

1 STATE BAR COURT
2 OF THE STATE OF CALIFORNIA
3
4 PUBLIC HEARING ON THE REVISION
5 OF THE RULES OF PROFESSIONAL CONDUCT
6

7 STATE BAR OF CALIFORNIA
8 845 SOUTH FIGUEROA STREET
9 LOS ANGELES, CALIFORNIA 90017
10 WEDNESDAY, FEBRUARY 3, 2016

11 APPEARANCES:

12 Panel Members:

13 JUSTICE LEE EDMON, Chairperson

14 GEORGE CARDONA

15 JUDGE KAREN CLOPTON

16 KEVIN MOHR

17 TOBY ROTHSCHILD

18 JOAN CROKER

19 Speakers:

20 Bob Kehr, Tobi Inlender, Jason Lee, Randall Difuntorum

21

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P R O C E E D I N G S

(10:00 a.m.)

MS. EDMON: All right. Good morning. It is about 10:00 a.m. on Wednesday, February 3, 2016, and we are here for a public hearing of the State Bar of California to receive testimony on proposed amendments to the Rules of Professional Conduct.

My name is Justice Lee Edmon, and I serve as chair of the State Bar's Commission for the Revision of the Rules of Professional Conduct.

The Rules of Professional Conduct are professional responsibility standards, the violation of which will subject an attorney to discipline. Pursuant to statute, Business and Professions Code Section 6077, the State Bar of California is charged with the responsibility of developing and adopting amendments to the rules for approval by the California Supreme Court. Amendments to the Rules of Professional Conduct do not become binding unless and until they are approved by the Supreme Court.

The State Bar staff has caused notice of this hearing to be issued by several methods, including a posting at the State Bar web site, the California Bar Journal, e-mail notifications to interested persons, a news release to the media and social media posts.

This proceeding is being audio recorded and

1 transcribed by a certified court reporter. Please speak
2 clearly and state your name when you are recognized and
3 called to testify. And if there are any intervening
4 speakers, we ask that you re-state your name, so that your
5 comments can be properly attributed.

6 This proceeding is accessible by teleconference
7 and by a video-conference link to the San Francisco Office
8 of the State Bar. Testimony may be offered by using any of
9 these systems. This public hearing has been authorized by
10 the Board of Trustees, which oversees the work of the
11 Commission, and the transcript of this public hearing will
12 be made available to the members of the Board.

13 If there is anyone here in Los Angeles or
14 attending in San Francisco, or connected by teleconference
15 who has not signed in, or otherwise informed Bar staff today
16 about an intent to speak, then I ask that you express your
17 intent now or sign in now with a Bar staff before we call
18 for the first speaker.

19 If you are here in Los Angeles and have any
20 written materials that previously have not been submitted,
21 please give them now to Lauren McCurdy of the State Bar
22 staff. She's standing right there in the doorway. If you
23 are in San Francisco, then please give them to the Bar staff
24 at that office.

25 If you are participating by teleconference, then

1 please e-mail any such materials to
2 Angela.marlaud@calbar.ca.gov. Let me spell that out for you.
3 Angela, A-N-G-E-L-A dot Marlod, M, as in Mary, A-R-L-A-U-D,
4 at calbar, C-A-L-B-A-R, dot C-A, dot gov, G-O-V. Or fax
5 them to Ms. Marlaud at 415-538-2171. I'll repeat that
6 number, 415-538-2171.

7 Supporting written materials will become a part of
8 the public record of this proceeding. In addition to this
9 public hearing, a 90-day period to receive written public
10 comment on the proposed rules has been authorized by the
11 Board, and the deadline for submission of written public
12 comment is February 29, 2016.

13 I'm going to take a moment just to introduce the
14 Commission members who are on the panel here in the dais
15 with me. To my far left is George Cardona. Next to George
16 is Judge Karen Clapton. To my right is Professor Kevin
17 Mohr. To his right is Toby Rothschild. And, finally, at
18 our far right is Joan Croker.

19 I'm going to ask that you limit your remarks to no
20 more than 10 minutes. We will have somebody be timing you
21 and we'll give you a heads-up as you start to get close to
22 your time limit.

23 And on that note, I'm going to ask Lauren, if you
24 would, please, to call our first speaker.

25 MS. MCCURDY: Okay. And the first speaker is

1 Laura Duffy.

2 MS. DUFFY: Good morning.

3 MS. EDMON: Good morning.

4 MS. DUFFY: As introduced, my name is Laura Duffy.
5 I am the United States Attorney for the Southern District of
6 California. I've been the United States Attorney since
7 2010, however, I've been a federal prosecutor since 1993.

8 I'm appearing before you this morning on behalf of
9 the four California United States Attorneys. Our offices
10 together employ over 400 federal criminal prosecutors. And
11 I mention that because proposed Rule 5-110(b) would impact
12 not only those federal prosecutors, but also other
13 department of justice prosecutors who litigate in
14 California, as well as the cases that they litigate.

15 Most of the discussion that I've seen and I think
16 that this will have on the merits of proposed Rule 5-110(d)
17 really has focused on the effects that the rule would have
18 on California state prosecutors, and the possible interplay
19 between that rule, between that rule and state law and state
20 cases. What I want to do today is add to that discussion
21 and explain what impact and effect it would have on federal
22 prosecutors and federal prosecutions.

23 Having considered the proposed rule, as well as
24 the alternate two version to the rule, the California United
25 States Attorneys endorse the alternate version. We believe

1 that it presents a more appropriate disciplinary standard
2 for all prosecutors because it accounts for the differences
3 between state and federal discovery law.

4 I want to start off by saying that the United
5 States Department of Justice takes very seriously its
6 discovery obligations, as it does its charge that
7 convictions not be won but that justice is done. And we
8 very strongly support efforts to ensure compliance with
9 discovery obligations. In fact, the Department has taken
10 many of those steps itself. Department policy's already
11 required by the prosecutors to go well beyond what is
12 required by federal discovery law, by Brady and its progeny.

13 Those policies require our prosecutors to disclose
14 anything that is inconsistent with any element of any crime
15 charged against a defendant. Those policies also require
16 our prosecutors to disclosure anything that establishes a
17 recognized affirmative defense.

18 Our policies require the disclosure of anything
19 that might cast substantial doubt on the accuracy of our
20 evidence, or that might have a significant bearing on the
21 admissibility of prosecution evidence. And these policies
22 state that in ordinary circumstances, information should be
23 disclosed regardless of materiality. These policies are not
24 identical to the proposed Rule 5-110(b), but the thrust is
25 similar.

1 Prosecutors shouldn't think in terms of
2 materiality. They should think more broadly. And the
3 Department has adopted these policies to promote our core
4 mission, which is to seek justice. And also, an important
5 part of these policies is they create a buffer. A buffer to
6 build a margin of error between our discovery practices and
7 the demands of federal discovery law, so that we can help
8 reduce the chances that any one federal case crosses over
9 that legal threshold.

10 Our concern then really is not with the broad
11 concepts behind proposed Rule 5-110(d), rather we are
12 troubled by the implementation of those concepts through the
13 application of the proposed disciplinary rule. And we think
14 it's problematic for several reasons, and there are four
15 reasons that I would like to discuss this morning.

16 First, federal discovery rules are set forth in
17 part through the Federal Rules of Criminal Procedure. A
18 committee of judges and professors, representatives from the
19 defense bar, and representatives from DOJ continually review
20 and propose amendments to those rules. And then they
21 propose those to the United States Supreme Court for
22 adoption.

23 That committee has considered repeated proposals
24 to amend the federal rules to impose discovery obligations
25 consistent with those that are proposed by your 5-110(d),

1 which does not have a materiality requirement, though the
2 committee has repeatedly rejected those proposals. So what
3 we have then is Rule 5-110(d), in effect doing what the
4 federal system itself has declined repeatedly to do. And I
5 will discuss more in a moment, but this also threatens to
6 dramatically --

7 (Phone-in caller coming in over phone.)

8 MS. DUFFY: -- it threatens to --

9 MS. EDMON: If those of you on the phone would
10 please mute your phones until we call on you, it will be
11 most appreciated.

12 MS. DUFFY: -- it threatens to dramatically impact
13 federal discovery law practice. And we would submit that,
14 respectfully, that type of a change should emanate from
15 Congress and should emanate from the federal courts. The
16 alternate version of the Rule accounts for developments
17 between state and federal law. The proposed Rule, as
18 written, does not.

19 The second point that I want to make is that Rule
20 5-110(d) will affect prosecutors differently than it will
21 affect state prosecutors -- federal prosecutors differently
22 than it will affect state prosecutors, if what the
23 California Public Defenders Association, the California
24 Attorneys for Criminal Justice, and the Innocence Project
25 say about California law, particularly discovery law, is

1 true.

2 They say that California law already requires
3 state prosecutors to disclose exculpatory information
4 consistent with 5-110(d), that is, without regard to
5 materiality. And if that's true, the proposed rule
6 essentially requires state prosecutors to no more than they
7 are currently required to do under law and policy. Federal
8 law though has no such requirement and has retained the
9 materiality standard.

10 Federal prosecutors then will be faced with
11 conflicting masters, which weighs as an additional concern
12 that I want to discuss, but it is another reason why the
13 California United States Attorneys believe that alternate
14 two to the Rule is a better construction of the Rule.

15 The introductory language, the introductory clause
16 in alternate two, which would require state prosecutors and
17 federal prosecutors to comply with their obligations to
18 disclose exculpatory evidence under existing law
19 maintains --

20 (Music playing in background.)

21 MS. DUFFY: It's okay. I'm -- I've got a first
22 grader. I'm used to like dealing with --

23 MS. EDMON: Thank you.

24 MS. DUFFY: It maintains the state prosecutor's
25 duty to disclose without regard to materiality, which is

1 what's been represented under California law. But it avoids
2 creating a conflict between the rule and federal discovery
3 law, which will uniquely in fact impact federal prosecutors.

4 The third point that I wanted to make is, the
5 Department of Justice, certainly all of the United States
6 Attorneys in California, understand and embrace that federal
7 -- that all prosecutors have a unique, different, higher
8 duty and responsibilities than other lawyers do.

9 However, incorporating this higher standard into a
10 rule of professional conduct really means that federal
11 prosecutors can be personally disciplined for discovery
12 violations even when they have completely and fully complied
13 with every word of federal discovery law.

14 And this is because under the language of the
15 proposed rule, prosecutors who fail to disclose non-material
16 information that they don't believe would tend to negate
17 guilt, might be disciplined if a disciplinary counsel viewed
18 the evidence differently than the prosecutor him or herself
19 and the federal judge who was involved in her litigation.

20 Additionally, defendants and their counsel may
21 threaten to seek personal sanctions against prosecutors
22 during litigation if a particular discovery request was not
23 fulfilled. Some say that this is not the intent of 5-
24 110(d), but the law -- or, excuse me, the rule as written
25 would allow for that.

1 And we recognize that there have been assurances
2 made, that there's no intent to use the rule in this way.
3 But those assurances don't provide us much comfort because,
4 I think we all have experienced instances in which rules and
5 other tools are used in ways that they were not intended to
6 be used.

7 MS. MCCURDY: Excuse me, Ms. Duffy. We're coming
8 up on a minute out --

9 MS. DUFFY: Okay.

10 MS. MCCURDY: -- right about now.

11 MS. DUFFY: The last point that I wanted to make
12 is that I think an accurate assessment of the proposed rule
13 has to acknowledge that as a practical matter, the rule will
14 effectively change and create a new federal discovery model,
15 one that expands a current federal discovery practice, and
16 one that adds a new arm of enforcement.

17 As far as expansion, one that expands what will be
18 produced -- what will be sought to be produced in discovery
19 by defendants, regardless of its true exculpatory value, and
20 rejecting the materiality analysis by using phrases like,
21 tends to negate and mitigates.

22 The proposed rule essentially have few, if any,
23 boundaries, and because the meaning of those terms are
24 unclear, they're going to have to be applied in the context
25 of the facts of any particular case. And absent case law,

1 or absent guidance to do that, to define the scope of those
2 terms, we -- this creates concern about whether prosecutors
3 will face the prospect of misconduct allegation for failing
4 to guess correctly what the extent of the rule is.

5 And because prosecutors may face personal
6 consequences, I think what they may tend to do, is to turn
7 over information that's not required under federal law and,
8 thus, might jeopardize turning over things that impact the
9 safety or the privacy concerns of witnesses.

10 Second, the Bar as an enforcement arm, I think we
11 can all agree that the purpose of conduct rules should be to
12 enhance the, and to build and enhance the trust the people
13 have in lawyers and our profession, and the outcome of our
14 justice system. But other courts who have considered this
15 issue have observed that it is inappropriate for federal --
16 for, excuse me, for prosecutors to be held to different
17 standards than they would be -- ethical standards and
18 substantive law standards. And that conclusion makes sense.

19 Imagine, if you will, an athlete who is trying to
20 reconcile conflicting rules by two different sets of
21 referees on the playing field. Essentially, that is what 5-
22 110 does to federal prosecutors. In every case it inserts a
23 second set of referees, the federal bar, employing different
24 rules from the federal courts that are attorneys are
25 practicing before, to enforce our discovery obligations. It

1 doesn't make sense to have two different sets of referees on
2 the same playing field.

3 Formally, I'll be making additional points in our
4 letter, and as my colleague, Deputy Director of the
5 Professional Responsibilities Advisory Office, Stacy Ludwig,
6 is going to pick up from here. We believe, alternative two
7 is the better construction of the rule, however, if the
8 Commission is inclined not to adopt or re-review alternate
9 two, we would ask that a mens rea requirement be added to
10 the proposed rule.

