

AGENDA ITEM

703 MAY 2016

DATE: April 22, 2016

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed Amended Rules 5-110 and 5-220 of the Rules of Professional Conduct – Return from Public Comment and Request for Additional Public Comment

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has been assigned to conduct a comprehensive study of the Rules of Professional Conduct and to recommend amendments where warranted. This agenda item requests that the Board of Trustees (“Board”) authorize an additional 45-day public comment period on proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct. In accordance with action taken by the Board at its November 2015 meeting, the processing of these proposed rules is being expedited on a separate track from the Commission’s anticipated comprehensive proposed amendments to the Rules of Professional Conduct. Following a 90-day public comment period that ended on February 9, 2016, the Commission modified its proposal. These modifications require the requested additional 45-day public comment period in order to continue the Board’s consideration of possible adoption of these rules on an expedited basis.

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

BACKGROUND

The Rules of Professional Conduct of the State Bar of California are attorney conduct rules, the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval.¹

¹ Business and Professions Code section 6076 provides: “With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state.” Business and Professions Code section 6077, in part,

At the Board's November 2015 meeting, the Board authorized a 90-day public comment period on proposed amendments to Rules 5-110 and 5-220 of the Rules of Professional Conduct. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. (See Board open agenda item [122 NOV 2015](#) and the [Board minutes](#) for that meeting.) The Board also agreed with the Commission's recommendation that the processing of these proposed amendments should be prioritized and handled on a separate track from the Commission's comprehensive proposed amendments to the Rules of Professional Conduct that are anticipated to be submitted to the Board in June of 2016. The Commission explained that it applied the following standard in deciding to recommend expedited consideration of a rule:

"Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule is necessary to respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to promulgate the rule would result in the continuation of serious harm."

The Commission's presentation to the Board in November identified proposed paragraph (D) of Rule 5-110 as a key provision that would amend the existing duty of a prosecutor under Rule 5-220, which requires a member, including a prosecutor, to refrain from suppressing "any evidence that the member or the member's client has a legal obligation to reveal or to produce." Rather than incorporating by reference a prosecutor's "legal obligation," the proposed amended rule would state that a prosecutor must: "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." In connection with this key provision, the Commission also reported that alternate language had been considered but did not receive the support of a majority of the Commission members. Set forth below is a redline/strikeout version of this alternate draft showing changes to the version the Commission recommended.

(D) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to ~~Make~~make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

The essential difference between this alternate version and the Commission's recommended provision is that in the former the standard of "information. . . that tends to negate the guilt of the accused or mitigates the offense" is expressly qualified as a requirement that complies with existing law.² Following discussion, the Board determined that both versions of paragraph (D)

provides: "The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar."

² The Commission's consideration of this alternate version of paragraph (D) included a related alternate version of Comment [3] stating that: "The disclosure obligations in paragraph (d) apply only with respect to controlling case law at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively."

should be included in the public comment proposal. As a result, the public comments received include comments that address the alternate version of paragraph (D). For ease of reference, the version supported by the Commission will be referred to as Alt. 1 and the other version included in the public comment will be referred to as Alt. 2.

Following consideration of public comments at the Commission's meeting on March 31 & April 1, 2016, the Commission modified proposed Rule 5-110 and determined that no modifications were needed for proposed Rule 5-220. The Commission's modified proposal is provided as Attachment 1. This agenda item presents the Commission's request that the Board authorize an additional 45-day public comment period in order to continue the Board's consideration of possible adoption of these rules on an expedited basis.

DISCUSSION

I. Public Comment

The 90-day public comment period ended February 9, 2016. A public hearing was held at the State Bar office in Los Angeles on February 3, 2016. A combined total of three hundred and twenty-one (321) public comments and testimony was received. Of these comments and testimony, three hundred and four (304) support Alt. 1 as drafted or the concept of Alt. 1, five (5) support Alt. 2 as drafted or the concept of Alt. 2, and twelve (12) did not expressly indicate a preference between Alt. 1 and Alt. 2. Public comment was received from prosecutors, defense attorneys, bar associations, ethics committees and other organizations. A summary of the public comment is provided as Attachment 2. The transcript of the February 3, 2016 public hearing is provided as Attachment 3.

Among the commenters supporting Alt. 1 are the following: the American Bar Association; the California Appellate Project – Los Angeles Office; the State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC"); the Innocence Project; Loyola Law School Project for the Innocent; and the State Bar's Office of the Chief Trial Counsel ("OCTC").

The commenters supporting Alt. 2 are the following: the California District Attorneys Association; attorney David Majchrzak; and the United States Department of Justice.

Points raised by those who support Alt. 1 include the following.

1. There is value in maintaining uniformity with other jurisdictions and the proposed rule would help avoid the risk of due process violations and ensure a full appellate record required to defend constitutional rights.
2. The proposed rule would appropriately apply to federal prosecutors consistent with local rules of federal courts that apply state ethics rules, and in compliance with federal statute - the McDade Act, 28 USC §530B (re duty of United States attorneys to comply with state ethics rules). As used in other jurisdictions, the proposed rule has not unleashed a flurry of disciplinary actions against prosecutors.
3. Federal prosecutors have been subject for decades to the Model Rule 3.8(d) standard and have not had any serious difficulty conforming their conduct to the rule's requirements. This standard is based on ABA Standards for Criminal Justice 3-3.11 that has been in existence since 1964.

