

## **Comment Letters Received by Interested Parties on Proposed Rule 3.8**

California District Attorneys Association (09-25-15)

California District Attorneys Association (10-01-15)

California Public Defenders Association and California Attorneys for Criminal Justice (10-08-15)

Innocence Project (10-09-15)

Sara Theiss (10-08-15)

Los Angeles District Attorneys Comment (10-14-15)

San Francisco Public Defender (10-16-15)

Riverside County Public Defender (10-19-15)

Contra Costa County Public Defender (10-20-15)

Orange County Public Defender (10-20-15)

State Public Defender & CA Appellate Project-SF (10-22-15)

Alameda County Public Defender (10-22-15)



**OFFICERS**

**President**

Patrick J. McGrath  
*Yuba County*

**First Vice President**

Stephen M. Wagstaffe  
*San Mateo County*

**Second Vice President**

Todd D. Riebe  
*Amador County*

**Secretary-Treasurer**

Birgit Fladager  
*Stanislaus County*

**Sergeant-At-Arms**

Nancy O'Malley  
*Alameda County*

**Immediate Past President**

Gilbert G. Otero  
*Imperial County*

**DIRECTORS**

J. Kirk Andrus  
*Siskiyou County*

Lisa S. Green  
*Kern County*

David Harris  
*Stanislaus County*

Vicki Hightower  
*Riverside County*

Candice Hooper  
*San Benito County*

Janice L. Maurizi  
*Ventura County*

Deborah Owen  
*Imperial County*

Jeff Reisig  
*Yolo County*

Jim Tanizaki  
*Orange County*

Tom Toller  
*Shasta County*

Ryan Wagner  
*Contra Costa County*

**CEO**

Mark Zahner

September 25, 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

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

The California District Attorneys Association (CDA A) represents the 58 elected district attorneys of the state, and as we do, we are very much interested in participating in the process of commenting on any proposed revisions to the Rules of Professional Conduct. I am disappointed that CDA A has not been included in the group receiving email notification of Commission meetings and agendas, and I request that I be included in future notifications. My email address is [mzahner@cdaa.org](mailto:mzahner@cdaa.org).

I am attending the Commission meeting today in Los Angeles, but because we were not given sufficient notice of the meeting and agenda, I respectfully request that no action be taken today on the Report and Recommendation on Rule 5-110 [Performing the Duty of Members in Government Service] (Including ABA Model Rule 3.8 [Special Responsibilities of a Prosecutor]) and that the matter be addressed again at the next public meeting of the Commission. Prosecutors would like the opportunity to prepare cogent and meaningful comments to the discussion.

Thank you for your consideration.

Very Truly Yours,

Mark Zahner  
Chief Executive Officer

MZ:lbb



CALIFORNIA  
DISTRICT  
ATTORNEYS  
ASSOCIATION

921 11th Street, Suite 300  
Sacramento, CA 95814  
916.443.2017  
[www.cdaa.org](http://www.cdaa.org)



October 1, 2015

**OFFICERS**

**President**

Patrick J. McGrath  
*Yuba County*

**First Vice President**

Stephen M. Wagstaffe  
*San Mateo County*

**Second Vice President**

Todd D. Riebe  
*Amador County*

**Secretary-Treasurer**

Birgit Fladager  
*Stanislaus County*

**Sergeant-At-Arms**

Nancy O'Malley  
*Alameda County*

**Immediate Past President**

Gilbert G. Otero  
*Imperial County*

**DIRECTORS**

J. Kirk Andrus  
*Siskiyou County*

Lisa S. Green  
*Kern County*

David Harris  
*Stanislaus County*

Vicki Hightower  
*Riverside County*

Candice Hooper  
*San Benito County*

Janice L. Maurizi  
*Ventura County*

Deborah Owen  
*Imperial County*

Jeff Reisig  
*Yolo County*

Jim Tanizaki  
*Orange County*

Tom Toller  
*Shasta County*

Ryan Wagner  
*Contra Costa County*

**CEO**

Mark Zahner

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 (CDA A) 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.

CDA A 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. CDA A continues to oppose the ABA Model Rule and supports most of the language in Alt. 2. For these reasons, CDA A 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.

<b>ABA Model Rule 3.8(d) [Alt. 1]</b>	<b>Cal Bar Proposed Rule 3.8(d) [Alt. 2]</b>
The prosecutor in a criminal case shall: ... (d) <i>make</i> 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

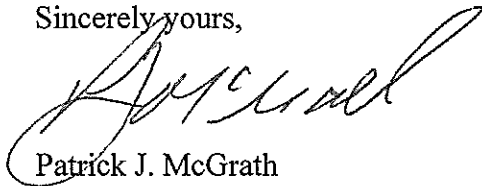
unnecessary expenditure of an incredible amount of resources to have the judiciary involved in reviewing every piece of marginally favorable yet immaterial information known by the prosecution in order for prosecutors to comply with their ethical requirements.

## 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,



Patrick J. McGrath  
President



# CPDA

California Public Defenders Association  
10324 Placer Lane  
Sacramento, CA 95827  
Phone: (916) 362-1690 x 8  
Fax: (916) 362-3346  
e-mail: cpda@cpda.org

*A Statewide Association of Public Defenders and Criminal Defense Counsel*

*President*  
Michael Ogul  
Santa Clara County

*1st Vice President*  
Charles Denton  
Alameda County

*2nd Vice President*  
Traci Owens  
Santa Clara County

*Secretary/Treasurer*  
Robin Lipetzky  
Contra Costa County

*Assist. Secretary/Treasurer*  
Brendon Woods  
Alameda County

*Board of Directors*

Laura Arnold, <sup>17</sup>  
Riverside County

Oscar Bobrow, <sup>17</sup>  
Solano County

Arthur Bowie, <sup>17</sup>  
Sacramento County

Jennifer Friedman, <sup>17</sup>  
Los Angeles County

Susan Leff, <sup>17</sup> Associate  
San Francisco County

Graciela Martinez, <sup>17</sup>  
Los Angeles County

Michael McMahon, <sup>17</sup>  
Ventura County

Kathleen Pozzi, <sup>17</sup>  
Sonoma County

Susan Israel, <sup>16</sup>  
San Bernardino County

Martin Schwarz, <sup>16</sup>  
Orange County

Bart Sheela, <sup>16</sup>  
San Diego County

Arlene Speiser, <sup>16</sup>  
Orange County

Jack Weedon, <sup>16</sup>  
Los Angeles County

**Past Presidents**

Richard Erwin, 1966 / James Hooley, 1969  
Sheldon Portman, 1970/Wilbur Littlefield, 1971  
William Higham, 1972 / Paul Ligda, 1974  
Farris Salamy, 1975 / Robert Nicco, 1976  
David A. Kidney, 1977 / Frank Williams, 1978  
John Cleary, 1979 / Glen Mowrer, 1980  
Fred Herro, 1981 / Stuart Rappaport, 1982  
Jeff Brown, 1983 / James Crowder, 1984  
Laurel Rest, 1985 / Charles James, 1986,  
Allan Kleinkopf, 1987 / Michael McMahon, 1988  
Tito Gonzales, 1989 / Norwood Nedom, 1990  
Margaret Scully, 1991 / Kenneth Clayman 1992  
James McWilliams, 1993 / Terry Davis, 1994  
Jack Weedon, 1995 / Michael Arkelian, 1996  
Mark Arnold, 1997 / Hank Hall, 1998  
Diane A. Bellas, 1999 / Gary Windom, 2000  
Michael P. Judge, 2001 / Joe Spaeth, 2002  
Louis Haffner, 2003 / Paulino Duran, 2004  
Gary Mandinach, 2005 / Barry Melton, 2006  
Kathleen Cannon, 2007 / Leslie McMillan, 2008  
Bart Sheela, 2009 / Jose Varela, 2010  
Margo George, 2011 / Juliana Humphrey, 2012  
Winston A. Peters, 2013, Garrick Byers, 2014

October 8, 2015

RE: CPDA and CACJ Support of Accelerated Implementation of Proposed Rule 3.8(d)

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  
Lauren McCurdy, Senior Administrative Specialist  
Office of Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Dear Justice Edmon, Mr. Bleich, and Mr. Zipser, and Ms. McCurdy,

The California Public Defenders Association (“CPDA”) and California Attorneys for Criminal Justice (“CACJ”) strongly support the prompt adoption of Rule 3.8(d) by the California Commission for the Revision of the Rules of Professional Conduct.

