

**TESTIMONY OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
BEFORE THE
CALIFORNIA COMMISSION ON
THE FAIR ADMINISTRATION OF JUSTICE**

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**Professional Responsibility Issues:
Focus Questions 1-3**

**John Wesley Hall
First Vice President
National Association of
Criminal Defense Lawyers
1150 18th Street, Suite 950
Washington, DC 20036**

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Introduction

My name is John Wesley Hall, First Vice President and President-Elect Designate of the National Association of Criminal Defense Lawyers. On behalf of NACDL, I thank the Commission for allowing NACDL to comment on some of the proposals under consideration by the Commission.¹

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.

The National Association of Criminal Defense Lawyers is a professional bar association founded in 1958. Its 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

In this paper, we address Focus Questions 1-3 on Professional Responsibility Issues:

¹ Allow me to give some professional background: Co-Chair or Chair of the NACDL Ethics Advisory Committee from 1990-2005, answering about 800 informal confidential requests for ethical advice from NACDL members; one of the principal drafters of the Code of Conduct and Disciplinary Procedure Applicable to Counsel for International Criminal Court through the International Criminal Bar; elected by the Registry of Counsel to the International Criminal Court to its Disciplinary Appeals Board (2007-10); author of *PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE* (Thomson-West, 3d ed. 2005) (“PRCDP”); NACDL's alternate member with Ephriam Margolin of San Francisco on the ABA Committee considering changes to the ABA Standards for Criminal Justice.

I am not a California lawyer, but I have studied some of California ethics law and rules for citation in my treatise. I obviously know little of the intricacies of California law, but I am an expert on legal ethics. Also, before I was a criminal defense lawyer, I was a Deputy Prosecuting Attorney in Little Rock, Arkansas from 1973-79.

1. Should amendments to the California Rules of Professional Conduct be recommended, to provide greater specificity in defining the ethical standards to guide prosecutors and defense lawyers engaged in handling criminal cases? In what areas is greater specificity desirable?

A. Ethics rules in general

One unique aspect of California ethics laws are their sublime vagueness in some areas and strictness in others. To a great degree, California law permits attorneys in criminal cases additional flexibility and protections in representing their clients consistent with our mandate under the Sixth Amendment. The starkest example for me is the California rule on confidentiality which is the historical confidentiality rule: Calif. Bus. & Prof. Code § 6068(e).² Whether California should adopt the Model Rules of Professional Conduct, or a hybrid version of the best of both the Model Rules and the former Code of Professional Responsibility (as did New York), is a question we are not equipped to even comment on, nor should we. That is a larger policy question for the Commission to advise the State Bar, and lawyers practicing outside of the criminal justice system should be heard on their concerns.

Try as we may, ethics rules cannot and do not answer all questions that criminal defense lawyers and prosecutors face in their daily work. It simply is not possible to foresee all that can confront a lawyer in representing either a person accused of crime or the People. Of necessity, ethics rules must strive to strike a balance between the needs of a criminal defense lawyer to effectively, competently, and independently represent his or her client, consistent with the requirements of the Sixth Amendment to the U.S. Constitution, and the systemic need for rules or limits on certain courses of conduct. They must have flexibility and protections that will allow for unanticipated or unusual situations.

The earliest American ethics rules were vague and relied on the good judgment of lawyers. As the law became more complex, it became necessary to tighten the rules to provide more explicit guidance. The ethics rules of the United States are the result of two hundred years of experience.³

² It dates from 1850 in the United States, but it has roots back to the oath given to lawyers in Europe, well before the American Revolution.

³ When we became a nation, there were likely less than 700 lawyers in the thirteen States.

Ways of providing for all the exigencies of criminal cases were avoided by the drafters of our modern ethics rules. Criminal cases are mentioned only in three rules in the Model Rules of Professional Conduct: Rule 3.1 on allowing the defense to put the prosecution to its burden of proof,⁴ Rule 3.6 on limits of trial publicity, and Rule 3.8 on special duties of the prosecutor.⁵ The

This is extrapolated by me from WILLIAM A. DAVIS & CAROLINE SLOAT, GOOD SENSE AND INTEGRITY: LAWYERS AND JUSTICES OF THE PEACE IN NEW ENGLAND (1986), online at <http://www.osv.org/learning/DocumentViewer.php?DocID=908>. At the time of the adoption of the Constitution, Massachusetts, one of the centers of commerce of the colonial United States, had one lawyer for every 4,250 people. If that statistic is equal throughout the original thirteen states, that would mean there were about 823 lawyers in the United States, but it presumably would be far less in more agrarian states with less commerce. Thus, there is no way of knowing the true number. One can reasonably estimate that the number had to be between 600-700, and probably less.

