The following materials are included for Proposed Rule 3.8:

- Proposed Rule 3.8 (as proposed and amended at the September 2015 meeting – Draft 3.4)

- Redline comparison of Proposed Rule 3.8 (Draft 3.4) to ABA Model Rule 3.8

- Report and Recommendation on Proposed Rule 3.8 previously distributed for the September 2015 meeting

- California District Attorney Association Letter dated October 1, 2015

Rule 3.8 [5-110] 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 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;

(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 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.

(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.

[(i) A prosecutor who, in exercising reasonable independent judgment, determines that evidence does not come within the scope of paragraphs (g) and (h) and takes no action, does not violate this Rule even if the prosecutor's determination is later found to have been in error.]

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.

[2] 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.

[3] **[ALT1 – 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.

[ALT2 – 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.

[4] 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).

[5] 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.

[6] 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. 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. (See Rules 4.2 and 4.3.)

[7] 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.

[8] 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.

Rule 3.8 [5-110] 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~~ 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;

(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) ~~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 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.

[(i) A prosecutor who, in exercising reasonable independent judgment, determines that evidence does not come within the scope of paragraphs (g) and (h) and takes no action, does not violate this Rule even if the prosecutor's determination is later found to have been in error.]

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~~right to counsel and ~~silence.~~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.

[3] **[ALT1 – 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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the obligation and not with respect to subsequent case law that is determined to apply retroactively.

~~[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 client-lawyer relationship.~~

[~~5~~4] 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~~5] ~~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 appropriate cautions to law- enforcement personnel and other relevant individuals.

[~~7~~6] 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~~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. (See Rules 4.2 and 4.3.)

[~~8~~7] 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.

[~~9~~8] 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.

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:

(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

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.

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

Lead Drafter: Rothschild
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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;

(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.

[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.

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[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.

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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

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;

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(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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(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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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.~~

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[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] 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 client-lawyer relationship.~~

[~~5~~3] 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~~4] ~~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

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

[~~7~~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.

[~~8~~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. ~~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.

[~~9~~7] 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.

- **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

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.

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.[1] (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.)

[1] 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
Meeting Date: September 25-26, 2015

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.

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

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

- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.[2] Seventeen jurisdictions have adopted a slightly modified version of Model Rule 3.8,

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

paragraphs (a), (b), (c), (d), and (f).[3] 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).[4]

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

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

[3] 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.

[4] The six states are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

[5] 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

[6] The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

[7] 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:

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 [Last visited 6/17/15]

- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.[8] Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).[9] Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule."[10] 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

- Two states have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.[11] Eleven states have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).[12] Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h)."[13]

(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.

[8] 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.

[9] The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

[10] 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.

[11] The two states are: Idaho and West Virginia.

[12] The eleven states are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

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

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

[13] The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

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 VIIIB1, 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;

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.[14] (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not

[14] 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.

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.[15]

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,[16] or coextensive with *Brady*.[17]

[15] 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.")

[16] 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

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[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).

[17] 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, Kellog-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.")

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.
   - 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

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

"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

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,

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

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

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.

7. Include RRC1's proposed Comment [6A].[18]
   - 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].[19]
   - 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.

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[18] 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].

[19] 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].

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.[20]

[20] 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)

CDAA
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October 1, 2015

The Honorable Lee Edmon, Chair
Mr. Jeffrey Bleich, Co-Vice-Chair
Mr. Dean Zipser, Co-Vice-Chair
Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

RE: Proposed Revisions of Rules of Professional Conduct
Proposed Rule 3.8(d) – SUPPORT – Alt. 2, with modifications;
OPPOSE – Alt. 1, and Fast Track

Dear Justice Edmon, Mr. Bleich, and Mr. Zipser:

The California District Attorneys Association (CDAA) respectfully opposes the adoption of ABA Model Rule 3.8(d) and its placement on an expedited schedule that bypasses periods for public comment and public hearing afforded the other proposed Rules of Professional Conduct.