1. Interest of CPDA

CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes almost 4,000 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 30 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. We regularly provide continuing legal education in all areas of criminal practice, including legal ethics.

CPDA has been granted leave to appear in over 50 California cases that have resulted in published opinions. (See e.g., *People v. Mosley* (2015) 60 Cal.4th 1044; *People v. Beltran* (2013) 56 Cal.4th 935; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112; *Galindo v. Superior Court* (2010) 50 Cal.4th 1; *People v. Nguyen* (2009) 46 Cal.4th 1007; *Chambers v. Superior Court* (2007) 42 Cal.4th 673; *People v. Warner* (2006) 39 Cal.4th 548; *San Francisco v. Cobra Solutions Inc.*, (2006) 38 Cal.4th 839.) CPDA has also served as amicus curiae in the United States Supreme

Court and other federal courts. (See, e.g., *Monge v. California* (1998) 524 U.S. 721; *Vasquez v. Rackauckas* (9<sup>th</sup> Cir. 2013) 734 F.3d 1035.)

Members of the CPDA Legislative Committee and CPDA's legislative advocate attend Senate and Assembly committee meetings on a weekly basis, and take positions on hundreds of bills in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In sum, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of justice and procedure to serve this Commission.

## 2. Statement of Interest of CACJ

CACJ is a non-profit association of criminal defense attorneys and allies with approximately 2,000 members. CACJ is also the California affiliate of the National Criminal Defense Lawyers Association ("NACDL"). CACJ's attorney members practice in all counties in California and have extensive personal experience with questionable behavior of prosecutors. CACJ has witnessed a wide range of activities from passive evasion of discovery rules, to outright refusal to abide by longstanding constitutional and statutory requirements. Since CACJ's establishment 43 years ago, our community of lawyers has fought tirelessly for the delivery of justice in our criminal courts. Every day our members stand side-by-side with Californians who are facing criminal charges. There is nothing more offensive and disturbing than when a public servant vested with the authority to pursue criminal prosecution on behalf of "The People of California" chooses to succumb to gamesmanship over justice.

Not only do our members speak up in courthouses up and down California fighting to ensure the constitutional rights of people, but our members have weighed in on countless cases before the Court of Appeals and California Supreme Court to ensure appropriate application of constitutional protections. Through our Amicus Committee, CACJ has also submitted dozens of briefs in landmark and critical cases in California.

Through our Legislative Committee, we have worked tirelessly in the State Capitol to preserve and advance due process rights, and have sponsored numerous new laws over the years

## 3. The Gravity of the Ethical Problem at Issue

As decried by former Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals, "There is an epidemic of *Brady* violations abroad in the land." (*U.S. v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626, Kozinski, J., dissenting from denial of rehearing en banc.) The constitutional and statutory rights of the accused to be provided with all exculpatory information are of vital importance to CPDA, CACJ, and all criminal defense attorneys in California, as well as the judiciary. CPDA and its members are all too familiar with the epidemic of ethical failures famously identified by Judge Kozinski. Therefore, CPDA and CACJ have a strong interest in the prompt adoption of Rule 3.8 as proposed by the Commission. Simply put, it is time for the State of California to join every other state in this country in adopting Rule 3.8. In support of that goal, we respectfully provide this response to the Opposition submitted by the California District Attorneys Association (CDAA) on October 1, 2015.

#### 4. CDAAs Unwillingness to Accept The Existing Duty of Prosecutors to Disclose All Exculpatory Information Regardless of Whether or Not it is Material

The crux of CDAAs opposition is their complaint that Rule 3.8 will require the timely disclosure of all exculpatory evidence and information known to the prosecutor whether or not that information is “material”. While CDAAs articulates its opposition most forcefully in regards to Alternative 1 as proposed to this Commission, the substance of their opposition applies equally to Alternative 2. Their opposition reflects a fundamental misunderstanding of a prosecutor’s disclosure obligations under existing California law, a misunderstanding that cries out for adoption of Rule 3.8 because it is painfully apparent that nothing else will motivate reluctant prosecutors to honor their duties to disclose all exculpatory evidence and information in their possession. To be sure, not all prosecutors fail to honor this duty. But as called out by Judge Kozinski, and manifested by CDAAs refusal to accept that prosecutors must disclose all exculpatory information *regardless of materiality*, the problem is widespread.

The CDAAs complains that “the model rule has no materiality limitation, but covers any evidence that ‘tends to negate the guilt of the accused or mitigate the offense.’” (CDAAs, p. 3.) While CDAAs implies that prosecutors would enjoy a materiality limitation if Rule 3.8 were tethered to “statutory and constitutional obligations, as interpreted by relevant case law” (see Alternative 2), CDAAs fails to recognize that the California Supreme Court has expressly held that prosecutors have the statutory duty under Penal Code section 1054.1, subdivision (e), to disclose *all* exculpatory evidence, **whether or not that evidence is material**. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901. Accord, *People v. Lewis* (September 9, 2015) \_\_\_ Cal.App.4th \_\_\_, 192 Cal.Rptr.3d 460, 469, pet. for review pending, Supreme Court No. S229371, where the Court of Appeal recognized the prosecution’s statutory duty to disclose exculpatory evidence even where it is not material, lamented the prosecution’s failure to do so, and found “it worth reminding prosecutors that their criminal-discovery obligations are broader than their *Brady* obligations and that the People’s interest is not to win convictions but instead to ensure that justice is done.”)

#### 5. The Need for Rule 3.8

The failure of CDAAs to appreciate or acknowledge the existing obligations of prosecutors to disclose all exculpatory evidence and information regardless of whether they consider that evidence to be material demonstrates the gravity of the problem and the need for Rule 3.8. As observed by the Court of Appeal in *Curl v. Superior Court* (2006) 140 Cal.App.4th 310, 324, disapproved on other grounds in *Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901, “[t]he regrettable reality is that sometimes prosecutors do not turn over materials to which the defense is entitled.” A part of this reality is that although California law requires prosecutors to disclose all exculpatory evidence and information regardless of materiality, prosecutors will not suffer any sanctions for failing to honor this duty unless the evidence is not only favorable to the defense but material to the outcome of the case. If the reviewing court concludes that the exculpatory information was not material, the conviction will not be reversed. And if the conviction is not reversed, Business and Professions Code section 6086.7 will not mandate referral of the prosecutor to the State Bar despite the prosecutor’s willful failure to disclose

exculpatory information in his possession. For example, although the court of appeal recently condemned the prosecutor's failure to disclose exculpatory information in *People v. Lewis*, *supra*, 192 Cal.Rptr.3d 460, the conviction was not reversed, and there will be no bar referral and no sanctions against the DA, because the information was not material. Thus, the bottom line is that prosecutors have little incentive to honor their duty to disclose all exculpatory information and evidence unless they consider that information to be material. Perhaps that is part of the reason for the widespread violations of this duty.

Since Penal Code section 1054.1, subdivision (e), and the decision of the California Supreme Court in *Barnett*, *supra*, 50 Cal.4th 890, 901, have failed to motivate more prosecutors to comply with their duty to disclose all exculpatory evidence and information, the choice before this Commission is whether to simply let the crisis of integrity continue or to promulgate a rule that will lead more prosecutors to honor their ethical duty. CPDA and CACJ submit that the choice is clear: California needs the prompt implementation of Rule 3.8 because only then will prosecutors face the possibility of State Bar sanctions for the knowing failure to disclose all exculpatory evidence and information, and as unfortunate as it may be, only that possibility will deter more prosecutors from violating their existing duty to disclose exculpatory evidence and information.

