

Attachment 4: Summary of Public Comments with Commission Responses

**Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
Alternative A – Synopsis of Public Comments**

| | |
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| TOTAL = 3 | A = 3 |
| | D = 0 |
| | M = 0 |
| | NI = 0 |

| No. | Commenter/Signatory | Comment on Behalf of Group? | A / M / NI ¹ | Comment | RRC Response |
|----------|-----------------------------------------------------------------------|-----------------------------|-------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A-2017-1 | Goodman, Paul Samuel (6-29-17) | N | A | I have worked as a criminal defense attorney in the past. During that time I have heard more than once a prosecutor say that in a case where there were two defendants, but evidence that only one person committed the crime, they would cheerfully attempt to obtain convictions for both. Many prosecutors ignore their duties to promote their careers. I support Alt. A. | The Commission continues to recommend Alt. B. The Commission believes that the example included in the language of paragraph (D) in Alt. A is better placed in the comment, as in Alt. B, to make more clear that it is simply an example. As to the commenter's comment regarding evidence of a crime, it is relevant to current rule 5-110(A), which was not a subject of the current public comment request. |
| A-2017-3 | Los Angeles County Public Defender Office (Emling) (6-29-17) | Y | A | Of the two options presented for public comment, we support Alt. A, though in our view, the original language, reflected in the Supreme Court's order concerning Rule 5-110, rather than the Bar's proposed modified language, is the best alternative. We believe the Bar's modified version unnecessarily repeats the phrase "that a prosecutor knows or reasonably should know." Repeating that phrase, which is used initially in the first sentence of the Court's proposed rule, is superfluous and redundant. We also believe the sentence: "This obligation includes the duty to disclose | (1) The repeat of the phrase "that a prosecutor knows or reasonably should know" in the Commission's version of Alt. A reflects a modification from 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. (2) The Commission continues to recommend Alt. B because it believes the example included in the text of the rule in Alt. A is better |

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| | | | | <p>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.”</p> <p>In our view, for this language to have the full force and effect envisioned by the Supreme Court, the language should be contained within the rule itself and not left to the Discussion section of the rule. To the extent that a rule is defined and interpreted principally by the plain meaning of the rule itself, for this part of the rule to have its intended effect, it should be part of the rule, not merely an advisory, non-compulsory discussion point.</p> | <p>placed in the comment, as in Alt. B, to make more clear that it is simply an example of the disclosures required by the rule, and does not serve to limit the disclosures required by the rule. This approach is consistent with other proposed rules, in which examples typically have been placed in comments.</p> |
| A-2017-2 | State Bar Office of Chief Trial Counsel (Moawad) (6-29-17) | Y | A | <p>(1) OCTC supports the Commission’s Alternative A of subsection (D) of Rule 5-110 of the Rules of Professional Conduct as the better option.</p> <p>(2) OCTC notes that both alternatives still leave to interpretation what</p> | <p>(1)The Commission continues to recommend Alt. B because it believes the example included in the text of the rule in Alt. A is better placed in the comment, as in Alt. B, to make more clear that it is simply an example of the disclosures required by the rule, and does not serve to limit the disclosures required by the rule. This approach is consistent with other proposed rules, in which examples typically have been placed in comments.</p> <p>(2)The Commission does not believe that either the second</p> |

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| | | | | <p>information “casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely” and when the information must be disclosed. This may make the rule difficult to enforce in some circumstances. Nonetheless, Alternative A, is the more definitive, clearer, and enforceable version of the rule.</p> | <p>sentence of the rule in Alt. A or the second sentence of proposed Comment [3] in Alt. B will make the rule more difficult to enforce in some circumstances. Both sentences are clearly drafted to set forth only one example of information a prosecutor would be required to disclose under the rule. 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.</p> |

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| | | | | <p>(3) OCTC supports Alternative A's Comment 3 because it provides needed guidance. OCTC also supports the deletion of the prior proposal's language about cumulative disclosures because the language was confusing and could be misinterpreted.</p> <p>(4) OCTC supports proposed Comment 4 to Alternative A because it is in the public's interest to allow prosecutors in certain circumstances to obtain a protective order, preventing disclosures that could result in substantial harm to an individual or the public interest, such as the disclosure of the identity or address of a witness.</p> <p>(5) OCTC is still concerned that the proposed rule does not address the prosecutor's duty to search for exculpatory evidence. (See <i>Kyles v. Whitley</i> (1995) 514 U.S. 419, 437 and <i>In re Brown</i> (1998) 17 Cal.4th 873, 879 [prosecutor's duty to search for exculpatory evidence]). OCTC believes this should be part of the rule.</p> | <p>(3) The Commission agrees with the deletion of the prior proposal's language about cumulative disclosures.</p> <p>(4) The Commission agrees that proposed Comment [4] is in the public's interest in that it permits prosecutors in certain circumstances to obtain a protective order preventing disclosures that could result in substantial harm to an individual or the public interest, such as the disclosure of the identity or address of a witness.</p> <p>(5) The Commission has addressed this issue in connection with previous drafts of the Rule.</p> |

