

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]**

**Lead Drafter: Rothschild**  
**Co-Drafters: Cardona, Clopton, Peters, Tuft**  
**Meeting Date: September 25-26, 2015**

### **I. CURRENT ABA MODEL RULE**

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

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

### **Comment**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the

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client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

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[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend proposed Rule 3.8(a), (b), (c), (d) (with two alternatives proposed for the Commission's consideration), and (f) as set forth below in Section III. A majority of the drafting team members favored recommending a proposed Rule 3.8(e), (g), and (h) as set forth below in Section III. A minority of the drafting team members favored adoption of a proposed Rule 3.8(e), (g), and (h) in different form, as discussed in the relevant portions of Section VIII below.

### III. PROPOSED RULE (CLEAN)

#### Rule 3.8 [5-110] Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from commencing or continuing to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) where the right to counsel exists, make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) **[ALT 1]** 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;

**[ALT 2]** comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, 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;

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- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) exercise reasonable care to prevent other persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) promptly disclose that evidence to an appropriate court or authority, and
  - (2) if the conviction was obtained in the prosecutor's jurisdiction,
    - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

### **Comment**

[1] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

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[2] **To be included only if Commission favors para. (d), ALT1** The disclosure obligations in paragraph (d) are not limited to those disclosures required by an accused's constitutional rights.

[2A] **To be included only if Commission favors para. (d), ALT2** The disclosure obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively.

[3] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[4] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[5] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[6] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[7] A prosecutor's reasonable independent judgment that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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### IV. PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 3.8)

#### Rule 3.8 [5-110] Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from ~~prosecuting~~ commencing or continuing to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) where the right to counsel exists, make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, ~~such as the right to a preliminary hearing~~ unless the tribunal has approved the appearance of the accused in propria persona;
- (d) **ALT 1** 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;  
**ALT 2** comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, 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;
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  - (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) ~~except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public~~

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~~condemnation of the accused and~~ exercise reasonable care to prevent other persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
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[voluntary cooperation in an ongoing law enforcement investigation.](#)

~~[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.~~ **To be included only if Commission favors para. (d), ALT1** [The disclosure obligations in paragraph \(d\) are not limited to those disclosures required by an accused's constitutional rights.](#)

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~~[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is~~ [Paragraph \(f\) is not](#) intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

~~[6] Like other lawyers,~~ Prosecutors are subject to Rules 5.1 and 5.3, ~~which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.~~ Ordinarily, the reasonable care standard [of paragraph \(f\)](#) will be satisfied if the prosecutor issues the

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appropriate cautions to law- enforcement personnel and other relevant individuals.

[75] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[86] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. ~~Necessary steps may~~ Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[97] A prosecutor's reasonable independent judgment, ~~made in good faith~~, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

### V. PUBLIC COMMENTS SUMMARY

- **Garrick Byers, California Public Defenders Association (June 16, 2015)**

Recommends adoption of Model Rule 3.8 requiring prosecutors to disclose exculpatory or mitigating evidence. Believes accelerating its submission to the Court is appropriate.

- **Laurie Levenson and Barry Scheck, Loyola Innocence Project (April 10, 2015)**

Recommends immediate adoption of a rule similar to MR 3.8. Similar rules have been adopted in every jurisdiction and are the key to protecting constitutional rights of criminal defendants. A rule will clearly delineate the special responsibilities of prosecutors and promote public trust in the justice system.

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- **Laurie Levenson and Barry Scheck, Loyola Innocence Project (April 23, 2015)**

*Brady* creates “practical cognitive challenges” for prosecutors attempting to determine whether information is material. A rule requiring disclosure of all potentially exculpatory evidence is necessary to eliminate the confusion created by *Brady*.
- **Laurie Levenson and Barry Scheck, Loyola Innocence Project (May 22, 2015)**

Detailed a study conducted by The Registry of Exonerations preliminarily showing that 39% of exonerations were due to misconduct in failing to disclose exculpatory evidence. Recommend expedited consideration of the rule because believe further delay will result in additional harm.
- **Ignacio Hernandez, California Attorneys for Criminal Justice (March 26, 2015)**

Recommends adoption of MR 3.8 and consideration of the rule on a fast track process.
- **Bruce Green and Ellen Yaroshefsky (June 18, 2015)**

Support adoption of a rule similar to MR 3.8 to address post-conviction disclosure obligations of prosecutors facing knowledge of wrongful conviction. The rule will provide a clear standard for remedial steps a prosecutor must take and will promote the training of prosecutors regarding their obligations.
- **Ronald Brown and Janice Jukai, Los Angeles County Public Defenders (June 12, 2015)**

Believe current rules 5-110 and 5-220 need to require additional efforts from prosecutors to avoid erroneous convictions. Recommends adoption of MR 3.8 to promote that goal.
- **Margaret Thum (May 1, 2015)**

Concern over conflict issues inherent in representation of government agencies.
- **Susan Shalit (May 1, 2015)**

Concerned that prosecuting attorneys fabricate evidence or lie about facts to gain an unfair advantage. Suggest Rules specifically address use of unfair tactics by prosecutors, and ensure such rules are applied equally to all attorneys. Highlights case of *Velasco-Palacios* where charges were dismissed after the prosecutor fabricated evidence of a confession to encourage a plea deal.

### VI. OCTC / STATE BAR COURT COMMENTS

#### A. JAYNE KIM, OCTC, 9/2/2015:

Please see OCTC's April 20, 2015 Comment on this subject.

1. Additionally, the language in rule 5-110 should be retained as part of a new or revised rule regarding the responsibilities of a prosecutor. This rule prohibits a government

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attorney from instituting criminal charges when the government lawyer knows or should know that the charges are not supported by probable cause.

2. An amendment to the rule prohibiting a prosecutor from seeking to obtain a waiver of pretrial rights from an unrepresented accused unless and until a tribunal has approved the appearance of the accused in propria persona may infringe on the trial court's prerogatives and discretion. The better practice may be to allow the trial court to decide in specific instances whether the prosecutor acted improperly. If a prosecutor's conduct is determined to be improper by the court, OCTC and the State Bar Court can then determine whether the conduct warrants discipline.
3. OCTC supports adopting language similar to Model Rule 3.8(d) regarding the duty to make timely disclosure to the defense of all evidence and information known to the prosecutor that tends to negate the guilt of the accused or otherwise mitigates the offense.
4. Any amendment imposing a duty on a prosecutor regarding the issuance of a subpoena for the purpose of obtaining the testimony of a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding in order to present evidence about the lawyer's past or present client should take into consideration Evidence Code, section 956, regarding legal services sought to enable the commission of a crime or fraud.
5. A rule requiring a prosecutor to exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6 (see Model Rule 3.8(f)) should take into consideration the fact that law enforcement agencies are often independent of the prosecutor's office. In such circumstances, simply advising the independent agency of the prohibition may meet a reasonable care standard.
6. OCTC supports a rule that requires a prosecutor to disclose exculpatory evidence after a conviction when the prosecutor knows of new, credible, and material evidence, creating a likelihood that the defendant did not commit the crime for which he or she was convicted. In California, a prosecutor has a duty to disclose exculpatory evidence after a conviction, and OCTC can discipline attorneys for a violation of that duty pursuant to Business and Professions Code, section 6106. (*In the Matter of Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at 178.)

### **B. JAYNE KIM, OCTC, 4/20/2015:**

1. 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.

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2. OCTC currently regulates and disciplines criminal prosecutors under the Business and Professions Code, sections 6068(a), 6103, 6106, and 6131, as well as, Rules of Professional Conduct, rules 2-100, 3-110, 5-110, 5-120, 5-200, 5-220, 5-300, 5-310, and 5-320. (See *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537; *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620; and *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597[.] However, a new rule clarifying and reaffirming the duties and responsibilities governing criminal prosecutors in California may be appropriate and should be explored.
3. OCTC recommends that any new rule specifically address whether reckless or grossly negligent failures to comply with the rule will support a violation. A criminal prosecutor's duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *U.S. v. Hanna* (9th Cir. 1995) 55 Fed.3d 1456, 1461[.] Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952[.] Mere negligence or inadvertence should not be disciplinable.
4. If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.<sup>1</sup> (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d\_, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678[.]

<sup>1</sup> The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]**

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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### **C. RUSSELL WEINER, OCTC, 6/15/2010:**

1. OCTC thanks the Commission for its changes in subparagraph (a), which is preferable to the original proposal, and its inclusion of a reference to section 6131 in Comment 10.
2. OCTC is, however, concerned about subparagraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor, control this. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. *People v. Jacinto* (2010) \_ Cal.App.4th \_\_, WL 2105069 [finding that the Sheriff's deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.
3. Likewise, OCTC is concerned with subparagraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 1A defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should be in the rule, not a Comment.

