

## Attachment F: Full Text of Public Comments

### Comments Received During the Additional 45-Day Public Comment Period

#### **Proposed Amended Rule 5-110**

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## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	N/A
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Catherine Irene Corn
<b>City</b>	Sacramento
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	catherineirenecon1@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	State No Preference.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I strongly urge the Bar to impose stricter standards on Prosecutors which would inhibit them from 'scaring witnesses into saying things they otherwise would never say', and from pushing to win cases where there isn't enough hard evidence. He said, she said arguments should not be enough to prosecute anyone.
<b>Date</b>	06/12/2016
<b>File :</b>	X-5110-1-Catherine Irene Corn (06-12-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	California District Attorneys Association
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	Mark Zahner
<b>City</b>	Sacramento
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	mzahner@cdaa.org
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule if MODIFIED.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	Please see attached letter from CDAA.
<b>Attachment</b>	<a href="#">CDAA_Response_Amended_Rule_5-110_-_06-22-16.pdf (180k)</a>
<b>Date</b>	06/22/2016
<b>File :</b>	X-5110-2-CDAA (Mark Zahner) (06-22-16)-FS
<b>Submitted via:</b>	Online



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Mark Zahner

June 22, 2016

The Honorable Lee Edmon, Chair  
Jeffrey Bleich, Co-Vice-Chair  
Dean Zipser, Co-Vice-Chair  
Commission for the Revision of the Rules of Professional Conduct  
Audrey Hollins, Senior Administrative Assistant  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

RE: Comment on Modified Proposed Rule 5-110(D)—Special  
Responsibilities of a Prosecutor

Dear Justice Edmon, Mr. Bleich, Mr. Zipser, and Ms. Hollins:

The California District Attorneys Association (CDA A) submits this public  
comment to modified proposed Rule of Professional Conduct 5-110(D).

After receiving public comments regarding Alternative 1 and Alternative 2 of  
proposed Rule 5-110(D), the Commission recommended the following  
modification for which the Board of Trustees approved an additional 45-day  
public comment period:

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;

A modified discussion point states:

[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.

## Attachment F: Full Text of Public Comments

State Bar of California

Office of Professional Competence, Planning and Development

Re: Comment on Modified Proposed Rule 5-110(D)

June 22, 2016

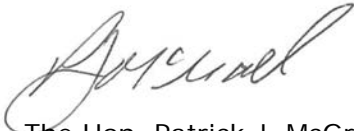
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CDAA's concerns regarding the modified proposed rule and its supporting comments are set forth in the attached letter, and in the following comment. CDAA has previously sent a copy of the attached letter, but offers this additional copy in an effort to conglomerate our concerns for purposes of this public comment period.

CDAA requests the language in the comments section be changed to state that no violation of this rule can be sustained regarding the lack of a disclosure of impeachment evidence unless the defense has, in advance of trial, made available to the prosecution the identity of defense witnesses. This would promote a fair and timely exchange of evidence as contemplated by Proposition 115 and give the prosecutor adequate information upon which to base disclosure.

CDAA respectfully requests that the Commission reconsider adopting Alternative 2 or further clarify certain aspects of the modified proposed rule.

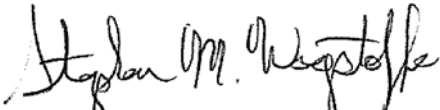
Sincerely yours,



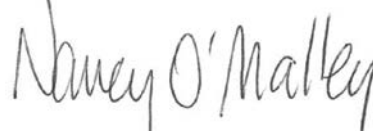
The Hon. Patrick J. McGrath  
Yuba County District Attorney  
CDAA President



The Hon. Birgit Fladager  
Stanislaus County District Attorney  
CDAA Secretary-Treasurer



The Hon. Stephen M. Wagstaffe  
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Enclosure



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February 26, 2016

The Honorable Lee Edmon, Chair  
Jeffrey Bleich, Co-Vice-Chair  
Dean Zipser, Co-Vice-Chair  
Commission for the Revision of the Rules of Professional Conduct  
Audrey Hollins, Senior Administrative Assistant  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

RE: Comment on Proposed Revisions of Rules of Professional Conduct  
Proposed Rule 5-110(d)—Special Responsibilities of a Prosecutor

Dear Justice Edmon, Mr. Bleich, Mr. Zipser, and Ms. Hollins:

The California District Attorneys Association (CDA A) submits this public comment to proposed Rule of Professional Conduct 5-110(d).

The only substantial controversy about any part of the proposed rule concerns subdivision (d), for which two versions have been considered – Alternative 1 and Alternative 2. On October 23, the Commission, over two dissents, tentatively recommended the adoption of Alternative 1. While Commission proceedings in and since October have done much to give positive substance to the proposed rule, CDA A continues to believe the Alternative 1 version the Commission tentatively adopted on October 23 has significant shortcomings which can be easily remedied by the adoption of Alternative 2. CDA A further believes that criticisms leveled at Alternative 2 are not warranted.

The difference in language between Alt. 1 and Alt. 2 can be simply illustrated as follows. The bracketed, italicized language is in Alt. 2, but not in Alt. 1.

The prosecutor in a criminal case shall:

(d) [***comply with all statutory and constitutional obligations, as interpreted by case law, to***] 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.

CDA A has supported Alt. 2, as did the two commission members who dissented from the October recommendation.

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CDAA submitted a letter of comment earlier in the Commission's proceedings. (October 1, 2015; see Board of Trustees Agenda Item 122 NOV 2015, Attachment G, hereafter CDAA 10/1/15 letter.) Several points raised in that letter have since been addressed in materials produced by the Commission in a manner that answers some of CDAA's concerns. Other points are of continuing concern to CDAA.

### I. POINTS OF AGREEMENT

#### A. No Materiality Requirement

The California criminal discovery statutes obligate prosecutors to provide the defense "any exculpatory evidence." (Pen. Code § 1054.1(e).) The California Supreme Court has twice unanimously stated this standard requires the prosecution to provide all exculpatory evidence, not just evidence that is "material" under *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny. (See *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Based on the statute and case law, CDAA agrees that prosecutors are obligated to provide all exculpatory evidence without a materiality limit on that obligation. Alternative 2 of the rule, which CDAA supports, makes it clear prosecutors are obligated by statute to make such disclosures.

With all due respect to the Commission, it erred in saying, "Alternative 2 seeks to limit pretrial discovery to only material disclosures a set forth in *Brady v. Maryland*, 373 U.S. 83 (1963)." (See Board of Trustees Agenda Item 122 NOV 2015, Supplemental Materials, Response to Dissents Regarding Proposed Rule 3.8(d) [5-110(d)], section A, third paragraph.) Alternative 2 does **not** seek to limit pretrial discovery obligations with a *Brady* materiality standard—in fact, it expressly ties the prosecutor's responsibilities to "statutory ... obligations, as interpreted by case law," which have no *Brady* materiality limit.

#### B. Timeliness Obligation

The proposed rule states the prosecutor "shall make timely disclosure to the defense" of exculpatory and mitigating evidence. In the "Discussion" section following the text of the proposed rule as adopted on October 23, the Commission states that "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...." (See Board of Trustees Agenda Item 122 NOV 2015, Attachment A, p. 2.) CDAA assumes the Commission's official discussion points will have interpretive force with respect to any adopted rule comparable to official law revision commission comments with respect to statutes, i.e. they will be entitled to substantial weight in construing the rule. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 947; *HLC Properties, Inc. v. Superior Court* (2005) 35 Cal.4th 54, 62; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 980.) CDAA agrees with the Commission that the timeliness component of the rule should be interpreted in this fashion.

It is noteworthy that this interpretation would be the same under Alternative 2, which expressly ties the prosecutor's obligations to statutes and case law, just as the Commission's discussion point does. Indeed, the discussion point and Alternative 2, while using some different language, appear to be the same in terms of intended and actual effect.

#### C. Knowledge

CDAA previously expressed concern in our October 1 letter about the level of responsibility the proposed rule might impose with respect to information for which the government as a collective entity may have disclosure responsibility, but of which the individual prosecutor may not have had personal



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knowledge. CDAA notes that the language of the proposed rule specifically refers to material “known to the prosecutor.” The California Public Defenders Association and California Attorneys for Criminal Justice, in their letter in support of the proposed rule, agree that for discipline purposes under the rule, actual knowledge of the individual prosecutor is required. (See Board of Trustees Agenda Item 122 NOV 2015, Attachment F, hereafter CPDA 10/8/15 letter.) CDAA agrees with CPDA and CACJ on this interpretation and application of the rule. While the Commission’s discussion points do not further address the point, the language itself seems clear.

#### D. Sentencing Mitigating Evidence Disclosed to the Tribunal

CDAA previously expressed concern in our October 1 letter about the requirement that evidence in mitigation of sentencing must be disclosed not only to the defense, but also to “the tribunal.” The proposed rule tentatively adopted on October 23 omits “the tribunal” from the disclosure requirement. CDAA agrees with this change from the ABA model version of the rule.

## II. POINTS OF CONTINUING CONCERN

### A. Scope of Material Covered By Proposed Rule

While the standard for the timing of disclosures is tied by the commission’s discussion points to statutes and court orders, the standard with respect to the type of evidence covered is not. The failure to anchor the meaning of “evidence or information,” “tends to negate ... guilt,” and “mitigates the offense,” to some specific or particular criteria leaves prosecutors without reasonable means to know where the lines are. This is a matter of great concern when crossing the lines could lead to professional discipline.

While Penal Code section 1054.1(e) and case law make it clear the prosecutor is obligated to turn over all “exculpatory” evidence, issues may arise as to whether that standard is the same as the standard of “evidence that tends to negate the guilt of the accused or mitigates the offense” under the disciplinary rule. To use just one specific example, California case law at this time does not make clear whether all witness impeachment evidence is “exculpatory” within the meaning of 1054.1(e). Two reported appellate cases (one quite recently) have addressed the point without deciding it, calling the issue “far from clear” and “unsettled.” (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 377-378; *People v. Lewis* (2015) 240 Cal.App.4th 257, 266.) Should California case law ultimately determine that not all impeachment evidence is “exculpatory” under 1054.1(e), a California prosecutor would not be required by the statutes to disclose such information. Yet if rule 5-110(d) was viewed as an alternative authority to require prosecutors to make such disclosures, a prosecutor could become the object of state bar investigation and discipline, despite having fulfilled all the duties under California’s comprehensive criminal discovery rules. Compare this suggested scenario with the actual scenario in *Disciplinary Counsel v. Kellogg-Martin* (Ohio Sup. Ct. 2010) 923 N.E.2d 125. There, the prosecutor faced disciplinary charges over failing to turn over impeachment evidence before the defendant entered a guilty plea as part of a plea bargain. The Ohio Supreme Court held that both the constitutional obligation and the obligation under the Ohio criminal discovery rules did not require disclosure. However, the disciplinary board argued that the Ohio version of ethics rules should hold a prosecutor in violation even if the evidence was not otherwise legally required to be disclosed.

