

DATE: May 16, 2017

TO: Members, Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Paragraph (D) of Proposed Amended Rule 5-110 of the Rules of Professional Conduct - Consideration Following Action by the Supreme Court

BACKGROUND

At the Board of Trustee's October 1, 2016 meeting, the Board adopted proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California and directed staff to submit the amendments to the Supreme Court of California for approval on an expedited basis. (See Board open agenda item [701 OCTOBER 2016](#) and the [Board minutes](#) for that meeting.) In proposed amended rule 5-110, a new paragraph (D) addressed the special responsibility of a prosecutor in a criminal matter 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, mitigates the offense, or mitigates the sentence.

On May 1, 2017, the Supreme Court of California ("Court") issued an order on the State Bar's request to approve the proposed amendments to rules 5-110 and 5-220. The State Bar's request was granted in part and denied in part. Approval of paragraph (D) of proposed amended rule 5-110 was denied. However, the order provides instructions for further consideration of paragraph (D) by the State Bar. (The Court's order is provided as Attachment 1.) On May 12, 2017, the Board referred the further consideration of paragraph (D) to the Commission that was appointed by the Board on March 9, 2017 and indicated that the Commission should make recommendations for a response to the Court, including revised rule amendment proposals.

DISCUSSION

I. Supreme Court Order

The Court's May 1, 2017 order addresses the State Bar's further consideration of paragraph (D) as follows:

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.

(Paragraph three of Administrative order 2017-04-26, filed May 1, 2017 in Supreme Court case no. S239387.)

As indicated above and in the Court's alternative revisions attached to the Court's order, there are six issues presented:

1. Whether to recommend adoption of the Court's revisions to paragraph (D) that would modify the language submitted by the State Bar;
2. Whether to recommend adoption of the Court's new second sentence added at the end of paragraph (D);
3. Whether to recommend adoption of the Court's revisions to the first sentence of Discussion paragraph [3] that would modify the language submitted by the State Bar;
4. Whether to recommend adoption of the Court's revisions to the second sentence of Discussion paragraph [3] that would modify the language submitted by the State Bar;
5. Whether to recommend adoption of the Court's new third sentence added to Discussion paragraph [3]; and
6. How to explain the meaning of the terms "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3] as submitted by the State Bar.

It should be noted that the Court approved version of amended rule 5-110 includes "reserved" provisions in the rule text and in the rule Discussion for including the concept of paragraph (D) and the related Discussion paragraphs. Also noteworthy is the Court's statement "the Board may submit such revisions for court approval **immediately** following its consideration of such revisions." (Emphasis added.) Taken together, this suggests a continued interest in expediting the consideration of this aspect of the proposed rule.

To facilitate the Commission's study of these issues, staff provides the following recommendation, options for action and observations.

II. Staff Recommendation

Regardless of the outcome of the Commission's consideration of the various issues, staff recommends that the language provided by the Court be recommended to the Board for a 30-day public comment period together with either: (i) the phrase "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3] included and accompanied with an explanation; or (ii) Discussion paragraph [3] modified to delete that phrase and an explanation for that deletion. This public comment version would be an "ALT 1" version of the proposed rule and if the Commission determines that, in addition, a different version of the proposed rule should be recommended for public comment, then that other version would be an "ALT 2" version. By using this approach, the Board would retain the flexibility after public

comment to adopt the ALT 1 version with the Court's revisions or the ALT 2 version of the rule that implements the Commission's different revisions.

III. Options for Action

For issues one through five, the options for action are to accept the Court's revised language as drafted or to reject or modify that language. Some staff observations are provided below for each of these five issues.

1. Whether to recommend adoption of the Court's revisions to paragraph (D) that would modify the language submitted by the State Bar.

The Court's revisions appear to streamline the language without any substantive change. Specifically, it avoids a repetitive reference to the bifurcated knowledge standard. Although this would depart from the language used in Model Rule 3.8(d), there does not appear to be any compelling reason for rejecting the Court's revision.

2. Whether to recommend adoption of the Court's new second sentence added at the end of paragraph (D).

In part, the Court's new sentence appears to move the concept of impeachment information from the first sentence of Discussion paragraph [3] to the black letter text of the rule. Having a substantive duty in the black letter rather than a Discussion paragraph seems consistent with the Commission's charter. However, the new sentence is not limited to impeachment information and it states a standard of "casts significant doubt" as the trigger for a prosecutor's duty to disclose. A CPDA letter dated May 8, 2017 (see Attachment 2) objects to the new sentence arguing that the standard of "casts significant doubt" is problematic and contrary to existing law. This same concern is asserted in a May 10, 2017 letter from CACJ (see Attachment 3).

One possible approach would be to modify the Court's sentence as follows: "For example, This obligation includes, but is not limited to, 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; . . ." A downside of this approach is that this version of the Court's sentence might be regarded as the type of statement that should appear in a Discussion paragraph rather than in the black letter text of a rule.

