

**Proposed Rule 5-110 [3.8]**  
**Alternate Version of Proposed Paragraph (D) Considered, but**  
**Not Recommended, by the Commission**

The Commission working group assigned to Rule 5-110 and Model Rule 3.8 drafted an alternate version of proposed paragraph (D) that was considered but ultimately not adopted by the Commission. The Commission designated this draft as Alternative 2 of paragraph (D). Set forth below is a clean version and redline/strikeout version of this alternate draft that shows changes to the version of paragraph (D) currently recommended by the Commission.

Clean Version of alternate draft of paragraph (D):

(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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Redline Version of alternate draft of paragraph (D):

(D) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to ~~Make~~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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

As indicated above, the essential difference with this alternate version is that the standard of “information. . . that tends to negate the guilt of the accused or mitigates the offense” is expressly qualified as a requirement that complies with existing law, including any case law interpretation of that existing law.<sup>1</sup>

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<sup>1</sup> The Commission’s consideration of this alternate version of paragraph (D) included a related alternate version of Comment [3] stating that: “The disclosure obligations in paragraph (d) apply only with respect to controlling case law at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively.”

## **DISSENT OF DANIEL E. EATON FROM RULE 3.8 [5-110] AS ADOPTED**

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar 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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not “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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor’s obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor’s obligations in this area undoubtedly will “promote confidence in the legal profession and the administration of justice.” (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be “necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice” and “where failure to promulgate the rule would result in the continuation of serious harm.” (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project’s several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission’s charter.

Directive two of the Charter admonishes us to “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.” Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted “is not aspirational.” That was flatly contradicted by the speaker those who argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism “to which all members of the profession should *aspire*.” (Emphasis added.) Dean Uelmen added that a prosecutor’s “aspirations” should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that “the primary purpose” of the rule, as the Commission ultimately adopted it, “is aspirational.” Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: “Do we want a very simple *aspirational* standard?” (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to “help promote a national standard with respect to professional responsibility issues whenever possible.” The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is “consistent [and coterminous] with the requirements of *Brady* and its progeny.” (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *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.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission’s Charter says: “The Commission’s work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.” The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission’s response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

There are two responses to the Commission’s assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of

the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art. 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

## **Dissent of George S. Cardona From Proposed Rule 3.8**

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

### **a. Proposed Rule 3.8(d)**

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Drafting Team's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.<sup>1</sup> The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and

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<sup>1</sup> I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

case law interpreting those authorities and the California and federal constitutions.” The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for defining what constitutes information that “tends to negate the guilt of the accused or mitigates the offense. . . .” This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California’s disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness’s testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to “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 . . . .” As explained by the First Commission, its addition of the highlighted introductory clause was to clarify “that the requirement of a prosecutor’s timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law.” This approach was based on the Commission’s determination that ABA Model Rule 3.8(d) “was in conflict with California statutory law,” in particular, “California statutory law that had been approved with the passage of Proposition 115 in 1991.” This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission’s proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose “[a]ny exculpatory evidence.” The California Supreme Court has explained that this pretrial disclosure obligation is not limited to “just material exculpatory evidence,” and that if, prior to trial, a defendant “can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality.” Barnett v. Superior Court, 50 Cal.4<sup>th</sup> 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010).<sup>2</sup> For “exculpatory evidence,” therefore, proposed Rule 3.8(d) and the California statutes appear to align. What constitutes “exculpatory evidence” falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

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<sup>2</sup> At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and the showing required to demonstrate, post-trial, a violation of the prosecutor’s duty to disclose exculpatory evidence: “The showing that defendants must make to establish a violation of the prosecution’s duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence.... To prevail on a claim the prosecution violated this duty, defendants challenging a conviction . . . have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” Id.

