TABLE OF CONTENTS

Public Comments Received on Rule 5-110 [3.8]

2015-002 Susan Shalit [5-110]

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation Member of the State Bar of California

Commenting on behalf of an organization
- Yes
- No

* **Name** Susan Shalit

* **City** San Francisco

* **State** California

* **Email address** (You will receive a copy of your comment submission.) spamhere@sonic.net

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

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After 30 years in a practice which included criminal defense, I can say that the below facts in Peeople v. Velasco-Palacios, in which the prosecuting attorney fabricated evidence to gain an unfair advantage, is unfortunately not uncommon: Ambitious young prosecutors who mostly care about their win-loss record and their future career often not only outright lie about the facts, but even more frequently withhold Brady (exculpatory) evidence from opposing counsel. I would like to see (1) the Rules more specifically address these ongoing unfair & unconstitutional power-plays by government/prosecuting lawyers, and (2) the Rules be applied equally to them. For instance, the particular liar and fabricator referred in Velasco-Palacios, summarized below per CCAP, immediately should be disciplined. (FYI: It is common perception that government lawyers can lie and cheat with impunity, safe in the knowledge that the State Bar will not come down on them.)

Summary per CCAP:
Case Name: People v. Velasco-Palacios , District: 5 DCA , Case #: F068833
Opinion Date: 3/23/2015 , DAR #: 3297
Case Holding:
Dismissal of charges is appropriate remedy where a prosecutor falsified an interrogation transcript to include an admission by the defendant. Appellant was charged with lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)). During plea negotiations, the prosecutor gave defense counsel a transcript of appellant's police interrogation that indicated appellant had admitted to police that he was a child molester. Based on the transcript, defense

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Attachments

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1 (Rules) / 2

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* **Date** 05/01/2015

File : 2015-002 Susan Shalit [5-110]

Submitted via: Online

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After 30 years in a practice which included criminal defense, I can say that the below facts in Peeople v. Velasco-Palacios, in which the prosecuting attorney fabricated evidence to gain an unfair advantage, is unfortunately not uncommon: Ambitious young prosecutors who mostly care about their win-loss record and their future career often not only outright lie about the facts, but even more frequently withhold Brady (exculpatory) evidence from opposing counsel. I would like to see (1) the Rules more specifically address these ongoing unfair & unconstitutional power-plays by government/prosecuting lawyers, and (2) the Rules be applied equally to them. For instance, the particular liar and fabricator referred in Velasco-Palacios, summarized below per CCAP, immediately should be disciplined. (FYI: It is common perception that government lawyers can lie and cheat with impunity, safe in the knowledge that the State Bar will not come down on them.)

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2015-003a Margaret Thum [5-110]

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Margaret Thum

*** City** Pebble Beach

*** State** California

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

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

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Rule 5-110 should be strengthened to clarify the responsibility of attorneys representing government agencies, especially attorneys acting in an outside counsel role, i.e., attorneys not employed by the agency but by an outside law firm, such as:

(1) if a public records request is made to an agency, an independent contracting attorney cannot hold information at his or her office that enables the agency to answer that it does not have requested information.

(2) the attorney cannot represent agency officers, e.g., council, commission, or Board members, in litigation, e.g., depositions, where it is the council member's activities that are at issue. In my public interest work, agency attorneys have an inherent conflict of interest, especially when they have advised an agency to take a certain position and in depositions or at trial they shield evidence or improperly coach deponents to support the advice given to the agency. In every corporate position I've held, it is company policy that the corporate attorney represents the corporation, not the individual officer. In my experience, this same principle has not transferred into the public agency realm.

(3) outside attorneys cannot represent multiple local agencies, especially when two or more of those agencies are entering into contracts. It seems impossible to obtain a legitimate waiver of the conflict of interest when the ultimate beneficiary is the public who has no say in objecting

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margaret@thumlaw.com

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* **Date** 05/01/2015

File : 2015-003a Margaret Thum [5-110]

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(1) if a public records request is made to an agency, an independent contracting attorney cannot hold information at his or her office that enables the agency to answer that it does not have requested information.