11 For example, one that would impose discipline only
12 if a prosecutor willfully and intentionally failed to
13 disclose exculpatory information, or one that precluded
14 discipline if, in a prosecutor's good-faith analysis, they
15 saw information falling outside the rule.

16 Thank you very much for your time. I appreciate
17 it.

18 MS. MCCURDY: Hello. In San Francisco, do we have
19 any speakers?

20 MS. HARRIS: Yes.

21 UNIDENTIFIED SPEAKER: Nobody's here yet, but I
22 know people are aware and wanted -- indicated that they
23 will be here but they have not shown up yet.

24 MS. MCCURDY: Okay. We're going to turn to the
25 telephone line. First, if those who are on the telephone

1 and intend to speak could identify yourselves, and then I
2 will call one of you.

3 Go ahead.

4 MR. ZAHNER: Hi --

5 MS. HARRIS: Hi.

6 MR. ZAHNER: Go ahead.

7 MS. HARRIS: Danielle Harris.

8 MS. MCCURDY: Danielle Harris. Go ahead.

9 MS. HARRIS: Yes.

10 MS. MCCURDY: Next?

11 MR. ZAHNER: Mark Zahner.

12 MS. MCCURDY: Okay. Next. Is that it? No one
13 else on the telephone? Okay.

14 With that, I'm going to turn --

15 MR. HERNANDEZ: Ignacio Hernandez.

16 MS. MCCURDY: Okay. Sorry. Can you say your
17 first name again?

18 MR. HERNANDEZ: Ignacio.

19 MS. MCCURDY: Okay. Thank you.

20 Okay. We are going to call Danielle Harris.

21 Please go ahead and speak.

22 MS. HARRIS: Thank you. My name, as I said, is
23 Danielle Harris. Thank you for the opportunity to speak to
24 the proposed amendments to Rule 5-110.

25 I fully support the proposed revision to 5-110(d),

1 and urge its adoption at the soonest possible time. I
2 cannot, however, support the amendment in 5-110(a), and urge
3 a return to the original language.

4 I am a Deputy Public Defender and one of two
5 managing attorneys for the felony unit of the San Francisco
6 Public Defender's Office. I have been trying criminal cases
7 in San Francisco Superior Court since 1999. I continue to
8 do so, and now also co-supervise a group of 36 felony trial
9 lawyers as well.

10 The State Bar should approve the proposed Rule 5-
11 110(d) as recommended because it clearly explains the duty
12 of prosecutors to disclose all exculpatory evidence as
13 California statute and decisional law requires.

14 My personal experience is that state discovery
15 violations are rampant, as Justice Kozinski has now famously
16 said, prosecutors will, quote, "keeping doing it because
17 they have state judges who are willing to look the other
18 way," unquote.

19 Until the courts start routinely reporting
20 prosecutors for discovery violations, the Rules of
21 Professional Responsibility are of admittedly limited use.
22 But a rule which clearly and accurately states the
23 prosecution's duty is the least we can do.

24 The California Supreme Court made the state's
25 discovery obligation plain in its 2010 Barnett decision.

1 The court stated Penal Code Section 1054.1(e), "requires a
2 prosecution to disclose any exculpatory evidence, not just
3 material exculpatory evidence."

4 If there was an ambiguity about the statement in
5 Barnett, it was eliminated in last year's People v. Cordova,
6 quote:

7 "California reciprocal discovery
8 statute requires the prosecution to
9 provide discovery of any exculpatory
10 evidence. This provision requires the
11 prosecution to provide all exculpatory
12 evidence, not just evidence that is
13 material under Brady and its progeny,"
14 unquote.

15 The proposed amendment to Rule 5-110(d) simply
16 catches the rules up to the existing state of the law.
17 Despite these repeated directments, the discovery violations
18 continue. A colleague of mine, one of the attorneys I've
19 supervised, just tried a three-strikes case in which the
20 prosecution failed to disclose that an incriminating
21 fingerprint was run through the state database and did not
22 match her client.

23 Another colleague last year tried a felony battery
24 and resisting police case, where the prosecution failed to
25 disclose that the alleged victim/officer had been recently

1 disciplined for using excessive force. In the last two of
2 four cases I have personally tried, I have had my request
3 for late discovery jury instructions granted.

4 Further, my years in the trial courts have taught
5 me that the prosecutors are not good at judging what is
6 material. Time and time again we see juries strenuously
7 disagreeing with the prosecution's opinion about the
8 significance of certain evidence shown clearly by acquittals
9 and convictions or severely reduced charges. Just one case
10 example shows as much.

11 I've represented David in a street robbery case.
12 There were three eye witnesses, the victim and two
13 bystanders. One bystander followed the thief and saw him go
14 into a building. A few minutes later he saw David emerge
15 and the police then stopped David, as a bystander's behest,
16 finding on David the stolen laptop. But both the victim and
17 the other bystander told police that David was not the
18 thief.

19 Despite the fact that two out of three eye
20 witnesses exonerated David of the robbery, the state
21 insisted on prosecuting and would only settle if David pled
22 guilty to robbery for a five-year prison sentence.

23 We went to trial, and David, without testifying,
24 thus, on the strength of the two eye witnesses, was
25 acquitted. Apparently the DA's office did not think that

1 the testimony of two exonerating witnesses was material.
2 That it would affect the outcome of the case. The jury
3 obviously disagreed.

4 As the Court of Appeal said just recently in
5 Lewis, quote:

6 "We think it worth reminding
7 prosecutors that their criminal
8 discovery obligations are broader than
9 their Brady obligations. And that the
10 People's interest is not to win
11 convictions, but instead to ensure that
12 justice is done."

13 The proposed Rule 5-110(d) will serve as another
14 such reminder and help to ensure that juries hear all
15 significant evidence as determined by the court, not solely
16 by the prosecution. If prosecutors are to set justice as
17 the goal, the rule should be about adopted.

18 I will turn now to the proposed Rule 5-110(a).
19 The proposed revision in (a) should be rejected as it
20 substitutes a subjective standard for an objective one. The
21 current version of the Rule reads:

22 "A member in government service
23 shall not institute or cause to be
24 instituted criminal charges when the
25 member knows or should know that the

1 charges are not supported by probable
2 cause.

3 If after the institution of
4 criminal charges, the member in
5 government service having responsibility
6 for prosecuting the charges becomes
7 aware that those charges are not
8 supported by probable cause, the member
9 shall promptly so advise the court in
10 which the criminal matter is pending."

11 The revised version makes two substantive changes.
12 It eliminates the phrase, "or should know." It changes,
13 "knows or should know," to read simply, "knows." And
14 second, it removes any kind of temporal reporting
15 requirement. Both changes should be rejected in favor of
16 the existing rule.

17 The individual prosecutor must be held to the
18 standard of a reasonable prosecutor. Maintaining the
19 existing knows or should know language ensures as much.
20 Knows or reasonably should know would do the same. Both
21 standards are used throughout the Rules of Professional
22 Conduct.

23 For example, knows or should know is used to
24 define member obligations in Rule 3-410, 5-210, 3-200 and 3-
25 700. Knows or reasonably should know is used in Rule 1-311,

1 3-310, 5-120. So the State Bar Court has said that, quote,
2 "an attorney simply may not adopt ostrich-like behavior to
3 avoid his or her professional responsibilities." The
4 revised rule can be interpreted to allow as much.

5 A prosecutor has a duty to seek, maintain and
6 absorb information needed to be well-informed about cases.
7 A prosecutor who fails to do so may act willfully or
8 negligently. Neither can be sanctioned. But this is
9 especially true given that the probable cause standard is so
10 much lower than the criminal trial standard. It could
11 indeed be credibly argued that a prosecutor should not be
12 permitted to proceed to trial unless there is a reasonable
13 belief and proof beyond a reasonable doubt.

14 That the model rules that knowledge can be
15 inferred from the circumstances does not solve the problem.
16 A negligent prosecutor could fail to do the work required to
17 have an adequate level of knowledge about a case. That
18 prosecutor would not know the case, and his knowledge could
19 not be inferred from the circumstances without reference to
20 a reasonable prosecutor standard.

21 MS. EDMON: Ms. Harris, you have one more minute.

22 MS. HARRIS: As it stands, the currently language,
23 utilizing the knows or should know language makes clear that
24 a prosecutor must act as a reasonable prosecutor should.
25 And the requirement of prompt reporting when probable cause

1 does not exist makes clear that the state has a duty to act
2 quickly to ensure that no one faces criminal charges when
3 probable cause is lacking. The proposed revision of Rule 5-
4 110(a) waters down an already minimal obligation, and should
5 be rejected.

6 In conclusion, as this federal and state appellate
7 court see it repeatedly necessary to remind prosecutors of
8 their role in the system, the State Bar should do its part
9 by adopted a clear rule, holding the prosecution to its
10 discovery obligation. The proposed Rule 5-110(d) says
11 exactly that and should be adopted.

12 Conversely, the current version of Rule 5-110(a)
13 holds prosecutors to the standard of a minimally reasonable
14 prosecutor and requires action without delay when a charged
15 case is not supported by probable cause. These minimal
16 obligations should not be tempered, and the proposed
17 revision of Rule 5-110(a) should be rejected. Thank you.

18 MS. EDMON: All right. Thank you very much.

19 If I could ask, please, the folks on the
20 telephone, if we could ask you to moot -- mute your phones.
21 We are getting some feedback in the sound, so that it makes
22 it difficult to hear. So if you could mute until we call
23 you, that would be very helpful.

24 I'm going to take the prerogative here of the
25 chair just for a moment to acknowledge some additional

1 Commission members who are in the audience. We have with us
2 Bob Kehr (phonetic), with Tobi Inlender (phonetic) who is
3 our public member. We also have with us Jason Lee
4 (phonetic), who is our liaison to the Board of Trustees.
5 And finally, Randy Difuntorum, who is the Director of the
6 Office of Professional Competence at the State Bar, and he
7 is the lead staff for the Commission. So thank you all very
8 much for being here as well.

9 On that note, Lauren.

10 MS. MCCURDY: Okay. We're going to go ahead and
11 turn to San Francisco because that registrant is here. And
12 so, go ahead, Richard Falk (phonetic).

13 MR. FALK: Okay. I'm involved in -- I'm here to
14 comment on proposing a new rule for prosecutors. And it's
15 based on the code for the Crown Prosecutors in the case. In
16 their system it's 6.3 that says:

17 "Prosecutors should never go ahead
18 with more charges than are necessary
19 just to encourage a defendant to plead
20 guilty to a few."

21 The same way, they should never go ahead with a
22 mysterious charge just to encourage a defendant to plead
23 guilty to a less serious one.

24 The purpose of that rule, and I'm proposing that
25 rule to be incorporated into our system, is primarily the

1 problems with the plea bargaining process. There are dozens
2 if not hundreds of papers on the plea bargaining process and
3 the problems with it. And I have listed just a few of them,
4 and I want to just read a few statements from some of them,
5 just to get some flavor of aptitude supporting why the rule
6 would be important.

7 One is from Judge Rakoff that wrote:

8 "The drama inherent is regularly
9 portrayed in movies and television
10 programs as an open battle played out in
11 public before a judge and jury..."
12 In other words, trial.

13 "...but this is all a mirage. In
14 actuality, our criminal justice system
15 is almost exclusively a system of plea
16 bargaining, negotiated behind closed
17 doors and with no judicial oversight.
18 The outcome is very largely determined
19 by the prosecutor alone."

20 There are in, of course, some of the papers,
21 there's one called, "Incompetent Plea Bargaining and
22 Extrajudicial Reforms" by Stephos Bibas. And in there, it's
23 just a short quote, but:

24 "Today grand juries are rubber
25 stamped. The chief juries are absent in

1 most cases, and prosecutors use
2 mandatory and minimum -- mandatory
3 minimum and maximum sentences to try to
4 scam. Charging is now convicting, which
5 is sentencing. Plea bargaining itself
6 has undermined these checks and
7 balances, and judges need to use their
8 remedial powers to restore some
9 semblance of balance, however
10 imperfect."

11 Another paper, (indiscernible), we can have
12 defendants who plead guilty, by John Blume and Rebecca Helm
13 from Cornell Law School University. Just one sentence I
14 want to quote:

15 "In today's plea-driven market,
16 prosecutors have incentives to
17 overcharge in order to start bidding, so
18 to speak."

19 Let's see. There were studies done for what
20 happens in a plea bargaining process. There was a study
21 that Etchings (phonetic) and Durbin (phonetic) had set up at
22 -- I'm not sure which university it was. But they had
23 college students enrolled in a logic study.

24 If a student admitted that they cheated, they
25 would lose their promised compensation for participating in

1 the study. If they didn't admit, and an academic review
2 board found them guilty, they'd not only lose their
3 compensation but their faculty advisor would be informed,
4 and they'd be enrolled in mandatory ethics course.

5 The first setting, over half, 56.4-percent of the
6 students were wrongfully accused of cheating chose to plead
7 guilty. So -- because part of the difficulty is, after-the-
8 fact it's difficult to discover the true number of innocent
9 people that have been, you know, plead guilty, unless
10 there's evidence clearing undoubtedly nothing -- you know,
11 something unusual. So these studies that there doesn't seem
12 (indiscernible).

13 Another paper, Why Should Prosecutors "Seek
14 Justice"?, from Bruce Green. I think this is the one that's
15 historical -- yeah. This one is -- so what I did is I
16 looked back in history to find out when did things start
17 getting, you know, turning to be more of a problem.

