# STATE BAR OF CALIFORNIA

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

### OPEN SESSION ACTION SUMMARY

**Friday, August 26, 2016**
(10:00 am – 4:30 pm)
State Bar of California
180 Howard Street, Rooms 4A-C
San Francisco, CA 94105

**Members Present:** Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout and Mark Tuft.

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

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

**State Bar Staff Present:** Gregory Dresser (Office of the Chief Trial Counsel),Kevin Taylor (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel), Kevin Mohr (Consultant/Reporter), Elizabeth Parker (Executive Director) and Andrew Tuft (Office of Professional Competence).

**Others Present:**, , Diane Karpman (Beverly Bar Association), Stanley Lamport, Laurie Levenson (Loyola Law School/Innocence Project), Michael Marcus, Jerry Miller, Michael Ogul (CPDA), Chris Spaulding (Office of State Public Defender), Teresa Schmid (LACBA), Sara Theiss (Office of State Public Defender), Mark Zahner (CDAA), and Richard Zitrin.

## I. CHAIR'S REMARKS

### A. Oral Report

The Chair requested and Mr. Cardona and Mr. Mohr provided an oral report on the LACBA public comment consideration process and an appearance by Commission representatives at the August 24, 2016 meeting of the LACBA Board.

The Chair requested and Mr. Difuntorum provided an oral report on notable upcoming events: (1) the end of the 90-day public comment period on the Commission's comprehensive proposed rules on September 27, 2016; (2) the Board of Trustees October 1, 2016 expedited consideration of proposed amended rules 5-110 and 5-220 following the conclusion of a 45-day additional public comment period; (3) the next meetings of the Commission scheduled for September 30, 2016 at the State Bar Annual Meeting in San Diego and for October 21 - 22, 2016 in Los Angeles; and (4) the Board of Trustees meeting set for November 18, 2016 at

which it is anticipated that the Board will consider the Commission's post-90-day public comment report on comprehensive proposed rules.

## II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

**Approval of Action Summary – Regular Meeting on June 2 & 3, 2016** (Open Session).

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

> RESOLVED, that the Commission approves the action summary of the Commission's June 2 & 3, 2016 meeting which included the May 6-7, 2016 action summary as amended.

All members present voted yes.

## III. ACTION

### A. Post Public Comment Consideration of Rules 5-110 (Performing the Duty of Member in Government Service) and 5-220 (Suppression of Evidence) (including ABA Model Rule 3.8)

The Chair recognized Mr. Rothschild who gave an oral report on the public comments received. Mr. Rothschild reported that the majority of comments received favor of the proposal. Mr. Rothschild stated that the drafting team recommends that no changes be made to the public comment drafts of the proposed rules.

Upon motion made, seconded and adopted, it was

> RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby recommends that the Board adopt proposed amended rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Cardona, Mr. Eaton, and Mr. Kehr.

Upon motion made, seconded and adopted, it was

> RESOLVED, that the Commission recommends that the Board prioritize consideration of proposed amended rules 5-110 and 5-220, and expedite the processing of these rules on a time-table independent of the Commission's anticipated comprehensive report and recommendation.

All members present voted yes.

Upon motion made, seconded and adopted, it was

> RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby adopts the responses in the Synopsis Chart that the drafting team has recommended for the public comments received in the form attached to this action summary and made a part hereto.

All members present voted yes.

### B. Report and Recommendation on Rule 2.1 (Advisor)

The Chair recognized Mr. Eaton who presented the report of the drafting team. The Chair also recognized visitor Stan Lamport who provided oral public comment to the Commission in connection with the consideration of proposed rule 2.1.

Upon motion made, seconded and adopted, it was

> RESOLVED, that upon consideration of the report of the drafting team on Rule 2.1, the Commission hereby recommends that the Board adopt Rule 2.1 in the form attached to this Action Summary and made a part thereto for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the Rule.

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

### C. Consideration of Proposed Rules 1.0 - 1.3, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.0:
The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.0 and the drafting team's recommended responses to those comments. For further consideration by the drafting team, Mr. Tuft recommended the deletion of the words "of guidance" in Comment [4] of the Rule.

RULE 1.0.1:
The Chair recognized Mr. Chou who gave an oral report on the public comments received on Rule 1.0.1 and the drafting team's recommended responses to those comments. The Chair also recognized visitor (by phone) Jerry Miller who provided oral public comment to the Commission in connection with the consideration of proposed Rule 1.0.1.

RULE 1.1:
The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 1.1 and the drafting team's recommended responses to those comments.

RULE 1.2:
The Chair recognized Ms. Langford who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.2.

RULE 1.2.1:
The Chair recognized Ms. Langford who gave an oral report on the public comments received on Rule 1.2.1 and the drafting team's recommended responses to those comments. The Chair also recognized visitor Richard Zitrin who provided oral public comment to the Commission in connection with the consideration of proposed Rule 1.2.1.

RULE 1.3:
The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 1.3 and the drafting team's recommended responses to those comments.

### D. Consideration of Proposed Rules 1.4 - 1.4.2, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.4:
The Chair recognized Mr. Harris who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4.

