MEMORANDUM

DATE: May 11, 2015

TO: Rules Revision Commission

FROM: Rules Revision Commission Working Group on Expedited Consideration of Certain Rules (Dean Zipser [Lead], Nanci Clinch, Daniel Eaton, Raul Martinez, Mark Tuft)

SUBJECT: Assignment for the Commission's May 29 & 30, 2015, Meeting:
(1) Standard for expediting consideration of a rule;
(2) whether consideration of ABA Model Rule 3.8 should be expedited

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WORKING GROUP ASSIGNMENT

In accordance with the discussion at the Commission's March 27, 2015, meeting, we were asked to prepare a report and recommendation on the following questions:

(1) Does the following language discussed at the Commission's March 27, 2015 meeting set the appropriate standard for the Commission's assessment of a request to expedite the consideration of a rule and, if not, what standard should be used?

> "Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule will likely respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where the promulgation of the rule would likely ameliorate the harm."

(2) Should the Commission expedite the consideration of ABA Model Rule 3.8?

RECOMMENDATION

(1) Applicable standard: The working group recommends that the standard for expediting the study of a rule should be revised to reflect a higher standard, such that early adoption of a rule is *necessary* to respond to ongoing harm and the *failure* to promulgate that rule would result in continuing serious harm. Thus, the working group recommends that the standard be revised to provide as follows (new version followed by a redline):

> Revised: "Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule is necessary to respond to

ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to promulgate the rule would result in the continuation of serious harm."

Redline: "Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule ~~will likely~~ is necessary to respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to ~~the promulgation~~ promulgate ~~of~~ the rule would ~~likely ameliorate the~~ result in the continuation of serious harm."

(2) ABA Model Rule 3.8: The working group recommends that: (1) a study group be appointed forthwith to evaluate ABA Model Rule 3.8 and (2) staff consult with the Chair to plan an appropriate timetable for the study group's consideration.

Although we believe consideration of the proposed rule should begin promptly, we have not determined that such a rule should be adopted and, if so, the nature and provisions of any such rule. That determination should await the report and recommendation of the study group assigned to consider the rule. Thus, we, the members of the expediting working group take no position on whether the proposed rule should be processed (*i.e.*, put out for public comment, presented to the Board for approval, submitted to the Supreme Court, etc.) on a separate track from the remainder of the Commission's comprehensive work to review and revise the entire set of rules. Further, our recommendation that a study group be assigned to consider Model Rule 3.8 also is without prejudice to any future Commission discussion or determination that a rule developed by the study group be placed on a separate/faster processing track.

DISCUSSION

I. APPLICABLE STANDARD

As discussed at the Commission's March 27 meeting, the standard to expedite consideration of a particular rule should be a high one. Given the Commission's two–year deadline to complete the project, expediting consideration of a rule should be reserved for those instances where earlier promulgation is required to prevent continuing harm. Although the proposed standard discussed at our March 27 meeting suggested a showing of necessity, our working group recommends the few revisions noted above to explicitly integrate that concept into the standard. We believe that these suggested revisions will underscore that expediting consideration of a rule both (1) is a limited exception, and (2) is necessary to prevent continuing, serious harm.

At the same time, we emphasize that the ultimate decision whether to recommend the adoption of a particular rule by the Board of Trustees remains with the full Commission after consideration of the study group's work product. Thus, by making a determination that the standard has been met, the Commission would be recommending only the expedited *consideration* of a rule, not its recommended adoption.

II. MODEL RULE 3.8 – STANDARD APPLIED

Brief Background

As discussed at our March 27 meeting, the Innocence Project has urged the adoption of ABA Model Rule 3.8, and specifically paragraphs (d), (g), and (h), which delineate special responsibilities of prosecutors to disclose exculpatory information. During an in-person presentation to the State Bar on December 11, 2014, Professor Laurie Levenson, on behalf of the Innocence Project, urged the State Bar's expedited consideration of Rule 3.8. Thereafter, on March 10, 2015, the Chief Justice of the California Supreme Court wrote to the State Bar President regarding Model Rule 3.8 and stated that the Commission and the Board "should feel free to consider for themselves, or entertain requests to consider, whether any particular rule or issue might warrant or benefit from fast track consideration and submission to the court." The State Bar President replied on March 11, 2015, agreeing that the Commission "should consider adopting a procedure to entertain requests for expedited consideration of rules, if appropriate, and give priority where needed."

