

MEMORANDUM

To: JOSEPH INIGUEZ
Interim Chief Deputy District Attorney

From: Appellate Division

Re: Duty to Cite Adverse Law Regarding
Special Directive 20-08.1

Date: December 18, 2020

ISSUE PRESENTED

Special Directive (SD) 20-08.1 requires deputies to move to dismiss all allegations under the Three Strikes law in any pending cases. As part of this, the directive requires deputies to argue that subdivision (f)(1) of Penal Code [section 667](#), and subdivision (d)(2) of [section 1170.12](#) are unconstitutional infringements of the prosecutor's discretion. The directive does not mention cases that are directly contrary to this position, in particular [People v. Kilborn \(1996\) 41 Cal.App.4th 1325, 1333 \(Kilborn\)](#), nor advise deputies to cite contrary authority to the court.

Does SD 20-08.1 violate the attorney's duty of candor under California Rules of Professional Conduct,¹ [Rule 3.3](#) by not citing adverse case law?

SUMMARY OF ANSWER

SD 20-08.1 should be construed in a manner to make it consistent with Rule 3.3.

When making any claim to a court, the duty of candor in [Rule 3.3\(a\)\(2\)](#) requires attorneys to cite any known, adverse authority. On the constitutional issue, *Kilborn* is on point and is directly adverse to the Office's legal argument. Deputies that know of

¹ All further references to a "Rule" or "Rules" is to the California Rules of Professional Conduct.

Kilborn therefore have an ethical duty to cite it when making the argument.

SD 20-08.1 does not conflict with this duty. Although it provides a script outlining the office’s legal position, nothing in the directive forbids deputies from citing any other pertinent authority to the court, including adverse authority as required by [Rule 3.3](#). Thus, deputies that are aware of *Kilborn* may, indeed must, cite it to the superior court if the constitutionality of the Three Strike law is at issue.

Relatedly, this presumes that deputies may ethically argue that the statutes are unconstitutional in the first instance, notwithstanding *Kilborn* or any other authority. For the time being, this is probably acceptable, with some caveats. Under the Rules, an attorney may make a claim contrary to existing law so long as “it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.” ([Rule 3.1\(a\)\(2\)](#).) Thus, so long as we believe in good faith that *Kilborn* or any other authority was wrongly decided, and we are actively seeking to have a co-equal or higher court create new case law, we may continue to argue that portions of the Three Strikes law are unconstitutional. But if *Kilborn* ultimately stands, at some point will no longer be able to make this claim in good faith. At that point, the Office would need to reevaluate its position on the constitutionality of the Three Strikes law.

ANALYSIS

[Rule 3.3](#) reads, in relevant part:

(a) A lawyer shall not:

. . .

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority;

Prior SD 20-08 forbade deputies from charging any prior strikes and further required deputies to move to dismiss any alleged

strikes in all pending cases.² SD 20-08.1 does not address the charging of strikes, and it reiterates the requirement that deputies move to dismiss all strike allegations in pending cases. In moving to dismiss, the directive further requires deputies to state, in part, the following:

Penal Code section 1385 authorizes the People to seek dismissal of all strike prior(s) (or other enhancements) when in the interests of justice. Supreme Court authority directs this Court to determine those interests by balancing the rights of the defendant and those of society ‘as represented by the People.’ The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. *It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority.*

(Italics added.) In a section titled “Legal authority,” the directive cites only *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 and *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 as authority for this position.

At the outset, the directive is confusing because it cites two different provisions—just one from each section of the Three Strikes law—as being unconstitutional.³ Subdivision (f)(1) of

² As this was being written, the Office issued SD 20-08.2, revising its policy on alleging sentence enhancements, but without affecting the policy regarding strikes. It therefore does not change this analysis.

³ Famously (or infamously), the Three Strikes law is codified almost identically in two statutes: section 667, amended by the Legislature with urgency legislation in 1994, and section 1170.12, enacted by the voters the same year. Subdivisions (d)(1) and (d)(2) of section 1170.12 correspond to subdivisions (f)(1) and (f)(2), respectively, of section 667. The subdivisions do

section 667 (identical to subdivision (d)(1) of section 1170.12, which is not listed), requires the prosecution to plead and prove all known strikes. Separately, subdivision (d)(2) of section 1170.12 (identical to subdivision (f)(2) of section 667, which is not listed) allows the prosecution to move to dismiss prior strikes “in the furtherance of justice pursuant to Section 1385.” It is not clear whether this was a typographical error or whether the Office intends to challenge both sections. As currently worded, the directive wants deputies to argue that the plead-and-prove provisions are unconstitutional infringements of the prosecutor’s *charging* discretion, *and* that the dismissal provisions are unconstitutional infringements of the prosecutor’s *dismissal* power (as an extension of the power to charge and the power to decide how to proceed).

Regardless, the argument that any of these provisions are unconstitutional is contrary to existing law.

The claim that subdivision (f)(1) of section 667 and subdivision (d)(1) of section 1170.12 unconstitutionally infringe on the prosecutor’s charging discretion was addressed and rejected by *Kilborn, supra*, 41 Cal.App.4th at p. 1333.⁴ As a decision of a higher court, all superior court judges are bound to follow *Kilborn* regardless of whether they believe it was wrongly decided. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As binding authority, no superior court judge may rule that these statutes are unconstitutional.