RULE 1.4.1:
The Chair recognized Mr. Kornberg who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4.1.

RULE 1.4.2:
The Chair recognized Ms. Clinch who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4.2.

### E. Consideration of Proposed Rules 1.5, 1.5.1, 1.15, and 1.16, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.5:
The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.5 and the drafting team's recommended responses to those comments. The Chair also recognized visitor Richard Zitrin who provided oral public comment to the Commission in connection with the consideration of proposed Rule 1.5.

RULE 1.5.1:
The Chair recognized Mr. Ham who gave an oral report on the public comments received on Rule 1.5.1 and the drafting team's recommended responses to those comments.

RULE 1.15:
The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.15.

RULE 1.16:
The Chair recognized Mr. Kornberg who gave an oral report on the public comments received on Rule 1.16 and the drafting team's recommended responses to those comments.

### F. Consideration of Proposed Rules 1.6 and 1.14, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.6:
The Chair recognized Mr. Zipser who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.6.

RULE 1.14:
The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 1.14 and the drafting team's recommended responses to those comments.

### G. Consideration of Proposed Rules 1.8.1 - 1.8.11, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.8.1:
The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 1.8.1 and the drafting team's discussion of those comments. The Commission members discussed the applicability of the rule to fee agreement modifications. The Chair also recognized visitor Richard Zitrin who provided oral public comment to the Commission in connection with the consideration of proposed Rule 1.8.1.

RULE 1.8.2:
The Chair recognized Mr. Zipser who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.2.

RULE 1.8.3:
The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.3.

RULE 1.8.5:
The Chair recognized Mr. Zipser who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.5.

RULE 1.8.6:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.6.

RULE 1.8.7:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.7.

RULE 1.8.8:
The Chair recognized Mr. Harris who gave an oral report on the public comment received on Rule 1.8.8 and the drafting team's recommended response to that comment.

RULE 1.8.9:
The Chair reported that no public comments were assigned for proposed Rule 1.8.9. For future consideration by the drafting team, Mr. Mohr reported on that an issue was raised during the Commission's June 23, 2016 presentation to the Board concerning the reasoning for having a rule that is contrary to statutory law. The Chair confirmed the drafting team's intent to consider the issue.

RULE 1.8.10:
The Chair recognized Mr. Ham who gave an oral report on the public comments received on Rule 1.8.10 and the drafting team's recommended responses to those comments. For the drafting team's further consideration, Mr. Tuft recommended the deletion of the brackets in Comment [1] of the Rule and the footnote regarding proposed Rule 2.1.

RULE 1.8.11:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.11.

### H. Consideration of Proposed Rules 1.7, 1.9 - 1.12, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.7:
The Chair recognized Mr. Cardona who gave an oral report on the public comment received on Rule 1.7 and the drafting team's recommended response to that comment. For the drafting team's further consideration, Mr. Tuft observed that paragraphs (b) and (c) were ambiguous as to which provision would control if both appeared to be triggered in a particular situation. The Chair also recognized visitor Richard Zitrin who provided oral public comment to the Commission in connection with the consideration of proposed Rule 1.7.

RULE 1.9:
The Chair recognized Mr. Martinez who deferred to Mr. Cardona who gave an oral report on the public comment received on Rule 1.9 and the drafting team's recommended response to that comment.

RULE 1.10:
The Chair recognized Mr. Martinez who gave an oral report on the public comment received on Rule 1.10 and the drafting team's recommended response to that comment.

RULE 1.11:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.11.

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.12.

### I. Consideration of Proposed Rules 1.13 and 1.17, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 1.13:
The Chair recognized Mr. Rothschild who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.13.

RULE 1.17:
The Chair recognized Mr. Kehr who gave an oral report on the public comment received on Rule 1.8.1 and the drafting team's discussion of that comment. For the drafting team's further consideration, Mr. Tuft observed that "solely" does not add anything to what is already provided in Comment [2] and the Chair confirmed the drafting team would reconsider the issue.

### J. Consideration of Proposed Rules 2.4 and 2.4.1, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 2.4:
The Chair recognized Judge Clopton who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 2.4.

RULE 2.4.1:
The Chair recognized Judge Clopton who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 2.4.1.

### K. Consideration of Proposed Rules 3.1 - 3.10, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 3.1:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.1.

RULE 3.2:
The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.2.

RULE 3.3:
The Chair recognized Mr. Tuft who gave an oral report on the public comment received on Rule 3.3 and the drafting team's recommended response to that comment.

RULE 3.4:
The Chair recognized Ms. Croker who gave an oral report on the public comments received on Rule 3.4 and the drafting team's recommended responses to those comments.

RULE 3.5:
The Chair recognized Judge Stout who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.5.

RULE 3.6:
The Chair reported that no public comments were assigned for proposed Rule 3.6.

RULE 3.7:
The Chair recognized Mr. Cardona who gave an oral report on the public comment received on Rule 3.7 and the drafting team's recommended response to that comment.

RULE 3.8:
Item not called for discussion. See Item III.A.

