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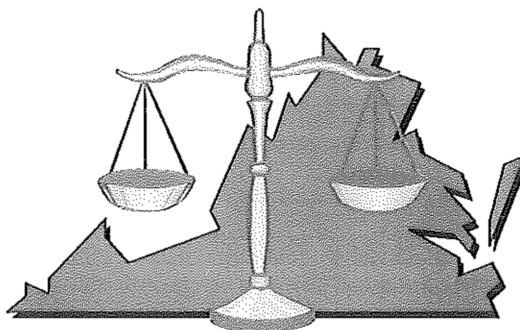

Virginia Association of Commonwealth's Attorneys

October 24, 2017

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

Re: <u>Public Comment on Proposed Legal Ethics Opinion 1888</u>

Dear Ms. Gould:

Please consider this letter as public comment by the Virginia Association of Commonwealth's Attorneys regarding proposed Legal Ethics Opinion 1888. The comment is offered pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia.

The proposed legal ethics opinion is problematic in many ways and may cause unforeseen consequences that have not been taken into account. In this letter, we will outline: 1) how the proposed opinion improperly alters the prosecutor's role in the provision of exculpatory evidence; 2) how the proposed opinion creates a "slippery slope" with an unmanageable standard; 3) how the proposed opinion will lead to negative, unintended consequences; and 4) how the proposed opinion utilizes biased language that is not conducive to this discussion.

Patricia T. Watson, President
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Emporia, Virginia 23847

General Correspondence:
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Williamsburg, Virginia, 23187-3549

I. The proposed opinion improperly alters the prosecutor's role in the provision of exculpatory evidence.

The main import of this proposed opinion requires a prosecutor to not only provide a defense attorney with exculpatory evidence, but to "draw the defense lawyer's attention" to the evidence and specifically identify the material as exculpatory evidence. As an organization, VACA is mindful that the Rules of Professional Conduct can impose obligations on a prosecutor that exceed what is mandated by cases such as *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. *See e.g.* Legal Ethics Opinion 1862. However, it would be fundamentally unsound to interpret a prosecutor's obligations under Rule 3.8 of the Rules of Professional Conduct without consideration of how the courts have structured rules pertaining to the provision of exculpatory evidence by the government. Failing to consider the rule in the context of relevant case law creates a risk of establishing obligations for the prosecutors from the courts that are different from those given by the State Bar. For example, case law clearly establishes that the exculpatory value of evidence is not evaluated from the prospective of the prosecutor, but rather how the evidence could be utilized by the defense attorney.

Also, the Virginia Supreme Court has previously noted that the Commonwealth's view regarding the credibility of the exculpatory evidence is irrelevant. *See Cherricks v. Commonwealth*, 11 Va. App. 101(1990) (noting, "Tension exists in instances where the prosecutor does not recognize the exculpatory nature of evidence, or, as here, in good faith denies the exculpatory potential of the evidence and accordingly declines its production."). Other cases note that even if evidence is inadmissible at trial, it is considered exculpatory if it could impact a defendant's trial preparation, his identification of potential witnesses, or the presentation of his case. *See White v. Commonwealth,* 12 Va. App. 99 (1991). As an organization that values fair play and justice, VACA has consistently educated our members on the principle that when one is in doubt about exculpatory evidence, it should be disclosed. We also routinely instruct that exculpatory evidence should be analyzed from the perspective of the defense attorney rather than the prosecutor in order to avoid a violation of *Brady.*

The proposed legal ethics opinion risks further dividing the interpretation of Rule 3.8 from the case law on *Brady* in a way that undermines the message that, when in doubt, a prosecutor should disclose evidence. If this opinion is adopted, a prosecutor confronted with a large volume of evidence whose exculpatory value is not facially apparent, may elect simply not to disclose the evidence. This would stem from the fear that he cannot articulate what is exculpatory, thus failing to meet his obligation under this opinion to "draw the defense lawyer's attention" to the exculpatory evidence. This opinion risks putting prosecutors in

the untenable position of either he complies with an expansive view of *Brady* and risks failing to comply with the dictates of the proposed opinion, or he views the potentially exculpatory evidence through the myopic and subjective lens encouraged by this opinion and risks the backlash of the courts.

Also, it would be derelict not to point out that the example, as given, while exculpatory, is not required to be disclosed because it is already in the possession of the defendant. The defendant received the information through the phone call. "Where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine." *United States v. Roane*, 378 F3rd 382, 402 (4th Cir. 2004) (quoting *United States v. Wilson*, 901 F.2d 378, 381 (4th Cr. 1990)). Furthermore, "information actually known by the defendant falls outside the ambit of the Brady rule." *Id.* (emphasis added). This is because "the rationale underlying Brady is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government." *United States v. LeRoy,* 687 F.2d 610, 619 (2d Cir. 1982).

