



May 22, 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 Commission for the Revision of the Rules of Professional Conduct:

We are deeply grateful for the Working Group's time and careful consideration of what type of standard necessitates expediting consideration of an ethical rule as well as its evaluation of whether a rule like ABA Model Rule 3.8 satisfies such criteria. It is our firm belief that there is a continuing, ongoing harm to the innocent men and women who have been wrongfully convicted in California courts, their families, potential victims of the unapprehended perpetrators, as well as society generally. In light of this harm, we respectfully request that the Commission recommend to the Board of Trustees that such an ethical rule merits expedited consideration.

Adopting an ethical rule that errs in favor of prosecutorial disclosure will better ensure that criminal defendants in California receive a fair trial. We all understand the practical cognitive challenges faced by a prosecutor when trying to determine if a failure to disclose information in a case where a trial has not yet occurred would ultimately be found, if the undisclosed material were ever discovered, as "material" by an appellate court, thereby resulting in a "Brady" violation. It is for this reason that the ABA adopted Model Rule 3.8 recognizing that its scope was independent and broader than the *Brady* materiality standard.

The Court of Appeals for the District of Columbia addressed this issue last month 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."¹

Chief Judge Washington explained that:

All too often we are asked to decide whether information withheld by the government was exculpatory and whether that information undermined the fairness of the criminal trial in that case. Often, the call is a close one, with the court making the best judgments it can about the impact the exculpatory evidence would have had on a jury's verdict. . . . These are judgment calls that can undermine the public's trust and confidence in the courts because they are not

¹ *In re Kline*, No. 13-BG-851, 2015 WL 1638151 (D.C. Apr. 9, 2015).

being made by a jury of one's peers but by a court that is sitting and reviewing a cold record. And, even where an appeals court ultimately decides that the failure of a prosecutor to disclose certain potentially exculpatory information should result in a new trial, the defendant has already spent a significant amount of time in jail with the concomitant consequences that incarceration has on the defendant's life and that of his or her family.²

Indeed, in California the average delay between sentencing and disposition of habeas claims in capital cases is 17.2 years.³ Many of these inmates have meritorious claims; in fact, 60% of all death row inmates whose habeas claims were finally evaluated by the federal courts were granted some type of relief.⁴

The wrongful convictions that have been exposed nationwide demonstrate the devastating consequences that can result from a prosecutor's failure to disclose exculpatory evidence. 1,603 exonerations of innocent criminal defendants have been identified by the National Registry of Exonerations ("the Registry"), a project based out of the University of Michigan Law School, which provides information on every known exoneration that has occurred in the United States since 1989.⁵ Of these 1,603 wrongful convictions, 329 cases were exonerated by DNA evidence that directly established their innocence. There have been 11 DNA exonerations⁶ in California and an additional 142 exonerations based on other evidence of innocence.⁷ The innocent men and women exonerated by DNA evidence served an average prison sentence of 14 years before they were able to prove their innocence.⁸

The Registry is in the process of conducting a detailed study of the first 1,367 cases it included to determine the nature of the official misconduct in those exonerations where such misconduct contributed to the false conviction of the defendant. As of the end of April 2014, the Registry had reviewed 920 of the exonerations in that study. Preliminary estimates based on the data collected so far indicate that:

- *Failure to disclose exculpatory evidence* is the *most common* form of official misconduct, occurring in an estimated 39% of all cases leading to exoneration.
- Misconduct in general, and concealing exculpatory evidence in particular, are estimated to be especially common in *homicide exonerations*—59% and 50% respectively.

² *Id.* at *9.

³ Judge Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 700 (2007).

⁴ *Jones v. Chappell*, No. CV 09-02158-CJC at 8, Appendix A(C.D. Cal. July 16, 2014) (Carney, J.).

⁵ THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/About-Us.aspx> (last visited May 20, 2015).

⁶ *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&c5=CA (last visited May 20, 2105).

⁷ *Browse the Cases*, THE 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 May 20, 2015).

⁸ Email from Vanessa Meterko, Research Analyst, The Innocence Project, to Sarah Leddy, Policy Analyst, The Innocence Project (Mar. 18, 2015 17:44 EST) (on file with the author). See also,

- Misconduct and concealing exculpatory evidence are more common yet in *exonerations of defendants who were sentenced to death*, with estimates of 70% and 67%, respectively.⁹

United States Supreme Court justices¹⁰, the American Bar Association, as well as numerous state and federal courts across the country have recognized the challenges of identifying *Brady* violations. Judges and practitioners across the country have recognized that there is a critical need for prosecutors to disclose all exculpatory evidence in their possession in order to avoid miscarriages of justice and maintain public confidence in the courts.¹¹

Further Delay Will Only Result In Additional Harm

California urgently needs a clear standard in the form of an ethical rule governing prosecutorial disclosure to avoid close calls in evaluations of the “materiality” of exculpatory evidence. The criminal justice system has a moral obligation to avoid and rectify the convictions of innocent persons. The exigency of the review of an ethical rule addressing prosecutorial disclosure of exculpatory evidence in both the pretrial as well as in the post-conviction settings is mandated by the ongoing harm to criminal defendants and the reality that inaction will be costly and result in further miscarriages of justice, with public safety implications. The ethical obligations imposed by ABA Rule 3.8 (g) and (h) not only provide the wrongfully convicted with a potential means of obtaining exculpatory evidence, but also has the potential to identify the real perpetrators of crimes. In fact, in the 329 DNA exonerations to dates, the real perpetrator has been identified in 161 cases. While innocent individuals languished in prison for crimes they did not commit, these true perpetrators committed an additional 77 rapes, 34 murders, and 34 other violent crimes.¹²

As the Working Group noted in its findings, the process of soliciting and studying input from interested stakeholders will “require additional time beyond that typically allocated to study” an ethical rule.¹³ Given the extensive deliberation of ABA Model Rule 3.8 that was conducted by the first Rules Commission in addition to the time dedicated by the Working Group as well as the broader Commission in recent months, we believe that the specific mechanics that must still be addressed can be resolved during the expedited consideration of the rule rather than through a study group.

⁹ Email from Samuel Gross, Thomas and Mabel Long Professor of Law, University of Michigan Law School to Sarah Leddy, Policy Analyst, The Innocence Project (May 20, 2015 14:25 EST).

¹⁰ *Connick v. Thompson*, 131 S.Ct. 1350, 1370 (Ginsburg, J. dissenting) (“I dissent from the Court’s judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson’s scheduled execution, the evidence that led to his exoneration might have remained under wraps.”).

¹¹ See e.g., *In re Disciplinary Action Against Feland*, 820 N.W.2d 672, 678 (N.D.2012); *In re Jordan*, 913 So.2d 775 (La.2005); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014), *United States v. Stevens*, 08–CR–231 EGS, 2009 WL 6525926 (D.D.C. Apr. 7, 2009), *United States v. Chapman*, 524 F.3d 1073, 1090 (9th Cir. 2008).

¹² Email from Vanessa Meterko, Research Analyst, The Innocence Project, to Sarah Leddy, Policy Analyst, The Innocence Project (Mar. 18, 2015 17:44 EST) (on file with the author).

¹³ Rules Revision Commission Working Group on Expedited Consideration of Certain Rules, Memorandum at 5 (May 11, 2015).

If the Commission or any members of forthcoming study group have 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 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,

A handwritten signature in cursive script that reads "Laurie L. Levenson".

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

A handwritten signature in cursive script that reads "Barry C. Scheck".

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