### **D. MIKE NISPEROS, OCTC, 9/27/2001:**

No comments were submitted regarding either Model Rule 3.8 or California Rule 5-110.

- **State Bar Court:** No comments received from State Bar Court.

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### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **West Virginia Rule 3.8** is identical to Model Rule 3.8:

#### **West Virginia Rule 3.8 Special responsibilities of prosecutors**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosures 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; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Model Rule 3.8(a), (b), (c) & (f) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor,” revised May 6, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf)
- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.<sup>2</sup> Seventeen jurisdictions have adopted a slightly modified version of Model Rule 3.8,

<sup>2</sup> The twenty-eight states are: Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New

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paragraphs (a), (b), (c), (d), and (f).<sup>3</sup> Six states have adopted a version of the rule that is substantially different from Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).<sup>4</sup>

Model Rule 3.8(d) Adoptions. Model Rule 3.8(d), which requires a prosecutor to timely disclose to the defense evidence or information that the prosecutor knows “tends to negate the guilt of the accused or mitigate the offense,” is of special concern to the Study Group and so is treated separately in this subpart.

- Forty jurisdictions have adopted Model Rule 3.8, paragraph (d) verbatim.<sup>5</sup> Eight jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.<sup>6</sup> Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule 3.8(d).<sup>7</sup> Only California lacks a

Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming.

<sup>3</sup> The seventeen jurisdictions are: Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, North Dakota, Ohio, Tennessee, Texas, and Vermont.

<sup>4</sup> The six states are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

<sup>5</sup> The forty jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>6</sup> The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

<sup>7</sup> The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

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counterpart to Model Rule 3.8(d). Attached as Attachment 1 is a document showing the variations in the ten jurisdictions that have diverged from the Model Rule.

Model Rule 3.8(e) Adoptions. Model Rule 3.8(e) prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless three enumerated conditions are satisfied. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(e),” revised May 6, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_e.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf) [Last visited 6/17/15]
- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.<sup>8</sup> Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).<sup>9</sup> Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule.<sup>10</sup> California also has not adopted any version of paragraph (e).

Model Rule 3.8(g) & (h) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(g) (h),” revised May 6, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf)
- Two states have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.<sup>11</sup> Eleven states have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).<sup>12</sup> Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h).<sup>13</sup>

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

<sup>8</sup> The twenty-four jurisdictions are: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

<sup>9</sup> The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

<sup>10</sup> The seventeen jurisdictions are: Alabama, Arkansas, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Michigan, Mississippi, New York, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

<sup>11</sup> The two states are: Idaho and West Virginia.

<sup>12</sup> The eleven states are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

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### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
2. Substitute the term "lawyer" for "member".
  - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
3. In paragraph (a), provide that a prosecutor's duty not to prosecute without probable cause includes both a duty not to commence a prosecution as well as not to continue to prosecute.
  - Pros: It clarifies the scope of prohibited conduct under paragraph (a) and carries forward similar language in current rule 5-110. RRC1 proposed similar language.
  - Cons: The change is unnecessary; the word "prosecute" includes both the commencing and maintenance of a prosecution.
4. In paragraph (a), recommend adoption of a knowledge standard, i.e., the prosecutor must know that the prosecution is not supported by probable cause before the duty to

<sup>13</sup> The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

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refrain from prosecution is triggered.

- Pros: The knowledge standard, which is found in the rule 3.8 counterpart in every other jurisdiction is the appropriate standard for imposing discipline on a prosecutor. “Know” is defined in MR 1.0(f) as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from putting his or her head in the sand and claiming not to have known of the facts when the facts would have been obvious given the surrounding circumstances. That would appear to be a sufficiently rigorous standard for rule 3.8(a). The same definition was recommended by RRC1 and adopted by the Board, and it is anticipated that this Commission will make a similar recommendation. (See, e.g., Report & Recommendation for Proposed Rule 4.2 [2-100], which also contemplates a similar definition.) The standard in current rule 5-110, “knows or should know,” is unnecessary for the same reasons that a “grossly negligent” or “reckless” standard is unnecessary. (See section VIII.B.1, below.)
  - Cons: Current rule 5-110, which similarly addresses a prosecutor’s duty not to prosecute criminal charges when probable cause is absent, has a “knows or should know” standard. There is no compelling reason to change that standard.
  - Note: See also section VIII.B.1, below, concerning the recommended rejection of a “reckless” or “gross negligence” standard.
5. Recommend adoption of Model Rule 3.8(b), modified to limit its application to situations where the right to counsel exists.
- Pros: The revision accurately describes the law, i.e., that the prosecutor’s obligation applies when a person has a right to counsel under the Sixth Amendment (when adversary judicial criminal proceedings have been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment) or (as Texas and Wyoming have made clear) under *Miranda’s* prophylactic procedures derived from the Fifth Amendment (when conducting a custodial interrogation). See Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of A Prosecutor the State of Rule 3.8*, 22 Geo. J. Legal Ethics 463, 477-79 (2009). Limiting the paragraph as indicated is appropriate in a disciplinary rule.
  - Cons: None identified.
6. Recommend adoption of Model Rule 3.8(c), modified to delete a reference to preliminary hearings, and to add a qualification where a court has approved the accused’s pro per appearance. This recommendation also includes the recommended adoption of proposed Comment [1], which is based on Model Rule comment [2], modified to reflect the proposed changes to the black letter.
- Pros: The *pro per* qualifying language appears in a comment to the Model Rule;

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similar to RRC1, the drafting team determined it is an appropriate limitation that belongs in the black letter and not a comment.

Deleting the reference to preliminary hearings is necessary because waiver of a preliminary hearing by an unrepresented accused conflicts with Penal Code section 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can only waive a preliminary hearing if represented by counsel.

- Cons: None identified.

**Note re Paragraph (d).** Paragraph (d) states a prosecutor's duty regarding exculpatory or mitigating evidence. The drafting team has provided two alternatives, **ALT 1** and **ALT 2**. The former is the Model Rule language that has been adopted in some form by every jurisdiction in the country. **ALT 2** consists of the language favored by RRC1 but ultimately rejected by the Board.

### ALT 1.

7. Recommend adoption of Model Rule 3.8(d), which provides a prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate guilt or mitigate the offense. This recommendation also includes the recommended adoption of proposed Comment [2], which is intended to clarify that paragraph (d)'s scope is intended to be broader than *Brady's* obligations.
  - Pros: The Model Rule language is intended to impose a duty on prosecutors that is broader than *Brady's* materiality standard. The provision is arguably more closely aligned with the current position of OCTC, which has informed the Commission that it can discipline a prosecutor for failure to disclose exculpatory evidence without proving materiality:

If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.<sup>14</sup> (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not

<sup>14</sup> The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

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excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d\_\_, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

See OCTC April 20, 2015 Memo to Commission, Section H., at p. 4.

Further, the Model Rule language also aligns with the position taken by the Innocence Project in its submissions to the Commission, the concept being that a prosecutor's determination of whether evidence or information is exculpatory or mitigating should not depend on its materiality under the Constitutional *Brady* standard because materiality often can only be determined after the fact. Instead, the disclosure should occur at the trial court level before a falsely accused defendant suffers the harm of a wrongful conviction. The Model Rule standard, which requires disclosure of evidence and information "that tends to negate the guilt of the accused or mitigate the offense" is intended to accomplish that objective.<sup>15</sup>

Finally, the provision provides for an exception when the prosecutor believes a protective order is required, for example, to protect a witnesses or the public interest.

- Cons: Although the ABA has opined that the Model Rule language is intended to be broader than *Brady*, the jurisdictions that have addressed the issue are split on whether the provision is broader than,<sup>16</sup> or coextensive with *Brady*.<sup>17</sup>

<sup>15</sup> See April 10, 2015 Letter from Professors Laurie Levenson and Barry Scheck to Commission, at page 2 ("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.")

