

TOTAL = 71 A = 66
D = 1
M = 3
NI = 1

Proposed Rule 5-110 Special Responsibilities of a Prosecutor
Synopsis of Public Comments

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Rule	Comment	RRC Response
X-5110-39	Abernethy, Ronald H. (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-4	Baker, Natasha (6-24-16)	No	A	5-110	Our judicial system is based on an innocent until proven guilty standard. Thus hiding exculpatory evidence undermines the legitimacy and public confidence in such a system. Boilerplate comment language.	No response required.
X-5110-43	Balahadia, Dave (6-29-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-17	Barana, Victoria (6-26-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-10	Berkowitz, Barney (6-25-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-57	Bermant, Alison (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-25	Bertolino, Lisa J. (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.

¹ Recommends adoption of Rule 5-110 as drafted. First, it is important to remind prosecutors of their duty, under existing California law, to timely disclose all exculpatory evidence and information, regardless of materiality. Second, given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutor “knows or reasonably should know” the information is exculpatory, prosecutors do not have to worry about being disciplined without having any culpable mental state. The Revision Commission has been sensitive to the concerns of prosecutors and it is time for California to finally join every other jurisdiction in the United States, all of which have adopted the ABA’s Model Rule on this issue.

NOTE: Full text of comments available from State Bar staff upon request by contacting Audrey Hollins (audrey.hollins@calbar.ca.gov) or 415-538-2167.

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No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Rule	Comment	RRC Response
X-5110-28	Bobrow, Oscar (6-24-16)	No	A	5-110	Supports rule and attaches a recent court ruling in a homicide case highlighting the issue. States that the behavior addressed in the ruling is not isolated.	No response required.
X-5110-48	Bollinger, Andre (6-30-16)	No	A	5-110	Proposed rule is necessary and in accordance with the ethical responsibilities of prosecutors in order to assure that those accused of crimes are not wrongfully convicted.	No response required.
X-5110-2	California District Attorneys Association, multiple signatories (6-22-16)	Yes	M	5-110	Cites to 2-26-16 letter as indicative of its position. Also requests that the comments section be changed to reflect that disclosure of impeachment evidence concerning defense witnesses is not warranted unless defense has made defense witness identity available in advance of trial.	The language concerning impeachment material in Comment [3] is not intended to refer to impeachment material concerning defense witnesses, as the California Supreme Court has held that such information is not exculpatory. See <i>People v. Tillis</i> (1998) 18 Cal.4th 284. The language refers to impeachment material concerning government witnesses.
X-5110-14	California Public Defenders Association, Joshua C. Needle (6-25-16)	Yes	A	5-110	There is nothing new in the rule regarding a prosecutor's obligation to see that justice is done and that defendants be treated with fairness. It is time that prosecutors took their obligations seriously or be sanctioned. Cites <i>Berger v. U.S.</i> for prosecutor's obligations.	No response required.

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X-5110-24	Camp, Daniel (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-51	Cavalluzzi, Maria (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-35	Clarke, Joe (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-60	Clift, Casey (7-1-16)	No	A	5-110	Fair administration of justice demands that prosecutors not be advocates for conviction but rather the keeper of fairness to those standing accused of a crime. There are many examples of where prosecutors have run afoul of this proposed rule to the detriment of society's belief that our justice system is fair and just.	No response required.
X-5110-42	Committee on Professional Responsibility and Conduct, Merri A. Baldwin (6-29-16)	Yes	A	5-110	Supports the adoption of proposed rule.	No response required.
X-5110-1	Corn, Catherine Irene (6-12-16)	No	NI	5-110	Urges Bar to impose stricter standards on prosecutors barring them from "scaring witnesses" and pushing hard to win cases. A person should not be prosecuted on "he said, she said" arguments.	Commenter's concerns re "scaring witnesses" are addressed in proposed Rules 8.4(c) and (d). The standard for initiating or continuing a prosecution is objective: probable cause.
X-5110-46	Cox, Jason (7-1-16)	No	A	5-110	Proposed rule appropriately requires a prosecutor to disclose evidence to the extent already required by existing law. Nothing in the proposed rule changes attorney existing legal	No response required.

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					<p>duties with regard to the exchange of information.</p> <p>Prosecutorial discovery violations are frequent and widespread. It is time for California to adopt a rule of professional conduct, like every other jurisdiction, that succinctly spells a prosecutor's duty to disclose exculpatory evidence and information to the defense.</p>	
X-5110-66	Curatola, Robert J. (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-61	D'Agustino, Elena (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-12	Defilippis, Stephen M. (6-25-16)	No	A	5-110	<p>Recounts an instance where a prosecutor withheld evidence in a special circumstances murder case.</p> <p>Modified boilerplate comment language.</p>	No response required.
X-5110-36	Dobbyn, Gerry (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-27	Dodd, Peter (6-24-16)	No	A	5-110	<p>Doesn't understand why prosecutors haven't been sanctioned in the past under Brady.</p> <p>Boilerplate comment language.</p>	No response required.
X-5110-55	Duquette, Richard (7-2-16)	No	A	5-110	Proposed rule will promote early disclosure of evidence and help resolve cases at earliest opportunity.	No response required.

