

# **AGENDA ITEM**

## **701 OCTOBER 2016**

**DATE:** September 22, 2016

**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 Rules 5-110 and 5-220 of the Rules of Professional Conduct – Return from and Request for Adoption

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### **EXECUTIVE SUMMARY**

The Board of Trustees (“Board”) has assigned the Commission for the Revision of the Rules of Professional Conduct (“Commission”) to conduct a comprehensive study of the Rules of Professional Conduct and to recommend amendments where warranted. As part of that Rules review, the Commission studied on a separate track proposed amendments to Rules 5-110 and 5-220 of the Rules of Professional Conduct. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. At its November 19, 2015 meeting, the Board authorized a 90-day public comment period on the proposed amendments. The Board also agreed with a Commission recommendation that the processing of these proposed amendments should be prioritized and handled on a separate track from the Commission’s other work.

Following the 90-day public comment period, the Commission modified its proposal in response to the public comments. At its May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to obtain input on the modified proposal. Seventy-one public comments were received during the 45-day public comment period. Following consideration of these public comments, the Commission made no changes to its proposal and now recommends that the Board adopt the rules and direct staff to submit them to the Supreme Court of California for approval.

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

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### **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.<sup>1</sup>

### The Initial 90-Day Public Comment Period

At the Board's November 2015 meeting, the Board authorized a 90-day public comment period on proposed amendments to Rules 5-110 and 5-220 of the Rules of Professional Conduct. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. (See Board open agenda item [122 NOV 2015](#) and the [Board minutes](#) for that meeting.) The Board also agreed with the Commission's recommendation that the processing of these proposed amendments should be prioritized and handled on a separate track from the Commission's work on the comprehensive review of, and proposed amendments to, the Rules. The Commission explained that it applied the following standard in deciding to recommend expedited 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."

The Commission's presentation to the Board in November identified proposed paragraph (D)<sup>2</sup> of Rule 5-110 as a key provision that would amend the existing duty of a prosecutor under Rule

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<sup>1</sup> Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state."

<sup>2</sup> In connection with this key provision, the Commission also reported in November that alternate language had been considered but had not received the support of a majority of the Commission members. Set forth below is a redline/strikeout version of the alternate language that was presented.

(D) Comply with all statutory and constitutional obligations, as interpreted by relevant case law, to ~~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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

The essential difference between this alternative version and the Commission's recommended provision is that in the former the standard of "information. . . that tends to negate the guilt of the accused or mitigates the offense" is expressly qualified as a requirement that complies with existing law. The Commission's consideration of this alternative version of paragraph (D) included a related alternative version of Comment [3] stating that: "The disclosure obligations in paragraph (D) apply only with respect to controlling case law at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively."

Following discussion, the Board determined that both versions of paragraph (D) should be included in the 90-day public comment proposal. As a result, the public comments received during the 90-day public comment period included comments on the alternate version of

5-220, which requires a member, including a prosecutor, 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 have stated 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.” Based on input received, including studies by the Innocence Project, the Commission believes that early adoption of this amendment would help prevent the serious harm of wrongful convictions and that the failure to promulgate the amendment would not only affect individual defendants but also would diminish the public’s trust and confidence in the administration of justice and the legal profession.

In connection with the 90-day public period, a public hearing was held on February 3, 2016. A combined total of three hundred and twenty-one (321) public comments and public hearing testimony was received. Following consideration of the public comments and testimony at the Commission’s meeting on March 31 & April 1, 2016, the Commission revised proposed Rule 5-110<sup>3</sup> but determined that no changes were warranted for proposed Rule 5-220.

## DISCUSSION

### I. The 45-Day Additional Public Comment Period

At its May 13, 2016 meeting, the Board considered the Commission’s revised proposal and authorized an additional 45-day public comment period.<sup>4</sup> (See Board open agenda item [703 MAY 2016](#) and the [Board minutes](#) for that meeting.) After the end of the 45-day public comment period, the Commission met on August 26, 2016 to consider the comments received and to prepare its recommendation for Board action. As discussed below, the Commission has not changed its proposal and is recommending that the Board adopt the proposed rules and direct staff to submit them to the Supreme Court of California for approval. The full text of proposed

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(Footnote No. 2 continued.)

paragraph (D). For ease of reference, the version supported by the Commission has been referred to as Alt. 1 and the other version included in the 90-day public comment has been referred to as Alt. 2.