<sup>16</sup> The District of Columbia, North Dakota, and the U.S. District Court for the District of Nevada have evaluated the scope of the pertinent ethical rule in their jurisdiction and concluded it is broader than *Brady*. See, *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (holding that Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny); *In re Disciplinary Action Against Feland*, 820 N.W.2d 672, 678 (N.D.2012) (holding that a prosecutor's ethical obligation to disclose evidence to the defense is broader than the duty under *Brady* or the criminal discovery rule); *United States v. Acosta*, 357 F.Supp. 2d 1228 (D. Nev. 2005) (ordering the government, over objection, to disclose to the defense 60

In addition, the drafting team is unaware of any case in which a prosecutor has been disciplined absent a showing of materiality. It is questionable whether Rules of Professional Conduct that are intended to function as minimum standards for discipline should include what is arguably an aspirational standard for the breach of which discipline is not imposed. In addition, as several public comments to

[Footnote continued...]

days before trial all evidence that negates guilt or mitigates the crime, and concluding that the *Brady* standard of materiality makes sense only in the context of appellate review). Virginia has issued an ethics opinion to the same effect. See Virginia Legal Ethics Comm. Op. 1862 (2012) (“Timely Disclosure of Exculpatory Evidence and Duties to Disclose Information in Plea Negotiations”). The New York State District Attorney’s Association has issued a best practices manual that clarifies that 3.8(d) disclosure is independent and broader than “materiality.” (See *The Right Thing: Ethical Guidelines for Prosecutors*, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK at 12 (2012), available at <http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf>.) The United States Attorney’s Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA’s broad interpretation of 3.8(d).

<sup>17</sup> Courts that have found Model Rule 3.8(d) coextensive with *Brady* are: *In re Attorney C* (Colo. 2002) 47 P.3d 1167 (holding that Rule 3.8(d) contains a “materiality standard” and rejecting the hearing board’s conclusion that the rule incorporates a “broader and more encompassing” standard); *In re Riek* (Wis. 2013) 834 N.W.2d 384 (rejecting the Office of Lawyer Regulation’s argument that “SCR 20:3.8(f)(1) requires disclosure of favorable evidence or information without regard to its ‘materiality’” and instead construing the rule “in a manner consistent with the scope of disclosure required by the United States Constitution, federal or Wisconsin statutes, and court rules of procedure”); *Disciplinary Counsel v. Kellogg-Martin* (Ohio 2010) 923 N.E.2d 125 (holding that “DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady v. Maryland* or Crim.R. 16”); *State ex rel. Okla. Bar Ass’n v. Ward* (Okla. 2015) 2015 OK 48 (construing ORPC Rule 3.8(d) “in a manner consistent with the scope of disclosure required by applicable law”); *United States v. Weiss* (D. Colo. 2006) 2006 U.S. Dist. LEXIS 45124 (rejecting defendants’ argument that the rules of professional conduct mandate “that the Government’s disclosure obligation is higher than the standards set in *Brady* and *Giglio* and holding that disclosure “is only necessary for information that is material”).

See also *In re Jordan* (La. 2005) 913 So. 2d 775 (holding that Respondent violated Rule 3.8(d) by “fail[ing] to produce evidence which was clearly exculpatory” and that Respondent “should have resolved this issue in favor of disclosure”). *Jordan* case has been cited by courts both for the proposition that a prosecutor’s ethical are broader than those imposed by law and that a prosecutor’s duty merely parallels that laid out in *Brady* and its progeny. See *Riek, supra* at pp. 390, citing *Jordan, Kellogg-Martin, and Attorney C* for the proposition that “several jurisdictions rendered decisions construing their equivalent of SCR 20:3.8(f) consistent with the requirements of *Brady* and its progeny.” Compare *In re Kline, supra*, 113 A.3d at 211 (disagreeing “that a fair reading of [Jordan] supports the [Riek] court’s decision”).

See also Steven Koppell, *An Argument Against Increasing Prosecutors’ Disclosure Requirements Beyond Brady*, 27 Geo. J. Legal Ethics 643 (2014) (arguing that ABA Formal Ethics Opinion 09-454 (Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense) “is in conflict with *Brady* and should not be implemented in any state.”)

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RRC1 asserted, an ethical rule that effectively imposes on prosecutors discovery obligations beyond those imposed by statutory and constitutional requirements may conflict with statutory provisions adopted by California Prop. 115, which added Penal Code Chapter 10, commencing with Section 1054), which defines discovery obligations in criminal cases, and which begins with a section (Section 1054) which states that the chapter “shall be interpreted” to, among other things, “provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” Penal Code Section 1054(e). Penal Code Section 1054.1(e) requires prosecutors to disclose to the defense “any exculpatory evidence” that is “in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of the investigating agencies.” Penal Code Section 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

### ALT 2.

8. Recommend adoption of RRC1’s proposed paragraph (d), which would provide that a prosecutor must comply with all statutory and constitutional obligations when making disclosures of exculpatory or mitigating evidence or information. ALT2 is the language RRC1 proposed to the Board in September 2010. ALT2 limits the prosecutor’s duty to what is required under the Constitution or statutory law, as interpreted by case law. The Board retained only the reference to “constitutional obligations.” The resulting rule, however, was not submitted to the Supreme Court for review by the time the Supreme Court ended the first Commission’s rules study. This recommendation also includes the recommended adoption of comment [2A], which is based on RRC1’s proposed comment.

- o Pros: As explained by RRC1 in its submission to the Board:

“Paragraph (d) is based on Model Rule 3.8(d) but clarifies that the requirement of a prosecutor’s timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law. In response to a July 22, 2010 letter from the Los Angeles Public Defender, the Board of Governors decided at its July 2010 meeting to solicit comment on whether California should adopt the broader scope of duty provided in Model Rule 3.8(d). During the public comment period that ended August 25, 2010, the Commission received a substantial number of comments from the prosecution bar that uniformly objected to the

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**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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adoption of the Model Rule provision. The commenters all pointed out that Model Rule 3.8(d) conflicted with California statutory law that had been approved with the passage of Proposition 115 in 1991. After considering the arguments of the prosecution bar, which was not represented at the July 23, 2010 RAC meeting where a representative of the L.A. County Public Defender's office made a presentation, the Commission voted at its August 27, 2010 meeting to recommend that the Board restore the previous version of paragraph (d), slightly revised to include a reference to statutory obligations in addition to constitutional obligations."

See also paragraph 7, "Cons" above.

- Cons: See paragraph 7, "Pros," above.
- 9. Recommend adoption of Model Rule 3.8(e), modified to include a reference to "work product protection" in subparagraph (1). (See also Section VIII.B.3 & 4.) A majority of the drafting team favors adoption of the rule as set forth above. A minority of the drafting team opposes adoption of the rule unless modified to accord with RRC1's approach as discussed below.
  - Pros: It is an important public policy to protect the lawyer-client relationship. (Compare proposed Rule 4.2 [2-100].) Subpoenaing a lawyer to present evidence in a criminal matter about a client will necessarily drive a wedge between them and destabilize the relationship. The provision promotes that important policy by permitting such subpoenas only where the information sought is not privileged or work product, the evidence is "essential to the successful completion" of the investigation, and no other "feasible alternatives" exist.
  - Cons: First, California has not had a rule similar to this, but to the knowledge of the drafting team unwarranted subpoenas to attorneys have not posed a significant issue, either in civil or criminal cases. Second, the ability to issue subpoenas to attorneys, and the issues posed by such subpoenas are not unique to prosecutors and do not flow from the special obligations or responsibilities of prosecutors, making this an unusual addition to a rule supposedly unique to prosecutors. Third, , subparagraphs (2) and (3) of Model Rule 3.8(e) create a unworkable standard that would be virtually impossible to satisfy: the information must be "essential" to the investigation and there must be "no other feasible alternative." It seems particularly unusual to impose such a high standard only on prosecutors where (a) the drafting team has not been made aware of any significant problem with prosecutors issuing subpoenas indiscriminately and (b) the subpoenas potentially covered by the rule would be issued to further the public interest in uncovering wrongdoing, for example, by seeking information from an attorney that is not subject to protection under the attorney-client privilege because "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." California Evidence Code Section 956. In light of all of the above, a better approach would be RRC1's proposed Rule 3.8(e), which substituted

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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“essential” with “reasonably necessary”. As RRC1 explained: “It is a difficult, if not impossible, task to decide *ex ante* what evidence will be “essential” to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of ‘evidence reasonably necessary to the successful prosecution’ is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.”

In addition, RRC1 substituted “reasonable” for “feasible”: “in order to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If ‘feasible’ means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If ‘feasible’ means that the alternative is reasonable, the more familiar term “reasonable” should be used.

Second, it is not necessary to include work product protection in the provision because the Rules of Professional Conduct are disciplinary rules that neither establish nor limit evidentiary privileges. (See 6/4/15 OCTC Memo to Commission, rule 3-500, at p. 3.)

