

**NOTE:** See Footnote No. 6 in the February 24, 2017 memorandum for agenda item 701 MARCH 2017. At its meeting on March 7, 2017, the Commission revised the response to the existing dissent to proposed rule 3.8 and added a new dissent and response to proposed rule 3.3. These items constitute a part of the Commission's final report and no Board action is necessary other than Board's action to consider the Commission's proposed rules as recommended for adoption.

**Commission Members Dissent, Submitted by Mark Tuft, on the Recommended Adoption of Proposed Rule 3.3(c)**

Limiting the duties stated in paragraphs (a) and (b) of the conclusion to the proceeding or the representation "whichever occurs first" is a significant departure from the rule in every other jurisdiction (with the possible exception of Texas) and if adopted would undermine the purpose of the rule and the goal of public protection. A lawyer who has knowingly made a false statement to the tribunal or who knows that the client or another person has committed a fraud on the court can simply withdraw or be discharged by the client to avoid having to take any remedial measures that may be reasonable available. A lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); nor would the lawyer interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of the relevant circumstances including the existence of criminal or fraudulent conduct in the proceeding and urging that corrective action be taken. Paragraph (c) adopted in other jurisdictions does not required a discharged or withdrawn lawyer to monitor the case until its conclusion. The Commission's proposed rule requires that the lawyer take reasonable remedial measures if the lawyer "knows" of the fraud on the tribunal and then only to the extent permitted under Business and Professions Code §6068(e) and Rule 1.6. There are no state variations limiting paragraph 3.3(c) as proposed and, if adopted, paragraph (c) would uniquely allow lawyers and their clients a means of circumventing the provisions of paragraphs (a) and (b).

**Commission's Response to Dissent Submitted by Mark Tuft on the Recommended Adoption of Proposed Rule 3.3(c)**

The Commission does not believe that the duties under paragraphs (a) and (b) should be extended to the conclusion of the proceeding. From the former client's standpoint, doing so might interfere with the relationship with replacement counsel and with remedial measures (or planned remedial measures) unknown to the client's former lawyer. From the former lawyer's standpoint, it would impose an unfair and potentially burdensome obligation to monitor the proceedings after the representation of the client has ended. The variety of circumstances in which paragraphs (a) and (b) could come into play does not warrant imposing a continuous obligation on a lawyer to take corrective action in a proceeding in which a lawyer no longer is involved and about which, due to the privilege that applies to communications between the former client and replacement counsel, the former lawyer can have only imperfect and potentially misleading information. Moreover, a lawyer would be compelled to correct a false statement of fact or law or adverse legal authority previously cited to the court even if such a "mea culpa" would have no significance to the parties or to the court. The lawyer's actions may also be ill-advised and contrary to the advice given by the client's current lawyer. The Commission further believes that limiting the obligation to take

corrective action to the conclusion of the proceeding or the representation, whichever occurs first, is a practical and workable time limit and consistent with the Commission's Charter to promulgate rules that are clear and enforceable.

The Commission disagrees with Mr. Tuft's interpretation of ABA Model Rule 3.3. That dissent suggests that the ABA Rule extends the remedial obligations of the Rule to the conclusion of the proceedings even in situations where the lawyer no longer represents the client. ABA Rule 3.3 merely states that the duties continue until the conclusion of the proceeding, but it is silent on whether these duties apply even after the lawyer has withdrawn or been terminated. ABA Rule 3.3 is therefore ambiguous on the issue, and no doubt this uncertainty over time will lead to different interpretations in the jurisdictions that have adopted ABA Rule 3.3(c).<sup>1</sup> Fairly read, ABA Rule 3.3 is premised on situations where the lawyer still represents the client and the lawyer has not withdrawn or been terminated. Therefore, the Commission's approach to draw the line at the conclusion of the representation is not inconsistent with the ABA Rule and in fact eliminates the ambiguity in the ABA approach.

The dissent from Mr. Chou, et al. recommends a more nuanced approach, which would specify what specific duties under paragraphs (a) and (b) continue to the conclusion of the proceeding. The problem with this approach is that identifying which paragraph (a) and (b) duties should continue after the lawyer's termination or withdrawal is necessarily fact-specific, depends on the particular circumstances of breach of candor, and the current status of the proceeding. The Commission believes that a more nuanced approach would defeat the objective of having a bright-line Rule. The Chou dissent also does not explain how such a Rule would read or offer an alternative. It does not explain what aspects of paragraphs (b) and (c) should apply after termination and to the conclusion of the proceeding.

