

August 17, 2010

Board of Governors
State Bar of California
180 Howard Street
San Francisco, California 94105

RE: Opposition to Proposed Rule 3.8(d) of the California Rules of Professional Conduct

As the elected District Attorney of Los Angeles County, I strongly oppose the current version of proposed Rule 3.8(d) of the California Rules of Professional Conduct ("Rule 3.8(d)") that is being circulated for public comment. The State Bar of California, Board of Governors ("Board") should reinstate the previous version authored by the Commission for Revision of the Rules of Professional Conduct ("Commission").¹

Los Angeles County District Attorney's Office

The Los Angeles County District Attorney's Office ("LADA") is the largest local prosecutorial office in the United States, serving over 10 million people. (LADA Legal Policies Manual (Apr. 2005) p.1.) LADA is responsible for all felony prosecutions in the county and misdemeanor prosecutions in 78 incorporated cities as well as in the County's unincorporated areas. (*Ibid.*) Annually, LADA prosecutes nearly 60,000 felonies, 200,000 misdemeanors and approximately 30,000 juvenile petitions. (LADA, *Office overview* (Feb. 1, 2006) <http://da.la.ca.us/oview.htm> (as of Aug. 5, 2010).)

The mission statement of the LADA provides that every employee "shall adopt the highest standards of ethical behavior and professionalism." (LADA Office Overview, <http://da/co.la.ca.us/oview.htm> (as of Aug. 5, 2010).) To accomplish the goal, LADA has three deputy district attorneys assigned to its Professional Responsibility Unit ("PRU"), who as part of their duties advise other deputies facing ethical issues. The PRU deputies, along with other prosecutors, regularly provide ethics training and publish an office wide newsletter, *Ethicsline*. Also, the LADA Brady compliance Unit ("BCU") is responsible for coordinating and making available to deputy district attorneys known *Brady* material on peace officers and other governmentally employed expert witness who are part of the "prosecution team." BCU maintains the LADA Brady Alert System, which is the central repository of known *Brady* material, and is charged with providing guidance to deputy district attorneys with questions regarding *Brady* issues. PRU and BCU serve as a model for prosecution offices throughout the state.

¹ The Los Angeles County District Attorney's Office previously objected to Rule 3.8(a) and 3.8(g) in a letter dated November 16, 2009 to Audrey Hollins, Office of Professional Competence, Planning and development, State Bar of California.

Background

The commission proposed a version of Rule 3.8(d) that was a modified version of American Bar Association (“ABA”) Model Rule 3.8(d). It obligated prosecutors to comply with discovery in accordance with their “constitutional obligations.” The Commission explained the change to the ABA version as follows:

The proposed language ... generally follows the ABA Model Rule but further clarifies that the requirement of the prosecutor’s timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law.

(Proposed Rules of Professional Conduct, Rule 3.8(d), Explanation, Draft 9.1 (Feb. 27, 2010), p.5.)

During the public comment period, a letter was submitted by Michael Judge, the Los Angeles County Public Defender, criticizing the Commission’s proposed Rule and urging a verbatim adoption of the ABA Rule. In response, the Board circulated the ABA version and is soliciting additional comment. The current version of proposed Rule 3.8(d) with redline comparison to the Commission’s version is as follows:

~~comply with all constitutional obligations, as defined by relevant case law, regarding the~~ 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[.]

(Redline Comparison of the Proposed Rule 3.8(d) of the previous Public comment Draft, 11 (July 25, 2010).)

Discussion

The Constitutional and statutory and case law of both United States and California have long been the guiding touchstones of prosecutorial discovery in our State. The present version of Proposed Rule 3.8 eviscerates these authorities by expanding the scope of a prosecutor’s ethical duty to provide discovery to defense far beyond what is required.²

This is particularly unreasonable in California where the voters of the state have specifically addressed this issue. On June 5, 1990, the citizens of the state voted to pass the Crime Victims Justice Reform Act, Proposition 115, commonly known as Proposition 115. (Prop. 115 (1990) <http://library.uchastings.edu/cgi-bin/starfinder/29526/calprop.txt>> (as of Aug.9, 2010).) The intent and purpose of the initiative are clear:

² The ABA Standing Committee on Ethics and Professional Responsibility interprets ABA Model Rule 3.8(d) to expand a prosecutors’ discovery obligation beyond federal and state constitutional obligations. (ABA, Formal Opinion 09-454, Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense (July 8, 2009) http://www.abanet.org/media/your_ABA/200909/opinion_09454.pdf (as of Aug. 9, 2010).)