Attachment 4: Summary of Public Comments with Commission Responses

**Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
Alternative B – Synopsis of Public Comments**

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| | D = 0 |
| | M = 143 |
| | NI = 1 |

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|------------|------------------------------|-----------------------------|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| B-2017-161 | Adlai, Tarik (6-29-17) | N | A | <p>Alt. A is deficient because, by limiting the duty of disclosure to evidence that could cast “significant doubt” is unknowable and often undeterminable in advance of the actual trial, thereby inviting prosecutors to rationalize concealing the evidence on the ground that they don’t anticipate it to be significant. The commentary to Alt. B which makes clear that the items covered “are not limited to evidence or information that is material” under <i>Brady</i> would avoid this deficiency.</p> <p>Furthermore, by limiting its scope to “evidence on which the prosecutor intends to rely,” Alt. A invites prosecutors to rationalize that, going into trial, they do not intend to rely on certain evidence, and therefore do not have to disclose evidence that would be favorable to the defense even if it did cast “significant doubt” on a particular item of evidence the prosecutor did intend to rely upon.</p> | <p>(1) The Commission continues to recommend Alt. B.</p> <p>(2) 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.</p> |
| B-2017-22 | Alonzo, Gregory (6-28-17) | N | M | <p>Although Alt. B is superior to Alt. A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it continues to include the qualifications “significant doubt” and “evidence on which the prosecution</p> | <p>(1) The Commission continues to recommend Alt. B.</p> <p>(2) The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B</p> |

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| | | | | <p>intends to rely....” The Discussion Comment should be changed to state:</p> <p>“These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”</p> | <p>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.</p> |
| B-2017-19 | Alpers, Steven (06-28-17) | N | A | No comment included. | No response required. |
| B-2017-117 | Alternate Public Defender, Los Angeles County (Goodman) (06-28-17) | Y | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-62 | Anderson, Caley (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-53 | Antrim, Whitney (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-78 | Applegate, Charles W. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-18 | Aye, Michael J. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-94 | Belisle, Katie (6-28-17) | N | M | I prefer Alt. B [but] it seems that it still creates ambiguity by including the qualifications “significant doubt” and “evidence on which the prosecution intends to rely.” | (1)The Commission continues to recommend Alt. B. (2) 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 |

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| | | | | | 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. |
| B-2017-111 | Bennett, Terrence J. (6-28-17) | N | M | Delete the language suggesting that the prosecution can do less than fully comply with its <i>Brady</i> disclosure obligations as to both guilt/innocence issue as well as evidence tending to mitigate at sentencing. Prosecution has an affirmative obligation to positively disclose not just evidence the prosecution intends to use in its case in chief, but rather all information of potential value to the accused at trial and at sentencing. | 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. |
| B-2017-10 | Berkowitz, Barney (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-76 | Bermant, Alison (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-82 | Black, William (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-63 | Boxeth, Heather (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-137 | Brandt, Nancy (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-108 | Bright, Aric M. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-39 | Brogna, Sheila (6-28-17) | N | A | No comment included. | No response required. |
| B-2017-52 | Burke, Adam (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-150 | California Attorneys for Criminal Justice (Edgar) (6-29-17) | Y | M | Alternative B is the only reasonable choice, Alternative A is very unreasonable and eliminate the meaning of the rule and its purpose. Justice requires evidence to be shared and avoid any injustices due to lack of proper disclosure. | The Commission continues to recommend Alt. B. |

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| B-2017-52 | California Attorneys for Criminal Justice (Hernandez) (6-29-17) | Y | M | <p>The Discussion Comment should be changed to state:</p> <p>“These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”</p> | <p>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.</p> |
| B-2017-1 | California Public Defenders Association (Ogul) (6-22-17) | Y | M | <p>We respectfully submit that Alternative A should be rejected, and Alternative B should be modified. We are concerned with both the word “significant” and the phrase “on which the prosecution intends to rely.” The word and phrase are problematic because they invite prosecutors to intentionally refuse to disclose exculpatory evidence and information unless they subjectively believe that it will cast <i>significant</i> doubt</p> | <p>(1)The Commission continues to recommend Alt. B.</p> <p>(2)The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B will invite prosecutors to interpret it as a limitation on their obligations under the rule to disclose exculpatory information. In response to public comment, the</p> |

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| | | | | <p>on their evidence and that they have subjectively concluded that they will present the impacted evidence regardless. Both conditions are inconsistent with existing law and invite mischief.</p> <p>The Comment should be modified to read: “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.” This language would leave no ambiguity and discourage prosecutors from suppressing exculpatory evidence based on their subjective beliefs.</p> | <p>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.</p> |
| B-2017-89 | Cavalluzzi, Maria (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-142 | Chaney, Michael (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-86 | Chestnut, William (6-28-17) | N | A | No comment included. | No response required. |

