

AGENDA ITEM

703 MAY 2017

DATE: May 5, 2017

TO: Members, Board of Trustees

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed Amended Rules 5-110 and 5-220 of the Rules of Professional Conduct – Consideration Following Action by the Supreme Court

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California (“Court”) issued an order on the State Bar’s request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. The order is attached. The State Bar’s request was granted in part and denied in part. The order provides instructions for the State Bar’s further consideration of the parts of the proposal that were not approved. This agenda item presents a staff recommendation that the Court’s request for further consideration be assigned to the Commission for the Revision of the Rules of Professional Conduct (“Commission”).

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

BACKGROUND

The Rules of Professional Conduct of the State Bar of California (“rules”) are attorney conduct standards, the violation of which will subject an attorney to discipline. Pursuant to statute, amendments to the rules may be formulated by the Board of Trustees (“Board”) for submission to the Court for approval.¹

At the Board’s October 1, 2016 meeting and upon the recommendation of the Commission, the Board adopted proposed amendments to rules 5-110 and 5-220. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. (See Board open agenda item [701 OCTOBER 2016](#) and the [Board minutes](#) for that meeting.)

The amendments to rule 5-110 adopted by the Board included proposed paragraph (D). Paragraph (D) would amend the existing duty of a prosecutor under rule 5-220, which requires a

¹ Business and Professions Code section 6076 provides: “With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state.” Business and Professions Code section 6077, in part, provides: “The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar.”

member, including a prosecutor, to refrain from suppressing “any evidence that the member or the member's client has a legal obligation to reveal or to produce.” Rather than incorporating by reference a prosecutor’s “legal obligation,” the proposed amended rule stated that a prosecutor must: “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

The amendments also included proposed paragraph (E) which provides that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

DISCUSSION

I. Supreme Court Action

In its May 1, 2017 order, the Court approved the State Bar’s request to approve paragraphs (A), (B), (C), (F), (G), and (H) of proposed amended rule 5-110. These paragraphs carry forward the substance of current rule 5 110 requiring that criminal charges be supported by probable cause and add the following new provisions.

- A requirement that a prosecutor make reasonable efforts to assure the accused has been advised of the right to, and the procedure for, obtaining counsel, and has been given reasonable opportunity to obtain counsel.
- A prohibition against a prosecutor obtaining from an unrepresented accused a waiver of pretrial rights, unless the tribunal has approved the accused’s appearance in propria persona.
- A requirement that a prosecutor exercise reasonable care to prevent persons under the prosecutor’s supervision from making an extrajudicial statement the prosecutor would be prohibited from making under current rule 5-120, which governs extrajudicial statements generally.
- A requirement that a prosecutor disclose and/or conduct an investigation when the prosecutor is presented with “new, credible and material” evidence of a wrongful conviction.
- A requirement that when a prosecutor “knows of clear and convincing evidence” establishing that a wrongful conviction occurred, the prosecutor must seek to remedy the conviction.

Discussion paragraphs which provide guidance on these provisions were also approved. In addition, the Bar’s proposed new Discussion paragraph to rule 5-220 that cross references rule 5-110 was approved. The Court’s order states that these approved amendments are operative May 1, 2017.

The Court denied the request to approve proposed paragraphs (D) and (E) of rule 5-110. The Court's order includes instructions for the State Bar's further consideration of paragraph (D), including alternative revisions attached to the Court's order. The Court's approved version of rule 5-110 that became operative on May 1, 2017 indicates that paragraph (D) and the related Discussion paragraphs [3] and [4] are "reserved" rather than omitted completely. The Court's order seems to contemplate prompt action on paragraph (D), using the word "immediately" in inviting resubmission. However, the order specifically states the State Bar should determine if public comment is warranted and a public comment process would require at least a 30-day comment period.

Regarding the further consideration of paragraph (E), the order says that the State Bar can resubmit a revised proposal at "any time it deems appropriate" and some substitute language is provided for consideration. The Court's order directs the State Bar to make a determination on whether the duty imposed by paragraph (E) should be imposed on all lawyers, not only prosecutors. A place in the Court's approved rule 5-110 is not "reserved" for this duty and this makes sense because a duty of general application should not be included in the rule setting forth the special responsibilities of a prosecutor in a criminal matter.

II. Assignment to the Commission

Staff recommends that the Board assign the further consideration of paragraphs (D) and (E) to the Commission. At the Board's meeting on March 9, 2017 and in connection with the Board's final step in the project to adopt comprehensive amendments to the rules, the Board appointed a nine member Commission (including one non-voting advisor) to assist the Board with any questions that the Court might have concerning the proposed rules. Justice Lee Edmon was appointed as the chair of the Commission. The term set by the Board terminates this extended Commission on March 9, 2018.