Likewise, as explained in a prior memorandum, the prosecutor lacks the unilateral power to dismiss a charge after filing, as well as the power to compel a court to dismiss an allegation in the absence of an abuse of discretion. We will not repeat that analysis here, nor cite the authorities therein.

not line up because section 667 also contains additional subdivisions beyond the Three Strikes law.

⁴ As noted in a prior memorandum, *People v. Gray* (1998) 66 Cal.App.4th 973, 994–995 and *People v. Butler* (1996) 43 Cal.App.4th 1224, 1247 agreed with *Kilborn* without expounding on its reasoning.

In light of this, deputies arguing that parts of the Three Strikes law are unconstitutional would have an ethical duty under Rule 3.3 to cite to the court any known authority contrary to that position. For the plead-and-prove provisions, the contrary authority would be *Kilborn*. For the proposition that People have the power to dismiss charges, many authorities hold to the contrary, notably *People v. Tenorio* (1970) 3 Cal.3d 89, 94. Citing these authorities is therefore necessary to satisfy an attorney's duty of candor.

Fortunately, this duty is not in conflict with SD 20-08.1. Though it requires the prosecutor to make certain arguments, nothing in SD 20-08.1 *forbids* a deputy from citing pertinent legal authority in addition to the authorities provided. Current office policy therefore leaves deputies free to comply with Rule 3.3.⁵ Thus, no new Special Directive is necessary, though the Office may wish to clarify this point in a GOM or email to Head Deputies if there is confusion.

Additionally, it is not necessarily unethical for attorneys to make claims in court that are contrary to current law, as long as they do so in pursuit of a good-faith change in the law. [Rule 3.1](#) of the California Rules of Professional Conduct reads, in relevant part (*italics added*):

(a) A lawyer shall not:

. . .

(2) present a claim or defense in litigation that is not warranted under existing law, *unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.*

Thus, if the Office believes that the pertinent authorities were wrongly decided, we can still argue that the statutes are unconstitutional in order to then seek review in a higher court. This presumes 1) that we do, in good faith, believe that the pertinent authorities were wrongly decided, and 2) we then actively pursue appellate remedies to generate a change in the

⁵ Of course, if an office policy or directive did conflict with the attorney's ethical duty, the ethical duty would prevail.

law.⁶ But we must also accept that since current law is to the contrary, the superior court would be compelled to rule against us in the first instance. And this further presumes that an adverse ruling on this issue is even reviewable by the People, which is not a foregone conclusion.

If the Office does pursue this course, it should keep in mind that if it is not successful, at some point we would no longer claim to be pursuing a change in the law in good faith. Instead, we would just be making meritless claims that violate existing law. This would violate our ethical duty to not pursue claims not warranted under the law. ([Rule 3.1\(a\)\(2\)](#).)

Further, though it is beyond the scope of SD 20-08.1, it should be noted that the concerns expressed here are not limited to motions to dismiss in pending cases. Additionally, the office's policy of declining to plead prior strikes in any new case violates the plain language of the Three Strikes law, as analyzed by a prior memorandum. Presumably, extrapolating from SD 20-08.1, we are pursuing this policy under a good-faith belief that the statutes are unconstitutional, notwithstanding *Kilborn*. Likewise, this may be within the Rules, for a time, if we are actively pursuing a good-faith change in the law. But in the meantime, we must acknowledge that any superior court reviewing the policy (to the extent it would be reviewable)⁷ would be compelled to follow *Kilborn*. And if our challenges fail, at some point we could no

⁶ This memorandum does not take any final position on whether the pertinent authorities, particularly *Kilborn*, were wrongly decided. But we note that the principle of stare decisis would counsel against overturning precedent that has been settled for at least 25 years, absent some compelling reason. (See, e.g., [People v. Birks \(1998\) 19 Cal.4th 108, 117.](#))

⁷ It is not clear how a court could review our policy, but two possibilities come to mind. First, a judge may order a deputy to file all known strikes or suffer contempt, the validity of which would depend on the legality of the order. Second, a civil suit may be possible, though this is not clear. (See [People for Ethical Operation of Prosecutors etc. v. Spitzer \(2020\) 53 Cal.App.5th 391.](#)) The Office should therefore have a strategy for defending its policy on the merits in court.

longer make this argument under the good-faith-change exception. Continuing to pursue the policy contrary the law in bad faith could lead to discipline by the State Bar: Attorneys have an individual duty to follow the Rules ([Rule 5.2\(a\)](#)), and a lawyer is responsible for a rule violation by another if he or she ordered the conduct involved ([Rule 5.1\(c\)\(1\)](#)).

CONCLUSION

Deputies have an individual duty under the Rules of Professional Conduct to disclose known contrary authority to a court when making any legal claim. SD 20-08.1 requires deputies to argue that portions of the Three Strikes law are unconstitutional, but does not forbid deputies from complying with their ethical duty to disclose any case law that is adverse to this position, nor could it lawfully do so. Deputies therefore may, indeed must, cite to the court any known case law holding that the contested provisions of the Three Strikes law are constitutional. Assuming the Office is actively pursuing a good-faith change in the law, for the time being there does not appear to be a conflict between the policy and the Rules.

Matthew Brown
December 2020