On April 1, following the March 27 Commission meeting, the State Bar wrote to the Innocence Project to advise it of the tentative, working standard approved at our meeting, and that our working group welcomed a written submission addressing why Model Rule 3.8 satisfies the tentative standard. The Innocence Project responded with a letter on April 10 from Professor Levenson and Professor Barry Scheck (copy attached). After our working group met, we requested that State Bar staff ask for any more recent statistical information than was contained in the initial submission. The Innocence Project responded with its letter of April 23 (copy attached).

On April 20, the State Bar Office of the Chief Trial Counsel submitted a memorandum to the Commission offering comments on the proposed rules anticipated for the Commission's May meeting agenda (copy attached). In that memorandum, OCTC stated in part that: "OCTC supports consideration of a new Rule of Professional Conduct addressing the duties and responsibilities of criminal prosecutors. OCTC takes no position, however, on whether to recommend a fast-track study of such a rule."

In addition to the above submissions, our working group considered the following materials:

1. Laurie Levenson, Professor of Law, Loyola Law School & Barry Scheck, Co-Director and Co-Founder, Innocence Project, Written Testimony Re: Adoption of ABA Model Rule 3.8(d), (g), and (h), Hearing Before the State Bar of California (Dec. 11, 2014).

2. Text of ABA Model Rules of Professional Conduct Rule 3.8: Special Responsibilities of a Prosecutor, ABA MPRC Rule 3.8 (2013 ed).

3. ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 3.8:Special Responsibilities of a Prosecutor,* ABA (Oct. 21, 2014), http://www.americanbar.org/ content/dam/aba/administrative/professional _responsibility/ mrpc_3_8.authcheckdam.pdf

4. ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h),* ABA (Oct. 6, 2014), http://www.americanbar.org/ content/dam/aba/administrative/ professional _responsibility/ mrpc_3_8_g_h.authcheckdam.pdf.

5. California Commission on the Fair Administration of Justice: *Report and Recommendations on Reporting Misconduct* (formerly titled Professional Responsibility and Accountability of Prosecutors and Defense Lawyers), CCFAJ (Oct. 18, 2007) and California Commission on the Fair Administration of Justice: *Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence* , CCFAJ (March 6, 2008).

6. Barry Scheck, *Four Reforms for the Twenty-First Century,* 96 JUDICATURE 323 (2013).

7. Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009,* (2010).

8. Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, National Association of Criminal Defense Lawyers, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases* (2014).

Working Group Analysis

As a preliminary matter, although some consideration of the underlying merits of a rule is inevitable when considering whether it should be expedited, we recognize that we were not charged with reviewing the merits of adopting a rule patterned on Model Rule 3.8. Nevertheless, the materials that the Innocence Project presented to us refer to continuing violations of a prosecutor's duty to disclose exculpatory information. More importantly for the working group's charge, the materials demonstrate that there are, at a minimum, issues of trust and confidence in the administration of justice in California. Among other things, California is the only state not to have adopted some portion of Model Rule 3.8, and the Chief Judge of the Ninth

Circuit opined that "*Brady* violations had reached epidemic proportions." Accordingly, based on our review and discussion, we unanimously concluded that the revised standard has been met.

Moreover, the current Commission schedule, together with the degree of work that we anticipate will confront the rule's study group, present additional reasons for expediting its consideration. In particular, we understand that the study of current California Rule 5-110 (Performing the Duty of a Member in Government Service), the closest analog in California to Model Rule 3.8 and therefore the rule with which study of rule 3.8 would have taken place, has not yet been calendared. Therefore, unless expedited, consideration of Model Rule 3.8 would not be taken up until sometime in 2016. Given the Model Rule's focus on critical aspects of the criminal justice system and the issues raised by the Innocence Project, it is likely that a rule patterned on Model Rule 3.8 will require a good deal of study time. For example, we discussed the likelihood that the study group assigned to consider Model Rule 3.8 would want to solicit input from other interested groups or parties, including the focal point of the rule, prosecutors, as part of its review. The process of soliciting and studying such input would require additional time beyond that typically allocated to study of a rule.