10. Recommend adoption of Model Rule 3.8(f), which imposes certain additional duties on a prosecutor with respect to extrajudicial statements, but modify the paragraph to eliminate an imprecise description of duties in Rule 3.6 (Trial Publicity) and limit the prosecutor’s duty to monitoring statements of persons under the prosecutor’s supervision or direction.

- Pros: Extrajudicial statements made by the prosecutor’s subordinates could prove as damaging as a prosecutor’s statements to an accused’s ability to obtain a fair trial. This provision recognizes that and requires that a prosecutor to exercise reasonable care to prevent such statements.
- Cons: A specific provision in this rule is unnecessary. A prosecutor’s statements would be regulated under Rule 3.6 and the prosecutor’s obligation to ensure that subordinates’ conduct conform to those obligations is contained in Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistance).

11. Recommend adoption of Model Rule 3.8(g) and (h), which impose certain obligations on a prosecutor with respect to post-conviction disclosures. This recommendation also includes the recommended adoption of proposed Comments [5], [6], and [7].

- Pros: Paragraph (g) and all of its subparagraphs are identical to Model Rule 3.8(g). The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of “new, credible and material evidence” that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. A majority of the drafting team agrees with the policies underlying these paragraphs and recommend their adoption. A minority of the drafting team agrees with the policies underlying these paragraphs, but recommends adoption

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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of a modified form of paragraphs (g) and (h) that is set forth in Section VIII.E, below.

As to the contention that paragraph (g) presents a trap for an unwary prosecutor, the “new, credible and material” modifier was specifically added to the proposed New York rule on which paragraph (g) is based to create a higher standard for triggering the prosecutor’s duty of disclosure. Similar to the language in paragraph (d), the language used in paragraph (g) encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.

- Cons: Model Rule 3.8(g)(1) should not be included because it is unclear how a prosecutor whose jurisdiction did not obtain the conviction would know if the information is “new, credible and material creating a reasonable likelihood....” The way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was “new, credible and material information creating a reasonable doubt,” the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority *any* information he or she receives.

12. Recommend adoption of Comment [1] concerning paragraph (c).

- Pros: Proposed Comment [1] is based on Model Rule 3.8, cmt. [2], with several changes, and provides guidance on how paragraph (c) should be applied. As to the changes, the first two sentences to the Model Rule comment have been deleted because they explain language in the Model Rule that has been deleted because the language conflicts with California law. (See paragraph 6, above.) In addition, the Model Rule exception governing an accused who is appearing *in propria persona* with approval of the tribunal has been moved into the black letter rule. (*Id.*) Finally, the last sentence has been added to clarify the application of paragraph (c), i.e., that while a complete waiver of an unrepresented accused right to a preliminary hearing is prohibited under California, a reasonable waiver *of time* for a preliminary hearing is not.
- Cons: None identified.

13. Recommend adoption of proposed comment [2] only if paragraph (d), ALT 1, is approved by the Commission. (See paragraph 7, above. See also Concept Rejected, B.5, below.)

- Pros: Several jurisdictions have interpreted the language of Model Rule 3.8(d) to be coextensive with *Brady*. (See paragraph 7, “Cons,” above & note 17.) If the recommended adoption of Model Rule 3.8(d) is intended to broaden a prosecutor’s disclosure obligations beyond those required by *Brady*, proposed Comment [2] is a necessary clarification to ensure the provision is so interpreted.
- Cons: If the intent of paragraph (d), ALT 1, is to broaden a prosecutor’s disclosure duties, that concept belongs in the black letter of the rule itself.

14. Recommend adoption of proposed Comment [2A] only if paragraph (d), ALT 2, is approved by the Commission. (See paragraph 8, above. See also Concept Rejected,

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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B.5, below.)

- Pros: Proposed Comment [2A], which is based on an RRC1 comment drafted in light of public comment from California prosecutors, clarifies that subsequent changes in the law will not be applied retroactively in establishing a prosecutor's disclosure duties at the time an alleged failure to disclose might have occurred. It is intended to prevent discipline being imposed in a situation in which a prosecutor followed the law at the time the case was pending, but the law was subsequently changed and applied retroactively during post-conviction proceedings. Although the new law or court decision would apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively.
  - Cons: None identified.
15. Recommend adoption of Comment [3], which is derived from MR 3.8, cmt. [5], as modified, to clarify the application of paragraph (f).
- Pros: The comment provides guidance for applying paragraph (f) by noting the paragraph merely supplements but does not supersede a lawyer's general duties under Rule 3.6 [5-120] with respect to extrajudicial statements, and clarifies that paragraph (f) is not intended to prohibit statements by a prosecutor that comply with paragraphs (b) or (c) of Rule 3.6 [two provisions that identify with specificity extrajudicial statements that a lawyer is permitted to make]. The second and third sentences of the Model Rule have been deleted because they provide a vague description of the Rule 3.6 duties.
  - Cons: None identified.
16. Recommend adoption of Comment [4], which is derived from MR 3.8, cmt. [6], as modified, to further clarify the application of paragraph (f).
- Pros: Proposed comment [4] clarifies that prosecutors are subject to Model Rule 5.1 and 5.3, which impose a duty to supervise subordinate lawyers and nonlawyers, respectively. The last sentence provides guidance on how to comply with the duty to exercise reasonable care to prevent extrajudicial statements of subordinates.
  - Cons: None identified.
17. Recommend adoption of Comment [5], which is identical to MR 3.8, cmt. [7], concerning paragraph (g).
- Pros: Provides guidance on how paragraph (g) should be interpreted and how a prosecutor can comply with its requirements. In particular, it provides a valuable cross-reference to the prosecutor's duties under Rules 4.2 and 4.3 when communicating with a represented and unrepresented person, respectively.
  - Cons: None identified.
18. Recommend adoption of Comment [6], which is derived from MR 3.8, cmt. [8], as modified, concerning paragraph (h).
- Pros: Provides guidance and examples on how a prosecutor can comply with his or duties under paragraph (g). The second sentence of MR 3.8, cmt. [8] has been

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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revised to delete the term “necessary” on the following grounds: (1) if the steps are “necessary,” then the described steps should be in the blackletter of the rule; (2) the use of the word “necessary” with the conjunction “and” suggests that a prosecutor must at a minimum take each step, not all of which would be necessary under every set of circumstances, i.e., a prosecutor should not have to take every listed step under every possible set of circumstances; (3) using the word “necessary” with the permissive “may” is confusing. A majority of the drafting team takes the foregoing position regarding the word “necessary.”

- Cons: The word “necessary” should be retained because a wrongful conviction raises questions about the integrity of the justice system, diminishing confidence in the system. A strong message concerning the “necessary” steps to be taken to remedy such consequences is warranted. A minority of the drafting team takes the foregoing position regarding the word “necessary.”
19. Recommend adoption of Comment [7], which is derived from MR 3.8, cmt. [9], modified to substitute “reasonable” for “good faith.”
- Pros: Substituting “reasonable” for “made in good faith” clarifies that an objective standard must be satisfied to conclude a prosecutor did not violate the rule by determining the new evidence did not trigger paragraphs (g) and (h), even if later proven wrong.
  - Cons: None identified.
20. [Insert Concept Here]
- Pros: [Insert Pro Here]
  - Cons: [Insert Con Here]

### **B. Concepts Rejected (Pros and Cons):**

1. Include a provision that would specify that reckless or grossly negligent failures to comply with the rule’s proscriptions will support a finding of a violation.
  - Pros: A criminal prosecutor’s duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *U.S. v. Hanna* (9th Cir. 1995) 55 Fed.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable. (See 4/20/15 OCTC Memo, at p. 4; section VI.B.3, above.)
  - Cons: The appropriate standard is “knowledge,” not reckless or gross negligence. (See section VIII.A.3, concerning paragraph (a), above.) It is not

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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accurate that a prosecutor has a “duty to search for exculpatory evidence.” Rather, the prosecutor has a duty not to ignore evidence that has been revealed during the criminal investigation. A knowledge standard, which recognizes that knowledge can be inferred from the surrounding circumstances, provides the requisite incentive for a prosecutor to pursue an evidentiary thread that could lead to discovery of exculpatory or mitigating evidence.