CDAA is the statewide organization of California prosecutors. It is a professional organization that has been in existence for more than 40 years, and has more than 2,700 members, including elected and appointed District Attorneys, the Attorney General of California, City Attorneys principally engaged in the prosecution of criminal cases, and the deputy attorneys employed by these officials. The Association presents its views on matters of concern to prosecutors before various bodies, including the Legislature, the Governor's office, the courts through amicus curiae briefs, and the State Bar.

The adoption of ABA Model Rule 3.8(d) presents a matter of great concern to California prosecutors. In fact, in 2010, prosecutors first appeared before the Board of Trustees and opposed the adoption of ABA Model Rule 3.8(d), resulting in the Board's recommendation of much of the language presented in Alt. 2, which apparently never made it to the Supreme Court before the deadline. CDAA continues to oppose the ABA Model Rule and supports most of the language in Alt. 2. For these reasons, CDAA opposes any expedited process that does not allow prosecutors adequate time to address the issues raised by the proponents of ABA Model Rule 3.8(d) and to answer any questions the Commission may have.

For now, and based upon the time constraints facing CDAA, we are unable to provide comprehensive input on proposed Rule 3.8(d). However, we would like to thank the Commission for agreeing to postpone its decision on Rule 3.8(d), and offer the following for the Commission's consideration.

PROPOSED RULE 3.8(D) [SPECIAL DUTIES OF A PROSECUTOR]

Rule 3.8(d) deals with the ethical obligation of prosecutors to make known to the defense evidence that is favorable to the defendant. The version originally proposed for California linked the prosecutor's obligations to the constitution and relevant case law. Our organization has embraced this proposal since its inception in 2009.

According to the Bar's invitation for comment in July 2010, the Bar received a letter from the Los Angeles County Public Defender's Office, which prompted the Bar to put forward a change in Rule 3.8(d). The Bar then solicited comment on whether California should adopt a version of Rule 3.8(d) that mirrors the ABA model rule. Following a presentation by prosecutors to the Board of Trustees in 2010 opposing ABA Model Rule 3.8(d), the Board recommended what is now largely the language in Alt. 2.

Upon the Second Rules Revision Commission being tasked with a comprehensive study of the Rules of Professional Conduct, the assigned study group has proposed two alternatives for Rule 3.8(d): Alternative 1 – ABA Model Rule 3.8(d) [Alt.1] and Alternative 2, which links prosecutors' discovery obligations to well-established rules set by the constitution and case law [Alt. 2]. The alternatives are shown below.

ABA Model Rule 3.8(d) [Alt. 1]	**Cal Bar Proposed Rule 3.8(d) [Alt. 2]**
The prosecutor in a criminal case 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;	The prosecutor in a criminal case shall: … (d) 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;

A. The Language in Alt. 1 is Not Tied to Any Clear Standards, Lends Itself to Arbitrary Results, and Conflicts with the State Discovery Statute

The question of the scope of a prosecutor's discovery obligations underlies almost every opinion involving discovery issues. It is a constant source of litigation despite being tethered to case law and statutory rules. Alt. 1 removes even that tether.

For example, there is a general case law consensus that, for constitutional purposes, discovery should be provided to the defense in sufficient time to allow the defense to make effective use of the evidence at trial. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 941; *United States v. Houston* (9th Cir. 2011) 648 F.3d 806, 813; *United States v. Higgins* (7th Cir. 1996) 75 F.3d 332, 335.) Moreover, the High Court has specifically refrained from requiring disclosure of certain types of discovery (e.g., impeachment or evidence bearing on an affirmative defense) before entering into a plea bargain. (*United States v. Ruiz* (2002) 536 U.S. 622, 633.) The California Discovery Statute also lays out specific time frames (e.g., 30 days before trial) for the disclosure of designated kinds of evidence, including exculpatory evidence. (Pen. Code, §§ 1054.1, 1054.7.)

