MEMORANDUM

TO: The State Bar Committee On Human Rights

FROM: John B. Mitchell/De De Donovan

DATE: March 20, 1980

RE: The Development of an Ethical Code for Government Attorneys

A. The Proposed Project: A Comprehensive Ethical Code To Provide Guidance For The Conduct of Government Attorneys 1/

The project envisioned is that of formulating a workable, comprehensive ethical code for government attorneys in California. The code should provide guidance to government attorneys in all of their widely varying endeavors (e.g., consulting with agencies, drafting administrative opinions, civil litigation, criminal litigation), and should include general ethical principles towards which all government attorneys can aspire as well as specific disciplinary rules which are enforceable by State Bar sanctions.

1/ This memorandum should begin with two caveats: (1) I have never practiced as a government attorney; (2) my official contact with government attorneys has been principally confined to criminal prosecutions and civil rights (prison) litigation. While I do not believe that these limitations affect the overall perspective of this memorandum, they no doubt have their impact in some of the paper's specific assertions and/or omissions. Should this committee find the project to be feasible and desirable, the thoughts, criticisms, etc., of the government attorneys on the committee will obviously be invaluable.

B. The Need For A Comprehensive Ethical Code: An Important Corollary To the Defense Of Human Rights

The conduct of government attorneys is no more severable from human rights issues than is the conduct of the government itself. Whether consulting with a state agency which deals with prisoners or undocumented aliens, or whether involved in litigation which is based upon human-civil rights legislation, government counsel is inextricably interwoven within the fabric of the human rights struggle. In providing such representation it is, therefore, essential that the attorney's conduct and decision-making be guided by the highest ethical standards.

At present, however, there does not exist a single, comprehensive code which can provide such guidance (see, section B-2, infra). Given the unique and complex ethical posture of the government attorney (see, section B-1, infra), this lack of clear guidance is unfortunate both for the attorney who desires to do the "right" thing, and for the wider society on behalf of whom the attrorny acts.

1. The Unique Ethical Problems of the Government Attorney and the Particular Interest Which Our Society Maintains in That Attorney's Conduct

a. The unique ethical problems of the government attorney

The most difficult ethical problems faced by government attorneys (and not coincidentally those problems

which most centrally touch upon human rights subjects) are a consequence of an ethical "conflict" which is built into the role-definition of a government attorney. All lawyers are ethically committed to the vigorous and zealous representation of their individual client within the bounds of law. American Bar Association Code of Professional Responsibility, EC 7-1. They are part of a larger mechanism known as the Adversary System or Adversary Process wherein the end product is supposed to be some form of rough justice when measured over a period of time. The government attorney, too, is an advocate. But she/he is an advocate with an implicit conflict built into her/his role. For not only is the government attorney part of this larger adversary machine which has justice as its end, but the government attorney must, in addition, independently also seek that "justice" be done in the name of the "People" in each case in which the attorney is involved. See, e.g., ABA Code of Prof. Resp., EC 7-13, at 33C; Berger v. United States, 295 U.S. 78, 88 (1935). Thus, in the area of criminal justice, government attorneys are mandated under Brady v. Maryland, 373 U.S. 83 (1963) to an ethical standard (i.e., provide defendants with exculpatory evidence) which in effect will make it more likely that these government attorneys will lose the prosecutions that they are conducting.[2/]

2/ See, also, F. Cone, "Some Problems of Ethics, Due Process in Criminal Prosecutions", 1 Idaho L.Rev.9 (1964); Note, "Standards of Conduct For Prosecution and Defense Personnel: A Symposium", 5 Amer. Crim. Law Quarterly 8 (Fall, 1966).