There are an estimated 1.1 million lawyers nationwide today.

⁴ Rule 3.1, Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

⁵ Rule 3.8, Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by

rest is left to practical experience.

B. The ABA Standards for Criminal Justice should be adopted as a state rule

To provide for the need for further guidance, the American Bar Association Criminal Justice Standards Committee began in the 1960's to draft more comprehensive rules for the administration of criminal justice. <http://www.abanet.org/crimjust/standards/>. The first draft of several of the Standards was published nearly 40 years ago in 1968, and then Chief Justice Warren Burger described the Standards project as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.” *Id.* As described by the ABA, “the ABA Criminal Justice Standards have guided policymakers and practitioners working in the criminal justice arena.” *Id.*

There are numerous subject headings within the ABA Standards that are relevant to the Commission's charge, but NACDL draws specific attention to the Standards for the Defense Function and the Standards for the Prosecution Function.⁶ In *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984), the U.S. Supreme Court adopted the ABA Standards for the Defense Function

any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

⁶ The Commission may find any of the others worth considering, too, so we do not foreclose our reliance on them.

In addition, the ABA also has a “guideline” on death penalty litigation which should also be considered: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines_2003.pdf. See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (this ABA guideline adopted as a minimum standard of constitutional performance of death penalty counsel).

as a minimum standard in criminal cases for evaluating the performance of counsel. The Defense Function standards have also been cited with approval in *Jones v. Barnes*, 463 U.S. 745, 760 (1983) (appellate defense counsel’s duties); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (defense counsel’s duty to consult with the defendant about the right to appeal); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (defense counsel’s duty to investigate mitigation of punishment).⁷ See also *Polk County v. Dodson*, 454 U.S. 312, 327 n.* (1981) (BURGER, C.J., concurring on the independence of counsel).

Where a prosecutor’s actions were at issue, the ABA Standards on the Prosecution Function have also been considered persuasive by the Supreme Court. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (egregious *Brady* violation of evidence that another man could have committed a homicide); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (exculpatory evidence received by a prosecutor after trial has to be disclosed under ethics rules).

Reliance on the ABA Standards has become the norm in the cases throughout the country. A Westlaw search on July 8, 2007 showed the ABA Standards for the Prosecution Function has been cited in 672 cases and the ABA Standards for the Defense Function has been cited in 692 cases.

Therefore, NACDL urges the Commission to adopt any ABA Standards that it finds would guide both defense counsel, the prosecution, and the courts in seeking to promote the mission of the fair administration of criminal justice.⁸

⁷ *Id.*:

“[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’” *Wiggins v. Smith*, 539 U.S., at 524 (quoting *Strickland v. Washington*, 466 U.S., at 688)

⁸ One ABA Standard for the Defense Function from the first edition in 1971 on dealing with client perjury, Std. 7.7, was not readopted in either the Second Edition in 1980 or the Third Edition in 1993. It was considered too controversial by the ABA, but NACDL publicly endorsed it by a unanimous vote of the Board of Directors in 1992. NACDL Ethics Advisory Opinion 92-2 (Nov. 1992), available on NACDL’s website at <http://www.nacdl.org/public.nsf/freeform/EthicsOpinions?OpenDocument>. We submit that this has since become the normal practice and commentators and legal scholars have embraced it, we submit that it should be adopted in California.

If the Commission needs further information on this particular subject, we will be happy to provide it.