Under Alt. 1, the requirement that disclosure be "timely" is left open to interpretation and creates a vague standard for prosecutors attempting to navigate ethically through their criminal prosecutions. The model rule on its face does not specify when disclosure must be made, except to say that it must be timely. ABA Formal Opinion 09-454, issued July 8, 2009, interprets Model Rule 3.8(d) [Alt.1] and construes "timely" to mean, "as soon as reasonably practical." To the extent that "as soon as reasonably practical" means something earlier than disclosure made "in time for meaningful use at trial," the model rule is inconsistent with the rules developed by the courts in their attempts to balance the practical concerns of the criminal justice system with the need to ensure fair trials.

Similarly, as the language of [Alt.1] indicates and Opinion 09-454 makes crystal clear, the model rule has no materiality limitation, but covers any evidence that "tends to negate the guilt of the accused or mitigate the offense." The term is not defined in case law. However, under Opinion 09-454, it has been defined in a manner that defies practicality. (See Opinion 09-454, p. 5 ["Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."].)

To what extent must the prosecutor, who is held to be in possession of evidence known to all persons on the prosecution team including investigating officers (see *Youngblood v. West Virginia* (2006) 547 U.S. 867, 870; *Kyles v. Whitley* (1995) 514 U.S. 419, 438), go searching for everything that may "tend to negate guilt," even if it is not material to the outcome of the case, for fear of being disciplined by the State Bar? What does this

include? Where does the search end? (See *United States v. Bagley* (1985) 473 U.S. 667, 675 fn. 7 ["a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments"].)

Whether or not some evidence is mitigating may be a matter of judgment, and may depend on the defense theory of the case. Under the *case law*, evidence may not be deemed "favorable" just because a defense counsel can concoct some possible but far-fetched theory under which the undisclosed evidence might help the defense or hurt the prosecution. (See e.g., *Harris v. Kuba* (7th Cir. 2007) 486 F.3d 1010, 1016 ["*Brady* does not require that police officers or prosecutors explore multiple potential inferences to discern whether evidence that is not favorable to a defendant could become favorable"].) But Alt. 1 is not bounded by case law.

Because Alt. 1, unlike Alt. 2, is untethered to case law, it threatens to effectively undermine the careful balancing of interests developed by the High Court in *Ruiz* and (1) could "force the Government to abandon its 'general practice' of not 'disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses'"; (2) "require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages" or (3) "lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number-90% or more-of federal criminal cases." (*Ruiz, supra,* at 632.)

The greater scope of information to be disclosed, and the earlier timing for the disclosure required by Alt. 1 *also* conflicts with California statutory law. "The practical effect—disclosing evidence to avoid disciplinary sanctions—could effectively expand the scope of discovery currently required of prosecutors in criminal cases." (*In re Riek* (2013) 350 Wis.2d 684, 697.) For 25 years, California criminal discovery has been governed by a balanced scheme based in constitutional and statutory provisions. California Constitution Article I, section 30(c), provides that criminal discovery shall be reciprocal, as provided by statutes enacted by the Legislature, and the People through the initiative process. The statutory provisions set out in Penal Code §§ 1054-1054.10 were passed through the initiative process and subsequent legislation that complied with the limitations set forth in the initiative itself.

Significantly, section 1054 specifically states that "***no discovery shall occur*** except as required by express statutory provisions or as required by the U.S. Constitution." (Emphasis added; see also *In re Littlefield* (1993) 5 Cal.4th 122, 129; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) The only substantive criminal discovery mandated

by the U.S. Constitution is *Brady* discovery. (*Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 62.) The U.S. Constitution does not require any other criminal discovery, either in a general sense, or as to evidence that may be favorable to the accused, but is insignificant. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258; *United States v. Ruiz* (2002) 536 U.S. 622, 628; *United States v. Bagley* (1985) 473 U.S. 667, 676, fn. 7.)

To the extent the model rule may require the prosecutor to make greater disclosures than the California statutes or the U.S. Constitution require, and/or make disclosures at an earlier time (since "as soon as reasonably practical" may well be earlier than 30 days before trial), the model rule is directly at odds with the specific provisions of the California criminal discovery statutes. This amounts to the State Bar, through the mechanism of an ethics rule, changing the discovery responsibilities of the prosecutor when the California Constitution decrees that discovery shall be governed by statute.