Prosecutors have legitimate reasons for concern about divergence between discovery obligations under statutes and court orders, and those which may be advanced through the tactical use of ethics rules as litigation tools. Kirsten Schimpff<sup>1</sup> has documented how in 2009 the ABA Ethics Committee issued Formal Opinion 09-454, which (among other things) interpreted Model Rule 3.8(d) to impose on

<sup>1</sup> Assistant General Counsel of the Washington State Bar Association and Visiting Assistant Professor at Seattle University School of Law.

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prosecutors ethical discovery obligations that conflict with the Jencks Act (18 U.S.C. § 3500, the federal statute dealing with the discovery disclosure of witness statements), after attempts to change the rule through the statutory process had proved not fully satisfactory to those seeking a different rule. Schimpff, *Rule 3.8, The Jencks Act, And How The ABA Created A Conflict Between Ethics And The Law On Prosecutorial Disclosure*, 61 Am. U. L. Rev. 1729 (2012). Irwin Schwartz, a criminal practitioner and past president of the National Association of Criminal Defense Lawyers (NACDL), presented a paper in 2010 to a national seminar for federal defenders, in which he advocated using Rule 3.8(d) as an affirmative tool in litigation to achieve discovery disclosures that might not otherwise be required by statute or ordered by a court. (See Schwartz, "Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information"; the paper can be viewed online at [https://www.fd.org/pdf\\_lib/fjc2010/fjc2010\\_strategy\\_exculpatory.pdf](https://www.fd.org/pdf_lib/fjc2010/fjc2010_strategy_exculpatory.pdf).) Schwartz's paper was also published in the March, 2010 edition of *The Champion*, the magazine of NACDL.

Alternative 2 would link the issue of what evidence is covered by the rule to discernible statutory obligations, which include the obligation to disclose all exculpatory evidence. Even while California case law on discovery develops (as does any body of case law), it remains the body of case law setting the parameters for criminal practice in this state. Alternative 1, without any further explication or clarification, leaves the obligation ambiguous, without any defined parameters or limits.

#### B. CPDA and CACJ Reasons for Adopting Rule Alternative 1

CPDA and CACJ argued in their October 8 letter that prosecutors feel free to ignore their duty to disclose exculpatory evidence because under Business and Professions Code section 6086.7, a mandatory referral to the state bar only occurs if the attorney's misconduct leads to "modification or reversal of a judgment in a judicial proceeding based in whole or in part on the [attorney's] misconduct..." and a prosecutor's withholding of evidence can only lead to reversal if the evidence was material under *Brady*. (See CPDA letter of October 8, at p. 8.) This argument fails to acknowledge that § 6086.7 has been amended to include, as basis for a mandatory state bar referral, a finding by a court that a prosecutor deliberately withheld exculpatory evidence, without any requirement that the evidence was material under *Brady*, or that the case was reversed or judgment was modified as a result. (Bus. & Prof. Code § 6086.7(a)(5); Pen. Code § 1424.5, as enacted in Statutes 2015, Chapter 467 (AB 1328).)<sup>2</sup>

This provision in Business and Professions Code section 6086.7 not only undercuts CPDA's and CACJ's argument that the structure of the mandatory bar referral statute allows prosecutors to ignore their statutory obligations, it also shows that California laws relating to the enforcement of criminal discovery obligations are part of an integrated statutory scheme. Actual or perceived deficiencies in this scheme can be investigated and addressed through the legislative process. The State Bar has a rightful place through the rules and discipline process in ensuring that all attorneys comply with the requirements and procedures of litigation. But California has a comprehensive framework, established through statutes and case law, for criminal discovery. The State Bar should not take on the role of redesigning and remodeling the criminal litigation process.

#### III. CONCLUSION

Since CPDA, CACJ and the Commission are committed to impressing upon prosecutors their responsibility to fulfill both their constitutional *and* their statutory obligations to disclose exculpatory evidence, it should follow they would embrace Alternative 2, which expressly incorporates both of those

<sup>2</sup> How this escaped the attention of CPDA and CACJ is unclear, since in their same October 8 letter (at p. 4) they cite the same bill, which amended B&P 6086.7 and added PC 1424.5, for the definition of disclosure requirements as to both evidence and information.

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Office of Professional Competence, Planning and Development

Re: Comment on Proposed Revisions of Rules of Professional Conduct, Proposed Rule 5-110(d)

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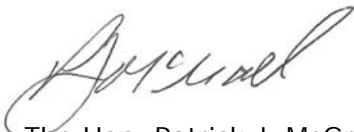
obligations. Alternative 2 tethers the ethics and discipline rules to the existing criminal discovery framework. Alternative 1 leaves the ethics and discipline process adrift—open-ended in the requirements for prosecutors, leaving them to speculate as to their obligations, with an ethics rule being subject to use as a litigation weapon in a fashion for which it should not be intended. The Commission, through its discussion points, wisely tied the timeliness issue to existing statutes and laws. It should do the same for the scope of material covered. Indeed, it is difficult to understand why timeliness is tied clearly to the existing procedural rules, and scope of information is not. The justification the Commission gives is the assertion that Alternative 2 is meant to establish the *Brady* materiality standard, a claim which is—with all due respect—mistaken, as is noted above.

The work of this commission and the State Bar must be to achieve real world solutions to real problems, the scope of which are realistically understood. It should not be driven by anecdotal evidence or melodramatic hyperbole, like the oft quoted lament of Judge Alex Kozinski that, "There is an epidemic of *Brady* violations abroad in the land." (*U.S. v. Olsen* (9th Cir. 2013) 737 F.3d 625, at 626, Kozinski, J. dissenting from denial of rehearing en banc.)<sup>3</sup>

CDAA supports the proposition that prosecutors should understand and fulfill their special responsibilities, including the statutory duty to disclose exculpatory evidence. Deficiencies in this area should be addressed by clear rules, not by creating rules that expand the duties of prosecutors beyond those required by California law, and beyond a clear understanding as to what those duties are. Alternative 2 would accomplish the former, while Alternative 1 embodies the latter.

CDAA respectfully urges the Commission to modify proposed rule 5-110, and include the additional language in Alternative 2.

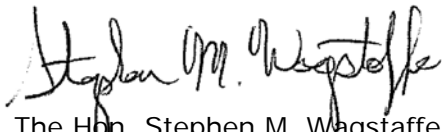
Sincerely yours,



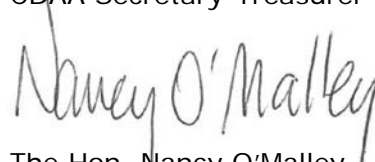
The Hon. Patrick J. McGrath  
Yuba County District Attorney  
CDAA President



The Hon. Birgit Fladager  
Stanislaus County District Attorney  
CDAA Secretary-Treasurer



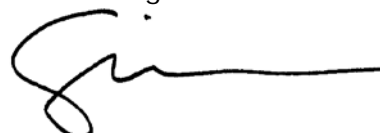
The Hon. Stephen M. Wagstaffe  
San Mateo County District Attorney  
CDAA First Vice-President



The Hon. Nancy O'Malley  
Alameda County District Attorney  
CDAA Sergeant-At-Arms



The Hon. Todd D. Riebe  
Amador County District Attorney  
CDAA Second Vice President



The Hon. Gilbert G. Otero  
Imperial County District Attorney  
CDAA Past President

<sup>3</sup> Judge Kozinski's chain citation of 29 cases to support his point draws on jurisdictions nationwide, over the 16-year span from 1998 to 2013, and includes three cases from California. In that time period, California alone saw over 3 million convictions in cases arising from felony arrests. (See California Dept. of Justice, *Crime in California 2014*, Table 37, p. 49.) Whatever problem may exist with respect to *Brady* compliance, Judge Kozinski's proffered evidence hardly demonstrates an epidemic.

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Katarina Pena
<b>City</b>	San Jose
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	katarina.pena@pdo.sccgov.org
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/24/2016
<b>File :</b>	X-5110-3-Katarina Pena (06-24-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	law student
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Natasha Baker
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. Our judicial system is based on an innocent until proven guilty standard, and thus hiding exculpatory evidence is one of the most damning methods of undermining the legitimacy of - and therefore public confidence in - the judicial system. The latest version of the rule is fair to prosecutors and fair to defendants. Prosecutors must be reminded of their duty, under existing California law, to timely disclose all exculpatory evidence and information, regardless of materiality. Second, the recent amendment to the proposed rule insulates prosecutors from discipline unless the prosecutor actually "knows or reasonably should know" the information is exculpatory. This is a concept defense attorneys appreciate and understand well; a knowing component is more fair and more realistic. 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, which have all adopted the ABA's Model Rule on this issue. Thank you for consideration of my comment.
<b>Date</b>	06/24/2016
<b>File :</b>	X-5110-4 Natasha Baker (06-24-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Public Defender
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Keri Klein
<b>City</b>	Nevada City
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	keri.klein@co.nevada.ca.us
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I support the proposed revision of Rule 5-110. It is important to remind prosecutors of their duty, under current California law, to timely disclose all exculpatory evidence and information, regardless of materiality. Given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutor actually "know 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.
<b>Date</b>	06/24/2016
<b>File :</b>	X-5110-5-Keri Klein (06-24-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Law Offices of Steven R. Mandell
<b>Name</b>	Steven Mandell
<b>City</b>	Santa Monica
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	srm6100@aol.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Receive Mass Email?</b>	For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a>
<b>Date</b>	06/24/2016
<b>File :</b>	X-5110-6-Steven Mandell (06-24-16)-FS
<b>Submitted via:</b>	Online

