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The ABA Standing Committee on Ethics and Professional Responsibility recently issued an advisory ethics opinion explaining that the ethical duty of the prosecutor under Model Rule 3.8(d) to disclose exculpatory evidence and information to the defendant is separate from, and more expansive than, the disclosure obligations under the Constitution. In Formal Opinion 09-454, *available at* http://www.abanet.org/cpr/09-454.pdf, the standing committee explained the ethical standard and addressed the scope and timing of required disclosure as well as whether a prosecutor may demand waiver of the ethical disclosure duty as a condition to a guilty plea agreement.

Model Rule 3.8(d) requires a prosecutor 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 the tribunal all unprivileged mitigating information known to the prosecutor." In thoroughly examining the relationship between Rule 3.8(d) and the prosecutor's constitutional obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and the *Brady* line of cases, the standing committee addressed an issue that the Ethics 2000 Commission sidestepped. The ABA's ethics opinion is likely to be treated by all jurisdictions as highly persuasive authority on the prosecutor's ethical disclosure duty, especially since almost every jurisdiction has adopted the language of Model Rule 3.8(d). It brings clarity to an area that has been confusing for prosecutors, defense counsel, and courts. In this column, we look at the key features of the opinion and its implications for discovery in criminal cases.

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Scope of Disclosure Obligation

The opinion states that the analyses of the U.S. Supreme Court and lower courts in the *Brady* line of cases focus solely on the prosecutor's disclosure obligations under the due process clause, which is separate from the ethical obligation imposed by Rule 3.8(d). These constitutional law cases "establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct."

Turning to the history of Rule 3.8(d), the opinion notes that the drafters of the rule "made no attempt to codify the evolving constitutional case law" or incorporate a legal standard, but rather established an independent ethical duty of disclosure that "is more demanding than the constitutional case law." As support for this interpretation, the opinion contrasts Model Rule 3.8(d) with ethics rules that incorporate a legal standard by prohibiting acts that are unlawful or prohibited by law. For example, Model Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value." (Emphasis added.) Model Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*." (Emphasis added.) Model Rule 3.8(d) does not incorporate the constitutional standard. It creates a separate, more expansive ethical disclosure duty.

The standing committee also stated that its interpretation of Rule 3.8(d) is consistent with the ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.11(a), which requires the prosecutor "to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged, or which would tend to reduce the punishment of the accused." The Commentary accompanying Prosecution Function Standard 3-3.11 states that the obligation under Standard 3-3.11(a) "is virtually identical to that imposed by ABA model ethics codes, [and] goes beyond the corollary duty imposed upon prosecutors by constitutional law." Because the Rule 3.8(d) disclosure requirement is more demanding than constitutional case law, the standing committee stated that the ethics rule "requires prosecutors to steer clear of the consti-

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tutional line, erring on the side of caution."

No Materiality Limitation. Formal Opinion 09-454 states that Rule 3.8(d) mandates that a prosecutor inform the accused of all known information favorable to the defendant even if the prosecutor does not believe that the information would affect the outcome of the case at trial. The prosecutor's constitutional obligation, as defined by the *Brady* line of cases, extends only to favorable evidence that is "material," which the committee described as evidence "likely to lead to an acquittal." According to the opinion, Rule 3.8(d) does not have such a materiality limitation, and while the ethical "obligation may overlap with a prosecutor's other legal obligations" it is more expansive.

In evaluating evidence and information, the opinion cautions the prosecutor to consider all "legally cognizable defenses" and not just those raised by defense counsel. There is not a "de minimis exception to the prosecutor's disclosure duty," and thus the prosecutor must turn over information even if the prosecutor believes that it "has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."

Information as Well as Evidence. The ethics rule requires the prosecutor to disclose both evidence and *information* "which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor." Thus, the ethical duty is not limited to admissible evidence, as in the *Brady* line of cases. Rather, Rule 3.8(d) also mandates disclosure of "information" that may be inadmissible but which "may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations."

Timing

The opinion also addresses the timing of disclosure. Disclosure must be made early enough so that defense counsel may use the evidence and information effectively. Reasoning that defense counsel can use favorable evidence and information most effectively the sooner it is received, Rule 3.8(d) requires disclosure of such evidence and information "as soon as reasonably practical" once it is known to the prosecutor.

The opinion examines how and when defense counsel may use favorable evidence and information, such as conducting a defense investigation, deciding whether to raise a defense, determining trial strategy, and advising the defendant whether to plead guilty. Thus, "[t]he obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information."