In the civil area, the special ethical role of the government attorney[3] requires that the attorney act as a "watchdog" on behalf of the People over the very state agencies which the attorney must also represent. See, [Deputy Attorney General] O'Brien, "The Role of the Attorney General as a Public Lawyer", 44 Los Angeles Bar Bulletin, 495, 533 (Sept., 1969). The problems inherent in this somewhat schizophrenic role, in fact, touch every area of the government attorney's practice:[4]

Need for Ombudsman

3/ Government attorneys face other ethical situations which are not presented in private practice. For example, government attorneys face very complex problems regarding conflicts of interests between their public roles and their previous or concurrent private practices. See, R. Mills, "The Practicing Prosecutor/Beset With Conflicts", 54 Illinois Bar Journal 606 (March, 1966); W. Reece, "Ethical Consideration for City Attorneys", 41 Florida Bar Journal 1167 (Nov., 1967). See, also, ABA Opinions #77, 135, 39, 134, 192, 55, 34, 30, 186, 261, 262, 71, 55. Similarly, government attorneys face ethical problems regarding confidential communications and such when they leave government service to go into private practice. See, note "Legal Ethics -- The ABA Code of Prof. Resp. -- Disciplinary Rule 9-101B -- Former Government Attorneys and the Appearance of Evil Doctrine -- General Motors Corporation v. City of New York", 16 Boston College Industrial and Commercial Law Review 651 (Apr., 1975).

4/ As a further example, the government lawyer faces the quandry of what to do when corrupt governmental action has been revealed to him/her through confidential sources. May the attorney "blow the whistle"? If so, when, how, and to whom? See, generally, R. Lawry, "Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question", 37 Federal Bar Journal 61 (Fall, 1968); L. Curtis and G. Kolts, "The Role of the Government Lawyer in the Protection of Civil Rights", 49 Australian Law Journal 335 (1975). For an interesting "rap" on the day-to-day pressures, political and otherwise, on a governmental attorney, see, J. Weinstein, "Some Ethical and Political Problems of a Government Attorney" 18 Main L.Rev. 155, 172 (1966) ("There is no inconsistency between sound ethics and good politics.").

> "Unlike a private attorney subject to dismissal for ignoring a client's wishes, counsel for the government has, subject to the variables of inter-governmental relations, the power to take a course of action or accept a settlement contrary to the wishes of the agency officials involved. In addition, government counsel owes some arguable duty to the opposing party, not only as a citizen and taxpayer of the entity to which he or she works, but also because that party seeks to invoke the same laws as those which he or she works, but also because that party seeks to invoke the same laws as those which he or she is committed, in theory, if not by oath, to enforce. The relationship of agency officials to government counsel is not that of client and attorney in any ordinary sense, for the identities and desires of those officials may vary with popular opinion, the vote of the Electorate, or the whims of their superiors, or the law to which both officials and counsel owe their allegiance remains unaltered." See, E. Schnapper, "Legal Ethics and the Government Lawyer", 32 The Record 649, 649 (1977)

While the ethical role of the government attorney is a demanding one, there are several specific reasons why it is important to the wider society that this role be achieved.

b. The societal interest in the ethics of the government attorney

In addition to a desire to insure that the government attorney's action on individual issues will be guided by a concern for the best interests of the "People", our society has two other reasons to want the highest level of ethical conduct from their legal representatives. First, the government attorney has a significant symbolic role unlike anything experienced by the private practitioner. When a private

practitioner cheats, he/she has obviously done disservice to the opposing party and, to an extent, to the integrity of the judicial forum in which the misconduct occurs. This misconduct also reflects upon the general bar.5/ When a government attorneys fails to behave ethically (or even appears to so act), however, the result is very different. The misconduct is more than an indictment of the attorney, or even the profession. The misconduct is an indictment of our very system of law and of the integrity of that law under this government. After all, "unless we are able to insist that law and order prevail in government, we can hardly expect law and order to prevail in the streets."

5/ All of us are aware that the public is, at best, ambivalent about the integrity of lawyers and most likely still retains the post-Watergate belief that the ethical standards of the profession are extremely low.

> The morality of the advocate has never been held in very high esteem. See Kent, Legal Ethics, 6 Mich.L.Rev. 468, 474 (1907). See generally, Note, Moral and Ethical Considerations in Defense of Those Accused of Crime, 35 Marq. L.Rev. 311 (1952). Since Watergate, however, the legal profession finds itself in the midst of an even greater moral crisis. See generally Carrington, The Ethical Crises of American Lawyers, 36 Pitt.L.Rev. 35 (1974); Cox, The Lawyer's Public Responsibility, 4 Human Rights 1 (1974); Savage & Gabriel, Lawyers in America: A Profession in Search of a Direction, 22 Cath. Law. 87 (1976); Note, The Bar and Watergate: Conversation with Chesterfield Smith, 1 Hastings Const.L.Q. 31 (1974); Lawyer's Watergate, N.Y. Times, June 11, 1974, at 40, col. 1.
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> Echoing what is perhaps the view of much of the public toward the legal profession, one author wrote: "The Point about lawyers...is that they are free to commit outrages against common morality and sense behind hallowed and intricate shields, and jargon." Reeves, The Trouble with Lawyers: The Case of James St. Clair, New York, July 29, 1974, at 27.