18 And this paper was from 1998, and it wasn't as bad
19 then, apparently, because the characteristic of plea
20 bargaining in the system was such where many prosecutors
21 took pride in the balance of the role that they had and the
22 power that they had. And in seeking justice, which, of
23 course, is a duty of prosecutors.

24 But there were hints in that paper of issues with
25 the plea bargaining coming up, and the paper basically was

1 trying to go through the history of where the power of the
2 prosecutor comes from and what they represent, how they
3 represent the government and --

4 "Because the prosecutors are not
5 themselves the client, but merely
6 representatives of the deponent, they
7 must act in accordance with the client's
8 objective..."

9 I'm quoting now,

10 "...as reflected in the
11 constitution and statutes, as well as
12 history and tradition. Thus,
13 prosecutors are expected to employ
14 judgment and restraint in making these
15 decisions no matter that the principals
16 governing the prosecutor's decision-
17 making, for example, principals of equal
18 treatment and proportionality, which are
19 unrelated to the prosecutor's superior
20 power, may be elusive and ill-defined."

21 There was another quote. I don't have it in front
22 of me, but was one that I note that the -- it basically
23 commented that the limitations of the prosecutorial power,
24 particular with respect to the plea bargaining process and
25 not over-charging as well, is lacking, sorely lacking in the

1 Rules of Professional Conduct. And I would -- but I don't
2 have that here, so I apologize for that.

3 The other thing I looked up was the F.B.I.
4 statistic for the percent of crimes cleared by arrest or
5 exceptional means, and it varies by the type of crime,
6 anywhere from 11-percent to 62-percent. So the point there
7 that I'm making, is that it's not as if we're actually
8 solving all crimes, and that the power for plea bargaining
9 is, you know, a necessary element. A lot of crimes go
10 unsolved.

11 So if you're going to have a legal system, let's
12 have it be fair, and let's have it do it right. And if you
13 miss, you know, the few criminals, because you don't have
14 sufficient evidence, you know, get away with it, you know,
15 odds are that career criminals will try it again and they'll
16 get caught the next time. That's basically what
17 (indiscernible). So, it's better to do that than to have
18 innocent people plead guilty and go to jail and so on.

19 So, that is the extent of my comments, except for
20 to say that I personally experienced this issue, not from
21 plea bargaining myself, but from being a juror on a jury
22 trial. I did make similar comments with that regard back in
23 2006 in the rules of professional conduct hearing at that
24 time. There were other rules being looked at the time, but
25 this, the basic issues there were, there's a focus on

1 winning cases, and that focus, when you take it extremes,
2 is, it's abusive.

3 The personal extremes I had was that the jury
4 trial, as a member of the jury, and there were 56 counts
5 initially that the prosecutor had put forth. And,
6 fortunately, the judge by the end of the trial threw out 48
7 of those. (Indiscernible) but how long was taken to go
8 through all those?

9 They were -- particularly to these other 48 that
10 were thrown out, were certain types of securities law, and
11 it was being applied in a somewhat extreme ways or unusual
12 way that knocked them down to (indiscernible). So, if you
13 gave it some measure of the extreme way that prosecutors
14 would throw out their charges and, you know, the person in
15 the --

16 (Phone-in callers coming in over phone.)

17 UNIDENTIFIED SPEAKER: Yeah, but I left it over at
18 the new place.

19 MR. FALK: Okay. Somebody's on the --

20 MS. EDMON: Let me ask again, please. If you
21 could mute your lines. We're hearing voices.

22 You may proceed, Mr. Falk.

23 MR. FALK: So the defendant in this case had --
24 was a, what do I call it, a secondary player. It was a huge
25 securities law, like a billion-dollar valuation in the

1 internet case. There was a main person or a main person
2 that pled, and only got 14 months. Whereas, this person,
3 the book was thrown at them even though they were secondary
4 player, primarily because she had the -- was able to on the
5 side collect money, and I think the prosecutor was trying to
6 recover money. It didn't work, but it just, it showed -- as
7 a jury member, you know, we're all looking at it just like,
8 this really unfair, and the prosecutors were abusing their
9 power. So that was back in early 2006.

10 So, that's the extent of my comments. Please
11 consider all future -- you should look at the rest of the
12 Crown Rules as well. This is just one I picked out that fit
13 very nicely and very (indiscernible). The whole Crown Rules
14 and the way they deal with prosecutors and stuff, I think
15 should be looked at. Thank you very much. Do you have any
16 questions?

17 MS. EDMON: I think we have none. Thank you very
18 much.

19 MR. FALK: Okay.

20 MS. MCCURDY: In Los Angeles, our next speaker is
21 Stacy Ludwig.

22 MS. LUDWIG: Good morning. I am Stacy Ludwig. I
23 am the head of the Department of Justice's Professional
24 Responsibility Advisory Office. That's the U.S. Department
25 of Justice. And our office is responsible for providing

1 advice and training to all, approximately 10,500 Department
2 of Justice attorneys --

3 MR. BROWN: I'm sorry to burst in, but on the
4 phone we can't hear anything.

5 MS. EDMON: Okay. If I could ask you --

6 MR. BROWN: And I'll go back on mute.

7 MS. EDMON: Thank you.

8 If I could ask you to speak up, Ms. Ludwig.

9 MS. LUDWIG: Okay. Do you want me to start again
10 because they didn't --

11 MS. EDMON: Why don't you do that, and if you
12 could maybe raise your mic a bit, that might help.

13 MS. LUDWIG: My name is Stacy Ludwig. I am the
14 head of the U.S. Department of Justice's Professional
15 Responsibility Advisory Office. And our office is
16 responsible for providing all Department of Justice
17 attorneys, approximately 10,500 attorneys, advice and
18 training on the State Rules of Professional Conduct.

19 And having worked myself in the professional
20 responsibility arena for a number of years on committees
21 like the one today, I certainly appreciate the challenges
22 that the committee has in trying to assimilate all the
23 various concerns and try to come up with a proposed rule
24 that really balances all of the relevant interest.

25 The Department supports the alternative version of

1 proposed Rule 5-110(d). The -- we believe the alternative
2 version better satisfies the policy considerations and
3 guiding principles set forth by the California Supreme Court
4 and the Commission's charter. It creates clear and
5 enforceable disciplinary standards by linking ethical
6 obligations to substantive legal obligations whether imposed
7 by the California Supreme Court or under federal law.

8 It accounts for the differences between state and
9 federal substantive disclosure law. And to the extent that
10 the California law requires disclosure of favorable
11 information without regard to materiality, the alternate
12 version enforces that requirement. It also properly
13 incorporates applicable federal standards and holds
14 prosecutors accountable for adhering to those standards.

15 The alternate version eliminates ambiguities and
16 uncertainties by using language that provides specific
17 guidance, whereas the proposed rule conflicts with carefully
18 balanced federal law, and uses undefined terms. The
19 alternate version uses precise terms that are tied to
20 substantive legal requirements and the case law interpreting
21 those requirements.

22 In contrast, the proposed rule uses vague and
23 undefined terms, "tends to negate guilt, or mitigated the
24 offense," without tying the terms to any specific
25 definitions, so that will lead to uncertainty in

1 application.

2 The alternate version incorporates by specific
3 reference a well-defined and developed body of law and
4 accounts for evolution of substance of law over time. The
5 alternate version also promotes confidence in the legal
6 profession and the administration of justice, and provides
7 adequate protection to the public by holding prosecutors
8 personally accountable for failure to comply with their
9 legal obligation.

10 Although we think the alternative version is the
11 better choice, if the Commission determines to adopt the
12 proposed 5-110(d), we respectfully request that it
13 incorporate an intentionality requirement into the rule.

14 Although we understand that the rule's proponents
15 do not intend for it -- the rule to be used as a tactical
16 weapon against prosecutors, the risk exists, especially to
17 federal prosecutors who have different obligations under
18 federal law.

19 At least one court, the Wisconsin Supreme Court,
20 in *In Re Wright*, has recognized the potential for abuse of
21 the rule as a litigation tactic. Adding an intentionality
22 requirement will avoid this, and also accord with the
23 proponent's position that the rule is not intended to be a
24 trap for well-meaning prosecutors.

25 There are three jurisdictions already, Alabama,

1 the District of Columbia and Massachusetts, that have or
2 will have an intentionality requirement in the rule. In
3 addition, although the Colorado rule does not have an
4 intentionality requirement --

5 MR. BROWN: We're not able to hear anything on the
6 audio conference.

7 MS. EDMON: Okay. Who is speaking?

8 MS. LUDWIG: Let me try --

9 MR. BROWN: Sorry. This is Robert Brown from the
10 San Bernardino County District Attorney's Office. We cannot
11 tell if anything is going on because we cannot hear
12 anything.

13 MS. MCCURDY: Can you hear now? Can you hear it
14 now? Hello? On the phone, can you tell me if you can hear
15 my voice?

16 MR. BROWN: Now I can hear you.

17 MS. EDMON: But I don't hear the speaker.

18 MS. MCCURDY: Okay. We --

19 MR. BROWN: I can hear you speaking. We cannot
20 hear anything at the moment still.

21 MS. MCCURDY: Okay. Let's try this again. We've
22 got a riser on the mic. Go ahead. Sorry.

23 MS. EDMON: All right. We have replaced the mic.
24 Ms. Ludwig.

25 MS. LUDWIG: Yes. As I was saying, there are

1 three jurisdictions, Alabama, the District of Columbia and
2 Massachusetts, that have or will have an intentionality
3 requirement in the rule. In addition, although the Colorado
4 rule doesn't have an intentionality requirement, the court
5 has read an intentionality requirement into the rule.

6 Other courts have also stated or suggested that
7 prosecutors will not be disciplined absent a showing of
8 intent, even where the rule itself does not contain an
9 intentionality requirement.

10 In addition, it is not inconsistent to add a mens
11 rea requirement to the rule. A number of the other proposed
12 rules also contain an intentionality requirement, proposed
13 Rule 1.1 on the duty of competence:

14 "A lawyer shall not intentionally,
15 recklessly, with gross negligence or
16 repeatedly fail to perform legal
17 services with competence..."

18 Proposed Rule 1.3:

19 "...A lawyer shall not
20 intentionally, recklessly, with gross
21 negligence or repeatedly fail to act
22 with reasonable diligence in
23 representing a client..."

24 And also proposed Rule 8.4(c):

25 "...It is professional misconduct

1 for a lawyer to engage in conduct
2 involving dishonesty, fraud, deceit,
3 reckless or intentional
4 misrepresentation."

5 We also respectfully request adopting a safe-
6 harbor provision to the rule. One that would recognize that
7 prosecutors who make a reasonable decision under the
8 circumstances will not be disciplined. Currently, the safe-
9 harbor provision only applies to 5-110(g) and (h), and is
10 found in a comment.

11 We think that substantive information should be in
12 the rule itself, rather than simply in an interpretative
13 comment, and there's no principal reason, we respectfully
14 think, to exclude (d). Again, it accords with proponent's
15 position that the rule is not intended to be a trap for
16 well-meaning prosecutors.

17 And I also point out that another one of the
18 proposed rules, proposed Rule 8.5(b) (2), that deals with the
19 choice of law provision, and as we all know, is lawyer's
20 choice of law, is very difficult at times to figure out.
21 And that, I believe, is one of the reasons there is a safe-
22 harbor provision, so that a lawyer who guesses wrong with
23 respect to choice of law will not be disciplined.

24 Similarly, the decision with respect to precisely
25 what information should be turned over, can be very

1 complicated. And likewise, there also should be a safe
2 harbor to recognize that prosecutors who do their best job,
3 and have a reasonable belief that they've turned over
4 everything that should be turned over, should not be
5 disciplined.

6 I also want to talk about another version -- part
7 of the rule, and that is, proposed Rule 5-110(g) and (h).
8 And the Department also supports the alternate version of
9 those rules, because we also think that alternative versions
10 of 5-110(g) and (h) better satisfy the policy considerations
11 and guiding principals set forth by the California Supreme
12 Court and the Commission's charter.

13 It creates a clear and enforceable disciplinary
14 standard. It distinguishes between situations where a
15 prosecutor is personally involved in a case, or the
16 prosecutor's office is personally involved in the case, as
17 opposed to the proposed rule, which may leave any prosecutor
18 having to make the decision who does not have any knowledge
19 of or access to information about the case.

20 The proposed rule also promotes disclosure by
21 requiring a prosecutor to assume that evidence is true, and
22 that the information should be evaluated only based on the
23 element of the crime, of the convicted offense.

24 The proposed rule eliminates ambiguities and
25 uncertainties. The proposed rule actually may undermine

1 disclosures by requiring prosecutors to make assessments
2 about whether evidence is new, credible and material, terms
3 which are not defined in the rule and comments. And such
4 assessments may be impossible for prosecutors who do not
5 have knowledge of or access to additional information about
6 the case to make, for example, prosecutors in other
7 jurisdictions.

8 We also think that all of the substantive
9 information should be continued in the rule. The proposed
10 rule relies too heavily on the comments to define a
11 prosecutor's obligations, rather than incorporating all
12 substantive information into the rule itself.

13 I think, importantly, that there are only two
14 other jurisdictions that have adopted Model Rule 3.8(g) and
15 (g) verbatim, that is, Idaho and West Virginia. There are
16 approximately 12 other states that have adopted (g) and (h),
17 but notably, those states have modified (g) and (h) because
18 of the ambiguities in the rule and some of the
19 impracticalities of the rule.

