August 4, 2010

TO: Jan Scully
District Attorney

FROM: Albert Locher
Assistant D.A.

RE: Proposed Rule of Professional Conduct 3.8(d)

This is in response to the Monday, 8/2 email from Scott Thorpe concerning the solicitation of public comment by the State Bar on proposed Rule 3.8(d).

When the State Bar put out its proposed Rule 3.8 in September 2009, the rule in major part tracked ABA Model Rule 3.8. However, the State Bar's 9/09 version subsection (d) differed from the ABA Model Rule. The two versions, with differences highlighted, are:

ABA Model Rule 3.8(d)	**Cal Bar Proposed Rule 3.8(d) [9/09]**
The prosecutor in a criminal case shall: … (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;	The prosecutor in a criminal case shall… (d) comply with all constitutional obligations, as defined by relevant case law regarding the 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 version originally proposed for California (right hand column) linked the prosecutor's obligations to the constitution and relevant case law. In Gary Lieberstein's letter to the State Bar (11/13/09), CDAA embraced this proposal.

After public comment on the Bar's 9/09 proposed rule, the Bar received a letter from the Los Angeles Public Defender's Office which prompted them to put forward a change. The Bar is now (as of July 2010) soliciting comment on whether California should adopt the unmodified, ABA model rule version of subsection (d) (left hand column).

The change should be of concern to California prosecutors. The ABA Model Rule was the subject of an ABA Ethics Opinion construing its meaning in July 2009 (ABA Formal Opinion 09-454; this document can be found easily online). As construed by Opinion 09-

454, the rule does not limit its scope to *Brady* case law – the opinion 09-454 expressly so states. This proposal raises the following issues:

1. Materiality requirement: Under *Brady*, evidence must be material, which means that there is a reasonable probability that the evidence would affect the final result. The same standard is applied pre-trial in deciding whether or not to disclose, and post-trial in deciding whether or not it should have been disclosed. This standard gives the DA leeway to make a judgment call on how important the evidence is, although case law says that DAs should not "tack too close to the wind," and resolve close cases in favor of disclosure. The ABA rule does not include a materiality limitation, but instead requires prosecutors to disclose all favorable evidence, so the defense can decide the usefulness of the evidence on its own. This puts a greater burden on prosecutors.

2. Timing of disclosure: The *Brady* obligation relates to a fair trial. If the evidence is disclosed in time for the defendant to make effective use of it a trial, the rule is met. Disclosure at the beginning of trial, or even during trial, has been held sufficient. Further, a defendant need not be given *Brady* evidence that is merely impeaching of the prosecution evidence before defendant enters a plea bargain, so long as all evidence of actual innocence is disclosed. *U.S. v. Ruiz* (2002) 536 U.S. 622. The ABA rule requires "timely" disclosure, which the opinion 09-454 construes to mean "as soon as reasonably practical."

(a) Opinion 09-454 specifically states that the prosecutor should make the evidence available before a guilty plea. This interpretation is contrary to the weight of precedent, including U.S. Supreme Court precedent, construing the *Brady* obligation.

(b) The Rule creates a discovery obligation on the part of the prosecution that is not required by statute. The California discovery statutes require the prosecution to provide discovery no later than 30 days before trial, or as otherwise required by the U.S. Constitution. Penal Code §§ 1054(e), 1054.5, 1054.7. Since neither the California statutes nor the U.S. Constitution (i.e. *Brady* case law) require the prosecution to make discovery "as soon as reasonably practical," an obligation to provide discovery earlier than 30 days before trial would be unauthorized, could not be judicially enforced, and is contrary to both Penal Code § 1054.4 and California Constitution Article I, § 30(c). See *In re Littlefield* (1993) 5 Cal.4th 122, 129; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106. This amounts to nothing less than an attempt to use the vehicle of a rule of ethics to create a rule of discovery that has been expressly rejected in our constitution and discovery statutes. It is not the role of the State Bar to mandate such rules.

It is worth noting that the issue of a defendant's right to force discovery, or a particular item of discovery, before preliminary hearing has been raised in several recent cases, and is currently before the 6th DCA (*Magallan v.* Superior Court, H034892; CDAA has filed an amicus curiae brief). While not directly on point, the California Supreme Court recently ruled a defendant does not have the right to force *Pitchess* discovery before preliminary hearing. *Galindo v. Superior Court* (2010) __ Cal.4th __, 2010 Cal.Lexis 7064. It would be ironic if the courts hold pre-preliminary hearing discovery is not

required in California, but the State Bar would hold prosecutors in violation of an ethics rule for not providing discovery "as soon as practical."

It is also worth noting that federal law is even more restrictive, since under the Jencks Act (18 U.S.C. 3500) the disclosure to the defense of statements by government witnesses is prohibited until after they have testified on direct examination at trial. A procedure required by federal statute would be an ethical violation under ABA 3.8(d) and Opinion 09-454.

3. Waiver: The U.S. Supreme Court allows a defendant to waive the right to receive *Brady* disclosure as part of a plea agreement. ABA Opinion 09-454 specifically states that the prosecutor is not relived of the ethical violation by virtue of the defendant's waiver, and therefore a prosecutor should not solicit, accept or rely on a defendant's consent. This is directly contrary to the rule in *U.S. v. Ruiz* (2002) 536 U.S. 622.

4. Disclosure of "Sentencing Evidence" Directly to the Court: As Michael Schwartz (Special Asst. D.A., Ventura) has pointed out, the rule requires 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. But whether or not some evidence is mitigating may be a matter of judgment, and may depend on the defense theory of the case. The defense may have objection to the prosecutor providing evidence directly to the court which the DA is afraid might be considered mitigating, but the defense does not want to present, because it undermines the defense theory of the case. A prosecutor will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with this rule.

5. 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, 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 questionable whether, or to what extent, this can be translated into a personal ethical breach by the supervisor. The recent U.S. Supreme Court case of *Van de Kamp v. Goldstein* held that supervising prosecutors are absolutely immune from civil liability for failure to train or ensure administrative compliance with *Brady* requirements. In addition, in larger offices, there is a question of who should be held accountable. Who does the bar discipline if training and/or discovery procedures are deemed inadequate – a supervisor, a division chief, the training manager, the chief deputy, or the elected DA? All of the above? Would the Bar be justified in disciplining Kamela Harris, and/or her chief deputy, for the failure of her office to have a *Brady* procedure in place before the SF Crime Lab scandal broke?

Conclusion: CDAA should consider filing a public comment objecting to the adoption of proposed rule 3.8(d).