See, O'Brien, supra at 533. "Governmental arrogance is intolerable. It underminds belief in our system. It destroys the citizen's contact with his government." Id.; Cf., also, People v. Superior Court [Greer], 19 Cal.3d 255, 268 (1977) ("It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requirement that public officials not only, in fact, properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety.")

Second, due both to the vast taxpayer-provided economic resources at their disposal and the prestige that government representation carries (see, Schnapper, "Legal Ethics and the Government Lawyer", supra, at 649-651), government attorneys carry great power into their legal endeavors. Like all power, it can be directed towards good or ill. It is the obvious interest of society that it be guided towards the former.

2. The Lack of an Existing Comprehensive Code

The American Bar Association (ABA), the Federal Bar Association, and the State of California Bar Association have all made some contributions towards developing a code of ethical behavior for government attorneys. Yet, none of these provide the comprehensive type of articulation, backed by state bar sanctions, which is necessary to guide the

conduct of attorneys in government practice.

The ABA's specific treatment of government attorney is found in the ethical considerations and disciplinary rules[6/] of Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law") Ethical Considerations 7-13 and 7-14 encompass the ABA Code's perception of the proper ethical role for governmental attorneys. Ethical Code 7-13 states:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those effecting the public interest should be fair to all; and, (3) in our system of criminal justice, the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has ressponsibilities different from those of a lawyer in private practice: The prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

6/ "Ethical Considerations", encompass the higher aspirations of the professions, or, in other words, those aspects of an attorney's conduct which are recommended but not subject to disciplinary sanctions if violated. "Disciplinary Rules" are those rules for which sanctions may be applied.

Ethical Consideration 7-14 provides that:

> "A government lawyer, who has discretionary power relative to litigation, should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power, who believes there is lack of merit in a controversy submitted to him, should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has a responsibility to seek justice and to develop a full and fair record. And, he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."

The actual ABA Disciplinary Rules are, however, far more limited in scope than these ethical considerations. In fact, the ABA's response to the ethics of government lawyers is focused upon the "performing the duty of public prosecutor or other government lawyer", thus, Disciplinary Rule 7-103 provides that:

> "(a) A public prosecutor or other government lawyer shall not institute, or cause to be instituted, criminal charges when he knows, or it is obvious, that the charges are not supported by probable cause.7/
> (b) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

7/ In a survey conducted in the late 1960's, 20% of the Los Angeles prosecutors interviewed stated that they would bring a charge even if they did not believe it could get past a "probable cause" determination at a preliminary hearing. See, Comment, "Prosecutorial Discretion in the Initiation of Criminal Complaints", 42 So.Cal.L.Rev. 519, 527 (1969).

Subsequently, in the ABA's proposed standards for the conduct of criminal trials (specifically, "the prosecution and defense functions") the ABA has developed a set of minimal ethical standards for prosecutors in criminal cases which include extensive ethical considerations and a large variety of disciplinary rules which cover all aspects of trial from investigation, to cross-examination, to jury selection, and such.[8/] Though the code is replete with rules whose violations would subject an attorney to disciplinary sanctions, the authors of the code do not, themselves, provide such a disciplinary structure.

In 1973, the National Council of the Federal Bar Association adopted federal ethical considerations to the Code of Professional Responsibility. The text of this code is provided in Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A.J. 1541, 1542 to 1544 (1974). The federal code generally covers topics such as the conflicts between the "public" and the agency being represented and, more specifically, "who is the client?" and when and how can

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8/ "The standards set forth in the ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft, 1971) cover a wide range of prosecutorial activity. Although the standards are not authoritative in themselves, courts are likely to find them helpful or even persuasive. Standards particularly relevant to prosecutorial misconduct inlcude the following: Standard 1.1 (prosecutor's function), 1.2 (conflict of interest), 1.3 (public statements), 3.9 (discretion in the charging decision), 3.11 (disclosure of evidence by the prosecutor), 5.4 (relations with jury), 5.5 (opening statement), 5.6 (presentation of evidence), 5.7 (examination of witnesses), 5.8 (argument to the jury), and 5.9 (facts outside the record)." See, D. Donovan "Prosecutorial and Judicial Misconduct, supra, at 6, §1.2.

the government attorney "blow the whistle"?[9/] While a

9/ See, e.g., Canon 4. A Lawyer Should Preserve the Confidence of a Client.