20 We ask that if the proposed rule is adopted, that
21 the safe-harbor provision be included as a separate,
22 enumerated provision of the rule, rather than included in
23 the comment.

24 In conclusion, I'd like to say that the
25 alternative version of 5-110(d) holds prosecutors personally

1 accountable for complying with their obligations to disclose
2 exculpatory and impeachment evidence under carefully
3 balanced state and federal law, and provided added
4 flexibility by automatically incorporating any changes to
5 the law as interpreted by the courts.

6 The alternative version of 5-1011(g) and (h) also
7 avoids ambiguity and impracticality of the proposed rules
8 and encourages prosecutors to disclose potentially
9 exculpatory evidence to those persons who are in the best
10 position to assess and act on the evidence.

11 We will address our points further in more detail
12 in our written submissions. I thank you for allowing the
13 Department of Justice to provide comments to you today.

14 MS. EDMON: Thank you very much.

15 MS. MCCURDY: We are going to turn to the phone
16 participants, and the next speaker will be Mark Zahner.

17 Go ahead.

18 MR. ZAHNER: Hi. Can you hear me?

19 MS. MCCURDY: Yes.

20 MS. EDMON: We can.

21 MR. ZAHNER: Okay. Thank you. I'm Mark Zahner.
22 I'm with the California District Attorneys Association, and
23 I'm here representing the interests of the California
24 District Attorney Offices throughout the State.

25 I am not going to reiterate everything that the

1 representatives from Department of Justice had to say, and
2 I'm here really to address 5-110(b), but would -- I
3 completely agree with the points that they brought up in
4 regard to 5-110(d).

5 I think prosecutors up and down the state all
6 understand that there is a desire for California to adopt
7 new disciplinary rules. I am left sometimes with the
8 impression that our position on this is being interpreted
9 as, we don't think there should be a 5-110(b) at all.
10 That's not the case. There's no problem with 5-110(b) as we
11 asked to have it adopted in alternative two. But we feel
12 that that is a very fair and easy to understand rule.

13 If I could reflect on the representative from the
14 public defender's office -- had to say, she gave an example
15 of a case where there may have been violations of California
16 law in regard to discovery. And should alternative two be
17 adopted, that person would be as amendable, would be
18 completely amenable to discipline by the State Bar.

19 There is absolutely no desire on our part to
20 escape discipline for following -- or for failing the follow
21 California law. The only problem we have with the existing
22 rule as it is currently written, is it introduces
23 fundamentally a term of art, "tends to negate," and
24 prosecutors are just left to try to interpret what that
25 means. Does it mean Brady? Does it mean current California

1 case law? Does it mean 1054.1, to follow Barnett or
2 Cordova?

3 Alternative two --

4 (Phone-in callers coming in over the phone.)

5 UNIDENTIFIED SPEAKER: We're not wrapping the
6 glass stuff in the kitchen.

7 MR. ZAHNER: Okay. I wasn't thinking so, but that
8 was -- I'll continue --

9 MS. EDMON: Okay.

10 MR. ZAHNER: There's a big roll.

11 MS. EDMON: Glass wrappers.

12 Folks --

13 MR. ZAHNER: Should I go on?

14 MS. EDMON: Folks on the telephone, we are hearing
15 discussion in the background about glasses in the kitchen.
16 And we really need you to try to mute your phones so that
17 the speaker can be heard.

18 All right. You can proceed, Mr. Zahner.

19 MR. ZAHNER: Okay. Thank you very much.

20 Let me read where I was. So I -- the problem we
21 had continued to have -- and we, too, are going to submit
22 something in writing by the end of the month. It's really
23 on our part a failure to understand the problem with
24 alternative two. It seems to fit.

25 The Commission's desire is to have us follow

1 California law and understand that it means something beyond
2 Brady, that it means what Barnett says, and what Cordova
3 says and what 1054.1 and all the case law out there has to
4 say. And that's absolutely acceptable. However, that's not
5 what the current rule says. It establishes some other
6 standard by which prosecutors have to act. And we see that
7 as expanding California law, discovery law, through the
8 disciplinary process, which I don't suspect this body really
9 wants to do. That that's not their goal here.

10 So -- and, like I say, I really don't want to
11 reiterate everything that everybody had to have said so far,
12 but it seems that when this rule is interpreted in other
13 jurisdictions, there are some jurisdictions that are saying,
14 well, surely it means within the context of existing law.
15 And then there are other jurisdictions that say, no, it
16 doesn't mean within the context of existing law.

17 And so, just by looking at what other states have
18 done with this rule so far, the states that have adopted
19 this and had time to actually interpret what it means and
20 have people brought up on disciplinary action.

21 There's ambiguity when you look nationally at what
22 this rule even means unless it has that language that we're
23 suggesting, which would put it in the context of existing
24 case law. We think that it interjects ambiguity. It's
25 unclear for prosecutors, who are left wondering, well, what

1 the heck do I do? Do I follow the law and then end up in
2 trouble at the end of the day?

3 And that is, ultimately, an unfair and an unclear
4 position for prosecutors to be in. Everybody wants
5 prosecutors to be absolutely spot-on with the delivery of
6 discovery, to make sure that everything that's legally
7 required is delivered. And prosecutors, CDAA's, the elected
8 district attorneys throughout the state have no objection to
9 that, but that is not what is achieved with the adoption of
10 the rule as it currently stands.

11 And we would just continue to urge the adoption of
12 alternative two, or the content that was discussed
13 previously of the safe harbor, and was discussed by the
14 Commission some weeks ago and rejected. That would be an
15 equally attractive alternative. And with that, I am done
16 with my comments.

17 MS. EDMON: All right. Thank you very much, Mr.
18 Zahner.

19 MR. ZAHNER: All right. And I'm going to go on
20 mute and do nothing with it.

21 MS. EDMON: Thank you so much.

22 MS. MCCURDY: Okay. I don't believe there are
23 currently any speakers in San Francisco. So we're going to
24 return to Los Angeles, and then next speaker is Robert
25 Belshaw.

1 MR. BELSHAW: Can you hear me? I want to make
2 sure we're not having another problem here. Can I move this
3 up a little bit?

4 MR. BROWN: I can hear you on the phone.

5 MR. BELSHAW: Okay. Okay. Thank you very much.
6 I want to make sure you could hear me.

7 MS. EDMON: Thank you.

8 MR. BELSHAW: Yes. My name is Robert Belshaw.
9 I'm a former Bar member. I resigned with pending charges in
10 2003. I served as an arbitrator, mediator, volunteering
11 otherwise with the L.A. Superior Court. I was a judge pro
12 tem on Englewood for short period of time.

13 And I'm bringing to you a little bit of a
14 different perspective on this, because I'm a convicted
15 felon. I cannot visit my daughter when she's in jail. I
16 basically cannot work. I am eligible to return to State
17 Bar, but mentally and other reasons, I'm not really able to
18 do so right now.

19 I suffer from post traumatic stress disorder from
20 having been molested in the county jail. So the reason why
21 I submitted a rather lengthy, which you -- summary of what
22 occurred, is because my case runs the gamut of Brady
23 violations and other types of unethical conduct.

24 I do not want to repeat what other people have
25 said here today. I certainly agree that the rules need to

1 be clarified, however, when you make too many rules,
2 particular mens rea requirements and safe harbor
3 requirements, that leaves things further open to
4 interpretation. And district attorneys, with all due
5 respect, they have ways of getting around those things. If
6 you look at materiality, it's very easy for them to say, it
7 was not material in many ways. So, obviously, I support
8 whatever version that they have which will require
9 prosecutors to pursue matters with probable cause and good
10 faith.

11 I was arrested on 20 counts of insurance fraud.
12 The police report clearly indicated that I had nothing
13 whatsoever to do with the fraud. Even the masterminds
14 behind the suits, swoop and squat accidents, wrote in the
15 report, I had nothing to do with it. But as Mr. Falk
16 pointed out, I was made to withstand charges. I had no
17 prior Bar discipline. I resigned under pressure, and I was
18 strapped with a Bar panel attorney, who I believe did not
19 comply with Strickland. He basically teamed up with the
20 prosecution.

21 So one of the things that I do mention in my
22 summary is how jurists sometimes and prosecutors, they
23 acquiesce in these Brady violations. One of the egregious
24 things that happened in my case was subordination of
25 perjury. And in Brady matters, it just does not mean

1 documents. It could mean witnesses. And there's a lot of
2 Brady witness problems.

3 Typically, a prosecutor will offer some sort
4 consideration, but tell them that they do know what the deal
5 is until after they've testified. So when they testify,
6 they testify that, no, I have not offered consideration yet,
7 but it is a way to taint the testimony.

8 In my case, I personally witnessed two forms of
9 attempted subordination of perjury, and one was by the
10 district attorney himself. His name is in the papers that I
11 have submitted.

12 Mid-trial I was seated in the hallway, and there
13 were six insurance adjusters seated across the hall. And
14 the district attorney asked them to testify that when they
15 looked at medical reports, they always check the signature's
16 validity. One the adjusters protested. He said, "we do not
17 do that, sir." And I'm not -- I'm going to tell them that
18 you're coaching me, because we do not do such a thing.

19 Ultimately, after a discussion -- it's in one of
20 the exhibits here. I think it's Exhibit 6 or 7 -- one of
21 those adjusters was allowed to testify to that fact. There
22 was a discussion that he should not be allowed to testify to
23 that, because it was not part and parcel of what adjusters
24 do, and he did. He testified that he looks at signatures,
25 which I believe was perjury.

1 Worse, I was brought to the district attorney's
2 office with my attorney, and I was asked to testify against
3 Mr. Davis (phonetic), who had committed the fraud. I was
4 asked to testify that I knew something about the fraud,
5 which I absolutely did not know. The masterminds had
6 already basically said, Mr. Belshaw had nothing whatsoever
7 to do with this.

8 I was eventually acquitted on those counts,
9 however, I was told, you're going to testify on Mr. Davis
10 about the fraud counts. Well, obviously, I did not accept.
11 Later on I found out I was supposed to receive three years
12 in prison. Ultimately I served a seven-year-eight-month
13 sentence.

14 This brings Brady into account again. There were
15 \$330,000 of checks which were forged by my office manager,
16 Mr. Davis. Exhibit 9, there's a handwriting expert report,
17 clearly showing they were not my signatures, at least the
18 ones we were able to analyze, however, the \$330,000 in
19 checks were never turned over the prosecution.

20 Even if you look at Exhibit 6, I wrote to not only
21 -- I wrote to the city attorney and the district attorney
22 that were handling the habeas and the appeal. And they
23 wrote a letter back saying, you're not entitled to pretrial
24 discovery. All I wanted was those checks.

25 Instead, spreadsheets came into evidence listing

1 those checks as my having received them. My attorney did
2 object. If you look, I think at Exhibit 5, you'll see he
3 objected. This was the best evidence rule issue. And the
4 trial judge said, well, look, with so many checks, we can
5 assume that he authorized the signatures on the checks. So
6 there was not one handwriting expert at trial, including my
7 own.

8 One day in court my handwriting expert comes to
9 testify. Right in front of the jury, the foreman is sitting
10 right there. My lawyer walks up and says, here's the
11 handwriting report. I'm sending the expert home as we
12 agreed. I know the jury foreman heard it, because she sort
13 of blinked.

14 And then if you look at Exhibit 11, the trial
15 judge right in front of the jury says, "ladies and
16 gentlemen, due to the state of the evidence, we're sending
17 that witness home." Why is that important? Well, what it
18 means is, the jury knows now or thinks now that the expert
19 is not favorable. And what did my lawyer do in opening? He
20 promised my testimony. Then, when we refused to allow me to
21 do so, it was withdrawn.

22 So, in Exhibit 10, I bring up various ways in
23 which the prosecutor in his summation subverted justice. By
24 telling the court evidence of forgery should have come from
25 the witness stand. Well, obviously, prosecutors can comment

1 on the state of the evidence or lack thereof. What they
2 cannot do or should not do is violate Griffin by indirectly
3 saying that I should have testified when, of course, a jury
4 instruction so prohibits.

5 So, my case came from lack of probable cause and
6 all sorts of subtle violations of Brady throughout. There
7 was a missing witness I referred to, that nobody knew where
8 to find, despite three years' of investigation that
9 certainly would have cleared me.

10 What do -- what need the prosecutors do? Well,
11 they have to delve in a little deeper than becoming an
12 ostrich, as Ms. Hernandez pointed out. There should
13 probably be some sort of a mens rea requirement. There
14 should probably be some sort of safe harbor perhaps. But,
15 again, this brings an additional issue, additional
16 definitions we have to make. And by the time they get
17 through the federal courts, you have a severe problem.

18 What I am mostly concerned about is the time it
19 takes to resolve all of these problems. It took six years
20 for the federal court to basically shoo my habeas corpus
21 petition aside, while I waited for six years of that. It is
22 the harm that is caused to people.

23 Here I am a former Bar member that had a perfect
24 record. Had no problems. Who had to go to fire camp and
25 fight fires up there at the age of 58, to be able to get out

1 at an earlier time.

2 And a couple of other things here I did note in my
3 suggestions. I believe Bar panel attorneys, this I think
4 relates somewhat to the amount of charges. Bar panel
5 attorneys are not always competent because many of them have
6 private practices, as my attorney did.

7 As it turned out, my lawyer had a period of seven
8 years' experience. He was a former prosecutor when the Bar
9 panel president told me on the phone that I should have had
10 a lawyer who had at least 15 or 20 years of experience,
11 because this was an extremely protracted and complicated
12 case, with 200 pages of documents. And he said, I can't
13 understand how this person became appointed to you.