2. Include a statement in paragraph (d), ALT 1, that the disclosure obligations in paragraph (d) are not limited to those disclosures required by an accused’s constitutional rights.
  - Pros: This explanatory provision that delimits the intended scope of proposed paragraph (d), ALT1, which has been included as proposed Comment [2], belongs in the blackletter.
  - Cons: A provision that explains the intended scope of a blackletter rule provision is more appropriately placed in a comment.
3. Include in paragraph (e) RRC1’s proposed addition of a “civil proceeding related to a civil matter.”
  - Pros: Habeas corpus proceedings are technically civil proceedings that are related to criminal matters.
  - Cons: A habeas proceeding often involves an allegation of ineffective assistance of counsel that would typically require the necessity to take testimony of the defense lawyer in the criminal proceeding. The defense lawyer may not always be willing to cooperate and a subpoena will be necessary. A rule of professional conduct should not interfere with that process.
4. Substitute RRC1’s proposed paragraphs (e)(2) & (3) for Model Rule 3.8(e)(2) and (3).
  - Pros: See Section VIII.A.9, “Cons,” above.
  - Cons: See Section VIII.A.9, “Pros,” above.
5. Include as a second sentence in proposed comment [2] or [2A] (whichever the Commission approves) the second sentence in RRC1’s comment [2A]: “The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor’s failure to disclose the evidence or information to the defense.”
  - Pros: Clarifies that subsequent events will not excuse a failure of the prosecutor to satisfy the prosecutor’s express obligations under paragraph (d) to disclose exculpatory or mitigating evidence or information.
  - Cons: The sentence, which is not found in either the Model Rule or the rules of any of the jurisdictions that have adopted the Model Rule language, is unnecessary surplusage. Whichever version of rule 3.8(d) is adopted, the Rule itself will impose obligations that must be complied with and will provide no basis for subsequent events excusing a failure to comply with those obligations.
6. Include Model Rule 3.8, cmts. [3] and [4], concerning paragraphs (d) and (e), respectively.
  - Pros: The comments provide guidance on applying the referenced paragraphs.
  - Cons: The comments simply restate the black letter rule.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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7. Include RRC1's proposed Comment [6A].<sup>18</sup>
  - Pros: The comment does not explain how to interpret or comply with the Rule but merely refers to other duties under Rule 3.3 (Candor To Tribunal).
  - Cons: The comment provides an important reminder that by withholding exculpatory or mitigating evidence and information, a prosecutor is violating his or her duty to the tribunal.
8. Include RRC1's proposed Comment [10].<sup>19</sup>
  - Pros: The comment belongs in a conflict of interest rule, not in a rule concerning a *current* prosecutor's duties.
  - Cons: None identified.
9. [Insert Concept Here]
  - Pros: [Insert Pro Here]
  - Cons: [Insert Con Here]

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. Paragraph (a) substitutes a knowledge standard for current rule 5-110's standard of "knows or should know". (See sections VIII.A.4 and VIII.B.1, above.)
2. Paragraph (b) is a new provision in the Rules. (See section VIII.A.5, above.)
3. Paragraph (c) is a new provision in the Rules. (See section VIII.A.6, above.)
4. Paragraph (d) is a new provision in the Rules, but arguably does not change a prosecutor's duties under current law. (See sections VIII.A.7 and VI.B.3 & 4 [OCTC comments], above.)
5. Paragraph (e) is a new provision in the Rules. (See section VIII.A.9, above.)
6. Paragraph (f) is a new provision in the Rules. (See section VIII.A.10, above.)
7. Paragraphs (g) and (h) are new provisions in the Rules. (See section VIII.A.11, above.)
8. [Insert summary of substantive change]

### **D. Non-Substantive Changes to the Current Rule:**

1. Change of rule number is a non-substantive change.
2. Change of rule formatting is a non-substantive change.

<sup>18</sup> The proposed comment provided:

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

<sup>19</sup> The proposed comment provided:

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16].

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

**Lead Drafter: Rothschild**

**Co-Drafters: Cardona, Clopton, Peters, Tuft**

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3. Although a new provision, paragraph (d) is arguably a non-substantive change under current California law. (See sections VIII.A.7 and VI.B.3 & 4 [OCTC comments], above.)
4. [Insert summary of Non-Substantive Changes]

### **E. Alternatives Considered:**

1. Instead of proposed paragraphs (g) and (h), which are based on Model Rule 3.8(g) and (h), an alternative was proposed.<sup>20</sup>

<sup>20</sup> The alternative provision would provide:

- (g) Upon receipt of evidence that, if true, would show that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose the evidence to the court or the chief prosecutor for the jurisdiction where the conviction occurred;
  - (2) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and the evidence appears on its face to be new and credible and to create a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
    - (i) promptly disclose that evidence to an appropriate court or other authority and to the defendant unless a court authorizes delay in disclosure to the defendant, or
    - (ii) promptly undertake further investigation or review, or make reasonable efforts to cause an investigation promptly to occur. If the prosecutor determines, after prompt investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in paragraph (g)(2)(i).

If the prosecutor determines that the evidence constitutes clear and convincing evidence establishing that the defendant was convicted of an offense that the defendant did not commit, the prosecutor shall notify the court of that determination and either move to vacate the conviction or request that the court appoint counsel for an unrepresented indigent defendant to assist the defendant in pursuing efforts to remedy the conviction.

### **Comment**

\* \* \*

[#] The requirement for disclosure set forth in paragraph (g)(1) applies even if the prosecutor receiving the information did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction.

**DRAFTING TEAM REPORT AND RECOMMENDATION:  
RULE 3.8 [5-110]**

**Lead Drafter: Rothschild**  
**Co-Drafters: Cardona, Clopton, Peters, Tuft**  
**Meeting Date: September 25-26, 2015**

**IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

1. Whether to recommend to the Board the adoption of ALT 1 [Model Rule 3.8(d)] or ALT 2 [RRC1 proposed Rule 3.8(d)], and recommend adoption of Comment [2] or [2A]. (See sections VIII.A.7, 8, 13 & 14, above.)

**X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

**Rothschild**

- [Date]: Email Comment

**Cardona**

- [Date]: Email Comment

**Clopton**

- [Date]: Email Comment

**Peters**

- [Date]: Email Comment

**Tuft**

- [Date]: Email Comment

**XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 3.8 in the form attached to this report and recommendation.

[#] Consistent with the objectives of Rules 4.2 and 4.3, disclosure pursuant to paragraph (g)(2)(i) to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new and credible evidence that creates a reasonable possibility that a defendant did not commit an offense regardless of whether that evidence could previously have been discovered by the defense.

[#] A prosecutor's reasonable independent judgment that evidence is not of such nature as to trigger the obligations of paragraph (g), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous.

**DRAFTING TEAM REPORT AND RECOMMENDATION:  
RULE 3.8 [5-110]**

**Lead Drafter: Rothschild**  
**Co-Drafters: Cardona, Clopton, Peters, Tuft**  
**Meeting Date: September 25-26, 2015**

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed rule 3.8 in the form attached to this Report and Recommendation.

**XII. DISSENTING POSITION(S)**

[Insert dissents, if any.]

**XIII. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)





# THE STATE BAR OF CALIFORNIA

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Date: September 2, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for September 2015 meeting

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  - D. Rule 4-200: Fees for Legal Services [Model Rules 1.5]
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  - G. Rule 2-400: Prohibited Discriminatory Conduct in a Law Practice
- III. Closing Comment

### I.

#### OPENING COMMENT

The following comments address the rules to be considered at the Commission's September 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

**II.**  
**POINTS FOR CONSIDERATION**

**[TEXT OMITTED]**

**B. Rule 5-110 and Model Rule 3.8 [Special Responsibilities of a Prosecutor]**

Please see OCTC's April 20, 2015 Comment on this subject.

Additionally, the language in rule 5-110 should be retained as part of a new or revised rule regarding the responsibilities of a prosecutor. This rule prohibits a government attorney from instituting criminal charges when the government lawyer knows or should know that the charges are not supported by probable cause.

An amendment to the rule prohibiting a prosecutor from seeking to obtain a waiver of pretrial rights from an unrepresented accused unless and until a tribunal has approved the appearance of the accused in *propria persona* may infringe on the trial court's prerogatives and discretion. The better practice may be to allow the trial court to decide in specific instances whether the prosecutor acted improperly. If a prosecutor's conduct is determined to be improper by the court, OCTC and the State Bar Court can then determine whether the conduct warrants discipline.

OCTC supports adopting language similar to Model Rule 3.8(d) regarding the duty to make timely disclosure to the defense of all evidence and information known to the prosecutor that tends to negate the guilt of the accused or otherwise mitigates the offense.

Any amendment imposing a duty on a prosecutor regarding the issuance of a subpoena for the purpose of obtaining the testimony of a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding in order to present evidence about the lawyer's past or present client should take into consideration Evidence Code, section 956, regarding legal services sought to enable the commission of a crime or fraud.

A rule requiring a prosecutor to exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6 (see Model Rule 3.8(f)) should take into consideration the fact that law enforcement agencies are often independent of the prosecutor's office. In such circumstances, simply advising the independent agency of the prohibition may meet a reasonable care standard.