Another separate issue is the Court's inclusion of a reference to the "admissibility" of testimony or other evidence. The term "admissibility" and the concept of casting significant doubt on admissibility is not used in Model Rule 3.8 or the rule submitted by the State Bar. Under *Brady* and its progeny, admissibility is a consideration that might arise when analyzing the issue of materiality. (Compare *Wood v. Bartholomew* (1995) 516 U.S. 1, 2 [prosecution was not obligated to disclose inadmissible evidence because the evidence was not material and would not have affected the outcome of trial] with *State v. Bennett* (2003) 119 Nev. 589, 602 [prosecution violated *Brady* by failing to disclose jailhouse informant statements notwithstanding the prosecution's determination that the statements included inadmissible hearsay].) If the Court's sentence is not clarified by the Commission to be a description of a non-exclusive example, then the inclusion of a reference "admissibility" might warrant clarification that this reference is not reintroducing the materiality test.

3. Whether to recommend adoption of the Court's revisions to the first sentence of Discussion paragraph [3] that would modify the language submitted by the State Bar.

As observed above, this sentence specifies that impeachment information as well as exculpatory information is within the scope of the rule's disclosure requirement. If implemented, the Court's new sentence at the end of paragraph (D) would eliminate the need for this explanation to appear in the Discussion because the concept of impeachment information would already be described in the black letter text of the rule (e.g., as information that casts significant doubt on the accuracy of testimony relied upon by the prosecution).

The Court's revisions to the first sentence of Discussion paragraph [3] also streamline the clarifying statement that the *Brady* materiality standard does not limit the scope of the rule's disclosure requirement.

4. Whether to recommend adoption of the Court's revisions to the second sentence of Discussion paragraph [3] that would modify the language submitted by the Bar.

The Court's revisions streamline the language by substituting "Nevertheless" for "Although" and by deleting a repetitive reference to the *Brady* materiality standard. The Court's revisions also substitute "disclosure of cumulative information" for "cumulative disclosures of information." The phrase "cumulative disclosures of information" itself is separate issue for which the Court is seeking an explanation. (See item number 6 below.)

5. Whether to recommend adoption of the Court's new third sentence added to Discussion paragraph [3].

The Court's new sentence might be susceptible to various meanings. On one hand, it might mean that the scope of the disclosure requirement imposed by the rule for disciplinary purposes is intended to be coextensive with the existing statutory and constitutional law governing discovery in California courts. A May 4, 2017 [Daily Journal](#) article by Gary Schons (see Attachment 4) takes this view observing in part that: "This passage does seem to tie or tether the disclosure obligation to both the substantive and procedural aspects of the Criminal Discovery Act. . . ." However, if this is a correct interpretation then the lawyer disciplinary standard to be established by rule 5-110(D) arguably is not a substantive change to the existing lawyer conduct rules because [current rule 5-220](#) applies to a prosecutor and imposes a disclosure duty that is coextensive with a prosecutor's "legal obligation to reveal or to produce" information.

On the other hand, the new sentence might represent a more limited intent. It might be construed as a clarification that nothing in the rule is intended to alter discovery in criminal court proceedings. Put another way, rule 5-110(D) is not intended to be an authority to be cited in compelling or objecting to discovery in a criminal proceeding because those proceedings are governed by existing statutory and constitutional law. Rather than a discovery law, rule 5-110(D) is intended to function exclusively as a professional conduct standard to be charged in lawyer disciplinary proceedings. Whether this is a correct reading of the Court's new sentence is not clear from the Court's language.

6. How to explain the meaning of the terms “cumulative disclosures of information” as used in the second sentence of Discussion paragraph [3] as submitted by the Bar.

Based on notes of the Commission’s meetings, at the Commission’s October 23, 2015 meeting, Michael Ogul attended as a representative of CPDA and there was a friendly amendment at his request to revise the drafting team’s earlier iteration of this sentence as follows:

Although this rule does not incorporate the Brady standard of materiality, it is not intended to require cumulative disclosures of information, ~~the disclosure of information that is insubstantial or speculative~~, or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases or court orders.

This was as close as the Commission got to modifying or deleting the reference to “cumulative” disclosures. It might have been the case that the Commission regarded the stricken language as a more important edit compared to the “cumulative disclosures” reference.

Resorting to case law for guidance, “cumulative” might be an appropriate qualifier as to impeachment information if “materiality” was the operative standard in rule 5-110(D). (See *State v. Rockette* (2006) 294 Wis.2d 611, 635) [In sum, “Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the Brady requirement.” *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir.1990); see also *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir.2003) (finding no *Brady* violation in part because the additional evidence would have been merely cumulative and therefore not material).] Because “materiality” is not the standard in rule 5-110(D), case law such as the foregoing should not constrain the standard to be imposed by the rule.

IV. Commission Member Comments and Resources

In advance of the Commission’s meeting on May 25, 2017, Commission members may send comments about this matter to staff.¹ Commission members should not send comments to any other member of the Commission. Staff will collect all Commission member comments submitted and post them as a part of the open session agenda materials for the May 25, 2017 meeting.