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| B-2017-55 | Chu, Courtney (6-28-17) | N | A | No comment included. | No response required. |
| B-2017-105 | Chu, Jimmy (6-28-17) | N | A | Personal observation and numerous incidents depicted in the media show innocent people convicted much too often and culpable prosecutors never held accountable. Alt. B will be a giant step in the right direction. | The Commission continues to recommend Alt. B. |
| B-2017-36 | Clarke, Joseph (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-38 | Coghlan, Michael R. (6-28-17) | N | NI | <p>In our court, we have what is called Early Disposition Project (“EDP”). It is a special arraignment court where we do arraignments and also attempt to settle felony cases before they progress upwards to preliminary hearings and beyond.</p> <p>Many times, a case will turn on a surveillance video. The defendant claims he never had a knife, the police report says he had a knife in his hand. There is a surveillance video mentioned in the police report.</p> <p>No competent attorney is going to plead out a client who claims he never had a knife when there is a video that will tell one way or the other, so we simply send the case on up, and out of the EDP court, for preliminary hearing. Our DA’s</p> | The Commission continues to believe that, as specified in the last sentence of proposed Comment [3], the timeliness of disclosures remains a matter better addressed by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions. |

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| | | | | <p>office says, “don’t worry – the video will be provided at least 30 days prior to trial.”</p> <p>Seems to me this is <u>precisely</u> the type of situation that should be remedied by the proposed rule.</p> | |
| B-2017-65 | Colombo Jr., Anthony (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-164 | Cox, Jason (6-29-17) | N | M | <p>First, the qualifier “significant” should be deleted. If left in, some prosecutors will almost certainly interpret that to condone withholding of exculpatory or impeaching information by the expedient of deeming it, in the prosecutor’s opinion, not significant.</p> <p>Second, the qualifying phrase “on which the prosecution intends to rely” should be deleted and replaced with “disclosed by the prosecution.” That would make the rule clearer, simpler, and less subject to evasion. A defendant is entitled to exculpatory and impeaching information regardless of whether the prosecution intends to call a particular witness or introduce a particular piece of evidence.</p> <p>The language about “intends to rely” should not be part of Rule 5-110(D) or the Discussion.</p> | 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 |

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| | | | | | is not intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. |
| B-2017-93 | Cratch, Celia (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-157 | Dabiri, Mani (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-153 | Dadmun, Stewart (6-29-17) | N | M | By placing the word "significant" in front of doubt it gives a prosecutor a loop hole. | The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B will invite prosecutors to interpret it as a limitation on their obligations under the rule to disclose exculpatory information. 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 |

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| | | | | | 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. |
| B-2017-134 | Davina, Zachary (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-33 | Defilippis, Stephen M. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-168 | Devine, Robert | N | A | The Bar should recommend the changes proposed in alternative B of the rule changes. It is clearer and more direct than alternative B. | No response required. |
| B-2017-4 | Ditlof, Daniel A. (6-27-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-14 | Dobbyn, Gerard (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-66 | Dombois, Markus (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

Attachment 4: Summary of Public Comments with Commission Responses

Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
Alternative B – Synopsis of Public Comments

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|--------------------|----------------|
| TOTAL = 168 | A = 24 |
| | D = 0 |
| | M = 143 |
| | NI = 1 |

| No. | Commenter/Signatory | Comment on Behalf of Group? | A / M / NI ¹ | Comment | RRC Response |
|----------|----------------------------|-----------------------------|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| B-2017-8 | Dunger, Julie (6-27-17) | N | M | The court, not the prosecution, should decide whether exculpatory evidence is “significant.” Alt. A transfers that authority to the individual prosecutor. The threshold for disclosure of exculpatory evidence should be as broad as possible and as early as possible in the trial process so that the court and the defense are not cut out of the discussion of whether that evidence is material to a contested issue or to the credibility of a witness. | (1)The Commission continues to recommend Alt. B. (2)The Commission does not believe that either Alt. A or Alt. B limits the disclosures required by the rule to exculpatory evidence a prosecutor determines to be significant. The first sentence in proposed Comment [3] makes clear that the disclosure obligations imposed by the rule are not limited to information that is material as defined by <i>Brady</i> and its progeny. 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 |

Attachment 4: Summary of Public Comments with Commission Responses

**Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
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|------------|--------------------------|-----------------------------|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | | | with statutory and constitutional provisions governing discovery in California courts. (3)The Commission continues to believe that, as specified in the last sentence of proposed Comment [3], the timeliness of disclosures remains a matter better addressed by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions. |
| B-2017-95 | Durovic, Milly (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017- | Edger, Deedrea (6-29-17) | N | M | Alt. B is the only reasonable choice, Alt. A is very unreasonable and eliminate the meaning of the rule and its purpose. Justice requires evidence to be shared and avoid any injustices due to lack of proper disclosure. | The Commission continues to recommend Alt. B. |
| B-2017-42 | Elias, Youseef (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-5 | Epps, David (6-27-17) | N | A | Please register my support of Alt. B and opposition to Alt. A. | No response required. |
| B-2017-128 | Fenske, Karl (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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|------------|-----------------------------------|-----------------------------|-------------------------|--------------------------------------------------------------------------------------------------------------|--------------------------------------------|
| B-2017-21 | Fitzgerald, Kimberly (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-67 | Foster, Craig (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-125 | Foster, Jodea (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-97 | Freidenreich, Stephanie (6-28-17) | N | A | Alt. B is a correct and clear statement of the law. | No response required. |
| B-2017-98 | Garrick, Sarah (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-167 | Gazipura, Rick | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-77 | Gold, Jeffrey (6-28-17) | N | A | No comment included. | No response required. |
| B-2017-163 | Goldscheider, Peter (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-104 | Gross, Dana (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-58 | Gutierrez, Andy (6-28-17) | N | A | <p>(1) I have concerns with Alt. A’s use of the term “significant” doubt. The rule should be as clear as possible and contain the least amount of subjectivity.</p> <p>(2) I also believe that adding the language “on which the prosecution intends to rely” will create more problems and litigation. That phrase will swallow the rule and allow prosecutors an escape hatch for exculpatory evidence. It also does not conform to the independent statutory obligation under PC 1054.1(e) which requires disclosure whether or not the prosecution intends to rely on that evidence.</p> | <p>(1)The Commission continues to recommend Alt. B.</p> <p>(2)The Commission does not believe that either the second sentence of the rule in Alt. A or the second sentence of proposed Comment [3] in Alt. B creates a subjective standard or imposes limits that swallow the rule. 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.</p> |

