U.S. Department of Justice

November 2, 2017

Karen A. Gould
Executive Director
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026

Via email delivery: publiccomment@vsb.org

Re: Proposed Legal Ethics Opinion 1888

Dear Ms. Gould:

On behalf of the U.S. Department of Justice ("the Department"), including the many Assistant United States Attorneys and Department attorneys who practice in Virginia, we write to oppose proposed Legal Ethics Opinion 1888 ("Opinion"). Ensuring that federal prosecutors comply with their discovery and disclosure obligations is a priority of the Department, and we understand the significance of the prosecutor's duty to provide criminal defendants with discovery consistent with relevant and controlling authority, including statutes, rules, and case law. This includes, of course, the prosecutor's duty to disclose exculpatory and impeaching evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Indeed, the Department's discovery policies require prosecutors to make broad disclosures of potentially exculpatory and impeaching information, and the Department devotes considerable resources to discovery training that is required of all prosecutors, renewed annually, and overseen by an Associate Deputy Attorney General and National Criminal Discovery Coordinator. We appreciate the opportunity to comment on this Opinion prior to its issuance.

We agree that prosecutors should not willfully and intentionally attempt to conceal exculpatory and impeaching evidence by hiding it in the midst of voluminous discovery. The Opinion is based upon incomplete and oversimplified facts, however. As a result, rather than providing guidance to prosecutors about their discovery and disclosure obligations as (presumably) intended, it will cause confusion when applied to the myriad factual scenarios that prosecutors encounter daily, will create disclosure requirements that are inconsistent with the prevailing case law and the text of Virginia Rule of Professional Conduct 3.8(d) ("Virginia Rule 3.8(d)" or the "Rule"),[1] and will likely be used as a tactical weapon in criminal litigation to distract prosecutors and burden courts with unwarranted collateral litigation. It also may support disciplining well-intentioned prosecutors who already broadly disclose information favorable to the defense.

[1] Virginia Rule 3.8(d) requires a prosecutor to "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."

The hypothetical underlying the Opinion concerns the prosecution of a defendant for strangulation, abduction, and domestic assault and battery. According to the hypothetical, the prosecutor has received, at an unknown time, 200 hours of recorded jail calls. In federal practice, the defendant's recordings would most likely be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(B), and any relevant recorded statements of a witness, including the victim, must be disclosed pursuant to Fed. R. Crim. P. 26.2. Therefore, legal authority other than Rule 3.8(d) may require disclosure of the information and further muddies the hypothetical's usefulness.

Even in what purports to be a relatively simple case of domestic assault, a prosecutor's obligation to identify and disclose potentially exculpatory evidence can be a complex and difficult task. The hypothetical fails to provide important details concerning the underlying facts of the case, the investigation, and any pre-trial litigation history. The Opinion's analysis, covering four short paragraphs, fails to appreciate the much more complicated and nuanced analysis a prosecutor must undertake when she determines what materials must be disclosed and why. Some of these factors include, in no particular order:

- The criminal history of the defendant, particularly any history of domestic violence with this victim or other victims;
- The criminal history of the victim, particularly any history involving dishonesty or fraud;
- The nature and extent of the relationship between the defendant and victim;
- Whether the victim was threatened;
- The defense theory of the case, if known, particularly whether the defense has alleged that the victim lied about the defendant's involvement in the crime charged;
- Other evidence of guilt, including third party witnesses, admissions by the defendant, physical evidence;
- Whether there are co-defendants, accomplices, or co-conspirators;
- The timing of when the prosecutor obtained the recordings and when they were turned over to the defense in relation to the trial date;
- The number of telephone calls between the defendant and the victim and what else was discussed during those calls;
- Whether the jail recordings are searchable by telephone number;
- Whether the victim was interviewed by the government and reports of those interviews provided to the defense;
- Whether any motions have been filed, particularly discovery motions; and
- Whether a discovery order was entered.

In analyzing the hypothetical's incomplete facts, we presume, as is typical of jail calls, that all of the calls were initiated by the defendant. Further, as to the single call in question, the entirety of the conversation posited is:

Defendant: Do you understand that I didn't do it?
Victim: Yeah.

In a more complete factual scenario, the call likely includes additional conversation; however, the hypothetical provides no further context. Accordingly, under the barebones facts available, the Opinion's assumption that this conversation tends to negate guilt is clearly incorrect. In fact, the nine-word conversation, in the context presented, could be inculpatory because it may constitute an attempt by the defendant to tamper with a witness.[2]

In addition, the hypothetical fails to describe the other jail calls including to whom the other calls were made, what other matters were discussed, and whether the defendant made statements consistent with guilt or admitting facts corroborating guilt. It also fails to provide any description of the other prosecution evidence, and does not indicate that defense counsel has advised the prosecutor of the defenses he will raise at trial. These and many other factual circumstances are important to an assessment of the nine-word phone call. Accordingly, the Opinion's conclusion that the prosecutor should know that the nine-word conversation "tends to negate guilt" is unsupported by the hypothetical facts. As described above, an equally probable interpretation is that the call evidences the defendant's attempt to tamper with a witness.