A Rule that attempts to encompass every ill sets an aspirational goal. The results necessarily will be indefinite, subject to varying interpretations, and deficient in providing guidance to lawyers in practice and to those who enforce the Rules.

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<sup>1</sup> However, there is textual support for the conclusion that the ABA Rule applies only while the lawyer-client relationship continues because it refers to ABA Rule 1.6, which states the duty of confidentiality to current clients, but not to Rule 1.9 which expresses a lawyer's duties to former clients. Had the ABA Rule drafters intended that ABA Rule 3.3 would apply after the lawyer-client relationship ends, Rule 3.3(c) would have referred to Rule 1.9 as well. That is, the last clause of Rule 3.3(c) would have been drafted to say, for example: "... even if compliance requires disclosure of information otherwise protected by Rule 1.6 **or Rule 1.9**, as applicable."

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## **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.

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<sup>1</sup> *People v. Cordova*, \_\_\_ Cal.4th \_\_\_, 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.4th 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).

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 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.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010) and *People v. Cordova*, \_\_\_ Cal.4th \_\_\_, 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**

### **Proposed paragraph (d).**

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.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010). See also *People v. Cordova*, \_\_\_ Cal. 4th \_\_\_, 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 (9th 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.

#### **Proposed paragraph (e).**

Mr. Cardona also finds fault with paragraph (e), which prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding unless the prosecutor reasonably believes

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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.4th 682, 701-702 (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.

that the information sought is not protected by a privilege, the evidence is essential to the ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information. The Commission continues to believe that this provision, adopted by 33 jurisdictions, sets the appropriate standard for a subpoena that can only serve to drive a wedge between lawyer and client.

Paragraph (e) was adopted by the ABA House of Delegates in 1990 after two separate Resolutions issued by the ABA during the 1980's had failed to stem the tide of federal subpoenas that had been served on criminal defense lawyers. (See *ABA Report 118 to House of Delegates recommending that new paragraph (f) be added to Model Rule 3.8* (Feb. 1990). [Paragraph (f) was re-lettered (e) in 2002 as part of the ABA Ethics 2000 revision of the Model Rules].) The proposal was prompted "by the effect these subpoenas might have on the adversary system and the attorney-client relationship – the trust placed by the clients in their attorneys and the confidentiality implicit in that relationship itself." (Id. at page 2.)

Mr. Cardona makes three arguments. First, he suggests the fact that some of the largest jurisdictions are among the minority of 17 jurisdictions that have not adopted paragraph (e), apparently implies that there is no problem with subpoenas being issued in these jurisdictions. That there are populous jurisdictions that have not adopted the provision does not necessarily demonstrate that there is no problem or that such a problem might not reasonably be anticipated. The Commission notes that in the 1980's, the precipitating cause of the ABA's resolutions and ultimately, rule amendment, was the increasing incidence of *federal* subpoenas.

Second, Mr. Cardona takes issue with the use of the term "essential" in subparagraph (2) of paragraph (e), stating his view that it "unduly limit[s] prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys." He further suggests the substitution of the first Commission's term "reasonably necessary" for "essential." The Commission disagrees with Mr. Cardona's assessment. The Commission believes that a subpoena served on a criminal defense attorney will inevitably lead to the deterioration of the attorney-client relationship which lies at the heart of our adversary system. Requiring that the prosecutor "reasonably believe" that the evidence sought is "essential" in effect prohibits the prosecutor from going on a fishing expedition for "merely peripheral, cumulative or speculative" information. (See ABA Report 118, at page 11.) Further, Mr. Cardona urges that the first Commission's term "reasonable" be substituted for the proposed term "feasible" in subparagraph (3). Again, the Commission believes that in light of the destructive effect such a subpoena will have on the attorney-client relationship, its use should be limited to those situations where the prosecutor has tried all other alternatives. A subpoena should be used only as a last resort.

Third, Mr. Cardona appears to rely on the fact that the first Commission revised the ABA Model Rule as supporting the conclusion there is no indication that prosecutors are misusing the subpoena power. The Commission does not believe that the first Commission's language supports any such conclusion. The Commission is unaware that the first Commission conducted an empirical study to support its proposed changes to the Model Rule. It again notes that the problem the ABA was addressing in 1990 was with the increased incidence of attorney subpoenas in *federal* proceedings. Given the current social and political climate, with California's position on several issues in conflict with the position of the federal government, there is a real potential for the renewal of federal attorney subpoenas. They should not be used except in the most compelling of cases. The history of Model Rule 3.8(e) demonstrates that only a rule of professional conduct with stringent standards will be effective in protecting the attorney-client relationship.