OCTC supports a rule that requires a prosecutor to disclose exculpatory evidence after a conviction when the prosecutor knows of new, credible, and material evidence, creating a likelihood that the defendant did not commit the crime for which he or she was convicted. In California, a prosecutor has a duty to disclose exculpatory evidence after a conviction, and OCTC can discipline attorneys for a violation of that duty pursuant to Business and Professions Code, section 6106. (*In the Matter of Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at 178.)

**[TEXT OMITTED]**

### **III.**

#### **CLOSING COMMENT**

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.



**Initial Public Comments**  
**[Rule 3.8 – Special Responsibilities of a Prosecutor]**

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-041	California Attorneys for Criminal Justice (CACJ)	Yes	3.8	Recommends adoption of MR 3.8 and consideration of the rule on a fast track process.	
2015-038b	California Public Defenders Association	Yes	3.8	Recommends adoption of Model Rule 3.8 requiring prosecutors to disclose exculpatory or mitigating evidence. Believes accelerating its submission to the Court is appropriate.	
2015-040a	Innocence Project (4-10-15)	Yes	3.8	Recommends immediate adoption of a rule similar to MR 3.8. Similar rules have been adopted in every jurisdiction and are the key to protecting constitutional rights of criminal defendants. A rule will clearly delineate the special responsibilities of prosecutors and promote public trust in the justice system.	
2015-040b	Innocence Project (4-23-15)	Yes	3.8	Brady creates “practical cognitive challenges” for prosecutors attempting to determine whether information is material. A rule requiring disclosure of all potentially exculpatory evidence is necessary to eliminate the confusion created by Brady.	
2015-040c	Innocence Project (5-22-15)	Yes	3.8	Detailed a study conducted by The Registry of Exonerations preliminarily showing that 39% of exonerations were due to misconduct in failing to disclose exculpatory evidence. Recommend expedited consideration of the rule because believe further delay will result in additional harm.	
2015-046b	Los Angeles County Public Defender	Yes	3.8	Believe current rules 5-110 and 5-220 need to require additional efforts from prosecutors to avoid erroneous convictions. Recommends adoption of MR 3.8 to promote that goal.	

**Initial Public Comments**  
**[Rule 3.8 – Special Responsibilities of a Prosecutor]**

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-043	Green, Bruce Yaroshefsky, Ellen	No	3.8	Support adoption of a rule similar to MR 3.8 to address post-conviction disclosure obligations of prosecutors facing knowledge of wrongful conviction. The rule will provide a clear standard for remedial steps a prosecutor must take and will promote the training of prosecutors regarding their obligations.	

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

**From:** Ignacio Hernandez, California Attorneys for Criminal Justice

**Date:** March 26, 2015

**Re:** 5-110 [3.8]

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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 believes 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.

**From:** Garrick Byers, California Public Defenders Association

**Date:** June 16, 2015

**Re:** 5-110 [3.8]

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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 Rule 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.

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

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.

**From:** Laurie L. Levenson, Barry C. Scheck, Innocence Project

**Date:** April 10, 2015

**Re:** 5-110 [3.8]

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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."<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> ABA Model Rules of Professional Conduct Rule 3.8.

<sup>2</sup> See *The Cases: DNA Exonerated Profiles*, INNOCENCE PROJECT, [http://www.innocenceproject.org/cases-falseimprisonment/front-page#c10=published&b\\_start=0&c4=Exonerated+by+DNA](http://www.innocenceproject.org/cases-falseimprisonment/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

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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.<sup>3</sup>

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 prosecutorial misconduct in state and federal appellate rulings as well as media reports and trial

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

<sup>3</sup> 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](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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h_authcheckdam.pdf).

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court decisions.<sup>4</sup> The Veritas findings revealed that in one-third of the cases involving findings of misconduct, the misconduct was committed by a “repeat offender.”<sup>5</sup> 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.<sup>6</sup>

In a now famous dissent from a 2013 U.S. Court of Appeals decision,<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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

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<sup>4</sup> 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>.

<sup>5</sup> 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](http://veritasinitiative.scu.edu/wp-content/uploads/2012/12/PMC_2012_6_11-12-12.pdf).

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

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

<sup>8</sup> *Id.* at 631.

<sup>9</sup> *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](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad150401.pdf) (last visited Apr. 7, 2015).

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likely that the implementation of provisions (g) and (h) of Rule 3.8 will provide an opportunity to prove his or her innocence.

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.<sup>10</sup> Mr. Anthony is one of the 152 men and women who have been wrongfully convicted by California courts.<sup>11</sup>

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.<sup>12</sup> 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."<sup>13</sup>

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.

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<sup>10</sup> 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>.

<sup>11</sup> *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).

<sup>12</sup> Email from Vanessa Meterko, Res. Analyst, Innocence Project, to Innocence Project staff (Mar. 18, 2015, 17:44 EST) (on file with author).

<sup>13</sup> *Olsen* at 632.

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

**From:** Laurie L. Levenson, Barry C. Scheck, Innocence Project

**Date:** April 23, 2015

**Re:** 5-110 [3.8]

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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<sup>1</sup> 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*.<sup>2</sup>

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*.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>6</sup> according to the following criteria:

- 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.

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<sup>1</sup> 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/>.

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.* at 11-13.

<sup>4</sup> *Id.* at 14.

<sup>5</sup> *Id.* at 21.

<sup>6</sup> 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.

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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.”<sup>7</sup> 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.<sup>8</sup>

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.”<sup>9</sup>

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.<sup>10</sup>

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.

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<sup>7</sup> Ridolfi et al., *supra* note 1 at 10.

<sup>8</sup> *Id.*

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

<sup>10</sup> See *United States v. Olsen*, 737 F.3d 625 (9th Cir. Dec. 10, 2013) (ord. denying reh’g *en banc*), (C.J. Kozinski, dissenting).

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

**From:** Laurie L. Levenson, Barry C. Scheck, Innocence Project

**Date:** May 22, 2015

**Re:** 5-110 [3.8]

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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."<sup>1</sup>

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 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.<sup>2</sup>

Indeed, in California the average delay between sentencing and disposition of habeas claims in capital cases is 17.2 years.<sup>3</sup> Many of these inmates have meritorious claims; in fact, 60% of all

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

<sup>2</sup> *Id.* at \*9.

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

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death row inmates whose habeas claims were finally evaluated by the federal courts were granted some type of relief.<sup>4</sup>

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.<sup>5</sup> Of these 1,603 wrongful convictions, 329 cases were exonerated by DNA evidence that directly established their innocence. There have been 11 DNA exonerations<sup>6</sup> in California and an additional 142 exonerations based on other evidence of innocence.<sup>7</sup> 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.<sup>8</sup>

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.
- 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.<sup>9</sup>

United States Supreme Court justices,<sup>10</sup> 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

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

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

<sup>6</sup> *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, [http://www.innocenceproject.org/cases-falseimprisonment/front-page#c10=published&b\\_start=0&c4=Exonerated+by+DNA&c5=CA](http://www.innocenceproject.org/cases-falseimprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=CA) (last visited May 20, 2105).

<sup>7</sup> *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).

<sup>8</sup> 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,

<sup>9</sup> 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).

<sup>10</sup> *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.").

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

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.<sup>11</sup>

### 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.

As the Working Group noted in its findings, the process of soliciting and studying input from interested stakeholders will “require additional time beyond that<sup>12</sup> typically allocated to study” an ethical rule.<sup>13</sup> 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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<sup>11</sup> 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).

<sup>12</sup> 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).

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

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

**From:** Ronald L. Brown, Los Angeles County Public Defender

**Date:** June 12, 2015

**Re:** 5-110 [3.8]

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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 wrongfully 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.
- 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

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

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.

**From:** Bruce Green, Ellen Yaroshefsky, Fordham University School of Law,  
Cardozo School of Law

**Date:** June 18, 2015

**Re:** 5-110 [3.8]

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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.<sup>1</sup>

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<sup>2</sup> These recommendations led the New York State Bar Association to recommend professional conduct rules concerning prosecutors' postconviction disclosure obligations that were drafted with significant input from state and federal prosecutors and representatives of the criminal defense bar.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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<sup>1</sup> 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/professionalresponsibility/2015/May/Conference/Materials/a\\_formal\\_opinion\\_09\\_454.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/professionalresponsibility/2015/May/Conference/Materials/a_formal_opinion_09_454.authcheckdam.pdf).

<sup>2</sup> 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).