Attachment F: Full Text of Public Comments

Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Attorney, Law Professor
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Patrick H. Kelly
<b>City</b>	San Jose
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	phkesq@pacbell.net
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>Date</b>	06/24/2016
<b>File :</b>	X-5110-7-Patrick Kelly (06-24-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Kim Vegas
<b>City</b>	San Diego
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	kim.vegas@sdcounty.ca.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110. I believe it is important to remind prosecutors of their duty, under existing California law, to timely disclose all exculpatory evidence and information, regardless of materiality.</p> <p>Now is the 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.</p>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-8- Kim Vegas (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	john duree
<b>City</b>	sacramento
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	jrduree@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>Failure to disclose exculpatory evidence is a recurring cause of convictions of innocent people. Criminal prosecutions are not just about justice; they are competitions between lawyers. Prosecutors start out with a huge advantage: they are first to the evidence, their investigative teams are far better funded, and they can strongly influence the pace of the proceedings, due primarily to their charging authority. In a judicial system where political forces undoubtedly influence outcomes, the prosecutor's office is almost always on the "right" side of the political dynamics. Given their inherent advantages, prosecutors win trials in a huge majority of the cases that are tried. This is as it should be. In this system, however, it can be embarrassing for prosecutors to lose and there are strong personal motivations to win.</p> <p>The temptation to hide the ball, to withhold exculpatory evidence, frequently arises in prosecutors' offices. Prosecutors of weak character--yes, they exist--can yield and have yielded to that temptation. There is every reason to fortify the judicial and ethical admonitions against failing to disclose exculpatory evidence. I see no reason not to adopt Proposed Rule 5-110</p>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-9-Kohn Duree (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Barney Berkowitz
<b>City</b>	Walnut Creek
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	berkomax@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-10-Barney Berkowitz (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	I graduated from Boalt Hall in 1973; was a Deputy DA for 4 years and now a criminal defense lawyer for 43 years.
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Jan David Karowsky
<b>City</b>	Sacramento
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	karowskylaw@sbcglobal.net
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. I have practiced criminal law for over 43 years - 4 1/2 as a prosecutor and the rest as a defense attorney. My focus has been on defending murder and death penalty cases. I am agast at the attitude of many prosecutors, including those handling the most seriouos cases, which approaches being cavalier about turning over required discovery. A number of local prosecutors have been caught withholding exculpatory information. No official action, to my knowledge, has ever been taken against them by any of the local elected DA's. In fact, for years, the local DA's office had a sign prominently displayed which read: "It's all of us against all of them." With that attitude sanctioned by the DA administration (they allowed the sign to remain) such a rule is the least the Bar can do to assure all prosecutors comply with the law and really do "seek justice," rather than just try to win at all, unlawful, costs.
<b>Receive Mass Email?</b>	For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-11-Jan Daivd Karowsky (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Attorney
<b>Name</b>	Stephen M. Defilippis
<b>City</b>	San Jose
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	flipsmd2005@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I support the proposed revision of Rule 5-110 in the form as currently drafted by the Commission. I have personally been in situations in my practice where prosecutors have held back exculpatory evidence, including an incident in the sanity trial of a special circumstance murder where the deputy DA actively attempted to hide the fact that a court appointed expert had changed his opinion, and even told that doctor not to notify the court of his changed opinion. I am a firm believer that it is important to remind prosecutors of their duty, as it exists under California law, to timely disclose all exculpatory evidence\information, whether or not the particular prosecutor deems it to be material. Significantly, the recent amendment to the proposed rule now address the concerns raised by prosecutors, shielding them from discipline unless they actually "know or reasonably should know" the information is exculpatory. Thus, prosecutors do not have to worry about being disciplined without having this required culpable mental state. These changes to the proposed rule show that the Revision Commission has been properly sensitive to the concerns of prosecutors. It is therefore important that California finally join every other jurisdiction in the United States in adopting the ABA's Model Rule on this issue. Thank you for your consideration of this most important issue.</p>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-12-Stephan Defilippis (06-25-16)-FS
<b>Submitted via:</b>	Online

Attachment F: Full Text of Public Comments

Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	attorney
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Steven L. Szocs
<b>City</b>	Los Angeles
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	szocslaw@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.

## Attachment F: Full Text of Public Comments

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

It's time for the State of California to hold prosecutor's fully accountable for their actions when it comes to violating defendant's constitutional rights by the suppression of Brady material. Clearly the convictions that are subsequently reversed or overturned on appeal causes significant harm to the wrongfully convicted, their family and friends, and questions the integrity of our justice system not to mention the costs to the tax payers of the length appeals process can not be ignored.

Attorney Stephen A. Shikes and I have personal experience with these issues not only here in Los Angeles County but Kern County as well. In Kern County our client (multiple strike priors) was facing in excess of 50 year to life that was resolved just prior to jury selection by a plea of no contest on a misdemeanor with time served (1 day). (prior offer was 25 years to life)

During the proceedings, one of the victims threatened our client in front of two DA Investigators. The DDA initially denied any knowledge of our victim having been threatened in the court hallway in front of two DA Investigators who did not prepare a report. When the names of the DA Investigators were demanded to be interviewed, the DDA again claimed no knowledge of the incident. When told a subpoena would be issued for the two investigators, only then did the DDA state that a report may have been prepared. Only after threatening to go to the judge with this conduct did the DDA advise the defense that a report was prepared.

The defense also sought the courthouse video of the incident. When the courthouse video was demanded by way of informal discovery, the amse DDA initially stated there was no video footage. The sheriff's department also claimed the cameras were non-operational in the courthouse. A subpoena was served for the video. The DDA filed a motion to quash that the defense never received. When confronted with the demand in front of the calendar judge, a chambers conference was held and the judge ordered the DDA to provide the video before noon that same day.

The exculpatory video was only then turned over which depicted the victim standing up sticking his finger in our client's face (threatening to kick his ass) who was seated at the time. The DDA investigators are seen pulling the victim away and into the courtroom.

Another current case involves the Los Angeles City Attorney's Office and video footage in the possession of the LAPD. First the DCA claimed based on personal knowledge that the video in question was taped over because no request to preserve it was made. However, the client had filed a personnel complaint against the LAPD officers the following day. LAPD initially submitted a declaration from the custodian of records for LAPD stating that there was no tape because it was taped over. Over a year later it

Attachment F: Full Text of Public Comments

	<p>turns out that the video was in fact downloaded before it was taped over but still the LAPD can not locate the video.</p> <p>The defendant's motion to dismiss pursuant to Trombetta/Youngblood is still pending since March of this year with three days of hearings and several motions and more discovery requests and subpoenas further burdening the court. It will probably take several more court appearances before the court can rule on the "bad faith" determination of the lost video by the LAPD. The DCA has also potentially deleted a voice mail message from an LAPD officer who downloaded the video. That motion for the destruction of evidence wi;; also be filed with the court.</p> <p>These are but two of the recent examples of conduct that seriously undermines the public's confidence in our judicial system as it relates to receiving a "fair trial" under our Constitution.</p> <p>It's time to put an end to this accepted conduct of the Prosecutors of our State.</p>
Receive Mass Email?	<p>For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website:  <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a></p>
Date	06/25/2016
File :	X-5110-13-Steven Szocs (06-25-16)-FS
Submitted via:	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	California Public Defenders Association
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	Joshua C. Needle
<b>City</b>	Santa Monica
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	jcneedle@verizon.net
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct.</p> <p>Though honored more in the breach than adherence, there is actually nothing new or onerous about the prosecutorial obligation to see that simple justice is done, or that defendants be treated with a modicum of fairness, and it is past time that public prosecutors took their obligation seriously or be subject to sanctions for falling below their duty. As I'm sure you've heard many time while deliberating this amendment, decades before there was Brady the United States Supreme Court said in <i>Berger v. United States</i> (1935) 295 US 78 at 88:</p> <p>"The [public prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."</p> <p>Joshua C. Needle Attorney at Law State Bar No. 77560</p>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-14-Joshua Needle (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Joseph Katz
<b>City</b>	Murrieta
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	josephkatzlaw@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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. It is important to remind them of their duty, as flagrant disregard for their obligations continues unabated throughout the state. Second, given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutor actually "know or reasonably should know" the information is exculpatory (with which it is expected wide latitude will be taken), 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. This is l-o-n-g overdue.</p>
<b>Receive Mass Email?</b>	<p>For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website:  <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a></p>
<b>Date</b>	06/25/2016
<b>File :</b>	X-5110-15-Joseph Katz (06-25-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Panteha saban
<b>City</b>	Los gatos
<b>Email address (You will receive a copy of your comment submission.)</b>	pantehasaban@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/26/2016
<b>File :</b>	X-5110-16-Panteha Saban (06-26-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Victoria Barana
<b>City</b>	San Diego
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	victoria.barana@sdcounty.ca.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.</p> <p>Sincerely, Victoria Barana</p>
<b>Date</b>	06/26/2016
<b>File :</b>	X-5110-17-Victoria Barana (06-26-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Sarah Megdal
<b>City</b>	Sherwood Forest
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	sarahmegdal@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-18-Sarah Megal (06-27-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Orange County Public Defender's Office
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Irene Pai
<b>City</b>	Fullerton
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	irene.pai@pubdef.ocgov.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>As a deputy public defender for 21 years, I have worked with prosecutors who care to get it right and those who do not care to get it right. The prosecutors who care to get it right are customarily smart and hardworking, take the initiative to question their investigators/law enforcement and not just take their word for it, and they are responsive to defense counsel's queries. They aren't overly-concerned with how they're perceived by their superiors, by the officers who they're questioning, or by the public in making their decisions. This proposed rule wouldn't much affect these prosecutors. The prosecutors who don't care to get their immense responsibilities right can be inexperienced, lazy or politically ambitious (or any combination of these), easily cowed by their superiors, are bullied or overly-deferential to aggressive law enforcement agencies and officers, and are obsessed with the political consequences of any decision they make as a prosecutor. Ironically, these prosecutors make great defense decisions on all the wrong cases (e.g., unsympathetic victims). With these prosecutors (who greatly outnumber the good ones), getting discovery from them is more difficult than pulling a tractor with a chicken. So often these prosecutors' inactivity is simply the easiest route. Why should they take time and energy to help this criminal they're prosecuting? For these prosecutors, ferreting out existing exculpatory evidence makes no sense to them and they don't want to do any favors at all for the criminals. Not taking the initiative to locate exculpatory evidence and not responding to defense counsel's queries is way easier. The proposed rule would very much help with this quality of prosecutors.</p> <p>This adversarial system works only when both sides are working as hard as they can. This rule ensures that prosecutors utilize their immense power focused on the truest result: justice rather than winning at all costs. I want to see this become the standard in my lifetime and not the one I unfortunately see in court every single day.</p> <p>Irene A. Pai</p>