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X-5110-9	Duree, John (6-25-16)	No	A	5-110	<p>Failing to disclose exculpatory evidence is a recurring cause of convictions of innocent people.</p> <p>Criminal prosecutions are not just about justice, they are about competition between lawyers.</p> <p>Prosecutors have a huge advantage and are always on the "right" side of the political dynamic. Accordingly they win a huge majority of the cases. Prosecutors have a strong personal motivation to win.</p> <p>The hiding of exculpatory evidence frequently arises. There is every reason to fortify the judicial and ethical admonitions against failing to disclose exculpatory evidence.</p>	No response required.
X-5110-54	Fischer, Barbara E. (7-1-16)	No	A	5-110	In favor of proposed rule. There must be consequences for thwarting justice.	No response required.
X-5110-32	Friedman, Jennifer (6-27-16)	No	A	5-110	<p>Proposed rule is necessary. Comments suggest that prosecutors do not understand their obligations under existing law. The proposed rule is clear and easy to follow. It is the law in every other jurisdiction.</p> <p>Cites a recent study that shows little discipline of prosecutors despite evidence of misconduct.</p>	No response required.
X-5110-30	Groshan, Justin (6-25-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.

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X-5110-65	Hamilton, Kenneth (7-1-16)	No	A	5-110	The rule is consistent with prosecutor obligations. When those obligations are breaches a defendant's fundamental liberty interests may be infringed. Discipline for such misconduct is appropriate.	No response required.
X-5110-53	Harter, John (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-64	Hendrickson, Charles (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-34	Henneman, Krista (6-27-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-41	Horner, Robert B. (6-28-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-37	Huerta, Joan (6-29-16)	No	A	5-110	Fully agrees with proposed rule. Boilerplate comment language. ¹	No response required.
X-5110-50	Jafine, Kelly (7-1-16)	No	A	5-110	There is no punishment so prosecutors withholding discovery runs rampant. This is partially because judges are afraid of and beholden to the DA's office. The only remedy is adoption of the proposed rule. It will serve to clarify the prosecutor's obligations under the law and would help curtail the limited discovery training given to prosecutors. If prosecutors actually have something to lose, they may actually comply with the law.	No response required.

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X-5110-11	Karowsky, Jan David (6-25-16)	No	A	5-110	<p>Aghast at the attitude of many prosecutors' cavalier approach to turning over discovery.</p> <p>Local prosecutors have been caught withholding evidence without repercussion. For years, the local DA's office had a sign which read "It's all of us against all of them."</p> <p>This rule assures that prosecutors will comply with the law and really seek justice rather than just win at all costs.</p>	No response required.
X-5110-15	Katz, Joseph (6-25-16)	No	A	5-110	Slightly modified boilerplate comment language. ¹	No response required.
X-5110-7	Kelly, Patrick H. (6-24-16)	No	A	5-110	No comment.	No response required.
X-5110-5	Klein, Keri (6-24-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-44	Kim, Jong Y. (6-30-16)	No	A	5-110	We must make prosecutors disclose any and all evidence that will exculpate a defendant in order to prevent even one single innocent person from going to jail or prison.	No response required.
X-5110-21	Krupka, Vickie Fernandes (6-27-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-6	Mandell, Steven R. (6-24-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-63	McCarthy, Paul (7-1-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.

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X-5110-29	McNamara, Susannah (6-25-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-18	Megdal, Sarah (6-27-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-56	Moss, Gary (7-1-16)	No	A	5-110	Modified boilerplate comment language. ¹	No response required.
X-5110-26	Muller, Barbara J. (6-24-16)	No	A	5-110	Every other jurisdiction has this rule. The rule will help ensure that prosecutors uphold their oath to seek justice.	No response required.
X-5110-22	Office of State Public Defender, Mary K. McComb (6-27-16)	Yes	A	5-110	Supports proposed rule but addresses comments regarding comment [3] and a prosecutor's duty to provide impeachment material. The rule doesn't bear upon impeachment material regarding defense witnesses but rather prosecution witnesses. Moreover, application of the rule has not been a problem in the other 49 states who have such a rule.	No response required.
X-5110-59	Ogul, Michael (7-1-16)	No	A	5-110	Proposed rule would encourage prosecutors to disclose exculpatory information regardless of whether it is deemed material by the prosecutor. This will help reduce the number of wrongful convictions and excessive sentences that occur each year. The recent modification provides innocent prosecutors with added	No response required.