At the same time, we are also cognizant of the tremendous effort State Bar staff already has made in sequencing and scheduling the rules for our consideration. Further, we recognize that expediting the consideration of any rule, and Model Rule 3.8 in particular, will necessarily require modification of this schedule. Nevertheless, we continue to believe that consideration of Model Rule 3.8 is of sufficient relevance that its expedited study is warranted. In any event, in recommending that consideration of Model Rule 3.8 be expedited, we leave the precise scheduling of the study group's determination to the good judgment of the Commission Chair and State Bar staff, as they are best positioned to make such a determination.

Supreme Court of California
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

March 10, 2015

Mr. Craig Holden
President, State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Mr. Holden:

The Supreme Court is pleased to see that membership of the State Bar's second Commission for the Revision of the Rules of Professional Conduct has been finalized and that the commission's work will commence shortly. The court looks forward to the presentation of proposed revisions to the California Rules of Professional Conduct that will assure adequate protection of the public, promote confidence in the legal profession and the administration of justice, eliminate unnecessary differences between California and other states where possible, and facilitate compliance and enforcement.

As you know, the commission is charged with conducting a comprehensive review of the existing rules and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017. Consistent with this charge, the commission and the board should feel free to consider for themselves, or entertain requests to consider, whether any particular rule or issue might warrant or benefit from fast track consideration and submission to the court. For instance, the court recently received an informal inquiry in this regard concerning issues related to special ethical duties for prosecutors addressed in current rules 5-110 and 5-220 and ABA Model Rule 3.8. These issues, of course, were not among the rule petitions put before the court during the last revision process, so the court expresses no opinion regarding the propriety of their fast tracking or their substantive merits. However, in the event the commission and the Board of Trustees were to determine that

priority consideration and submission of proposed amendments of these or any other particular rules are necessary or otherwise appropriate, all materials supporting such determinations, as well as the supporting materials for the proposed amendments, should be provided to the court.

Sincerely,

T. Cantil-Sakauye

TANI G. CANTIL-SAKAUYE

cc: Hon. Loni Hancock, Chair, Senate Public Safety Committee
Hon. Bill Quirk, Chair, Assembly Public Safety Committee
Hon. Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Hon. Mark Stone, Chair, Assembly Judiciary Committee
June Clark, Deputy Legislative Secretary, Office of the Governor
Hon. Lee Edmon, Chair, Second Com. for the Rev. of the Rules of Prof. Conduct
Robert Hawley, Acting Executive Director, State Bar of California
Larry Yee, Acting General Counsel, State Bar of California
Carin Fujisaki, Managing Attorney, California Supreme Court
Greg Fortescue, Liaison to Second Com. for the Rev. of the Rules of Prof. Conduct

THE STATE BAR
OF CALIFORNIA

180 Howard Street. San Francisco. CA 94105-1639

Craig E. Holden
President
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March 11, 2015

Honorable Chief Justice Tani Cantil-Sakauye and
the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Dear Chief Justice Cantil-Sakauye:

Thank you for your letter of March 10, 2015, proposing that the State Bar's second Commission for the Revision of the Rules of Professional Conduct consider whether any particular rule or issue warrants a faster track for consideration and submission to the Court, including ABA Model Rule 3.8.

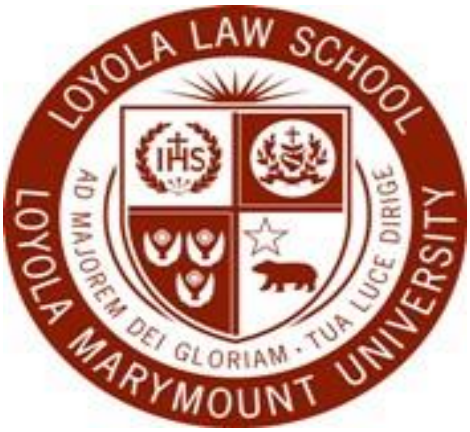
I agree that the Commission should consider adopting a procedure to entertain requests for expedited consideration of rules, if appropriate, and give priority where needed. I look forward to attending the Commission's first meeting on March 27th and discussing this issue.

