VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 3.8
PROPOSED COMMENT 5

PETITION OF THE VIRGINIA STATE BAR

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed new Comment 5 to Rule 3.8, as set forth below. The proposed comment was approved by a 47-13 vote of the Council of the Virginia State Bar on February 23, 2019 (Appendix at 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to Rule 3.8, Additional Responsibilities of a Prosecutor. Proposed Comment 5 is an entirely new comment that explains what "disclosure" means as used in Rule 3.8(d), regarding a prosecutor's duty to make known to the defense the existence of exculpatory evidence. Comment 5, as approved by Council, provides as follows:

[5] Paragraph (d) requires disclosure of the existence of exculpatory

> evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.
> ***

The proposed comment makes clear that the prosecutor's obligation is triggered only once the existence of exculpatory evidence becomes known to the prosecutor, and that the prosecutor must disclose and identify particular evidence that he or she knows to be exculpatory.

Current Rule of Professional Conduct 3.8 and its Comments

Rule 3.8 and its comments currently provide as follows:

> **Rule 3.8**
>
> **Additional Responsibilities of A Prosecutor**
>
> A lawyer engaged in a prosecutorial function shall:
>
> (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
> (b) not knowingly take advantage of an unrepresented defendant;
> (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
> (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
> (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[1a] Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.

[1b] Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court's usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of *Code of Virginia* Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.

[2] At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing *pro se* with the ultimate approval of the tribunal. Where an accused does appear *pro se* before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are knowingly made and voluntary.

[3] The qualifying language in paragraph (c), i.e., ". . . after a party has been charged with an offense," is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term

> "encourage" in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
> [4] Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.

History of This Proposal

The Committee's efforts to address a prosecutor's duty to disclose the existence of exculpatory evidence, particularly in a "needle in a haystack" situation where a piece of known exculpatory evidence is included in a large volume of other materials, began with proposed LEO 1888. That opinion was based on a hypothetical scenario involving 200 hours of recorded jail calls, including one statement that the prosecutor knew to be exculpatory, and the proposed opinion concluded that the prosecutor was required to specifically identify that exculpatory statement to the defense lawyer. After the proposed opinion was released for public comment, the Committee withdrew the opinion, based in part on concerns about the ability to address this issue through a hypothetical scenario, and in part on the decision that the interpretation of the phrase "disclose the existence of" was better suited to a comment to the Rule rather than a legal ethics opinion.

The Committee then drafted a proposed Comment 5 to Rule 3.8 and released it for public comment. After receiving comments on that proposal, the Committee agreed to withdraw that proposed comment and establish a working group to ensure that the views of all stakeholders, including the Virginia Association of Commonwealth's Attorneys ("VACA"), were included in the Committee's process. The working group subsequently produced the following comment, which was adopted by the Committee and submitted to Council, where it was amended before being adopted. The proposal, which was approved by the working group and by the Committee and submitted to Council at its February 2019 meeting, read:

> [5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely disclose the evidence. What constitutes sufficient disclosure is dependent on the circumstances. In many cases, providing a copy of or access to the evidence or information is sufficient. In some circumstances, additional steps may be necessary to fulfill the disclosure obligation.

Council Proceedings

At the February 23, 2019, Council meeting, there were several motions made to delay or reconsider the proposal, as well as several motions to amend the text of proposed Comment 5. Motions to defer consideration of proposed Comment 5 until Council's June meeting and to send it back to the Committee for

further study in order to strengthen the obligations placed on the prosecutor both failed. A motion to amend the proposal to require that the prosecutor take "good faith" steps to disclose exculpatory evidence failed, as did a motion to add a sentence to the comment to indicate that it is aspirational. Ultimately, Council approved a motion to amend the proposed comment by deleting the final three sentences and modifying the now-last sentence to require that the prosecutor "identify and disclose" known exculpatory evidence, rather than just "disclose" the evidence. The amended comment, adopted by Council by a vote of 47 to 13, provides as follows:

> [5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.
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Analysis

Rule 3.8(d) requires a prosecutor "make timely disclosure" of the "existence of evidence" that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, but the rule does not specify what form that disclosure must take, nor whether disclosure requires more than mere production of the evidence. The Committee was of the opinion that "disclosure…of the existence of evidence" means more than just making the

evidence available to be found by the defense, and particularly that a "needle in a haystack" scenario is not compatible with the prosecutor's obligations under this Rule.

The Committee also felt that, even when there was no intentional concealment of exculpatory evidence, a prosecutor has not disclosed the existence of exculpatory evidence when he or she includes one piece of exculpatory evidence within hundreds or thousands of pages of non-exculpatory evidence. The proposed comment makes explicit that the prosecutor's duty to disclose the "existence of [exculpatory] evidence" requires the prosecutor to do more than merely produce or make available the exculpatory evidence.

