

# **AGENDA ITEM**

**701 JULY 2017**

**DATE:** July 7, 2017

**TO:** 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 –  
Return from Public Comment and Request for Adoption

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## **EXECUTIVE SUMMARY**

On May 1, 2017, the Supreme Court of California (“Supreme Court”) issued an order on the State Bar’s request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar’s request was granted in part and denied in part. Proposed rule 5-110(D) and related Discussion paragraphs concerning pretrial disclosure obligations were not approved but the Supreme Court’s order provides instructions for the State Bar’s further consideration. The Board of Trustees (“Board”) referred this matter to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) for study and development of revised rule proposals and on May 30, 2017 the Board’s Committee on Regulation, Admissions and Discipline (“RAD committee”) authorized a 30-day public comment period on two alternate drafts, Alternative A and Alternative B, prepared by the Commission. One hundred and seventy-one public comments were received. Following consideration of the public comments at the Commission’s meeting on July 5, 2017, this agenda item presents the Commission’s recommendation that the Board adopt a proposed rule and direct staff to submit the rule to the Supreme Court for approval.<sup>1</sup>

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

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## **BACKGROUND**

Attachment 3 to this memo is the May 30, 2017 RAD agenda item in which the Commission requested a 30-day public comment period on the two alternative drafts. Attachment C of the

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<sup>1</sup> Attachment 1 provides the clean text of proposed amended rule 5-110. Attachment 2 provides two redline/strikeout versions: one showing changes to the proposed rule (Alternative B) as issued for a 30-day public comment period that ended on June 29, 2017; and another version showing changes to current 5-110 that became operative on May 1, 2017.

RAD agenda item provides the Board agenda item 703 MAY 2017 and relevant background for this matter, including the full text of the Supreme Court's May 1, 2017 order.

### The Two Alternative Drafts of Proposed Amended Rule 5-110

The RAD committee authorized two alternative drafts for a 30-day public comment period in accordance with the recommendation of the Commission presented to that committee on May 30, 2017.

Alternative A was prepared by the Commission to seek public comment on the language suggested in the Supreme Court's order. The Commission made only two changes to the Supreme Court's language. First, at the Commission's meeting the Commission was informed that following its May 1, 2017 order, the Supreme Court considered a modification to the sentence that the Court originally suggested for addition at the end of paragraph (D). This modification adds the words "knows or reasonably should know." As modified the sentence would read: "This obligation includes the duty to disclose information that a *prosecutor knows or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely."

Second, the Supreme Court's order questioned the meaning of the reference to "cumulative disclosures of information" in Discussion paragraph [3]. In response, the Alternative A draft of the rule omits this reference as it might create ambiguity in construing the rule.

Alternative B represented the Commission's recommended proposal for Rule 5-110. Like the Alternative A draft, Alternative B omits the reference to "cumulative disclosures of information" in Discussion paragraph [3] that the Court's order questioned. With respect to the second sentence that the Supreme Court suggested adding to paragraph (D), the Commission recommended that the sentence be revised and moved to Discussion paragraph [3]. The Commission was informed at its meeting that the sentence had been added as an undisputable example of when a prosecutor would be obligated to disclose impeachment information as required under the standard set forth in the first sentence of that paragraph. The Commission's insertion of the modified sentence in the Discussion paragraph was made to clarify that the sentence is simply an example of impeachment information that would trigger a prosecutor's disclosure duty. Because the sentence functioned as an example, the Commission believed that it was properly placed in the Discussion rather than in paragraph (D). More importantly, the change was also intended to avoid any potential interpretation that the Supreme Court's added sentence functioned to limit the governing standard of "tends to negate" set forth in paragraph (D). The potential for such an interpretation was apparent from public comment received from visitors who attended the Commission's May 25, 2017 meeting.

### The 30-Day Public Comment Period

The 30-day public comment period ended on June 29, 2017. One hundred and seventy-one (171) public comments were received. (A public comment synopsis table that includes Commission responses is provided as Attachment 4. The full text of the comments is provided as Attachment 5.)

