

AGENDA ITEM

122 NOV 2015

DATE: November 3, 2015

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed Amended Rule 5-110 of the Rules of Professional Conduct.
Request for Release for Public Comment

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has been assigned to conduct a study of the Rules of Professional Conduct and to recommend comprehensive amendments. The Commission requests that the Board of Trustees authorize a 90-day public comment period on proposed amended Rule 5-110 of the Rules of Professional Conduct. The Commission adopted proposed amended Rule 5-110 at its October 23, 2015 and also determined to recommend that the processing of this proposed rule be expedited on a separate track from the Commission’s anticipated comprehensive proposed amendments to the Rules of Professional Conduct.

Members with questions about this agenda item may contact Randall Difuntorum at: (415) 538-2161.

BACKGROUND

The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval.¹

At the Board’s November 2014 meeting, the Board authorized the State Bar President’s appointment of the Commission and directed the Commission to conduct a study of the Rules of

¹ Business and Professions Code section 6076 provides: “With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this state.” Business and Professions Code section 6077, in part, provides: “The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar.”

Professional Conduct with the goal of proposing comprehensive amendments for final Board action in early 2017. (Board Open Session Agenda Item 123, November 7, 2014.)

On December 11, 2014, Professor Laurie Levenson testified, on behalf of the Innocence Project, at the State Bar's annual public hearing held pursuant to Business and Professions Code section 6095(a). Professor Levenson testified about the importance of the State Bar's consideration of American Bar Association ("ABA") Model Rule 3.8 [Special Responsibilities of a Prosecutor], and urged that the State Bar's commitment to develop comprehensive rule amendments over the following two years not interfere with the immediate consideration of this rule.

By letter dated March 10, 2015, from the Honorable Tani G. Cantil-Sakauye, Chief Justice of the Supreme Court of California, to State Bar President Craig Holden, the State Bar was informed that the Board "should feel free to consider . . . whether any particular rule or issue might warrant or benefit from fast track consideration and submission to the court." In a reply letter dated March 11, 2015, President Holden indicated that the Commission would adopt "a procedure to entertain requests for expedited consideration of rules, if appropriate, and give priority where needed."

At the Commission's meeting on March 27, 2015, the Commission appointed a standing working group to receive requests for expediting consideration of rules and to conduct initial evaluations of such requests. At the Commission's May 28 – 29, 2015 meeting, the Commission adopted the following standard to be used by the working group and the full Commission in making a decision on whether to expedite the consideration of a rule:

"Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule is necessary to respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to promulgate the rule would result in the continuation of serious harm."

Following adoption of that standard, at the same meeting the Commission voted to have a separate working group appointed to study whether a rule similar to ABA Model Rule 3.8 should be drafted and recommended for adoption by the Board.

At the Commission's meeting on October 23, 2015, the Commission considered ABA Model Rule 3.8 and the rule proposed by the working group and adopted a proposed amended Rule 5-110 for submission to the Board with a request that the Board authorize a public comment period. The Commission also considered written input and oral presentations asking that the Commission prioritize the processing of the proposed rule on a separate track from the Commission's anticipated comprehensive proposed rule amendments. Following consideration of the Commission's standard for expediting consideration of a rule, the Commission voted in favor of recommending that the Board prioritize the processing of proposed amended Rule 5-110.

DISCUSSION

Current California Rules 5-110 and 5-220.

Current Rule 5-110 is entitled "Performing the Duty of Member in Government Service," and provides that:

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

Current Rule 5-220 is entitled “Suppression of Evidence,” and provides that:

“A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.”

ABA Model Rule 3.8.

ABA Model Rule 3.8 is entitled “Special Responsibilities of a Prosecutor,” and provides that:

“The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial

likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the

court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Proposed Amended Rules 5-110 and 5-220.

Proposed amended Rule 5-110 would implement provisions similar to Model Rule 3.8, in particular it would add a provision governing a prosecutor's responsibility to make timely disclosure to the defense of exculpatory evidence. The full text of proposed amended Rule 5-110 is provided as Attachment A. A redline/strikeout version of proposed amended Rule 5-110 showing changes to current Rule 5-110 is provided as Attachment B. A redline/strikeout version of proposed amended Rule 5-110 showing changes to ABA Model Rule 3.8 is provided as Attachment C.

Because the duty to disclose evidence imposed on all lawyers, including a prosecutor, is currently governed by Rule 5-220, a conforming change to Rule 5-220 has also been drafted. The amendment to Rule 5-220 adds a Discussion paragraph stating: "See rule 5-110 for special responsibilities of a prosecutor." A clean version of proposed amended Rule 5-220 is found in Attachment A. A redline/strikeout version showing changes to current Rule 5-220 is provided as Attachment D.

If ultimately adopted by the Board and approved by the Supreme Court, proposed amended Rule 5-110 would result in the following key substantive changes in attorney duties.

1. Paragraph (A) would amend the existing requirement that a member have probable cause when instituting criminal charges. A member subject to proposed Rule 5-110 would be described as a "prosecutor in a criminal case." This is arguably narrower than the current rule that applies to a "member in government service" who can "institute or cause to be instituted criminal charges." However, because only a member in government who also has prosecutorial powers can institute criminal charges, the scope of coverage should not change.

The knowledge standard in the current rule of "knows or should know" would be replaced with "knows." The change conforms to the language used in a preponderance of jurisdictions that have adopted a version of ABA Model Rule 3.8. "Know" is defined in ABA Model Rule 1.0(f) as "actual knowledge of the fact in question." Under the Model Rules, "a person's knowledge may be inferred from circumstances." By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.

2. Paragraph (B) would be a new provision in the Rules derived from Model Rule 3.8(b). It would require a prosecutor to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel.

3. Paragraph (C) would be a new provision in the Rules derived from Model Rule 3.8(c). It would provide that a prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights, unless the tribunal has approved the appearance of the accused *in propria persona*.

4. Paragraph (D) would amend the existing duty of a prosecutor under Rule 5-220 to refrain from suppressing any evidence that the member or the member's client has a legal obligation to reveal or to produce. Rather than incorporating by reference a prosecutor's legal obligation, the proposed amended rule would state that a prosecutor must: "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." It is nearly identical to Model Rule 3.8(d).

5. Paragraph (E) would be a new provision in the Rules derived from Model Rule 3.8(e). It would provide that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

6. Paragraph (F) would be a new provision in the Rules derived from Model Rule 3.8(f). It would require a prosecutor to exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 5-120. Rule 5-120 is the current rule that governs extra-judicial statements by a lawyer, including prosecutors.

7. Paragraph (G) would be a new provision in the Rules derived from Model Rule 3.8(g). Where a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor would be required to promptly disclose that evidence to an appropriate court or authority. In addition, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor would be required to: (a) promptly disclose that evidence to the defendant unless a court authorizes delay, and (b) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

8. Paragraph (H), derived from Model Rule 3.8(h), would be a new provision in the Rules. Where a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor would be required to seek to remedy the conviction.

Public Input on Proposed Paragraph (D).

The preliminary input on proposed paragraph (D) that the Commission received was submitted from both prosecutors and defense attorneys, among others.