14 So, the tendency is, and I think this relates to
15 somewhat what Mr. Falk was saying, this leads to plea
16 bargains, because when your own attorney will not put you on
17 the witness stand. Imagine. He says I would make a poor
18 witness.

19 Now, imagine. He's telling me, I'm not going to
20 question you. Am I supposed to ask the questions of myself
21 in front of the jury? I had to sit behind my lawyer, which,
22 by the way, is a violation of law, during the entire time.

23 So, when you go through all of these problems, I
24 think Bar panel attorneys are often not competent because
25 they have private practices, and that causes corner cutting

1 or dealing, like my attorney did with the prosecutor in that
2 manner. The way -- I think it was, it was very poorly
3 handled.

4 So, you know, I would suggest, one thing I did
5 suggest in my paperwork, I do so today -- I don't know how
6 much time I have. But when I was in prison I was very glad
7 to have helped some other inmates that had Brady problems.
8 I know I shouldn't have been practicing law, I suppose, that
9 I was or was not, and three of them got relief because I saw
10 the problem.

11 The problem has to be seen early, and sometimes
12 when attorneys and some trial judges acquiesce in this
13 behavior, where does the ZQ's (phonetic) go for relief.
14 They often don't have anyplace to go.

15 My family didn't come to the trial because they
16 were all busy. My own lawyer is a Bar member, who was
17 involved in a eight-week trial and couldn't come. So you
18 can imagine my feeling when I didn't get help during the
19 case. I could have demanded to testify. I did not.

20 There was -- as far as the remainder of 5-110(d)
21 and (g), whatever -- where a prosecutor must right a wrong
22 should he see it, I suffered a four-year money laundering
23 enhancement that was added at the behest of Judge Ann Jones,
24 who handled the preliminary hearing. She said, mister --
25 why is Mr. Belshaw not charged with money laundering,

1 because Mr. Davis is? He says, "I'm sorry, your Honor."

2 She says, "I want you to add those charges."

3 So Judge Ann Jones on the record advised the
4 prosecutor to add those charges, and I suffered a three-year
5 tax sentence on money that I never received, plus a four-
6 year money laundering enhancement that my co-defendant
7 should have received, because all the money went into his
8 pockets. And I thought the prosecutor should have
9 intervened, because I know that was not justice.

10 And this ties in with the offer. Because I
11 refused to take the offer, what happens? Well, now you're
12 going to get a worse sentence. I believe that was malicious
13 on his part, because as the jurors on the bench know, a
14 judge may not punish a suspect or an accused by giving them
15 a larger sentence for having refused a deal, which is what
16 happened indirectly here.

17 So, obviously, you cannot -- should not be able to
18 do indirectly what you couldn't do directly. And I think
19 that's what happened here. So --

20 MS. MCCURDY: Mr. Belshaw, if you can wrap it up.

21 MR. BELSHAW: Good. I will wrap it up.

22 I really appreciate this. I had no idea I was
23 going to be here. How I got to the Bar web site was a total
24 accident. But I'm a victim. And I propose some sort of a
25 hotline. There's got to be some way that Brady violations

1 can be cut off early in the game, so that people don't
2 suffer, and their families don't suffer such an egregious
3 loss over a period of time. And I'm still suffering from
4 it.

5 So, I know I came at this at a little different
6 angle than the other people that have studied the law a
7 little carefully than I have. I haven't researched the
8 proposed alternates as much as I probably should have. But
9 in conjunction with what the people have said today,
10 actually I'm in agreement with most of it. Thank you.

11 MS. EDMON: Thank you very much.

12 MR. BELSHAW: You're welcome.

13 MS. MCCURDY: Okay. We are going to turn to the
14 phone, and our next speaker is Ignacio Hernandez.

15 Go ahead. Mr. Hernandez, are you on the line?
16 Okay. It's possible he dropped. So we will go to San
17 Francisco. I understand there is a speaker there now. And
18 I will call Royal Glaude.

19 Go ahead.

20 MR. GLAUDE: I'd like to start off with --

21 MS. MCCURDY: Sir. Mr. Glaude, can you speak
22 and make ~~sure~~ ^{sure} that --

23 UNIDENTIFIED SPEAKER: Is the microphone off?

24 MS. MCCURDY: Yeah, it's below.

25 UNIDENTIFIED SPEAKER: That helps.

1 MS. MCCURDY: Go ahead. Thank you.

2 MR. GLAUDE: First off I'd like to thank
3 (indiscernible war, and speak not as a reverend
4 (indiscernible) stick to our plan, (indiscernible), middle
5 of the bar, my own topic. And I'm glad I'm (indiscernible)
6 this came before me for a number of reasons. But it's hard
7 to be on the same page with most professionals, but I know a
8 couple lawyers and realtors. They know the system
9 especially.

10 But I want to start off with Judge Honorable Mark
11 Stoner, Chair of the Assembly of the Judicial Committee.
12 And in July 6th, 2015, he had done some stuff. I found
13 about this here (indiscernible). So, in the process of
14 doing this, we all started (indiscernible) is because what
15 we're dealing with is a (indiscernible). And in the
16 processes of (indiscernible) it came from the
17 (indiscernible) regarding the California State Bar, that it
18 is not consistently protected the public. Now that's why
19 I'm, I really expressing concerns, especially what's really
20 going (indiscernible). Okay.

21 And then, the disciplinary process, one concern
22 that I had when I ran across this hearing, is that there was
23 already a rule 5-110, and this is dealing with members of
24 the Bar who work in Government service. And everybody was
25 looking at (indiscernible). It was (indiscernible) been

1 decided. And they already have a rule. And that rule is 5-
2 200. An attorney (indiscernible) and I went to some other
3 attorney (indiscernible) heard about this (indiscernible).

4 Now an attorney goes before the bench, and there's
5 a disrespect for the tribunal, he or she is (indiscernible)
6 to be a judge. That's already a violation. And the reason
7 why I'm saying that is, is because I'm seeing that when
8 we're looking at this other stuff, that was on the State Bar
9 about this new draft and everything, I could understand this
10 stuff to a certain extent. But I'm a little confused why
11 they have the State Bar Court.

12 And I believe that (indiscernible) State Bar
13 (indiscernible) so you have like (indiscernible) whatever
14 they do in the State Bar Court. Initially beyond that is
15 (indiscernible) intertwining that with the public.
16 (indiscernible) greater than this. Okay.

17 And the reason why I'm saying that is that I ran
18 across this on a discussion (indiscernible), number one, and
19 it said a prosecutor had the responsibility of a master of
20 justice, and not typically that of an adversary. Okay.
21 (indiscernible) regular citizen under (indiscernible) some
22 of these (indiscernible) are doing it (indiscernible). That
23 I kind of learned a lot from them. Okay.

24 So, when I look at that discussion one, I
25 (indiscernible) our trials. And I want you to understand

1 something on there. So what I get is that I -- here's what
2 he told me. (indiscernible) new age of being
3 (indiscernible), really causes it all when you get to the
4 (indiscernible), and, essentially, of doing what this
5 attorney (indiscernible) a while back. And then I thought
6 about. And I just looked the other day, yesterday, last
7 night, and I looked up the Goldberg war trials. The
8 minister (indiscernible).

9 I'll tell you the reason I bring this up here.
10 Because (indiscernible) it's really that the attorneys
11 (indiscernible) State Bar really are also ministers of
12 justice, because that's what we advocate. And then for me,
13 as a layman, I think they're staying, a minister of justice
14 is (indiscernible) State Bar. And when you hold a public
15 position you have other (indiscernible) State Bar offices.
16 They (indiscernible). And I looked at those (indiscernible)
17 you get there by (indiscernible) in their cars getting
18 (indiscernible) what they got.

19 So I looked at this (indiscernible) I was told to
20 look at the Lowenberg (phonetic) trial. I was going to read
21 a small portion of it. And the purpose of reading this, it
22 goes with the last (indiscernible) mystery of justice. And
23 he is (indiscernible) prison (indiscernible) and that did
24 affect the officials of the ministry of prosecutors and
25 judges.

1 The basic principals control conduct within the
2 ministry of justice. I understand they have the separation
3 of power. They've got the Legislature and Congress doing
4 their laws.

5 I agreed with Judge Stall (phonetic) when he says
6 that these matters don't need the Attorney General's Office
7 to (indiscernible), just be in the personnel's office. That
8 prosecuting private citizen, they're dealing with all the
9 time. And that's why I look at that and think, wow, that's
10 (indiscernible).

11 So, I told her get in touch with the State of
12 California Attorney General's Office. When it deals with
13 that stuff, you know, they can't really get into something
14 that deals with the State Bar. You know, the legislature
15 makes laws. But it does refer to the fact that both -- we
16 have a system of checks and balances.

17 And in the process of doing that, we have the
18 California Constitution. It's a declaration of one --
19 there's 28 (indiscernible) this is going through Brady.
20 They have a right talented -- you guys are definitely
21 planted here for the American citizen. But turning to the
22 Government rights (indiscernible) the evidence. Okay. And
23 that's part of the California Constitution.

24 So I look at the (indiscernible) office. And the
25 AD says, yeah, we understand that, but we have no

1 jurisdiction over the State Bar. Where because. So that,
2 therefore, they do have jurisdiction, but not in that level.

3 So we have the 14th Amendment that should deal
4 with your processes and also raise -- and it was taken from
5 the (indiscernible) to the limit, which supports the
6 declaration for review of the State of California people of
7 the -- limited to the State Bar, who say, well, we're going
8 to protect the public.

9 There's a -- I believe the law will tell you, the
10 law (indiscernible). I also believe that attorneys desire
11 just enough to be around something (indiscernible). They
12 know (indiscernible) so that the public rushing in.

13 There's a Title 18 Section 242, and that's
14 deprivation of rights under color of law. Okay. And when
15 you're dealing with these situations, these situations
16 themselves, it's obvious, and we'd all have to raise a foul
17 because -- over at the State Bar, and (indiscernible).

18 So I think those things would grow old
19 (indiscernible). Then it turns (indiscernible). What we
20 have to say about courthouse time. I think you
21 (indiscernible) has to go to an investigation will cause a
22 worse problem, and I was looking partially to me when I
23 looked at it. No thought reaches from the objection of the
24 State Bar -- not the necessary Bar, but as a skill in this
25 case, those accounts will spring forth that are stuck in

1 2000. Now, those are understood.

2 Some of the guys, like (indiscernible) guy, are
3 (indiscernible) state laws, state laws and other stuff. And
4 so they've got these guys here for (indiscernible) law
5 (indiscernible) test drive. So, I think they're from the
6 State Bar Court. And the State Bar Court should go -- can't
7 properly prosecute, so it can't protect the loss of
8 (indiscernible). It can't protect the laws of the
9 (indiscernible), or can we protect the prosecution from the
10 federal government? So I think it's kind of dangerous for
11 the (indiscernible) and attitude to come together to make
12 the laws.

13 But I do believe with Judge Stoll, Judge Stoll on
14 the judiciary committee, that a certain something with the
15 Attorney General's Office, mainly separate administrative
16 law of the Supreme Court from the private law practices of
17 the Executive Office. Okay. If we have to go set up a
18 ruckus, then it should go to the Federal Bureau of
19 Investigation, because they're going to have jurisdiction
20 over the Bar. That's important to that side, there was a
21 power (indiscernible). And that's why I mention so many
22 things, because that's why we got (indiscernible).

23 And so, are we at the entrance of simple things?
24 I'm all done. I mean, I've got to repeat everything for the
25 paperwork. I believe evidence brought up against our

1 military and our veterans (indiscernible). When it goes
2 through (indiscernible), they (indiscernible). So I think
3 the issue of it is (indiscernible), you need to address
4 these issues, and you've got a job here.

5 I know there's a lot I don't know, but I know this
6 doesn't (indiscernible). You don't want to cater to him.
7 This guy is pink. What I just do (indiscernible), black is
8 pink. And now we'd better turn it to about races. I don't
9 want to get too deep in this stuff, but there's
10 (indiscernible). So that (indiscernible). If you guys have
11 any questions, fine. (indiscernible) real quick what I
12 have. But other than that, I'm (indiscernible).

13 MS. EDMON: All right. Thank you very much, Mr.
14 Glaude.

15 MR. GLAUDE: Thank you.

16 MS. MCCURDY: Okay. Our next speaker will be in
17 Los Angeles, and it is Jose Castenada (phonetic).

18 UNIDENTIFIED SPEAKER: Jose Castaneda. He's here.
19 He's probably at the restroom.

20 MS. EDMON: Okay.

21 UNIDENTIFIED SPEAKER: I can (indiscernible) the
22 work, so.

23 MS. MCCURDY: Did you? Okay. Well, we'll just,
24 we'll go to the next speaker.

25 All right. Then we will move to Professor Laurie

1 Levenson.

2 MS. LEVENSON: Thank you very much. It's a
3 pleasure to be back before this group, and I appreciate your
4 patience each time I'm here.

5 As you know, I'm a professor at Loyola Law School.
6 I am a former federal prosecutor. I am currently the
7 director of Loyola's Project for the Innocent. All of these
8 aspects play into my comments and my remarks today.

9 I was not here, but I had an associate take notes
10 when U.S. Attorney Laura Duffy made her remarks, and I know
11 that Mr. Cardona is on your panel. And I know that she
12 mentioned that she was there on behalf of four U.S.
13 attorneys.