#### 6. There is Nothing Vague About A Prosecutor's Duties Under Rule 3.8(d)

While CDAA insists that “[w]hether or not some evidence is mitigating may be a matter of judgment,” (CDAA, p. 4, par. 1), “exculpatory” evidence and information is well-defined. As reiterated by the California Supreme Court time and time again, it includes anything favorable to the defense, that is, anything that might help the defense or hurt the prosecution. “Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution.” (*People Coddington* (2000) 23 Cal.4th 529, 589, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13. Accord, *In re Sassounian* (1995) 9 Cal.4th 535, 544 [“Evidence is ‘favorable’ if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses.”]; *People v. Morrison* (2004) 34 Cal.4th 698, 714 [“‘Evidence is ‘favorable’ if it hurts the prosecution or helps the defense.’”].)

Further, while CDAA expresses concern that exculpatory “information” is broader than exculpatory “evidence”, it fails to recognize that California law requires disclosure of both exculpatory evidence and exculpatory information. (See, e.g., Chapter 467 of the 2015 Legislature, enacting new Penal Code section 1424.5, concerning the withholding of “relevant or material exculpatory evidence or information” by a prosecutor.) Moreover, not only have all 49 other states in the union, the District of Columbia, and the territories of Guam and Puerto Rico adopted Rule 3.8(d), but 46 of those states have included exculpatory “information” in their disclosure obligations without appearing to have created any problems of interpretation in those jurisdictions. Indeed, it must be recognized that often times the disclosure of exculpatory *information* is a necessary precursor to the ability to present exculpatory *evidence*.

Also misplaced is CDAA's concern over the extent to which a prosecutor must “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? (CDAA, pp. 3-4.) Rule 3.8 is expressly limited to evidence and information that is “known to the prosecutor.” Although a prosecutor’s disclosure duty extends to exculpatory information that is unknown by the particular prosecutor but is in the possession of any prosecution agent (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438, and fn. 11), Rule 3.8 would allow State Bar sanctions only where the individual prosecutor had actual knowledge of the exculpatory information. As specifically observed by ABA Formal Ethics Opinion 09-454:

Rule 3.8(d) requires disclosure only of evidence and information “known to the prosecutor.” Knowledge means “actual knowledge,” which “may be inferred from [the] circumstances.” Although “a lawyer cannot ignore the obvious,” Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors’ legal obligations under other law. Although the rule requires prosecutors to disclose known evidence and information that is favorable to the accused, it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware.

(At p. 15, footnotes omitted.)

Similarly, and contrary to the position taken by CDAA, the “timely disclosure” requirement is not vague. Penal Code section 1054.7 expressly provides that disclosures shall be made at least 30 days before trial. Case law has clarified that the 30-day deadline is an outside limit and disclosures may be required earlier (*Sandeffert v. Superior Court* (1993) 18 Cal.App.4th 672, 677-678). For example, the California Supreme Court and Courts of Appeal have held that discovery may be ordered before the preliminary examination (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 11; *Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1461-1462; *People v. Gutierrez* (2013) 214 Cal.App.4th 343; *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074), and it has been specifically held that exculpatory evidence or information must be disclosed before the preliminary examination (*Gutierrez, supra*, 214 Cal.App.4th 343, 346; *Bridgeforth, supra*, 214 Cal.App.4th 1074, 1087; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, and *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 96). Further, Rule 10.953, California Rules of Court, expressly permits discovery before the preliminary examination—which is long before the CDAA’s asserted limitation that discovery does not need to be provided any earlier than “in time for meaningful use at trial” (CDAA, p. 3, par. 3)—for the specific and laudatory goal of “facilitate[ing] dispositions before the preliminary hearing and at all other stages of the proceedings....” (Rule 10.953, subds. (a), (a)(1).) The “timely disclosure” requirement must be understood in the context of these considerations, and illustrates that it is not vague.

Further, given the expressed encouragement by the California Judicial Council that discovery should be provided before the preliminary examination in order to facilitate early plea dispositions (Rule 10.953, subds. (a), (a)(1), *supra*), CDAA’s complaint that the “timely disclosure” requirement may result in a reduction of cases that are resolved by plea bargaining is inapt.

7. CDAA Complaints About the Duty to Disclose Mitigating Evidence to The Sentencing Tribunal are Refuted by the Terms of Rule 3.8

CDAA complains that a prosecutor “will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with” the requirement to disclose mitigation evidence at sentencing to both the defense and “the tribunal.” (CDAA, p. 5, section B.) However, CDAA’s complaint fails to reference that disclosure is not required “when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” Thus, if the defendant objects to having the prosecutor make the disclosure to the court at sentencing, the prosecutor will not be required to disclose that information to the court where the court sustains the objection, and the prosecutor will not “offend” anyone. Further, on a more fundamental level, the concern stated by CDAA is a non-issue at sentencing because “the defense theory of the case” is an issue on guilt or innocence, not at sentencing. Just as the jury’s consideration of punishment at the penalty phase of a capital case may include mitigating factors that the defense never articulated, any mitigation may benefit the defendant at sentencing, whether or not it is mitigation that the defense presented.

8. Supervisory Prosecutors are Not Subject to Discipline Under Rule 3.8 Unless they Personally Order, Ratify, or Knowingly Fail to Correct Violations of the Disclosure Duties

While CDAA describes ABA Formal Ethics Opinion 09-454 as imposing ethical requirements on supervising prosecutors, neither version of the proposed “Clean” Rule 3.8 states that any supervising or training prosecutor is subject to discipline merely because a line prosecutor violates the Rule.

Further, Ethics Opinion 09-454 expressly describes the duty of supervising or training prosecutors as follows: “supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.” Thus, contrary to the CDAA letter, no supervisor, training manager, chief deputy, or elected District Attorney could be disciplined simply because training procedures were deemed inadequate. (Cf., CDAA, p. 5, section C.)

9. ABA Model Rule 3.8(d) Has Been Adopted by All Other States

The CDAA asserts that “Model Rule 3.8(d) has not been universally adopted by the states.” (CDAA, pp. 6-7, section D.) However, CDAA conspicuously fails to identify a single state or jurisdiction that has *not* adopted Model Rule 3.8(d). Instead, CDAA merely cites to a decision of the Wisconsin Supreme Court, *In re Riek* (2013) 350 Wis.2d 684, 695-696, for the proposition that the ABA Formal Ethics “Opinion 09-454 ‘has not been universally adopted’ and ‘has received some pointed criticism.’” But the “clean” Rule 3.8 proposed by the California Commission for the Revision of the Rules of Professional Conduct is *not* the ABA Formal Ethics Opinion. Instead, it is Rule 3.8. It is not surprising that an ABA ethics opinion may have received some criticism, and this Commission is not being asked to promulgate that ethics

opinion as a Rule of Professional Conduct. Rather, the question before this Commission is whether to adopt Rule 3.8, in either Alternative 1 or Alternative 2. And the fact of the matter is that Wisconsin—like every other state in our nation, the District of Columbia, Guam and Puerto Rico—has adopted Rule 3.8. Indeed, subdivision (f)(1) of Rule 3.8 of the Wisconsin Rules of Professional Conduct presently requires a prosecutor 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; ...

(<http://legis.wisconsin.gov/rsb/scr/5200.pdf> as of October 7, 2015.) This language is identical to Alternative 1 of the Proposed Rule 3.8.

Further, while the Wisconsin Supreme Court in *Riek* rejected an interpretation of Rule 3.8 that would require disclosure of exculpatory information without regard to materiality because materiality is required under Wisconsin law, it bears repeating that existing California law is to the contrary and requires disclosure of exculpatory information even when it is not material. (*Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901.) Thus, unlike the statutory and decisional law in Ohio and Wisconsin, existing California decisional and statutory law is in agreement with ABA Formal Ethics Opinion 09-454, and expressly requires disclosure of exculpatory information whether or not it is material.<sup>1</sup>

#### 10. Adoption of Model Rule 3.8 Will Not Jeopardize the Safety of Witnesses, the Integrity of Investigations, or the Confidentiality of Privileged Information

CDAAs invoke the fear of possible dangers to witnesses, informants, or ongoing investigations as a reason for prosecutors to be able to unilaterally determine not to disclose exculpatory information if they evaluate the information to be “immaterial to the outcome of the case...” (CDAAs, pp. 7-9, section E.) This claim is unavailing for two reasons.