B. Disclosure of Sentencing Evidence to "The Tribunal" May Be Contraindicated

Both alternatives of Rule 3.8(d) require the prosecutor to disclose all unprivileged mitigating evidence on sentencing to both the defense and "the tribunal." With this requirement, the prosecutor would be subject to discipline if he/she had given the information to the defense, but not the court. The defense may have an objection to the prosecutor providing evidence directly to the court that the prosecutor is afraid might be considered mitigating, but the defense does not want to present, because it undermines the defense theory of the case. In such situations, a prosecutor will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with this rule.

C. Obligation of Supervisory Prosecutors

As interpreted in Opinion 09-454, Rule 3.8(d) makes it an ethical requirement for supervising prosecutors to ensure that subordinate prosecutors are adequately trained regarding their obligations, and that internal office procedures facilitate such compliance. While it is generally consistent with *Brady* case law to say that the government has an institutional *Brady* obligation (see *Giglio v. United States* (1970) 405 U.S. 150), on pain of sanctions that may be suffered in the criminal litigation (i.e., continuance, prohibiting testimony of a witness, dismissal of the case, etc.), it is both questionable and problematic whether, or to what extent, this can be translated into a personal ethical breach by a supervisory or management prosecutor. In particular, the issue of what supervisory layer the responsibility lies with creates a fundamental dilemma in such an application of the rule. Who does the Bar discipline if training and/or discovery procedures are deemed inadequate – the immediate supervisor of the regular prosecuting attorney, a division chief, the office training manager, the chief deputy, or the elected District Attorney? All of the above? Would the Bar be justified disciplining an elected District Attorney, the

elected Attorney General, and/or that official's chief deputy, for the failure of an office to have a *Brady* procedure in place?

As applied to managing or elected prosecutors, insofar as the State Bar serves as an administrative arm of the judiciary (State Bar Rule 1.2; see also Bus. and Prof. Code § 6008), such application of the rule also raises serious separation of powers concerns.

D. ABA Model Rule 3.8(d) Has Not Been Adopted by All Other States

Contrary to the suggestions of the proponents of Alt. 1, Model Rule 3.8(d) has not been universally adopted by the states. In addition to California, other states have also either declined to adopt ABA Model Rule 3.8(d) as written, adopted variations of the rule, or limited its application. As pointed out in *In re Kline* (D.C. 2015) 113 A.3d 202, 211, while the Supreme Courts of Louisiana and North Dakota have interpreted the disclosure requirements of prosecutors more broadly, there are courts that have decided that it would be confusing to prosecutors if they were required to comply with two different disclosure standards.

For example, in *In re Riek* (2013) 350 Wis.2d 684, the Wisconsin Supreme Court rejected an ethics rule that would require disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome as demanded by ABA Opinion 09-454. The *Riek* court observed that Opinion 09-454 "has not been universally adopted" and "has received some pointed criticism." (*Id.* at 695-696 [and citing to Kirsten M. Schimpff, Rule 3.8, "The Jencks Act, and How the ABA Created a Conflict Between Ethics and The Law on Prosecutorial Disclosure," 61 *Am. U. L. Rev.* 1729, 1756 (August 2012)].)

The *Riek* court adopted an interpretation of their state version of Rule 3.8(d) that was "consistent with the requirements of *Brady* and its progeny" and pointed to several other jurisdictions that had done the same. (*Riek, supra,* at 696 [citing to *Disciplinary Counsel v. Kellogg–Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *In re Attorney C.* (Colo. 2002) 47 P.3d 1167].)

The *Riek* court reasoned that adopting a more expansive interpretation would "impose inconsistent disclosure obligations on prosecutors" and that such "[d]isparate standards [would be] likely to generate confusion and could too easily devolve into a trap for the unwary." (*Riek, supra,* at 696.)

The *Riek* court concluded that the broader interpretation invited "the use of the ethics rule as a tactical weapon in litigation" and rhetorically asked: "What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint?" (*Id.* at 697.)