14 I have now submitted, I hope you have in your
15 packet, a letter that is signed by, I think about 100 former
16 federal and state prosecutors, including the former attorney
17 general of California, the former district attorney of Los
18 Angeles, six United States attorneys, four federal judges, a
19 collection of state judges, and then, as you can see, former
20 assistant United States attorneys and deputy district
21 attorneys.

22 And all of these people signed on for alternative
23 one. Because, frankly, they understand why this makes a
24 difference. It makes a difference to take out of the
25 equation prosecutors making materiality decisions, because

1 they make mistakes all the time. And those mistakes cost
2 people their freedom.

3 I do not want to, and never have wanted to make
4 this proposal about prosecutors versus defense lawyers. I
5 have enormous respect for prosecutors on the federal and
6 state side. But when I look at the leaders of our criminal
7 justice community, and I am sure that every member of this
8 panel will recognize names on those letters, these are
9 people that have dedicated their lives to our criminal
10 justice system. And, frankly, it took me two days to get
11 those signatures, and more are coming in.

12 It's because they know we have a problem, and we
13 know we have a direct solution to that problem. It's the
14 one we've been talking about for the last several months. I
15 do appreciate that Ms. Ludwig came out from the Department
16 of Justice to talk about the training and their perspective.
17 But the truth is, is that her lawyers have not understood
18 the law.

19 And I had hoped for and was surprised that she did
20 not address the rash of misconduct and Brady violations that
21 we've had right here in our own district, that have led to
22 our judges, federal judges, head of the Ninth Circuit and
23 otherwise, not only dismissing cases, but making a call for
24 reform.

25 In terms of mens rea language, this Committee has

1 done an excellent job in drafting it. It does refer
2 specifically that it has to be evidence known to the
3 prosecutors. This is not a "gotcha" provision.

4 In terms of what else there needs to be, I hear
5 that it's not simple enough. Well, it's a lot simpler than
6 telling prosecutors, go look through all the case law you
7 might find that you might think's controlling, and decide
8 whether or not you can fit within a exception or not.

9 If "tends to negate" is not clear enough, maybe we
10 want to use "any tendency to negate." But we don't want to
11 move in the other direction of saying, you get to decide how
12 material it is, because that's where the problem has been.

13 I also note the remarks by Mr. Mark Zahner today
14 from the California District Attorneys Association. Again,
15 they go to the words, "tends to negate," and I think it is
16 actually far-fetched to claim that they don't know what
17 those words mean.

18 Frankly, if that's what's happening, we're in real
19 trouble. But it does reflect what we heard at our last
20 hearing in San Francisco, where you had some prosecutors who
21 said, sure, we understand the California law to being that
22 we turn it all over.

23 And then we had representatives from our district
24 attorney's office saying, no, no, no, it's the Brady
25 standard, which is a post-conviction standard for having a

1 new trial. That's the one that goes into our discovery law.

2 We have submitted letters and briefs, and we've
3 spoken to the fact of what California law provides. This
4 panel will not be tampering with anything in California
5 discovery law. What we have proposed does comport with the
6 California Supreme Court's decisions in this area. So all
7 prosecutors actually have to do is follow that, and not try
8 to pouch it in language and materiality.

9 Ironically, I will end with this. While I've been
10 in this hearing and listening to the remarks of colleagues,
11 there was a news story that came across from Associated
12 Press. And it reported that the number of exonerations went
13 up yet again. We now have a record number. Over time that
14 we know of, we've had 1,730 exonerations. And, again, what
15 the statistics show is that 75- to 80-percent of those had
16 this type of misconduct, Brady violations, or if the other
17 side want to say, confusion, but I don't think it is.

18 I think that this ethic rule will make the move
19 that is so essential to fair trials, which is to say to
20 prosecutors, don't pretend to be defense lawyers. You're
21 not good at it. That's what our letter, in fact, from all
22 of these former prosecutors said. From the highest, to our
23 judges, to those who are street prosecutors, we were not
24 good at it, and that's why we support this rule. Thank you.

25 MS. EDMON: Thank you.

1 MS. MCCURDY: I'm going to turn to the phone, and
2 just see if Ignacio -- sorry, Ignacio Hernandez is on the
3 line. Okay. We are going to go to our next Los Angeles
4 speaker, and that is Jose Castaneda.

5 MR. CASTANEDA: Good morning.

6 MS. EDMON: Good morning.

7 MR. CASTANEDA: Thank you for giving us the
8 opportunity to address some of the issues. And when I
9 obtained the revision rule, a special responsibilities, I
10 saw that, you know, I do support this proposed rule, new
11 version, but I also wish that some more could be done with
12 the State Bar and the way they look at complaints by the
13 public.

14 My attorney got disbarred on November 20th, 2014.

15 MR. BLUME: And he lost his case.

16 MR. CASTANEDA: And I lost all my cases. And I
17 will -- I'm a vexatious litigant. And according to an order
18 by Judge Daniel Buckley, my name is Jose Castaneda, also
19 known as Mr. James Blume.

20 MR. BLUME: Okay. Hold on a second.

21 MR. CASTANEDA: And as you can see, we're both
22 people.

23 MR. Blume: He was convicted of being a vexatious
24 litigant, but he's not admitting to being one. See, that's
25 part of the -- what we're talking about here, let's redo a

1 subject thesis or opening statement here.

2 Basically, what me and him are talking about is
3 called, "judicial racketeering, judicial facilitation,"
4 using the courts to commit crimes and violating rights. So,
5 no offense, I was laughing -- it was you, sir, because when
6 you were at camp and stuff, you were set up, and -- yeah,
7 you know. I'm probably one of the guys that set you up.

8 We do deals all the time in court. I'm a former
9 police officer. I brang copies of my two badges. I have
10 attorneys and judges calling me at home, telling me what
11 they tell me to say, to get these people hooked, on or off.
12 It's called, "judicial racketeering, judicial facilitation,
13 judicial perversion and judicial treason." Or you could
14 change it to administrate, if this is an administrative
15 hearing.

16 Now, I'm -- a lot of you people are green, you're
17 virgins. You really don't know what's going on. But when
18 the judge is calling me at home and telling me to change my
19 statement, there's something wrong here.

20 Mr. Castaneda, the reason why I'm talking with
21 him, is I've been ordered to be Mr. Castaneda. So we have
22 two Castaneda's here by court order, and we bring the
23 exhibits. My Exhibit 1's, first of all, police officer.
24 I'm a police officer for two law enforcement agencies, a
25 former Marine with a security clearance. Because I was

1 stationed at El Toro, I got security clearance to be around
2 jet fighters, bombs. I had to refuel them.

3 After that my country called me back again.
4 Because I had the security clearance, I went to Army
5 National Guard, became a counselor for the Army National
6 Guard troops, okay. We put in the chaplain's office for
7 suicides, everything else. I'd seen a lot of dead bodies in
8 my life because I worked in the military, as well as
9 policing.

10 I'm the guy that you will see in your -- I will
11 testify under oath, underneath the penalty of perjury under
12 Penal Code 118. I'm raising my right hand. And I'm going
13 to tell you the truth, the whole truth and nothing but the
14 truth, so help you God. Nobody here has done that.

15 To me, this whole thing's a joke, because if it's
16 not underneath the penalty of perjury and under Penal Code
17 126, which states it's a felony, stating something that you
18 know is a lie to anybody hearing a court, but we do it all
19 the time. We commit fraud. What are you going to do about
20 it? Not a thing. That's why I'm here for an FBR, a filer's
21 bill of rights.

22 If something happens in any type of incident, and
23 this is where you should go at. I don't care if it's
24 criminal or civil, because there's all criminal acts in all
25 courts. Criminal acts are committed in criminal court. I

1 could testify to that. I even got the proof. The
2 difference between me and you is, I'm tired of the crap,
3 okay.

4 I was on the news on Channel 11 trying to open
5 this up. Judicial racketeering, judicial facilitation,
6 judicial perversion of the laws, judicial treason, because I
7 can't even get a jury trial. How can I serve in the Marine
8 Corps, be a police officer, see this poor man, and I feel
9 you, because I was there watching you in the camp. But you
10 know what, so what? You should have bribed the judge.
11 That's all you had to do.

12 Judge De Vanon on court documents, on court tapes
13 -- and I hope this is being taped, but it doesn't matter
14 because if you're Mexican, you can't get your tapes. It's
15 federal law. Federal Rules of Civil Procedure. Who cares?
16 The law only works if you pay for it, or if you bribe a
17 judge. And if you're Mexican or Black, forget it. The
18 rules don't even apply to you.

19 MR. CASTANEDA: He asked me for a bribe on record.

20 MR. BLUME: You get screwed up.

21 On his, the Judge asked him for a bribe. He said,
22 no, so he lost his case. And then do you know what judicial
23 stalking is? I want to change this law. You guys got to
24 get a hold of this. They stalk you. So if one judge says,
25 you don't pay up, then he keeps hearing all your motions

1 until you become a vexatious litigant. That's judicial
2 entrapment. Hello. Why don't you just plant evidence on
3 me? I mean, I'd laugh at this.

4 This is so funny. Because of my training, being
5 shot twice, United States Marine Corps, United States Army,
6 United States MP, because I love the country, I support it.
7 And, you know, I'm over 50 years old and the Navy calls me.
8 But now I'm not going to serve this country no more. I had
9 it. I had it. You guys make me sick. If you're an
10 attorney, you're a piece of shit -- excuse me. That's just
11 my personal opinion. If you're a judge, you're a more piece
12 of shit. I will never swear again allegiance to this
13 country again, and I did it three times, but never again. I
14 had it with you guys.

15 But I blame the attorneys and the judges and the
16 politicians. And I blame you because you're not going after
17 the -- I'm asking for an FBR. I'm not asking to retry my
18 cases. I don't care, screw me. I don't care. I'm a Marine.
19 We're worthless. We're supposed to be punished. We got
20 nothing coming when we signed up and we knew it. But when
21 you are coming here as judges, and you're sworn to uphold
22 the law, and half you guys don't --

23 MR. CASTANEDA: I presented plenty of evidence in
24 my cases against, obviously, Mr. Jack Conway (phonetic), and
25 not only was he lying to different judges, he lying to

1 commission a jury, he lied to Judge Rita Miller. He lied to
2 Judge De Vanon, Judge Simpson, Judge Pluim.

3 So this guy was lying repeatedly in every way, and
4 I kept raising a, you know, I kept saying, I kept
5 complaining, he's lying, he's lying. He was even lying
6 about when I contracted him, and I have a contract dated
7 December 17th, 2009 -- and '08.

8 On May 8, 2009, Judge Rita Miller placed him under
9 oath, because the issue was a free speech case, where this
10 attorney, Sonia Mercado had appear at my trial, and she was
11 the one behind the accusation that I had stole millions from
12 the estate of my brother.

13 My brother died in jail, and nothing was provided
14 as far as how he died, you know. All of the sudden millions
15 are missing, and I'm the one that is getting the point --
16 that I'm being blamed for it. When I complained, when I
17 posted that on the internet, that's when the lawsuit came.
18 But I had the great misfortune of paying him \$10,000, and he
19 did nothing except -- not even appear for the hearings,
20 because he hired somebody else, Ivan Shulmer (phonetic), who
21 contradicts what he was saying.

22 So, from what I learned from Mr. Blume, is that
23 evidence doesn't lie. And when judges are ignoring that --
24 I mean, I'm just trying to remove myself from a vexatious
25 litigant list, and I could not even get a hearing in the

1 superior court. Not one hearing, or not an evidentiary
2 hearing.

3 In his case, they give him every single case that
4 he filed, and 3,500 posting a security. In my case they
5 wanted \$50,000. Fifty-thousand dollars for a case. So the
6 law gets manipulated in the civil courts as well. Not only
7 in the criminal but --

8 MR. BLUME: What he's saying is, we both got
9 convicted at the same time of being a vexatious litigant,
10 okay, because they named me and him the same person. What
11 judge would make a court order to say, Mr. Castaneda is also
12 James Blume, and James Blume -- that's abuse of process,
13 abuse of -- it's a court order. We'll show it to you. Please
14 bring this in. Please.

15 And prosecute me for perjury. Bring it on. I'm a
16 United States Marine. I mean what I say, and I say what I
17 mean. I swear underneath the penalty of perjury in front of
18 God and country, which you -- it just makes me so sick.
19 Because if they make me a Mexican and lose my case -- and
20 what does Donald Trump say? I mean, come on. Look at where
21 this is really going, you guys.

22 Mexicans come over the border to what, to make
23 crimes. They make me a Mexican, I'm losing all my cases.
24 And I'm a former police officer. And sometimes I take
25 cases, civil and criminal, and I help these people win,

1 because I know the law really well.

2 I graduated with 90-percent in the policy academy,
3 and I also taught law enforcement classes. I have an AA
4 Degree, a Bachelor's Degree. Mr. Castaneda has a Bachelor's
5 Degree. And we're basically being screwed by tricks and
6 tactics that we could use in the Bar, in the courts, by
7 attorneys and judges in concert. I could show you so many
8 tricks and tactics if you contact me. My number is (323)
9 663-1397. Please call me. I've got tons of evidence. I've
10 even got judges that say, I can't appeal my own vexatious
11 litigant. I've got it right here in writing.

12 MR. BELSHAW: Can you repeat that?

13 MR. BLUME: -- by Judge Buckley.

14 MR. BELSHAW: Can you repeat that?

15 MR. BLUME: (323) 663-1397. I've got a list of
16 all the dirty judges, and what they asked of me to do when I
17 was a police officer.