First, the fears themselves are misplaced. Penal Code section 1054.7 permits a prosecutor to make a showing of good cause in an attempt to convince the court to delay, restrict or completely

---

<sup>1</sup> Moreover, CDAAs’ suggestion that District of Columbia ethics rules do not require disclosure of all exculpatory information regardless of materiality is misleading, be it intentional or otherwise. While CDAAs relies on Comment 1 to District of Columbia Rule 3.8(e) for the proposition that their “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...’” (CDAAs letter, p. 7, par. 3), CDAAs fails to acknowledge that the very case it cites from the District of Columbia, *In re Kline* (D.C. 2015) 113 A.3d 202, expressly rejects a limited interpretation of their Rule 3.8 and holds that the rule requires disclosure of exculpatory information regardless of whether that information is material to the outcome of the case. (113 A.3d at pp. 210-212.) As explained by the court in *Kline*: “adopting an ethical rule that errs in favor of disclosure will better ensure that criminal defendants in the District of Columbia receive a fair trial.” (*Id.* at p. 212.)

deny disclosure information that would otherwise have to be disclosed under the discovery rules. “Good cause” includes “threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.” (Pen. Code §1054.7, par. 1.) As the model rule (Alternative 1) expressly provides that the prosecutor would not be required to make disclosures under the rule if “the prosecutor is relieved of this responsibility by a protective order of the tribunal...,” prosecutors would be able to invoke the provisions of Penal Code section 1054.7 in those circumstances where there is a reasonable basis for these concerns, and would not be required to make the disclosure if the court agrees there is a genuine reason for concern.

Second, the position articulated by CDAA not only ignores the existing safety precautions afforded by Penal Code section 1054.7, but is troubling because it substitutes the judgment of an individual prosecutor for the authority of a neutral tribunal in making the decision whether there is good cause to withhold the exculpatory evidence or information. And this usurpation of authority bespeaks the attitude underlying the widespread failures to disclose exculpatory evidence and information that have led this Commission to propose the adoption of Rule 3.8(d).

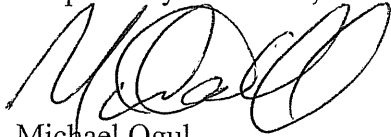
### Conclusion

CDAA admits that “the scope of a prosecutor’s discovery obligations ... is a constant source of litigation despite being tethered to case law and statutory rules...” (CDAA, p. 3, section A, par. 1), but complains that the proposed rule, Alternative 1, will only increase litigation over these obligations. CPDA and CACJ respectfully disagree.

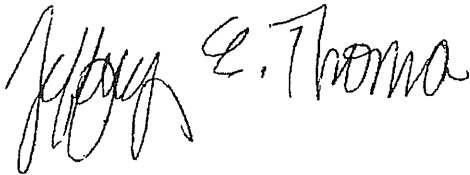
The reason that the question of whether a prosecutor has fulfilled his discovery obligations “is a constant source of litigation despite being tethered to case law and statutory rules” is because too many prosecutors, and the CDAA itself, ignores their duty to disclose exculpatory evidence and information regardless of whether they believe that evidence will make a difference in the outcome of the case. They know there will not be any reversal of the case unless an appellate court finds that the evidence was not only exculpatory but material, despite the prosecutor’s violation of existing California law requiring disclosure of *all* exculpatory evidence and information. And they realize that they are exempted from mandatory referrals under Business and Professions Code 6086.7 for failures to disclose exculpatory evidence unless they resulted in a reversal or modification of the judgment, which will not occur unless the evidence or information was “material.” Thus, although the California Supreme Court in *Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901, squarely interpreted Penal Code section 1054.1, subdivision (e), to require disclosure of *all* exculpatory evidence without regard to whether or not it is “material”, under the current disciplinary rules, prosecutors have little incentive to disclose exculpatory evidence or information that is not material. Simply put, as things stand now, prosecutors can violate their existing duties to disclose all exculpatory information, regardless of materiality, without fear of being reprimanded by the appellate courts or suffering a mandatory referral under the State Bar Act. Indeed, CDAA’s letter opposing adoption of Rule 3.8(d) insists that prosecutors do *not* have to disclose any exculpatory evidence *unless* it is material. It is no wonder that the issue of whether a prosecutor has complied with his discovery obligations “is a constant source of litigation despite being tethered to case law and statutory rules.”

The regrettable reality is that far too many prosecutors fail to honor their ethical duty to disclose all exculpatory evidence and information to the defense. That reality manifests the urgent need to adopt Rule 3.8, subdivision (d), Alternative 1. Only then will prosecutors have an increased incentive to honor their duty to disclose *all* exculpatory evidence and information regardless of whether or not they deem it to be immaterial or inconsequential to the proceedings at issue.

Respectfully submitted,



Michael Ogul  
President, California Public Defenders Association



Jeffrey E. Thoma  
President, California Attorneys for Criminal Justice



October 9, 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: Response to CDAA Letter in Opposition to Proposed Rule 3.8(d) Alt. 1 and Fast Track

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

CDAA's letter in opposition to Rule 3.8(d) Alt. 1 ("Alt. 1) fixates on unsubstantiated concerns of increased disciplinary action, rather than the true purpose of the Rule- to enforce constitutional protections for those charged with a crime, improve public safety by ensuring accurate convictions, and build confidence in the integrity and legitimacy of our justice system.<sup>1</sup> Our responses to the arguments are below:

#### **A. The Rule is Not Tied to Clear Standards and Leads to Arbitrary Results**

The CDAA letter complains that Alt. 1 is not a clear standard and will lead to arbitrary results. In fact, the ABA's purpose in drafting 3.8(d) was to create a prophylactic rule that would be clear and easy to apply in a pre-trial context in order to avoid Brady violations while at the same time providing an opportunity for prosecutors to delay disclosure through protective orders when "timely" disclosure could endanger witnesses or for other good cause. Much has been written since the passage of 3.8(d) that demonstrates it is based on sound cognitive science principles. Professor Alafair Burke, a former prosecutor, has written persuasively about why

---

<sup>1</sup> McGrath, Patrick J., California District Attorneys Association "Proposed Revisions of Rule of Professional Conduct Proposed Rule 3.8(d)-SUPPORT- Alt. 2, with Modification; OPPOSE- Alt. 1." Letter to the Honorable Lee Edmon, Chair. 1 Oct. 2015.

<sup>2</sup> Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary

using the materiality standard as the basis for disclosure pre-trial doesn't work as a matter of cognitive science and common sense:

Because *Brady's* materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review. They must anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place "the whole case" in a different light. [citing *Kyle v. Whitley*, 514 U.S. 419, 435 (1995)]<sup>2</sup> ...

Because the prosecutor has already formed a theory of guilt, she will overestimate the value of inculpatory evidence, underestimate the value of the exculpatory evidence, and ultimately undercount instances of materiality.<sup>3</sup>

In their response letter, the CDAA contends that case law gives adequate guidance as to what is material and that the post-trial standard for Brady disclosure – materiality – provides greater clarity in a pre-trial context than that provided by Alt. 1 of 3.8(d). Not so. The Alt. 1 3.8(d) standard is much easier to apply in a pre-trial context. Disclosure of any information that “tends to negate guilt or mitigate the offense” sends a clear message to err on the side of caution to avoid Brady violations – if you think it might be exculpatory or impeachment evidence, disclose it or consult a judge. It’s much clearer than trying to figure out in a trial that has not yet occurred, based on a defense that you do not know, what an appellate court might later consider suppressed “material” evidence, assuming that evidence is ever discovered. The California Courts of Appeals and Supreme Court have issued 131 opinions on Brady claims since 2014, yet what many have perceived to be an “epidemic” of *Brady* violations continues.<sup>4</sup> Failure to disclose exculpatory evidence is the most common form of official misconduct, occurring in approximately 39% of all exonerations. Moreover, it must be emphasized that these findings of Brady violations only involve reported decisions where undisclosed evidence was discovered. The question naturally arises: Is this the tip of an ice berg? Are there many more Brady violations that remain hidden? One important value of Alt. 1 of 3.8(d) is that provides much needed assurance that the “ice berg” problem is being addressed because prosecutors are reviewing their file pre-trial erring on the side of caution to avoid Brady violations.

