

**STATE BAR OF CALIFORNIA  
COMMISSION FOR THE REVISION OF THE RULES OF  
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**

**DRAFT OPEN SESSION ACTION SUMMARY**

**Friday, October 23, 2015  
(10:00 am – 4:30 pm)**

**State Bar of California  
180 Howard Street  
Room 4A-C, 4th Floor  
San Francisco, CA 94105**

**Members Present:** Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co-Vice Chair); George Cardona (by telephone), Danny Chou, Daniel Eaton, Nanci Clinch, James Ham, Lee Harris, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout, and Mark Tuft.

**Advisors Present:** Wendy Chang and Hon. Richard Fybel.

**Liaisons Present:** Greg Fortescue (California Supreme Court) and Miriam Krinsky (Board of Trustees).

**State Bar Staff Present:** Allen Blumenthal (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel), Lauren McCurdy, Kevin Mohr (Consultant/Reporter), and Andrew Tuft (Office of Professional Competence).

**Others Present:** David Angel, Marcus Dombois, Nancy Haydt, Ignacio Hernandez (by telephone), Diane Karpman (by telephone), David Klaus, Stan Lampport, Prof. Laurie Levenson, Michael McDermott, Hon. Patrick McGrath, Hon. Nancy O'Malley, Michael Ogul, Hon. Jeff Rosen, Prof. Barry Scheck (by telephone), Teresa Schmidt (by telephone), Saul Sugarman, Sara Theiss, Hon. Greg Totten, Prof. Gerald Uelman, Martha Uelman, Hon. Steve Wagstaffe, William Woods, and Mark Zahner.

## **I. CHAIR'S REMARKS**

The Chair requested and staff provided: an update on the schedule of meetings, including confirmation of the Commission's next meeting as a two-day meeting on November 12 & 13, 2015; and information for obtaining rule background materials from the Commission's shared online folder; and Dropbox. Members were encouraged to retrieve and review background materials in advance of receiving formal assignment memoranda.

The Chair announced the following changes to the Commission's roster: (1) the appointment of Heather Rosing as a new Commission advisor; (2) the resignation of Winston Peters and appointment of Joan Croker; and (3) the substitution of Jason Lee for Miriam Krinsky as the new Board of Trustees liaison. The latter change facilitates Miriam Krinsky's ability to focus on Commission oversight through her role as the new Chair of the Board's Committee on Regulation and Discipline.

## **II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY**

### **a. Approval of Action Summary - Regular Meeting on September 25 – 36, 2015 (Open Session).**

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's September 25 – 26, 2015 meeting.

All members present voted yes with the exception of Mr. Harris who abstained.

## **III. ACTION**

### **a. Report and Recommendation on Rule 5-110 (Performing the Duty of Member in Government Service) (including ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor))**

The Chair provided a brief introduction and welcomed visitors in attendance. The Chair acknowledged that the Rule 5-110 (3.8) drafting team's recommendation included two alternate versions of a proposed paragraph (d) and that some visitors were present to provide input to the Commission on these alternate versions. All visitors were given an opportunity to introduce themselves and state their position on this issue. In the interest of time, the Chair asked those visitors in favor of Alternative 1 to select representative speakers and asked the same of those visitors in favor of Alternative 2. Each position was given fifteen minutes to allocate amongst their respective speakers.

The following visitors stated support for Alternative 1 of proposed paragraph (d):

Marcus Dombois, Nancy Haydt (California Attorneys for Criminal Justice), David Klaus (Alameda Public Defenders Office), Prof. Laurie Levenson (Innocence Project), Michael McDermott, Michael Ogul (California Public Defenders Association and the Santa Clara Public Defenders Office), Prof. Barry Scheck (Innocence Project), Sara Theiss (State Public Defender), and Prof. Gerald Uelman.

The following visitors stated support for Alternative 2 of proposed paragraph (d):

David Angel (Homicide Division, Santa Clara District Attorneys Office), Hon. Patrick McGrath (District Attorney Yuba County), Hon. Nancy O'Malley (District Attorney Alameda County), Hon. Jeff Rosen (District Attorney Santa Clara County), Hon. Greg Totten (District Attorney Ventura County), Hon. Steve Wagstaffe (District Attorney San Mateo County), William Woods (Los Angeles District Attorneys Office), and Mark Zahner (California District Attorneys Association).

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. Regarding the alternate versions of proposed paragraph (d), a consensus vote was taken and Alternative 1 was selected (10 yes, 2 no, 1 abstain).

After further discussion, the proposed rule submitted with the agenda was amended.

Upon motion made, seconded and unanimously adopted, it was

RESOLVED, that upon consideration of the report of the Rule 5-110 drafting team, the Commission hereby adopts the proposed amendments to Rule 5-110 [Rule 3.8] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Eaton, who voted no, and Mr. Ham, who abstained.

Mr. Rothschild presented the issue of whether the Commission should recommend that the Board prioritize consideration of this proposed rule and expedite the processing of the rule on a time-table independent of the Commission's anticipated comprehensive report and recommendation. Mr. Rothschild noted that the drafting team did not take a position on this issue. The standard adopted by the Commission for evaluating a request to expedite a rule was read by staff.

Following discussion, upon motion made, seconded and adopted, it was

RESOLVED, that Commission recommends that the Board prioritize consideration of proposed amended Rule 5-110 and expedite the processing of the rule on a time-table independent of the Commission's anticipated comprehensive report and recommendation.

All members present voted yes.