Defense attorneys supported paragraph (D) and asserted that the standard is necessary to address ongoing failures to disclose evidence documented by the work of the Innocence Project. (As an example of the input received from defense attorneys, Attachment F provides a copy of a letter to the Commission dated October 8, 2015 from the California Public Defenders Association and the California Attorneys for Criminal Justice.)

Prosecutors did not support paragraph (D) and observed that as a disciplinary rule, the standard failed to give adequate notice as to what conduct by prosecutors would constitute compliance. In part, prosecutors asserted that a standard for this category of lawyer conduct should be expressly tethered to the duty of prosecutors under constitutional and statutory law in order to avoid ambiguity and conflicts with existing law. (As an example of the input received from prosecutors, Attachment G provides a copy of a letter to the Commission dated October 1, 2015 from the California District Attorneys Association.)

A list of the individuals and groups who submitted preliminary input to the Commission is provided as Attachment E. The full text of preliminary written comment is available upon request from the Office of Professional Competence. This record also includes relevant information submitted by Professor Laurie Levenson at the December 2014 State Bar public hearing conducted pursuant to Business and Professions Code section 6095(a).

State Adoption of ABA Model Rule 3.8(d).²

Thirty-nine jurisdictions have adopted Model Rule 3.8, paragraph (d) essentially verbatim.³ Nine jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.⁴ Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule 3.8(d).⁵ While California is the only

² A state adoption chart is posted at the ABA Center on Professional Responsibility webpage: http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html

³ The thirty-nine jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The nine jurisdictions are Alabama, Hawaii, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

⁵ The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

jurisdiction that does not have direct counterpart to Model Rule 3.8(d), current California Rule 5-220 has long provided that every lawyer has an obligation not to suppress evidence that the lawyer or the lawyer's client has a legal obligation to reveal or produce.

Request for Public Comment Authorization and an Expedited Process for Proposed Amended Rule 5-110.

Consistent with the standard adopted by the Commission at its May 28 – 29, 2015 meeting, the Commission believes that the prioritized processing of proposed amended Rule 5-110, separate and apart from the Commission's comprehensive proposed amendments to the entire rules, is warranted to respond to ongoing harm to: (i) the rights of defendants in criminal matters where a prosecutor fails to disclose evidence; and (ii) public confidence in the administration of justice that follows from publicity concerning prosecutors' failures to disclose evidence that result in the wrongful convictions of persons accused of criminal violations.

If the Board agrees, proposed amended Rule 5-110 (and the conforming non-substantive amendment to Rule 5-220) would be released for a 90 day public comment period ending approximately on February 23, 2016. During this period, the Commission would also hold a public hearing to receive oral testimony on the proposal.

The written comment and the transcript of the any public hearing testimony would be considered by the Commission at its meeting on April 1 & 2, 2016. Following consideration of this input, the Commission would either recommend to the Board: (i) a further amended rule for additional public comment; or (ii) a proposed rule for adoption by the Board. It is anticipated that Board consideration of the Commission's recommendation would occur at the Board's meeting on May 13, 2016.

No amended rule would become operative unless and until the proposed rule is approved by the Supreme Court of California.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None. This agenda item only requests public comment authorization. A Board decision to adopt a rule amendment would be the subject of a separate agenda item.

BOARD BOOK IMPACT

None.

[Footnote continued...]

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

BOARD COMMITTEE RECOMMENDATIONS

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees authorize the release of proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct, attached hereto as Attachment A, for public comment for a period of 90 days; and it is

FURTHER RESOLVED, that this authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposal.

ATTACHMENT(S) LIST

- A.** Clean Version of Proposed Amended Rules 5-110 and 5-220
- B.** Redline/Strikeout Version of Proposed Amended Rule 5-110 Showing Changes to Current Rule 5-110
- C.** Redline/Strikeout Version of Proposed Amended Rule 5-110 Showing Changes to ABA Model Rule 3.8
- D.** Redline/Strikeout Version of Proposed Amended Rule 5-220 Showing Changes to Current Rule 5-220
- E.** List of Persons and Groups Providing Preliminary Input to the Commission
- F.** Copy of a letter to the Commission dated October 8, 2015 from the California Public Defenders Association and the California Attorneys for Criminal Justice
- G.** Copy of letter to the Commission dated October 1, 2015 from the California District Attorneys Association

Rule 5-110 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Adopted on October 23, 2015 – Clean Version)

The prosecutor in a criminal case shall:

- (A) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused *in propria persona*;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) Promptly disclose that evidence to an appropriate court or authority, and
 - (2) If the conviction was obtained in the prosecutor's jurisdiction,
 - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- (H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilty is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the

Attachment A: Clean Version of Proposed Amended Rules 5-110 and 5-220

appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[7] Under paragraph (H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

**Rule 5-220 Suppression of Evidence
(Commission's Proposed Rule – Clean Version)**

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Discussion:

See rule 5-110 for special responsibilities of a prosecutor.

**Rule 5-110 ~~Performing the Duty of Member in Government Service~~Special
Responsibilities of a Prosecutor
(Redline Comparison of the Proposed Rule to Current California Rule)**

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

The prosecutor in a criminal case shall:

- (A) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused *in propria persona*;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) Promptly disclose that evidence to an appropriate court or authority, and
 - (2) If the conviction was obtained in the prosecutor's jurisdiction,

Attachment B: Redline/Strikeout Version of Proposed Amended Rule 5-110
Showing Changes to Current Rule 5-110

- (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilty is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction

Attachment B: Redline/Strikeout Version of Proposed Amended Rule 5-110
Showing Changes to Current Rule 5-110

occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[7] Under paragraph (H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

Attachment C: Redline/Strikeout Version of Proposed Amended Rule 5-110
Showing Changes to ABA Model Rule 3.8

Rule ~~3.8~~5-110 Special Responsibilities of a Prosecutor
(Redline Comparison of the Proposed Rule to Current ABA Model Rule)

The prosecutor in a criminal case shall:

- (~~a~~A) ~~refrain~~Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (~~b~~B) ~~make~~Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (~~e~~C) ~~not~~Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, ~~such as the right to a preliminary hearing~~ unless the tribunal has approved the appearance of the accused in propria persona;
- (~~d~~D) ~~make~~Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense ~~and to the tribunal~~ all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (~~e~~E) ~~not~~Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) ~~the~~The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) ~~the~~The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) ~~there~~There is no other feasible alternative to obtain the information;
- (~~f~~F) ~~except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise~~Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ~~Rule 3.6 of this Rule~~rule 5-120.
- (~~g~~G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) ~~promptly~~Promptly disclose that evidence to an appropriate court or authority, and
 - (2) ~~if~~If the conviction was obtained in the prosecutor's jurisdiction,
 - (~~ia~~ia) ~~promptly~~Promptly disclose that evidence to the defendant unless a court authorizes delay, and

Attachment C: Redline/Strikeout Version of Proposed Amended Rule 5-110
Showing Changes to ABA Model Rule 3.8

(#b) ~~undertake~~Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(#H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

CommentDiscussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that ~~guilt~~guilty is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. ~~The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.~~

[2] ~~In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it~~Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the ~~rights~~right to counsel and ~~silence~~the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (~~d~~D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] ~~Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client lawyer relationship.~~

Attachment C: Redline/Strikeout Version of Proposed Amended Rule 5-110
Showing Changes to ABA Model Rule 3.8

[54] Paragraph (f) supplements ~~Rule 3.6~~rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. ~~In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is~~Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with ~~Rule 3.6~~rule 5-120(~~b~~B) or ~~3.6~~5-120(~~c~~C).