SECTION 1. (a) We the people of the State of California hereby find that the rights and crime victims are too often ignored by our courts and by our State Legislature, ... and that comprehensive reforms are needed in order to restore *balance* and *fairness* to our criminal judicial system.

(b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the laws as developed in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.

(c) The goals of the people in enacting this measure are to restore *balance* to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods and schools.

(Pro. 115 (1990) <http://library.uchastings.edu/cig-bin/starfinder/29526/29526/calprop.txt>> (as of Aug. 9, 2010) (ital.added).)

In order to attain these goals, Proposition 115 revamped criminal discovery statutes in Penal Code section 1054 et seq. which enumerated disclosure obligations (Pen. Code, § 1054.1)³ and set forth clear time periods (pen. Code § 1054.7).⁴ Additionally, Proposition 115 added Article I, section 30 of the California Constitution. Section 30, subdivision (c), which states that “[i]n order to provide for fair and

³ Penal Code section 1054.1 states:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as part of the investigation of the offense charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the result of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at trial.

(Pen. Code, § 1054.1.)

⁴ Penal Code section 1054.7 requires that disclosure shall be made at least 30 days before trial or immediately if the information becomes known to the prosecutor within 30 days before trial, unless good cause is shown why disclosure should be “denied, restricted or deferred.” (Pen. Code, § 1054.7.)

speedy trials, discovery in criminal cases shall be reciprocal in nature ... (Cal. Const., art. I, § 30, subd. (c).) The statutory scheme set forth in Penal Code section 1054 et seq. provide a framework for reciprocal discovery. Finally, the statutes themselves again emphasized the point that voters wanted to be clear, that “no discovery shall occur in criminal cases except as provided by th[ese statutes], other express statutory provisions, or as mandated by the Constitution of the United States. (Pen. Code § 1054, subd. (e).)

There is no question that the California Supreme Court has the authority to adopt professional rules of conduct. However, those rules cannot conflict with constitutional and statutory principles.

The Constitution of the State of California provides that:

The powers of the state government are legislative, executive and judicial:

Persons charged with the exercise of one power may not exercise either of the others, except as permitted by this constitution.

(Cal. Const., Art. III, §3.)

As stated above, the People in Proposition 115 mandated a criminal discovery process. Additionally, the United States Supreme Court has refused to require generalized disclosure of all evidence favorable to the accused as creating an impossible requirement for prosecutors. (*United States v. Bagley* (1985) 473 US 667, 676, fn. 7.) Prosecutors, as members of the executive branch, must adhere to the federal and state constitutions and relevant statutes. Adoption of the current version of Rule 3.8(d) would require otherwise and violate the separation of powers doctrine.

As the California Supreme Court stated in response to a post conviction discovery request concerning potentially mitigating evidence:

Requiring the prosecution, on its own, to disclose information that might fit some defense theory but is irrelevant to the prosecution evidence or theory of the case is generally not necessary to ensure a fair trial. Because mitigation is often “in the eye of the beholder” (*Burger v. Kemp* (1987) 483 U.S. 776, 794), the defense will know far better than the prosecution what evidence fits its theory of the case and what evidence does not. Because the defense can offer virtually anything about the defendant personally that it considers mitigating, virtually anything regarding the defendant personally that it considers can be exculpatory if the defense consider it so. Thus, evidence whose exculpatory nature is not obvious might become exculpatory whenever the defense so claims. But the duty to disclose evidence cannot extend to evidence the prosecution had no reason to believe the defense would consider exculpatory. Requiring the prosecution to, as the high court put it, “assist the defense in making its case” (*United States v. Bagley, supra*, at p. 675, fn. 6) is unnecessary when it comes to potential mitigating evidence against the defendant personally. It would also be overly burdensome. It is one thing to expect the prosecution to know about its own case and to provide the defense with evidence weakening that case. It is quite different to expect it to be alert to

information unrelated to its case that might support a defense theory, especially given the unlimited range of potentially mitigating evidence.

(*In re Steele* (2004) 32 Cal.4th 682, 699-700, parallel citations omitted.)

Our current reliance on the constitution, statutes and case law provides clear guidance to prosecutors who are litigating matters before judges who are in the best position to determine if violations occur. Tactical gamesmanship by some defendants will be exacerbated without any improvement to the quality of justice. Trials will be delayed, and the fairness and balance to be accorded to victims and witnesses, and demanded by the voters of California, will be substantially and unnecessarily diminished.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steve Cooley", with a large, stylized flourish extending from the end of the name.

STEVE COOLEY
District Attorney

ss

c: Scott Thorpe, Executive Director, CDAA