For example, in People v. Lewis, 240 Cal.App.4<sup>th</sup> 257, 192 Cal.Rptr.3d 460, 468 (2015), the court recognized that “whether exculpatory evidence includes impeachment evidence may be unsettled.” (citing Kennedy v. Superior Court, 145 Cal.App. 4<sup>th</sup> 359, 378, 51 Cal.Rptr.3d 637 (2006).) If California courts ultimately conclude that impeachment evidence constitutes “exculpatory information” within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission’s proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission’s proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts’ interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that “tends to negate the guilt of the accused” does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear 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.” California Penal Code § 1054(e).<sup>3</sup> The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

Finally, a primary driver to the Commission’s recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” United States v. Agurs, 427 U.S. 97, 108 (1976); see also Cone v. Bell, 556 U.S. 449, 470 n. 15 (2009) (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); Kyles v. Whitley, 514 U.S. 410, 439-40 (1995) (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.”) (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular “requires

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<sup>3</sup> Similarly, California Penal Code § 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

disclosure by prosecutors of information beyond that which is ‘material’ to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-91 (1999).” United States Attorneys’ Manual § 9-5.001(C).<sup>4</sup> As Mr. Eaton notes, it is simply wrong to say that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

**b. Proposed Rule 3.8(e)**

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is “essential” to successful completion of the prosecutor’s investigation; and (3) there is no other “feasible” alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent. While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission’s proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

First, while the Commission’s proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors’ use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be “essential” to the investigation and that there be “no other feasible alternative” for obtaining that

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<sup>4</sup> In footnote 16 on page 22 of the Drafting Team’s Report and Recommendation, the drafting team states, “The United States Attorney’s Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA’s broad interpretation of 3.8(d).” It is true that, as referenced above, the United States Attorney’s Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA’s interpretation of its Model Rule 3.8(d).

information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship. The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting "reasonably necessary" for "essential." As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: "It is a difficult, if not impossible, task to decide *ex ante* what evidence will be 'essential' to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of 'evidence reasonably necessary to the successful prosecution' is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution." The First Commission also modified subsection (3) by substituting "reasonable" for "feasible," explaining that this was "to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If 'feasible' means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If 'feasible' means that the alternative is reasonable, the more familiar term 'reasonable' should be used." Again, the First Commission's proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission's meetings, if there is uncertainty whether the First Commission's or ABA's balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission's recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA's more stringent limitation.

For all these reasons, I dissent from the Commission's recommendation of its proposed Rule 3.8(e).

## **RESPONSE TO DISSENTS REGARDING PROPOSED RULE 3.8(d) [5-110(D)]**

Following consideration of the proposed rule at four meetings at which stakeholders were present and addressed the Commission, the Commission voted 12-2 to adopt Proposed Rule 3.8(d). Although dissenting positions by Daniel Eaton and George Cardona were noted, they were rejected for the following reasons:

### **A. Response to Dissent of Daniel Eaton**

First, Proposed Rule 3.8(d) is not aspirational. In fact, it is an effort to provide a clear articulation of the standard that some of the testifying prosecutors claimed they already follow. A major reason to adopt Alternative #1 for Rule 3.8(d) is to get all prosecutors on the same page and ensure the uniformity in discovery practices that will safeguard the integrity of the criminal process. As was evident at the October 23, 2015 Commission meeting, some District Attorneys' Offices claim that they disclose all evidence or information that would tend to negate the guilt of the accused or mitigate the offense, while others submitted letters arguing that they should be able to consider materiality in deciding what evidence to disclose. Under California law, prosecutors have a duty to disclose all exculpatory information, not just evidence they deem material.<sup>1</sup> Alternative #1 does not "aspire" to have prosecutors fulfill their ethical duties.<sup>2</sup> It plainly explains what that duty is.