~~[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.~~

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[76] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (~~g~~G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (~~g~~G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent ~~court-authorized~~court authorized delay, to the defendant. ~~Consistent with the objectives of Rules 4.2 and 4.3, disclosure~~Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[87] Under paragraph (~~h~~H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. ~~Necessary steps may~~Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[98] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (~~g~~G) and (~~h~~H), though subsequently determined to have been erroneous, does not constitute a violation of ~~this Rule~~rule 5-110.

Attachment D: Redline/Strikeout Version of Proposed Amended Rule 5-220
Showing Changes to Current Rule 5-220

Rule 5-220 Suppression of Evidence
(Redline Comparison of the Amended Rule to Current California Rule)

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Discussion:

[See rule 5-110 for special responsibilities of a prosecutor.](#)

List of Persons and Groups Providing Preliminary Input to the Commission¹

| NAME | ORGANIZATION |
|-----------------------|---|
| Jeff Adachi | San Francisco Public Defender |
| Ronald Brown | Los Angeles County Public Defender |
| Garrick Byers | California Public Defenders Association (CPDA) |
| Bruce Green | |
| Steven Harmon | Riverside County District Attorney's Office |
| Ignacio Hernandez | California Attorneys for Criminal Justice (CACJ) |
| Jackie Lacey | Los Angeles County District Attorney's Office |
| Sarah Leddy | Innocence Project |
| Prof. Laurie Levenson | Loyola Law School, Innocence Project |
| Robin Lipetsky | Contra Costa County Public Defender |
| Patrick McGrath | California District Attorneys Association (CDAA), Yuba County District Attorney's Office |
| Michael Ogul | California Public Defenders Association (CPDA) |
| Nancy O'Malley | Alameda County District Attorney's Office |
| Frank Ospino | Orange County Public Defender |
| Jeff Rosen | Santa Clara County District Attorney's Office |
| Barry Scheck | Innocence Project |
| Susan Shalit | |
| Jeffrey Thoma | California Attorneys for Criminal Justice (CACJ) |
| Margaret Thum | |
| Prof. Gerald Uelmen | Santa Clara University School of Law |
| William Woods | Los Angeles County District Attorney's Office |
| Ellen Yaroshefsky | |
| Mark Zahner | California District Attorneys Association (CDAA) |

¹ The Board Committee authorized the Commission to conduct a public comment period ending on June 15, 2015. This was a preliminary public comment period inviting interested persons to provide, by written comment, proposals for changes to the California Rules of Professional Conduct that should be studied by the Commission. This initial public comment solicitation was the subject of a [May 2015 quest column](#) by the Commission Chair in the California Bar Journal. In addition, visitors have attended open session Commission meetings when amendments to Rule 5-110 and ABA Model Rule 3.8 were discussed. At the Chair's discretion, visitors were invited to provide written and oral comments.



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Winston A. Peters, 2013, Garrick Byers, 2014

CPDA

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A Statewide Association of Public Defenders and Criminal Defense Counsel

October 8, 2015

RE: CPDA and CACJ Support of Accelerated Implementation of Proposed Rule 3.8(d)

The Honorable Lee Edmon, Chair
Mr. Jeffrey Bleich, Co-Vice-Chair
Mr. Dean Zipser, Co-Vice-Chair
Commission for the Revision of the Rules of Professional Conduct
Lauren McCurdy, Senior Administrative Specialist
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Justice Edmon, Mr. Bleich, and Mr. Zipser, and Ms. McCurdy,

The California Public Defenders Association (“CPDA”) and California Attorneys for Criminal Justice (“CACJ”) strongly support the prompt adoption of Rule 3.8(d) by the California Commission for the Revision of the Rules of Professional Conduct.

1. Interest of CPDA

CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes almost 4,000 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 30 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. We regularly provide continuing legal education in all areas of criminal practice, including legal ethics.

CPDA has been granted leave to appear in over 50 California cases that have resulted in published opinions. (See e.g., *People v. Mosley* (2015) 60 Cal.4th 1044; *People v. Beltran* (2013) 56 Cal.4th 935; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112; *Galindo v. Superior Court* (2010) 50 Cal.4th 1; *People v. Nguyen* (2009) 46 Cal.4th 1007; *Chambers v. Superior Court* (2007) 42 Cal.4th 673; *People v. Warner* (2006) 39 Cal.4th 548; *San Francisco v. Cobra Solutions Inc.*, (2006) 38 Cal.4th 839.) CPDA has also served as amicus curiae in the United States Supreme

Court and other federal courts. (See, e.g., *Monge v. California* (1998) 524 U.S. 721; *Vasquez v. Rackauckas* (9th Cir. 2013) 734 F.3d 1035.)

Members of the CPDA Legislative Committee and CPDA's legislative advocate attend Senate and Assembly committee meetings on a weekly basis, and take positions on hundreds of bills in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In sum, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of justice and procedure to serve this Commission.

2. Statement of Interest of CACJ

CACJ is a non-profit association of criminal defense attorneys and allies with approximately 2,000 members. CACJ is also the California affiliate of the National Criminal Defense Lawyers Association ("NACDL"). CACJ's attorney members practice in all counties in California and have extensive personal experience with questionable behavior of prosecutors. CACJ has witnessed a wide range of activities from passive evasion of discovery rules, to outright refusal to abide by longstanding constitutional and statutory requirements. Since CACJ's establishment 43 years ago, our community of lawyers has fought tirelessly for the delivery of justice in our criminal courts. Every day our members stand side-by-side with Californians who are facing criminal charges. There is nothing more offensive and disturbing than when a public servant vested with the authority to pursue criminal prosecution on behalf of "The People of California" chooses to succumb to gamesmanship over justice.

Not only do our members speak up in courthouses up and down California fighting to ensure the constitutional rights of people, but our members have weighed in on countless cases before the Court of Appeals and California Supreme Court to ensure appropriate application of constitutional protections. Through our Amicus Committee, CACJ has also submitted dozens of briefs in landmark and critical cases in California.

Through our Legislative Committee, we have worked tirelessly in the State Capitol to preserve and advance due process rights, and have sponsored numerous new laws over the years

3. The Gravity of the Ethical Problem at Issue

As decried by former Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals, "There is an epidemic of *Brady* violations abroad in the land." (*U.S. v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626, Kozinski, J., dissenting from denial of rehearing en banc.) The constitutional and statutory rights of the accused to be provided with all exculpatory information are of vital importance to CPDA, CACJ, and all criminal defense attorneys in California, as well as the judiciary. CPDA and its members are all too familiar with the epidemic of ethical failures famously identified by Judge Kozinski. Therefore, CPDA and CACJ have a strong interest in the prompt adoption of Rule 3.8 as proposed by the Commission. Simply put, it is time for the State of California to join every other state in this country in adopting Rule 3.8. In support of that goal, we respectfully provide this response to the Opposition submitted by the California District Attorneys Association (CDAA) on October 1, 2015.