> F.E.C.-4-1. If, in the conduct of official business of his department or agency, it appears that a fellow employee of the department or agency is revealing or about to reveal information concerning his own illegal or unethical conduct to a federal lawyer acting in his official capacity the lawyer should inform the employee that a federal lawyer is responsible to the department or agency concerned and not the individual employee and, therefore, the information being discussed is not privileged.
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> F.E.C.-4-2. If a fellow employee volunteers information concerning himself which appears to involve illegal or unethical conduct or is violative of department or agency rules and regulations which would be pertinent to that department's or agency's consideration of disciplinary action, the federal lawyer should inform the individual that the lawyer is responsible to the department or agency concerned and not the individual employee.
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> F.E.C.-4-3. The federal lawyer has the ethical responsibility to disclose to his supervisor or other appropriate departmental or agency official any unprivileged information of the type discussed above in F.E.C.-4-1 and 2.
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> F.E.C.-4-4. The federal lawyer who has been duly designated to act as an attorney for a fellow employee who is the subject of disciplinary, loyalty, or other personnel administration proceedings or as defense counsel for court-martial matters or for civil legal assistance to military personnel and their dependents is for those purposes acting as an attorney for a client and communications between them shall be secret and privileged. In respects not applicable to the private practitioner the federal lawyer is under obligation to the public to assist his department or agency in complying with the Freedom of Information Act, 5 U.S.C. §552 (1970), and regulations and authoritative decisions thereunder.

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9/ [cont.] Canon 5. A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

F.E.C.-5-1. The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. He is required to exercise independent professional judgment which transcends his personal interests, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of the government.

Canon 8. A lawyer Should Assist in Improving the Legal System.

F.E.C.-8-1. The general obligation to assist in improving the legal system applies to federal lawyers. In such situations he may have a higher obligation than lawyers generally. Since his duties include responsibility for the application of law to the resolution of problems incident to his employment there is a continuing obligation to seek improvement. This may be accomplished by the application of legal considerations to the day-to-day decisional process. Moreover, it may eventuate that a federal lawyer by reason of his particular tasks may have insight which enhances his ability to initiate reforms, thus giving rise to a special obligation under Canon 8. In all these matters paramount consideration is due the public interest.

F.E.C.-8-2. The situation of the federal lawyer which may give rise to special considerations, not applicable to lawyers generally, include certain limitations on complete freedom of action in matters relating to Canon 8. For example, a lawyer in the office of the Chief Counsel of the Internal Revenue Service may reasonably be expected to abide, without public criticism, with certain policies or rulings closely allied to his sphere of responsibility even if he disagrees with the position taken by the agency But even if involved personally in the process of formulating policy or ruling there may be rare occasions when his conscience compels him publicly to attack a decision which is contrary to his professional, ethical or moral judgment. In that event, however, he should be prepared to resign before doing so, and he is not free to abuse professional confidences reposed in him in the process of leading to the decision which is contrary to his professional,

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number of opinions have been written by the Federal Bar Association's Ethics Committee interpreting various provisions of the ethical considerations, these ethical guidelines are not themselves enforced by any particular disciplinary rules.

The California Bar Act does not include any ethical considerations regarding the practice of attorneys. The only specific provision focused upon the functioning of the government lawyer is Rule 7-102, "performing the duty of a member of the state bar in governmental service". See, California Business and Professions Code, foll. §6076. Rule 7-102 incorporates part of ABA's Rule 7-103, leaving

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9/ [cont.] ethical or moral judgment. In that event, however, he should be prepared to resign before doing so, and he is not free to abuse professional confidences resposed in him in the process leading to the decision.