III. Time-Line for Action

If the Board agrees, the following time-line for action would be pursued.

- Commission meeting third or fourth week of May to develop public comment proposals.
- Special set RAD teleconference third or fourth week of May, following the Commission meeting, to authorize public comment.
- A 30-day public comment period ending no later than the week of June 26, 2017.
- Commission meeting the week of June 26, 2017 to consider public comments and complete drafting.
- Board action on the Commission's recommendation at the Board's July 14, 2017 meeting.
- State Bar submission to the Supreme Court in August 2017.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item only requests a process for considering possible amendments to the rules. A Board decision to adopt a rule amendment would be the subject of a separate agenda item. Board adopted amendments to the rules only become operative if approved by the Court.

BOARD BOOK IMPACT

None.

PROPOSED BOARD RESOLUTION

RESOLVED, that the Board of Trustees assigns the Commission for the Revision of the Rules of Professional Conduct of the State Bar of California to study the Supreme Court of California's May 1, 2017 order on proposed amended rules 5-110 and 5-220; and it is

FURTHER RESOLVED, that the Commission is directed to make recommendations to the Board for responding to the Court, including revised rule proposals.

ATTACHMENT(S) LIST

- A. Supreme Court order filed on May 1, 2017 (case no. S239387)

S239387

MAY - 1 2017

ADMINISTRATIVE ORDER 2017-04-26

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

**ORDER RE REQUEST FOR APPROVAL OF AMENDMENTS TO RULE 5-110 AND
RULE 5-220 OF THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA.**

On January 9, 2017, the Board of Trustees of the State Bar of California filed a request for approval of recommended amendments to rule 5-110 and rule 5-220 of the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The request is granted in part and denied in part.

The request to add paragraphs (A), (B), (C), (F), (G), and (H), and Discussion paragraphs [1], [2], and [5] through [9] to rule 5-110, and to add a discussion paragraph to rule 5-220, is granted. These amendments are set forth in the approved versions of rule 5-110 and rule 5-220 appended as Attachment 1 to this order, and are effective May 1, 2017.

The request to add paragraph (D) to rule 5-110 and its related Discussion paragraphs [3] and [4], concerning prosecutors' ethical pretrial disclosure obligations, is denied. The court directs the Board to consider the alternative revisions set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. Additionally, the court requests that the Board explain the meaning of the terms "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3], or alternatively, consider removing this portion of the sentence from the Discussion paragraph. To the extent the Board chooses to recommend any revisions to rule 5-110(D) and Discussion paragraphs [3] and [4], the Board may submit such revisions for court approval immediately following its consideration of such revisions. For the present time, paragraph (D) and Discussion paragraphs [3] and [4] shall be designated as "reserved," as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

The request to add paragraph (E) to rule 5-110, regarding the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client, is denied. The court directs the Board to reconsider whether this is an ethical obligation that should be imposed on all attorneys, not only prosecutors. To the extent the Board chooses to recommend a more broadly applicable rule patterned on

the language in proposed rule 5-110(E), the court directs the Board to reconsider whether substitution of the terms “reasonably necessary” for “essential” under proposed paragraph (E)(2), and “reasonable” for “feasible” under proposed paragraph (E)(3), would be appropriate. The Board may submit a recommendation for a new or revised rule on this subject matter at any time it deems appropriate.

In light of the court’s decision to not approve proposed rule 5-110(E), paragraphs (F), (G), and (H), and references thereto, shall be relabeled as paragraphs (E), (F), and (G), respectively, as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

It is so ordered.

CANTIL-SAKAUYE

Chief Justice

WERDEGAR, J.

Associate Justice

CHIN, J.

Associate Justice

CORRIGAN, J.

Associate Justice

LIU, J.

Associate Justice

CUÉLLAR, J.

Associate Justice

KRUGER, J.

Associate Justice

ATTACHMENT 1

Rule 5-110 Special Responsibilities of a Prosecutor

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) *Reserved.*

(E) 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.

(F) 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.

(G) 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] *Reserved.*

[4] *Reserved.*

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) 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 (E) 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 (F) 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 (F) 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 (G), 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 paragraphs (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

(Adopted, eff. May 1, 2017.)

Rule 5-220 Suppression of Evidence

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

Discussion

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

(Adopted, eff. May 1, 2017.)

ATTACHMENT 2

Proposed alternative revisions to Rule 5-110(D) and Discussion paragraphs [3] and [4] for consideration by the State Bar's Board of Trustees

The prosecutor in a criminal case shall:

...

(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~~ or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;. This obligation includes the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely;

...

[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.~~ Nevertheless, Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require disclosure of 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. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. 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.