The Chair noted that the version of the rule adopted by the Commission was not in the form (e.g., rule numbering, cross references, global terminology) of the current rules and that non-substantive edits were required for expedited consideration by the Board. Following discussion, the non-substantive edits were identified and there was no objection to authorizing the staff to implement the changes in the expedited version of the proposed rule. These changes included the addition of a proposed new Discussion sentence to current Rule 5-220 that would cross reference the amended version of Rule 5-110. Both rules are attached.

#### **b. Report and Recommendation on Rule 1-100(D) (Geographic Scope of Rules).**

The Chair recognized Mr. Eaton who presented the report and recommendation of the drafting team.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(D) drafting team, the Commission hereby adopts the proposed amendments to Rule 1-100(D) [Rule 8.5] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Ham who voted no.

#### **c. Report and Recommendation on Rule 1-500 (Agreements Restricting a Member's Practice).**

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-500 drafting team, the Commission hereby adopts the proposed amendments to Rule 1-500 [Rule 5.6] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Martinez who abstained.

**d. Report and Recommendation on Rule 1-650 (Limited Legal Services Programs) (including ABA Model Rules 6.1 (Voluntary Pro Bono Publico Service), 6.2 (Accepting Appointments), 6.3 (Membership in Legal Services Organization), 6.4 (Law Reform Activities Affecting Client Interests), and 6.5 (Public Service))**

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team. Mr. Martinez introduced the team's proposals and deferred to Mr. Rothschild to present the team's recommendation on Rule 1-650.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-650 drafting team, the Commission hereby adopts the proposed amendments to Rule 1-650 [Rule 6.5] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Mr. Rothschild presented the team's recommendation for a proposed new Rule 6.1. Following discussion, a straw vote was taken to ascertain the sense of the Commission on the general concept of a rule similar to the team's proposed new Rule 6.1. The straw voted revealed that the Commission favored the general concept of a new rule concerning the provision of pro bono public legal services (11 yes, 2 no, 0 abstain).

Further consideration was continued to the next Commission meeting.

**e. Report and Recommendation on Rule 1-700 (Member as Candidate for Judicial Office).**

The Chair recognized Judge Stout who presented a brief introduction of the report and recommendation of the drafting team.

Visitor Michael McDermott asked to address the Commission on this rule and the Chair permitted him to speak briefly, with the understanding that due to the press of time the Commission's consideration and action on the rule would be continued to the next Commission meeting.

**CLOSED SESSION**

*None\**

\*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

\*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**PROPOSED RULE 1-100(D) [8.5] OF THE RULES OF PROFESSIONAL CONDUCT  
OF THE STATE BAR OF CALIFORNIA  
ADOPTED BY THE COMMISSION AT THE OCTOBER 23RD MEETING**

**Rule 1-100(D) [8.5] Disciplinary Authority; Choice of Law**

- (a) **Disciplinary Authority.** A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
  - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
  - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

**COMMENT**

*Disciplinary Authority*

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

**PROPOSED RULE 1-500 [5.6] OF THE RULES OF PROFESSIONAL CONDUCT  
OF THE STATE BAR OF CALIFORNIA  
ADOPTED BY THE COMMISSION AT THE OCTOBER 23RD MEETING**

**Rule 1-500 [5.6] Restrictions on a Lawyer's Right to Practice**

- (a) A lawyer shall not participate in offering or making:
- (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or
  - (2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.
- [(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.]
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**COMMENT**

[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.]

**PROPOSED RULE 1-650 [6.5] OF THE RULES OF PROFESSIONAL CONDUCT  
OF THE STATE BAR OF CALIFORNIA  
ADOPTED BY THE COMMISSION AT THE OCTOBER 23RD MEETING**

**Rule 1-650 [6.5] Limited Legal Services Programs**

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

**COMMENT**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See [Rule 1.2(c).] If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1), Rule 1.6 and Rule 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition,

paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows that another lawyer in the lawyer's law firm would be disqualified under Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm, paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows that any lawyer in the lawyer's firm would be disqualified under Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

**PROPOSED RULE 5-110 [3.8] OF THE RULES OF PROFESSIONAL CONDUCT  
OF THE STATE BAR OF CALIFORNIA**

ADOPTED BY THE COMMISSION AT THE OCTOBER 23RD MEETING

(NOTE: ANOTHER VERSION OF THIS PROPOSED RULE WAS ADOPTED IN THE  
FORMAT OF THE CURRENT CALIFORNIA RULES. SEE THE FOLLOWING VERSION.)

**Rule 5-110 [3.8] Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 5-120 [3.6].
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) promptly disclose that evidence to an appropriate court or authority, and
  - (2) if the conviction was obtained in the prosecutor's jurisdiction,

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

### **Discussion:**

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

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

[3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although Rule 3.8 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and Rule 3.8 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

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

[5] Paragraph (f) supplements Rule 5-120 [3.6], which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 5-120(B) [3.6(b)] or Rule 5-120(C) [3.6(c)].

[6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

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

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

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

**PROPOSED AMENDED RULE 5-110 OF THE RULES OF PROFESSIONAL CONDUCT  
OF THE STATE BAR OF CALIFORNIA**  
ADOPTED BY THE COMMISSION AT THE OCTOBER 23RD MEETING FOR RECOMMENDATION TO THE  
BOARD FOR EXPEDITED PROCESSING

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

The prosecutor in a criminal case shall:

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

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

**Discussion:**

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

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

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

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

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

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

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

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

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