Attachments 1 – 6 are integrated with this memorandum. For convenient reference, the following resources are provided as a separate Background Attachment A: Public comment synopsis table for proposed rule 5-110 (90-day & 45 day comment periods) (Background Attachment A-1); transcript for the rule 5-110 public hearing on February 3, 2016 (Background Attachment A-2); Report and Recommendation for Rule 3.8 (Background Attachment A-3); Minority dissent and response for proposed rule 3.8 (Background Attachment A-4); and public comment synopsis table for proposed rule 3.8 (Background Attachment A-5).

¹ Send to Lauren.McCurdy@calbar.ca.gov with a copy to Randall.Difuntorum@calbar.ca.gov and Mimi.Lee@calbar.ca.gov.

ATTACHMENT(S) LIST

1. Administrative order dated May 1, 2017 in Supreme Court case no. S239387.
2. CPDA letter dated May 8, 2017.
3. May 10, 2017 letter from CACJ.
4. May 4, 2017 Daily Journal article by Gary Schons.
5. Clean version of rule 5-110 as approved by the Court operative May 1, 2017.
6. Redline comparison of the rule approved by the Supreme Court, effective May 1, 2017, with the recommended language for paragraph (D) and Comments [3] & [4], to the rule as approved by the Board of Trustees on October 1, 2016.

BACKGROUND ATTACHMENT A

- A-1 Public comment synopsis table for proposed rule 5-110 (90 day & 45 day comment periods).
- A-2 Transcript for the rule 5-110 public hearing on February 3, 2016.
- A-3 Report and Recommendation for proposed rule 3.8.
- A-4 Minority dissent and response for proposed rule 3.8.
- A-5 Public comment synopsis table for proposed rule 3.8.

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

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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
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

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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.

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[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 1
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.



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May 8, 2017

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

RE: California Supreme Court Administrative Order 2017-04-26
Response to Proposed Rule 5-110, Rules of Professional Conduct

Dear Justice Edmon and President Fox,

As you know, California is the only state in the country without a Rule of Professional Conduct incorporating ABA Model Rule 3.8, special duties of prosecutors. Indeed, the territories of Guam, US Virgin Islands, Puerto Rico, and the District of Columbia also have this rule. But not California. The California Rules Revision Commission and the Board of Trustees of the State Bar worked hard for well over a year to produce the best rule possible, proposed as Rule 5-110. Together, the Commission and the Board considered all viewpoints. Well over 90% of public comments supported the final version of the Rule, and the Rule was approved by similar margins of the Commission and the Board of Trustees, although the Board included four career prosecutors and other members who had worked as prosecutors, but no career defenders.

During the comprehensive evaluation and proceedings conducted by the Commission, prosecutors objected to the Rule—which provides that a prosecutor shall “make timely disclosure 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”—because it “has no materiality limitation” (October 1, 2015, comment letter by California District Attorneys Association, p. 3), claiming that it “would abolish the materiality requirement” (October 14, 2015, comment letter by Los Angeles District Attorney Jackie Lacey, p. 2). These objections failed to acknowledge that there is *no* materiality requirement under existing California law. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Thus, it became abundantly clear that prosecutors understood the proposed rule would require them to disclose exculpatory evidence regardless of their subjective pre-trial assessment of materiality, but they did not understand that existing law required them to do so, and the only

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way to impress their existing duty upon them was to promulgate Rule 5-110 as overwhelmingly approved by the Commission and the Board of Trustees.

We are extremely grateful that the California Supreme Court has agreed that new Rule 5-110 should include the language quoted above, and that “[t]he disclosure obligations ... 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.” (Supreme Court Administrative Order 2017-04-26, Attachment 2, Proposed Alternative Revision to Rule 5-110 discussion paragraph [3].) However, we are afraid that the modification suggested by the Court may have unintended consequences. The suggested modification would add the following sentence: “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;....” (*Id.* Attachment 2, Proposed Alternative Revision to Rule 5-110, subd. (D).)

We respectfully submit that the foregoing modification suffers from two problems that will cause detriment to the public by increasing the likelihood of wrongful convictions and miscarriages of justice.

By way of background, Rule 5-110 is not meant to govern discovery disputes at trial but is meant to foster compliance with existing discovery obligations by meaningfully providing clear warnings that violations of those obligations may subject the offending attorney to professional discipline. In order to achieve this purpose, the rule must avoid ambiguity. Especially when it comes to lawyers, whose very careers involve debating competing interpretations of governing provisions, such ambiguities must be avoided if at all possible.