<sup>3</sup> The principal change to proposed rule 5-110 following the initial 90-day public comment period was to paragraph (D), which was revised as follows:

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that [the prosecutor knows or reasonably should know](#) 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; [that the prosecutor knows or reasonably should know mitigates the sentence](#), except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

A change was also made to Comment [3] to correspond to this revision to paragraph (D).

<sup>4</sup> The Alt. 2 version of proposed rule 5-110 was not included in the 45-day public comment period.

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. 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.

The additional 45-day public comment period ended July 1, 2016. A total of seventy-one (71) public comments were received. Of these comments, sixty-six (66) agreed with the proposal as drafted, one (1) disagreed with it, three (3) agreed only if modified, and one (1) did not indicate a position in support or opposition to the proposal.

Among the commenters who support the proposal are the following: the California Public Defenders Association; the State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC"); and the Office of the State Public Defender ("OSPD").

Among the commenters who would support the proposal only if it is modified are the following: the California District Attorneys Association ("CDA"); and the State Bar's Office of the Chief Trial Counsel ("OCTC").

The one commenter who opposes the proposal is the United States Department of Justice ("DOJ").

Among the points raised by those who support the proposal are the following.

1. It is important to clarify that existing law requires disclosure of exculpatory information regardless of materiality and to align California's rule with the rules in other jurisdictions, but include a "knows or reasonably should know" element to alleviate a prosecutor's concern that discipline might be imposed in the absence of a culpable mental state.<sup>5</sup>
2. The criminal justice system is premised on a presumption of innocence and hiding exculpatory evidence undermines the legitimacy of, and public confidence in, this system.
3. Prosecutor discovery violations are widespread and a prosecutor must take seriously the obligation to disclose exculpatory information or be subject to discipline.
4. Timely disclosure of exculpatory information promotes early resolution of cases.
5. Prosecutors have a competitive motivation to win despite the duty to seek fair and just outcomes and the proposed rule would help a prosecutor focus on justice rather than winning at all costs.
6. The prosecutor's asserted concern that late disclosure of defense witnesses will make it difficult to disclose impeachment evidence is inapposite because by definition, information that impeaches a defense witness is not exculpatory; the provision applies only to exculpatory evidence or information concerning prosecution witnesses.

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<sup>5</sup> These points were repeated, in a boilerplate manner, across twenty-eight (28) separately submitted comment letters.

Among the points raised by those who would support the proposal only if it is modified are the following.

1. The Discussion paragraphs should be amended to state that a prosecutor's disclosure of impeachment evidence concerning a defense witness is not warranted unless the identity of the defense witness is made available in advance of trial.
2. The Alt. 2 version<sup>6</sup> of disclosure standard should be adopted because it affirms that a prosecutor must comply with all statutory and constitutional obligations, as interpreted by case law, and the latter qualification is necessary because a rule that is untethered to the existing criminal discovery law framework is speculative and subject to use as an unfair litigation weapon.
3. The Commission should consider working with the Legislature to amend Penal Code section 1054 as prosecutors feel that it is not applicable pre-trial.
4. The proposed rule's requirement that a prosecutor make efforts to ensure that someone has been advised of his or her right to counsel should be amended to include a "timeliness" element.
5. The black letter text of the rule, not just the comments, should state that a prosecutor's duty to disclose exculpatory information is broader than the Brady materiality standard.
6. The "know or reasonably should know" standard should be clarified to address a prosecutor's duty to search for exculpatory evidence as well as issues of recklessness, gross negligence and willful blindness.
7. For disciplinary purposes, the proposed rule should require actual knowledge on the part of an individual prosecutor.

A summary of the public comments received is provided as Attachment E. This summary includes the Commission's response to each comment. The full text of the public comments received is provided as Attachment F. The Commission examined the comments received and determined that no changes to the proposed rules should be made. The Commission found that many of the comments received during the 45-day comment period expressed points that were already raised in the initial 90-day comment period. As the Commission has not changed its proposal, the rules may be adopted by the Board without any further public comment.

## **II. Summary of Proposed Amended Rules 5-110 and 5-220 as Recommended for Adoption**

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

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<sup>6</sup> Because the initial 90-day public comment period included both an Alt. 1 and an Alt. 2 version of the proposed rule 5-110, during the 45-day comment period some of the commenters referred to Alt. 2 notwithstanding the fact that Alt. 2 was not included in the 45-day request for comment. See note 4.

disclosure to the defense of exculpatory evidence. The scope of the proposed rule is much broader than current Rule 5-110.<sup>7</sup>

Current Rule 5-220 states the duty of all lawyers to disclose evidence in accordance with applicable legal obligations.<sup>8</sup> This current rule applies to the conduct of a prosecutor in a criminal matter. Proposed amended Rule 5-220 would add a Discussion paragraph stating: “See rule 5-110 for special responsibilities of a prosecutor.” Apart from this cross-reference, no other change to current Rule 5-220 is being recommended. The terms of the current rule would remain applicable to lawyers who are not acting as a prosecutor in a criminal case.