The State Bar and the second Commission appreciate the opportunity to serve the Supreme Court and the people of the State of California in this important endeavor.

Sincerely,

Craig E. Holden, President

cc: Hon. Loni Hancock, Chair, Senate Public Safety Committee
Hon. Bill Quirk, Chair, Assembly Public Safety Committee
Hon. Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Hon. Mark Stone, Chair, Assembly Judiciary Committee
June Clark, Deputy Legislative Secretary, Office of the Governor
Hon. Lee Edmon, Chair, Second Com. for the Rev. of the Rules of Prof. Conduct
Robert Hawley, Acting Executive Director, State Bar of California
Larry Yee, Acting General Counsel, State Bar of California
Randall Difuntorum, Director, Professional Competence, State Bar of California
Carin Fujisaki, Managing Attorney, California Supreme Court
Greg Fortescue, Liaison to Second Com. for the Rev. of the Rules of Prof. Conduct



April 10, 2015

Commission for the Revision of the Rules of Professional Conduct
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Members of the Rules Commission Working Group:

We are writing today to reiterate our belief that there is urgent need for this Commission to adopt an ethical rule similar to Rule 3.8 of the ABA Model Rules of Professional Conduct. The safeguards provided by Rule 3.8 not only protect the innocent from wrongful conviction but enhance public safety in a tangible and immediate fashion: Every time an innocent defendant is wrongly convicted or remains in prison when prosecutors are in possession of material evidence of innocence, the person who really committed the crime avoids apprehension and is often at liberty to offend again. There are few, if any, ethical rules that are more central to protecting the constitutional rights of criminal defendants or more critical to ensuring public confidence in the fairness of the criminal justice system.

Rule 3.8 of the American Bar Association Model Rules of Professional Conduct delineates the special responsibilities imposed upon prosecutors to disclose exculpatory information. Rule 3.8(d) requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense 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."[1] In the post-conviction context, Rule 3.8 (g) and (h) mandates that prosecutors shall disclose any evidence pointing to innocence that he or she becomes aware of after a conviction and take proactive steps to vacate a conviction if there is clear evidence of the defendant's innocence. The obligations specified in the provisions of 3.8 (g) and (h), a natural extension of Rule 3.8(d), are the common sense ethical rules that emerged from the extraordinary wave of exonerations, from both DNA testing and non-DNA evidence, that have swept across the country since 1989 when post-conviction DNA testing began to expose many sources of error in criminal adjudications and investigations.[2]

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[1] ABA Model Rules of Professional Conduct Rule 3.8.

[2] *See The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Apr. 9, 2015); NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Apr. 9, 2015). *See also, The Causes of the Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction (last visited Apr. 9, 2015)(listing common causes of

The immediate adoption of an ethical rule similar to ABA Rule 3.8 ensures that the bedrock constitutional right of criminal defendants to exculpatory evidence is protected. The obligations imposed by 3.8(d), (g) and (h) protects those most damaged by prosecutorial misconduct – the innocent wrongly convicted – by providing access to evidence that any objective, fair prosecutor would immediately recognize as necessary to redress a potentially egregious miscarriage of justice. The adoption of such a rule is imperative to preventing further harm to innocent men and women as well as the public.

1. Early Adoption of Rule 3.8 (d), (g), and (h) Is Essential to Ameliorate An Ongoing Harm To Criminal Defendants, Society, and the Criminal Justice System.

Early adoption of Rule 3.8 provides immediate assurance that the constitutional rights of citizens charged with crimes will be protected and public safety improved by ensuring the true perpetrators of crimes are arrested and convicted. It will bolster public confidence in the fair administration of justice. The critical importance of the obligations imposed upon prosecutors through Rule 3.8 is demonstrated by the simple fact that forty-nine states, Guam, the United States Virgin Islands, and the District of Columbia have already implemented some version of Rule 3.8.[3]

Rule 3.8(d) was enacted by the American Bar Association to obviate the cognitively difficult problem prosecutors face in complying with the *Brady v. Maryland* standard which requires them to determine *before* a trial has been held whether undisclosed information will be considered "material" by an appellate court many years later. Rule 3.8(d) is designed to be broader and independent of *Brady*, requiring "timely" and prophylactic disclosure of all information that *could be Brady* or impeachment evidence (anything that "tends to negate guilt or mitigate punishment") in order to make sure *Brady* violations do not occur. The rule, of course, provides an exception so that prosecutors who have *bona fide* concerns about witness safety, subornation of perjury, or other significant considerations can seek and obtain protective orders from a court to delay disclosure. Additionally, the rule promotes judicial efficiency by eliminating subjective "materiality" evaluations prior to trial.