4. CDAA's Unwillingness to Accept The Existing Duty of Prosecutors to Disclose All Exculpatory Information Regardless of Whether or Not it is Material

The crux of CDAA's opposition is their complaint that Rule 3.8 will require the timely disclosure of all exculpatory evidence and information known to the prosecutor whether or not that information is "material". While CDAA articulates its opposition most forcefully in regards to Alternative 1 as proposed to this Commission, the substance of their opposition applies equally to Alternative 2. Their opposition reflects a fundamental misunderstanding of a prosecutor's disclosure obligations under existing California law, a misunderstanding that cries out for adoption of Rule 3.8 because it is painfully apparent that nothing else will motivate reluctant prosecutors to honor their duties to disclose all exculpatory evidence and information in their possession. To be sure, not all prosecutors fail to honor this duty. But as called out by Judge Kozinski, and manifested by CDAA's refusal to accept that prosecutors must disclose all exculpatory information *regardless of materiality*, the problem is widespread.

The CDAA complains that "the model rule has no materiality limitation, but covers any evidence that 'tends to negate the guilt of the accused or mitigate the offense.'" (CDAA, p. 3.) While CDAA implies that prosecutors would enjoy a materiality limitation if Rule 3.8 were tethered to "statutory and constitutional obligations, as interpreted by relevant case law" (see Alternative 2), CDAA fails to recognize that the California Supreme Court has expressly held that prosecutors have the statutory duty under Penal Code section 1054.1, subdivision (e), to disclose *all* exculpatory evidence, **whether or not that evidence is material**. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901. Accord, *People v. Lewis* (September 9, 2015) ___ Cal.App.4th ___, 192 Cal.Rptr.3d 460, 469, pet. for review pending, Supreme Court No. S229371, where the Court of Appeal recognized the prosecution's statutory duty to disclose exculpatory evidence even where it is not material, lamented the prosecution's failure to do so, and found "it worth reminding prosecutors that their criminal-discovery obligations are broader than their *Brady* obligations and that the People's interest is not to win convictions but instead to ensure that justice is done.")

5. The Need for Rule 3.8

The failure of CDAA to appreciate or acknowledge the existing obligations of prosecutors to disclose all exculpatory evidence and information regardless of whether they consider that evidence to be material demonstrates the gravity of the problem and the need for Rule 3.8. As observed by the Court of Appeal in *Curl v. Superior Court* (2006) 140 Cal.App.4th 310, 324, disapproved on other grounds in *Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901, "[t]he regrettable reality is that sometimes prosecutors do not turn over materials to which the defense is entitled." A part of this reality is that although California law requires prosecutors to disclose all exculpatory evidence and information regardless of materiality, prosecutors will not suffer any sanctions for failing to honor this duty unless the evidence is not only favorable to the defense but material to the outcome of the case. If the reviewing court concludes that the exculpatory information was not material, the conviction will not be reversed. And if the conviction is not reversed, Business and Professions Code section 6086.7 will not mandate referral of the prosecutor to the State Bar despite the prosecutor's willful failure to disclose

exculpatory information in his possession. For example, although the court of appeal recently condemned the prosecutor's failure to disclose exculpatory information in *People v. Lewis*, *supra*, 192 Cal.Rptr.3d 460, the conviction was not reversed, and there will be no bar referral and no sanctions against the DA, because the information was not material. Thus, the bottom line is that prosecutors have little incentive to honor their duty to disclose all exculpatory information and evidence unless they consider that information to be material. Perhaps that is part of the reason for the widespread violations of this duty.

Since Penal Code section 1054.1, subdivision (e), and the decision of the California Supreme Court in *Barnett*, *supra*, 50 Cal.4th 890, 901, have failed to motivate more prosecutors to comply with their duty to disclose all exculpatory evidence and information, the choice before this Commission is whether to simply let the crisis of integrity continue or to promulgate a rule that will lead more prosecutors to honor their ethical duty. CPDA and CACJ submit that the choice is clear: California needs the prompt implementation of Rule 3.8 because only then will prosecutors face the possibility of State Bar sanctions for the knowing failure to disclose all exculpatory evidence and information, and as unfortunate as it may be, only that possibility will deter more prosecutors from violating their existing duty to disclose exculpatory evidence and information.

6. There is Nothing Vague About A Prosecutor's Duties Under Rule 3.8(d)

While CDAA insists that “[w]hether or not some evidence is mitigating may be a matter of judgment,” (CDAA, p. 4, par. 1), “exculpatory” evidence and information is well-defined. As reiterated by the California Supreme Court time and time again, it includes anything favorable to the defense, that is, anything that might help the defense or hurt the prosecution. “Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution.” (*People Coddington* (2000) 23 Cal.4th 529, 589, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13. Accord, *In re Sassounian* (1995) 9 Cal.4th 535, 544 [“Evidence is ‘favorable’ if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses.”]; *People v. Morrison* (2004) 34 Cal.4th 698, 714 [“‘Evidence is ‘favorable’ if it hurts the prosecution or helps the defense.’”].)

Further, while CDAA expresses concern that exculpatory “information” is broader than exculpatory “evidence”, it fails to recognize that California law requires disclosure of both exculpatory evidence and exculpatory information. (See, e.g., Chapter 467 of the 2015 Legislature, enacting new Penal Code section 1424.5, concerning the withholding of “relevant or material exculpatory evidence or information” by a prosecutor.) Moreover, not only have all 49 other states in the union, the District of Columbia, and the territories of Guam and Puerto Rico adopted Rule 3.8(d), but 46 of those states have included exculpatory “information” in their disclosure obligations without appearing to have created any problems of interpretation in those jurisdictions. Indeed, it must be recognized that often times the disclosure of exculpatory *information* is a necessary precursor to the ability to present exculpatory *evidence*.

Also misplaced is CDAA's concern over the extent to which a prosecutor must “go searching for everything that may ‘tend to negate guilt,’ even if it is not material to the outcome of the case, for fear of being disciplined by the State Bar? What does this include? Where does the search

end? (CDAA, pp. 3-4.) Rule 3.8 is expressly limited to evidence and information that is “known to the prosecutor.” Although a prosecutor’s disclosure duty extends to exculpatory information that is unknown by the particular prosecutor but is in the possession of any prosecution agent (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438, and fn. 11), Rule 3.8 would allow State Bar sanctions only where the individual prosecutor had actual knowledge of the exculpatory information. As specifically observed by ABA Formal Ethics Opinion 09-454:

Rule 3.8(d) requires disclosure only of evidence and information “known to the prosecutor.” Knowledge means “actual knowledge,” which “may be inferred from [the] circumstances.” Although “a lawyer cannot ignore the obvious,” Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors’ legal obligations under other law. Although the rule requires prosecutors to disclose known evidence and information that is favorable to the accused, it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware.