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|------------|---------------------------------|-----------------------------|-------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|
| B-2017-140 | Haberman, Christopher (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-126 | Hagood, Sandra Payne (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-96 | Hall, Carrie (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-113 | Hamasaki, John (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-50 | Henneman, Krista (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-71 | Hermansen, Kurt David (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-54 | Hingle, Michael (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-154 | Horowitz, Rick (6-29-17) | N | M | The language “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 | See response to Alonzo, Gregory B-2017-22. |

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| | | | | mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal” is enough. Adding wiggle words like “significant doubt” or limiting the rule to evidence that the prosecution says it intends to rely is just a way of gutting the rule. | |
| B-2017-132 | Humphries, Gregory (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-75 | Independent Defense Counsel Office (MacDonald) (6-28-17) | Y | M | (1) Alt. B addresses the issues best by avoiding ambiguity and not diluting a prosecutor’s responsibility. (2) Alt. A would dilute the duties of counsel by adding ambiguity with language such as “significant doubt” and “evidence on which the prosecutor intends to rely.” These words give prosecutors justification not to comply. It is critical that prosecutors receive clear guidance therefore the language should be that: “disclosure obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.” | (1)The Commission continues to recommend Alt. B. (2)The Commission does not believe that either Alt. A or Alt. B would dilute the duties of counsel under the rule, add ambiguity to the rule, or provide prosecution with justifications not to comply with the rule. 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. |

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| | | | | | 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. The Commission recommends Alt. B because it believes the example is better placed in the Comment rather than the rule itself. |
| B-2017-109 | Jansen, Aaron (6-28-17) | N | A | Alt. B is the stronger and broader of the two and therefore more likely to deter prosecutors from withholding exculpatory evidence and thereby circumventing the administration of justice. | The Commission continues to recommend Alt. B. |
| B-2017-107 | Jo, Grace (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-159 | Jones, Rebecca (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-56 | Katano, Akio (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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|-----------|---------------------------------|-----------------------------|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| B-2017-32 | Katz, Joseph (6-28-17) | N | M | Adopt Alt. B with Mr. Ogul’s improved and far more effective and meaningful language. This improved modification would read: “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.” The last thing we should want is an endless debate regarding the interpretation of the word, “significant.” | See response to Alonzo, Gregory B-2017-22. |
| B-2017-80 | Kazarian, Bryan R. (6-28-17) | N | M | The duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility or witness testimony or other evidence disclosed by the prosecution. | <p>The commenter appears to request that the second sentence of Discussion paragraph [3] be revised to remove the word “significant” and the clause “on which the prosecutor intends to rely.”</p> <p><u>Commission’s Response:</u> 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</p> |

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| | | | | | 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. |
| B-2017-17 | Kelly, Patrick (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-15 | Kimpel, Amy (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-122 | Klein, Keri (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-130 | Kroger, Christine (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-145 | Krueger, Angela (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-74 | Kumaus, Michele (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-133 | Lake, Jeffrey (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-165 | Lance, Lisa (6-30-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-34 | Leff, Susan (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-20 | Linowitz, Zachary (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-120 | Lopez, Gabriela (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-57 | Madeleine (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-41 | Major, Dale (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-37 | Maloney, Marie (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-127 | Marasco, Robert (6-29-17) | N | A | No comment included. | No response required. |
| B-2017-83 | Marinho, Sarah (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-147 | Marmalefsky, Dan (6-29-17) | N | M | <p>I prefer a blend of Alt. A and Alt. B which removes use of the word “significant” but includes the example that information casting doubt on a witness’ credibility should be disclosed:</p> <p>“(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. This obligation includes the duty to disclose information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”</p> <p>The integrity of the fact-finding process should be governed by clear rules – rather than importing amorphous standards such as what is considered “significant” or whether a prosecutor</p> | <p>(1)The Commission continues to recommend Alt. B.</p> <p>(2)The Commission does not believe that either the second sentence of the rule in Alt. A or the second sentence of proposed Comment [3] in Alt. B creates a subjective standard or imposes limits that swallow the rule. 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</p> |