C. Specific areas of the Commission’s concern and recommendations

1. The prosecutor’s discovery obligations pursuant to *Brady v. Maryland*

A prosecutor’s discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *Kyles v. Whitley*, *supra*; *Strickler v. Greene*, 527 U.S. 263 (1999); *Banks v. Dretke*, 540 U.S. 668 (2004)⁹; also memorialized as an ethics rule in Model Rules of Professional Conduct 3.8(d), note 5, *supra*, and in California Rule of Professional Conduct 5-220 (“A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.”) has been a sore point with the criminal defense bar ever since *Brady* was decided. It promises more in theory than it delivers in practice, and its failures can be spectacular, as in *Kyles v. Whitley* and *Strickler v. Greene*, and these failures are what often lead to the public questioning the correctness of results or fairness of criminal cases. The criminal justice system must, like Caesar’s wife, strive to be above all suspicion, or the public will not trust the police, prosecutors, defense lawyers, judges, or courts.

I remember my own tenure as a prosecutor in my small state where prosecutors made no effort to find out whether there was exculpatory evidence in the hands of the police. We expected the police to do their job and naïvely expected them to produce the entire file for us to make a decision whether to prosecute a case. Prosecutors still trust the police to turn over everything, but the police do not. And, if we did request the “street file,” I have no confidence that the police would have acknowledged it existed, anyway.

Much later, as a criminal defense lawyer, I learned that the police departments usually (but not always) would keep a separate file of that which they were unwilling to provide the prosecutor.

⁹ See generally *U.S. v. Jernigan*, 2007 WL 1965112, * 3 (9th Cir. July 9, 2007) (en banc):

In *Brady v. Maryland*, the Supreme Court explained, “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” 373 U.S. at 87. The Court also noted that prosecutors are charged not only with winning trials but with seeking justice. *Id.* at 87-88 & n. 2. Premised on this understanding of fairness and prosecutorial responsibility, the Court held that the suppression of evidence favorable to any accused violates the due process of law, irrespective of whether the suppression is done in good faith or bad. *Id.* at 87.

Police well know that prosecutors are obliged to provide discovery to the defense, so the police would willingly keep the prosecutors in the dark about what they have that would indicate that the accused did not commit the crime or would support a defense. This is not an issue just in my state; it is an issue everywhere in the nation, and it has become a significant part of the exonerations in Illinois where many men were convicted of crimes they did not commit, and withheld *Brady* material was a part of it.

Let me give an egregious example from my own experience. I took over a death penalty habeas case on the eve of execution, and we were able to get a stay of execution to further investigate. It had been testified to at trial and on habeas that my client and his brother were the only suspects in this murder. Approximately 160 pages of discovery were turned over to trial counsel. In discovery in one of the habeas proceedings, we found over 1,100 pages of additional undelivered investigative material that showed that the police had a list of approximately 33 suspects, and all of them had been brought in for interrogation before my client and his brother. Four (as I recall) were found to have actually confessed to the crime under use or threats of force, but they were discounted as suspects. Some had alibis. My client confessed, alleging it was after he was threatened with deadly force if he did not confess. (The court ultimately ruled the confession was not coerced and was voluntary.)

There was exculpatory evidence in the 1,100 pages (*i.e.*, 31 other suspects and the confessions of some), and the prosecuting attorney at trial testified in the habeas proceeding that he was unaware of any of it, and, if he had possession of it, he would have turned it over to the defense at trial. Sixteen days of habeas hearings were held over a two month period before the district court ultimately denied relief. On that issue, the District Court held that it would not have changed the outcome. There is no published opinion on this issue, but the district court (Garnett Thomas Eisele, U.S. D.J.) spent a day and a half reading findings of fact and conclusions of law into the record (over 600 pages worth) to expedite the appeal which is *Fairchild v. Norris*, 21 F.3d 799 (8th Cir. 1994), *rehearing denied* 51 F.3d 129 (8th Cir. 1995), *cert. denied* 515 U.S. 1134 (1995). The prior appeal referring to the alleged sole “tip” my client was the killer is *Fairchild v. Lockhart*, 857 F.2d 1204, 1206 n.2 (8th Cir. 1988), *cert. denied* 488 U.S. 1051 (1989).