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					protection from discipline. The concern that late disclosure of defense witnesses will make it difficult to disclose impeachment evidence is inapposite because by definition, information that impeaches a defense witness is not exculpatory.	
X-5110-22	Otani, Kay (6-27-16)	No	A	5-110	Proposed rule is a good start. Cites Judge Kozinski article. Cites an example where someone was charged based on an invalid waiver of rights and states this rule could prevent that. Proposed rule will help upright prosecutors make and justify good decision while helping over-zealous ones avoid mistakes. It is not enough to have an abstract punishment or reversal several years down the line. Proposed rule is step toward making prosecutors realize that they are not above the law. This will prevent convicting innocent people.	No response required.
X-5110-3	Pena, Katarina (6-24-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-31	Petrosino, Sharon L. (6-27-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-19	Pai, Irene (6-27-16)	No	A	5-110	Prosecutors who care to get it right are outnumbered by those who do not. For the latter,	No response required.

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					inactivity with regard to potentially exculpatory evidence is the easiest route. This proposed rule would help with the quality of prosecutors. This rule ensures that prosecutors utilize their immense power to focus on justice rather than winning at all costs.	
X-5110-38	Ramirez, Joseph (6-28-16)	No	A	5-110	Proposed rule sorely needed. Our profession and the public's trust in criminal justice are both diminished when prosecutors do not fulfill their legal obligations.	No response required.
X-5110-67	Ruzanna (7-1-16)	No	A	5-110	When a prosecutor interferes with defendant's constitutional rights, disciplinary action is not only appropriate but is necessary.	No response required.
X-5110-16	Saban, Pathena (6-26-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-68	Sanger, Robert M. (7-1-16)	No	A	5-110	Concurs with California Attorneys for Criminal Justice. While most prosecutors honor their obligation to disclosure exculpatory material, there have been all too many exceptions. Honoring this obligation is of critical importance to the liberty and lives of the public served by	No response required.

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					the Bar in general and prosecutors in particular. Proposed rule is an appropriate and long overdue addition to the Rule of Professional Conduct.	
X-5110-20	Schweitzer, Stefan (6-27-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-62	Scofield, Robert (7-1-16)	No	A	5-110	The revised version of the proposed rule is fair and appropriate.	No response required.
X-5220-62	Scofield, Robert (7-1-16)	No	A	5-220	Supports the adoption of proposed rule.	No response required.
X-5110-40	Shea, George (6-28-16)	No	A	5-110	No comment provided.	No response required.
X-5220-40	Shea, George (6-28-16)	No	A	5-220	No comment provided.	No response required.
X-5110-58	Sheela III, Barton (7-1-16)	No	A	5-110	Proposed rule is modeled after ABA rule and there is no reason to “water down” that rule for California prosecutors.	No response required.
X-5110-69	Sklan, Jeffrey (6-24-16)	No	M	5-110	Prosecutors frequently feel that pre-trial, penal code section 1054 doesn't require them to turn over all evidence. Defense should be provided all evidence at earliest possible juncture. Commission should work with legislature to draft changes to section 1054. Recounts recent story where client spent a year in jail while he was waiting for information in law enforcement's possession since	Making recommendations for amendments to Penal Code section 1054 is beyond the purview of the Commission's charter. However, the California Supreme Court has interpreted the scope of section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v. Superior Court</i> (2010) 50

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					<p>arrest. Despite infuriating the bench officer, nothing was done.</p> <p>Suggests that the judiciary become mandatory reporters of prosecutors' violations. Hasn't seen a judge report violations in his 38 years of practice.</p> <p>Unlike sanctions exceeding \$1000 in the civil area which must be reported, there is no counterpart for prosecutors. If there is no consequence, it would be naïve to expect change.</p>	<p>Cal.4th 890, 901.</p> <p>Similarly, the Commission is not assigned to recommend rules governing the conduct of judges, which is governed by the California Code of Judicial Ethics.</p>
X-5110-23	Spicer, Adam (6-28-16)	No	A	5-110	<p>Boilerplate comment language.¹</p> <p>Thinks we need this proposed rule at once.</p>	No response required.
X-5110-45	State Bar of California, Office of Chief Trial Counsel, Gregory Dresser (6-27-16)	Yes	M	5-110	<p>Reiterates previous comments on proposed rule.</p> <p>Proposal published by Board of Trustees tracks ABA Rule 3.8 and is consistent with California law.</p> <p>1. Wants the rule to specify when a prosecutor must make efforts to ensure that someone has been advised of his or her right to counsel. Suggests that "timeliness" addressed in the discussion section should be addressed in the text of the rule.</p>	<p>1. Concerning timeliness, the Commission has recommended adoption of the ABA Model Rule text language, as clarified by Comment [3]. The Commission believes that this approach provides the greatest flexibility in applying the rule to a</p>