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(3) outside attorneys cannot represent multiple local agencies, especially when two or more of those agencies are entering into contracts. It seems impossible to obtain a legitimate waiver of the conflict of interest when the ultimate beneficiary is the public who has no say in objecting to the waiver. In my experience, an outside attorney can become too political in currying favor amongst his/her public agency clients, e.g., financial assistance/grants being given only or primarily to agencies represented by the outside attorney. This severely harms not only the public, but also destroys the public's overall trust in attorneys and the worth of our profession.

2015-038b California Public Defenders Association [3.8]

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation California Public Defenders Association

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

*** Name**
(Type 'Anonymous' if you would like to submit comments anonymously.)
Garrick Byers

*** City** Martinez

*** State** California

Email address
(You may, but are not required to, provide your email address. You will receive a copy of your comment submission, if you choose to do so.)
garrick.byers@pd.cccounty.us

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Rule 2-100 Communication With a Represented Party

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In addition to my comments in Attachment 1, on Rule 2-100,

I am also, in Attachment 2, commenting on ABA Model Rule 3.8, which was discussed in the email that was forwarded to me from: Randall Difuntorum of the State Bar, dated June 2, 2015.

Attachments

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garrick.byers@pd.cccounty.us

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* **Date** 06/16/2015

File : 2015-038b California Public Defenders Association [3.8]

Submitted via: Online

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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.

The author of this comment, Garrick Byers, was President of CPDA from 2014 to 2015, and is currently chair of CPDA's Ethics Committee. These comments are made on behalf of CPDA.

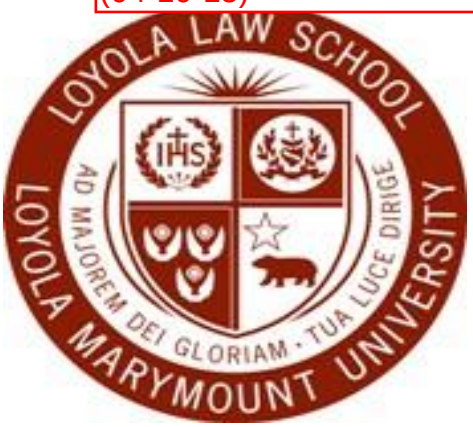
CPDA applauds the recent vote by State Bar's Commission to appoint a study group to evaluate ABA Model Rule of Professional Conduct 3.8; and that the Commission's work plan be amended to accommodate the study group's consideration.

When the first Commission to study the California Rules of Professional Conduct took up this matter, CPDA sent a comment that we agreed with ABA Model Rue 3.8, which requires prosecutors to disclose before trial all evidence that "tends to negate the guilt of the accused or mitigates the offense."

CPDA continues to agree with that rule. This is a matter of simple fairness.

CPDA understands that California is the only state that has not adopted some form of ABA Model Rule 3.8. Our State, and, in particular, our state's prosecutors, should join the rest of our nation in implementing this rule.

Just as the Commission has accelerated its study of ABA Model Rule 3.8, CPDA believes it would also be appropriate to accelerate its submission to the California Supreme Court for adoption.



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]

---

[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.

---

[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)

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[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

INNOCENCE PROJECT

LOYOLA LAW SCHOOL
LOYOLA MARYMOUNT UNIVERSITY
IHS
AD MAJOREM DEI GLORIAM · TUA LUCE DIRIGE

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:

[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,

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

INNOCENCE PROJECT

LOYOLA MARYMOUNT UNIVERSITY

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 exonerations[6] 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.

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[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).
[77] *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 justices[10], 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.

