May 21, 2019

VIA EMAIL
scvclerk@vacourts.gov
Douglas B. Robelen, Clerk
Supreme Court of Virginia

Re: Comments on Proposed Modification of Rule 3.8(d) of the Virginia Rules of Professional Responsibility to add Comment 5

Dear Mr. Robelen,

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to provide NACDL's comments on the addition of Comment 5 to Rule 3.8(d) of the Virginia Rules of Professional Responsibility.

NACDL worked extensively on criminal discovery and *Brady* initiatives at both the state and federal level. It is with this experience and perspective that we urge the Virginia Supreme Court to adopt the proposed Comment. While not perfect, the Comment addresses an important aspect of ensuring the fundamental fairness of the adversarial process—that as the "minister of justice," prosecutors are tasked with the responsibility of ensuring the proceedings are fair and justice is done, not simply that cases are won. Ethical rules that overtly or by their silence sanction the obfuscation of known mitigating information do more than impede justice; they actively undermine public trust in the very institutions of the criminal legal system.

NACDL's Commitment to Fairness in Criminal Discovery and the Disclosure of Exculpatory Evidence

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crimes or other misconduct and to promote the proper and fair administration of justice. Founded more than 60 years ago, NACDL boasts thousands of direct members and 90 state, provincial, and local affiliate organizations, totaling tens of thousands of attorneys—including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges.

NACDL has long been active in the area of criminal discovery and *Brady* reform. In 2014, NACDL developed a model open-file discovery law. Designed to promote fairness and informed decision-making, the model legislation calls for production immediately after arraignment and prior to entry of any guilty plea of all information generated during the investigation of a charged offense. This model law is the product of NACDL's extensive research, discussion, and revision and draws from

best-practice provisions around the country. That same year, in partnership with the Veritas Institute, NACDL undertook an unprecedented study of *Brady* cases litigated in the federal courts over a five-year period. The resulting report, *Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases*, documents the failure to ensure full, fair, and timely disclosure of information favorable to the accused in courtrooms across the nation. Key findings in the report included:

- The materiality standard produces arbitrary results and overwhelmingly favors the prosecution. Even in remarkably similar factual situations circumstances in which prosecutors withheld favorable information, the courts' outcomes on the question of materiality varied. Moreover, in only 14 percent of the cases did the court deem the undisclosed favorable information material and find that a *Brady* violation occurred.

- The prosecution almost always wins when it withholds favorable information. In 90 percent of the decisions in which the prosecution withheld favorable information—either disclosed it late or not at all—the defense lost the case. Meanwhile, the courts held that the prosecution's withholding of the favorable information violated *Brady* in just 10 percent of these decisions.

As the authors noted, the study "provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information."[1] *See Material Indifference* study at xii.

The Need for Comment 5

As defense attorneys, NACDL's members carry a heavy responsibility to see that the accused in every criminal case enjoys meaningful representation and puts the government to its burden, consistent with the rights guaranteed by the United States Constitution. That job is made more difficult, if not impossible, when information the government ***knows*** negates the accused's guilt, mitigates the degree of the offense, or mitigates punishment, is purposefully withheld until the final moments before trial or intentionally buried amongst reams of materials.

Rule 3.8(d) has its roots in the professional responsibility rules first drafted by the ABA in 1908. Predating the *Brady* decision by over 50 years, the ABA Canons of Professional Ethics set apart the duties of prosecutors, detailing the special responsibilities they carry as ministers of justice ("The primary duty of a lawyer engaged in public prosecution is not to convict but to see justice

[1] NACDL, *Material Indifference How Courts are Impeding Fair Disclosure in Criminal Cases*, at xii, (2014), https://www.nacdl.org/discoveryreform/materialindifference/.

is done.").[2] Among those responsibilities was the obligation not to suppress facts capable of establishing the innocence of the accused. In 1969, several years after the *Brady* decision, the ABA adopted the Model Code of Professional Conduct, specifically providing "A public prosecutor . . . shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilty of the accused, mitigate the degree of the offense, or reduce the punishment."[3] In 1983, this became the language of Model Rule 3.8(d).