Unfortunately, the modifier “significant” in the phrase describing “the duty to disclose information that casts *significant* doubt on the accuracy or admissibility of witness testimony or other evidence...” (emphasis added) invites disagreement over the degree to which the information hurts the evidence offered by the prosecution. Moreover, although California law specifically requires the prosecution to disclose exculpatory evidence or information *regardless of whether or not it is material* (*Barnett, supra*, 50 Cal.4th 890, 901; *People v. Cordova, supra*, 62 Cal.4th 104, 124), excluding information unless it casts *significant* doubt essentially limits the scope of information a prosecutor must disclose to *material* evidence. Indeed, it could be argued that “significant doubt” imposes a greater degree of magnitude than the materiality standard rejected in *Barnett* and *Cordova*, because the standard of materiality under *Brady v. Maryland* (1963) 373 US 83 is whether “there is a reasonable probability its disclosure would have altered the trial result” (*Cordova, supra*, 62 Cal.4th at p. 124)—i.e., by raising a *reasonable* doubt that the defendant is guilty—which is a lesser standard than a requirement of casting a *significant* doubt.¹

¹ The constitutional standard for determining whether suppression of exculpatory evidence requires reversal of a conviction is even lower than requiring a reasonable probability of altering the trial result: “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when

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Thus, as a practical matter, the proposed modification may result in some prosecutors, if not many or most, failing to honor their statutory duty to disclose *all* exculpatory evidence, whether or not it is material or significant.

Further, while at first blush it may seem that there is no need to require disclosure of evidence when its only value would be to discredit or exclude evidence that the prosecution does not intend to introduce, the realities of trial practice illustrate the contrary. For example, consider the situation where the prosecution discloses a report written by a police officer or a statement by a civilian witness, but the prosecutor later learns that the officer or witness is not reliable or credible because of additional information the prosecutor has learned, and the prosecutor therefore decides not to call them to testify. Under the proposed modification to Rule 5-110, the prosecutor would not have to disclose the impeaching information. Consequently, defense counsel would be unaware that the witness is not credible. But as so often occurs in trial practice, the police report or witness statement may include information that, on its face, is helpful to the defense, leading the defendant to present the witness at trial. The net result would see the prosecutor using the undisclosed information to discredit the witness, not only negating any possible benefit the defense hoped to achieve by calling the witness, but tarnishing the integrity of the entire defense because the jury would naturally associate it with the discredited witness. Whether or not such a scenario should be considered gamesmanship or sandbagging, it demonstrates that the failure to disclose the discrediting information was inimical to the search for truth and the interests of justice. These scenarios must be discouraged, not encouraged, but will be countenanced by the proposed modification.

Condoning a prosecutor's failure to disclose impeaching information where the prosecutor ultimately decides not to present the witness who would be impeached by that information overlooks another critical reason for the disclosure of exculpatory information: a defendant's due process rights under *Brady* are violated not merely where the suppressed evidence was itself material, but where its disclosure would have led the defendant to learn of other significant evidence by investigating the suppressed information. (*In re Bacigalupo* (2013) 55 Cal.4th 312, 337-340, conc. opn. Liu, J.) Justice Liu's concurring opinion in *Bacigalupo* was joined by Justices Cantil-Sakauye, Werdegar, and Corrigan, a majority of the court, and specifically concluded that suppression of evidence requires reversal under *Brady* where disclosure of the suppressed evidence would have led the defendant to other evidence that would have been material to his defense.

Exculpatory evidence and information should always be disclosed, whether or not it is material or significant. While those conditions are important in making the hindsight determination whether a failure to disclose requires a conviction to be vacated, they are alluring incentives for a prosecutor to refrain from disclosing exculpatory information if he personally believes that it is insignificant. And as any seasoned trial lawyer knows, it is common for prosecutors who have become personally convinced in the certitude of the defendant's guilt to dismiss exculpatory evidence as insignificant because of their belief that it would not make a difference. But as the late Justice Antonin Scalia chastised the prosecutor during oral arguments in *Smith v. Cain*

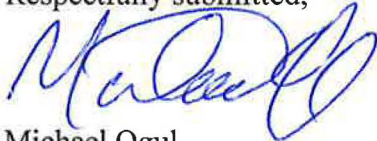
the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434, quoting from *United States v. Bagley* (1985) 473 U.S. 667, 678.)

Attachment 2

(2012) 565 U.S. 73, prosecutors should “stop fighting as to whether it should be turned over[.] Of course, it should have been turned over... the case you’re making is that it wouldn’t have made a difference.” (Official Transcript of Proceedings on Oral Arguments in *Smith v. Cain*, No. 10-8145, November 8, 2011, available online as of May 8, 2017, at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf, p. 51, l. 24, through p. 52, l. 2.)

We believe the purpose of the Rules of Professional Conduct is to encourage ethical behavior. An ethical prosecutor will disclose all exculpatory evidence and information without considering if it is insignificant or won’t matter anyway because the prosecutor isn’t going to call the affected witness to testify. Indeed, a prosecutor who refrains from disclosure because he concludes that the exculpatory information is insignificant risks not only the wrongful conviction of an innocent person and reversal if a reviewing court disagrees, finding instead that the evidence was material, but the possibility of facing a felony prosecution under Penal Code section 141, subdivision (c), for choosing not to disclose that evidence. Prosecutors, individuals accused of crimes, and the entire state of California would be better served by firmly establishing a culture that clearly requires the disclosure of all exculpatory evidence and information, whether or not it is material, significant, or only discredits evidence the prosecutor affirmatively intends to present at trial.