There must be some strong deterrence and a strong remedy for intentional or reckless *Brady* violations, and the remedy must extend to the police as well. If a prosecutor is not told about what

else there is in a case, the prosecutor would not think to ask about that which is merely hypothetical to him or her. If the prosecutor asks in every case “what else is there?” the police will sooner or later simply answer “nothing” because they have no intention of turning it over to the prosecutor they know will provide it to the defense.

Therefore, knowing *Brady* violations should be treated as an obstruction of justice or abuse of public office for failing to turn over potential evidence that the defense is entitled to, whether the defense will use it or not. *See, e.g.*, Model Penal Code § 242.1 (a violation of the law if there is an official duty; but only a misdemeanor in the MPC). The closest analog I could find in the California Penal Code is § 118.1.¹⁰ A knowing *Brady* violation by a police officer would seemingly fit within this statute, but it should be clearer so that prosecutors and police officers will be on notice of exactly what is expected of them.

In this regard, allow me another egregious example that I am sure others will tell or already have told you about: the infamous case of Mike Nifong, former North Carolina District Attorney who knowingly suppressed evidence from the defense that was far more than exculpatory – it was completely exonerating. He was disbarred for his actions in June 2007, but, in light of prosecutorial immunity; *Imbler v. Pachtman, supra*; his case cries out for criminal prosecution because he was not merely negligent—he did it knowingly. Moreover, at his disciplinary hearing, he blamed his mistake on lack of felony trial experience, and he had been in the district attorney’s office for 29 years. What does this tell us about prosecutors and their respect for *Brady*? Or, as prosecutors will tell it, is it limited to one rogue prosecutor? To me, it is symptomatic of a lack of respect for the *Brady* rule. The only question is: how deep does it run within the prosecutorial profession? I know of prosecutors who would never violate *Brady*. And, I know of prosecutors who have no

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Every peace officer who files any report with the agency which employs him or her regarding the commission of any crime or any investigation of any crime, if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false, whether or not the statement is certified or otherwise expressly reported as true, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. This section shall not apply to the contents of any statement which the peace officer attributes in the report to any other person.

I am not a California lawyer, so, if I missed any other statute, I apologize in advance.

clue about *Brady* or would intentionally violate it. I have had it happen to me and my clients, and I have no doubt that it will happen again.

Thankfully, Nifong is the exception rather than the rule.¹¹ Should Rule 5-220 be amended to include a new subsection that the prosecutor be obliged to ask the police if there is any exculpatory evidence beyond that which is turned over? Would it do any good, other than create a duty on the police to look and respond, a duty that might create other legal obligations? This is a policy decision that the Commission will have to make.

The defense is entitled to make the determination of whether the information is helpful or usable; not the police, not the prosecutor. In obstruction of justice cases generally, it does not matter that the evidence withheld did not have an effect on the outcome. Potential materiality is the issue.

2. The prosecutor's duties in the investigation of post conviction claims of innocence

If a prosecutor receives evidence after conviction that supports a claim of innocence, or is even just exculpatory, evidence, the prosecutor has a continuing ethical duty to disclose it under *Imbler v. Pachtman, supra*, 424 U.S. at 427 n.25.¹² Just so there is no mistake, we suggest that the ethical rule be modified or a comment added that this duty is continuing. Thus, California Rule of Professional Conduct 5-220 could be modified to add a new subsection: "In criminal cases, this duty continues after conviction and appeal."¹³

¹¹ Adam Liptak, "Prosecutor Becomes Prosecuted," New York Times, § 4, page 4 (June 24, 2007).

¹² This is what former U.S. Attorney General John Ashcroft did when he delayed the execution date of Timothy McVeigh when thousands of pages of additional FBI files were discovered that had not been disclosed to the defense.

¹³ With the changes we suggest, the rule would read, for example, adding Model Rule 8.4(d) and *Imbler* as new (b):

(a) A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

(b) A prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the

3. Prosecutorial and defense lawyer competence in addressing issues of forensic science

Prosecutors and defense lawyers are notoriously incompetent in issues of forensic science, but this is a matter left to individual conscience and the lawyers educating themselves at Continuing Legal Education or in preparation for defense of a case. We default to the experts in the field, and, if the defense has access to its own expert, we have the expert educate us. Some of us buy books on forensic issues pertinent to our cases and study them before we interview our experts. This is a matter of personal effort and finances. Both Thomson-West and Lexis Law Publishing publish books on scientific evidence, and specialty publishers cover the gamut of forensic issues. It is merely a matter of looking for the books and buying them.