Focusing on how important defense counsel's evaluation of the strength of the prosecutor's case is to a defendant considering whether to plead guilty, the opinion states that timely disclosure under Rule 3.8(d) requires disclosure of evidence and information "prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment." The Supreme Court in *United States v. Ruiz*, 536 U.S. 622 (2002), appeared to reach a contrary conclusion about the prosecutor's *Brady* obligation prior to a guilty plea. If the prosecutor believes that early disclosure or disclosure of evidence or information may compromise an ongoing investigation or prosecution witness's safety, the opinion advises the prosecutor to seek a protective order.

Waiver

The opinion also makes clear that a defendant may not waive or consent to the prosecutor's abrogation of the ethical disclosure duty, and "a prosecutor may not solicit, accept or rely on the defendant's consent" as a mechanism to avoid Rule 3.8(d). The opinion notes that a third party may not absolve a lawyer of an ethical duty except in specifically authorized instances, such as consent to certain conflicts of interest. Rule 3.8(d) does not explicitly permit third-party consent or waiver of the prosecutor's disclosure obligation.

The opinion states that Rule 3.8(d) is designed both to protect the defendant and "to promote the public's interest in fairness and reliability of the justice system, which requires that defendants be able to make informed decisions." Allowing the prosecutor to obtain a defendant's waiver of disclosure of favorable evidence and information undermines defense counsel's ability to advise the defendant whether to plead guilty and may lead a factually innocent defendant to plead guilty.

In reaching this conclusion, the standing committee observed that whether the defendant may waive the constitutional right under *Brady* to receive exculpatory evidence appears unresolved

after the decision in *Ruiz*. In *Ruiz*, the Court held that a plea agreement could require the defendant to forgo the right to receive material evidence that could be used to impeach critical witnesses and information regarding any affirmative defenses. Nonetheless, the standing committee stated that even if the courts were to hold that a defendant could entirely waive the right to favorable evidence for constitutional purposes, "the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure . . . ."

If the prosecutor seeks to withhold favorable evidence or information for a legitimate purpose, such as to prevent witness tampering, again the opinion advises the prosecutor to seek a protective order to limit what must be disclosed. Another acceptable alternative in the committee's view would be to "seek an agreement with the defense to return, and maintain the confidentiality of evidence and information it receives."

Knowledge, Supervisory Responsibility, and Sentencing

The opinion also addresses three other aspects of the prosecutor's ethical disclosure obligation: knowledge, the obligations of supervisors, and the disclosure obligation in connection with sentencing.

Knowledge. Rule 3.8(d) requires disclosure of favorable evidence and information "known to the prosecutor." Model Rule 1.0(f) defines knowledge as "actual knowledge" that "may be inferred from [the] circumstances." In a prior advisory ethics opinion, ABA Formal Opinion 95-396, the standing committee stated that because actual knowledge may be inferred from the circumstances, "[i]t follows . . . that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious." This view is consistent with ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.11(c), stating, "A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." But, Formal Opinion 09-454 states that "Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence."

While the prosecutor may not pursue a path of willful ignorance to avoid the ethical disclosure obligation, the knowledge requirement limits the ethical rule. For example, the opinion states that a prosecutor is not required "to conduct searches or investigations for favorable evidence that may possibly exist but of which . . . [the prosecutor is] unaware." As an example, the opinion uses a guilty plea made at the time of the arraignment. At that point, the prosecutor must disclose all known evidence and information that would be relevant or useful in establishing possible defenses or negating the government's proof. "If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information."

Supervisory Responsibility. The ethics opinion also provides guidance to lawyers with managerial responsibility in the prosecutor's office. Those supervisory lawyers are obligated to ensure that subordinate lawyers comply with Rule 3.8(d). The supervisory lawyer who directly oversees a trial prosecutor must ensure that the trial prosecutor meets his or her ethical disclosure obligation. A supervisory lawyer is "subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations." The opinion advises such managerial lawyers to promote compliance with Rule 3.8(d) by adequately training subordinate lawyers and by having internal office procedures that facilitate compliance.

As an example, the opinion discusses a case in which work is distributed among several different prosecutors. In such a situation, the opinion advises an internal policy requiring all prosecutors on the case to convey all files containing favorable evidence or information to the prosecutor responsible for discovery. Another useful internal policy would require that favorable information conveyed orally to a prosecutor be memorialized in writing. The opinion also recommends requiring a prosecutor who obtains information favorable to a defendant in another case to provide it to the colleague responsible for that other case.