---

<sup>2</sup> Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1610 (2006).

<sup>3</sup> *Id.*, at 1627

<sup>4</sup> *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (C.J. Kozinski, dissenting). Whether one agrees or disagrees with Judge Kozinski’s assessment that there is, in fact, an “epidemic,” there should be little dispute that there is a commonly held perception among many in the judiciary and the public about the seriousness of the problem.

At the same time, Alt.1 does not require a prosecutor to “go searching for everything that may ‘tend to negate guilt’.”<sup>5</sup> Consistent with the National District Attorneys Association standards, it only requires disclosure of evidence and information known to the prosecutor.<sup>6</sup> The “fear of being disciplined by the state bar” is similarly unwarranted.<sup>7</sup> Only one percent of the 600 prosecutors found by the courts to have engaged in misconduct were disciplined by the California State Bar between 1997 and 2009.<sup>8</sup> Six of the 4,741 public disciplinary actions by the Bar during that period involved prosecutorial misconduct in a criminal case.<sup>9</sup> Requiring the prosecutor to err on the side of disclosure relieves the prosecutor from guessing whether evidence is material to the defendant’s case. Instead, the duty to investigate and develop evidence material to the defendant’s case is properly placed on the defense counsel.

### **B. Requiring the Prosecutor to Disclose Mitigating Evidence in Connection with Sentencing to Both the Defense and the Tribunal Makes it Challenging to Comply with the Rule and Will Lead to Discipline**

This contention fails to cite even one example from the decade that these rules have been in place in every other jurisdiction. The purpose of requiring disclosure of mitigating evidence on sentencing, to both the defense and the tribunal itself, is to facilitate accuracy and fairness in the sentencing process, not to increase disciplinary actions against prosecutors. Only willful and deliberate violations of this rule would be subject to discipline.

### **C. Requiring Supervising Prosecutors to Ensure Subordinate Prosecutors are Adequately Trained Regarding Their Obligations and That Office Procedures Facilitate Compliance Leaves Ambiguous who Exactly will be Punished.**

The intent of requiring all prosecutors to be educated and trained on the rule is to give them the ability to follow it, thereby minimizing the likelihood of misconduct. In theory, prosecutor offices should already provide training for *Brady* compliance and ethics. Thus, the proposed rule does not impose an additional burden, nor has this been a demonstrated problem in other states where the rule is enacted.

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

---

<sup>5</sup> McGrath, Patrick J., California District Attorneys Association “Proposed Revisions of Rule of Professional Conduct Proposed Rule 3.8(d)-SUPPORT- Alt. 2, with Modification; OPPOSE- Alt. 1.” Letter to The Honorable Lee Edmon, Chair. 1 Oct. 2015.

<sup>6</sup> NAT’L PROSECUTION STANDARDS, 2-8.4 (Nat’l Dist. Attorneys Ass’n, 3d ed. 2009).

<sup>7</sup> McGrath, Patrick J., California District Attorneys Association “Proposed Revisions of Rule of Professional Conduct Proposed Rule 3.8(d)-SUPPORT- Alt. 2, with Modification; OPPOSE- Alt. 1.” Letter to The Honorable Lee Edmon, Chair. 1 Oct. 2015.

<sup>8</sup> Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, (2010)

<sup>9</sup> *Id.*

In fact, California remains the only jurisdiction in the country that has not adopted ABA Model Rule 3.8(d).<sup>10</sup> As noted in a previous submission, every state, including the District of Columbia, Guam, and the United States Virgin Islands, has adopted some version of the ethical rule to govern timely, pre-trial disclosures by prosecutors.<sup>11</sup> Rule 3.8 was adopted as the standard for disclosure by the United States Department of Justice nine years ago, which applies to every United States Attorney in every federal court, including California.<sup>12</sup> Forty jurisdictions have adopted the rule verbatim; eight jurisdictions have a provision similar to the model rule language, with only non-substantive variations; and two jurisdictions have provisions with different language but the same substance. Contrary to the letter, Wisconsin and Ohio have both adopted a version of the rule.<sup>13</sup> Because California currently does not have *any* version of the rule, it remains the outlier. However, we agree those states that have subsequently interpreted 3.8(d) to require “materiality” as the pre-trial standard of disclosure have deviated from how ABA intended rule 3.8(d) to be interpreted when it was adopted. Indeed, adopting 3.8(d) with “materiality” as the standard is an empty exercise that does nothing to address the Brady disclosure problem and, arguably, makes it worse.

#### **E. Disclosure of “All Information” May Unnecessarily Jeopardize the Safety of Witnesses, the Integrity of Investigations, and Privileged Information**

Alt. 1 provides exceptions to disclosure to prevent these concerns. The option to seek a protective order from the court remains.

Requiring the prosecutor to disclose anything that tends to negate guilt or mitigate the offense sets forth clear ethical obligations and reinforces the responsibility of the prosecutor to seek truth and fairly administer justice. There is no viable justification for the inaction in California to continue.

---

<sup>10</sup> Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 328 (2013).

<sup>11</sup> See, ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 3.8: Special Responsibilities of a Prosecutor*, ABA (Oct. 21, 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.authcheckdam.pdf).

<sup>12</sup> See Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, (2010); California Commission on the Fair Administration of Justice, *Report and Recommendation on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence* (Mar. 6, 2008), <http://ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf>; California Commission on the Fair Administration of Justice, *Report and Recommendations on Reporting Misconduct*

<sup>13</sup> American Bar Association CPR Implementation Committee, “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor” [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.authcheckdam.pdf)

Sincerely,

A handwritten signature in black ink, appearing to read "L. L. Levenson". The letters are fluid and cursive, with the first name "Laurie" and last name "Levenson" clearly distinguishable.

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

A handwritten signature in black ink, appearing to read "Barry Scheck". The signature is written in a cursive style, with the first name "Barry" and last name "Scheck" clearly distinguishable.

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

## McCurdy, Lauren

---

**From:** saratheiss@aol.com  
**Sent:** Thursday, October 08, 2015 2:03 PM  
**To:** McCurdy, Lauren  
**Subject:** Adoption of ABA Rule 3.8

Dear Ms. McCurdy,

As a member of the State Bar, I am writing to urge the adoption of ABA Rule 3.8 regarding the special duties of prosecutors. As the members of the Rules Committee are undoubtedly aware, there have been too many convictions in California called into question by the conduct of some prosecutors. I view this as a systemic, rather than an individual, problem: in the last several decades, there has been little accountability when prosecutors engage in actual or potentially questionable conduct. This, combined with 'tough on crime' practices and attitudes has led to an unfortunate culture in some places where winning is everything. Lawyers in general should be held to a high standard of ethics and as the United States Supreme Court has recognized, prosecutors even more so. (*Berger v. United States* (1935) 295 U.S. 78, 88.) When prosecutors get a reputation for being less than forthright, the entire criminal justice system suffers. I urge the Bar to adopt ABA Rule 3.8 for California.

Sincerely,

Sara Theiss  
SBN No. 159587



JACKIE LACEY  
LOS ANGELES COUNTY DISTRICT ATTORNEY

---

HALL OF JUSTICE  
211 WEST TEMPLE STREET, SUITE 1200 LOS ANGELES, CA 90012-3205 (213) 974-3500

October 14, 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  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Dear Justice Edmon, Messrs. Bleich and Zipser:

PROPOSED REVISIONS OF RULES OF PROFESSIONAL CONDUCT  
PROPOSED RULE 3.8(d) – SUPPORT – Alt. 2, WITH MODIFICATIONS; OPPOSE – Alt. 1,  
AND FAST TRACK

As the District Attorney of Los Angeles County (LADA), I am writing in full support of the October 1, 2015, letter from the California District Attorneys Association (CDAA) to the Commission for the Revision of the Rules of Professional Conduct supporting the adoption of Alternate 2, with modifications, as the proposed Rule of Professional Conduct (RPC), rule 3.8(d).