With the advent of DNA evidence in 1990, both prosecutors and defense lawyers had immediate exposure to CLE training on the science and law. More CLE on forensic issues and developments should be required of both prosecutor and criminal defense lawyers.

4. The defense lawyer's duty to decline presentation if commitments to other clients or lack of adequate expertise or resources preclude competent representation

This subject is addressed in a separate submission on indigent defense issues this same date.

5. The defense's lawyer's duty to investigate before recommending acceptance of a plea bargain

This is a sensitive issue, and it apparently arose from the Rampart cases where many defendants were desiring to plead guilty to crimes that they did not commit to avoid being convicted on a "third strike."

The defendant, however, is not the person to be determining whether he or she has a legal

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. This duty continues after conviction and appeal.

or factual defense to the charge. It is ultimately the client's determination alone whether to plead guilty, after being fully informed by the criminal defense lawyer of the options, potential defenses, and potential outcomes, sentences, and collateral consequences of conviction.

This is an issue dealt with at length in innumerable ineffective assistance cases. A criminal defense lawyer is only obligated to do an investigation to the extent necessary to adequately defend, and that does not include running down every possible lead or talking to every possible witness. What the client tells the lawyer during debriefing and preparation for trial or a plea will often be determinative of the extent of the investigation that is required.

The lawyer has a duty to ask the right questions to determine whether there is a factual or legal defense. If the lawyer is satisfied that an investigation is futile, there should be no burden on defense counsel to do so. It would not necessarily be ineffective assistance of counsel. If the Commission decides to go that way, the question thus may be: "should the duties on defense counsel be more stringent than ineffective assistance cases require?"

6. The defense lawyer's duty to advise clients on the collateral consequences of conviction

NACDL has not taken a public position on this that I am aware of, but I am certain that we have filed amicus briefs in support of the proposition that a criminal defense lawyer has a duty to advise clients on the collateral consequences of a conviction before a guilty plea is entered or after a conviction by a court or jury.

Collateral consequences of a conviction are far-reaching. From denial of government benefits, including ineligibility for health care programs, housing programs and student loans, to restrictions on employment, and from registration requirements and suspended voting rights, these collateral effects can severely impact the future life of individuals with criminal convictions. Indeed, in many instances, the collateral consequences can be more harmful to the client than time spent in prison.

Defense attorneys are frequently the only advocates in a position to advise clients of these consequences and develop strategies to minimize their impact. When defense lawyers do not fulfill this role, the consequences for the client can be devastating. For this reason alone, the duty to advise clients of collateral consequences should be considered within the scope of California

Rule of Professional Conduct 3-110 on competence of counsel.

A number of courts have found that failure to fully advise a client properly of collateral consequences constitutes ineffective assistance. *See, e.g., United States v. Grammas*, 376 F.3d 433, 436-37 (5th Cir. 2004)¹⁴; *Meyers v. Gillis*, 142 F.3d 664, 668 (3d Cir. 1998) (defendant would not have pled if he was told no parole eligibility).

This presupposes that lawyers have learned about all the collateral consequences that can flow from a conviction. This, too, can be taught at CLEs.

7. The reporting of violations of the Rules of Professional Conduct by other lawyers or the Code of Judicial Ethics by judges¹⁵

The general rule everywhere else in the nation is that lawyers are obligated to report unprivileged knowledge of ethics violations by other lawyers. Model Rules of Professional Conduct, Rule 8.3(a)¹⁶; Code of Professional Responsibility, DR 1-103. Indeed, a lawyer cannot use a

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Failing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by *Strickland*. When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court. . . . By grossly underestimating [the defendant's] sentencing exposure . . . , [counsel] breach[es] his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable.

¹⁵ *See generally* PRCDP § 32:30; Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L. J. 491 (1986); Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978); Michael J. Burwick, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137 (1994).

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Rule 8.3, Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

...