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| | | | | “intends to rely.” | 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. |
| B-2017-60 | Matthews, Brian (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-68 | May, Emery (6-28-17) | N | A | No comment included. | No response required. |
| B-2017-61 | Mayfield, Daniel Miller (6-28-17) | N | A | Any change here is positive, but let's remember the public trust that goes with being able to charge and convict individuals. These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution. | 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 |

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| | | | | | provisions governing discovery in California courts. |
| B-2017-79 | McCarthy, Paul (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-6 | McCarthy, Sarah B. (6-27-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-88 | McKneely, Michael (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-26 | McLandrich, Cheryl (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-101 | McMillan, Leslie Edward (6-28-17) | N | A | Neither version fully binds prosecutors to their duty under <i>Brady</i> to reveal all exculpatory evidence or evidence reflecting adversely on the credibility of their witnesses. However, there is no current State Bar ethics rule explicitly addressing prosecutors <i>Brady</i> obligations, and Alt. B is better than continuing that blatant omission from our ethics rules. | (1)The Commission continues to recommend Alt. B. (2)The Commission does not believe that Alt. B can be interpreted as limiting the disclosures required by the rule to the example set forth in the second sentence of proposed Comment [3]. 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 |

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|-----------|--------------------------|-----------------------------|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | | | <p>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.</p> |
| B-2017-59 | Mehan, Arsh (6-28-17) | N | M | <p>(1) Prosecutors should err on the side of disclosure. Alt. B is better because it is not watered down. What is the purpose of a new rule of conduct if it has no clear directive?</p> <p>(2) While Alt. B is better for this reason, it still falls short. It should include a statement that does not limit it to the listed behavior.</p> | <p>(1) The Commission continues to recommend Alt. B.</p> <p>(2) The Commission does not believe that Alt. B can be interpreted as limiting the disclosures required by the rule to the example set forth in the second sentence of proposed Comment [3]. In response to public comment, the Commission has revised the second sentence in Comment [3] to make even more</p> |

Attachment 4: Summary of Public Comments with Commission Responses

**Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
Alternative B – Synopsis of Public Comments**

| | |
|--------------------|----------------|
| TOTAL = 168 | A = 24 |
| | D = 0 |
| | M = 143 |
| | NI = 1 |

| No. | Commenter/Signatory | Comment on Behalf of Group? | A / M / NI ¹ | Comment | RRC Response |
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| | | | | | 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. |
| B-2017-106 | Meraz, Robert (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-155 | Miller, Marion (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | (1)The Commission continues to recommend Alt. B, which it believes will best further the public trust granted prosecutors to charge and convict individuals. (2)To the extent modifications are suggested to the second sentence to proposed Comment [3], see response to Alonzo, Gregory B-2017-22. |

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|------------|-----------------------------------------------|-----------------------------|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| B-2017-136 | Moller, Richard (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-35 | Moore, Christina (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-141 | Morga, Maria (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-43 | Moshier, Dominique (6-28-17) | N | A | I am opposed to Alt. A as it creates a loophole within the text of the rule which would directly contradict the purpose behind the rule. There are still problems with Alt. B, which should change the Discussion to read: “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.” | (1)The Commission continues to recommend Alt. B. (2)To the extent modifications are suggested to the second sentence to proposed Comment [3], see response to Alonzo, Gregory B-2017-22. |
| B-2017-30 | Multiple Attorneys (Levenson) (6-28-17) | Y | M | This comment includes former prosecutors, former judges, academics and other “concerned members of the criminal justice community” listing their support for the comment. (1) While we strongly endorse the addition of Rule 5-110(D) as an important step toward promoting compliance with prosecutors’ existing | (1)The Commission continues to recommend Alt. B. |

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| | | | | <p>duties to disclose evidence, we are concerned with the proposed language of both Alt. A and Alt. B.</p> <p>(2) Specifically, we are concerned with the phrase “<i>significant</i> doubt” and “<i>on which the prosecution intends to rely.</i>”</p> <p>Although Commission members indicated the added language is intended to give just one example of how the rule would be implemented, we are concerned that prosecutors may rely on it to intentionally refuse to disclose exculpatory evidence and information unless they both subjectively believe that it will cast <i>significant</i> doubt on their evidence and that they have <i>subjectively concluded</i> that they <i>will present</i> the impacted evidence regardless. Both conditions are inconsistent with existing law and invite mischief.</p> <p>We strongly urge that Alt. A be rejected and that the portion of the discussion comment discussed above for Alt. B be deleted in order to avoid ambiguity and discourage prosecutors from suppressing exculpatory evidence based on their subjective beliefs.</p> | <p>(2)The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B creates ambiguity in the rule or will encourage prosecutors to suppress exculpatory evidence based on their subjective beliefs. 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.</p> |

