PUBLIC COMMENT: PROPOSED CHANGES RPC 3.8(d)

Dear Members of the Supreme Court Standing Committee on the Rules of Professional Conduct:

We write to comment on the proposed changes to Colorado Rule of Professional Conduct 3.8(d) with several suggestions that we believe will further the purpose and clarity of the rule. As background, we are Colorado Attorneys Against Police Violence (CAAPV), a group of lawyers and advocates who seek to transform the criminal legal system by working to end law enforcement violence against marginalized communities in all its forms. One of our key issue areas is working to address inequities in the criminal system and unjust prosecution.

As attorneys and advocates who work with and represent individuals facing criminal charges, including those who are indigent, and/or are disproportionately members of marginalized communities, we have seen first-hand that prosecutors repeatedly fail to disclose information favorable to our clients. We have also spent a significant amount of time researching, investigating, and documenting these all-too-frequent abuses across the state. There can be no question that prosecutors often fail to disclose favorable information, but the instances in which a prosecutor faces any sort of discipline for such failures are exceedingly rare.

It is clear that existing rules and laws are insufficient to ensure that prosecutors disclose favorable information in a timely manner. Revising Colo. RPC 3.8(d) to clearly state that prosecutors have an obligation to take affirmative steps to search out and disclose favorable information is an important step in increasing fairness and prosecutorial accountability. It is essential that the rule be changed to abrogate *In re Attorney C*, 47 P.3d 1167 (Colo. 2002), in the manners discussed in the September 14, 2021 letter from the subcommittee formed to address the potential rule change, authored by Jessica Yates from OARC—i.e. eliminating the standard of intentionality and the requirement of a materiality determination by the prosecutors holding the favorable information. As OARC investigators have advised us, the *In Re Attorney C* intentionality standard has made it virtually impossible to open investigations against prosecutors. This is so even when courts have reversed convictions due to prosecutors' concealment of favorable information, and even after trial courts have issued Rule 16 sanctions against prosecutors.

As such, eliminating the intentionality standard is necessary to effectuate the purpose of the proposed rule change. Moreover, many courts have recognized that a materiality determination is simply unworkable in a pretrial situation. As the Ninth Circuit has held:

> A trial prosecutor's speculative prediction about the likely materiality of favorable evidence . . . should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be "material" after trial. Thus, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge.

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United States v. Olsen, 704 F.3d 1172, 1183 (9th Cir. 2013) (quotation marks omitted); *see also United States v. Naegele*, 468 F. Supp. 2d 150, 153 (D.D.C. 2007) (expressing the view "that the post-trial 'materiality' standard is irrelevant to pretrial and in-trial *Brady* decisions to be made by prosecutors and trial judges" (quoting *United States v. Safavian,* 233 F.R.D. 205, 206-07 (D.D.C. 2006)); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005) ("[T]he government urges *Brady*'s materiality standard is the limit of the duty to disclose. This court cannot agree. . . . *Brady*'s concern whether a constitutional violation occurred after trial is a different question than whether *Brady* is the full extent of the prosecutor's duty to disclose pretrial."); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial."); *United States v. Carter*, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) ("[I]n the pretrial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial. The judge cannot know what possible effect certain evidence will have on a trial not yet held."); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999) (determining that *Brady* materiality standard "is only appropriate, and thus applicable, in the context of appellate review"); *see generally* Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. of Crim. Proc. iii, viii-ix (2015) ("This puts prosecutors in the position of deciding whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the *Brady*/*Giglio* line of cases and increases the risk that highly exculpatory evidence will be suppressed.").

While we are in agreement with the goals of the proposed rule change, we are concerned that certain language in the rule and comment will undermine these goals. First, the last sentence of the revised rule is important in imposing an affirmative obligation on prosecutors to seek out information in the possession of other agencies. The rule should make clear, however, that a prosecutor does not fulfill this obligation simply by sending out a generic request to investigating agencies. The last sentence of the revised comment 3 appears to do the opposite. Allowing a prosecutor to fulfill their obligation to "make diligent efforts to obtain information" merely by submitting an "inquiry" is at odds with the language of the rule, the rule's intent, and with existing case law. *See People v. District Court*, 793 P.2d 163, 167 (Colo. 1990) (holding that it is "incumbent upon the prosecutor to promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation"). Thus, the rule should make clear that a prosecutor's failure to comply is not excused by another agency's failure to provide information.

Second, the last sentence of the proposed rule should be changed to reflect that if an agency refuses to produce information, the prosecutor must alert not only the defense, but also the court overseeing the case. The burden should not fall on the defense to take steps to produce information that ethical and procedural rules as well as the Federal and State Constitutions require the prosecution to produce.

Third, we suggest removing the sentence in the comment reading: "However, a finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case." The Rules of

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Professional Conduct are rules governing the conduct of attorneys; they are not rules of criminal procedure and do not guide the decisions of judges within a particular case. The proper basis for a sanction in a criminal case is guided by the Colorado Rules of Criminal Procedure, the federal and state constitutions, and relevant statutes. This sentence in the comment would improperly intrude on a judge's discretion to impose sanctions when appropriate, and the Committee should remove that sentence from the comment.

Last, consistent with *Kyles v. Whitley*, 514 U.S. 419, 438 (1995), the revised rule makes clear that prosecutors cannot rely on what is in their file, but have an affirmative obligation to seek out information favorable to the defense. Yet the comment then appears to counter this obligation by stating, "Whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances of the case, including whether anyone has alerted the prosecutor to the likely existence of information that has not yet been discovered." That a prosecutor has been alerted to the existence of favorable information, but still failed to disclose that information, may be a relevant consideration in determining the sanction for a prosecutor who has violated their ethical obligations. However, this should not be a consideration in determining whether the prosecutor violated their ethical obligations in the first place. We therefore ask that the Committee remove this sentence from the comment.

We thank the Committee for this opportunity to comment on this important rule. We hope the Committee moves forward with revising RPC 3.8(d) and incorporates the changes we have suggested.

Sincerely,

Colorado Attorneys Against Police Violence

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