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

potential ethics violation as a bargaining chip in a settlement; *see In re Himmel*, 125 Ill. 2d 531, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988) (lawyer suspended for one year for seeking to settle case against a lawyer without reporting misconduct of the other lawyer's conversion of funds); but it has been held that a client has veto power of whether a lawyer shall report the violation by another lawyer. S.C. Op. 95-13.

NACDL has no position on this, but my personal view is that mandatory reporting deters ethics violations by those lawyers who are willing push all the ethical limits and cross the line where they know that lawyers in a community may have a culture to not report the violations of others.¹⁷ Lawyers without conscience need to be reported for their ethical violations.

2. **Should the rule that criminal defense lawyers be reported for ineffective assistance claims “based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney be modified to require a court to notify the State Bar whenever a finding is made that an attorney in a criminal proceeding engaged in misconduct, incompetent representation or wilful misrepresentation, regardless of whether the misconduct, incompetence or misrepresentation results in the modification or reversal of a judgment”?**

NACDL's position apparently disagrees with existing California law on when a lawyer should be referred for disciplinary action after a post-conviction proceeding. We would frame the question differently, but that is not our prerogative. We believe that not every attorney failure in a criminal case justifies referral to the State Bar. It should be reserved for misconduct or gross or serious negligence.

It is NACDL's position that lawyers should be given actual or de facto use immunity for

¹⁷ *See Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, PC*, 39 Conn. L. Rptr. 627, 2005 WL 2009277 (Conn. Super. Ct. 2005) (unpublished opinion) (Lawyer told superiors in his law firm of an ethical violation by his opponent in a case, and the superiors told him that “we do not grieve other lawyers.” He did and was fired. He stated a claim for relief despite to the employment at will doctrine because of public policy. “If a lawyer could be fired with impunity for following the self-policing requirement of the professional rules, the trial judge concluded, ‘this would compromise the autonomy of the profession.’”).

their testimony at a post-conviction hearing where their conduct is at issue, except in cases where defense counsel's conduct was beyond mere negligence, to fully encourage cooperation with post-conviction counsel and promote full candor. Referrals should be limited to conduct that is grossly ineffective, a clear violation of the ethics rules, or involves willful misrepresentations to the client or court.

Ineffective assistance claims are strange proceedings for the criminal defense lawyer. The client is now the adversary and the prosecutor (and sometimes the court) are defense counsel's advocate.¹⁸ I have written that:

As a practical matter, it is submitted that public policy should hold that criminal defense lawyers should have at least a limited immunity from his or her testimony in a post-conviction proceeding being used in an ethics proceeding in order to promote the lawyer's full cooperation with post-conviction counsel and candidness. The post-conviction proceeding will more readily get to the truth of the matter if defense counsel is not automatically on the defensive for every bit of his or her testimony.

PRCPD § 10:64. Criminal defense lawyers have a duty to cooperate with post-conviction counsel and a duty of candor to the court. *Id.* § 10:65.

Yet, under the question as posed, these duties would, we submit, be subconsciously or consciously subverted because every criminal defense lawyer whose conduct has been challenged will be far less likely to cooperate or be candid because any admission would be used against the lawyer to cause a disciplinary referral or be used in a disciplinary proceeding. The post-conviction process should be designed to promote the search for the truth and produce correct results, even if it is at the expense of not disciplining every lawyer who was found to have failed in some duty to the client. Another example of a significant policy choice in ineffective assistance cases is a bar against using the testimony of the lawyer in a retrial.¹⁹ This policy choice is less significant and

¹⁸ David M. Siegal, *My Reputation or Your Liberty (Or Your Life), The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85 (1999); Michael Mears, *The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims*, 5 GA. B. J. 40 (Oct. 1999).

¹⁹ *Bittaker v. Woodford*, 331 F.3d 715, 723-24 (9th Cir. 2003), *cert. denied* 540 U.S. 1013 (2003); *People v. Ledesma*, 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006) (following *Bittaker v. Woodford*); *Commonwealth v. Chmiel*, 558 Pa. 478, 738 A.2d 406 (1999).

The law of attorney-client privilege is a more extreme example, but it is founded on the

promotes the truth, and that should be our goal as lawyers.