18 MR. BELSHAW: What is your name, sir?

19 MR. BLUME: My name is James Blume, United States
20 Marine Corps.

21 MR. BELSHAW: How do you spell your last name?

22 MR. BLUME: B-L-U-M-E.

23 MR. BELSHAW: Okay. Thank you.

24 MR. BLUME: Sure. Call me and I'll give you a
25 hand on some of this.

1 MR. CASTANEDA: Last, you know, the internet is
2 giving us opportunity to see all the people that have been
3 subjected to this type of behavior by officers of the court,
4 you know, sworn officers, that they're supposed to adhere to
5 the letter of the spirit of the law.

6 And it's really troubling to see that the State
7 Bar fails so many times to even look at my case until now,
8 Mr. Conway has finally been disbarred for a case that took
9 place in Pasadena. He was lying to Judge Syed (phonetic) so
10 that he was eligible to practice law.

11 The attorney that filed two cases for me, I also
12 paid him 7,500. All he did was file two cases. So they
13 take your money and run. The cases were settled, but, you
14 know, what happens, you know?

15 MR. BLUME: This is important. The same common
16 theme is, if you notice, everybody who files a court case,
17 check with the original complaint. Follow these people.
18 This isn't hard. This is elementary. The original
19 complaint never matches the final decision. The judge has
20 half the time their heads up their (sensored). It doesn't
21 make sense, and there's something wrong.

22 MS. EDMON: Mr. Blume. Mr. Blume, I'm going to
23 have to ask you to wrap it up.

24 MR. BLUME: Yes. Thank you.

25 MR. CASTANEDA: Go ahead.

1 MR. BLUME: Do you want me to do a closing -- MR.

2 CASTANEDA: Go ahead.

3 MR. BLUME: Basically, ma'am, we know now it's --
4 and I feel for some of these people here. And, basically,
5 we don't want to vent. You know, I feel sorry for you and,
6 no offense, but I'm used to being, you know, always being
7 jerked around.

8 But what we're tired of is -- and you've got to
9 understand something. This is judicial or administrative
10 treason. They're doing it all across the state. The same
11 tricks, the same tactics. Attorneys, bait and switch of
12 attorneys. Conway comes in. He decides not to, and he puts
13 in another attorney. He doesn't even know what the case is
14 about.

15 Lady, you've got to see some of these tricks and
16 tactics used over and over again for just criminal. Please
17 contact me. I'm glad you took my number. I could show you
18 a list of these tricks. They bait and switch of evidence.
19 They bait and switch of attorneys. They bait and switch of
20 the actual -- from what you started in your complaint, they
21 change it. They -- it's called judicial manipulation, while
22 they do judicial facilitation. I mean, they're using -- I
23 mean, one attorney told me, I just have to make up a fake
24 case, bribe the judge, and make money.

25 MS. EDMON: Mr. Blume, your time is up.

1 MR. BLUME: Thank you, ma'am. Thank you for
2 having me.

3 MR. CASTANEDA: Thank you so much.

4 MS. EDMON: Thank you.

5 MS. MCCURDY: Okay. We -- our next speaker in Los
6 Angeles is Michael Goodman.

7 MS. EDMON: Do you want to take a break? Well,
8 Lauren, can you -- is there anybody else on the telephone?
9 I don't know if there's anybody else who's not identified
10 themselves yet.

11 MS. MCCURDY: We can check.

12 Anyone on the telephone who wishes to speak?

13 MS. EDMON: Okay. Thank you.

14 MS. MCCURDY: Michael Goodman.

15 MR. GOODMAN: Thank you. Good morning. I'm
16 Michael Goodman. I'm the head deputy of the Appellate
17 Division of the Los Angeles County Alternate Public
18 Defender's Office, and I'm speaking today on behalf of the
19 head of our department, Janice Fukai.

20 MS. EDMON: I'm sorry. Could you state your name
21 again.

22 MR. GOODMAN: Michael Goodman. It's G-O-O-D-M-A-
23 N.

24 MS. EDMON: Thank you very much.

25 MR. GOODMAN: We are in support of alternate one

1 of the revision of Rule 5-110(d). We believe that the
2 alternate number two, which adds in a materiality
3 requirement waters down the rule in a way that allows
4 prosecutors to avoid the import of what this rule is
5 intended to accomplish, and that is, primarily, I think
6 really to give prosecutors an ethical reason, not just a
7 legal reason, in order to provide discovery which is
8 exculpatory in nature.

9 Allowing prosecutors to decide whether or not
10 something is or is not material is a mistake. My office has
11 over 200 lawyers. As the head of our appellate department,
12 I get telephone calls on a daily basis for lawyers that are
13 in pitched battles over discovery.

14 With prosecutors arguing something isn't material
15 and doesn't need to be turned over, and defense lawyers
16 routinely, ultimately getting that evidence and winning
17 cases by virtue of being in possession of that evidence.

18 We have a very different view of what's material
19 than what prosecutors do. And forcing prosecutors to look
20 to case law to decide what is or is not material means that
21 this rule will have no teeth. If we want a rule that's
22 going to compel prosecutors to turn over evidence which is
23 exculpatory in nature, we should take away any ability for
24 that rule to be ambiguous.

25 We should just say, if it has an exculpatory value

1 at all, prosecutors should turn that over to the defense,
2 and let the defense decide whether or not it's exculpatory
3 to the defense or not, and let the defense decide whether or
4 not it's material and should be presented at trial.

5 We don't have the same view of what's material
6 that prosecutors do, and we shouldn't put prosecutors in a
7 position of having to decide whether or not the defense will
8 or won't decide something is material and should be
9 presented at trial.

10 When evidence turns out not to be material and
11 that evidence is withheld, that might be the reason why an
12 appellate court chooses not to find harmful error, and not
13 set aside a conviction. But it is only pretrial -- excuse
14 me, prior to any appellate action in a case happening that a
15 defense lawyer can take that evidence, investigate that
16 evidence, and determine whether or not that evidence can be
17 used in a way that is or is not beneficial to the defense.

18 We cant let prosecutors be the ones that decide a
19 defense attorney should litigate his or her case, and we
20 urge you to adopt alternate number one of Rule 5-110(d).
21 Thank you.

22 MS. EDMON: Thank you very much.

23 We seem to have lost Lauren. And I think that the
24 members of the panel may need to take a brief break. So
25 let's take five minutes and then come back, and we'll talk

1 among ourselves about how we're going to proceed. Because
2 there are still a fair number of speakers who have not been
3 heard, and we need to figure out what we're going to do
4 about lunch. And so, let's take a break and we'll get back
5 together in five minutes.

6 (Proceedings recessed briefly.)

7 MS. EDMON: Again, thank you all very much.

8 And Lauren, I will ask you to call the next
9 speaker, please.

10 MS. MCCURDY: Okay. I'm going to check again on
11 the phone. We've returned. Is there anyone on the phone
12 who would like to present comments? Okay.

13 In Los Angeles, the next person up is Peter
14 Pierce.

15 MR. PIERCE: Good morning. I'm Peter Pierce and
16 I'm a Senior Deputy District Attorney with the Orange County
17 District Attorney's Office. I'm also on the Civic Action
18 Committee of the Association of Orange County District
19 Deputy Attorneys. Not surprisingly, we oppose the proposed
20 change, alternative one. And the substantive reasons for
21 that have been articulated not only today, but in the CDA
22 letter to the Commission dated October 1st, 2015.

23 And in summary, we oppose the proposed changes
24 because the revisions could subject state prosecutors or
25 deputy DA's to disciplinary actions based upon new and

1 arbitrary standards that are not tethered to current
2 statutory rules or case law.

3 But rather than echo the CDAA's detailed
4 opposition letter, and echo the comments that have been made
5 by my colleagues this morning, I would like to instead give
6 the Commission a personal perspective of a career deputy DA.

7 As a Deputy DA and state prosecutor, one the key
8 aspects of my job that I cherish is the requirement that I
9 must play by the rules. And that I cannot obtain a
10 conviction without honoring the rights of the accused by
11 strict standards.

12 I bring up on a personal note that I currently
13 serve, for the last five-and-a-half years, within our
14 offices, white collar or major fraud unit. I have done
15 that. I was sent to the unit -- or I came back to the unit
16 in 2009 after a 15-month mobilization in the United States
17 Army Reserve, which included a combat tour in Iraq in 2008.

18 I bring up my Iraq -- my service in Iraq, not to
19 be self-righteous, or at least not to be entirely self-
20 righteous, but to let the Commission know that I have seen
21 what it's like for citizens to live in a military
22 dictatorship or a police state.

23 And I thank goodness that the United States, the
24 State of California, is not such a police state. And I take
25 my responsibilities to the defense, especially discovery,

1 very seriously. And I submit that I am not unique as a
2 state prosecutor, but that I am typical.

3 With all due respect to Judge Kozinski, I disagree
4 with his assertion that Brady violations are rampant or
5 systemic. I believe that the overwhelming majority of state
6 prosecutors are honest, hardworking civil servants, who take
7 their responsibility serious, and that includes the
8 responsibilities to the accused, and including especially
9 regarding discovery.

10 The proposed revision, as I've said earlier, could
11 now subject these state prosecutors, these civil servants,
12 to disciplinary sanctions based on an arbitrary standard not
13 tied to case law or to statutory rules regarding discovery.

14 I can tell the Commission from first-hand
15 experience, something they probably already know, that
16 discovery in so-called "white collar" or major fraud cases
17 is often extensive.

18 My last case, which ended just two weeks ago,
19 involved almost 11,000 pages of discovery. The defendant's
20 rights were honored, all his rights, including discovery
21 rights. The discovery rights were not honored if the
22 defendant's rights had not been honored or violated, his
23 conviction could have been overturned.

24 Under the proposed changes, not only could his
25 conviction already have been -- could have been overturned,

1 but because of an inadvertent discovery violation, and
2 again, regarding 11,000 pages of discovery, by conceivably
3 any member of the prosecution team, could potentially result
4 in disciplinary actions against me.

5 And I must tell the Commission that it saddens me
6 to think that there are members of our profession that think
7 that such additional sanctions are needed against state
8 prosecutors to safeguard the rights of the accused. I, we,
9 do not believe that they are needed. They will, in the end,
10 make our job, our already tough job harder, not easier, and
11 our job is to seek justice.

12 Therefore, like my colleagues who have previously
13 spoken this morning, I strongly urge the Commission not to
14 adopt the proposed alternative one of 5-110(d) Rule, but
15 rather to adopt its alternative. And I thank the Commission
16 for its time today.

17 MS. EDMON: Thank you.

18 MS. MCCURDY: Okay. We're going to turn Marcella
19 McLaughlin here in Los Angeles.

20 MS. MCLAUGHLIN: Good afternoon.

21 MS. EDMON: Good afternoon.

22 MS. MCLAUGHLIN: Thank you for this opportunity to
23 speak to you. I am from the San Diego District Attorney's
24 Office, and I represent that office today. I also have a
25 letter that was prepared by District Attorney Bonnie

1 Dumanis, that I brought with me today, and will be submitted
2 to you for your consideration.

3 I join in my colleagues' comments. Mr. Zahner and
4 Ms. Duffy from the U.S. Attorney's Office, the woman -- I'm
5 sorry, I forget her name, from Department of Justice, and
6 Mr. Price (phonetic) who just spoke.

7 We certainly see the issues, we certainly see the
8 policy considerations behind this, and what the Committee
9 seeks to achieve. What we want is a rule that can be
10 realistically applied and followed.

11 I, just by way of background, I'm a Deputy
12 District Attorney. I'm the ethics coordinator for the
13 District Attorney's Office. So I -- my role is to advise
14 and train 300 deputy district attorneys as they seek to
15 follow their ethical obligations as they do their jobs.

16 That's a job I only very, very recently came into,
17 very timely for this issue. I stepped right into it, so to
18 speak. But before that, I was a prosecutor. I've been a
19 prosecutor for 16 years. I started out as a deputy city
20 attorney, so I prosecuted everything from the lowest
21 infraction to every garden variety misdemeanor you could
22 think of, for five years, in the City Attorney's Office in
23 San Diego, before coming to the District Attorney's Office
24 where I've been for the last 11 years.

25 So I feel that I can speak with some experience as

1 to how this rule would really apply in the day-to-day life
2 of a prosecutor, from the lowest case to the most serious
3 and violent felony. And I do have some concerns, I really
4 do, about that.

5 First and foremost in my mind as a prosecutor, is
6 the right of the defendant to a fair trial, and his or her
7 due process rights, it really is. But it is such a
8 difficult rule, and you do accept that.

9 When you become a DA, you get it, you understand
10 that that -- you have the highest responsibility in the
11 room. And that you get to wear that white hat, but you have
12 to carry the greatest responsibility there. And you're --
13 it's a very delicate balance of things throughout. It's a
14 delicate balance of interests that we face.

15 And the whole time that you are seeking to ensure
16 that this accused person gets a fair trial, you have to
17 protect the interest of your victims, your witnesses, and
18 the community.

19 And so, I recently spoke to -- the County Bar
20 Association has an ethics committee, and they're currently
21 reviewing this rule. And they may or may not be making a
22 recommendation to the County Bar on the issue.

23 And had a very interesting and lively discussion
24 with them about the application of the rule to my job. And
25 some of them had some questions about it, you know, who had

1 never practiced in the area of criminal prosecution. And
2 the feeling was, you know, what's so hard about it? You
3 know, hey, just hand it over. You know, it's if
4 exculpatory, you know, just hand it over, just give it to
5 them.