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[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,

Laurie L. Levenson
Professor of Law, Loyola Law School
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March 26, 2015

Randall Difuntorum
Committee Coordinator
Commission for the Revision of Rules on Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: American Bar Association Rule 3.8 – Special Responsibilities of a Prosecutor

Dear Mr. Difuntorum:

The California Attorneys for Criminal Justice (CACJ), a statewide association of criminal defense attorneys, writes in support of the Commission for the Revision of Rules on Professional Conduct's consideration for a fast track process for particular rules or issues of immediate importance. Specifically, CACJ hopes that the State Bar will approve this fast track process in order to consider American Bar Association Rule 3.8 – Special Responsibilities of a Prosecutor

CACJ is one of the leading criminal justice organizations in the state as well as leading the push for thoughtful and essential criminal justice reform in Sacramento, including strategies to reduce incidents of prosecutorial misconduct. CACJ's fight to address this growing "epidemic," as described by Judge Alex Kozinski, has only just begun.

As such, CACJ believe the State Bar should adopt ABA rule 3.8. California is the only jurisdiction in the country that has not adopted 3.8(d) as an ethical rule to govern the timely pre-trial Brady disclosures by prosecutors. Forty-nine states, Guam, the United States Virgin Islands, and the District of Columbia have already implemented some version of Rule 3.8. California cannot afford to wait any longer to adopt Rule 3.8; our state must ensure criminal defendants' constitutional rights are protected and set forth clear ethical obligations that prosecutors are expected to follow.

For the reasons stated herein, CACJ supports the State Bar's consideration of a fast track process.

Respectfully Submitted,

Ignacio Hernandez
Legislative Advocate, CACJ

June 18, 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 would like to thank the Rules Revision Committee for their service in redrafting the California Rules of Professional Conduct and express our appreciation for the opportunity to submit public commentary. The two of us are legal ethics professors in New York; one of us formerly served as a criminal defense lawyer, the other as a federal prosecutor. We served on the New York state bar committee that first proposed the adoption of professional conduct rules to address prosecutors' obligations post-conviction, and we co-chaired the committee of the ABA Criminal Justice Section that drew on our state bar's work to develop the provisions that were ultimately adopted by the ABA House of Delegates as ABA Model Rule 3.8 (g) and (h). Since then, we have consulted with various state bar representatives who have sought to adapt these model rules to their own state practices. Drawing on our experience developing the provisions in conjunction with prosecutors, defense lawyers and judges around the country, we hope to serve as a resource to Commissions such as your own.

We write today to express our support for this Commission's expedited consideration as well as submission of an ethical rule governing prosecutorial misconduct similar to ABA Model Rule 3.8 (g) and (h). The adoption of a post-conviction disclosure obligation for prosecutors will provide a clear standard for the remedial steps a prosecutor must take when confronted with evidence of a clear miscarriage of justice. As former criminal practitioners who practiced on opposing sides of the courtroom, we endeavor to provide a balanced statement of our views.[1]

[1] Although it is not the focus of this statement, we also support adoption of a provision based on ABA Model Rule 3.8(d) to facilitate the criminal discovery process for prosecutors and defense attorneys by providing increased clarity and consistency. ABA Model Rule 3.8(d) has been adopted (with some variation in wording) by every state other than California, and has been in effect in other states for decades. *See generally,* ABA COMM. ON ETHICS AND PROF. RESPONSIBILITY, Formal Op. 09-454 (2009), *available at* http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf.

In 2006 the Association of the Bar of the City of New York evaluated numerous aspects of prosecutors' responsibilities in the wake of wrongful convictions around the country. The findings were issued in a report that concluded that a rule was needed to govern prosecutors' ethical responsibilities when a prosecutor becomes aware of new and material evidence that an innocent person was wrongfully convicted.[2] These recommendations led the New York State Bar Association to recommend professional conduct rules concerning prosecutors' post-conviction disclosure obligations that were drafted with significant input from state and federal prosecutors and representatives of the criminal defense bar.[3] The New York rules, which won widespread support from local bar associations and near unanimity in the state bar's House of Delegates, became the predecessor to provisions (g) and (h) of ABA Model Rule 3.8.[4]