The extent to which *Brady* violations occur in our criminal justice system is virtually impossible to quantify with precision because it requires finding exculpatory documents in old, undisclosed law enforcement files or exculpatory witnesses whose statements were not documented in the first place. The California Commission on the Fair Administration of Justice (CCFAJ) and a 2010 study conducted by the Veritas Initiative at the Santa Clara Law School have attempted to gather information about "harmful" and "harmless" failures to disclose exculpatory evidence and

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wrongful conviction as: eyewitness misidentification, false confessions or admissions, government misconduct, unvalidated or improper forensic science, informants, and inadequate defense).

[3] *See*, ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 3.8: Special Responsibilities of a Prosecutor,* ABA (Oct. 21, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.authcheckdam.pdf. *See also*, ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h),* ABA (Oct. 6, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf.

prosecutorial misconduct in state and federal appellate rulings as well as media reports and trial court decisions.[4] The Veritas findings revealed that in one-third of the cases involving findings of misconduct, the misconduct was committed by a "repeat offender."[5] Many of these "repeat offenders" suffer no consequences for their violation of a criminal defendant's constitutional rights; even in appellate opinions that review allegations of misconduct, it is exceedingly rare for a prosecutor's name to be published.[6]

In a now famous dissent from a 2013 U.S. Court of Appeals decision,[7] the Chief Judge of the Ninth Circuit, Alex Kozinski, observed that:

> Some prosecutors don't care about *Brady* because courts don't *make* them care. I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.[8]

Whether one agrees with Chief Judge Kozinski that Brady violations have reached "epidemic proportions," or that it is merely a serious problem, the seriousness of the ongoing harm is evident. There are 130,309 men and women incarcerated in California corrections facilities and an additional 53,024 individuals are under the supervision of the California Department of Corrections and Rehabilitation in some capacity.[9] Many of these men and women may not have been convicted, or perhaps would not have pled guilty to certain crimes, if the prosecuting attorney knew there was an ethical rule that required "timely" disclosure of all information that tends to negate guilt or mitigate and offense. For some wrongfully convicted individuals, it is likely that the implementation of provisions (g) and (h) of Rule 3.8 will provide an opportunity to prove his or her innocence.

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[4] *See* Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (2010); California Commission on the Fair Administration of Justice, *Report and Recommendation on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence* (Mar. 6, 2008), http://ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf; California Commission on the Fair Administration of Justice, *Report and Recommendations on Reporting Misconduct* (formerly titled Professional Responsibility and Accountability of Prosecutors and Defense Lawyers)(Oct. 18, 2007), http://ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

[5] N. Cal. Innocence Project, *PREVENTABLE ERROR: 2011 ANNUAL REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA*, 7 (2012), http://veritasinitiative.scu.edu/wp-content/uploads/2012/12/PMC_2012_6_11-12-12.pdf.

[6] *See* Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, 23 (2010).

[7] *See United States v. Olsen*, 737 F.3d 625 (9th Cir. Dec. 10, 2013) (ord. denying reh'g *en banc*), (C.J. Kozinski, dissenting).

[8] *Id.* at 631.

[9] *Weekly Report of Population As Of Apr. 1, 2015,* CDCR, http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad150401.pdf (last visited Apr. 7, 2015).