<sup>3</sup> 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>

<sup>4</sup> *Id.*

<sup>5</sup> 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

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

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.<sup>6</sup>

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."<sup>7</sup>

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 of 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.<sup>8</sup>

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 postconviction 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.

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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](http://www.americanbar.org/content/dam/aba/events/criminal_justice/Forensics_Ethics_Saltzburg.authcheckdam.pdf)

<sup>6</sup> *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/professionalresponsibility/mrpc3\\_8\\_g\\_h.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professionalresponsibility/mrpc3_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.

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

<sup>8</sup> *In re Petition for the Adoption of A mended Tennessee Rules of Professional Conduct*, Comments of the Tennessee District Attorneys General Conference, No. M2009-00979-SC-RLI-RL at 2 (Tenn. Nov. 30, 2009).

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3.8

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.

**CURRENT CALIFORNIA RULE 5-110**  
**“Performing the Duty of Member in Government Service”**

***I. Text of Current Rule:***

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

***II. Background/Purpose:***

Rule 5-110 originated as rule 7-102 and was adopted effective January 1, 1975. Rule 7-102, titled “Performing the Duty of Member of the State Bar in Government Service,” was based on ABA DR 7-103. Rule 7-102, as adopted, provided:

A member of the State Bar in government service shall not institute or cause to be instituted criminal charges when he knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, he shall promptly so advise the court in which the criminal matter is pending.

In 1986, the State Bar Committee on Professional Responsibility and Conduct (“COPRAC”) rules subcommittee studied ABA Model Rule 3.8 but did not recommend it for adoption by the Board. COPRAC noted that California’s rule 7-102 already addressed the concept in paragraph (a) of Model Rule 3.8, which prohibits a prosecutor from prosecuting an accused without probable cause. It was also COPRAC’s position that the remainder of Model Rule 3.8 addressed the legal and procedural relationship between a prosecutor and the accused. Because this relationship is subject to constant refinement as a result of legislation and constitutional decisions which serve to define it, COPRAC did not recommend adoption of these other provisions.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-102 was renumbered 5-110 and became operative on May 27, 1989. No substantive amendments were recommended at that time. The Commission also considered ABA Model Rule 3.8 and again determined that rule 5-110 was preferable to the ABA Model Rule, as it was much broader (the conduct of a member who knows that criminal charges are not supported by probable cause, as well as the conduct of a member who should know such charges are not supported by probable cause, are encompassed by the proposed rule). In addition, rule 5-110 required a member to advise the court of the lack of probable cause after the case was filed, whereas Model Rule 3.8(a) speaks only of prosecuting a charge, which is ambiguous as to a prosecutor’s duty if evidence

subsequently shows that probable cause no longer exists. The amendments made in 1989 conformed the revised rule to the definition of a “member” in rule 1-100 and removed references to gender.

A member ~~of the State Bar~~ in government service shall not institute or cause to be instituted criminal charges when ~~he~~ the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a the member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, ~~he~~ the member shall promptly so advise the court in which the criminal matter is pending.

(See enclosure 2, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

The 1987 amendment was the last revision of rule 5-110.

### **III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):**

A. In a September 27, 2001 memorandum to the first Commission, OCTC provided the following comment regarding rule 5-110:

None.

B. In an April 15, 2015 memorandum to the Commission, OCTC provided the following comment regarding a possible new rule on the conduct of criminal prosecutors:

#### **New Rule Regulating Criminal Prosecutors**

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.

OCTC currently regulates and disciplines criminal prosecutors under the Business and Professions Code, sections 6068(a), 6103, 6106, and 6131, as well as, Rules of Professional Conduct, rules 2-100, 3-110, 5-110, 5-120, 5-200, 5-220, 5-300, 5-310, and 5-320. (See *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537; *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620; and *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597.) However, a new rule clarifying and reaffirming the duties and responsibilities governing criminal prosecutors in California may be appropriate and should be explored.

OCTC recommends that any new rule specifically address whether reckless or grossly negligent failures to comply with the rule will support a violation. A criminal prosecutor's duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *U.S. v. Hanna* (9th Cir. 1995) 55 Fed.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable.

If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a Brady violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.\* (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d\_, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

[\*Footnote in OCTC comment: The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.]

C. In a \_\_\_\_\_, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 5-110:

(Note: OCTC is expected to provide new comments on this rule prior to the August Commission meeting. These comments will be distributed to the drafting team when they are received from OCTC.)

#### **IV. Potential Deficiencies in the Current Rule:**

A. See above April 20, 2015 input from OCTC, above.

B. The current rule does not address a prosecutor's duty to ensure a defendant has been apprised of the defendant's right to counsel and provided a reasonable

opportunity to do so. A substantial majority of jurisdictions impose a duty to make reasonable efforts to assure that an accused has been advised of the right to counsel. (Cf. Model Rule 3.8(b).)

C. The current rule does not address a prosecutor's duty in seeking to obtain from an unrepresented accused a waiver of important pretrial rights. A substantial majority of jurisdictions prohibit such conduct. (Cf. Model Rule 3.8(c).)

D. Of particular interest to the Study Group are special duties of prosecutors to disclose exculpatory evidence and information, which is governed by Model Rule 3.8, specifically paragraph (d), which provides that a prosecutor shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

As noted below, (see Section VI.B.), 40 jurisdictions have adopted the Model Rule language verbatim, with the remaining jurisdictions adopting the same standard for disclosing exculpatory evidence, i.e., that it "tends to" exculpate the accused rather than requiring that the evidence or information be material. Thus, every jurisdiction except California has adopted the Model Rule's express standard that triggers a prosecutor's duty to reveal exculpatory evidence. Thus, in each jurisdiction, the specific duty imposed exceeds what is required by the Constitution. (Compare *Brady v. Maryland* (1963) 373 U.S. 83, 87 ["[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added)].)

Given the Commission's charge to "consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives," (Charter, Principle 2), California not following the other jurisdictions would appear not to be a deficiency in the current rule. As noted in its the April 20, 2015 comment, OCTC explained that there are other disciplinary standards that can be used aside from rule 5-220 that are more rigorous than the obligations imposed by Constitutional law (see above section III.B. See also sections VI.A.VI.E, below, regarding state adoptions of ABA Model Rule 3.8.)

However, as noted in the submissions from the Innocence Project, discipline operates retroactively to impose sanctions on a prosecutor who has violated his or her ethical duties. However, the concern addressed by the prospectively-oriented lower-threshold "tends to" standard in Model Rule 3.8 and its

counterparts in all other jurisdictions is the prevention of the injustice of incarceration or even death to persons innocent of the crime of which they have been accused. (See, e.g., May 22, 2015 Letter from Innocence Project to Commission, at page 1 [“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.”])

A question confronting the Study Group initially and the Commission as a whole is whether the broader 3.8(d) standard fits within rules of professional conduct intended as disciplinary standards (Charter, Principle 1) where such a standard arguably advances other principles set forth in the Commission’s Charter (e.g., Standard 1 [“[P]romote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public”]; Standard 3 [Commission should “focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California’s rules and the rules used by a preponderance of the states ....”]; and Standard 4 [“[F]acilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties”].)

E. The current rule does not address a prosecutor’s duty in subpoenaing a lawyer in a grand jury proceeding or a criminal proceeding to present evidence about a past or present client. A substantial majority of jurisdictions prohibit this conduct unless certain requirements are satisfied. (Cf. Model Rule 3.8(e); see also section VI.C, below.)

F. The current rules generally address trial publicity in rule 5-120. Other jurisdictions have similar rules but also impose additional duties on prosecutors to exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under the general trial publicity rule. (Cf. Model Rule 3.8(f).)

G. Also of particular interest to the Study Group is the fact that the current rule does not address a prosecutor’s duty when the prosecutor has knowledge of evidence demonstrating the innocence of a defendant who has been convicted. This the subject of Model Rule 3.8(g) and (h), which at present has been adopted in some form in 13 jurisdictions, with the provisions being studied in another six jurisdictions, including California. (See Section VI.D, below.) California has no corresponding provision that imposes an affirmative duty on a prosecutor to promptly disclose evidence creating a reasonable likelihood that a convicted defendant did not commit the crime of which the defendant was convicted when the prosecutor knows of such “new, credible and material” evidence. Nor does

California impose a duty to remedy a wrongful conviction when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit.. The Study Group initially and the Commission as a whole will need to decide whether to recommend these provisions of Model Rule 3.8 as well.

## **V. California Context:**

A. See section III.B, above, for California statutes and disciplinary case law concerning violations of professional conduct by prosecutors.