Respectfully submitted,



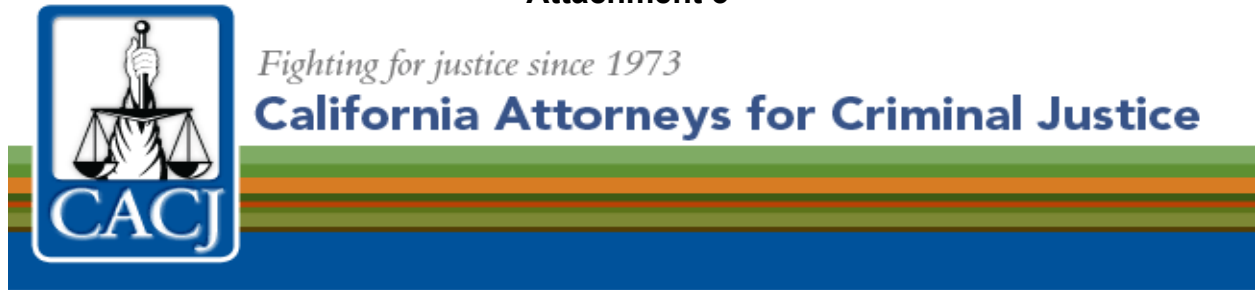
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Attachment 3



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May 10, 2017

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

RE: California Supreme Court Administrative Order 2017-04-26 Response to Proposed Rule 5-110, Rules of Professional Conduct

Dear Justice Edmon and President Fox,

After a year of negotiation and public commentary, the California Rules Revision Commission and the Board of Trustees of the State Bar proposed adoption of a modification to Rule 5-110 which incorporated ABA Model Rule 3.8, Special Duties of Prosecutors.¹ Including the language of Model Rule 3.8 clarifies a prosecutor's existing duty to disclose *all* unprivileged exculpatory or mitigating information known to a prosecutor, and, *all* exculpatory or mitigating evidence which reasonably should be known to the prosecutor.²

The California Supreme Court has recommended an amendment to Rule 5-110 which dilutes the prosecutor's present duty to disclose all mitigating information.³ The Court limits the prosecutor's duty, requiring the prosecutor to disclose only *information that casts a significant* doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution relies.

¹ Forty-nine states, Guam, the U.S. Virgin Islands, and the District of Columbia have adopted a version of ABA Model Rules of Professional Conduct Rule 3.8-Special Responsibilities of a Prosecutor (Rule 3.8). ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454(2009).

California is the only state that has not adopted attorney ethics codes that are substantially similar to the ABA Model Rule. David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L. J. Online 203, 222 (2012).

² *Barnett V. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124 [California law requires the prosecution to disclose exculpatory evidence or information regardless of materiality.]

³ *Ibid.*



The Court's recommended modification not only contravenes the Court's own holdings in *Barnett* and *Cordova*, but invites prosecutors to hide exculpatory evidence by withholding testimony of a witness or witnesses who could be favorable to the defendant's guilt or sentencing. The Court's recommendation relies on the prosecutor's subjective view of the value of evidence, which has proven time and again to be flawed. The State Bar's proposed Rule 5-110 unambiguously establishes a prosecutor's ethical obligation to disclose *all* exculpatory and mitigating information. There is no reason that any ethical prosecutor should oppose this language.

1. This is not the time to be soft on prosecutor misconduct.

"A prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice."⁴

Prosecutor misconduct, the act of withholding of exculpatory evidence, is recognized as a major factor in convicting the innocent. The current Rules of Professional Conduct clearly have not been sufficient to deter prosecutor misconduct.⁵ Exonerations involving prosecutor misconduct occur nationally at the rate of over 100 per year. The National Registry of Exonerations⁶ [NRE] documents 2023 exonerations from 1989 to May 10, 2017.⁷

From 1989 through 2016, the NRE documents 174 California exonerations.⁸ In these cases, prosecutor misconduct – primarily *Brady* violations, along with false or perjured testimony, and false or perjured accusations – were a significant factor in a defendant's unjust conviction.

⁴ Bennett L. Gershman, *Prosecutorial Misconduct*, (2d ed., Thompson/West, 2007).

⁵ The ambiguity in the current rules of conduct, and the fact that there are no practical consequences to a prosecutor who fails to disclose exculpatory evidence suggest that without stricter rules and improved disciplinary proceedings, Prosecutor Misconduct will persist. Thomas Sullivan and Maurice Possley, The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform, 105 *Journal of Criminal Law and Criminology* 881-946 (2015).

⁶ The National Registry of Exonerations is a joint project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan School of Law, and Michigan State School of Law. "The Mission of the National Registry of Exonerations is to provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions by learning from past errors." See, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx>.