F.E.C.-8-3. The method of discharging the obligations imposed by Canon 8 may vary depending upon the circumstances. The federal lawyer is free to seek reform through the processes of his agency even if the agency has no formal procedure for receiving and acting upon suggestions from lawyers employed by it. Such intra-agency activities may be the only appropriate course for him to follow if he is not prepared to leave the agency's employment. However, there may be situations in which he could appropriately bring intra-agency problems to the attention of other federal officials (such as those in the Office of Management and Budget or the Department of Justice) with responsibility and authority to correct the allegedly improper activities of the employing agency. Furthermore, it may be possible for the lawyer to participate in bar association or other activities designed to improve the legal system within his agency without being involved in a

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out the ABA's concern that the prosecutor provide the defense with exculpatory evidence under its Brady duty.

State Bar Rule 7-102 states:

> "A member of the State Bar in government service, shall not institute or cause to be instituted criminal charges when he knows, or should know, that the charges are not supported by probable cause. If, after the institution of criminal charges, a member of the State Bar in government service having responsibility of prosecuting the charges, becomes aware that those charges are not supported by probable cause, he shall promptly advise the court in which the criminal matter is pending."

There are, in addition, several rules in the State Bar Act which apply equally to government as to private attorneys:

> "The rules of professional conduct adopted by the California Supreme Court directly govern the conduct of California attorneys. Several of these rules that have particular application to prosecutorial conduct are: Rule 5-102 (representation of conflicting interest), 7-102 (institution or prosecution of criminal charges not supported by probable cause), 7-103 (communicating with an adverse represented by counsel), 7-105 (misleading a judicial officer), 7-106 (improper communications with jurors), 7-107 (suppression of evidence; improper contact with witnesses), and 7-108 (ex parte communication with judge). Violation of these professional standards or rules subjects counsel, whether prosecution or defense, to possible Bar sanctions." See, Donovan, "Prosecutorial and Judicial Misconduct", n. 10 infra, at 6, §1.2.

9/ [cont.] public attack on the agency's practices, so long as the requirement to protect confidences is observed.

Sound policy favors encouraging government officials to invite and consider the views of counsel. This tends to prevent the adoption of illegal policies. Even where there are choices between legal alternatives, the lawyer's viewpoint may be valuable

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While all of these state, federal, and private bar ethical standards are resources from which an ethical code may be constucted, they obviously do not provide detailed, comprehensive, enforceable standards. They thus provide neither a code from which government attorneys can effectively seek guidance, nor a mechanism by which the society can insure that its attorneys will conform to those standards.

C. Some Final Reflections - The Desired Impact of An Ethical Code For Government Attorneys

The proposed code is intended both to provide guidance in the difficult task of representing the often [illegible] inconsistent interests of specific state agencies and the "People" (see, section B-1, supra), and to insure that government service will be carried out by attorneys of only the highest ethical character. To the extent that the code demands higher conduct and higher values in government service than is expected of private practitioners, the code will tend to elevate the image of government attorneys. As a result, a source of pride in being "better, nobler, more

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9/ [cont.] in affecting the choice. Lawyers in federal service accordingly should conduct themselves so as to encourage utilization of their advice within the agencies, retaining at all times an obligation to exercise independent professional judgment, even though their conclusions may not always be warmly embraced. The failure of lawyers to respect official and proper confidences discourages this desirable resort to them.

principled", should arise in the profession of government attorneys and itself be a motivation for behaving in a principled manner towards litigation, in general, and human rights concerns, in particular. Finally, a precise code, subject to rigorous enforcement by the State Bar,[10/] will act both as a deterrent to those whose principles may be momentarily weakened and as a filter to screen out those who are unworthy of the high calling of government practice.

10/ In this regard, litigation in the appellate process is an inadequate substitute for vigorous enforcement of a specific ethical code by the State Bar. While courts do remedy extreme governmental misconduct in the course of litigation, see, e.g., D. Donovan, "Prosecutorial and Judicial Misconduct", California Criminal Practice Series, CEB (1979), the remedies do not focus on, e.g., the actual prosecutor whose misconduct is the center of the court's attention. Moreover, the sanctions for finding such misconduct in an appellate context are sufficiently severe (e.g., mistrial or reversal) that the courts are generally unwilling to find such misconduct. After all, it is one thing to reprimand the government lawyer who is specifically responsible for the misconduct. It is quite another to let free a convicted criminal for that prosecutor's misconduct.

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