Attachment F: Full Text of Public Comments

<b>Receive Mass Email?</b>	For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a>
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-19-Irene Pai (06-27-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Public Defender
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Stefan Schweitzer
<b>State</b>	California
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-20-Stefan Scheitzer (06-27-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Vickie Fernandes Krupka
<b>City</b>	San Diego
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	vickie.fernandes@sdcounty.ca.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-21-Vicki Fernandes Krupka (06-27-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Office of the Federal Public Defender
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Kay Otani
<b>City</b>	Riverside
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	Kay_Otani@fd.org
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>This is a good start. As Judge Kozinski of the Ninth Circuit recently pointed out in his article, there has been increasing aggressiveness by prosecutors with no check on violations of defendants' rights. Not all or even most prosecutors intentionally violate defendants' rights and hide Brady evidence. However, even upstanding prosecutors sometimes make questionable decisions in gray areas.</p> <p>In one of our cases, a very upstanding prosecutor obtained a waiver of rights from an unrepresented person to interview them about an alleged offense against a third party. Later, that person was charged based on their statements. This rule could prevent that.</p> <p>The proposed rule is a start towards making prosecutors think harder about gray areas. It shows that society and the profession value our Constitutional rights and prosecutors will think before violating them. It will help upright prosecutors make and justify good decisions. It will help an over-zealous prosecutor from making mistakes.</p> <p>It is not enough to have an abstract punishment of reversal several years down the line. The proposed rule is a start towards making prosecutors realize that they are not above the law--if they violate their ethical duties, they are accountable like all other attorneys. It will help improve our justice system and prevent the prosecution and conviction of innocents.</p> <p>Thank you.</p> <p>-Kay Otani</p>
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-22-Kay Otani (06-27-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Office of the State Public Defender
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	Mary K. McComb
<b>City</b>	Oakland
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	McComb@ospd.ca.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>Attachment</b>	<a href="#">2016_06_27_OSPD_Comment.pdf (89k)</a>
<b>Receive Mass Email?</b>	For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a>
<b>Date</b>	06/27/2016
<b>File :</b>	X-5110-22-Mary McComb (06-27-16)-FS
<b>Submitted via:</b>	Online

OFFICE OF THE STATE PUBLIC DEFENDER

1111 Broadway, 10<sup>th</sup> Floor  
Oakland, California 94607-4139  
Telephone: (510) 267-3300  
Fax: (510) 452-8712



June 27, 2016

Commission for the Revision of the  
Rules of Professional Conduct  
The Honorable Lee Edmon, Chair  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Support for Proposed Rule 5-110 and Amended Rule 5-220

Dear Justice Edmon and Commission Members:

The Office of the State Public Defender ("OSPD") has commented at two previous stages in the consideration of Proposed Rule 5-110 and Amended Rule 5-220 and fully supports the proposed rule. We comment again simply to address concerns that were raised by a few members of the Board of Trustees of the State Bar of California at their meeting in May 2016.

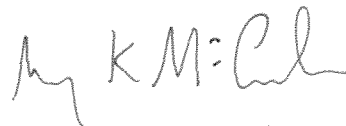
Specifically, a few board members, noting that Comment [3] to Rule 5-110 explains that a prosecutor's duty of disclosure includes "impeachment material," expressed concern that defense attorneys often turn over their witness lists at the last minute and unwary prosecutors could be disciplined for not anticipating who the defense intended to call. This concern is puzzling as the impeachment material a prosecutor is obligated to disclose is generally for *prosecution* witnesses. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 445; *Giglio v. United States* (1972) 405 U.S. 150, 154; *People v. Tillis* (1998) 18 Cal.4th 284, 292 [prosecutor's discovery obligations under Penal Code section 1054.1 do not include impeachment material on defense witnesses].) Thus, the disclosure of the defense witness list would not affect the prosecutor's separate duty to disclose impeachment material for its own witnesses (except as to rebuttal witnesses). Further, as you explained at the meeting, this has not been an issue in any of the other 49 jurisdictions that already have this rule.

Commission for the Revision of the  
Rules of Professional Conduct  
June 27, 2016  
Page 2

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We hope adoption of proposed Rule 5-110 and Amended Rule 5-220 will not be delayed by such unfounded concerns. Prompt adoption of these rules is important to show that the Bar cares as much about lawyer misfeasance that can result in a wrongful loss of liberty as it cares about misfeasance that results in financial harm. Both are important dimensions of protecting the public and restoring its confidence in the legal profession and the criminal justice system.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary K. McComb".

Mary K. McComb  
State Public Defender

A handwritten signature in cursive script, appearing to read "Christina Spaulding".

Christina Spaulding  
Supervising Deputy  
State Public Defender

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Adam Spicer
<b>City</b>	South Lake Tahoe
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	AdamSpicerLaw@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.</p> <p>As a defense attorney that practices in the trial courts daily, I think we need this proposed rule at once!</p>
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-23-Adam Spicer (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Daniel B Camp
<b>City</b>	San Jose
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	burnell01@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. I believe it is important to remind prosecutors of their duty and to hold their legal obligations, 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 actually "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. This rule is fair, clear and concise, and would ensure that criminal prosecutions are even more expedient and efficient. Thanks for taking the time to consider my opinion on this matter.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-24- Daniel B. Camp (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

**From:** [Lisa Bertolino Muetting](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Tuesday, June 28, 2016 9:57:20 AM

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I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. It is important to remind prosecutors of their duty, under existing California law, to timely disclose all exculpatory evidence and information, regardless of materiality.

Given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutors actually "know 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 and responsive 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.

**Lisa J. Bertolino**  
**Tulare County Public Defender**  
**Courthouse, Room G-35**  
**221 S. Mooney Blvd.**  
**Visalia, CA 93291**

**(559) 636-4500**  
**(559) 733-6113 fax**  
[Lbertoli@co.tulare.ca.us](mailto:Lbertoli@co.tulare.ca.us)



## Attachment F: Full Text of Public Comments

**From:** [Muller, Barbara](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** proposed revision of Rule 5-110  
**Date:** Friday, June 24, 2016 4:31:00 PM

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I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. It is my understanding that every other jurisdiction in the United States has adopted the ABA's Model Rule on this issue.

Prosecutors swear an oath to seek justice, this proposed revision will help ensure that they keep that oath.

**BARBARA J. MULLER | ATTORNEY**  
County of Santa Clara | Office of the Alternate Defender  
270 Grant Avenue | Palo Alto, CA 94306  
Phone: [\(650\) 324-6442](tel:650-324-6442) | fax: [\(408\) 938-1119](tel:408-938-1119)

## Attachment F: Full Text of Public Comments

**From:** [adodd@aol.com](mailto:adodd@aol.com)  
**To:** [Hollins, Audrey](#)  
**Subject:** Rule 5-110  
**Date:** Friday, June 24, 2016 4:37:53 PM

---

I do not understand why prosecutors should not be sanctioned for violating Brady, which has been the law of the land for many years. Under the proposed rule, they would not be sanctioned unless they knew or should have known that the material was required to be disclosed under Brady.

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

Peter dodd

## Attachment F: Full Text of Public Comments

**From:** [Bobrow, Oscar](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendment to rules 5-110 of the Rules of Professional Conduct of the State Bar of California  
**Date:** Friday, June 24, 2016 4:59:40 PM  
**Attachments:** [Daniels ruling.pdf](#)

---

Audrey Hollins  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Dear Ms. Hollins:

I am writing in support of the proposed rule change to 5-110. Over my 30 year career as a public defender I have represented numerous clients in cases where prosecutors have failed to disclose exculpatory evidence.

I have attached a recent ruling of a Solano County Superior Court Judge that speaks to this issue in a homicide case that our office handled which I think you might find insightful. The defendant in that matter was acquitted after trial.

Unfortunately the behavior described therein is not an isolated incident.

I am in total support of the amendment.

Thank you.

Sincerely,  
Oscar Bobrow  
Chief Deputy Public  
Defender Solano County  
Vallejo Branch Office  
Direct line: (707) 553 5009  
OBobrow@solanocounty.com

The attachment referenced in the email, *The People of the State of California v. Michael Daniels*, is available upon request. Please contact Mimi Lee at 415-538-2162 for a copy of the attachment.

## Attachment F: Full Text of Public Comments

**From:** [Susannah McNamara](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed revision of Rule 5.110  
**Date:** Saturday, June 25, 2016 6:50:19 AM

---

To whom it may concern:

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

Sincerely,

Susannah McNamara  
Attorney at Law  
Bar # 193375

## Attachment F: Full Text of Public Comments

**From:** [Josh Groshan](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** I am writing to support  
**Date:** Saturday, June 25, 2016 6:57:49 AM

---

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

Sent with Writer

Justin "Josh" Groshan  
Sent from my iPad so please excuse any typos.

## Attachment F: Full Text of Public Comments

**From:** [Petrosino, Sharon](#)  
**To:** [Hollins, Audrey](#)  
**Cc:** [Petrosino, Sharon](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Monday, June 27, 2016 8:15:55 AM

---

Dear Ms. Hollins:

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

Sincerely,

Sharon L. Petrosino  
Interim Public Defender

---

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## Attachment F: Full Text of Public Comments

**From:** [Jennifer Friedman](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Comment re amended rules 5-110 and 5-220  
**Date:** Monday, June 27, 2016 9:23:02 AM

---

Ms. Hollins:

I am writing to urge the bar to adopt Amended Rule 5-110. It appears clear that the amendment to this rule is not only a good idea but a necessity. The comments by state prosecutors demonstrate that many state prosecutors do not understand their discovery obligations under Penal Code Section 1054.1 regarding information that is exculpatory whether or not it is material. The proposed rule is clear and easy to follow. The rule only covers information known to the prosecutor so the prosecutor is not responsible under this rule for its agents their conduct. This rule or a version of this rule had been adopted by virtually every state in the nation. There is absolutely no reason why this rule should not be adopted in California. While one may argue whether or not there is an epidemic of prosecutorial misconduct in this state, no one may argue that California unlike the 49 other states is free from misconduct. A 2010 report by the Northern California Innocence Project cited 707 cases in which state courts found prosecutorial misconduct over 11 years. Only six of the prosecutors were disciplined, and the courts upheld 80% of the convictions in spite of the improprieties. This is an important and much needed rule change. I strongly urge the state bar to adopt Rule 5-110.