The full text of the Commission’s proposed rule 5-110 is set forth below.

### **Rule 5-110 Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute 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 the prosecutor knows or reasonably should know 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 that the prosecutor knows or reasonably should know mitigates the sentence, 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:

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<sup>7</sup> The full text of current Rule 5-110 states: “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.

<sup>8</sup> The full text of current Rule 5-220 states: “A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.”

- (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 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. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[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) include exculpatory and impeachment material relevant to guilt or punishment and 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.

[4] 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.

[5] 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).

[6] 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.

[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. 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.)

[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. 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.

[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 rule 5-110.

The Commission approved the above rule by a vote of 11 yes, 3 no and 0 abstentions. In addition, the Commission voted unanimously to recommend that the rule be considered by the Board on an expedited basis. 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.

#### Paragraph (A)

This provision carries forward the substance of current Rule 5-110. A member subject to proposed Rule 5-110 is described as a "prosecutor in a criminal case." The proposed language 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 service who also has prosecutorial powers can institute criminal charges, the scope of coverage should not change.

In some circumstances, criminal charges might be initially supported by probable cause, but a subsequent change in circumstances can result in those charges no longer being supported by probable cause. Current rule 5-110(A) addresses this situation in a lengthy second sentence. The Commission has streamlined that language by using the operative phrase: "not institute or continue to prosecute" to provide greater specificity on the duty of a prosecutor to stop prosecuting a matter that was originally initiated in good faith.

The knowledge standard in the current rule of "knows or should know" has been replaced with "knows." The change conforms the language to that used in the substantial majority 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.

#### Paragraph (B)

This would be a new provision in the Rules. Derived from Model Rule 3.8(b), paragraph (B) 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.

#### Paragraph (C)

This would be a new provision in the Rules. Derived from Model Rule 3.8(c), paragraph (C) 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*.

#### Paragraph (D)

This 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 the prosecutor knows or reasonably should know 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 that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Paragraph (D) is derived from Model Rule 3.8(d) but unlike the Model Rule, it describes with specificity the standard that is applied not only to the prosecutor's "knowledge" of the *existence* of evidence or information, but also to the prosecutor's knowledge of the *legal consequences* that such evidence or information will have on the proceeding as to guilt or the sentence of the accused. The Commission believes that a disciplinary rule should provide that specificity so that prosecutors clearly understand their obligations under the rule. A corresponding change is recommended for Comment [3].

At least one public commenter continues to advocate for the Alt. 2 version of the rule that was included in the prior 90-day public comment circulation. The Commission's present recommendation reaffirms that it does not support the Alt. 2 approach. As noted, the Commission's proposed knowledge standard applicable to both a prosecutor's determination of whether information "tends to negate the guilt of the accused or mitigates the offense" or "mitigates the sentence" is a "knows or reasonably should know" standard and this standard should obviate concerns that a prosecutor would face disciplinary charges without having a culpable mental state.

#### Paragraph (E)

This would be a new provision in the Rules. Derived from Model Rule 3.8(e), paragraph (E) 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.

#### Paragraph (F)

This would be a new provision in the Rules. Derived from Model Rule 3.8(e), paragraph (F) 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.

### Paragraph (G)

This would be a new provision in the Rules. It is 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.

### Paragraph (H)

This would be a new provision in the Rules. It is derived from Model Rule 3.8(h). 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. It is nearly identical to Model Rule 3.8(h).

### **Summary of Proposed Discussion to Rule 5-110**

The current Rules are formulated to include a primary text and an optional rule Discussion for each rule.<sup>9</sup> This is similar to the ABA Model Rules that have a primary text and a Comment section. Current Rule 5-110 has no Discussion. The Commission's proposed rule would add nine Discussion paragraphs that are summarized below.

Discussion paragraph [1] states the foundational policy the rule by explaining that a prosecutor in a criminal matter has special responsibilities to seek justice and to observe that a defendant is accorded procedural rights. It also provides cross references to Rule 3-200 ("Prohibited Objectives of Employment") and Rule 5-220 ("Suppression of Evidence"). In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [1].