6 And, you know, that seems to be kind of the
7 feeling behind this rule of, you know, let's take it out of
8 your hands. You're not in the best position as the
9 prosecutor to decide what's material. Just give it to the
10 defense, give it to the judge. Let them decide. They're in
11 the best position to do it.

12 And I have to say, it does not give me comfort to
13 have that decision taken away from me completely by this
14 rule. Not because I want to -- because I'm fearful of being
15 divested of that power, or I'm fearful that I will lose some
16 sort of influence as a prosecutor, but because I understand
17 what that means. That I will be subjecting people to harm.
18 That, you know, people to us and they trust us with this.

19 That there is a abuser out there, there's a drug
20 dealer out there, there's a violent criminal out there, and
21 there are issues to consider when people come to you and
22 they want you to prosecute a case. And they trust you to be
23 that person to protect them from harm.

24 And so when you use terms in a rule like, tend to
25 -- tend to -- I think Mr. Zahner pointed them out. When you

1 use words like -- sorry, "tends to negate" or "mitigate."
2 And I'm a, you know, a prosecutor. I'm trying think about,
3 you know, what those are going to mean, and I'm fast-
4 forwarding to having to respond to an ethical violation.

5 And, for instance, it's a gangs case, and I have
6 an incredibly violent gang member who's in custody for a
7 serious offense. And I have a series of letters written by
8 other inmates in custody about him, that are actually
9 inculcating him.

10 They're actually all writing to me because the
11 know he's being prosecuted, and they inculcating him for the
12 offense, because they want probably some favorable
13 treatment. And they want to get him in trouble.

14 And I'm reading these letters, and I'm thinking,
15 hey, there's some information here that possibly his defense
16 attorney might be able to use in some way down the line,
17 that could somehow mitigate this offense. And I'm really
18 thinking this through. Is that something I should disclose?
19 But if I do that, that will put these people in incredible
20 harm, because the person I'm prosecuting has incredible
21 influence and power in the prison system.

22 And I'm obviously basing this -- you know, it's a
23 hypothetical facts, but I'm basing this on true situations.
24 And this case actually is probably going to settle. It's
25 not going to trial because of the circumstances of this

1 defendant's case.

2 So, these are the scenarios I'm talking about that
3 we're faced with every day. So, what we -- that is what
4 we're dealing with here. And, you know, what we are really,
5 really seeking here is a clear standard to follow, and we
6 have those.

7 And I know what you keep hearing from us, from the
8 different speakers against this rule and in support of
9 alternate two, is that we have those standards. And, you
10 know, by adopted alt two, by putting that into an ethical
11 role which we currently don't have, you're sending that
12 message.

13 We understand 1054. We have 1054.7 right now
14 which we use. When we are in doubt, we go to the court
15 under 1054.7, and we say, your Honor, we have something.
16 It's -- we think it could be exculpatory. We want you to
17 make the decision because it's sensitive. And if it's not,
18 then we get a protective order and we deal with it that way.

19 So we understand Brady, Winters, Barnett and
20 Cordova. And we also -- you know, you're sitting here and
21 you're hearing these things anecdotally, but please put them
22 in the context. You know, you heard about this exoneration
23 report today from Mr. Levenson. You know, four, only four
24 of those exonerations were in California. Only one of those
25 was in federal court. You're hearing a lot of anecdotal

1 information.

2 And you hear about the famous case from Judge
3 Kozinski, United States v. Olsen, and the line of cases that
4 he cites. Only one of those cases was, I believe, a
5 California case, Hubele Arribe (phonetic). And I do not
6 believe that was intentional misconduct. It was a third
7 party who had a video tape from a SART exam, that was not
8 produced, and I do not believe that was intentional
9 misconduct or withholding by the prosecution.

10 So, please, as a Committee, I urge you to please
11 put this in the context of what the urgency really is around
12 this issue, and think about that when you are considering
13 what type of rule it is we really need.

14 It's very easy to sign on to a letter when you're
15 not in the trenches, okay. When -- it's easy to say, yes,
16 that sounds good to us, when you're not, you know, in there
17 fighting the fight every day.

18 The letter that Ms. Dumanis submitted addresses
19 this, my comments, also other things. There were some other
20 parts of the rule, 5-110(b), 5-110(f) and -- (e) and (f),
21 excuse me, that just seemed out of context and not based on
22 any information I saw, or we could see, that were public
23 policy issues or problems. You know, is there a rash of
24 Sixth Amendment violations out there that prosecutors now
25 need to sort of be tasked with addressing?

1 The extra judicial statements by police, again, we
2 addressed that in our letter. Is that a problem that law
3 enforcement is doing that? That is not something that I've
4 seen, or that we've seen.

5 The abuse of subpoena power. That seems strange.
6 I know that the State Bar is very concerned with public
7 protection, and we respect and understand that, but that
8 seemed more about protecting civil attorneys more than
9 anything else.

10 So, in closing, we respectfully, again, we do seek
11 to be ethical, we do seek to follow the rules. We
12 respectfully ask though that we have a rule that we can
13 realistically follow. And we thank you very much for your
14 time today. Thank you.

15 MS. EDMON: Thank you.

16 MS. MCCURDY: Is there anyone on the telephone who
17 would like to speak? Okay.

18 In Los Angeles our next speaker will be James
19 Bloom (phonetic).

20 MR. BLUME: I already spoke.

21 MS. MCCURDY: Sorry.

22 MS. EDMON: Thank you.

23 MS. MCCURDY: Okay. I apologize if I mispronounce
24 this. Is it Azar Elihu?

25 MS. ELIHU: Hello. My name is Azar Elihu. I am a

1 criminal defense lawyer in practice in good standing with
2 the State Bar. I have been in practice since 2000. I serve
3 as a volunteer arbitrator with L.A. County Bar, and with the
4 State Bar, I hear fee disputes between clients and former
5 lawyers.

6 And I have published several articles with the
7 Daily Journal, California Lawyer Magazine. And my last
8 article was also was published in the Criminal Law Journal
9 of the State Bar regarding dismiss or expunge. That was
10 based on my case in the Court of Appeal.

11 I am not as prepared as the rest of the speakers,
12 as I saw the proposed rule in the California E-Bar Journal a
13 couple days ago in the e-mail that I got. So, I printed out
14 the rule 5-110 and I have suggestion regarding these rules.

15 First of all, the district attorney's office and
16 the prosecutors are vested with excessive authority by the
17 penal code, and often state court judges give in to those
18 authorities, because perhaps they are concerned about the
19 reelection.

20 Rule 5-110(a), first these rules are making it
21 subjective, as there are no speakers mentioned. They make
22 it too subjective and leaving room for evasion by the
23 prosecutors.

24 Section (a):

25 "A prosecutor in a criminal case

1 shall refrain from prosecuting a charge
2 that is not supported by probable
3 cause..."

4 We should not leave the, whether it's supported by
5 probable cause to the D.A. It should be a reasonable
6 standard, the same way that US v. Strickland needs a
7 competency of a lawyer based on an objective, reasonable
8 standard. It's often cases are filed by the district
9 attorney's office or city attorney that have no merit.

10 A few years ago I was representing a driver who
11 was charged with hit and run. The case was filed, the court
12 here. And the police report was devoid of any evidence
13 implicating the driver. There were three passengers in the
14 car and a pedestrian who had made statement in the police
15 report that the police car drove and hit the driver, the
16 defendant.

17 The case was assigned to the junior deputy D.A.,
18 and she would not give in. She was not willing to dismiss
19 the case. I just -- my job is -- I do my job, you do your
20 job. And I said, your job is to find the truth. And she
21 was coming up with different deals, and I said, no deal. I
22 like to put this case before the jury to see how the system
23 work.

24 And on eight of 10 of the trial, a senior deputy
25 walked in the court, profusely apologize and dismiss the

1 case. And she said, this case shouldn't have been charged.
2 We see that, I would say not very often, but it happens a
3 lot when cases have no merit.

4 And so, section (a) should be different from
5 prosecuting a charge that is not supported by probable
6 cause. A police officer may not know, but a filing deputy
7 will definitely know if this case has merit. And when it
8 excessively lack merit, it should not be charged.

9 Section (c):

10 "...Not seek to obtain from
11 unrepresented accused a waive of
12 important pretrial right unless the
13 tribunal has approved appearance of the
14 accused in propria persona..."

15 This is fine. I have no problem with that. I
16 join Mr. Mike Goodman, the APD, on section (d), that is too
17 much -- too subjective.

18 Section (f):

19 "...The prosecutor in a criminal
20 case shall prevent persons under the
21 supervision or direct of the prosecutor
22 exercise reasonable care..."

23 Again, leaves them with some discretion and some
24 room to nagivate through the misconduct. So, we should --
25 this rule should be enacted the same with the penal code.

1 They are narrowly tailored to promote justice and to apprise
2 the defendant of the wrongdoing. The same way should be
3 with these rules. They should be based on a reasonable
4 standard and not subjective.

5 Section (h) should be amended to --

6 "...When a prosecutor knows by
7 clear and convincing evidence that the
8 defendant in the prosecutor jurisdiction
9 is wrongfully convicted, the prosecutor
10 shall seek promptly to remedy the
11 conviction."

12 Promptly is -- should be a key word, because
13 sometimes these wrongfully convicted defendants struggle for
14 years in state and federal court to rectify the wrong.

15 At section seven on -- once the prosecutor knows
16 by clear and convincing evidence that the defendant was
17 wrongfully convicted, "the prosecutor must seek to," again,
18 "promptly remedy the conviction."

19 Again, you know, I am handling a post-conviction
20 case right now. It's from San Bernardino. And in that
21 case, before trial, the co-defendant came forward. It was
22 like a gang case. Said, "I did it. This guy didn't do it."
23 The shooting. They were -- one was charged with conspiracy,
24 the other was charged with attempted murder. With murder,
25 and the co-defendant came forward, said, "I did this,"

1 before trial. No one listened. He didn't testify. His
2 lawyer did not allow him to testify, the co-defendant.

3 The other defendant was convicted and he's serving
4 56 to life now. So now we have to open the case, get a new
5 investigator to go around and to prove that the co-
6 defendant, my client hasn't -- did not commit the crime.

7 Overall, the rules should change to just divest in
8 general the prosecutors from so much authority. And to
9 allow the defense lawyer, like to inspect the evidence, so
10 they could decide whether the evidence is material, and not
11 leave it on the discretion of the prosecutors. And they are
12 very good prosecutors. I've deal with many, some of very --
13 most of them are very decent, very ethical, very
14 professional.

15 And there are some, you know, unethical, that have
16 been reprimanded. But, in general, when prosecutors commit
17 serious misconduct, the State Bar will give them a slap on
18 the wrist, compared to other lawyers who may commit some
19 minor misconduct, like commingling the fund, and they may
20 get disbarred. Submit. Thank you.

21 MS. EDMON: Thank you.

22 MS. MCCURDY: Is there anyone on the phone that
23 wishes to address the panel?

24 Okay. In Los Angeles, the next speaker is Sue
25 Frowen. Did I pronounce that --

1 MS. FROWEN: I never signed up to speak.

2 MS. MCCURDY: You didn't? You're just an
3 observer? Okay.

4 Just to confirm, is there anyone in San Francisco?

5 UNIDENTIFIED SPEAKER: Not at this time.

6 MS. MCCURDY: Okay. Thank you, Randall.

7 Okay. Justice Edmon, do you want to adjourn
8 temporarily?

9 MS. EDMON: All right. Thank you all very much
10 for participating today in this very important process.
11 Yes, sir, Mr. Castaneda?

12 MR. CASTANEDA: May I ask a question to the panel,
13 if I may? Just one question. Very simple. It won't take
14 more than one minute.

15 My understanding is that there are audio tapes in
16 the court system, and that's from Mr. Gene Wzorek, who I've
17 been in contact because he wrote a book called, "Death of
18 the Justice System." And it pertained to the City of
19 Chicago, Gene Wzorek v. the City of Chicago.

20 And what happened was, that they gave him, set him
21 up for 350 -- \$250,000. And when they went to appeal,
22 everything changed. One of the law professors here in, I
23 think it's Orange County, was involved in the case. He was
24 the second -- he was the, I guess, the law clerk for Justice
25 Stevens.

1 And Mr. Wzorek told me that he was the one that
2 stole the tapes. When you have a question regarding
3 something that was said in court, how do you go to the
4 record if the court clerks -- the court transcripts are
5 being changed? It's hard for the average person to even get
6 a bite of the apple, so they say.

7 But the audio tapes, and my understanding from
8 what he had was, that the 93 U.S. attorneys have control of
9 those tapes. So it's regarding a case called, I guess, me
10 versus officer of the court, where he was challenging what
11 was being said in court in the transcripts and the tapes,
12 so.

13 MS. EDMON: I'm sorry, Mr. Castenada. I don't
14 think any of us have any information about that particular
15 case.

16 MR. CASTANEDA: Thank you.

17 MS. EDMON: All right. At this point we are going
18 to adjourn. I thank all of the speakers and attendees. It
19 is now, just for the record, 12:28 p.m. And this public
20 hearing is adjourned. Everybody have a good afternoon.
21 Thank you very much for participating.

22 (Proceedings concluded.)
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CERTIFICATION OF TRANSCRIBER

I, Holly Martens, do hereby certify that the foregoing 93-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript, to the best of my ability, of the hearing in the matter of Public Hearing on Revision of the Rules of Professional Conduct, held on February 3, 2016.

Date

Transcriber