to include comment 2C as a means of ensuring that government attorneys involved in these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. For this reason and the other reasons stated by the Commission, we do not believe the concerns expressed by the Office of Chief Trial Counsel outweigh the need for keeping this comment.

Conclusion

For all the foregoing reasons, we strongly urge the Board to adopt the introductory clause included in Proposed Rule 3.8(d), comments 18 and 19 to Proposed Rule 4.2, and comment 2C to Proposed Rule 8.4(c), all as drafted by the Commission. Thank you for this opportunity to comment.