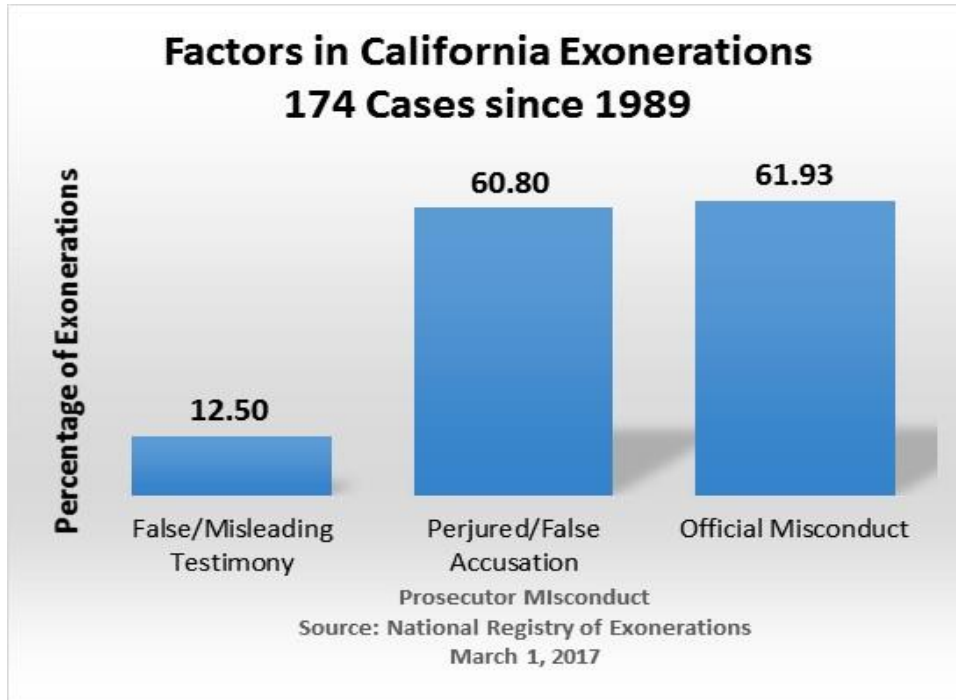
⁷ <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

⁸ See Attachment A, California Exonerations.



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In 2016, 9 defendants were exonerated of charges including murder and child sex abuse.⁹ Of these, 1 case involved false or misleading testimony, 7 cases involved perjured testimony or false accusation that would have come to light with full disclosure, and 5 involved other official misconduct including failure to disclose exculpatory evidence.

To date in 2017, 2 defendants have been exonerated. Official misconduct, including false and misleading testimony and failure to disclose exculpatory evidence were factors in both unjust convictions.

- 2. The cost of withheld evidence in exonerations, civil judgments and settlements, and the public's trust in the justice system justifies an unambiguous statement by the State Bar that a prosecutor has an absolute obligation to disclose any and all information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence.**

The costs of prolonged criminal litigation that results from prosecutorial misconduct can be staggering. Each reversal requires investigation; some require retrials and multiple appeals.

In some cases, the cost of exoneration can be estimated. Among the 174 exonerations reported in the NRE, we've selected the cases below of as examples of exonerations due to prosecutor misconduct.

⁹ See Attachment.

Attachment 3



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In each case exculpatory evidence was withheld; prosecutors introduced false testimony and fabricated evidence; and/or charged defendants knowing that the defendants were not involved in the crime.

Exoneree	Age	Charge	Sentence	Conviction Date	Exoneration Date	Settlement
Anthony Obie	19	Murder	LWOP	1995	2011	\$8.3m
Reggie Cole	18	Murder	Life	1994	2009	\$15m
Glenn Nickerson	29	Murder	LWOP	1987	2003	\$1m
Brenda Kniffen	29	Child Sex Abuse	Life	1984	1996	\$275,000
Bruce Lisker	17	Murder	Life	1985	2009	\$7.6m
Franky Carrillo	16	Murder	Life	1992	2011	\$10.8m
Herman Atkins	19	Sex Assault	47 years	1988	2000	\$2m
Timothy Gantt	47	Murder	LWOP	1994	2008	\$512,600
Caramad Conley	18	Murder	LWOP	1994	2011	\$3.5m
Susan Mellen	42	Murder	LWOP	1998	2014	\$597,200
Marco Milla	19	Murder	LWOP	2002	2015	\$654,000

In many of these cases, prosecutors argued that the evidence withheld was not material or that it *did not cast significant doubt on the accuracy or admissibility of testimony*. In none of these cases was a prosecutor held accountable for withholding evidence favorable to the defendant.¹⁰

These cases represent a fraction of California cases where municipalities, counties and the state paid for prosecutors' disregard of their disclosure obligations under *Brady*, *Barnett* and *Cordova*.

The cost for ongoing proceedings in cases of egregious systemic prosecutor misconduct, notably the Orange County case of *People v. Scott DeKraai*, is unknown. However, it would be reasonable to estimate the cost of ongoing litigation to be in the tens of millions of dollars. After years of litigation, it is widely believed that there is still exculpatory evidence being withheld in the cases of DeKraai and other defendants entrapped by the decades-long jailhouse snitch scandal. Apparently, the mandate of current Rule 5-110 was ambiguous to the Orange County District Attorneys. The existence of the State Bar's proposed Rule 5-110 would clarify the Orange County prosecutors' duties to disclose all mitigating and all exculpatory evidence.