(At p. 15, footnotes omitted.)

Similarly, and contrary to the position taken by CDAA, the “timely disclosure” requirement is not vague. Penal Code section 1054.7 expressly provides that disclosures shall be made at least 30 days before trial. Case law has clarified that the 30-day deadline is an outside limit and disclosures may be required earlier (*Sandeffner v. Superior Court* (1993) 18 Cal.App.4th 672, 677-678). For example, the California Supreme Court and Courts of Appeal have held that discovery may be ordered before the preliminary examination (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 11; *Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1461-1462; *People v. Gutierrez* (2013) 214 Cal.App.4th 343; *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074), and it has been specifically held that exculpatory evidence or information must be disclosed before the preliminary examination (*Gutierrez, supra*, 214 Cal.App.4th 343, 346; *Bridgeforth, supra*, 214 Cal.App.4th 1074, 1087; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, and *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 96). Further, Rule 10.953, California Rules of Court, expressly permits discovery before the preliminary examination—which is long before the CDAA’s asserted limitation that discovery does not need to be provided any earlier than “in time for meaningful use at trial” (CDAA, p. 3, par. 3)—for the specific and laudatory goal of “facilitate[ing] dispositions before the preliminary hearing and at all other stages of the proceedings...” (Rule 10.953, subs. (a), (a)(1).) The “timely disclosure” requirement must be understood in the context of these considerations, and illustrates that it is not vague.

Further, given the expressed encouragement by the California Judicial Council that discovery should be provided before the preliminary examination in order to facilitate early plea dispositions (Rule 10.953, subs. (a), (a)(1), *supra*), CDAA’s complaint that the “timely disclosure” requirement may result in a reduction of cases that are resolved by plea bargaining is inapt.

7. CDAA Complaints About the Duty to Disclose Mitigating Evidence to The Sentencing Tribunal are Refuted by the Terms of Rule 3.8

CDAA complains that a prosecutor “will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with” the requirement to disclose mitigation evidence at sentencing to both the defense and “the tribunal.” (CDAA, p. 5, section B.) However, CDAA’s complaint fails to reference that disclosure is not required “when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” Thus, if the defendant objects to having the prosecutor make the disclosure to the court at sentencing, the prosecutor will not be required to disclose that information to the court where the court sustains the objection, and the prosecutor will not “offend” anyone. Further, on a more fundamental level, the concern stated by CDAA is a non-issue at sentencing because “the defense theory of the case” is an issue on guilt or innocence, not at sentencing. Just as the jury’s consideration of punishment at the penalty phase of a capital case may include mitigating factors that the defense never articulated, any mitigation may benefit the defendant at sentencing, whether or not it is mitigation that the defense presented.

8. Supervisory Prosecutors are Not Subject to Discipline Under Rule 3.8 Unless they Personally Order, Ratify, or Knowingly Fail to Correct Violations of the Disclosure Duties

While CDAA describes ABA Formal Ethics Opinion 09-454 as imposing ethical requirements on supervising prosecutors, neither version of the proposed “Clean” Rule 3.8 states that any supervising or training prosecutor is subject to discipline merely because a line prosecutor violates the Rule.

Further, Ethics Opinion 09-454 expressly describes the duty of supervising or training prosecutors as follows: “supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.” Thus, contrary to the CDAA letter, no supervisor, training manager, chief deputy, or elected District Attorney could be disciplined simply because training procedures were deemed inadequate. (Cf., CDAA, p. 5, section C.)

9. ABA Model Rule 3.8(d) Has Been Adopted by All Other States

The CDAA asserts that “Model Rule 3.8(d) has not been universally adopted by the states.” (CDAA, pp. 6-7, section D.) However, CDAA conspicuously fails to identify a single state or jurisdiction that has *not* adopted Model Rule 3.8(d). Instead, CDAA merely cites to a decision of the Wisconsin Supreme Court, *In re Riek* (2013) 350 Wis.2d 684, 695-696, for the proposition that the ABA Formal Ethics “Opinion 09-454 ‘has not been universally adopted’ and ‘has received some pointed criticism.’” But the “clean” Rule 3.8 proposed by the California Commission for the Revision of the Rules of Professional Conduct is *not* the ABA Formal Ethics Opinion. Instead, it is Rule 3.8. It is not surprising that an ABA ethics opinion may have received some criticism, and this Commission is not being asked to promulgate that ethics

opinion as a Rule of Professional Conduct. Rather, the question before this Commission is whether to adopt Rule 3.8, in either Alternative 1 or Alternative 2. And the fact of the matter is that Wisconsin—like every other state in our nation, the District of Columbia, Guam and Puerto Rico—has adopted Rule 3.8. Indeed, subdivision (f)(1) of Rule 3.8 of the Wisconsin Rules of Professional Conduct presently requires a prosecutor to:

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ...

(<http://legis.wisconsin.gov/rsb/scr/5200.pdf> as of October 7, 2015.) This language is identical to Alternative 1 of the Proposed Rule 3.8.

Further, while the Wisconsin Supreme Court in *Riek* rejected an interpretation of Rule 3.8 that would require disclosure of exculpatory information without regard to materiality because materiality is required under Wisconsin law, it bears repeating that existing California law is to the contrary and requires disclosure of exculpatory information even when it is not material. (*Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901.) Thus, unlike the statutory and decisional law in Ohio and Wisconsin, existing California decisional and statutory law is in agreement with ABA Formal Ethics Opinion 09-454, and expressly requires disclosure of exculpatory information whether or not it is material.¹

10. Adoption of Model Rule 3.8 Will Not Jeopardize the Safety of Witnesses, the Integrity of Investigations, or the Confidentiality of Privileged Information

CDAА invokes the fear of possible dangers to witnesses, informants, or ongoing investigations as a reason for prosecutors to be able to unilaterally determine not to disclose exculpatory information if they evaluate the information to be “immaterial to the outcome of the case...” (CDAА, pp. 7-9, section E.) This claim is unavailing for two reasons.

First, the fears themselves are misplaced. Penal Code section 1054.7 permits a prosecutor to make a showing of good cause in an attempt to convince the court to delay, restrict or completely

¹ Moreover, CDAА’s suggestion that District of Columbia ethics rules do not require disclosure of all exculpatory information regardless of materiality is misleading, be it intentional or otherwise. While CDAА relies on Comment 1 to District of Columbia Rule 3.8(e) for the proposition that their “rule is ‘not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure...’” (CDAА letter, p. 7, par. 3), CDAА fails to acknowledge that the very case it cites from the District of Columbia, *In re Kline* (D.C. 2015) 113 A.3d 202, expressly rejects a limited interpretation of their Rule 3.8 and holds that the rule requires disclosure of exculpatory information regardless of whether that information is material to the outcome of the case. (113 A.3d at pp. 210-212.) As explained by the court in *Kline*: “adopting an ethical rule that errs in favor of disclosure will better ensure that criminal defendants in the District of Columbia receive a fair trial.” (*Id.* at p. 212.)

deny disclosure information that would otherwise have to be disclosed under the discovery rules. “Good cause” includes “threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.” (Pen. Code §1054.7, par. 1.) As the model rule (Alternative 1) expressly provides that the prosecutor would not be required to make disclosures under the rule if “the prosecutor is relieved of this responsibility by a protective order of the tribunal...,” prosecutors would be able to invoke the provisions of Penal Code section 1054.7 in those circumstances where there is a reasonable basis for these concerns, and would not be required to make the disclosure if the court agrees there is a genuine reason for concern.