Jennifer Friedman  
Los Angeles County Public Defender  
210 West Temple Street, 19th Floor  
Los Angeles, CA. 90012  
213-974-2922  
[jfriedman@pubdef.lacounty.gov](mailto:jfriedman@pubdef.lacounty.gov)

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## Attachment F: Full Text of Public Comments

**From:** [Bob Zernich](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed Revision of Rule 5.110  
**Date:** Monday, June 27, 2016 11:07:54 AM

---

I am commenting on proposed revision of Rule 5.110. I strongly recommend that this proposed revision be adopted state wide. Presently in Plumas County we have an adequate and timely discovery, however, in other jurisdictions I am aware that delay and failure to provide exculpatory discovery is not unusual.

Thank you for considering my comments.

Plumas County Public Defender  
Robert J. Zernich



## Attachment F: Full Text of Public Comments

**From:** [Henneman, Krista L](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments  
**Date:** Monday, June 27, 2016 11:43:44 AM

---

Hello Ms. Hollins,

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct.

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 actually “know 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.

Thank you,

**Krista Henneman**  
**Deputy Public Defender**  
**120 W. Mission Street | San Jose, CA 95110**  
**office 408-299-7823 | 408-998-8265**

## Attachment F: Full Text of Public Comments

**From:** [Clarke, Joseph](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** public comment on proposed revision to Rule 5-110.  
**Date:** Tuesday, June 28, 2016 7:23:59 AM

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I support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually “know 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.

--

Joe Clarke  
Deputy Public Defender, Santa Clara County  
120 W. Mission St., San Jose, CA 95110  
ph. 408-299-7772  
fax 408-938-1106

**NOTICE:**

*This email message and/or its attachments may contain information that is confidential or restricted. It is intended only for the individuals named as recipients in the message. This entire message constitutes a privileged and confidential communication pursuant to California Evidence Code Section 952 and California Code of Civil Procedure Section 2018. If you are NOT an authorized recipient, you are prohibited from using, delivering, distributing, printing, copying, or disclosing the message or content to others and must delete the message from your computer. If you have received this message in error, please notify the sender by return email.*

## Attachment F: Full Text of Public Comments

**From:** [Dobbyn, Gerry](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Tuesday, June 28, 2016 8:12:50 AM

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I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually “know 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.

Gerry Dobbyn  
Deputy Public Defender  
Santa Clara County of the Public Defender  
231 Grant Avenue  
Palo Alto, CA 94306  
(408) 918-7750

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Juan J. Huerta
<b>City</b>	Santa Barbara
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	jhuerta@juanhuertalaw.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>Dear Sir or Madam:</p> <p>I fully agree with the proposed Rule 5-110. As a criminal defense attorney for the last 15 years I have too often seen prosecutors not fulfill their ethical and legal duties regarding discovery obligations.</p> <p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know or reasonably should know" the information is exculpatory, prosecutors do not have to worry about being disciplined without having any culpable mental state. I believe 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.</p> <p>Sincerely Juan J. Huerta, Esq.</p>
<b>Date</b>	06/29/2016
<b>File :</b>	X-5110-37-Joan Huerta (06-29-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Joseph Ramirez
<b>City</b>	ELK GROVE
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	ramirezjo@saccounty.net
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-220 Suppression of Evidence
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	The proposed rules are sorely needed. There is no rational reason for opposing the rules. Our profession and the public's trust in criminal justice are both diminished when prosecutors do not fulfill their legal obligations.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-25-Lisa J. Bertolino (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Ronald H. Abernethy
<b>City</b>	Napa
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	ronald.abernethy@countyofnapa.org
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. First, it is important to the administration of justice that prosecutors comply with their constitutional and statutory discovery obligations. A criminal justice system works only when the public and those prosecuted have confidence in the fairness of the procedures utilized. Second, under the proposed rule prosecutors are insulated from discipline unless they actually "know or reasonably should know" the information is exculpatory. For the sake of the public it is time for California to finally join most other jurisdictions in the United States and adopt the ABA's Model Rule on this issue.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-39-Ronald H. Abernethy (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Retired Deputy Public Defender/CPDA member
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	George Shea
<b>City</b>	Fairfax
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	geoirishbox@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-40-George Shea (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Robert B Horner
<b>City</b>	Los Angeles
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	babydoc@criminaltrial.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5110-41-Robert B Horner (06-28-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Committee on Professional Responsibility and Conduct
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	Merri A. Baldwin
<b>City</b>	San Francisco
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	mimi.lee@calbar.ca.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.</p> <p>COPRAC has reviewed the provisions of proposed Rule 5-110 [3.8] – Special Responsibilities of a Prosecutor. COPRAC supports the adoption of proposed Rule 5-110.</p> <p>Thank you for your consideration of our comments.</p>
<b>Attachment</b>	<a href="#">COPRAC_Comment_Letter_5-110_06-29-16.pdf (125k)</a>
<b>Date</b>	06/29/2016
<b>File :</b>	X-5110-42-COPRAC (Baldwin) (06-29-16)-FS
<b>Submitted via:</b>	Online



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

June 29, 2016

Justice Lee Edmon, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 5-110 [3.8] – Special Responsibilities of a Prosecutor

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 5-110 [3.8] – Special Responsibilities of a Prosecutor. COPRAC supports the adoption of proposed Rule 5-110.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in blue ink, appearing to read "maB", followed by a horizontal line.

Merri A. Baldwin, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

## Attachment F: Full Text of Public Comments

**From:** [David Balahadia](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Wednesday, June 29, 2016 4:23:07 PM

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Hello Audrey,

I am a criminal defense attorney in eastern Riverside County in Indio. I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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 ABAs Model Rule on this issue.

Yours sincerely,

Dave Balahadia

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Law Offices of Jong Yun Kim
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	JONG Y KIM
<b>City</b>	LOS ANGELES
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	JONGKIMLAW@HOTMAIL.COM
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	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.
<b>Date</b>	06/29/2016
<b>File :</b>	X-5110-44-Jong Yun Kim (06-29-16)-FS
<b>Submitted via:</b>	Online



THE STATE BAR  
OF CALIFORNIA

OFFICE OF CHIEF TRIAL COUNSEL

Gregory Dresser, *Interim Chief Trial Counsel*

845 S. Figueroa Street, Los Angeles California 90017-2515  
180 Howard Street, San Francisco, California 94105-1639

Fax: 213-765-1029  
Tel: 415-538-2203 Fax: 415-538-2214

June 27, 2016

Audrey Hollins  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Public Comment on proposed revisions to Rule 5-110 of the Rules of Professional Conduct, Special Responsibilities of a Prosecutor and ABA Model Rule 3.8

Dear Ms. Hollins:

The State Bar reiterates its previous comments on this subject. The Office of Chief Trial Counsel appreciates the time and resources the Commission for the Revision of the Rules of Professional Conduct and the Board of Trustees has devoted to consideration of Rule 5-110 of the Rules of Professional Conduct, the special duties of prosecutors, and suggestions that California adopt ABA Model Rule 3.8.

The Office of Chief Trial Counsel's foremost concern regarding revisions to the Rules of Professional Conduct is that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by this office.

The proposal published by the Board of Trustees essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. (See Business and Professions Code, sections 6068(a), 6103, 6106, and 6131, as well as Rules of Professional Conduct, rules 2-100, 3-110, 5-110, 5-120, 5-200, 5-220, 5-300, 5-310, and 5-320; *Price v. State Bar* (1982) 30 Cal.3d 537; *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821 [Review Department Opinion, not published], Supreme Court case No. S219597; and *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [Hearing Department decision], Supreme Court case No. S181620).

Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office. For example, section 5-110(B) should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many situations, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Departments in California are generally independent of prosecutors' offices. (See e.g. *People v. Jacinto* (2010) 49 Cal.4th 263 [Sheriff's deportation of witness not attributed to prosecutor]).

Audrey Hollins  
June 27, 2016  
Page 2

Portions of section 5-110(D) are also subject to interpretation. First, the requirement that disclosures be made “timely” is addressed in discussion point number 3, stating that a “disclosure’s timeliness will vary with the circumstances” and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.

Next, the section requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Discussion point number 3 states that the disclosure obligation is “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.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. (Compare *In re Riek* (Wisc. 2013) 834 N.W.2d 384 [interpreted rule to be same as Brady requirements] with *In re Kline* (D.C. 2015) 113 A.3d 202 [interpreted rule to require a prosecutor to disclose all potentially exculpatory information in his or her possession, regardless of whether that information would meet the materiality requirements of *Brady* and its progeny] and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678 [broad interpretation]). Consequently, it may be advisable to state the Board of Trustee’s intention within the text of the rule, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in *Brady*.<sup>1</sup> The section should also address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.

Finally, section 5-110(D) states that a prosecutor must disclose 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 . . . .” The section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct, gross negligence, or willful blindness is a basis to find a violation for disciplinary purposes. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437 and *In re Brown* (1998) 17 Cal.4th 873, 879 [prosecutor’s duty to search for exculpatory evidence]).

Very truly yours,



Gregory Dresser  
Interim Chief Trial Counsel

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<sup>1</sup> Presumably, the Commission’s intention is also that a prosecutor’s duty to disclose would not be limited by criminal discovery statutes.

## Attachment F: Full Text of Public Comments

**From:** [Jason Cox](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Friday, July 01, 2016 8:22:00 AM

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To the Commission and the Board of Trustees:

I urge adoption of the proposed revision of Rule of Professional Conduct, Rule 5.110 (D) as recently amended.

I submitted written comments in February regarding the duty of prosecutors to disclose to the defense before trial all exculpatory evidence and information regardless of its materiality. I will not repeat those comments here. Rather I will address two additional issues.

First, the proposed revision appropriately requires a prosecutor to disclose all evidence and information that the prosecutor "knows or reasonably should know" is exculpatory. Both the United States and California Supreme Courts have long required this of prosecutors. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 437; and *In re Brown* (1998) 17 Cal.4th 873, 879.) If a prosecutor does not know or reasonably know that the evidence or information is exculpatory, then a failure to disclose it is not a violation of the proposed rule.