LADA is the largest local prosecutor's office in the United States staffed with nearly 1,000 attorneys who prosecute each year over 71,000 felonies and 112,000 misdemeanors. Guiding these prosecutions is the Department's mission statement: "The Los Angeles County District Attorney's Office is dedicated to protecting our community through the fair and ethical pursuit of justice and the safeguarding of crime victims' rights." My administration has been committed to ethics through training, supervision and a willingness to look at those cases where justice may not have been served.

Mindful of the ethical core of our mission, I want to take this opportunity to note problems posed if the Supreme Court were to adopt Alternative 1, as rule 3.8(d). As proposed Alternative 1 states:

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

The Honorable Lee Edmon, Chair  
Mr. Jeffrey Bleich, Co-Vice-Chair  
Mr. Dean Zipser, Co-Vice-Chair  
October 14, 2015  
Page 2

information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

First, it needs to be strongly emphasized that in June of 1990 the voters of California adopted the current discovery statute as part of Proposition 115. They specifically enacted Penal Code section 1054, subdivision (d), which declared that their purpose was “[t]o 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.” This was reemphasized in Penal Code section 1054.5, subdivision (a), which states:

No 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.

Proposed Alternative 1, a direct adoption of the American Bar Association (ABA) Model Rule 3.8(d), would defeat this directive by according a defendant greater discovery rights than mandated by either the Constitution or California law. (*Cone v. Bell* (2009) 556 U.S. 449 470, fn. 15 [129 S. Ct. 1769; 173 L. Ed. 2d 701]; ABA Standing Comm. on Ethics and Professional Responsibility, Formal Opn. 09-454 (2009).) The wording of Alternative 1, as interpreted by both the ABA and other courts, would abolish the materiality requirement for criminal discovery. As such, it would mandate disclosures well beyond what is currently required under California and Constitutional law.

While this may be a subject for consideration, I vigorously question whether or not the State Bar and our Supreme Court, through its rule making authority, has the legal power to override the voter’s declared intent that discovery should only occur in compliance with its enactment or the Constitution. (*In re M.* (1978) 21 Cal.3d 337, 346 [invalidating Judicial Council rule as inconsistent with statute]; *People v. Hall* (1994) 8 Cal.4th 950, 960 [invalidating Judicial Council rule in conflict with sentencing statute].) To the extent that there needs to be a substantive change in the California’s criminal discovery rules, that concern is best addressed to the Legislature. (See, *California Charter Schools Assn. v. Los Angeles Unified School Dist.* (2015) 60 Cal.4th 1221, 1236.)

The Honorable Lee Edmon, Chair  
Mr. Jeffrey Bleich, Co-Vice-Chair  
Mr. Dean Zipser, Co-Vice-Chair  
October 14, 2015  
Page 3

Alternative 2 avoids this issue entirely by providing:

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.

Alternative 2 creates no conflict between the legislative authority of the voters and the State Bar or the Supreme Court. It also avoids the anomalous problem that if Alternative 1 were adopted, a state prosecutor could comply with both his or her California and Constitutional discovery requirements, but still be in violation of the RPC because of the failure to disclose non-material information to the defense. This very problem has confronted a number of state courts who have adopted Alternative 1, with a “majority” adopting a view that imposes discipline only on prosecutors who violate applicable discovery law. (*State ex rel. Okla. Bar Ass'n v. Ward* (Ok. Sup. Ct. 2015) 353 P.3d 509, 521.) For example, recently the Oklahoma Supreme Court refused to impose discipline on a prosecutor who complied with state discovery procedures, but did not turn over all “evidence or information” favorable to the defense without regard to materiality. (*Ibid.*) Instead, they joined “a majority of courts” to construe Rule 3.8(d) (Alternative 1) to only require disclosure “consistent with the scope” of “applicable law.” (*Ibid.*; see also, *In re Disciplinary Proceedings Against Sharon A. Riek* (Wis. Sup. Ct. 2013) 2013 WI 81, 350 Wis. 2d 684, 834 N.W.2d 384; *Disciplinary Counsel v. Kellogg-Martin* (Ohio Sup. Ct. 2010) 124 OhioSt. 3d 415, 2010 Ohio 282, 923 N.E.2d 125.) Additionally, faced with this problem of discipline being imposed where there was no statutory or Constitutional discovery violation, two other jurisdictions have amended their Rules of Professional Conduct or added commentary limiting Rule 3.8(d) (Alternative 1). (D.C. Rules Prof. Conduct, rule 3.8 comment; N.C. Rules Prof. Conduct, rule 3.8(d) (2015) [requiring timely disclosure of “all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions”].) None of these issues are presented were the Supreme Court to adopt Alternative 2.

A substantially similar problem arises with Alternative 1’s provision regarding the timing of discovery. It requires a prosecutor to “make timely disclosure to the defense...” Timely, is not defined. (*In re Attorney C, supra*, 47 P.3d at p. 1172 [“‘Timely’ is defined neither by the Rules of Professional Conduct, nor by case law.”].) ABA opinion 09-454 did note that this meant discovery should be made “as soon as reasonably practical.” Whether undefined or when “practical”, Alternative 1 may conflict with the voter’s clear declaration that in California

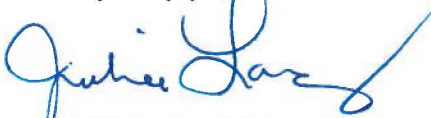
The Honorable Lee Edmon, Chair  
Mr. Jeffrey Bleich, Co-Vice-Chair  
Mr. Dean Zipser, Co-Vice-Chair  
October 14, 2015  
Page 4

reciprocal discovery is due “30 days prior to trial, unless good cause is shown why a disclosure should be denied, restricted or deferred.” (Pen. Code, § 1054.7.)

Is this statutory timeline in conflict with “timely disclosure”? Does the prosecutor who provides discovery 30 days before trial violate Alternative 1 if he or she possessed the information 40 days before trial but did not disclose it at that time? Such issues would need to be litigated and this creates a danger recognized by the Colorado Supreme Court when they noted the potential for Rules of Professional Conduct to be “subverted” when used by an opposing party to attempt to gain an advantage. They observed, “In the context of discovery in criminal cases, that danger, [of using the Rules as a weapon,] is a real one. We do not wish to create a mechanism that could be used to obstruct the progress of a case.” (*In re Attorney C, supra*, 47 P.3d at p. 1174, see also *In re Disciplinary Proceedings Against Sharon A. Riek, supra*, 834 N.W.2d at p. 390 [“What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint?”] .) This problem is avoided by the adoption of Alternative 2. As the Wisconsin Supreme Court observed of the defects in Rule 3.8(d) (Alternative 1), “Disparate standards are likely to generate confusion and could too easily devolve into a trap for the unwary.” (*In re Disciplinary Proceedings Against Sharon A. Riek, supra*, 834 N.W.2d at p. 390.)

In conclusion, I want to emphasize that in Los Angeles County prosecutors are encouraged to provide most, if not all discovery, at arraignment. They also work diligently to meet their other discovery obligations in compliance with both California and federal mandates. Any changes in those requirements must be made by the Executive and Legislative branches of government and not through the rule making authority of the judiciary. I strongly urge you to adopt Alternative 2, which avoids the problems presented by CDAA and the concerns expressed here.

Very truly yours,



JACKIE LACEY  
District Attorney

ww

c: Mr. Mark Zahner  
Executive Director, CDAA

# SAN FRANCISCO PUBLIC DEFENDER

JEFF ADACHI – PUBLIC DEFENDER  
MATT GONZALEZ – CHIEF ATTORNEY



October 16, 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: Support of Accelerated Implementation of Proposed Rule 3.8(d)

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

I am writing in support of the adoption of ABA Model Rule 3.8(d). The rule ensures the integrity of the criminal justice system, justice for the accused, and safety for the general public. The rule protects the constitutional rights of citizens charged with crimes while bolstering public confidence in the fair administration of justice. In so doing, it improves public safety by ensuring that true perpetrators of crimes are arrested and convicted. Every time an innocent defendant is wrongly convicted or remains in prison when prosecutors are in possession of material evidence of innocence, the person who committed the crime is at liberty to re-offend.