Second, the position articulated by CDAA not only ignores the existing safety precautions afforded by Penal Code section 1054.7, but is troubling because it substitutes the judgment of an individual prosecutor for the authority of a neutral tribunal in making the decision whether there is good cause to withhold the exculpatory evidence or information. And this usurpation of authority bespeaks the attitude underlying the widespread failures to disclose exculpatory evidence and information that have led this Commission to propose the adoption of Rule 3.8(d).

Conclusion

CDAA admits that “the scope of a prosecutor’s discovery obligations ... is a constant source of litigation despite being tethered to case law and statutory rules...” (CDAA, p. 3, section A, par. 1), but complains that the proposed rule, Alternative 1, will only increase litigation over these obligations. CPDA and CACJ respectfully disagree.

The reason that the question of whether a prosecutor has fulfilled his discovery obligations “is a constant source of litigation despite being tethered to case law and statutory rules” is because too many prosecutors, and the CDAA itself, ignores their duty to disclose exculpatory evidence and information regardless of whether they believe that evidence will make a difference in the outcome of the case. They know there will not be any reversal of the case unless an appellate court finds that the evidence was not only exculpatory but material, despite the prosecutor’s violation of existing California law requiring disclosure of *all* exculpatory evidence and information. And they realize that they are exempted from mandatory referrals under Business and Professions Code 6086.7 for failures to disclose exculpatory evidence unless they resulted in a reversal or modification of the judgment, which will not occur unless the evidence or information was “material.” Thus, although the California Supreme Court in *Barnett v. Superior Court, supra*, 50 Cal.4th 890, 901, squarely interpreted Penal Code section 1054.1, subdivision (e), to require disclosure of *all* exculpatory evidence without regard to whether or not it is “material”, under the current disciplinary rules, prosecutors have little incentive to disclose exculpatory evidence or information that is not material. Simply put, as things stand now, prosecutors can violate their existing duties to disclose all exculpatory information, regardless of materiality, without fear of being reprimanded by the appellate courts or suffering a mandatory referral under the State Bar Act. Indeed, CDAA’s letter opposing adoption of Rule 3.8(d) insists that prosecutors do *not* have to disclose any exculpatory evidence *unless* it is material. It is no wonder that the issue of whether a prosecutor has complied with his discovery obligations “is a constant source of litigation despite being tethered to case law and statutory rules.”

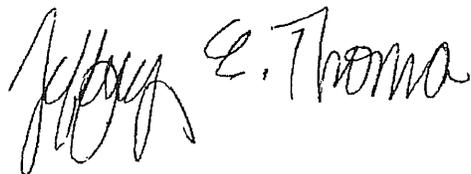
Attachment F: California Public Defenders Association &
California Attorneys for Criminal Justice Comment Dated October 8, 2015

The regrettable reality is that far too many prosecutors fail to honor their ethical duty to disclose all exculpatory evidence and information to the defense. That reality manifests the urgent need to adopt Rule 3.8, subdivision (d), Alternative 1. Only then will prosecutors have an increased incentive to honor their duty to disclose *all* exculpatory evidence and information regardless of whether or not they deem it to be immaterial or inconsequential to the proceedings at issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Ogul". The signature is fluid and cursive, with the first name being more prominent.

Michael Ogul
President, California Public Defenders Association

A handwritten signature in black ink, appearing to read "Jeffrey E. Thoma". The signature is cursive and somewhat stylized, with the last name being the most legible part.

Jeffrey E. Thoma
President, California Attorneys for Criminal Justice



October 1, 2015

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The Honorable Lee Edmon, Chair
Mr. Jeffrey Bleich, Co-Vice-Chair
Mr. Dean Zipser, Co-Vice-Chair
Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

RE: Proposed Revisions of Rules of Professional Conduct
Proposed Rule 3.8(d) – SUPPORT – Alt. 2, with modifications;
OPPOSE – Alt. 1, and Fast Track

Dear Justice Edmon, Mr. Bleich, and Mr. Zipser:

The California District Attorneys Association (CDA A) respectfully opposes the adoption of ABA Model Rule 3.8(d) and its placement on an expedited schedule that bypasses periods for public comment and public hearing afforded the other proposed Rules of Professional Conduct.

CDA A is the statewide organization of California prosecutors. It is a professional organization that has been in existence for more than 40 years, and has more than 2,700 members, including elected and appointed District Attorneys, the Attorney General of California, City Attorneys principally engaged in the prosecution of criminal cases, and the deputy attorneys employed by these officials. The Association presents its views on matters of concern to prosecutors before various bodies, including the Legislature, the Governor’s office, the courts through amicus curiae briefs, and the State Bar.

The adoption of ABA Model Rule 3.8(d) presents a matter of great concern to California prosecutors. In fact, in 2010, prosecutors first appeared before the Board of Trustees and opposed the adoption of ABA Model Rule 3.8(d), resulting in the Board’s recommendation of much of the language presented in Alt. 2, which apparently never made it to the Supreme Court before the deadline. CDA A continues to oppose the ABA Model Rule and supports most of the language in Alt. 2. For these reasons, CDA A opposes any expedited process that does not allow prosecutors adequate time to address the issues raised by the proponents of ABA Model Rule 3.8(d) and to answer any questions the Commission may have.

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For now, and based upon the time constraints facing CDAA, we are unable to provide comprehensive input on proposed Rule 3.8(d). However, we would like to thank the Commission for agreeing to postpone its decision on Rule 3.8(d), and offer the following for the Commission’s consideration.

PROPOSED RULE 3.8(D) [SPECIAL DUTIES OF A PROSECUTOR]

Rule 3.8(d) deals with the ethical obligation of prosecutors to make known to the defense evidence that is favorable to the defendant. The version originally proposed for California linked the prosecutor’s obligations to the constitution and relevant case law. Our organization has embraced this proposal since its inception in 2009.

According to the Bar’s invitation for comment in July 2010, the Bar received a letter from the Los Angeles County Public Defender’s Office, which prompted the Bar to put forward a change in Rule 3.8(d). The Bar then solicited comment on whether California should adopt a version of Rule 3.8(d) that mirrors the ABA model rule. Following a presentation by prosecutors to the Board of Trustees in 2010 opposing ABA Model Rule 3.8(d), the Board recommended what is now largely the language in Alt. 2.