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| B-2017-162 | Munkelt, Stephen (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-139 | Nalls, Christopher (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-13 | Nims, David (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-2 | Office of the State Public Defender (McComb) (6-27-17) | Y | M | <p>(1) We agree that reference to “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” is properly moved to the discussion section to avoid diluting the central text of Rule 5-110(D). Since this language was intended to be an example of impeachment evidence subject to disclosure and not to define or modify the entire category of exculpatory evidence, we also agree with the additional language “These obligations include, but are not limited to ...” to make that clear.</p> <p>(2) We are concerned that using the adjective “significant” to modify “doubt” introduces an unnecessary and counterproductive element of</p> | <p>(1)The Commission continues to recommend Alt. B. The Commission agrees that the movement of the language discussing an example of information required to be disclosed under the rule is better placed in proposed Comment [3] than in the text of the rule itself.</p> <p>(2)With respect to the language of the second sentence of proposed Comment [3], the Commission does not believe that the use of the</p> |

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| | | | | <p>subjectivity to defining the prosecutor’s duty of disclosure. The word “significant” should be deleted.</p> <p>In addition, by describing the duty of disclosure as information that casts doubt on “witness testimony or other evidence on which the prosecution intends to rely,” the added language (in bold), even when relegated to the discussion section, introduces another ambiguity that could undermine the overall purpose of the rule. We believe the discussion comment would be better phrased by stating, “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts the doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”</p> <p>This would make clear that information that casts doubt on other investigatory evidence or information that has been disclosed to the defense in discovery must likewise be disclosed.</p> | <p>adjective “significant” to modify “doubt” introduces an element of subjectivity to defining the duty of disclosure. Nor does the Commission believe that use of the phrase “on which the prosecution intends to rely” introduces ambiguity that could undermine the overall purpose of the rule. 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.</p> |

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| | | | | (3) Alternatively, the second sentence should be deleted altogether from the discussion comment to avoid introducing ambiguity that could lead prosecutors to withhold exculpatory evidence based on their subject belief's about its significance or because they decide not to "rely on" the testimony or evidence that has been called into doubt. | (3)The Commission does not believe that the second sentence of proposed Comment [3] should be deleted in its entirety. The Commission believes it serves an important purpose by setting forth an example that makes clear that impeachment evidence can, in some circumstances, fall within the scope of information that must be disclosed under the rule. |
| B-2017-100 | Oien, Kara (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-49 | Olen, Jared W. (6-28-17) | N | A | While Alt. A includes initially strong, pro-disclosure language, the last clause waters down the disclosure obligation and would create significant doubt about a prosecutor's ethical duties to disclose exculpatory evidence. What does "significant doubt" mean? Why should ethical disclosure obligations be limited to only evidence upon which the prosecution "intends to rely?" This clause departs from the well-defined <i>Brady</i> standard and provides an almost complete defense to any <i>Brady</i> violation. Prosecutors as ministers of justice must ensure that a criminal defendant receives all exculpatory evidence - not just the evidence that they determine is "significant." | (1)The Commission continues to recommend Alt. B. (2)The Commission does not agree that the last clause of Alt. A would water down the disclosure obligation. 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 |

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| | | | | Please reject Alternative A. | 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. The Commission agrees, however, that placing the example in the Comment, as opposed to the rule itself, is consistent with other rules and makes even more clear that this is an example that does not limit the potential reach of the rule. |
| B-2017-28 | Orloff, Rebecca (6-28-17) | N | A | Alt. B is far superior to Alt. A. | No response required. |
| B-2017-29 | Osborne, Karen (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-112 | Panwala, Asit (6-28-17) | N | M | Alt. B is superior to Alt A. However, both versions suggest that the prosecutor must only disclose evidence that casts a “significant” doubt upon the People’s evidence. The qualifier “significant” waters down this rule and allows prosecutors an “out” by claiming that the undisclosed evidence did not create a “significant” doubt. | (1)The Commission continues to recommend Alt. B. (2)The Commission does not believe that Alt. B can be interpreted as limiting the disclosures required by the rule to the example set forth in the second sentence of proposed Comment |

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| | | | | | <p>[3]. 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.</p> |
| B-2017-72 | Pena, Katarina (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-70 | Penalosa, Miguel (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-7 | Piano, Meghan (6-27-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-73 | Picone, Christian E. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-19 | Polverino, Sam (6-28-17) | N | A | Alt. B is clearly the best alternative. Lawyers are trained to look for the answer that is the most general and least specific to advance their case. The best rule is one which leaves the least doubt as to its meaning. The objective of any rule should be to guide with the least room for doubt. Alt. B is therefore the best alternative. | The Commission continues to recommend Alt. B, which it agrees is the best alternative. |
| B-2017-110 | Post, Alexander (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-160 | Public Defender Association of San Diego County (Britt) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-124 | Public Defender, Monterey County (Chapman) (6-29-17) | Y | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-69 | Quirk, Suzanne (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-148 | Reagan, David (6-29-17) | N | M | Alt. B with modifications to increase the scope of the information required to be disclosed beyond the somewhat constrained “significant doubt” and “evidence on which the prosecution intends to rely.” | <p>(1)The Commission continues to recommend Alt. B.</p> <p>(2)The Commission does not believe that Alt. B can be interpreted as limiting the disclosures required by the rule to the example set forth in the second sentence of proposed Comment [3]. 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.</p> |