B. See Reports and Recommendations of the California Commission for the Fair Administration of Justice, posted at: <http://www.ccfaj.org/rr-pros-official.html> [Last visited June 16, 2015]:

- Official Report and Recommendations on Reporting Misconduct (October 18, 2007).
- Official Report and Recommendations on Prosecutorial Duty To Disclose Exculpatory Evidence (March 6, 2008).

C. Regarding statistics cited by the Innocence Project, see 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), posted at: <http://www.nacdl.org/discoveryreform/materialindifference/>

## **VI. Approach In Other Jurisdictions (National Backdrop):**

Because the focus of the Study Group for whom this Rule Assignment Memo is being prepared is Model Rule 3.8, primarily paragraphs (d), (g) and (h), subparts A through E of this Section address Model Rule 3.8 variations among the jurisdictions.

A. Model Rule 3.8(a), (b), (c) & (f) Adoptions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor," revised May 6, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf)

- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.<sup>1</sup> Seventeen jurisdictions have adopted a slightly modified

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<sup>1</sup> The twenty-eight jurisdictions are: Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming.

version of Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).<sup>2</sup> Six states have adopted a version of the rule that is substantially different from Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).<sup>3</sup>

B. Model Rule 3.8(d) Adoptions. Model Rule 3.8(d), which requires a prosecutor to timely disclose to the defense evidence or information that the prosecutor knows “tends to negate the guilt of the accused or mitigate the offense,” is of special concern to the Study Group and so is treated separately in this subpart. Attached as Attachment 1 is a document in redline showing changes to paragraph (d) in those jurisdictions that have diverged from the Model Rule.

- Forty jurisdictions have adopted Model Rule 3.8, paragraph (d) verbatim.<sup>4</sup> Eight jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.<sup>5</sup> Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule 3.8(d).<sup>6</sup> Only California lacks a counterpart to Model

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<sup>2</sup> The seventeen jurisdictions are: Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, North Dakota, Ohio, Tennessee, Texas, and Vermont.

<sup>3</sup> The six jurisdictions are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

<sup>4</sup> The forty jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming

<sup>5</sup> The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

<sup>6</sup> The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

Rule 3.8(d). Attached as Attachment 1 is a document showing the variations in the ten jurisdictions that have diverged from the Model Rule.

C. Model Rule 3.8(e) Adoptions. Model Rule 3.8(e) prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless three enumerated conditions are satisfied. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(e),” revised May 6, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_e.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf) [Last visited 6/17/15]

- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.<sup>7</sup> Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).<sup>8</sup> Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule.<sup>9</sup> California also has not adopted any version of paragraph (e).

D. Model Rule 3.8(g) & (h) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(g) (h),” revised May 6, 2015, is available at::

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf)

- Two states have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.<sup>10</sup> Eleven states have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).<sup>11</sup> Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h).<sup>12</sup>

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<sup>7</sup> The twenty-four jurisdictions are: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

<sup>8</sup> The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

<sup>9</sup> The seventeen jurisdictions are: Alabama, Arkansas, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Michigan, Mississippi, New York, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

<sup>10</sup> The two states are: Idaho and West Virginia.

<sup>11</sup> The eleven states are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

<sup>12</sup> The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

In addition, attached as Attachment 2 is a collection of redline/strikeout versions of state rules showing the rule text variations in the adoption of Model Rule 3.8, paragraphs (g) and (h).

E. A Scope Comparison of Current Rule 5-110 and Model Rule 3.8. The regulatory scope of rule 5-110 and Model Rule 3.8 is not coextensive. The table below identifies the primary differences between the rules as to the kinds of conduct regulated (an “X” in the column for Model Rule 3.8 or rule 5-110 indicates that the identified standard of conduct is addressed in the respective rule).

<b>Standard of Conduct</b>	<b>Model Rule 3.8</b>	<b>California Rule 5-110</b>
refrain from charges not supported by probable cause	X [3.8(a)]	X [5-110]
advise the court if a prosecutor becomes aware that charges are not supported by probable cause	X [3.8(d)]	X [5-110]
assure that the right to counsel has been conveyed	X [3.8(b)]	
refrain from obtaining a waiver of rights from an unrepresented accused	X [3.8(c)]	
make timely disclosure of evidence that negates guilt	X [3.8(d)]	(not found in Rule 5-110 but see Rule 5-220 “Suppression of Evidence”)
with limited exceptions, not subpoena a lawyer to present evidence about a past or present client	X [3.8(e)]	
refrain from extrajudicial statements and prevent others from doing so	X [3.8(f)]	(not found in Rule 5-110 but see Rule 5-120 “Trial Publicity”)
take certain steps to respond to new evidence creating a reasonable likelihood that a convicted person did not commit the relevant offense	X [3.8(g)]	
in stated circumstances, seek to remedy a wrongful conviction	X [3.8(h)]	

## **VII. Public Comment Received by the First Commission:**

The clean text of proposed new Rule 3.8 drafted by the first Commission and adopted by the Board to replace rule 5-110 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 5-110, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-110 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

## **VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

Because the focus of the Study Group for whom this Rule Assignment Memo is being prepared is Model Rule 3.8, primarily paragraphs (d), (g) and (h), the issues identified below relate primarily to the possible adoption of a version of Model Rule 3.8 in California.

- (1) Whether to recommend the adoption of a provision similar to Model Rule 3.8(a) in place of current rule 5-110, but to revise the Model Rule paragraph to clarify that a prosecutor must "refrain from *commencing or* prosecuting a charge that the prosecutor knows is not supported by probable cause," (emphasis

added), so as to conform to current rule 5-110 and clarify that the prohibition applies not only to filing of charges but also to the continued prosecution of charges when probable cause no longer exists.

(2) Related to (1), whether current rule 5-110 (counterpart to Model Rule 3.8(a)) should be amended to specifically address whether reckless or grossly negligent failures to comply with the rule will support a violation (see above section III.B regarding OCTC's recommendation).

(3) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(b), which requires a prosecutor to make reasonable efforts to assure the accused has been advised of the right to, and procedure for obtaining counsel.

(4) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(c), which requires that a prosecutor not seek to obtain from an unrepresented accused a waiver of important pretrial rights.

(a) The first Commission added a qualifier: "unless the tribunal has approved the appearance of the accused *in propria persona*."

(5) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(d), which requires that a prosecutor "make timely disclosure to the defense of all evidence and information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense ...." (See Section IV.D, above, regarding the policies underlying this provision and Section VI.B, above, regarding the universal adoption of a version of Model Rule 3.8(d) in other jurisdictions.

(a) Please refer to the document, attached hereto as **Attachment 1**, entitled "Model Rule 3.8(d) – State Variations" for other concepts that might be appropriate for implementation in California, e.g., New York's explicit requirement that the disclosure be made to "counsel for the defendant" or "to a defendant who has no counsel."

(6) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(e), which prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding unless certain requirements are satisfied. (See Section VI.C, above, regarding state adoptions of this provision.)

(a) The first Commission, in response to public comment, included a "civil proceeding related to a criminal matter" in addition to grand jury and other criminal proceedings.

(7) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(f), which requires that a prosecutor exercise reasonable care to prevent "investigators, law enforcement personnel, employees or other

persons assisting” the prosecutor in a criminal case from making extrajudicial statements that the prosecutor is prohibited from making.

(a) In response to public comment, the first Commission specified that the identified persons must be “persons under the supervision or direction of the prosecutor.”

(8) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(g), which requires that a prosecutor make certain disclosures or, under certain described circumstances, undertake further investigation when the “prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (See Section IV.G, above.)

(a) Please refer to the document, attached hereto as **Attachment 2** for other concepts that might be appropriate for implementation in California.

(9) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.8(g), which requires that a prosecutor seek to remedy a conviction when the prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense the defendant did not commit. (See Section IV.G, above.)

(a) Please refer to the document, attached hereto as Attachment 2 for other concepts that might be appropriate for implementation in California.

## **IX. Research Resources:**

- Business & Professions sections 6068(a), 6103, 6106, and 6131
- In the Matter of Field (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171
- Price v. State Bar (1982) 30 Cal.3d 537 [179 Cal.Rptr. 914]
- Sanders v. Hallinan (N.Dist., CA) 2005 WL 61491
- Guillory v. Superior Court (2003) 31 Cal.4th 168 [1 Cal.Rptr.3d 879]
- People v. Arroyo (2014) 171 Cal.Rptr.3d 104 (Review granted and opinion superseded by People V. Arroyo (2014) 174 Cal.Rptr.3d 296.)
- [State Bar Formal Op. No. 1989-106](#)