Over the past 100 years the basic text describing this part of the prosecutor's special responsibilities has remained virtually unchanged, but technology has not. It is largely in the last decade that a proliferation of information occurred: digital records and communications; audio and video recordings from body-worn cameras, in car dash cams, home and business security cameras, and inmate phone call recordings; and cell phone, computer, and social media data. When the pool of data was shallow, ethical concerns were associated with the failure to provide exculpatory information. Today the government can bury the evidence on a beach filled with data and send the accused on a treasure hunt without a map to guide their way.

The provisions of Rule 3.8(d) are not encompassed by existing *Brady* jurisprudence.

The United States Supreme Court in *Brady v. Maryland* held "the suppression by the prosecutor of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."[4] The "evidence" must be admissible or lead to admissible evidence and, in deciding whether a violation merits reversal, the court considers whether the suppressed evidence was "material," i.e., that the government's suppression of the information results in a lack of faith in the outcome of the case.[5]

In 1995, the Court further held that the prosecution maintains an affirmative duty to learn of and disclose exculpatory evidence known not only to the prosecutor themselves, but that which is known to others, such as the police, who are acting on the government's behalf.[6] It also made clear that the constitutional demands of the Due Process Clause require prosecutors to not merely rely upon the information they receive from their agents—rather an affirmative obligation exists to "learn of any favorable evidence known to the others acting on the government's behalf."[7]

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[2] ABA Cannons of Professional Ethics, Cannon 5 (1908).

[3] ABA Model Code of Professional Responsibility, DR7-103(B) (1969).

[4] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[5] *Stricker v. Greene*, 527 U.S. 263 (1999).

[6] *Kyles v. Whitley*, 514 U.S. 419 (1995).

[7] *Id.* at 437.

As a result, the provisions of Rule 3.8(d) and *Brady* are distinct, with the Rule being broader in some respects and narrower in others. Where *Brady* includes information known only to agents acting on the government's behalf, Rule 3.8(d) is limited to information only known by the prosecutor themselves. Where *Brady* requires prosecutors to actively learn about potential exculpatory information, Rule 3.8(d) is narrowly tailored to evidence that the prosecutor has actual knowledge of both its existence and its exculpatory nature. And, where *Brady* considers whether the information at issue is admissible or can lead to admissible evidence and is material, Rule 3.8(d) applies to all evidence that tends to negate guilt, mitigates the degree of offense, or reduces punishment, without consideration of its materiality.

Equally important is recognizing that Rule 3.8(d) serves a *different purpose* than *Brady*. The requirements of *Brady*, which arise from the constitutional protections of due process, are constructs of the courts, with rules and remedies relating to the issue before the court—the outcome of the criminal case. In contrast, Rule 3.8(d) is rooted in the special responsibilities of lawyers and their role to police themselves and their conduct.[8] Ethical violations are not tied to the outcome of the case and are not designed to remedy questionable convictions. They are connected to the behavior of the lawyers and designed to sanction those who engaged in wrongful behavior.
Without Comment 5, the current provisions allow the prosecution to dump a large volume of information into the hands of the defense. Efforts to hide away favorable information in hopes the accused does not find it or to bury the defense in frivolous information so as to derail efforts at preparing their case detract from public confidence in the criminal legal system, undermine the credibility of courts and verdicts, and risk innocent people being convicted, jailed, and imprisoned.

Objections and Concerns Raised in Opposition to Comment 5 Mischaracterize the Law and the Obligations Placed Upon Prosecutors by the Rule and Comment

Existing Law Does Not Support Hiding Known Exculpatory Evidence.

Some who defend the position that prosecutors should not face requirements by ethics rules to identify exculpatory evidence but merely to provide it.[9] cite in support the Fifth Circuit's ruling in *U.S. v. Skilling.*[10] While the *Skilling* opinion does indicate, "[a]s a general rule, the government is

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[8] Virginia Rules of Professional Conduct, Preamble ("The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.")