Second, the proposed revision does not alter or increase the requirements in the case law regarding prosecutorial disclosure of impeaching information on defense witnesses or the timing of any such disclosure. The timing of mutual disclosures was established by the California Supreme Court shortly after the passage of Proposition 115: The prosecution must first disclose to the defense the witnesses it intends to call at trial and their statements. Then the defense must disclose its intended witnesses and their statements. Then the prosecution must disclose its intended rebuttal witnesses and their statements. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376-377.)

However, the prosecution is not required to disclose information it will use to impeach defense witnesses. (*People v. Tillis* (1998) 18 Cal.4th 284, 292.) Nothing in the proposed revision of Rule 5.110 changes this.

I have practiced criminal law for almost three decades. I have lectured on discovery issues at a number of CLE events, including the annual Capital Case Defense Seminar. I frequently hear complaints from other criminal defense attorneys, both public and private, across the state about pervasive prosecutorial discovery violations, and have seen the same in my own practice. These violations are so frequent and widespread as to be disturbingly routine. I see no evidence of that having improved significantly in recent years, despite several highly-publicized discovery scandals. It is time for California to adopt a Rule of Professional Conduct, as has every other jurisdiction in the United States, that clearly and succinctly spells out a prosecutor's duty to disclose exculpatory evidence and information to the defense. I again urge adoption of the proposed Rule 5.110. Thank you.

Jason Cox

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Attorney
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Sara Theiss
<b>City</b>	Pacifica
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	saratheiss@aol.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I again am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.</p> <p>Sincerely, Sara Theiss SBN 159587</p>
<b>Receive Mass Email?</b>	<p>For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a></p>
<b>Date</b>	06/29/2016
<b>File :</b>	X-5110-47-Sara Theiss (06-29-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Andre Bollinger
<b>City</b>	San Diego
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	arbolin@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	Rule 5-110 is important, necessary and in accordance with the ethical responsibilities of prosecutors. In order to assure that those accused of crimes are not wrongfully convicted, prosecutors should abide by rule 5-110.
<b>Date</b>	06/29/2016
<b>File :</b>	X-5110-48-Andre Bollinger (06-29-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	U.S. Department of Justice
<b>Commenting on behalf of an organization</b>	Yes
<b>Name</b>	Stacy M. Ludwig
<b>City</b>	Washington
<b>State</b>	Washington DC
<b>Email address (You will receive a copy of your comment submission.)</b>	Stacy.Ludwig2@usdoj.gov
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	DISAGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	Letter to the Commission for the Revision of the Rules of Professional Conduct of the State Bar of California Opposing the Recent Revisions to Proposed California Rule 5-100(D)'s Knowledge Requirement and Reiterating Opposition to Proposed California Rules 5-100(D), (E), (G), and (H)
<b>Attachment</b>	<a href="#">Letter_to_the_Commission_for_the_Revision_of_the_Rules_of_Professional_Conduct_2016-07-01.pdf (108k)</a>
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-49-USDOJ (Ludwig) (07-01-16)-FS
<b>Submitted via:</b>	Online



July 1, 2016

Commission for the Revision of the Rules of Professional Conduct  
State Bar of California  
c/o Audrey Hollins  
Office of Professional Competence, Planning, and Development  
180 Howard Street  
San Francisco, CA 94105

Re: Proposed California Rule of Professional Conduct 5-110

Dear Commission Members:

On behalf of the U.S. Department of Justice (“the Department”), including the over 400 Department attorneys who practice in California, we write to: (1) urge the Commission to reconsider its recent revisions to proposed California Rule 5-110(D)’s knowledge requirement; and (2) reiterate our continued opposition to all of the proposed changes to California Rule 5-110(D), (E), (G), and (H). We appreciate the Commission’s efforts to clarify the knowledge requirement contained in proposed California Rule 5-110(D)<sup>1</sup> and are grateful for the opportunity to comment.

We are concerned that the additional proposed language defining the Rule’s knowledge requirement—the phrase “reasonably should know”—threatens to subject earnest prosecutors to discipline even for honest, understandable, and minor mistakes. In effect, under the revised proposal, it appears that prosecutors may be disciplined for simple negligence if they mistakenly fail to disclose evidence or information that they “reasonably should know” tends to negate the guilt of the accused or mitigates the offense or the sentence. Because the proposed Rule’s other terms (*i.e.*, “tends to negate the guilt of the accused” and “mitigate the offense”) are undefined, a prosecutor has no way to measure compliance with what is “reasonably” expected under the proposed Rule. Thus, the Rule could snare even a scrupulous prosecutor by failing to provide clear notice of the expected standard. Moreover, well-intentioned prosecutors may not seek

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<sup>1</sup> “The prosecutor in a criminal case shall . . . [m]ake timely disclosure to the defense of all evidence or information 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, disclosure 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.” Rule 5-110(D) Special Responsibilities of a Prosecutor (Commission’s Proposed Rule Adopted on March 31, 2016—Clean Version), [available at](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2016/2nd-Pub-Cmt-Attach-1-Proposed-Rule-5-110.pdf) <http://www.calbar.ca.gov/Portals/0/documents/publicComment/2016/2nd-Pub-Cmt-Attach-1-Proposed-Rule-5-110.pdf>.

“safe harbor” in proposed Comment [8], which was designed to protect prosecutors who act in good faith, because it does not apply to proposed California Rule 5-110(D).<sup>2</sup>

Prosecutors should be subject to discipline under proposed California Rule 5-110(D) only if they willfully and intentionally fail to disclose evidence or information that they know tends to negate the guilt of the accused or mitigates the offense or sentence.<sup>3</sup> As we previously stated in our February 24, 2016, letter, a “willful and intentional” standard should be incorporated into the text of the proposed Rule to protect prosecutors who, despite their best efforts, mistakenly fail to comply with their disclosure obligations. Doing so also will minimize the risk that the proposed Rule will be used as a tactical weapon against prosecutors.

If the Commission is not inclined to adopt a “willful and intentional” standard, however, the Commission should make clear that proposed California Rule 5-110(D) seeks to hold prosecutors accountable only when they know of the evidence or information and know that it is the type of information required to be disclosed under the Rule. This is a sufficiently rigorous standard. The Commission has proposed adopting a definition of “knows” that makes clear that “[a] person’s knowledge may be inferred from circumstances.”<sup>4</sup> Under this standard, prosecutors cannot escape discipline either by ignoring the fact that certain evidence or information tends to negate the guilt of the accused or mitigates the offense or sentence or by later denying that they had direct knowledge. This standard also permits prosecutors to demonstrate that they have not acted in bad faith by reference to the circumstances giving rise to the disclosure obligation. This is particularly important where the character of the evidence is unclear to the prosecutor at the time of the disclosure obligation, especially in light of the proposed Rule’s vague terms. Alternatively, if the Commission chooses to adopt the proposed Rule, we would ask the Commission to reconsider its position and include Proposed Rule 5-110(D) in a “safe-harbor” provision in the Rule’s text.

Ultimately, as we explained in our February 24, 2016, letter, these issues and others can be resolved by adoption of the alternate versions of proposed Rule 5-110(D), (F), and (G), which establish the appropriate standards to guide prosecutors in making their disclosure obligations for the following reasons:

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<sup>2</sup> In addition, the “safe harbor,” whatever its ultimate scope, should be moved from its current placement in a Comment into the Rule itself to comply with the Commission’s Charter, which states that “[s]ubstantive information about the conduct governed by the rule should be included in the rule itself.” See Charter of the Second Comm’n for the Revision of the Rules of Prof’l Conduct of the State Bar of California (“Comm’n Charter”) at ¶ 2, [available at http://ethics.calbar.ca.gov/Committees/RulesCommission2014.asp](http://ethics.calbar.ca.gov/Committees/RulesCommission2014.asp).

<sup>3</sup> See MASS. RULES OF PROF’L CONDUCT R. 3.8 cmt. [3A] (“[A] prosecutor violates paragraph (d) only if the information required to be disclosed is *known* to the prosecutor as tending to be exculpatory or mitigating.”) (emphasis added).

<sup>4</sup> See Rule 1-100(B) [1.0.1] Terminology (Commission’s Proposed Rule Adopted on January 22-23, 2016—Clean Version), [available at http://ethics.calbar.ca.gov/Portals/9/documents/2d\\_RRC/Action%20Summaries/Tentative%20Proposed%20Rules/RRC20-%201-100\(B\)%20%5B1.0.1%5D%20-%20Rule%20-%20DFT%20\(01-23-16\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Action%20Summaries/Tentative%20Proposed%20Rules/RRC20-%201-100(B)%20%5B1.0.1%5D%20-%20Rule%20-%20DFT%20(01-23-16).pdf).

- to the extent that California law already requires prosecutors to disclose exculpatory and impeachment evidence without regard to materiality,<sup>5</sup> the alternate version of proposed California Rule 5-110(D)<sup>6</sup> would hold state prosecutors personally accountable for violating that obligation, while, unlike the proposed Rule, also automatically incorporating any changes in both federal and state law and accounting for the differences between federal and state law;
- the undefined terms and phrases in proposed California Rule 5-110(D) do not “eliminat[e] ambiguities and uncertainties in the rules” or “set forth a clear and enforceable articulation of disciplinary standards,” as mandated by the Supreme Court of California and the Board,<sup>7</sup> whereas the alternate version of the proposed Rule holds prosecutors accountable for following a well-developed body of case law;
- by imposing a disclosure obligation on federal prosecutors greater than that imposed under federal law, proposed California Rule 5-110(D) may chill witness cooperation, be used as a tactical weapon, and require federal prosecutors to seek relief from an already over-burdened federal court system to avoid being disciplined for failing to disclose personal and potentially legally-protected, yet immaterial information;
- proposed California Rule 5-110(D) will not eliminate “unnecessary differences between California’s rules and the rules used by a preponderance of the states,” because, although nearly all jurisdictions have adopted a Rule that contains language similar to that of proposed California Rule 5-110(D), several jurisdictions explicitly have held that the Rule’s requirements are co-extensive with a prosecutor’s disclosure obligations under Brady/Giglio<sup>8</sup> and many other jurisdictions have yet to address the issue;

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<sup>5</sup> See People v. Cordova, 62 Cal.4th 104, 124 (2015) (concluding that Cal. Penal Code § 1054.1(e) requires disclosure of “all exculpatory evidence, not just evidence that is material under Brady and its progeny”) (citing Barnett v. Superior Court, 50 Cal.4th 890, 901 (2010)).