II. The proposed opinion creates a "slippery slope" with an unmanageable standard.

While the facts in the proposed opinion offer a seemingly clear and quantifiable way to look at exculpatory evidence (exculpatory call buried amidst 199 otherwise irrelevant calls), the day to day realities of discovery do not operate in that manner. In many cases, the amount of discovery is easily manageable – both sides can readily digest all of the evidence that exists. In other cases, that is not the situation. Some cases are incredibly complex and the evidence may consist of large volumes of supporting data or records. Often a prosecutor may have a case where competent representation does not require or permit him to look at a large volume of documents that lie behind a witness's testimony. The prudent prosecutor however, may nonetheless disclose the records to the defense so that if they contain exculpatory evidence that the prosecutor is not attuned to, the defense will still have access to the information and be able to potentially make use of the information at trial. The proposed opinion, however, will invariably lead to further defense complaints about the prosecutor's not identifying or, in the attorney's view misidentifying, the portions of evidence that are exculpatory. Today's requirement to point out the single phone call that is damaging to the government's case becomes tomorrow's requirement that the prosecutor routinely outline for the defendant what he perceives to be the flaws in the government's evidence.

This proposed opinion requires the prosecutor to now also act as the defense attorney by highlighting the evidence that is useful to the defense and pointing him to the arguments that he should make. How the prosecutor can possibly fulfill that demand is baffling to say the least. But what is more problematic is the unmanageable standard that this opinion offers. It states that the duty to disclose, "requires identifying the specific evidence the prosecutor knows tends to negate the guilt of the defendant." Where case law regarding exculpatory evidence offers the clean rubric of how evidence is objectively viewed, this opinion places emphasis on the subjective state of mind of the prosecutor. That subjective viewpoint and standard does not facilitate easy resolution of the ethics issues that will arise because of the promulgation of this opinion.

III. The proposed opinion creates negative unintended consequences.

Interestingly, the opinion appears to almost recognize the negative consequence that its holding will create. In the opening paragraph of the analysis it notes that, "The rule does not impose any obligation on a prosecutor to seek out evidence" and concludes that the duties under the opinion do not arise until the prosecutor knows of the existence of the evidence. The opinion goes on to differentiate the prosecutor who is aware of the exculpatory phone call versus the prosecutor who never listened to the calls at all. This opinion inadvertently encourages the prosecutor to act as the proverbial ostrich sticking his head in the sand, lest he be unwittingly exposed to exculpatory evidence that he would be compelled to divulge. That outcome does not help advance the cause of justice. Moreover, it directly contradicts the command of case law pertaining to exculpatory evidence which holds, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). That legal principle aside, the legal ethics opinion encourages the prosecutor to make himself aware of as little evidence as he needs for fear that he may otherwise trigger additional requirements that might subject him to disciplinary action. The greatest irony of this proposed opinion is that from the disciplinary perspective, the hypothetical prosecutor would be better off by not listening to the calls at all.

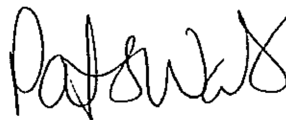
IV. The proposed opinion utilizes biased language.

The proposed opinion uses informal language that unintentionally implies a bias when it notes that by handing over a high volume of materials, the prosecutor "implicitly tells the defense lawyer to 'go fishing' for whatever exculpatory evidence can be found somewhere in the materials." The use of the word "implicitly" appears to highlight that the prosecutor in the hypothetical did

not actually tell the defense attorney to "go fishing". But, in utilizing this language, the opinion ascribes nefarious intent that may or may not be present in the prosecutor's mind. If a prosecutor actually told a defense attorney to "go fishing", it would be easy to see that the attorney's intent is to do nothing more than waste the opposing counsel's time and resources. However, in assuming that mindset from the stated facts, the opinion offers a shady prosecutor as the only image, rather than one who may be simply approaching the duty to disclose by providing as broad disclosure of the evidence. The broader point to make is that regardless of what opinion the Bar eventually releases, language and imagery like this is unnecessary to support the conclusion that is being advanced. And when an opinion offers a stereotype of the prosecutor as a malicious actor out for a win at all costs, it also acts to shut down meaningful discussion between the prosecutors, the defense bar, and the State Bar on this vital topic.

I would also add that a remedy already exists for the perceived problem because the defense counsel has the ability to file a motion to compel and the court can fashion a ruling that is tailored to the specific problem. We appreciate the opportunity to provide input on this topic and look forward to future productive conversations that advance the values of transparency and integrity without causing unintended consequences.

Sincerely,



Patricia T. Watson
President