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| B-2017-40 | Rita (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-11 | Roderigues, Madelyn (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-143 | Romo, Lisa (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-16 | Ross, Kathryn (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-46 | Sage, John (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-115 | Salera, Andrew (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-135 | Saltzman, Michael (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-116 | Sandoval, Melissa (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-129 | Santana, Jesse I. (6-29-17) | N | M | I oppose Alt. A. I support Alt. B with the modifications suggested by the CACJ. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-118 | Sasnett Jr., William B. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-131 | Schmidt, Brian (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-81 | Schwartz, Ivan (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-92 | Scofield, Robert G. (6-28-17) | N | M | (1) I prefer Alt. B to Alt. A. (2) But I would delete the language in B that refers to “evidence on which the prosecution intends to rely.” Like the additional language in Alt. A, this invites people to interpret an example as the essence of the rule. In this way, the additional language in both A and B tends to dilute the rule. | (1)The Commission continues to recommend Alt. B. (2)The Commission does not believe that the second sentence of proposed Comment [3] in Alt. B can be interpreted as redefining the “essence of the rule.” 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, |

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| | | | | | 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. |
| B-2017-123 | Self, Jessica (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-84 | Sevilla, Charles M. (6-28-17) | N | M | While I support Alt. B [over] Alt. A, I agree with others who have stated that Alt. B can also be improved by rephrasing the Discussion 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 doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.” | See response to Alonzo, Gregory B-2017-22. |
| B-2017-149 | Shannon, Michael T. (6-29-17) | N | M | (1) Alt. B is preferable. (2) However, it should change the qualifying phrase “significant doubt” to “reasonable doubt,” or simply “doubt,” without qualification. Alt. B should also leave out the phrase “evidence on which the prosecution intends to rely.” That phrase greatly weakens the discovery obligation. | (1)The Commission continues to recommend Alt. B. (2)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 |

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| | | | | | 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. |
| B-2017-158 | Shea, George (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-64 | Sheppard, Laura (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-166 | Sheridan, Joanna (6-30-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-102 | Silldorf, David (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-12 | Silver, Damon (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

Attachment 4: Summary of Public Comments with Commission Responses

**Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (July 2017)
Alternative B – Synopsis of Public Comments**

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|--------------------|----------------|
| TOTAL = 168 | A = 24 |
| | D = 0 |
| | M = 143 |
| | NI = 1 |

| No. | Commenter/Signatory | Comment on Behalf of Group? | A / M / NI ¹ | Comment | RRC Response |
|------------|------------------------------------------------------------------------------------------------------|-----------------------------|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|
| B-2017-24 | Singh, Aminder (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-48 | Slentz, Matthew (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-85 | Speiser, Arlene (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-25 | Stadlin, Dmitry (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-144 | Stangle, Angela (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-99 | State Bar of California, Committee on Professional Responsibility and Conduct (Spencer) (6-28-17) | Y | A | (1) The Committee supports adoption of Alt. B. The Committee agrees that the language suggested by the Supreme Court for addition at the end of paragraph (D) (as revised by the Commission) should be moved to the Discussion section of the rule. It is the Committee's understanding, based on the materials it reviewed, that the suggested language is intended simply as an example of impeachment information that would trigger a disclosure obligation. As such, it is appropriately included in the Discussion rather than the text of the rule itself. | (1)The Commission agrees with the recommendation for adoption of Alt. B. |

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| | | | | <p>Placement of the suggested language in the Discussion will also help to avoid any confusion or suggestion that the language somehow qualifies the "tends to negate" standard articulated in the substantive text of paragraph (D). We understand that the example is not intended to qualify that standard.</p> <p>(2) We further note the Supreme Court's suggested inclusion, in Discussion subparagraph [3], of the statement "Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts," which statement is incorporated into Alternative B proposed by the RRC. We do not read this statement, or the materials prepared by the RRC, to suggest that this statement is a qualification of the "tends to negate" standard set forth in the text of paragraph (D) of the rule. Nor do we understand the statement to be a substantive move back to "Alternative 2" of the proposed rule that was issued for public comment by the RRC in May 2016. Based on that understanding, we do not object to inclusion of this statement in the Discussion.</p> | <p>(2)The Commission agrees that the fourth sentence of proposed Comment [3] is not intended either to qualify the "tends to negate" standard set forth in the rule text or to be a substantive move back to "Alternative 2" of the proposed rule that was issued for public comment by the RRC in May 2016. It is a recognition, however, that as a result of California law, the rule may not be, and is not intended to be, applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts.</p> |
| B-2017-23 | Stein, Edward (6-28-17) | N | A | I would oppose Alt. A. | No response required. |