Consider the harm done to Obie Anthony, an innocent man who was released from a California prison in 2011 after serving seventeen years for a murder in South Los Angeles. Mr. Anthony was able to prove his innocence only after lawyers from Northern California and Loyola Law School innocence projects demonstrated that the star eyewitness at Mr. Anthony's 1995 murder trial did not actually observe the crime. In addition, Mr. Anthony's attorneys discovered an undisclosed agreement between the prosecution and the star witness, who was a convicted murderer, that promised the witness a reduced sentence for pending criminal charges in exchange for his testimony against Anthony.[10] Mr. Anthony is one of the 152 men and women who have been wrongfully convicted by California courts.[11]

Nor should there be any doubt about the ongoing harm done to the public when an innocent person is incarcerated and the guilty party escapes apprehension. In the 329 DNA exonerations to date, the true perpetrator was identified in 161 cases. These guilty individuals committed an additional 145 crimes, including 77 rapes and 34 murders, after an innocent person was subsequently arrested and convicted for their criminal acts.[12] Rule 3.8 further promotes public safety by ensuring that state resources are spent on apprehending and prosecuting the true perpetrators of crime.

2. Early Adoption of Rule 3.8 is Required to Ameliorate the Continuing Harm Caused By Prosecutors' Failure to Disclose Exculpatory Material.

Until an ethical rule similar to ABA Model Rule 3.8 is adopted in California, prosecutors in this state have no ethical obligation to disclose exculpatory material to criminal defendants. As Chief Judge Kozinski eloquently explained in his dissent in *Olsen*, "When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law."[13]

The benefits of adopting Rule 3.8(d), (g), and (h) are clear, as are the risks of failing to implement the rule. Promulgating the ethical rule will encourage the exercise of prosecutorial discretion by formally directing prosecutors to err on the side of timely disclosure or seek a protective order. Given the widespread harm caused by prosecutors' failure to disclose exculpatory evidence and the absence of any ethical rule guiding such obligations, it is imperative that this Commission permit an expedited review of this rule. We would like to thank the group for the opportunity to address the importance of adopting Rule 3.8 as well as the need for the rule's expedited consideration.

If the working group or the Commission has any questions or would like additional information, we can be reached at by phone at 213-736-1149 (Ms. Levenson) and 212-364-5391 (Mr. Scheck)

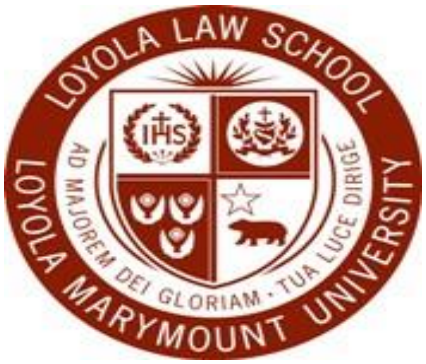
[10] Jack Dolan, *Judge Overturns Murder Conviction in 1994 Slaying*, L.A. TIMES (Oct. 1, 2011), http://articles.latimes.com/2011/oct/01/local/la-me-conviction-overturned-20111001.
[11] *Browse the Cases*, NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=California (last visited Apr. 7, 2015).
[12] Email from Vanessa Meterko, Res. Analyst, Innocence Project, to Innocence Project staff (Mar. 18, 2015, 17:44 EST) (on file with author).
[13] *Olsen* at 632.

or by email at bscheck@innocenceproject.org and laurie.levenson@lls.edu. We thank you for your time and we look forward to working with this Commission in the future.

Sincerely,

Laurie L. Levenson
Professor of Law, Loyola Law School
David W. Burcham Chair of Ethical Advocacy

Barry C. Scheck
Professor of Law, Benjamin N. Cardozo School of Law
Co-Director and Co-Founder, Innocence Project



April 23, 2015

Commission for the Revision of the Rules of
Professional Conduct
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Members of the Rules Commission Working Group:

We would like to thank the working group as well as the Rules Commission generally for the opportunity to provide more information on the scope of Brady violations in California as well as across the nation. The most current statistical information that we have identified comes from a report[1] published by the National Association of Criminal Defense Lawyers ("NACDL") which was published in 2014. The report's findings are based off of a review of 1,497 federal court decisions that were published between August 1, 2007 and July 31, 2012. These decisions were selected at random from approximately 5,000 federal decisions that cited to *Brady v. Maryland*.[2]