4. Police and prosecutors often have a narrow interpretation of what is material and the rule is needed to require prosecutors to err on the side of disclosure to prevent wrongful convictions.
5. A prosecutor is supposed to administer justice, not just act as an advocate, and Brady violations are a problem of epic proportion. If evidence is exculpatory it should be provided to the defense so that the defense, not the prosecution, can make an evaluation as to the usefulness for the defense at trial.

Points raised by those who support Alt. 2 include the following.

1. Read properly, Alt. 2 does not limit pretrial discovery obligations with a Brady materiality standard. Instead, it expressly ties the prosecutor's responsibilities to statutory obligations as interpreted by case law which clearly does not have a Brady materiality limit.
2. Business and Professions Code § 6086.7 has been amended to require a referral to the State Bar if a court finds that a prosecutor deliberately withheld exculpatory evidence without any requirement that the evidence was material under Brady.
3. Alt. 2 is preferable to Alt. 1 because Alt. 1 imposes an overly broad duty to disclose evidence and there is an inherent problem with a rule that creates a standard that is broader than what is required by the substantive law.
4. The "tends to negate. . ." language leaves prosecutors with no reasonable means to know where the line is drawn. For example, it is not clear whether all impeachment evidence is exculpatory within the meaning of Penal Code § 1054.1(e).
5. For disciplinary purposes, the proposed rule should require actual knowledge on the part of an individual prosecutor.

II. Summary of Proposed Rule 5-110 as Modified after Consideration of Public Comments³

The Commission's modifications to the public comment version of proposed Rule 5-110 are set forth below.

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

The prosecutor in a criminal case shall:

- (A) ~~Refrain from prosecuting~~Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

³ The Commission has not made any modifications to proposed amended Rule 5-220. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor." Although not modified, proposed Rule 5-220 should be included in the requested additional public comment period because proposed Rule 5-110 has been modified and the addition to Rule 5-220 is a cross reference to Rule 5-110.

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

defendant was convicted of an offense that the defendant did not commit.

- (H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that ~~guilty~~guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

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

[3] The disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

~~[3A]~~[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

~~[45]~~ Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

~~[56]~~ Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant

individuals.

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

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

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

As indicated in the above rule text, on the main issue of Alt. 1 or Alt. 2, the Commission recommends Alt. 1. There were two members of the Commission who dissented because they support Alt. 2 and their respective dissenting statements are provided as Attachment 4. The Commission's response to these dissents is provided as Attachment 5.

1. Paragraph (A).

This provision carries forward the substance of current Rule 5-110. A member subject to proposed Rule 5-110 is described as a "prosecutor in a criminal case." This is arguably narrower than the current rule that applies to a "member in government service" who can "institute or cause to be instituted criminal charges." However, because only a member in government who also has prosecutorial powers can institute criminal charges, the scope of coverage should not change.

The knowledge standard in the current rule of "knows or should know" is replaced with "knows." The change conforms to the language used in the substantial majority of jurisdictions that have adopted a version of ABA Model Rule 3.8. "Know" is defined in ABA Model Rule 1.0(f) as "actual knowledge of the fact in question." Under the Model Rules, "a person's knowledge may be inferred from circumstances." By providing that knowledge can be inferred from the

circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.

Modifications following public comment: In paragraph (A), the Commission has substituted the language “Not institute or continue to prosecute” for the phrase “Refrain from prosecuting” to provide greater specificity on the duty of a prosecutor to stop prosecuting a matter where the charges were initially supported by probable cause, but a subsequent change in circumstances results in the charges no longer being supported by probable cause.

2. Paragraph (B)

This would be a new provision in the rules. Derived from Model Rule 3.8(b), it would require a prosecutor to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel.

Modifications following public comment: None.

3. Paragraph (C)

This would be a new provision in the rules. Derived from Model Rule 3.8(c), it would provide that a prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights, unless the tribunal has approved the appearance of the accused *in propria persona*.

Modifications following public comment: None.

4. Paragraph (D)

This would amend the existing duty of a prosecutor under Rule 5-220 to refrain from suppressing any evidence that the member or the member's client has a legal obligation to reveal or to produce. Rather than incorporating by reference a prosecutor's legal obligation, the proposed amended rule would state that a prosecutor must: “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” It is nearly identical to Model Rule 3.8(d).

Modifications following public comment: The Commission recommends retaining Alt. 1. However, the Commission has modified the knowledge standard applicable to a prosecutor's determination of whether information “tends to negate the guilt of the accused or mitigates the offense.” The Commission has added a “knows or reasonably should know” standard. The Commission has made the same change regarding mitigating information at sentencing. The change was made in response to public comment that inquired whether the term “known” in paragraph (d) is intended to mean knowledge of the existence of the evidence or information, or knowledge of the legal consequences of the evidence or information (negate guilt, mitigate). The Commission determined that knowledge of the existence of the evidence or information should require actual knowledge (“known”) but that appreciation of the consequences of such evidence or information should be subject to an objective “knows or reasonably know” standard.