Similarly, the ABA's 2008 amendments to Model Rule 3.8 were proposed to the House of Delegates by the ABA Criminal Justice Section with support from a wide range of co-sponsors.[5] The House of Delegates adopted the new provisions with little opposition. In the intervening years since the ABA's adoption of provisions (g) and (h), 13 states that have adopted some version of the rules, verbatim or with modifications.[6]

Since 2008, the guidance provided by the rule has also been endorsed by prosecutors' associations in other jurisdictions. Wisconsin, which was the first state to adopt the new provisions to Model Rule 3.8, did so at the encouragement of the Wisconsin District Attorneys Association, which filed a petition urging the Wisconsin Supreme Court to adopt the ABA's new provisions. In its petition calling for the Court to enact a post-conviction ethical rule governing prosecutorial disclosure, the Wisconsin District Attorneys Association noted that, "the prosecutor's duty to seek justice not only requires the prosecutor to take precautions to avoid convicting innocent individuals but also requires action when it appears likely that an innocent person was convicted."[7]

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[2] Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York (2006).

[3] *See* discussion, Letter from Patricia Hynes, President, New York City Bar, to Hon. Jonathan Lippman, Chief Judge, New York Court of Appeals (Feb. 3, 2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071856-LetterregardingRule3.8RulesofProfConduct.pdf

[4] *Id.*

[5] These included the ABA Death Penalty Representation Project, the Section of Individual Rights and Responsibility, the Section of Litigation, the Section of State and Local Government Law, the Standing Committee on Ethics and Professional Responsibility, the Government and Public Sector Lawyers Division, the ABA Commission on Domestic Violence, the New York State Bar Association, the Association of the Bar of the City of New York, and the National Organization of Bar Counsel. *See* Stephen Saltzburg, *Changes to Model Rules Impacts Prosecutors*, ABA, 23 CRIMINAL JUSTICE (Spring 2008), http://www.americanbar.org/content/dam/aba/events/criminal_justice/Forensics_Ethics_Saltzburg.authcheckdam.pdf.

[6] *Variations of the ABA Model Rules of Professional Conduct: Rule 3.8 (g) and (h)*, ABA (May 6, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf. Idaho and West Virginia adopted the provisions verbatim. Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming have adopted modified versions of the provisions. The District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont are currently evaluating adoption of the provisions.

[7] *In the Matter of the Amendment of Supreme Court Rules Chapter 20 Rules of Professional Conduct for Attorneys*, Pet. (Wis. Sept. 19, 2008).

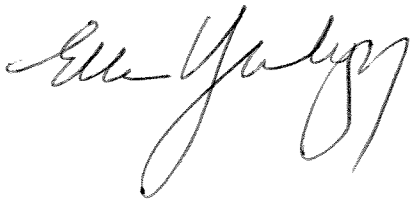
Likewise, during the Tennessee Supreme Court's consideration of provisions (g) and (h), the Tennessee District Attorneys General Conference (TDAGC) drafted a petition in support. The TDAGC explained its strong interest in the new "innocence provisions" and noted:

> The TDAGC is dedicated to preventing mistaken convictions and rectifying the very few mistaken convictions that occur. The TDAGC believes the addition for proposed paragraphs (g) and (h) to Rule 3.8, Special Responsibilities Of A Prosecutor, sets a clear standard for prosecutors and will increase confidence in our criminal justice system. In addition and just as importantly these amendments will lead to a greater understanding of the unique role of prosecutors to seek the truth over and above winning a case.[8]

As these submissions reflect, the ABA model rule will serve a variety of salutary functions. It will promote the training of prosecutors and future prosecutors regarding their obligation to rectify wrongful convictions and the minimum conduct that the requirement entails. In particular, it will provide guidance regarding prosecutors' disclosure obligations in the post-conviction context by codifying what prosecutors almost universally regard to be required as an aspect of their duty to seek justice, if not as a matter of constitutional obligation. In the rare cases in which prosecutors transgress, it will provide a standard against which to evaluate their professional misconduct.