Brady v. Maryland, 373 U.S. 83 (1963) and its progeny established a prosecutor's legal duty to turn over exculpatory evidence to the defense. Rule 3.8(d) is not coextensive with a prosecutor's legal obligations in several respects. Notably, as emphasized in the proposed comment, Rule 3.8(d) applies only to evidence that the prosecutor knows exists and is exculpatory, whereas the prosecutor's legal obligations include information known to law enforcement but not to the prosecutor personally, and even require the prosecutor to learn of "any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). *Cf. Workman v. Commonwealth*, 272 Va. 633, 646 (2006) (". . . the individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police."). Rule 3.8(d) and proposed Comment 5 do not put any burden on the prosecutor to look for exculpatory evidence, but rather to disclose and identify it once it becomes known to the prosecutor.

The legal requirement of *Brady* disclosure only applies to evidence that is "material" to the defendant's guilt or punishment, whereas Rule 3.8(d) does not include any materiality standard and requires disclosure of any evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Brady v. Maryland*, 373 U.S. at 87. The *Brady* standard is inherently backward-looking as it is generally applied and interpreted in post-conviction proceedings, whereas the Rules of Professional Conduct, and especially the comments to the rules, are primarily addressed to lawyers analyzing their own prospective conduct. Accordingly, Rule 3.8(d) requires broader disclosure, at an earlier stage in the proceeding, than the *Brady* standard requires, balanced with the actual knowledge standard of Rule 3.8(d) which does not require the prosecutor to search for or take responsibility for information that is not actually known to the prosecutor. *See also* Va. Legal Ethics Op. 1862 (2012) (explaining how the ethics rule was rewritten after *Read v. Virginia State Bar*, 233 Va. 560 (1987), and that the prosecutor's *ethica*l duty under Rule 3.8(d) is not co-extensive with the prosecutor's *legal* duty under *Brady*).

Proposed Comment 5 as amended and adopted by Council applies to all circumstances, not merely a "needle in a haystack" or other situations in which defense counsel would be required to wade through large volumes of non-exculpatory material to locate the exculpatory evidence. Rather, the proposed comment makes it clear that a prosecutor must always identify and disclose exculpatory evidence once he or she knows that it is exculpatory. As compared to the comment proposed by the Committee, it removes any uncertainty or need for judgment calls by prosecutors about whether they are obligated to do more than provide access to exculpatory evidence, since identifying the exculpatory evidence will be necessary in every case regardless of the timing or circumstances of disclosure.

The proposed amendment is included below in Section III.

II. Publication and Comments

The Committee approved the proposed amendment at its meeting on October 9, 2018 (Appendix at 8). The Virginia State Bar issued a publication release dated October 11, 2018, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix at 9). Notice of the proposed amendment was also published on the bar's website on the "Rule Changes" page (Appendix at 11) and in the bar's E-News on November 1, 2018 (Appendix at 13).

Eight comments were received from: Kennedy (Appendix at 14); Shaia (Appendix at 17); Ferguson (Appendix at 18); Boyce (Appendix at 20); Hakes (Appendix at 22); Reis (Appendix at 24); Evans on behalf of VACA (Appendix at 26); and Blair on behalf of Local Government Attorneys of Virginia (Appendix at 29).

The Committee received comments from prosecutors criticizing the proposed comment because it does not offer sufficient guidance, is potentially duplicative of procedural discovery rules, and because it reaches the wrong conclusion. VACA argues that "disclosure" is synonymous with "production," and therefore the proposed comment goes beyond what is required by Rule 3.8(d) by suggesting that additional steps beyond just production may be required in certain situations. The Committee considered these comments and determined not to make any change to the proposal in light of the issues raised.

The Committee also reviewed the new rules governing criminal discovery and concluded that the discovery rules do not affect the issues raised by Rule 3.8(d) and proposed Comment 5, as both the discovery rules and Rule 3.8 indicate that a prosecutor's obligations under the two sets of rules are not coextensive, and a prosecutor's ethical obligations can and do extend beyond what is required by legal, constitutional, and procedural rules. The Committee also concluded that the proposed comment provides necessary guidance and clarification that "disclosure"

is not the same as "production" and that a prosecutor may have to do more than merely produce exculpatory evidence in order to satisfy this duty of disclosure.

The VACA comment letter also argues that the Committee, and the Bar, mischaracterize the process that led to this proposal, and that the working group never reached a consensus because the prosecutors did not agree to the proposed language. However, other members of the working group, including a report from its chair, Judge Robert J. Humphreys (Appendix at 31), agree that the group reached a consensus on the proposed language.

III. Proposed Rule Change

Rule 3.8 Additional Responsibilities of a Prosecutor

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[5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.

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IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and

regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed rule change was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed new Comment 5 to Rule 3.8 for the reasons stated above.

Respectfully submitted,

VIRGINIA STATE BAR

Leonard C. Heath, Jr., President

Karen A. Gould, Executive Director

Dated this 5th day of March, 2019.