RULE 3.9:
The Chair recognized Mr. Tuft who gave an oral report on the public comment received on Rule 3.9 and the drafting team's recommended response to that comment.

RULE 3.10:
The Chair recognized Mr. Bleich who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.10.

### L. Consideration of Proposed Rules 4.1 - 4.4, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 4.1:
The Chair recognized Ms. Langford who gave an oral report on the public comment received on Rule 4.1 and the drafting team's recommended response to that comment.

RULE 4.2:
The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 4.2.

RULE 4.3:
The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 4.3.

RULE 4.4:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 4.4.

### M. Consideration of Proposed Rules 5.1 - 5.6, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 5.1:
The Chair recognized Mr. Kehr who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.1.

RULE 5.2:
The Chair recognized Mr. Kehr who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.2.

RULE 5.3:
The Chair recognized Mr. Kehr who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.3.

RULE 5.3.1:
The Chair recognized Mr. Rothschild who gave an oral report on the public comment received on Rule 5.3.1 and the drafting team's recommended response to that comments.

RULE 5.4:
The Chair recognized Mr. Harris who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.4.

RULE 5.5:
The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.5.

RULE 5.6
The Chair reported that no public comments were assigned for proposed Rule 5.6.

### N. Consideration of Proposed Rules 6.3 and 6.5, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 6.3:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 6.3.

RULE 6.5:
The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 6.5.

### O. Consideration of Proposed Rules 7.1 - 7.5, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULES 7.1, 7.2, 7.3, 7.4 and 7.5:
The Chair recognized Ms. Langford who reported that no public comments were assigned for these rules and that the drafting team had no discussion issues to raise for the Commission's consideration.

### P. Consideration of Proposed Rules 8.1 - 8.5, including any public comments

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 8.1:
The Chair recognized Ms. Clinch who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.1.

RULE 8.1.1:
The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.1.1.

RULE 8.2:
The Chair recognized Judge Stout who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.2.

RULE 8.4:
The Chair recognized Mr. Cardona who gave an oral report on the public comments received on Rule 8.4 and the drafting team's recommended responses to those comments, including

modifications to the proposed rule discussed by the drafting team. Commission members were asked to send to staff any comments on the modifications under consideration by the drafting team.

RULE 8.4.1:
The Chair recognized Mr. Cardona who gave an oral report on the public comments received on Rule 8.4.1 and the drafting team's recommended responses to those comments, including modifications to the proposed rule discussed by the drafting team. Commission members were asked to send to staff any comments on the modifications under consideration by the drafting team.

The Chair recognized visitors Diane Karpman (by phone) and Judge Michael Marcus (Ret.) (by phone) who provided oral public comment to the Commission in connection with the consideration of proposed rule 8.4.1.

RULE 8.5:
The Chair reported that no public comments were assigned for proposed Rule 8.5.

**Q. Consideration of Model Rules Rejected by Commission [if warranted by public comment received on a rejected rule or as a result of consideration of any other agenda item]**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

MODEL RULE 1.18:
The Chair recognized Mr. Zipser who gave an oral report on the public comments received on Rule 1.18 and the drafting team's recommended responses to those comments, including the drafting team's tentative recommendation that the Commission reconsider its prior decision to not recommend any version of Model Rule 1.18. Mr. Zipser explained the concept of a possible rule that the Commission might consider for adoption after the end of the public comment period. The Chair confirmed there was no objection to the drafting team reconsidering a rule derived from Model Rule 1.18. Commission members were asked to send to staff any comments on the drafting team's tentative recommendation for reconsideration of Model Rule 1.18 by the drafting team.

The Chair also recognized visitor Richard Zitrin who provided oral public comment to the Commission in connection with the consideration of Model Rule 1.18.

MODEL RULE 2.3:
The Chair recognized Ms. Langford who inquired why Model Rule 2.3 was rejected and Mr. Mohr provided an explanation.

MODEL RULE 5.7:
The Chair recognized Mr. Tuft who inquired whether Model Rule 5.7 had been discussed and Mr. Kehr explained that the Commission concluded that there is existing case law or ethics opinions on many of the issues addressed by the rule and that it would be virtually impossible to draft a rule in conformance with California law that covers the broad subject matter of Model Rule 5.7.

MODEL RULES 6.1, 6.2, 6.4, 7.6 and 8.3.
The Chair reported that no public comments were assigned for these Model Rules.

## *CLOSED SESSION*

*None**

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

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

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor**
**Adopted by the Commission at the August 26, 2016 Meeting**

The prosecutor in a criminal case shall:

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

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) The information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible alternative to obtain the information;

(F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

**Discussion**

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

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

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

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

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

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

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant.

Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

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

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

## Proposed Rule 5-220 Suppression of Evidence
## Adopted by the Commission at the August 26, 2016 Meeting

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

**Discussion:**

See rule 5-110 for special responsibilities of a prosecutor.

**Proposed Rule 2.1 Advisor**
**Adopted by the Commission at the August 26, 2016 Meeting**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

**Comment**

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.