The Commission made a similar determination regarding its tentatively approved Rule 1.13 (organization as client), recommending that an organization's lawyer have actual knowledge of a constituent's misconduct but requiring an objective knowledge standard (knows or reasonably should know) for the legal consequences of the misconduct before a lawyer's duty to take corrective action within the organization is triggered.

5. Paragraph (E)

This would be a new provision in the rules. Derived from Model Rule 3.8(e), it would provide that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Modifications following public comment: None.

6. Paragraph (F)

This would be a new provision in the rules. Derived from Model Rule 3.8(e), it would require a prosecutor to exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 5-120. Rule 5-120 is the current rule that governs extra-judicial statements by a lawyer, including prosecutors.

Modifications following public comment: None.

7. Paragraph (G),

This would be a new provision in the rules. It is derived from Model Rule 3.8(g). Where a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor would be required to promptly disclose that evidence to an appropriate court or authority. In addition, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor would be required to: (a) promptly disclose that evidence to the defendant unless a court authorizes delay, and (b) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Modifications following public comment: None.

8. Paragraph (H)

This would be a new provision in the rules. It is derived from Model Rule 3.8(h). Where a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor would be required to seek to remedy the conviction. It is nearly identical to Model Rule 3.8(d).

Modifications following public comment: None.

9. Modifications following Public Comment to the Rule Discussion

Discussion sections [1] and [3] have been modified by the Commission. The other Discussion sections have not been changed with the exception of renumbering to accommodate the new numbering of prior Discussion section [3A] as Discussion section [4], and renumbering of all subsequent sections.

The modifications to Discussion section [1] include a clarification that all lawyers in government service remain bound by Rules 3-200 (Prohibited Objectives of Employment) and 5-220 (Suppression of Evidence). In part, this was added by the Commission because current Rule 5-110 applies to “a member in government service” but the proposed amended rule would only apply to “a prosecutor in a criminal case.”

The modifications to Discussion section [3] clarify that the disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment. This responds to public comments that questioned whether impeachment material was covered by paragraph (D).

Regarding Discussion section [8], the Commission considered a motion to expand the safe harbor language to encompass paragraph (D). Public hearing testimony from the United States Department of Justice recommended this revision (see page 34 of the transcript of the February 3, 2016 public hearing). This change was defeated by a vote of 4 yes, 11 no, and no abstentions. The revision would have modified Discussion section [8] as follows:

[8] A prosecutor's determination that evidence or information is not of such nature as to trigger the obligations of paragraphs (D), (G), or (H), though subsequently determined to have been erroneous, does not constitute a violation of this Rule, if the original determination was made in good faith based on all information known to the prosecutor at the time.

III. Request for Public Comment Authorization and an Expedited Process for Proposed Amended Rule 5-110.

With due consideration of the modifications made after public comment, the Commission continues to believe that the prioritized processing of proposed amended Rule 5-110, separate and apart from the Commission's comprehensive proposed amendments to the entire rules, is warranted to respond to ongoing harm to: (i) the rights of defendants in criminal matters where a prosecutor fails to disclose evidence; and (ii) public confidence in the administration of justice that follows from publicity concerning prosecutors' failures to disclose evidence that result in the wrongful convictions of persons accused of criminal violations.

If the Board agrees, proposed amended Rule 5-110 (and the conforming non-substantive amendment to Rule 5-220) would be released for a 45-day public comment period ending approximately on Monday, June 27, 2016. This additional public comment is needed to conform to the Board's policy requiring such public comment when substantive changes have been made to a proposal following an initial public comment period.

After the 45-day public comment period, the comments received would be considered by the Commission at its meeting on August 26, 2016. At that meeting, the Commission would decide to present to the Board either: (i) a further amended rule for additional public comment; or (ii) a

proposed rule recommended for adoption by the Board. It is anticipated that Board consideration of the Commission's recommendation would occur at the Board's meeting during the State Bar Annual Meeting (September 29 – October 2, 2016).

No amended rule would become operative unless and until the proposed rule is approved by the Supreme Court of California.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None. This agenda item only requests public comment authorization. A Board decision to adopt a rule amendment would be the subject of a separate agenda item.

BOARD BOOK IMPACT

None.

PROPOSED BOARD RESOLUTION

RESOLVED, that the Board of Trustees authorize the release of proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct, attached hereto as Attachment A, for public comment for a period of 45 days; and it is

FURTHER RESOLVED, that this authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposal.

ATTACHMENT(S) LIST

1. Clean Version of Proposed Amended Rules 5-110 and 5-220
2. Synopsis of Public Comments and Public Hearing Testimony
3. Transcript of the February 3, 2016 public hearing
4. Minority Dissents of Commission Members George Cardona and Daniel Eaton
5. Commission Response to Minority Dissents.