For similar reasons, the Commission was not persuaded by the dissent's second argument that Alternative #1 to Rule 3.8(d) should not be adopted because a handful of jurisdictions have been flexible in defining a prosecutor's disclosure obligations. The Charter for this Commission plainly states that it should, among other things: (1) work to promote public confidence in the legal profession and the administration of justice, and ensure adequate protection to the public; (2) not set forth standards that are "purely" aspirational objectives; (3) focus on revisions that are necessary to eliminate differences between California's rules and the rules used by a preponderance of the states to help promote a national standard wherever possible; and (4) eliminate ambiguities and uncertainties.

Every other state in the nation, as well as the U.S. Department of Justice, has adopted the language of Alternative #1. No other jurisdiction has adopted the language of Alternative #2. This is for good reason. Alternative #2 sends prosecutors into the perpetual morass of trying to continually determine what so-called "relevant case law" might say about how, if at all, they

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<sup>1</sup> *People v. Cordova*, \_\_ Cal. 4<sup>th</sup> \_\_, 194 Cal.Rptr.3d 40, 2015 WL 6446488, \*12 (Oct. 26, 2015) (California Penal Code § 1054.1, subdivision (e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny"). See also *Barnett v. Superior Court*, 50 Cal.4<sup>th</sup> 890, 901 (2010) (discovery of exculpatory evidence not governed by materiality).

<sup>2</sup> Mr. Eaton takes out of context Dean Gerald Uelmen's reference to "aspirational" standards. In context, Dean Uelmen was referring to his work as Executive Director of the 2008 California Commission on the Fair Administration of Justice. That Commission focused on prosecutors' widespread indifference to their discovery obligations and the need for more compliance. For years, Dean Uelmen, as well as other leaders of the California legal community, have sought to have prosecutors comply with their ethical and legal duties, including those involving discovery. As stated in oral comments at the Commission meetings, Public Defenders continue to face difficulty in getting prosecutors to comply with their discovery obligations. (Comments of Michael Ogul, President of California Public Defenders Association).

should consider materiality in deciding whether to disclose potentially exculpatory information. Alternative #2 seeks to limit pretrial discovery to only material disclosures as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). We rejected that standard, as has the California Supreme Court, because it is not a standard that was either designed or intended to govern a prosecutor's pretrial ethical duties for disclosing exculpatory information. To the contrary, it is a standard that governs whether a new trial should be granted after there has been a trial in which necessary disclosures were not made.

The Commission meetings at which stakeholders attended revealed that prosecutors either do not understand, or have been ignoring, their responsibility to provide exculpatory information to the defense. Contrary to what the dissent suggests, we do not expect that years of litigation will be needed to resolve how prosecutors can meet their obligations under Rule 3.8(d). Unlike Alternative #2 that requires perpetual analysis and reference to new case law, Alternative #1 plainly states that if information "tends to negate the guilt of the accused" or "mitigate the offense," it must be disclosed. This is an easy standard to understand and apply, as evidenced by the experience of the vast majority of states that have adopted the rule.

Commission members agreed that the public has lost confidence in our criminal justice system. With case after case of discovery violations that have led to wrongful convictions, there is a pressing need for a rule that does not signal to prosecutors that they should do their own analysis of materiality and case law before deciding whether to turn over potentially exculpatory information. Instead, the rule proposed by the overwhelming majority of the Commission, Alternative #1, will promote public confidence; it will set forth a concrete, not merely aspirational, ethical standard; and it will bring California into line with the rest of the nation. It will also eliminate the ambiguities and uncertainties that have led District Attorney Offices in this state to express conflicting views, like those that surfaced at the Commission meetings, about when they are required to disclose exculpatory information. In fact, written submissions to the Commission from the CDAA and from the Los Angeles County District Attorney both indicate that requiring turning over of information that does not meet the materiality test would be a major change in the law. The Supreme Court has held that the language of Alternative #1 is the current law of California as set forth in Penal Code § 1054.1(e) (requiring the disclosure of "any exculpatory evidence"), *Barnett v. Superior Court*, 50 Cal.4<sup>th</sup> 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010) and *People v. Cordova*, \_\_\_ Cal.4<sup>th</sup> \_\_\_, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at \*12 (2015) (decided 3 days after the Commission adopted Rule 3.8).