<sup>6</sup> “The prosecutor in a criminal case shall . . . comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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 and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” Proposed Rule 5-110 [3.8], Alternate Version of Proposed Paragraph (D) Considered, but Not Recommended, by the Commission, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000014067.pdf>.

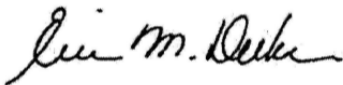
<sup>7</sup> See Letter from Frank A. McGuire, Ct. Adm’r & Clerk, Sup. Ct. of Cal., to Sen. Joseph L. Dunn (ret.), Exec. Dir. and CEO, State Bar of Cal., 1-2 n.1 (Sept. 19, 2014), available at [http://ethics.calbar.ca.gov/Portals/9/documents/2d\\_RRC/Miscellaneous/RAD\\_Agenda\\_Item\\_IIC.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Miscellaneous/RAD_Agenda_Item_IIC.pdf); Comm’n Charter, supra n.2.

<sup>8</sup> See State ex rel. Okla. Bar Ass’n v. Ward, 353 P.3d 509, 520-22 (Okla. 2015); In re Riek, 834 N.W.2d 384, 390 (Wis. 2013); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010); In re Att’y C, 47 P.3d 1167, 1170-71 (Colo. 2002).

- there is no empirical evidence of an “epidemic” of Brady violations that would warrant the sweeping change in federal discovery practice that proposed California Rule 5-110(D) would create;<sup>9</sup>
- unlike the alternate version, which requires a prosecutor to take prompt action upon receiving “evidence that, if true, would show that a convicted defendant did not commit an offense of which the defendant was convicted,” proposed California Rule 5-110(G) ignores the practical reality that prosecutors who are unfamiliar with a case will be unable to make assessments about whether evidence is “new, credible and material” or whether evidence will “create[] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”; and
- the alternate versions of California Rules 5-110(G) and (H) recognize that prosecutors have limited investigative authority post-conviction and, unlike the proposed Rules, which rely heavily on the commentary to explain a prosecutor’s obligations, provide specific guidance on what a prosecutor must do to “remedy the conviction.”<sup>10</sup>

In sum, if the Commission does not adopt the alternate version of proposed California Rule 5-110(D), we urge the Commission add a “willful and intentional” standard into the text of the proposed Rule. Alternatively, we request that the Commission use only a “knowing” standard to proscribe conduct, rather than a “knows or reasonably should knows” standard, and reconsider including proposed Rule 5-110(D) in the Rule’s “safe-harbor” provision.

Sincerely,



Eileen M. Decker  
United States Attorney  
Central District of California



Laura E. Duffy  
United States Attorney  
Southern District of California

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<sup>9</sup> As we indicated in our previous letter, the Department alone prosecutes roughly 80,000 cases each year, and yet in only two of the twenty-nine cases in which courts found a Brady violation over a fifteen year period, as identified by Chief Judge Alex Kozinski in United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013), did a prosecutor engage in deliberate misconduct. Neither was a federal case.

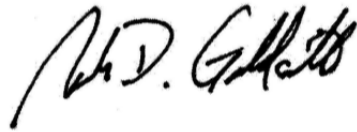
<sup>10</sup> As we previously have explained, we also believe that by permitting prosecutors to subpoena lawyers only where the evidence sought is “essential” (as opposed to “reasonably necessary”) and where there is “no other feasible” (as opposed to “reasonable”) alternative to obtain the information, proposed California Rule 5-110(E) unnecessarily limits the ability of prosecutors and grand juries to investigate persons who would use attorneys to conceal their crimes or attorneys who discredit and undermine the public’s trust in the legal profession by intentionally engaging in criminal acts themselves.



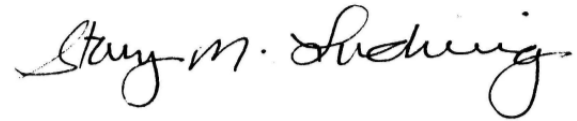
Brian Stretch  
United States Attorney  
Northern District of California



Phillip A. Talbert  
Acting United States Attorney  
Eastern District of California



Andrew D. Goldsmith  
Associate Deputy Attorney General  
National Criminal Discovery Coordinator  
Office of the Deputy Attorney General



Stacy M. Ludwig  
Director  
Professional Responsibility Advisory Office

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Deputy Public Defender - Imperial County
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Kelly Jafine
<b>City</b>	El Centro
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	kellyjafine@co.imperial.ca.us
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>Imagine if our penal code contained laws but no punishments. Crime would run rampant. That is exactly what has happened to discovery obligations of prosecutors. There is no punishment so prosecutors withholding of discovery runs rampant. In our county, I have personally witnessed many incidents of discovery violations. These have occurred with impunity. This is partially because the judges are so afraid of and beholden to the District Attorney's office that they refuse to issue any sanctions against them. I believe the only remedy is the adoption of Proposed Rule 5-110. This rule would also serve to clarify what prosecutor's obligations are under the law which would help curtail another problem that I have witnessed with the Imperial County District Attorney's office: there is limited to no training provided to their deputies on the subject of discovery. This rule would clarify what those obligations are in plain language. Thereafter, prosecutors cannot simply claim ignorance to their own violations of discovery rules. Withholding exculpatory and/or mitigating evidence is by far one of the worst things that any prosecutor can do. Without consequences for violating these rules they will continue to do it because their only focus is to win at all costs. If prosecutors actually have something to lose, they may actually comply with the law.</p>
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-50-Kelly Jafine (07-01-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

**From:** [Maria Cavalluzzi](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Friday, July 01, 2016 12:10:10 PM

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I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually “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.

Maria Cavalluzzi, Esq.  
CAVALLUZZI & CAVALLUZZI  
6430 Sunset Blvd., Suite 1180  
Hollywood, California 90028  
Telephone: (323) 467-2300  
Facsimile: (323) 467-2308

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## Attachment F: Full Text of Public Comments

**From:** [David Swanson](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Rule 5-110  
**Date:** Friday, July 01, 2016 1:12:52 PM

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I just finished a hearing in Orange County Superior Court in which a prosecutor failed to recognize and turn over an exculpatory witness statement. Partly because she doesn't understand the rules of discovery. Until there is some penalty for that I don't think this situation will change. Therefore, I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

David Swanson  
Law Office of David Swanson  
Certified Specialist in Criminal Law California State Bar Board of Legal Specialization  
4100 Newport Place, Suite 550  
Newport Beach, CA 92660  
949.477.3030

## Attachment F: Full Text of Public Comments

**From:** [John Harter](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Comment regarding proposed amended rules 5-110  
**Date:** Friday, July 01, 2016 4:28:49 PM

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Dear Ms. Hollins,

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.

Sincerely,

**John A. Harter**

Attorney at Law

SBN 268382

Deputy Public Defender

[JohnHarter@co.imperial.ca.us](mailto:JohnHarter@co.imperial.ca.us)

Office: 442-265-1705

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895 Broadway

El Centro, CA 92243

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## Attachment F: Full Text of Public Comments

**From:** [Barbara E. Fisher](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Friday, July 01, 2016 3:24:14 PM

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I am in favor of the proposed amendments. There must be consequences for thwarting justice.

Barbara E. Fisher  
Attorney At Law  
PO Box 6098  
San Pedro, CA 90734  
(310) 514-3495

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## Attachment F: Full Text of Public Comments

**From:** [Richard Duquette](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Saturday, July 02, 2016 10:17:26 AM

---

Dear Ms Hollins

I support the change to the above rules because they will promote early disclosure of evidence. This will facilitate justice and less motions for discovery. Clients/Judges want "their" cases resolved at the earliest opportunity. To do so, we need to see what evidence has been collected. I have heard too many times from prosecutors, "We don't have to give you evidence until 30 days before trial." ie per Penal Code section 1054. This is inconsistent with Brady v Maryland, and draws a motion for discovery, which almost always causes further disclosure of evidence.

Moral of the story, disclose early and often, or face sanctions.

Respectfully,

Richard L. Duquette

Attorney at Law

SBN 108342

Since 1983

Sent from my iPad

## Attachment F: Full Text of Public Comments

**From:** [Gary Moss](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Friday, July 01, 2016 5:21:01 PM

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Dear Ms. Hollins;

On the website I was directed to your email address for public comments re: the proposed amendments to Rules . . . By this email to your address, please find my comment as a criminal law defense attorney with many years of experience in the field of criminal defense. The below comment is exactly what I would, and will say if called upon, to any committee or gathering concerning the proposed amendments.

I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 should actually "know or reasonably should know" the information is exculpatory, prosecutors do not have to worry about being disciplined without having any culpable mental state. In my mind, having tried many cases in this state, If the prosecutor cannot discern what might, either pro or con, effect their case they should not be allowed to hide behind "ignorance of the issues &/or witnesses, &/or evidence, which will effect or be relevant to the guilt, innocence, or impeachment of the witnesses, prosecution or defense, that might arise. All information the prosecution has should be turned over to the defense or the Constitution is violated, either United States, or California. The Revision Commission has been over-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.

--

Law Offices of Gary W. Moss, P.C.  
8200 Wilshire, Suite 200  
Beverly Hills, CA 90211  
310-278-7800

## Attachment F: Full Text of Public Comments

**From:** [Alison Bermant](#)  
**To:** [Hollins, Audrey](#)  
**Subject:** Proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California.  
**Date:** Friday, July 01, 2016 5:12:56 PM

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I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually “know 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.