California is the only jurisdiction without a version of Rule 3.8(d). Forty-nine states, Guam, the United States Virgin Islands, and the District of Columbia have already implemented some version of Rule 3.8. These jurisdictions have not experienced the consequences anticipated by CDAAs. Often the leader on many legal issues, this time California is the sole outlier. There is no reason California should not follow *all other* jurisdictions and adopt Rule 3.8(d). It is time for California to catch up to the rest of the country.

The rule is essential. It is a workable solution to *Brady* violations, rampant in California. It is not possible for prosecutors to accurately determine whether something is material to the *defense's* case before a trial. *Failure to disclose exculpatory evidence* is the *most common* form of official misconduct, occurring in an estimated 39% of all cases leading to exoneration. Specifically, Rule 3.8(d) removes the "material" requirement and provides guidance regarding prosecutors' pre-trial disclosure obligations. The rule is independent and more broad than *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 minimize potential *Brady* violations.

California should not remain the only state without this rule, especially in light of the documented discovery problem here. The innocent are going to prison while the guilty walk

**Adult Division - HOJ**  
555 Seventh Street  
San Francisco, CA 94103  
P: 415.553.1671  
F: 415.553.9810  
[www.sfpublicdefender.org](http://www.sfpublicdefender.org)

**Juvenile Division - YGC**  
375 Woodside Avenue, Rm. 118  
San Francisco, CA 94127  
P: 415.753.7601  
F: 415.566.3030

**Juvenile Division - JJC**  
258A Laguna Honda Blvd.  
San Francisco, CA 94116  
P: 415.753.8174  
F: 415.753.8175

**Clean Slate**  
P: 415.553.9337  
[www.sfpublicdefender.org/services](http://www.sfpublicdefender.org/services)

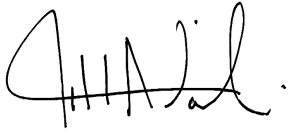
**Community Justice Center**  
P: 415.202.2832  
F: 415.563.8506

**Bayview Magic**  
P: 415.558.2428  
[www.bayviewmagic.org](http://www.bayviewmagic.org)

**MoMagic**  
P: 415.567.0400  
[www.momagic.org](http://www.momagic.org)

free. Rule 3.8(d) ensures integrity and accuracy. Adoption is long overdue: Now is the time for California to adopt Rule 3.8(d).

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Adachi". The signature is stylized with a large initial "J" and a long horizontal stroke.

Jeff Adachi  
San Francisco Public Defender

## McCurdy, Lauren

---

**From:** Roldan, Fe <FFRoldan@co.riverside.ca.us> on behalf of Harmon, Steven <SLHarmon@co.riverside.ca.us>  
**Sent:** Monday, October 19, 2015 11:31 AM  
**To:** McCurdy, Lauren  
**Cc:** 'azamora@aclunc.org'  
**Subject:** ABA Model Rule 3.8(d)

I am writing to lend my support for the adoption of ABA Model Rule 3.8(d). I am privileged to head an office of approximately 140 lawyers who everyday work tirelessly to make sure their clients are well-served and their rights are well-protected. In order to ensure this, the provisions within Rule 3.8(d) are critical. Nothing is more important than making sure that a lawyer representing an accused has everything material to the case available to him or her in order to adequately defend their client. If everything is not disclosed to the defense, then we can never be assured justice has been done. There is simply no reason for us as a society to take the chance that an innocent person may be wrongfully convicted. This is why I am urging the adoption of Rule 3.8(d).

### *Steven L. Harmon*

Public Defender  
Riverside County Law Offices of the Public Defender  
4200 Orange Street  
Riverside, CA 92501  
Tel: (951) 955-6000; Fax: (951) 955-6114  
[SLHarmon@co.riverside.ca.us](mailto:SLHarmon@co.riverside.ca.us)

---

This email message, including any attachments, is intended for the sole viewing and use of the individual or entity to which it is addressed, and may contain confidential and privileged information, which is prohibited from disclosure. Any unauthorized review, use, disclosure, distribution, or the taking of any action in reliance on the information contained in this email, including attachments, is prohibited. If you are not the intended recipient, you are hereby notified that any dissemination or copy of this message, or any attachment, is strictly prohibited. If you have received a copy of this email in error, please notify the sender by reply email immediately, and remove all copies of the original message, including attachments, from your computer.



**PUBLIC DEFENDER**  
**Contra Costa County**

Robin Lipetzky  
Public Defender

Supervising Attorneys  
Patrick Cannon  
Michelle Dawson  
Elizabeth Harrigan  
Jonathan Laba  
Karen Moghtader

October 20, 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  
Lauren McCurdy, Senior administrative Specialist  
Office of Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Support for Proposed Revisions of Rules and Professional Conduct Proposed Rule 3.8(d)  
From the Contra Costa County Public Defender

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

As the Public Defender for Contra Costa County, I write in support of Rule 3.8(d) (Alternative 1) and urge your expedited adoption of the rule. The reasons underlying the need for Rule 3.8(d) are many, as set forth in great detail in the October 8 letter submitted by CPDA and CACJ. I will not repeat them here.

One need look no further than the crisis currently facing the District Attorney's Office in Orange County to understand that there is an urgent need for the clear guidance provided by Rule 3.8(d) regarding the special responsibilities of a prosecutor. Time and again we see cases reversed on appeal and concerns voiced by appellate justices faced with the painful decision to reverse a conviction because a prosecutor has failed to abide by his ethical obligations to turn over exculpatory material to the defense. CDAA's concerns over the wording of Rule 3.8(d) notwithstanding, the Rule is clear and, as you know, has been adopted by nearly every, if not every, other state in the land.

Day in and day out judges presiding over criminal trials must grapple with needless delays and pretrial litigation pertaining to the late disclosure of exculpatory evidence on the part of the prosecution. This Rule is needed, and it is needed now. I urge this body to avoid all further delay and adopt Rule 3.8(d) as expeditiously as possible.

Very truly yours,

Robin Lipetzky  
Public Defender  
Contra Costa County

## McCurdy, Lauren

---

**From:** Ospino, Frank <Frank.Ospino@pubdef.ocgov.com>  
**Sent:** Tuesday, October 20, 2015 11:42 AM  
**To:** McCurdy, Lauren  
**Subject:** Rule 3.8 Special Responsibilities Of A Prosecutor

Dear Ms. McCurdy:

My name is Frank Ospino. I serve as the Public Defender of Orange County. As you may know, our office has been involved in significant litigation examining the recent and long term use of jailhouse informants. At the forefront of our studies has been an examination of the role that prosecutors have played in repeated non-disclosure of *Brady* evidence in a wide range of cases over many years, including a number of capital cases.

I believe strongly that Rule 3.8 includes critically important mandates for the practice of prosecutors, and believe that its passage on an emergency basis would represent a tremendous step forward for the criminal justice system in California.

Thank you for your consideration.

Sincerely,

Frank Ospino

Orange County Public Defender

---

**CONFIDENTIAL EMAIL:** The information contained in this email is confidential and may also be attorney-client privileged and constitute attorney work product. The information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify sender immediately.

**OFFICE OF THE STATE PUBLIC DEFENDER**

Michael J. Hersek  
State Public Defender  
770 L Street, Suite 1000  
Sacramento, California 95814-3362  
Telephone: (916) 322-2676  
Fax: (916) 327-0459



October 22, 2015

Commission for the Revision of the  
Rules of Professional Conduct  
The Honorable Lee Edmon, Chair  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

RE: State Public Defender's Letter of Support of Accelerated Implementation of  
Proposed Rule 3.8(d)

Dear Justice Edmon and Commission Members:

The Office of the State Public Defender (OSPD) was founded in 1976 to provide indigent criminal defendants their right to counsel on appeal. Since the 1990's, OSPD's mission has been to focus primarily on death penalty cases. (See Govt. Code, § 15421.) OSPD currently handles 98 death penalty cases.