The question as posed is reporting “misconduct, incompetent representation or willful misrepresentation,” and the answer to the question depends upon the definitions of those words and phrases. A lawyer can be ineffective for a bad judgment call about something that seemed appropriate or even necessary at the time, but, in hindsight, was ineffective assistance. But, hindsight cannot be the perspective, at least in ineffective assistance claims.²⁰

We do not believe that criminal defense lawyers should be protected from proven ethical violations, willful misrepresentations of fact or law to the client or the court, or gross negligence.²¹ Mere negligence, in some cases, may be enough, but this would depend upon the gravity, or even the existence, of prejudice to the client. A course of conduct may have been good strategy when it was planned, but it became negligence when it was effected because circumstances changed, and the lawyer did not accommodate the change. The variations of examples would be endless and impossible to categorize.

Therefore, we submit, a per se rule of always referring a lawyer for ineffective assistance claims needs to be tempered on policy grounds for ethical violations, prejudicial failures, gross misconduct, and misrepresentations.

500 year old public policy choice that protecting attorney-client confidentiality, with certain exceptions, is more important than getting at the entire truth. This a converse view which we believe has merit: Getting at the truth in post-conviction is more important than disciplining every mistake a criminal defense lawyer makes.

²⁰ *Strickland v. Washington*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

²¹ An example of gross negligence would be *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002), where a defendant acquired new counsel immediately after conviction, and he filed a motion for new trial based on gross ineffective assistance at trial and prevailed on appeal. Trial counsel was retained to negotiate a plea, which never happened, and he was totally unprepared for trial. The Arkansas Supreme Court opinion is a litany of his fundamental failures. Trial counsel was referred for disciplinary action, and he received a caution from the Arkansas Committee on Professional Conduct. <http://courts.state.ar.us/opc/20030116/2002-131.htm>. The lawyer escaped even having his name mentioned in the published opinion of the court.

Another example is *The Florida Bar v. Sandstrom*, 609 So. 2d 583 (Fla. 1992) (60-day suspension).

3. Do procedures for discipline of employees of the District Attorney and Public Defender offices unreasonably limit or compromise the ability to insure adherence to the professional standards that apply to prosecutors and defense lawyers? Should independent Special Masters, who are acquainted with professional standards for prosecutors and defense lawyers be utilized by Civil Service Commissions or similar bodies in recommending or upholding action in cases involving prosecutors or defense lawyers?

I cannot address the question of how California Civil Service Commissions investigate, but it is definitely preferable for those familiar with the area of practice involved be appointed Special Masters. This is why the International Criminal Court opted to put criminal practitioners in both stages of its disciplinary process.

And, I might add that this is an issue in some states, like my own, that has three seven member panels hearing disciplinary cases where there is one prosecutor (a federal prosecutor at that) and no criminal defense lawyers among the 21 members. It frankly makes criminal defense lawyers uncomfortable that those who do not do what we do sit in judgment in a disciplinary case. NACDL submits that criminal defense work is sufficiently unique in the practice of law that disciplinary authorities should be able to respond to those differences.

Moreover, we of the criminal defense bar have always felt that there is a double standard²² in disciplinary proceedings involving prosecutors and criminal defense lawyers, Nifong's case not-

²² See, e.g., Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 276-77 (2004) ("Scholars and other commentators agree that discipline for prosecutors is rare and that there are few, if any, consequences for prosecutorial misconduct. In contrast to discipline for private lawyers, we have hardly moved beyond the 1908 aspirational standard to a regulatory disciplinary model for the errant prosecutor."); Fred C. Zacharias, *Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773 (2001) ("Abdication of enforcement also contributes to a public sense that a double standard exists.") (footnote omitted); Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 Wm. & Mary L. Rev. 675, 723 (2005).

I have been the victim of this double standard. I was the subject of a judicial referral based on an affidavit procured by a prosecutor. At my 2000 disciplinary hearing, the affiant court reporter admitted the affidavit was false, but she signed it because she was told to by the prosecutor. My complaint against the prosecutor for suborning perjury resulted in no action against her.

withstanding. He made the Duke Lacrosse case notorious, so his disciplinary case became notorious.

Conclusion

NACDL thanks you for this opportunity to provide this information. If the Commission has any further questions, NACDL always stands ready to assist in anyway we can.