With this in mind, we reiterate our support for the adoption of an ethical rule similar to ABA Model Rule 3.8 (g), and (h). We appreciate the opportunity to address the Rules Commission and thank you again for your service on the Commission.

Sincerely,



Bruce Green
Director, Louis Stein Center for Law and Ethics
Fordham University School of Law

Ellen Yaroshefsky
Director, Youth Justice Clinic
Cardozo School of Law

[8] *In re Petition for the Adoption of Amended Tennessee Rules of Professional Conduct*, Comments of the Tennessee District Attorneys General Conference, No. M2009-00979-SC-RL1-RL at 2 (Tenn. Nov. 30, 2009).

2015-046b LA County Public Defender [3.8]

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

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

Thank you for circulating this request for comments at this early stage of the process. Below, please find our comments on the two proposed rule changes which are of greatest concern to the Los Angeles County Public Defender and Los Angeles County Alternate Public Defender.

[TEXT OMITTED]

Regarding the Adoption of ABA Model Rule 3.8

In order to promote the worthwhile goal of fewer erroneous convictions, the committee should support the adoption of a rule of professional conduct that mirrors ABA Model Rule 3.8.

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RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

At present there is no Rule of Professional Conduct which establishes any obligation on the part of a prosecutor to disclose potentially exculpatory evidence beyond that which is constitutionally mandated, as has been set forth in *Brady v. Maryland* (1963) 373 U.S. 83.

There are two Rules of Professional Conduct which touch upon this area of the law, but do not go far enough to establish a professional obligation on the part of the prosecution to ensure that the defense possesses all of the potentially exculpatory evidence that is possessed by or known to the prosecution.

First is Rule 5-110, which prohibits a prosecutor from pursuing criminal charges against a defendant where the prosecution knows or should know that the charges are not supported by probable cause. Next is Rule 5-220, which forbids any member of the bar from suppressing evidence where there is a legal obligation to disclose it.

The American Bar Association has developed a set of Model Rules which includes Rule 3.8 which has a more stringent list of professional obligations than that which presently exists in California. Forty nine states, the District of Columbia, and the U.S. Virgin Islands have all adopted the principles contained in the ABA Model Rules, including ABA Model Rule 3.8.

ABA Model Rule 3.8 includes an array of professional obligations which exceeds those required by *Brady v. Maryland* in order to help ensure that the accused are not wrongly prosecuted and are not prosecuted without the benefit of knowledge of all the potentially exculpatory evidence that is possessed by or known to the prosecution.

In relevant part, Rule 3.8 requires that the prosecution:

I. Refrain from prosecuting anyone where the charge is not supported by probable cause. This subsection of Rule 3.8 mirrors California's own Rule 5-110.

II. Disclose to the defense all information known to the prosecutor that tends to negate guilt or mitigates the offense, and, regarding sentencing, to disclose all unprivileged mitigating information known to the prosecutor.

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RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

III. After conviction, when the prosecutor learns of evidence creating a reasonable likelihood that the defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to an appropriate court.

A. If the conviction occurred in the prosecutor's jurisdiction, the prosecution must promptly disclose that evidence to the defendant.

B. The prosecution must also conduct further investigation, in order to determine whether the defendant was wrongly convicted.

IV. If clear and convincing evidence establishes that a defendant did not commit the offense for which he was convicted, the prosecutor shall seek to remedy the conviction.

Presently, the California Rules of Professional Conduct only limit the prosecution from seeking a conviction if the prosecution does not believe that a charge is supported by probable cause. The adoption of a rule of professional conduct that mirrors ABA Model Rule 3.8 would require additional efforts on the part of the prosecution to seek to avoid erroneous convictions. Therefore, the committee should support the adoption of a rule of professional conduct that mirrors ABA Model Rule 3.8.

Date: 6-15-15 Signature: _____
RONALD L. BROWN
Public Defender

Date: 6-15-15 Signature: _____
JANICE FUKAI
Alternate Public Defender