[9] See e.g. Virginia Association of Commonwealth's Attorneys letter Re: Proposed Comment [5] to Rule 3.8 of Nov. 30, 2018, Appendix to Petition of the Virginia State Bar.

[10] *U.S. v. Skilling*, 554 F.3d, 529 (5th Cir. 2009, *rev'd in part on other grounds by Skilling v. U.S,* 561 U.S. 358 (2010).

under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence,"[11] that is not all the court says on the subject.

In rejecting Skilling's claim that the prosecution violated *Brady* by providing him a large volume of discovery yet identifying none of it as exculpatory,[12] the Fifth Circuit noted there was no indication that the prosecutor knew at the time of disclosure that *any* of the items were in fact exculpatory.[13] The court went on to explain that

> it should go without saying that **the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it.** These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*.[14]

The Comment Limits Application to Evidence the Prosecutor Actually Knows of and Actually Knows to be Exculpatory

By its own language, Comment 5 makes clear the requirements to timely identify and disclose exculpatory evidence is limited to evidence that the prosecutor has actual, personal knowledge of (rather than the broader imputed knowledge that *Brady* encompasses) and that they ***know*** is exculpatory. This point is made clear by the Comment's specific reference to Comment 4, which excludes from the ambit of ethical obligations, evidence the prosecutor does not know to be exculpatory because they lack full information as to the potential defenses the accused may raise.

The Comment Does Not Create New Standards of Knowledge

Concerns over prosecutors facing ethical liability because they are unable to determine whether a piece of evidence tends to negate guilt, mitigate the degree of offense, or reduce punishment are unfounded. First, the current provisions of Rule 3.8(d) placed this same challenge before prosecutors for the past 50 years, as it is the Rule—not the Comment—that defines what is the disclosure's subject. Despite the many years the Rule has been in effect, there is no indication Rule 3.8(d) has subjected prosecutors to excessive, unfounded ethics complaints.

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[11] *Id. at* 576.

[12] It is important to note the government provided Skilling the file in a searchable electronic format, indices to the documents, and produced a set of "hot documents" that were identified as documents the government felt were important to their case or potentially relevant to Skilling's defense.

[13] The court specifically noted "there was no evidence that the government found something exculpatory but hid it in the open file with the hope Skilling would never find it." *Id.* at 577.

[14] *Id.* at 577. (Emphasis added).

The provisions of the Comment, like the Rule, are limited to addressing the duties a prosecutor has towards information they know to be exculpatory. Neither provision addresses obligations for information they *should have* known was exculpatory.[15] Instead, the Comment directs, broadly, how to discharge the existing ethical duty.

The Comment Does Not Shift Responsibility to the Prosecution

Concern that the Comment blurs the lines between a prosecutor's responsibilities and defendant's due diligence obligations represents a fundamental misunderstanding of the respective roles and responsibilities of each party. Multiple, simultaneous obligations are at play, none of which "end" at the point where another party's begins. Every group—law enforcement, prosecutors, and defense attorneys—maintain ongoing responsibilities to seek out information favorable to an accused. Such a shared responsibility is a cornerstone of the American legal system. As the person entrusted to act on behalf of the community, the prosecutor must be mindful that the person who stands accused is themselves a member of the community and a person to whom the prosecutor owes a special responsibility to ensure the proceedings are fair. A prosecutor's identification of a particular item as exculpatory does not relieve the obligations of defense counsel to seek out all information that can be helpful to the accused.[16] The Comment does not ask the prosecution to do the defense's job, but rather for the prosecutor to do their own job—to seek justice, not merely win convictions.