#### *Public Comment Received on Alternative A:*

Of the one hundred and seventy-one (171) public comments that were received, three comments prefer Alternative A over Alternative B. (See A-2017-1 Goodman, A-2017-2 OCTC

and A-2017-3 Los Angeles County Public Defender). One of these comments specifies a recommended language change. The Los Angeles County Public Defender would modify the second sentence of Alternative A's paragraph (D) to delete the phrase "that a prosecutor knows or reasonably should know" which was added by the Commission. This commenter prefers the original paragraph (D) language provided in the attachment to the Court's May 1<sup>st</sup> order. In addition, the Office of Chief Trial Counsel's ("OCTC") comment letter supporting Alternative A asserts that the rule should include the concept that a prosecutor is required to search for exculpatory evidence citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437 and *In re Brown* (1998) 17 Cal.4th 873, 879.

The Commission was not persuaded that Alternative A should be recommended for adoption either as issued for public comment or with any of the revisions recommended by commenters who support Alternative A. The primary difference between Alternative A and Alternative B is the placement of the sentence that provides an example of impeachment information that would trigger the rule's disclosure obligation. In Alternative A this sentence is found in paragraph (D) of the rule and in Alternative B this sentence is found in Discussion paragraph [3]. In response to the preference of all three commenters that the impeachment sentence should be in the black letter of the rule, as noted above, the Commission believes this sentence is better placed in the Discussion paragraph, as in Alternative B, to make clear that it is simply an example that provides explanatory guidance rather than establishing any element of the rule. This is consistent with the approach used in all of the other proposed rules adopted by the Board and is consistent with the current rules. If Alternative A were adopted, then the example would reside in paragraph (D) and might be misinterpreted as having greater significance than simply that of an example. Public commenters in support of Alternative B expressed concerns that the inclusion of the sentence in paragraph (D) might have the effect of injecting the concept of a "materiality" test that is not intended for this rule.

With respect to the Los Angeles County Public Defender's suggestion that the second instance of the clause, "that a prosecutor knows or reasonably should know" be deleted, the Commission notes that the clause's addition reflects a modification to the language in the Supreme Court's original order that was suggested by the Supreme Court itself in a communication to the Commission. The Commission agrees that this is necessary to make the rule clear, and does not believe that it is superfluous and redundant.

Finally, with respect to OCTC's suggestion that the rule include a duty of a prosecutor to search for exculpatory evidence, the Commission notes that it has thoroughly considered this proposal in connection with previous drafts of the rule. The Commission continues to believe that the proposed rule utilizes an appropriate standard of knowledge as a key element of the rule (e.g, a prosecutor must act on "all evidence or information **known** to the prosecutor. . ."). Under this standard, the prosecutor has a duty not to ignore evidence that has been revealed during the criminal investigation because knowledge can be inferred from the surrounding circumstances.<sup>2</sup> This provides the requisite incentive for a prosecutor to pursue an evidentiary thread that could lead to discovery of exculpatory or mitigating evidence.

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<sup>2</sup> The "Terminology" rule, proposed Rule 1.0.1, adopted by the Board and pending action by the Supreme Court includes paragraph (f) which provides that the terms "know" and "knows" means "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

*Public Comment Received on Alternative B:*

Of one hundred and seventy-one comments, one hundred and sixty-eight prefer Alternative B over Alternative A. Many of these comments include specific language suggestions for modifying the rule. Among the commenters who prefer Alternative B are: California Attorneys for Criminal Justice; California Public Defenders Association; the State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC"); and the Office of the State Public Defender.

The specific language changes suggested by the overwhelming majority of the comments that prefer Alternative B concern the second sentence of Discussion paragraph [3].<sup>3</sup> These commenters recommend deletion of the word "significant" and the phrase "on which the prosecution intends to rely." These suggested changes reflect a concern that the foregoing language, even if included in the Discussion rather than the black letter, would effectively limit the governing standard of "tends to negate" set forth in paragraph (D). As recommended by the commenters, the sentence could be revised to state:

These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts ~~significant~~ doubt on the accuracy or admissibility of witness testimony or other evidence ~~on which the prosecution intends to rely~~ disclosed by the prosecution.