## **B. Response to Dissent of George S. Cardona**

As noted above, the majority of the Commission believes that it is important to clarify that the standard for disclosure does not include prosecutors deciding the extent to which evidence that "tends to negate the guilt of the accused or mitigates the offense" is material to the case. Only Alternative #1 makes that clear. This dissent demonstrates exactly why it is necessary to set forth a clear standard for disclosure. Mr. Cardona poses questions of whether disclosure is required even if the prosecutor assumes that the evidence is trivial or of "minimal significance." California law has answered that question; it requires the disclosure of any exculpatory evidence, even if prosecutors do not believe it is of significance. As became evident in stakeholder input at Commission meetings, prosecutors are not in the best position to determine what evidence is or is not important to the defense. Thus, a clear rule of disclosure

will prevent prosecutors from making erroneous assessments of the exculpatory potential of evidence, as has occurred in the many cases brought to the Commission's attention. Contrary to what the dissent suggests, Proposed Rule 3.8(d) provides very clear guidance. The only problem is that some prosecutors do not like the guidance it provides.

Furthermore, the Commission determined that adoption of Proposed Rule 3.8(d) does not violate Proposition 115. As noted, California law already requires disclosure of "any exculpatory evidence" and the California Supreme Court has held that a defendant is entitled to such evidence without having to show its materiality. *Barnett v. Superior Court*, 50 Cal.4<sup>th</sup> 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010). See also *People v. Cordova*, \_\_ Cal. 4<sup>th</sup> \_\_, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at \*12 (2015). The dissent argues that a conflict *may* develop between a prosecutor's duties under the rule and under case law, but none exists at this time and there is no reason to believe that one will develop in the future.<sup>3</sup> California is, therefore, free to adopt Proposed Rule 3.8(d), a rule that best protects the integrity of the criminal justice system.<sup>4</sup>

Finally, this dissent argues that Rule 3.8(d) is not needed because prosecutors have gotten the message and promise to abide by their disclosure obligations in the future. While we take in good faith the representations made by a handful of prosecutors who attended the meeting, we note that the problem with discovery violations has been ongoing and, in the eyes of some judges, has escalated significantly. The former Chief Judge of the United States Court of Appeals for the Ninth Circuit recently wrote of the "epidemic" of *Brady* violations. *United States v. Olsen*, 737 F.3d 625, 626 (9<sup>th</sup> Cir. 2013). Several stakeholders provided oral comments at Commission meetings regarding the ongoing problems with discovery from prosecutors. Surprisingly, even though fellow prosecutors admitted that they should not be determining materiality before making discovery disclosures, even as late as the Commission's last consideration of this proposal, the Los Angeles County District Attorney was still arguing that it is the prerogative of her prosecutors to make materiality determinations before providing discovery.

Proposed Rule 3.8(d) is not intended to punish prosecutors. It is a responsible measure to address preventable miscarriages of justice. Adopted across the nation, it has not been used as a tactical weapon to give the defense an advantage in criminal proceedings. Rather, it is an ethical standard that guides prosecutors in ensuring that defendants receive fair trials. It is time for California to adopt it.

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<sup>3</sup> In fact, there is no reason to believe that such a conflict will develop. Even before *Barnett*, *supra*, the California Supreme Court recognized in the case of *In re Steele*, 32 Cal.4<sup>th</sup> 682, 701-02 (2004), that exculpatory evidence under California's discovery statutes includes evidence that "weakens the strength of" prosecution evidence. As developed, California law equates "exculpatory" with evidence that impeaches prosecution witnesses or detracts from the strength of prosecution evidence.

<sup>4</sup> The reference to the first Rules Revision Commission's work does not reflect that its work was completed before the *Barnett* and *Cordova* cases.