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| B-2017-138 | Stewart-Oaten, Nick (6-29-17) | N | M | Alt. B is better than Alt. A, but is still a problem because it includes caveats regarding “significant doubt” and evidence “on which the prosecution intends to rely.” It would be far better to clarify that the obligation includes turning over evidence that the prosecution “knows or reasonably should know” casts doubt on the admissibility or accuracy of evidence against a defendant. | (1)The Commission continues to recommend Alt. B. (2)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. |
| B-2017-114 | Sugarman, Scott A. (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-91 | Taylor, Annie (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-87 | Theiss, Sara (6-28-17) | N | A | (1) I oppose Alt. A and support Alt. B. (2) Language added by the Court is problematic, i.e., “significant doubt” and “evidence on which the prosecution intends to rely...” The rule should be clear cut regarding prosecutor’s duty to make timely disclosure to the defense of exculpatory evidence and information. This language should be deleted from the rule and at most, added to the Comment as just one example of when a prosecutor is obliged to disclose evidence to the defense. | (1) The Commission agrees with the recommendation for adoption of Alt. B. (2) The Commission agrees that the example set out in the second sentence of proposed Comment [3] in Alt. B is better placed in the Comment than in the rule itself. |
| B-2017-121 | Thiagarajah, N. Fred (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-156 | Thickstun, Kathryn (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-103 | Tobler, Kelton (6-28-17) | N | M | The terms “significant” and “on which the prosecution intends to rely” in Alt. A creates holes in the proposed rule big enough for the steamroller of dubious and overzealous prosecution to proceed unhindered. Therefore, those terms should be removed from Alt. B as well. | 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 |

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| | | | | | 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. |
| B-2017-90 | Todus, Michelle (6-28-17) | N | A | No comment included. | No response required. |
| B-2017-151 | Tyler, Ronald (6-29-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-3 | U.S. Department of Justice (Goldsmith) (6-27-17) | Y | M | (1) Because both Alt. A and Alt. B impose ethical disclosure obligations on federal prosecutors that are inconsistent with their obligations under substantive law, we oppose both alternatives. We also oppose Alternative A because we agree with the Commission that the second sentence of paragraph (D) is better placed in Discussion paragraph [3]. In addition, we strongly believe that, instead of omitting any reference to cumulative disclosure of information in the Discussion, the proposed Rule should define the phrase. | (1)The Commission does not agree that Alt. A and Alt. B impose disclosure obligations on federal prosecutors “inconsistent with their obligations” under substantive law. While the rule may require disclosures of information that would not be required by Brady and its progeny, such an imposition of greater disclosure obligations is not inconsistent with Brady and its progeny, that is, it does not require disclosures that federal law expressly precludes. Indeed, 28 |

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| | | | | <p>(2) If the Commission is inclined to adopt Alt. B, we ask that it be modified, based on the Supreme Court of California’s proposed revisions and the Commission’s earlier alternate version of the proposed Rule, as follows:</p> <p>“(D) Comply with all constitutional and statutory obligations, as interpreted by relevant case law, to 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;”</p> <p>***</p> <p>“[3] Nothing in this rule is intended to be applied in a manner inconsistent with constitutional and statutory provisions governing discovery in California and</p> | <p>U.S.C. 530B expressly contemplates federal prosecutors being bound by state law ethical obligations, and the Supreme Court has recognized that ethics rules may impose disclosure obligations that go beyond Brady and its progeny.</p> <p>(2)The Commission continues to believe, for reasons previously stated, that Alt. B is preferable to “Alternative 2” of the proposed rule that was issued for public comment by the RRC in May 2016. As a result, the Commission does not agree that it should return 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.</p> <p>(3)With respect to the commenter’s proposed revision of Comment [3], the Commission continues to believe that there is no need to</p> |

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| | | | | <p>federal courts. Under California law, the disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by <i>Brady v. Maryland</i> (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny, and include the duty to disclose information that the 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. Paragraph (D) does not require disclosure of information protected from disclosure by California or federal laws and rules, as interpreted by case law or court orders. Paragraph (D) also does not require disclosure of information that the prosecutor knows is already in the possession of or previously has been disclosed to the defense, including where a prosecutor previously has disclosed the information in a different form. 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.</p> <p>[4] The exception in paragraph (D) recognizes that a prosecutor may seek</p> | <p>retain language referring to cumulative disclosures. The Commission believes that such language is unnecessary because even in its absence it is clear that the rule should not be interpreted to require the disclosure of information, or substantially identical information in a different form, that a prosecutor knows is already in the possession of the defense or has already been disclosed to the defense. Seeking discipline in such a circumstance would be contrary to the intent of the rule.</p> |

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| | | | | 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.” | |
| B-2017-47 | Valeros, Gilda (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-44 | Van Meir, Christopher (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-27 | Vinyard, Stacy (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-51 | Wasley, Kendall (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-31 | Weese, Marsanne (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-9 | Weigel, William (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |
| B-2017-45 | Weintre, Jim (6-28-17) | N | M | The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above. | See response to Alonzo, Gregory B-2017-22. |

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| B-2017-146 | Wellenkamp, Paul (6-29-17) | N | M | I am concerned with that qualifying the disclosure by the term “significant” will render the rule ineffective. Prosecutors rarely decide to withhold information they know to be exonerating. Instead, they withhold information which they assess as unimportant. Prosecutors often are not in a position to make that call, because they lack other information and because of the natural bias litigators have. For these reasons, I support CACJ’s proposed change to the Discussion: “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecutor.” | 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. |