Upon the Second Rules Revision Commission being tasked with a comprehensive study of the Rules of Professional Conduct, the assigned study group has proposed two alternatives for Rule 3.8(d): Alternative 1 – ABA Model Rule 3.8(d) [Alt.1] and Alternative 2, which links prosecutors’ discovery obligations to well-established rules set by the constitution and case law [Alt. 2]. The alternatives are shown below.

| ABA Model Rule 3.8(d) [Alt. 1] | Cal Bar Proposed Rule 3.8(d) [Alt. 2] |
|---|--|
| <p>The prosecutor in a criminal case shall: ... (d) <i>make</i> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p> | <p>The prosecutor in a criminal case shall: ... (d) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p> |

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A. The Language in Alt. 1 is Not Tied to Any Clear Standards, Lends Itself to Arbitrary Results, and Conflicts with the State Discovery Statute

The question of the scope of a prosecutor's discovery obligations underlies almost every opinion involving discovery issues. It is a constant source of litigation despite being tethered to case law and statutory rules. Alt. 1 removes even that tether.

For example, there is a general case law consensus that, for constitutional purposes, discovery should be provided to the defense in sufficient time to allow the defense to make effective use of the evidence at trial. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 941; *United States v. Houston* (9th Cir. 2011) 648 F.3d 806, 813; *United States v. Higgins* (7th Cir. 1996) 75 F.3d 332, 335.) Moreover, the High Court has specifically refrained from requiring disclosure of certain types of discovery (e.g., impeachment or evidence bearing on an affirmative defense) before entering into a plea bargain. (*United States v. Ruiz* (2002) 536 U.S. 622, 633.) The California Discovery Statute also lays out specific time frames (e.g., 30 days before trial) for the disclosure of designated kinds of evidence, including exculpatory evidence. (Pen. Code, §§ 1054.1, 1054.7.)

Under Alt. 1, the requirement that disclosure be "timely" is left open to interpretation and creates a vague standard for prosecutors attempting to navigate ethically through their criminal prosecutions. The model rule on its face does not specify when disclosure must be made, except to say that it must be timely. ABA Formal Opinion 09-454, issued July 8, 2009, interprets Model Rule 3.8(d) [Alt.1] and construes "timely" to mean, "as soon as reasonably practical." To the extent that "as soon as reasonably practical" means something earlier than disclosure made "in time for meaningful use at trial," the model rule is inconsistent with the rules developed by the courts in their attempts to balance the practical concerns of the criminal justice system with the need to ensure fair trials.

Similarly, as the language of [Alt.1] indicates and Opinion 09-454 makes crystal clear, the model rule has no materiality limitation, but covers any evidence that "tends to negate the guilt of the accused or mitigate the offense." The term is not defined in case law. However, under Opinion 09-454, it has been defined in a manner that defies practicality. (See Opinion 09-454, p. 5 ["Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."].)

To what extent must the prosecutor, who is held to be in possession of evidence known to all persons on the prosecution team including investigating officers (see *Youngblood v. West Virginia* (2006) 547 U.S. 867, 870; *Kyles v. Whitley* (1995) 514 U.S. 419, 438), go searching for everything that may "tend to negate guilt," even if it is not material to the outcome of the case, for fear of being disciplined by the State Bar? What does this

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include? Where does the search end? (See *United States v. Bagley* (1985) 473 U.S. 667, 675 fn. 7 [“a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments”].)

Whether or not some evidence is mitigating may be a matter of judgment, and may depend on the defense theory of the case. Under the *case law*, evidence may not be deemed “favorable” just because a defense counsel can concoct some possible but far-fetched theory under which the undisclosed evidence might help the defense or hurt the prosecution. (See e.g., *Harris v. Kuba* (7th Cir. 2007) 486 F.3d 1010, 1016 [“*Brady* does not require that police officers or prosecutors explore multiple potential inferences to discern whether evidence that is not favorable to a defendant could become favorable”].) But Alt. 1 is not bounded by case law.

Because Alt. 1, unlike Alt. 2, is untethered to case law, it threatens to effectively undermine the careful balancing of interests developed by the High Court in *Ruiz* and (1) could “force the Government to abandon its ‘general practice’ of not ‘disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses””; (2) “require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages” or (3) “lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number-90% or more-of federal criminal cases.” (*Ruiz, supra*, at 632.)

The greater scope of information to be disclosed, and the earlier timing for the disclosure required by Alt. 1 *also* conflicts with California statutory law. “The practical effect—disclosing evidence to avoid disciplinary sanctions—could effectively expand the scope of discovery currently required of prosecutors in criminal cases.” (*In re Riek* (2013) 350 Wis.2d 684, 697.) For 25 years, California criminal discovery has been governed by a balanced scheme based in constitutional and statutory provisions. California Constitution Article I, section 30(c), provides that criminal discovery shall be reciprocal, as provided by statutes enacted by the Legislature, and the People through the initiative process. The statutory provisions set out in Penal Code §§ 1054-1054.10 were passed through the initiative process and subsequent legislation that complied with the limitations set forth in the initiative itself.

Significantly, section 1054 specifically states that “***no discovery shall occur*** except as required by express statutory provisions or as required by the U.S. Constitution.” (Emphasis added; see also *In re Littlefield* (1993) 5 Cal.4th 122, 129; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) The only substantive criminal discovery mandated

by the U.S. Constitution is *Brady* discovery. (*Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 62.) The U.S. Constitution does not require any other criminal discovery, either in a general sense, or as to evidence that may be favorable to the accused, but is insignificant. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258; *United States v. Ruiz* (2002) 536 U.S. 622, 628; *United States v. Bagley* (1985) 473 U.S. 667, 676, fn. 7.)

To the extent the model rule may require the prosecutor to make greater disclosures than the California statutes or the U.S. Constitution require, and/or make disclosures at an earlier time (since “as soon as reasonably practical” may well be earlier than 30 days before trial), the model rule is directly at odds with the specific provisions of the California criminal discovery statutes. This amounts to the State Bar, through the mechanism of an ethics rule, changing the discovery responsibilities of the prosecutor when the California Constitution decrees that discovery shall be governed by statute.

B. Disclosure of Sentencing Evidence to “The Tribunal” May Be Contraindicated

Both alternatives of Rule 3.8(d) require the prosecutor to disclose all unprivileged mitigating evidence on sentencing to both the defense and “the tribunal.” With this requirement, the prosecutor would be subject to discipline if he/she had given the information to the defense, but not the court. The defense may have an objection to the prosecutor providing evidence directly to the court that the prosecutor is afraid might be considered mitigating, but the defense does not want to present, because it undermines the defense theory of the case. In such situations, a prosecutor will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with this rule.

C. Obligation of Supervisory Prosecutors

As interpreted in Opinion 09-454, Rule 3.8(d) makes it an ethical requirement for supervising prosecutors to ensure that subordinate prosecutors are adequately trained regarding their obligations, and that internal office procedures facilitate such compliance. While it is generally consistent with *Brady* case law to say that the government has an institutional *Brady* obligation (see *Giglio v. United States* (1970) 405 U.S. 150), on pain of sanctions that may be suffered in the criminal litigation (i.e., continuance, prohibiting testimony of a witness, dismissal of the case, etc.), it is both questionable and problematic whether, or to what extent, this can be translated into a personal ethical breach by a supervisory or management prosecutor. In particular, the issue of what supervisory layer the responsibility lies with creates a fundamental dilemma in such an application of the rule. Who does the Bar discipline if training and/or discovery procedures are deemed inadequate – the immediate supervisor of the regular prosecuting attorney, a division chief, the office training manager, the chief deputy, or the elected District Attorney? All of the above? Would the Bar be justified disciplining an elected District Attorney, the

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elected Attorney General, and/or that official's chief deputy, for the failure of an office to have a *Brady* procedure in place?