--

Alison Bermant, Attorney at Law  
[truckeelawyer@gmail.com](mailto:truckeelawyer@gmail.com)  
[www.truckeetahoelaw.com](http://www.truckeetahoelaw.com)  
(530)550-0529

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## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	BARTON SHEELA, III
<b>City</b>	SAN DIEGO
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	BARTON.SHEELA@SDCOUNTY.CA.GOV
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I ENCOURAGE ADOPTION OF THE PROPOSED RULE. IT IS MODELED ON THE ABA RULE, AND THERE IS NO REASON TO "WATER DOWN" THAT RULE FOR CALIFORNIA PROSECUTORS.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-58-Barton Sheela (07-01-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

Professional Affiliation	public defender and immediate past president of California Public Defenders Association
Commenting on behalf of an organization	
Name	Michael Ogul
City	San Jose
State	California
Select the Rule that you would like to comment on from the list below.	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.	AGREE with the proposed Rule.
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I commend the work of the Commission for the Revision of the Rules of Professional Conduct in responding to the urgent need for California to join every other State in the Union in adopting Model Rule 3.8. The specific language of proposed Rule 5-110 would achieve the important goal of encouraging prosecutors to disclose exculpatory information and evidence whether or not that information is deemed material by the prosecutor. As such, it would produce greater compliance with existing California law and would help to reduce the numbers of wrongful convictions and excessive sentences that occur each year because of the failure to disclose exculpatory information. The rule, as proposed, enjoys the benefit of clarity. Moreover, the recent modification of the proposed rule provides innocent prosecutors with added protection by protecting them from potential discipline unless they were actually aware of the exculpatory value of the information or reasonably should have been aware of its exculpatory value. Finally, although it has been reported that some prosecutors have claimed about potential liability when late disclosure of defense witnesses makes it difficult for them to disclose impeachment information concerning those witnesses, this concern is inapposite because by definition, information which impeaches a defense witness is not "exculpatory" because it does not "help the defense or hurt the prosecution." In short, there is no objectively reasonable basis to disagree with the proposed rule.</p>
Attachment	
Attachment	
Attachment	
Date	07/01/2016
File :	X-5110-59-Michael Ogul (07-01-16)-FS
Submitted via:	Online
Last Update	2016-07-06 09:45:11
Start Time	2016-07-01 11:42:06
Finish Time	2016-07-01 11:55:44

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Casey Clift
<b>City</b>	Boulder Creek
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	caseyplease@aol.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>There is noting wrong with codifying common sense in this proposed rule. The fair administration of Justice demands that prosecutors not be advocates for a conviction of any person, but rather the keeper of fairness to those standing accused of a crime.</p> <p>There are to many examples where prosecutors have run afoul of this proposed rule to the detriment of societies belief that our criminal system is fair and just.</p>
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-60-Casey Clift (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Chief Deputy Public Defender
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Elena D'Agustino
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	edagustino@gmail.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. Prosecutors are required to disclose all exculpatory evidence and information, regardless of their opinion of its materiality, as required by state law. Under the new rule a prosecutor who does not "Know or reasonably should know" would not be subject to discipline for non-disclosure. This is an important rule, in place in every other jurisdiction in the US, and that would put prosecutors on notice that they must adhere to these requirements and their obligation to ensure that justice is done, and that the rights of all, including the accused, are protected.
<b>Receive Mass Email?</b>	For updates and further information concerning the Rule Revision Commission's project to develop comprehensive amendments to the California Rules of Professional Conduct, visit the following web page at the State Bar's website: <a href="http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx">http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx</a>
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-61-Elena D'Agustino (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Paul McCarthy
<b>City</b>	Oakland
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	p_mccarthy@sbcglobal.net
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	<p>I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually “know 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. Without this rule, the prosecutors will have no reason to disclose exculpatory evidence and information other than the remote possibility that years down the line, some court might overturn a conviction.</p>
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-63-Paul McCarthy (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Santa Clara County Office of the Public Defender
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Charles Hendrickson
<b>City</b>	San Jose
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	charles.hendrickson@pdo.sccgov.org
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. It is important to remind prosecutors of their duty, under existing California law, to timely disclose exculpatory evidence and information, regardless of materiality. Further, given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutor actually "knows or reasonably should know" the information is exculpatory, a prosecutor needn't worry she will be disciplined without having a culpable mental state. The Revision Commission has been sensitive to the prosecutor's concerns and it is time for California to join the other jurisdictions in the United States and adopt a sensible rule reflected in the ABA's Model Rules.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-64-Charles Hendrickson (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Kenneth Hamilton
<b>City</b>	VENTURA
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	ken@socodui.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am a criminal law specialist. The rule is consistent with prosecutor obligations. When those obligations are breached a defendant's fundamental liberty interests may be infringed. Disapline for such misconduct is appropriate.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-65-Kenneth Hamilton (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Robert J Curatola
<b>City</b>	Orange
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	rcuratola@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am writing to support the proposed revision of Rule 5-110 as drafted by the Commission for the Revision of the Rules of Professional Conduct. 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 actually "know 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.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-66-Robert Curatola (07-01-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Name</b>	Ruzanna
<b>City</b>	Poghosyan
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	ruzanna@rpcriminaldefense.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-110 Special Responsibilities of a Prosecutor
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I am a criminal law defense attorney. When a prosecutor interferes with defendant's fundamental constitutional rights, disciplinary action is not only appropriate but is necessary.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-67-Ruzanna (07-01-16)-FS
<b>Submitted via:</b>	Online



## Attachment F: Full Text of Public Comments



**Robert M. Sanger** | rsanger@sangerswysen.com  
Criminal Law Specialist, Certified by the State Bar of California Board of Legal Specialization  
**Catherine J. Swysen** | cswysen@sangerswysen.com  
**Stephen K. Dunkle** | sdunkle@sangerswysen.com  
Appellate Law Specialist, Certified by the State Bar of California Board of Legal Specialization  
**Jeffrey S. Sanger** | jsanger@sangerswysen.com  
**Rebekah Dillon** | rdillon@sangerswysen.com  
Investigator

**Sanger Swysen & Dunkle** | Attorneys at Law

July 1, 2016

Audrey Hollins  
Office of Professional Competence,  
Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Dear Ms. Hollins:

In concurrence with the position of California Attorney's for Criminal Justice, please accept this letter in favor of proposed Rule of Professional Conduct 5-110.

CACJ has long believed that the Rules should impose a fair responsibility on prosecutors to disclose exculpatory material. While most prosecutors honor their obligation to provide such material, there have been all too many exceptions. To honor this obligation is an integral part of the professional responsibility of prosecutors as a matter of Constitutional law under both United States Supreme Court and California Supreme Court precedents. It can be of critical importance to the liberty and lives of the public served by the Bar in general and prosecutors in particular.

We believe that the current version of the Rule, as now amended to provide further protection to prosecutors, is an appropriate and long overdue addition to the Rules of Professional Conduct. We urge the adoption of this Rule.

Thank you and please call the undersigned if you have any questions.

Respectfully,

SANGER SWYSEN & DUNKLE

Robert M. Sanger

## Attachment F: Full Text of Public Comments

**From:** [Hollins, Audrey](#)  
**To:** [McCurdy, Lauren](#); [Lee, Mimi](#)  
**Subject:** FW: Committee on Professional Conduct : Prosecutors  
**Date:** Friday, June 24, 2016 2:15:38 PM

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[Public comment.](#)

**From:** Jeffrey Sklan [mailto:[jeffreysklan@aol.com](mailto:jeffreysklan@aol.com)]  
**Sent:** Thursday, June 23, 2016 4:26 PM  
**To:** Hollins, Audrey  
**Subject:** Committee on Professional Conduct : Prosecutors

Daer Ms. Hollins,

First, let me thank you in advance for your work. Nothing can be more important than an unbiased and evenly applied set of laws. This is particularly true in the criminal arena where there exists a disparity in access to justice and legal choices in many instances.

I am pleased to count many prosecutors among my closest friends, despite the fact that my practice consists largely of handling criminal defense matters. They are as ethical as any group of lawyers in the State. Many of my cases have been pro-bono, including homicide matters. Therefore, I am responding to the request for comment as to prosecutorial misconduct and proposed changes to the RPC.

Part of the issue that arises, pre-trial, is that prosecutors frequently feel that PC 1054 does not require them or their offices to turn over all discovery. Defense counsel not only should be entitled to all *Brady* material, but complete forensic reports, records regarding informants,

etc at the earliest possible juncture so that we may properly do our assigned tasks. I encourage you to work with the liason for legislative matters and draft a tweaking of PC 1054 in this regard.

This is a very real issue. Discovery ( *in a recent case*) was piece-mealed out over a period of one year. My client was behind bars the whole time due to bail issues. I could not successfully prepare for his preliminary hearing as new reports etc were turned over at every court date, *despite them having been in law enforcement's possession since the arrest* many months before.

Despite this infuriating the bench officer, nothing was done, and there was no real remedy. The prosecutor had actual notice of surveillance video for months before admitting it had existed. That video was exculpatory... My client cannot get that time back.

Additionally, there must be a strict and clear punishment for prosecutors who do not abide by the very highest standards. They are the gatekeepers of justice in our society. With that in mind, I suggest that the Judiciary be **mandatory reporters** of egregious violations of discovery matters, witness intimidation or secreting, successful Batson-Wheeler motions ( where race/creed/ etc are improperly used to select juries), etc. This would require necessarily, a more dynamic role for the Courts to take. In almost 38 years of practice, NOT ONCE have I seen a Judge or bench officer report a prosecutor,

despite having found numerous ethical/ legal/statutory violations.

However, there is an analogue in the civil arena where sanctions of over \$1000 should be reported. Certainly, if monetary sanctions are an important gauge of a lawyer's threat to the public, then Prosecutorial misconduct that causes freedom/loss of family/ exposure to violence and disease, is as equally important.

As there is generally no consequence for this niche of the bar, it would be naive to expect any changes in conduct until meaningful sanctions are implemented. If a special section of Bar prosecutor reviews is needed, and staffed, so be it. The issue is that important.

Thank you for listening. Please correspond should follow up questions remain.

Jeffrey Sklan

Jeffrey Sklan JD, MBA  
Cal. Bar # 87742  
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## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Retired Public Defender/CPDA member
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	George Shea
<b>City</b>	Fairfax
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	geoirishbox@yahoo.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-220 Suppression of Evidence
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>Date</b>	06/28/2016
<b>File :</b>	X-5220-1-George Shea (06-28-16)-FS
<b>Submitted via:</b>	Online

## Attachment F: Full Text of Public Comments

## Rule 5-110 and 5-220 PC2

<b>Professional Affiliation</b>	Attorney
<b>Commenting on behalf of an organization</b>	No
<b>Name</b>	Robert Scofield
<b>City</b>	Woodland
<b>State</b>	California
<b>Email address (You will receive a copy of your comment submission.)</b>	research@omsoft.com
<b>Select the Rule that you would like to comment on from the list below.</b>	Proposed Rule 5-220 Suppression of Evidence
<b>From the choices below, we ask that you indicate whether you have a position on the rule you have selected from the drop down.</b>	AGREE with the proposed Rule.
<b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b>	I submitted a long comment to the original version of the proposed rule. I think the revised version is fair and appropriate. I recommend adoption.
<b>Date</b>	07/01/2016
<b>File :</b>	X-5110-62-Robert Scofield (07-01-16)-FS
<b>Submitted via:</b>	Online