Of the 1,497 cases reviewed, 620 decisions resolved a *Brady* claim on the merits. In 22 of those decisions federal courts found that the prosecution violated the defendant's due process rights under *Brady*.[3] The report's finding demonstrated that the vast majority of materiality determinations are resolved in the prosecution's favor. In fact, in 145 decisions the prosecution failed to disclose favorable information, and in 124 decisions (86% of the time) the court determined that the undisclosed evidence was not material.[4] Additionally, the review identified 210 decisions where favorable information was disclosed late or never disclosed at all. Within this group, the defendant prevailed on the question of materiality in only one of every 10 decisions – meaning that in 188 of the 210 decisions, the prosecution prevailed and no *Brady* violation was found.[5]

After consultation with Kathleen Ridolfi and Todd Fries, authors of the *Material Indifference* report, they were able to extrapolate data related exclusively to California cases. In the 620 cases discussed above, 126 of the cases originated in California courts. In 40 of the 126 cases, favorable evidence was withheld or disclosed late[6] according to the following criteria:

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[1] Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases*, National Association of Criminal Defense Lawyers (2014), *available at* http://www.nacdl.org/discoveryreform/materialindifference/.
[2] *Id.* at 10.
[3] *Id.* at 11-13.
[4] *Id.* at 14.
[5] *Id.* at 21.
[6] A late disclosure decision is a decision in which the accused asserts a *Brady* claim based on the untimely disclosure of favorable information by the prosecutor. The timing of the disclosure in these cases ranges from shortly before trial to long after conviction with the majority taking place during trial.

- In 5, courts found withheld evidence favorable and material (violated Brady);
- In 2, courts expressly stated that withheld evidence was "favorable;"
- In 16, courts acknowledged the withheld evidence had exculpatory or impeachment value without expressly calling it "favorable;" and
- In 17, courts did not expressly state or acknowledge the evidence was favorable, but based on our analysis, we concluded that the favorability of the evidence was implicit in the facts.

Thus, there were a total of 40 CA cases where favorable evidence was withheld or disclosed late. Based on this finding, we would expect to find a total of 149 CA cases where favorable evidence was withheld, during those five years.

Perhaps equally as instructive as the findings are the methodological limitations that are noted by the authors of the report, which cautions that, "this research barely scratches the surface of *Brady* practice and jurisprudence. *Brady* violations are by definition hidden and this study examines only decisions in which a petitioner/appellant raised a violation claim."[7] An additional limitation of their review is the fact that every case evaluated involved a defendant who exercised his or her Sixth Amendment right to a jury, which is the minority of criminal defendants. In fact, more than 90 percent of all state and federal criminal cases are resolved by a guilty plea.[8]

We all understand the practical cognitive challenges faced by a prosecutor trying to determine if failure to disclose information in a case, where a trial has not yet occurred, would ultimately be found to be "material" by an appellate court, thereby resulting in a *Brady* violation. It is for this reason that the ABA adopted 3.8 recognizing that its scope was independent and broader than the *Brady* materiality standard and would be instructive to prosecutors to err on the side of disclosure to avoid *Brady* violations. The Court of Appeals for the District of Columbia addressed this issue last week in *In re Kline*, which held that Rule 3.8(e), the codification of ABA Model Rule 3.8 under the District of Columbia Rules of Professional Conduct, "requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether than information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny."[9]

The adoption of Rule 3.8 in California will eliminate the confusion created by the *Brady* materiality standard and by providing clear instructions on disclosure obligations, it will likely help to curb what Chief Judge Kozinski has called an "epidemic" of *Brady* violations.[10]

We would like to reiterate our thanks to the group for the opportunity to address the importance of adopting Rule 3.8 as well as the need for the rule's expedited consideration. If the working group or the Commission has any questions or would like additional information, we can be reached at by phone at 213-736-1149 (Ms. Levenson) and 212-364-5391 (Mr. Scheck) or by

[7] Ridolfi et al., *supra* note 1 at 10.
[8] *Id.*
[9] *In re Kline*, No. 13-BG-851, 2015 WL 1638151 (D.C. Apr. 9, 2015).
[10] *See United States v. Olsen*, 737 F.3d 625 (9th Cir. Dec. 10, 2013) (ord. denying reh'g *en banc*), (C.J. Kozinski, dissenting).

email at bscheck@innocenceproject.org and laurie.levenson@lls.edu. We thank you for your time and we look forward to working with this Commission in the future.

Sincerely,

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