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					<p>2. Recommends that the text of the rule explain that a prosecutor's duty to disclose is broader than the Brady materiality standard. The text should also address whether it includes impeachment materials.</p> <p>3. The "know or reasonably should know" standard does not address a prosecutor's duty to search for exculpatory evidence or whether violation is based upon recklessness, gross negligence, or willful blindness.</p>	<p>particular set of circumstances.</p> <p>2. Concerning the recommendation that the rule text expressly state that the duty is broader than the material standard of <i>Brady</i>, there is nothing in the rule that suggests the duty is coextensive with Brady. The comment <i>clarifies</i> that the duty is broader than Brady; clarifying a rule is a proper function of a comment. Further, the Commission believes that incorporating the ABA rule text is important in furthering a national standard as charged in the Commission's Charter.</p> <p>3. The rule does not impose a duty to search for exculpatory evidence. First, there are two knowledge standards in proposed paragraph (D). The Commission made this change after the first round of public comment revealed confusion as to what the prosecutor must have knowledge of.</p> <p>The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of the evidence or information. That is an actual knowledge standard. Under</p>

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						<p>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.</p> <p>On the other hand, the “knows or reasonably should know” standard, which is also objective, applies to the prosecutor’s knowledge of <i>legal effect</i> of the <i>known</i> information or evidence. Neither standard imposes on prosecutors a blanket duty without more to search for exculpatory evidence or information.</p>
X-5110-52	Swanson, David (7-1-16)	No	A	5-110	<p>Recounts story where prosecutor failed to turn over evidence. Until there is some penalty, this will not change.</p> <p>Boilerplate comment language.¹</p>	No response required.
X-5110-13	Szocs, Steven L. (6-25-16)	No	A	5-110	<p>It’s time for CA to hold prosecutors accountable for their actions.</p> <p>Recounts two personal examples where prosecutors have failed to turn over known evidence and</p>	No response required.

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					states that these examples seriously undermine the public's confidence in the fairness of our judicial system.	
X-5110-47	Theiss, Sara (6-30-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-49	U.S. Department of Justice, multiple signatories (7-1-16)	Yes	D	5-110	1. Urges the Commission to reconsider proposed rule's "knowledge" requirement as it threatens to subject earnest prosecutors to discipline even for honest, understandable, or minor mistakes. Because some of the proposed rule's terms are undefined, the rule could snare even a scrupulous prosecutor by failing to provide clear notice of the expected standard. Proposed discipline only under a willful or intentional standard.	1. The Commission believes that the two knowledge standards in paragraph (D) are appropriate and provide the proper balancing of interests – the disclosure of exculpatory information possessed by the prosecutor to the defense and the protection of prosecutors who attempt to comply with that obligation – by applying different knowledge standards. Neither standard should be viewed as a "negligence" standard that will result in discipline for simple negligence. The Commission made this change after the first round of public comment revealed confusion as to what the prosecutor must have knowledge of. The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of the evidence or information. That is an actual knowledge standard. Under the Model Rules, "a person's knowledge may be inferred

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					<p>2. Reiterates position address in February 24, 2016, letter. First, that the rule should reflect that federal prosecutors are held to a different legal standard than California prosecutors. Second, that there are undefined terms in the proposed rule that are ambiguous. Third, imposing greater disclosure requirements on federal prosecutors will chill witness cooperation, be used as a tactical weapon, and require federal prosecutors to seek relief from over-burdened federal</p>	<p>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.</p> <p>On the other hand, the “knows or reasonably should know” standard, which is also objective, applies to the prosecutor’s knowledge of <i>legal effect</i> of the <i>known</i> information or evidence. Neither standard is intended to impose on prosecutors a blanket duty without more to search for exculpatory evidence or information.</p> <p>2. The Commission considered each of the concerns expressed in the commenter’s February 24, 2016 letter during its consideration of the first round of public comment and declined to implement any of the suggested changes. The Commission believes that its previous positions continue to be correct.</p>

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					courts to avoid discipline. Fourth, the proposed rule will not eliminate unnecessary differences between California and the preponderance of the states. Fifth, there is no empirical data of “epidemic” Brady violations. Sixth, 5-110(G) ignores the practical reality that prosecutors who are unfamiliar with a case will be unable to assess evidence relating to whether a convicted defendant did not commit the offense. Finally, proposed alternative versions of (G) and (H) address the limited investigatory authority that prosecutors have post-conviction.	
X-5110-8	Vegas, Kim (6-25-16)	No	A	5-110	Boilerplate comment language. ¹	No response required.
X-5110-33	Zernich, Robert J. (6-27-16)	No	A	5-110	States that home county has adequate and timely discovery but understands that this isn’t the case in the rest of the state.	No response required.