¹⁰ It is rare that a prosecutor is reported to the state bar for misconduct, and, even more rare that a prosecutor is disciplined. In 2010, the Northern California Innocence Project identified 707 cases from 1997 to 2009 where prosecutor misconduct was identified by a court. Of those, only 6 prosecutors were disciplined. Ridolfi, Kathleen M.; Possley, Maurice; and Northern California Innocence Project, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009" (2010). Northern California Innocence Project Publications. Book 2, at p. 3.



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Conclusion

The Rules of Professional Conduct are intended to guide and encourage ethical behavior. The frequency and cost of exonerations suggests that prosecutors need more, *not more ambiguous*, language defining their obligation of discovery.

There is nothing in the State Bar's proposed Rule 5-110 subd. (D) that imposes an unreasonable burden on ethical prosecutors. It is in the interest of defendants and the citizens of California to know that the State Bar has imposed the unambiguous requirement that prosecutors disclose *all* exculpatory and mitigating evidence.

Respectfully submitted,

A handwritten signature in blue ink that reads "Nancy Haydt".

Nancy Haydt
Attorney at Law, SBN 196058
Past Member, Board of Governors
California Attorneys for Criminal Justice

A handwritten signature in black ink that reads "Cris Lamb".

Cris Lamb, President
California Attorneys for Criminal Justice

Prosecutor rule edit reflects concerns

Gary Schons, Of Counsel at Best Best & Krieger LLP

Published in Daily Journal on May 4, 2017

It was fitting that the California Supreme Court's first order responding to the State Bar Board of Trustees' proposed revisions to the Rules of Professional Conduct addressed Proposed Rule 3.8, Special Responsibilities of a Prosecutor, modeled on ABA Rule 3.8, which would have replaced current Rule 5-110. That proposed rule (along with Rule 5-220, Suppression of Evidence) was sent by the board to the court on an expedited basis in October of last year, well ahead of the 70 odd rules revisions sent to the court in January. The unanimous order of the court, issued May 1, reflects that the court left its rubber stamp in the drawer and pulled out a very sharp blue editing pencil.

The rule, as proposed by the board, imposed a number of duties solely on prosecutors. These included provisions intended to require prosecutors to make disclosures and take affirmative efforts to address cases of possible "false convictions." Those provisions and other relatively non-controversial requirements regarding charging and protecting the rights of the accused were approved by the court and take effect immediately. However, the provision which was the most controversial, particularly in the prosecution community - the pretrial disclosure requirement - did not survive the court's editing pencil.

As proposed, the disclosure obligation, denominated paragraph D, would have required prosecutors to disclose all evidence or information known to the prosecutor that the prosecutor knows or should know tends to negate the guilt of the accused or mitigate the offense or the potential sentence. While this may sound rather reasonable and unremarkable on its face, one of the Discussion notes pertaining to D stated that "the disclosure obligations are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83" - the bedrock constitutional disclosure requirement imposed on prosecutors to safeguard the right to a fair trial. Not discussed, but equally true, is that this disclosure obligation was not tethered to or limited by the Criminal Discovery Act found in Penal Code Section 1054 et seq., including its definition of "exculpatory evidence" (Section 1054.1) and the timing requirements of that law, which require discovery be made at least 30 days prior to trial (Section 1054.7).

During the Rules Revision Commission process, the California District Attorneys Association (CDAA) sought amendments to the proposed rule, which was lifted bag and baggage from ABA Rule 3.8. The commission did agree to accept language regarding the prosecutor's knowledge of the existence and import of the evidence or information, which provided some protection from unwitting or good faith failures to disclose and a resulting disciplinary violation. However, the commission, and in turn the Board or Trustees, rejected the statewide prosecutors' suggestion that the rule be referenced to the Criminal Discovery Act and constitutional requirements. This became a significant concern within the prosecution community after the proposed rule was sent to the court. In the ensuing months a number of prosecutors under the aegis of CDAA huddled and began to circulate thought pieces arguing that the rule as proposed was susceptible to challenge as being inconsistent with the Criminal Discovery Act, preempted by that law, and, a violation of the separation of powers in that it constitutes judicial rule-making imposing on the otherwise lawful conduct of the prosecutor's office.

Attachment 4

At the Rules Revision Commission level, two of the commissioners, George S. Cardona, an assistant U.S. attorney in Los Angeles, and Daniel Eaton of Seltzer Caplan in San Diego, lodged separate dissents from the rule as proposed, both targeting the discovery requirement. Both commissioners focused their criticism on the rejection of the proposal to tie the disclosure requirement to existing statutory (the Criminal Discovery Act) and constitutional (*Brady*) requirements. Both attorneys also pointed out that the ABA rule had been given widely varied interpretations in a number of states and would, therefore, not serve to promote uniformity, but, rather, would cause uncertainty and confusion among prosecutors, defense attorneys, courts and disciplinary authorities.

