

TO: CDAA

FROM: Laura Tanney  
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RE: State Bar Meeting - Model Rule 3.8(d)

DATE: September 23, 2010

On September 22, 2010, the California State Bar Regulations and Admissions Committee (RAC) met at the State Bar Annual Meeting followed by the Board of Governors to consider seven of the Proposed Rules of Professional Conduct that were circulated for public comment in July and August. One of these rules was ABA Model Rule 3.8 dealing with the Special Role of the Prosecutor. Of significant concern was ABA Model Rule 3.8, subdivision (d), which would impose additional burdens on the prosecution relating to discovery that go above and beyond that required by the United States Constitution, as interpreted by the courts in *Brady v. Maryland* (1963) 373 US 83 and by statute.

Also under consideration was an alternative version of Rule 3.8(d) that was recommended by the Rules Revision Commission as a compromise after numerous letters written by prosecutors were sent during the public comment period, including one drafted by Albert Locher, Assistant District Attorney, Sacramento County, on behalf of CDAA, and after a teleconference at which I was permitted to make a presentation on behalf of my office and CDAA. This compromise would still have subjected prosecutors to disciplinary action for mere violations of the criminal discovery statutes regardless of whether any withheld information was material to the outcome of the case.

At the State Bar annual meeting, I appeared on behalf of CDAA and the San Diego District Attorney's Office along with AUSA George Cardona; Santa Cruz DDA Joyce Angell; Fresno DDAs Burton Francis and Blake Gunderson, Monterey County DDA Berkeley Brannon, and Santa Clara Bar Association President Clark Stone. Only George Cardona and I were permitted to make presentations and were asked to limit ourselves to five minutes each despite the significance of this issue. I urged the RAC to go back to the February draft proposal which required prosecutors to comply with their constitutional discovery obligations as interpreted by relevant case law.

After much heated debate around the table among members who in large part either lacked familiarity with the laws relating to criminal discovery, or who practiced criminal defense, the RAC voted 3 – 2 in favor of the original February version of Rule 3.8(d). This recommendation was carried forward to the Board of Governors, where another heated debate was had and I was

asked to make another presentation. When all was said and done, the Board adopted the February draft version of the proposed rule.

Thus, the Rule 3.8, subdivision (d), adopted by the State Bar and being sent to the Supreme Court states:

“A prosecutor must comply with all 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.”

While I also addressed Rule 4.2 relating to communications with represented “persons,” the RAC and the Board felt that our concerns were addressed in comments and thus adopted the Rule as set forth in the most recent draft including all 24 comments, including two comments that indicate the intent to allow criminal investigations to continue as authorized by law.

I would like to express my appreciation to District Attorneys Bonnie Dumanis, Elizabeth Egan, Dean Fillipo and Delores Carr, and to their above named representatives for appearing in opposition to ABA Model Rule 3.8, subdivision (d). I truly believe that were it not for this united effort, that prosecutors throughout the state would be subject to rules of discovery that, in practice, would be impossible to carry out.