The Commission did not implement these changes in the rule that the Commission recommends for Board adoption. The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B dilutes the rule or creates ambiguity. In response to public comment, the Commission has revised the second sentence in Comment [3] to make even more clear that it sets forth only one example of information a prosecutor would be required to disclose under the rule. As with similar examples in comments to other rules, this example is not properly interpreted as limiting the information reached by the rule. The example was selected because it falls squarely within the scope of disclosures required by current California law, and is therefore consistent with the fourth sentence of proposed Comment [3], which recognizes that the rule is not intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts.

In addition to the foregoing comments stating a preference for Alternative B but with modifications to the second sentence of Discussion paragraph [3], the U.S. Department of Justice ("DOJ") also submitted a comment that preferred Alternative B to Alternative A on the ground that Alternative A's second sentence in paragraph (D) more appropriately should be placed in a Discussion paragraph. The DOJ, however, also urged that the black letter of paragraph (D) be modified to track the language of "Alternative 2," which is one of the two versions circulated in the original 90-day public comment for rule 5-110. That alternative limited a prosecutor's disclosures to those that "[c]omply with all constitutional and statutory obligations, as interpreted by relevant case law." The Commission did not implement that suggested reversion to an earlier alternative. The Commission notes that the first Principle of its extended Charter provides: "1. The Commission's revisions should respond to the questions or issues posed by the referral from the Supreme Court." Implementing the DOJ's suggestion would be beyond the scope of the Commission's authority. In any event, the Commission continues to believe, for reasons previously stated, that Alternative B is preferable to "Alternative 2" of the

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<sup>3</sup> See public comment synopsis table for other language changes that did not garner support from multiple commenters.

proposed rule that was circulated in the initial public comment for rule 5-110. The Commission does not agree that the rule should be returned to language equivalent to that included in “Alternative 2” that would limit the rule’s disclosure obligations to those imposed by statutory and constitutional law, particularly in light of the Supreme Court’s modifications of paragraph (D) as originally adopted by the Board of Trustees. In its May 1, 2017 Order, the Court removed any ambiguity in the rule by modifying paragraph (D), which had largely tracked ABA Model Rule 3.8(d), to clearly provide that the “tends to” standard applies not only to information and evidence that “tends to negate the guilt of the accused,” but also to evidence and information that tends to “mitigate the offense, or mitigate the sentence.”

### **Summary of Proposed Amended Rules 5-110 as Recommended for Adoption**

Proposed amended Rule 5-110 would include the Court’s language of the first sentence of paragraph (D) verbatim as attached to its May 1, 2017 order. Similar to Alternative B, the Court’s suggested second sentence has been moved to Discussion paragraph [3] and has been further modified to make even more clear that it is intended only as an indisputable example of impeachment evidence that a prosecutor must disclose. The Commission believes these further revisions should avoid a potential interpretation that the sentence functions to limit the governing standard of “tends to negate” set forth in paragraph (D). Otherwise, the proposed rule tracks Alternative B.

As recommended for adoption by the Commission, the full text of paragraph (D) and Discussion paragraphs [3] and [4] are set forth below.

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

The prosecutor in a criminal case shall:

\* \* \*

- (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, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

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#### **Discussion**

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[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. For example, these obligations include at a minimum the duty to disclose impeachment evidence or information that casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information that is protected from disclosure by federal or California

laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) 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.

The Commission approved the above rule by a unanimous vote of 7 yes, 0 no and 0 abstentions.<sup>4</sup>

### **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 Rule 5-110 of the Rules of Professional Conduct, as set forth in Attachment 1.

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<sup>4</sup> Two members of the Commission who voted "yes" noted their prior written dissents that were provided to the Board when proposed Rule 5-110 was adopted by the Board on October 1, 2016. These dissents are on file with the Office of Professional Competence and are available upon request by contacting Lauren McCurdy at [lauren.mccurdy@calbar.ca.gov](mailto:lauren.mccurdy@calbar.ca.gov).)

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

**ATTACHMENT(S) LIST**

1. Clean Text of Proposed Amended Rule 5-110
2. Redline Text of Proposed Amended Rule 5-110 Showing Changes to Current Rule 5-110 and to the Public Comment Draft
3. May 30, 2017 RAD Agenda Item Requesting Public Comment Authorization, Including Attachment C – Board Agenda Item 703 May 2017.
4. Summary of Public Comments with Commission Responses
5. Full Text of Public Comments