Further, recorded jail calls are frequently indexed by phone number called. Accordingly, even if there is a factual basis for the Opinion's finding that the nine-word conversation "tends to negate guilt," the prosecutor's production of the call with the other calls does not constitute the intentional concealment of exculpatory evidence. The defendant clearly knows the victim's phone number, the defendant and his counsel can easily review the index of the phone calls and readily identify the call to the victim, and defense counsel should recognize the importance of a recorded phone call between the defendant and the victim.

Accordingly, the Opinion is plainly wrong when it concludes that disclosure of the 200 hours of calls without specifically identifying or highlighting the one call to the victim amounts to an intentional concealment. To the contrary, the disclosure of this ambiguous, arguably inculpatory, nine-word recorded phone call was meaningful and proper because the index accompanying the calls would clearly highlight its importance to defense counsel exercising reasonable diligence.

Under the hypothetical's limited facts, the prosecutor clearly satisfied any legal or ethical duty she may have to disclose the nine-word phone call under both prevailing case law and Virginia Rule 3.8(d) by providing it as part of the 200 hours of calls. *See United States v. Catone*, 769 F.3d 866, 871 (4th Cir. 2014) (to establish a violation under *Brady*, a defendant must show that (1) evidence withheld is either exculpatory or impeaching, (2) the government suppressed the evidence, and (3) the evidence was material to the defense). Under the hypothetical's facts, the nine-word phone call was, at best, ambiguous and not exculpatory, and possibly inculpatory witness tampering. In any event, the prosecutor, acting with an abundance of caution, provided it to the defendant. Accordingly, it was "actually known by the defendant" and "falls outside the ambit of the *Brady* rule." *Catone*, 769 F. 3d at 872 (quoting *United States v. Roane*, 378 F.3d 382,

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[2] 18 U.S.C. § 1512(b)(1) states that "[w]hoever knowingly…corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—…influence…the testimony of any person in an official proceeding…" shall be guilty of a felony. *See also* Va. Code. Ann. § 18.2-460 (making it a crime to knowingly obstruct a witness).

402 (4th Cir. 2004)). The fact that it was included with 200 hours of other calls is of no consequence where the defendant well knew the victim's phone number, jail calls are indexed by phone number, and the importance of a recorded phone call between defendant and victim is inherently obvious to diligent defense counsel. *See also Porter v. Warden*, 233 Va. 326, 332 (2012) (Virginia law in accord with federal law); VA. RULES OF PROF'L CONDUCT R. 3.8(d) (requiring a prosecutor to disclose the "existence of evidence" that "tends to negate guilt"). Not only did the prosecutor disclose the existence of this conversation (and others) but she also disclosed a recording of the conversation.

The text of Virginia Rule 3.8(d) already requires prosecutors to disclose information that tends to negate guilt. The Opinion seeks to expand this disclosure requirement to include an identification obligation even where the defendant already is aware of the information, *i.e.*, where the evidence itself has already been disclosed. Even more troubling is the fact that the Opinion could be interpreted to suggest that a prosecutor has an ethical duty to identify or highlight specific pieces of information that she previously disclosed to the defendant even if the information is ambiguous or possibly inculpatory and where she does not know the defense theory. We are aware of no case law or other ethics opinions that impose on prosecutors such an extraordinary obligation under Virginia Rule 3.8(d), and the Opinion fails to cite any such authority supporting its conclusion. Imposing such a requirement is inconsistent with the text of the Rule, would be bad public policy, and would invite the use of the Rule as a "tactical weapon in litigation." *Cf. In re: Ronald Seastrunk*, No. 2017-B-0178, 2017 WL 4681906, at *9 (La. Oct. 18, 2017) ("A broader interpretation of Rule 3.8(d) invites the use of an ethical rule as a tactical weapon in criminal litigation. We find the practical effect of this potential threat to be poor policy."). The prosecutor's legal and ethical obligation is disclosure of the evidence itself. Once that disclosure has occurred, the prosecutor has fulfilled her legal and ethical obligation.

The Opinion fails to indicate whether the defendant articulated his defense to the prosecution. The defense theory of the case is often not clear at the outset of the litigation or even until the defense opening statement at trial. Yet, the Opinion suggests that a prosecutor may be disciplined for disclosing, but not identifying or highlighting, information for the defense that is ambiguous, or even inculpatory, even where she did not yet have sufficient information to appreciate its significance to the defense. Such a requirement arguably imposes an obligation on the prosecutor to speculate about how a defense counsel could possibly use even ambiguous or inculpatory information and identify such information even if disclosed based on speculative theories about the defense counsel's case.