In sum, the *Riek* court opined that "[p]rosecutors should not be subjected to disciplinary proceedings for complying with legal disclosure obligations" and construed the ethical mandate of the Wisconsin 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." (*Id.* at 697.)

That *Riek* ruling is consistent with Alt. 2, but not Alt. 1. (See also N.C. Rules Prof'l Conduct 3.8(d) (2012) [requiring timely disclosure of "all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions"].)

The Ohio Supreme Court similarly declined to construe its former Disciplinary Rule 7-103(B), which essentially mirrors its current rule and ABA Model Rule 3.8(d), as requiring a greater scope of disclosure than Brady and Ohio statutory law required. The court held 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[.]" (*Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St .3d 415; see also District of Columbia Rule 3.8(e) [providing that the prosecutor in a criminal case shall not "[I]ntentionally 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 ...."], emphasis added; Comment 1 to District of Columbia Rule 3.8(e) [clarifying that the rule is "not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure."]; New Jersey Rule 3.8(d) [requiring timely disclosure to the defense of all "evidence," rather than "information"–as standard (as ABA opinion 09-454 makes clear) not as broad as the ABA model rule].)

E. Disclosure of "All Information" May Unnecessarily Jeopardize the Safety of Witnesses, the Integrity of Investigations, and Privileged Information

Prosecutors often have other important responsibilities that must be taken into consideration when determining what information must be disclosed to the defense during a criminal prosecution. Often, these considerations must be balanced against the due process rights of the defendant. Where the information in possession of the prosecutor is immaterial to the outcome of the case and therefore does not implicate the due process rights of the defendant, these other considerations may very well weigh in favor of withholding the information. Prosecutors should have the flexibility to balance these concerns without the fear of losing their licenses. Such considerations include the safety of witnesses, the integrity of ongoing investigations, and privileges associated with the information.

The necessity for this flexibility was summed up in *Wallace v. City of Los Angeles* (1993) 12 Cal.App.4th 1385:

> As our society becomes increasingly violent in its daily human interactions, more and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families will be subjected to violence by the very criminal defendants against whom they will give testimony. Thus, the old phrase "violence begets violence" takes on a new meaning. The threat to the safety of these witnesses is very real, especially when the defendant has gang or drug trafficking affiliations. Unfortunately, the lack of safeguards for such witnesses is also very real.
>
> Society reaps enormous benefits when a witness's testimony succeeds in getting a criminal off the streets and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness's family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide the information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.
>
> If the result which we reach in the case before us brings about a greater level of official concern and action promotive of witness safety, and an appropriate devotion of public resources to that end, the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority.

(*Wallace, supra,* at 1405-1406; overruled on other grounds in *Adkins v. State* (1996) 50 Cal.App.4th 1802; see also Evid. Code § 1042(c) [allowing evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the narcotics offense charged, to be admitted on the issue of reasonable cause to make an arrest or search *without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied,* based upon evidence produced in open court, out of the presence of the jury, that such information discretion does not require such disclosure].)

Alt.1 fails to account for these situation and arguably requires disclosure of not just "evidence," but all favorable "information," whether material or not, at the risk of discipline sanctions, unless a protective order is obtained. This would require the

unnecessary expenditure of an incredible amount of resources to have the judiciary involved in reviewing every piece of marginally favorable yet immaterial information known by the prosecution in order for prosecutors to comply with their ethical requirements.

CONCLUSION

The discussion above is not meant to suggest that California prosecutors routinely have been, or will be, anything less than generous in making extensive early discovery disclosure. It is likely that most California prosecutors will voluntarily provide broad discovery in the initial stages of the case, if for no other reason than to promote early case disposition. (See California Rule of Court 10.953(a).)

ABA Model Rule 38d [Alt. 1], on its face and as interpreted in ABA Opinion 09-454, is not only is at odds with California criminal discovery law as defined by the California Constitution and California statutes, but sets prosecutors adrift without guidance. Alt. 2, though not without its downsides, is the more reasonable approach of the two alternatives.

Sincerely yours,

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President