Discussion paragraph [2] clarifies that the prohibition in paragraph (C) permits lawful questioning when the right to counsel and the right to remain silent are knowingly waived. Similarly, it clarifies that it is permissible for a prosecutor to seek 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. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [2].

Discussion paragraph [3] cites to *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] ("*Brady*") to emphasize that the disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment but are not limited to the *Brady* standard of materiality. It also clarifies that the rule is not intended to impose timing requirements

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<sup>9</sup> Rule 1-100 (C) states the following purpose of Discussion sections to a rule.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

different from those established by statutes, procedural rules, court orders, and applicable case law. This Discussion paragraph has no direct counterpart in the Comments to Model Rule 3.8.

Discussion paragraph [4] states that under paragraph (D) a prosecutor may seek a protective order from a tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [3].

Discussion paragraph [5] clarifies that on the issue of extrajudicial statements, paragraph (F) serves as a supplement to the more general standards of Rule 5-120 (“Trial Publicity”). It also clarifies that the rule does not negate the provisions in Rule 5-120 that provide for extrajudicial statements that a lawyer may make, including statements in a criminal matter such as the identity of the investigating and arresting officers and the length of the investigation (see Rule 5-120(B)(7)(d)). In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [5].

Discussion paragraph [6] provides a cross reference to the general duty to supervise described in the Discussion to Rule 3-110 (“Failing to Act Competently”). It also clarifies that the reasonable care standard of Rule 5-110(F) ordinarily will be satisfied if a prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [6].

Discussion paragraph [7] explains the varying application of paragraph (G) when information about a possible wrongful conviction involves a person convicted outside of the prosecutor’s jurisdiction and when a conviction was obtained in the prosecutor’s jurisdiction. It also provides a cross reference to Rule 2-100 (“Communication with a Represented Party”) in regards to possible required disclosures to the counsel of a represented defendant. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [7].

Discussion paragraph [8] states that under Rule 5-110(H) a prosecutor’s steps taken to seek to remedy a wrongful conviction will depend on the specific surrounding circumstances. Examples of possible steps are provided. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [8].

Discussion paragraph [9] recognizes that compliance with the requirements of Rule 5-110(G) and (H) must account for a prosecutor’s independent judgment, made in good faith when evaluating the nature of new evidence. In part, this Discussion paragraph is derived from Model Rule 3.8 Comment [9].

### **III. Recommendation and Expedited Process for Proposed Amended Rule 5-110 and 5-220.**

The Commission recommends adoption of the proposed rules as submitted. With due consideration of the modifications previously implemented after the initial 90-day public comment, the Commission continues to believe 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. While prioritization would expedite submission of the proposal to the

Supreme Court of California, the amended rules would become operative unless and until they are approved by the Supreme Court of California.

#### **FISCAL/PERSONNEL IMPACT**

None.

#### **RULE AMENDMENTS**

This agenda item requests Board adoption of amended Rules of Professional Conduct that would only become operative and binding if the amended rules are approved by the Supreme Court of California. 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." Accordingly, Board action alone does not effectuate an amendment to the rules.

#### **BOARD BOOK IMPACT**

None.

#### **BOARD GOALS & OBJECTIVES**

Adoption of the amended rules is consistent with the public protection mission of the State Bar provided for in Business and Professions Code section 6001.1 and carries out a Board function set forth in Business and Professions Code section 6076, namely the development of Rules of Professional Conduct that serve as lawyer disciplinary standards.

#### **PROPOSED BOARD RESOLUTION**

**RESOLVED**, following notice and publication for comment and upon the recommendation of the Commission for the Revision of the Rules of Professional Conduct, that the Board of Trustees adopt proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct, as set forth in Attachment A.

**FURTHER RESOLVED**, that staff is directed to submit the amended rules to the Supreme Court of California with a request that the rules be approved, together with a request that if approved, the amended rules be made operative on an expedited basis.

#### **ATTACHMENT(S) LIST**

- A. Clean Text of Proposed Amended Rules 5-110 and 5-220
- B. Redline Text of Proposed Amended Rule 5-110 Showing Changes to Current Rule 5-110
- C. Redline Text of Proposed Amended Rule 5-110 Showing Changes to ABA Model Rule 3.8
- D. Redline Text of Proposed Amended Rule 5-220 Showing Changes to Current Rule 5-220
- E. Summary of Public Comments with Commission Responses
- F. Full Text of Public Comments