The Values Supported by Comment 5 Reflect Model ABA Criminal Justice Practices

The American Bar Association's Criminal Justice Standards for the Prosecution Function, while not mandatory, provide "guidance for the professional conduct and performance of prosecutors."[17] Although non-compliance with their provisions is not intended to serve as a basis for attorney discipline, they are "written and intended to be entirely consistent with the ABA's Model Rules of Professional Conduct."[18] The ABA's Model Rule of Professional Conduct 3.8(d) is virtually

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[15] *See contra*. State Bar of California Rules of Professional Responsibility, Rule 5-110: Special Responsibilities of Prosecutors "(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor **knows or reasonably should know** tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." (Emphasis added)

[16] See, Va. Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence). See also, American Bar Association Criminal Justice Standard for the Defense Function, 4th ed. (2015) Standard 4-41. (Duty to Investigate and Engage Investigators), and Virginia Indigent Defense Standards of Practice 4.1 (Investigation).

[17] ABA Criminal Justice Standards for the Prosecution Function, 4th ed., (2015), Std. 3-1.1.

[18] *Id*.

identical to Virginia Rule 3.8(d)[19] with both sharing the directive that part of a prosecutor's special responsibility is to make timely disclosure to the defense of evidence the prosecutor knows is exculpatory.

The ABA's Criminal Justice Standards for the Prosecution Function include an explicit discussion of the obligations prosecutors maintain relating to the "Identification and Disclosure of Information and Evidence." Standard 3-5.4(c) provides that before trial prosecutors should make timely disclosure of known favorable information and that a prosecutor ***"should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials."***[20]

Provisions outlined in Comment 5 Should be Implemented Immediately

Having further delayed the implementation of the new discovery provisions until July 2020,[21] the Court deciding to defer acting upon the clarification that "disclosure" of known exculpatory evidence requires timely identification of that evidence to the accused only serves to further widen the existing gap between the resources and power of the prosecution and defense in Virginia. As noted earlier, the absence of the clarification of Comment 5 allows prosecutors to engage in the type of gamesmanship that only erodes public trust and detracts from a fair and accurate criminal justice system. Any claims or concerns about the need for additional prosecutorial resources to discharge the requirements of Comment 5 fail to fully appreciate the issue that Comment 5 seeks to address. Nothing in the Comment calls for prosecutors to seek out additional information or calls for prosecutors to review additional documents. Furthermore, nothing in the Comment requires the prosecutor to engage in additional complex, time consuming, or resource-intensive work. The Commonwealth already enjoys an existing *Brady* obligation to seek out exculpatory information known to its agents and already carries an existing ethical obligation to timely disclose known exculpatory evidence to the defense. The Comment's only additional requirement is that when disclosing any exculpatory evidence that has already been uncovered, the prosecutor do something to "identify" that information for the defense.

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[19] The key difference is that the ABA Model Rule refers expressly to the disclosure of "all evidence and information," whereas the Virginia Rule uses the term "evidence" (ABA Model Rule 3.8(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." (Emphasis added)).

[20] ABA Criminal Justice Standard for the Prosecution Function, Std. 3-5.4, 4th Ed. (2015) (emphasis added).

[21] This 12 months is in addition to the 10 months of delay between the Court's letter of September 5, 2018, announcing the Rule's approval and its first implementation date of July 1, 2019.

In contrast, not requiring affirmative identification will add to the costs of criminal cases. Defense counsel will expend additional time and resources scouring the materials provided in search of buried information; late identification of the evidence will result in continuances of trial dates as defendants will need additional time to subpoena additional witnesses, conduct additional investigation, file new motions, and seek out new records; and courts will be left to litigate *Brady* motions seeking out the very information the prosecution provided but hidden within the crevasses of the materials turned over.

NACDL Urges the Court to Adopt Comment 5

The language of Comment 5, as proposed by the Virginia State Bar's Petition, will strengthen the Commonwealth's criminal justice system, placing fairness ahead of victory, and pursuit of justice before gamesmanship.

We urge the Supreme Court to adopt the recommended rule revisions.

Respectfully submitted,

Drew Findling,
President