As applied to managing or elected prosecutors, insofar as the State Bar serves as an administrative arm of the judiciary (State Bar Rule 1.2; see also Bus. and Prof. Code § 6008), such application of the rule also raises serious separation of powers concerns.

D. ABA Model Rule 3.8(d) Has Not Been Adopted by All Other States

Contrary to the suggestions of the proponents of Alt. 1, Model Rule 3.8(d) has not been universally adopted by the states. In addition to California, other states have also either declined to adopt ABA Model Rule 3.8(d) as written, adopted variations of the rule, or limited its application. As pointed out in *In re Kline* (D.C. 2015) 113 A.3d 202, 211, while the Supreme Courts of Louisiana and North Dakota have interpreted the disclosure requirements of prosecutors more broadly, there are courts that have decided that it would be confusing to prosecutors if they were required to comply with two different disclosure standards.

For example, in *In re Riek* (2013) 350 Wis.2d 684, the Wisconsin Supreme Court rejected an ethics rule that would require disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome as demanded by ABA Opinion 09-454. The *Riek* court observed that Opinion 09-454 "has not been universally adopted" and "has received some pointed criticism." (*Id.* at 695-696 [and citing to Kirsten M. Schimpff, Rule 3.8, "The Jencks Act, and How the ABA Created a Conflict Between Ethics and The Law on Prosecutorial Disclosure," 61 *Am. U. L. Rev.* 1729, 1756 (August 2012)].)

The *Riek* court adopted an interpretation of their state version of Rule 3.8(d) that was "consistent with the requirements of *Brady* and its progeny" and pointed to several other jurisdictions that had done the same. (*Riek, supra*, at 696 [citing to *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *In re Attorney C.* (Colo. 2002) 47 P.3d 1167].)

The *Riek* court reasoned that adopting a more expansive interpretation would "impose inconsistent disclosure obligations on prosecutors" and that such "[d]isparate standards [would be] likely to generate confusion and could too easily devolve into a trap for the unwary." (*Riek, supra*, at 696.)

The *Riek* court concluded that the broader interpretation invited "the use of the ethics rule as a tactical weapon in litigation" and rhetorically asked: "What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint?" (*Id.* at 697.)

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In sum, the *Riek* court opined that “[p]rosecutors should not be subjected to disciplinary proceedings for complying with legal disclosure obligations” and construed the ethical mandate of the Wisconsin rule “in a manner consistent with the scope of disclosure required by the United States Constitution, federal or Wisconsin statutes, and court rules of procedure.” (*Id.* at 697.)

That *Riek* ruling is consistent with Alt. 2, but not Alt. 1. (See also N.C. Rules Prof'l Conduct 3.8(d) (2012) [requiring timely disclosure of “all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions”].)

The Ohio Supreme Court similarly declined to construe its former Disciplinary Rule 7-103(B), which essentially mirrors its current rule and ABA Model Rule 3.8(d), as requiring a greater scope of disclosure than Brady and Ohio statutory law required. The court held that “DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady v. Maryland* or Crim.R. 16[.]” (*Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St .3d 415; see also District of Columbia Rule 3.8(e) [providing that the prosecutor in a criminal case shall not “[I]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know”], emphasis added; Comment 1 to District of Columbia Rule 3.8(e) [clarifying that the rule is “not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.”]; New Jersey Rule 3.8(d) [requiring timely disclosure to the defense of all “evidence,” rather than “information”—as standard (as ABA opinion 09-454 makes clear) not as broad as the ABA model rule].)

E. Disclosure of “All Information” May Unnecessarily Jeopardize the Safety of Witnesses, the Integrity of Investigations, and Privileged Information

Prosecutors often have other important responsibilities that must be taken into consideration when determining what information must be disclosed to the defense during a criminal prosecution. Often, these considerations must be balanced against the due process rights of the defendant. Where the information in possession of the prosecutor is immaterial to the outcome of the case and therefore does not implicate the due process rights of the defendant, these other considerations may very well weigh in favor of withholding the information. Prosecutors should have the flexibility to balance these concerns without the fear of losing their licenses. Such considerations include the safety of witnesses, the integrity of ongoing investigations, and privileges associated with the information.

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The necessity for this flexibility was summed up in *Wallace v. City of Los Angeles* (1993) 12 Cal.App.4th 1385:

As our society becomes increasingly violent in its daily human interactions, more and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families will be subjected to violence by the very criminal defendants against whom they will give testimony. Thus, the old phrase “violence begets violence” takes on a new meaning. The threat to the safety of these witnesses is very real, especially when the defendant has gang or drug trafficking affiliations. Unfortunately, the lack of safeguards for such witnesses is also very real.

Society reaps enormous benefits when a witness’s testimony succeeds in getting a criminal off the streets and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness’s family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide the information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.

If the result which we reach in the case before us brings about a greater level of official concern and action promotive of witness safety, and an appropriate devotion of public resources to that end, the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority.

(*Wallace, supra*, at 1405-1406; overruled on other grounds in *Adkins v. State* (1996) 50 Cal.App.4th 1802; see also Evid. Code § 1042(c) [allowing evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the narcotics offense charged, to be admitted on the issue of reasonable cause to make an arrest or search *without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied*, based upon evidence produced in open court, out of the presence of the jury, that such information discretion does not require such disclosure].)

Alt.1 fails to account for these situation and arguably requires disclosure of not just “evidence,” but all favorable “information,” whether material or not, at the risk of discipline sanctions, unless a protective order is obtained. This would require the

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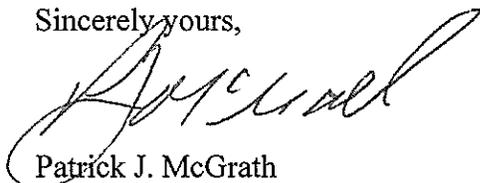
unnecessary expenditure of an incredible amount of resources to have the judiciary involved in reviewing every piece of marginally favorable yet immaterial information known by the prosecution in order for prosecutors to comply with their ethical requirements.

CONCLUSION

The discussion above is not meant to suggest that California prosecutors routinely have been, or will be, anything less than generous in making extensive early discovery disclosure. It is likely that most California prosecutors will voluntarily provide broad discovery in the initial stages of the case, if for no other reason than to promote early case disposition. (See California Rule of Court 10.953(a).)

ABA Model Rule 38d [Alt. 1], on its face and as interpreted in ABA Opinion 09-454, is not only is at odds with California criminal discovery law as defined by the California Constitution and California statutes, but sets prosecutors adrift without guidance. Alt. 2, though not without its downsides, is the more reasonable approach of the two alternatives.

Sincerely yours,



Patrick J. McGrath
President