The plain text of Virginia Rule 3.8(d) requires disclosure of the information that tends to negate the guilt of the defendant or mitigate the offense. It does not require a prosecutor to consider the numerous ways that defense counsel could spin ambiguous or even inculpatory information into material that is helpful to the defendant's undisclosed defense theory, or to catalogue her thought-process about the potential impact of already disclosed evidence and then provide that work-product to the defendant. The Opinion opens the door to litigation over the validity of speculative and ambiguous matters that distract from the trial court's primary function of administering justice in criminal cases.

Moreover, where a defense attorney has a need for specific information, he can seek assistance from the court and prosecutor, if necessary. Virginia Rule 3.8(d) should not be used to disincentivize defense attorneys from thoroughly evaluating the government's evidence in the light most favorable to their clients or to permit defense attorneys to rely on prosecutors to develop the defense's theory of the case. Ironically, the result of the proposed Opinion would reward defense attorneys who abdicate their own duties of competence and diligence while penalizing prosecutors who act in good faith.

We agree with the Opinion that Virginia Rule 3.8(d) "does not apply to evidence unless it is actually known by the prosecutor, even if it is in the prosecutor's possession and even if it is known by law enforcement officials." Some may argue that the Opinion is not far-reaching because discipline is limited only to prosecutors who act "knowingly," but as the Opinion makes clear, a prosecutor's "duties of competence and diligence . . . require her to gather and review the evidence necessary to competently prosecute the case." Thus, prosecutors are faced with an unresolvable situation. On the one hand, the Opinion states that Virginia Rule 3.8(d) would not require the prosecutor to identify the specific conversation if she had not listened to the recordings. On the other hand, the prosecutor may face discipline for failing to act competently and diligently in examining and gathering evidence under Virginia Rules 1.1 and 1.3. The ironic result is that a prosecutor who acts competently and diligently still could be disciplined. Even where the prosecutor previously disclosed the conversation, she may be sanctioned simply because she did not also disclose her specific thought-process about the potential import of the conversation in which the defendant himself participated.

The Opinion sends a mixed message to prosecutors who endeavor to act justly and competently. A prosecutor who in good faith discloses information to the defense without also specifically identifying each piece of information the prosecutor thinks may potentially help the defendant should not face discipline as long as there is no indication that the prosecutor willfully and intentionally attempted to conceal the evidence. Sanctions should be reserved for that rare prosecutor who seeks to avoid compliance with the Rule by deliberately hiding information from the defendant. Ultimately, we are concerned that the Opinion threatens to subject well-meaning prosecutors to discipline in the absence of any malicious intent.

We also are concerned the Opinion may be used to distract prosecutors and burden courts with unwarranted collateral litigation focused on what the prosecutor "knew" and when, instead of on assessing the defendant's guilt. As the Wisconsin Supreme Court observed, "[w]hat better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint?" *In re Riek*, 834 N.W.2d 384, 390-91 (Wis. 2013). Because the Opinion provides no guidance about how many disclosures a prosecutor would have to make to satisfy the Rule's disclosure obligation, the Opinion could be interpreted to suggest that the required disclosures are limitless. For example, what if the prosecutor became aware of the conversation at issue during trial? This Opinion could be construed to suggest that a prosecutor may be found to have violated the Rule for failing to call to the defendant's attention the conversation at issue even where the defense may have specifically chosen not to use that portion of the recording at trial. To avoid discipline under the Opinion's interpretation of Virginia Rule 3.8(d), the prosecutor would be required to monitor the defense constantly throughout trial to ensure that the defendant is using the disclosed evidence in a manner consistent with the prosecutor's own observations about the evidence. Such a circumstance would

turn the adversary process on its head and would permit the defense attorney to lodge a distracting ethical challenge during the middle or end of trial about evidence that he had fully evaluated and rejected using. It also would divert the prosecutor's attention from building and presenting the strongest case for her client to focusing on her personal interest in avoiding discipline, even if it may hurt her client. Finally, it would distract courts from the primary function of administering justice in criminal cases to deal with litigation over various collateral issues relating to the identification/highlighting of discovery materials, such as the reasonableness of the identification, the viability of defense theories, and the prosecutor's thought processes in speculating about defense theories. Virginia Rule 3.8(d) was not written to serve such a purpose.

In conclusion, we urge the Committee to withdraw the proposed Opinion because it creates more confusion than clarity. If the Committee elects to move forward with the Opinion, we respectfully request that the facts be modified, and the text of the Opinion made clear that the intent of the Opinion is to deter prosecutors from willfully and intentionally hiding evidence by attempting to conceal it within voluminous discovery productions. Absent such malicious intent, a prosecutor should not be subject to discipline where she has disclosed information to the defendant in compliance with her legal and ethical duties, or out of an abundance of caution.

Sincerely,

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