The Supreme Court's Monday order seems to be a direct response to these criticisms and concerns. The court denied approval of paragraph D, the pretrial disclosure obligation provision, and its Discussion paragraphs. The court then took to the drafting role and offered an alternative for the Board of Trustees to consider on "remand." In doing so, the court gave consideration to advocates on both sides of the prosecutorial disclosure issue. The court retained the core language on the scope of the obligation - evidence or information that "tends to negate the guilt of the accused, mitigate the offense or mitigate the sentence." However, the court proposed language to beef up the disclosure obligation to include "the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely." This is essentially a duty to disclose (significant) "impeachment" evidence. This is an interesting development in that it could be an effort by the court to plug a hole in the Criminal Discovery Act. In *Kennedy v. Superior Court*, 145 Cal. App. 4th 359 (2006), the appellate court expressed skepticism that the statutory requirement to disclose "exculpatory evidence" reaches all possible "impeachment evidence." That court wrote, "there is reason to think the electorate intended to use the term 'exculpatory evidence' in its narrow sense and thus did not intend section 1054.1(e) to require the disclosure of impeachment evidence."

The court edited Discussion paragraph [3] that explains paragraph D. The court retained the language that the disclosure obligation is not limited to evidence that is "material" under *Brady*. That is a conclusion at odds with a number of other state supreme courts - Colorado, Ohio, Oklahoma and Wisconsin - but consistent the highest courts in the District of Columbia and Nevada. However, that is not of significant import because the Criminal Discovery Act, as construed by the courts, requires disclosure of all "exculpatory evidence" regardless of *Brady* "materiality." *People v. Cordova*, 62 Cal. 4th 104 (2015).

Most significantly for prosecutors, the court added this sentence to the Discussion note: "Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts." This passage does seem to tie or tether the disclosure obligation to both the substantive and procedural aspects of the Criminal Discovery Act and the "procedural" aspects of *Brady*, including such issues as timing and waiver - precisely what CDAA had sought before the Board or Trustees. If adopted by the board and approved by the court, this language should still the waters disturbed by the board's original proposal.

Mark Zahner, CEO of CDAA commented: "We acknowledge the action of the Supreme Court and their sensible approach to this situation. The ethical rule they suggest is logical and requires

Attachment 4

prosecutors to follow existing law. Prosecutors would expect nothing more or less."

Of additional significance, if the court eventually approves its own suggestions, it will liberate the California rule from the interpretative constraints of ABA Model Rule 3.8. For example, in a 2009 formal ethics opinion, the ABA Ethics Committee gave the scope of disclosure required by Rule 3.8 a very broad reading and suggested that the obligation is "free standing," that is, unrestrained by *Brady*, statute or court rule, and cannot be "waived" by a guilty plea, contrary to the holding of the U.S. Supreme Court in *United States v. Ruiz*, 536 U.S. 622 (2002). ABA Ethics Committee Formal Opinion 09-454.

The court also declined to approve paragraph E of the rule as proposed by the Board or Trustees, which would have significantly curtailed the ability of a prosecutor to subpoena a lawyer to a grand jury or other criminal proceeding to present evidence about a past or present client absent the existence of certain conditions. First, the court directed the board to consider imposing this obligation on all attorneys, not just prosecutors. Obviously, this limit would then extend only to defense attorneys in a criminal proceeding, except in the rarest cases. Whether this may prove to be a meddlesome limit on the right to present a defense or the effective assistance of counsel will await resolution in the courts. The court also suggested the qualifying language to permit calling an attorney as a witness be softened from "essential" to "reasonably necessary" and from "no other feasible alternative" to "no other reasonable alternative."

Whether the court's first shot at the proposed rules sent to it by the Board of Trustees for approval is a harbinger of how the other proposals will be met and ultimately fair is not apparent. To be sure, the court appears aware and sensitive to the proceedings of the commission and the board and the "administrative record" generated in those processes. Additionally, it does not appear the court is reticent to add its own hand to the rule drafting process, whether it be the precise language of the rule or its discussion notes.

Attachment 5

Rule 5-110 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective May 1, 2017)¹

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.

¹ This rule was approved by California Supreme Court Order S239387. Paragraph (D) and Discussion paragraphs [3] and [4] are designated as "reserved" until the Board considers alternative revisions.

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

Attachment 5

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 (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

Rule 5-110 Special Responsibilities of a Prosecutor
(Redline Comparison of the Rule Approved by the Supreme Court, Effective May 1, 2017, with the Recommended Language for Paragraph (D) and Comments [3] & [4], to the Rule as Approved Board of Trustees on October 1, 2016)

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~~, 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; and
- ~~(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;~~
- (E) ~~(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.

Attachment 6

(F) ~~(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.

(G) ~~(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. ~~This~~ 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~~ Nevertheless, 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. ~~A disclosure's~~ 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~~ constitution.

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