The California Appellate Project in San Francisco (CAP-SF) is a non-profit corporation established by the State Bar of California in 1983 as a legal resource center to implement the constitutional right to counsel for indigent persons facing execution. CAP-SF assists private counsel appointed by the California Supreme Court to represent indigent defendants in capital cases challenging their convictions and sentences on direct appeal and through habeas corpus proceedings, and provides them with professional training. CAP-SF serves the largest population of individuals sentenced to death in the country.

OSPD and CAP-SF are writing jointly in support of the accelerated adoption and implementation of proposed Rule 3.8(d), Alternative 1. The rule is a reasonable and workable response to a recurring problem of state misconduct at criminal trials. We join the comments of the California Public Defenders Association and the California Attorneys for Criminal Justice, expressed in their joint letter dated October 8, 2015. In addition to those comments, we write to emphasize three points.

First, there can be no doubt that state misconduct is a serious problem in California. From 2004 through 2008, the California Commission on the Fair

Administration of Justice (CCFAJ) studied the causes of wrongful conviction and found not only that official misconduct is a leading cause of wrongful conviction, but that failure to disclose potentially exculpatory evidence is a common form of official misconduct. In fact, failure to disclose evidence is responsible for nearly 40% of all cases leading to exoneration.

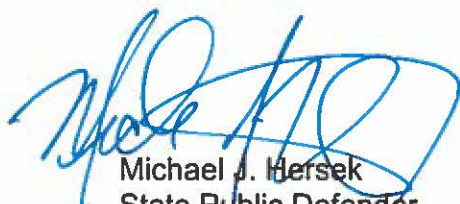
Second, since the CCFAJ released its 2007 reports on official misconduct, professional responsibility, and exculpatory evidence, *Brady* violations have continued to play a substantial role in wrongful convictions in California. As noted by other commentators, former Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals recently stated, "There is an epidemic of *Brady* violations abroad in the land." (*U.S. v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626, Kozinski, J., dissenting from denial of rehearing en banc.) Judge Kozinski is correct that the number of recent reversals due to a California prosecutor's failure to disclose evidence is unsettling. In fact, California federal court reversals for *Brady* violations since the issuance of the CCFAJ support Judge Kozinski's observations. Those cases include the following, which are unfortunately typical of the types of violations we see at OSPD and CAP-SF in most capital post-conviction (habeas corpus) cases:

1. *Shelton v. Marshall*, 796 F.3d 1075 (9th Cir. (Cal.) Aug. 7, 2015). In this case, the prosecutor failed to disclose a critical term of a plea bargain that reflected his belief that the state's key witness was mentally incompetent. The court found that such evidence would have been "powerful fodder for impeaching" the witness's testimony against Mr. Shelton, and "constitutes evidence that is favorable to the accused under *Brady's* first prong."
2. *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. (Cal.) July 11, 2014). In this case, the district attorney emphasized the critical nature of a particular prosecution witness, but failed to disclose that the witness had been recently convicted of robbery, was on felony probation, and recently had been a member of a criminal street gang.
3. *Aguilar v. Woodford*, \_ F.3d \_ [2013 WL 3870727] (9th Cir. (Cal.) July 29, 2013). In this case, dog-scent identification evidence was an important part of the prosecution's case at trial, but the state failed to disclose that the K-9 officer had a history of dog-scent misidentification.
4. *Maxwell (Bobby Joe) v. Roe*, \_ F.3d \_ [2010 WL 4925429] (9th Cir. (Cal.) November 30, 2010). Here, the prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine the credibility of its star witness, including important details of his "deal" for providing testimony against the defendant, and that the witness had acted as an informant on numerous previous occasions.

5. *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. (Cal.) July 16, 2010). In this case, the state maintained that its informant had been provided no compensation to testify against petitioner. This was later shown to be false.
6. *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. (Cal.) April 12, 2010). Here, the prosecutor failed to disclose a use-immunity arrangement it had with a key witness who testified against the defense.
7. *Valdovinos v. McGrath*, 598 F.3d 568 (9th Cir. (Cal.) March 10, 2010). Here, the prosecution failed to timely disclose (1) that two witnesses who identified petitioner at the preliminary hearing previously had trouble picking out his photo at photo lineups, (2) a photograph showing a man (who was not the defendant) at the scene of the shooting wearing clothes similar to those the shooter wore, (3) an anonymous letter asserting that a third party had ordered the killing, and (4) the fact that a witness who initially incriminated petitioner had been found in possession of drugs and a gun.
8. *Tennison v. City and County of San Francisco*, \_\_ F.3d \_\_ [2009 WL 1758711] (9th Cir. (Cal.) June 23, 2009). In this case, the homicide inspectors failed to disclose notes of statements made to them by a witness whose observations exculpated the defendants who had been arrested for the murder.

Third, not only do reversals for *Brady* violations result in great additional costs to an already overburdened and underfunded criminal justice system, but official misconduct of this type, even when it does not result in a full reversal of a conviction, impugns the integrity of the entire criminal justice system. It is our view that immediate adoption and implementation of the proposed rule – which has been adopted in every other state in the union – is a reasonable and positive step that the State Bar can take to protect the integrity of our legal system. After all, the very point of the State Bar Rules of Professional Conduct is “to protect the public and to promote respect and confidence in the legal profession.” (<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx>.) Unnecessary delay in implementation of the rule would seem inconsistent with that mandate.

Sincerely,

  
Michael J. Hersek  
State Public Defender

  
Joseph Schlesinger  
Executive Director, CAP-SF

# Alameda County Public Defender

Main Office  
1401 Lakeside Drive, Suite 400  
Oakland, CA 94612-4305  
(510) 272-6600



Brendon D. Woods  
Public Defender  
Robert C. Shipway  
Chief Assistant Public Defender

October 22, 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  
Lauren McCurdy, Senior Administrative Specialist  
Office of Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

RE: SUPPORT for Proposed Revisions of Rules and Professional Conduct Proposed Rule 3.8(d)  
from the Alameda County Public Defender

Dear Justice Edmon, Mr. Bleich, Mr. Zipser, and Ms. McCurdy,

I am writing in support of the adoption of ABA Model Rule 3.8(d). This rule will serve to ensure the integrity of the criminal justice system as a whole, and is a modest step toward ensuring justice for the accused and safety for the general public.

The rule protects the constitutional rights of citizens charged with crimes while bolstering public confidence in the fair administration of justice. At the same time, it also improves public safety by ensuring that those responsible are appropriately arrested and prosecuted. Not only is it miscarriage of justice to convict an innocent person, while the system is focusing on this person, the person who actually committed the crime remains at large and may offend again.

The rule is essential, and is a workable solution to *Brady* violations, which occur with disturbing frequency in California. *Failure to disclose exculpatory evidence* is the *most common* form of official misconduct, occurring in an estimated 39% of all cases leading to exoneration.

Specifically, Rule 3.8(d) removes the "material" requirement and provides guidance regarding prosecutors' pre-trial disclosure obligations. It is simply not possible, or appropriate, for prosecutors to accurately determine whether something is material to the defense before a trial.

The proposed rule is also more broad than *Brady*, requiring “timely” and prophylactic disclosure of all information that *could be Brady* or impeachment evidence, defined as anything that “tends to negate guilt or mitigate punishment,” in order to minimize potential *Brady* violations.

California is the only jurisdiction without a version of Rule 3.8(d): forty-nine states, Guam, the United States Virgin Islands, and the District of Columbia have already implemented some version of Rule 3.8, and none of these jurisdictions have experienced the negative consequences anticipated by the CDAA. There is no reason California should not follow *all other* jurisdictions and adopt Rule 3.8(d). California should not remain the only state without this rule, especially in light of the documented discovery problem here.

The innocent are going to prison while the guilty walk free. Rule 3.8(d) ensures integrity and accuracy. Adoption is long over-due: Now is the time for California to adopt Rule 3.8(d).

Sincerely,

ALAMEDA COUNTY PUBLIC DEFENDER

A handwritten signature in blue ink, appearing to read 'Brendon D. Woods', with a stylized flourish at the end.

Brendon D. Woods  
Public Defender