Disclosure for Sentencing. In connection to sentencing, the opinion points out four ways in which the duty to disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor differs from the disclosure obligation that applies before a guilty plea or trial. First, the information differs because the duty requires disclosure of mitigating information

recidivism reduction. Research has validated that belief. An evaluation conducted by Professor Bruce Western of Harvard University concluded that ComALERT graduates were substantially less likely to be rearrested, reconvicted, or reincarcerated than parolees in a matched control group (a*vailable at* http://www.wjh.harvard.edu/soc/faculty/western/pdfs/report_1009071.pdf).

As reentry programs proliferate, research will prove critical in identifying those aspects of reentry programs that work best. The National Institute of Justice (NIJ) apparently recognizes the importance of this issue. For example, the NIJ is currently funding a multiyear comprehensive evaluation of the Serious and Violent Offender Reentry Initiative, a collaborative federal effort to improve reentry outcomes along criminal justice, employment, education, health, and housing dimensions. The study is being jointly conducted by the Urban Institute and the Research Triangle Institute.

Understanding the mounting interest in such reentry programs and in how to implement them successfully, the Criminal Justice Section sponsored a Reentry Summit on November 5, in Washington, D.C. Criminal justice practitioners who run reentry programs in a variety of practice settings around the country convened to discuss all aspects of their programs, including creation, expansion, trouble-shooting, and measures of success. Those contemplating launching their own reentry programs gained practical know-how, and those with programs already up and running profited greatly from the stimulating exchange of ideas and information.

On November 6, the Section further explored the myriad issues surrounding reentry at this year's Sentencing Advocacy, Practice and Reform Institute. The well-attended conference had a great cross-section of panelists offering their expertise and insights. Among the topics discussed were the Second Chance Act, supervised release, and collateral consequences of convictions.

This last topic is also now the focus of a new grant secured by the Section. The NIJ awarded the Section $700,000 over the next three years to conduct a comprehensive all-states survey of adult collateral consequences and create an easily accessible and searchable database of the collected information. This ambitious project is a natural follow-up to the reference work produced through a collaboration of the ABA and the Public Defender Services for the District of Columbia, *Internal Exile* (ABA 2009), a compilation of the collateral consequences arising under federal statutes and regulations. Former chair of the Section as well as chair of the ABA Commission on Effective Criminal Sanctions, Professor Stephen Saltzburg of George Washington School of Law, with his deep reserves of both expertise and stamina, will serve as chair of the advisory board for the new project. Once up and running, the new Web-based national inventory of collateral consequences (covering areas such as employment bars, housing restrictions, curtailment of voting rights, limits on education loans and scholarships, and deportation, to name but a few) will inform the public discourse on reentry and help guide policy makers as they consider the appropriate role of sanctions and disqualifiers.

Just as research is already helping us refine reentry programs and make them more effective, research can also help policy makers in identifying those collateral consequences that make the most (and the least) sense from a public safety standpoint. One of the frequent and most serious stumbling blocks to an ex-prisoner's successful reentry into the community is his or her inability to secure employment. The reasons for this are many, but among them is an employer's fear that the ex-prisoner will reoffend while on the job. When developing policy on employment restrictions and the availability of criminal history records, jurisdictions must balance the public interest in, on the one hand, preserving the safety of the workplace, including customers and other employees, and, on the other hand, ensuring that ex-offenders obtain jobs and become contributing members of society. Recent research may provide empirical evidence to inform that discussion.

Professor Alfred Blumstein, a preeminent criminologist and a 2007 winner of the Stockholm Prize in Criminology, and Kiminori Nakamura, a doctoral student at the Heinz College of Carnegie Mellon University, are conducting an NIJ-funded study on the "redemption point"—that point in time from the commission of the crime when a person with a criminal record who remained free of further contact with the criminal justice system is of no greater risk to committing a new crime than any counterpart of the same age. The initial findings of their recidivism risk study are presented in "Redemption in the Presence of Widespread Criminal Background Checks," in *Criminology* 47(2) (May 2009). Their ongoing re-

search has clear implications for employers struggling to make hiring decisions on individuals with criminal backgrounds.

As our nation over the last few decades expanded its use of incarceration as a way to address crime, we perhaps did not adequately foresee some of the social and fiscal consequences of this prison-based strategy. Going forward, let's keep our eyes open. Research can help us craft intelligent policies with regard to reentry. An estimated 95 percent of all inmates will eventually be released from prison. Let's do all we can to ensure that they develop a stake in society, and don't put a stake through it. ■