

TOTAL = 321 Alt. 1 = 304
Alt. 2 = 5
NA = 12

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept Synopsis of Public Comments						
No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-119	Adams, Jesse M. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. ²	No response required.
2016-193	Afrashteh, Mona (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-127	Aguirre, Carmine (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-311	Alex, Marie F. (2-29-16)	No	Alt. 1	5-110	Prosecutors should ethically disclose all exculpatory evidence because that is the current state of the law in California.	No response required.
2016-323	American Bar Association (ABA), Thomas Susman (3-15-16)	Yes	Alt. 1	5-110	The proposed rule would appropriately apply to federal prosecutors. Federal prosecutors already comply with disclosure law drawn from various sources, including case law, statutes, and rules of criminal procedure. The ethics rule would not interfere in any way with federal prosecutors' other obligations. There is nothing anomalous or troubling about a state ethics rule that is more demanding than	No response required.

¹ Alt. 1 = Support Alt. 1 Draft and/or Concept Alt. 2 = Support Alt. 2 Draft and/or Concept NA = No Preference Expressly Indicated

² Recommends adoption of proposed rule 5-110(D), which clearly explains the duty of prosecutors to disclose all exculpatory evidence regardless of materiality, and recommends rejection of the alternative draft (ALT 2).

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					<p>other law on the subject. In general, ethics rules go beyond existing law, rather than merely restating or codifying existing law or incorporating it by references. (See, CRPC 2-100; ABA 4.2).</p> <p>Federal prosecutors' legal obligation to comply with state ethics rules that supplement existing legal restrictions has two undeniable bases. First, the obligation is generally established by local rules of the federal courts that make clear the state ethics rules applicable to attorneys in federal judicial proceedings. Second, and wholly apart from the federal court rules, the obligation is established clearly and unequivocally by federal statute (see, the McDade Act, 28 USC § 530B).</p>	
2015-13	Anderson, Ed (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-225	Anderson, Johnnetta E. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-110	Arant, Adam (2-24-16)	No	Alt. 1	5-110	States that proposed rule comports with existing law and that proposed rule will incentivize prosecutors to turn over	No response required.

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					evidence.	
2016-305	Archer, Jennifer (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutor should not be allowed to make determination of what is material or exculpatory.	No response required.
2015-50	Arfa, Faye (11-28-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-98	Ayala, Rosa (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-129	Baldwin, Maureen (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2015-4	Barrett, Brendan (11-23-15)	No	Alt. 1	5-110	Written comments address rule 5-110. Agrees with proposed rule as needed to end prosecutor "gamesmanship". Believes the alternative draft is toothless.	No response required.
2015-3	Barrett, Brendan (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as needed to end prosecutor "gamesmanship". Believes the alternative draft is toothless.	No response required.
2016-100	Barrett, Brendan (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-224	Bartle, Rory (2-25-16)	No	Alt. 1	5-110	Proposed rule represents full and good faith exchange of information that helps all California citizens.	No response required.

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2016-260	Batchelder, Elias (2-29-16)	No	Alt. 1	5-110	If a prosecutor is aware of exculpatory information, he should be ethically bound to disclose it. Regardless if defense counsel can point out it exists.	No response required.
2015-52	Becker, Mark (11-30-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to require prosecutors to disclose all exculpatory evidence, regardless whether prosecutors think it is material. Expressed concern that despite existing case law, prosecutors frequently fail to disclose all exculpatory evidence.	No response required.
2016-254	Beekman, Catherine (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-159	Bell, John T. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2/3/16 Public Hearing Testimony	Belshaw, Robert (Provided oral public hearing testimony on February 3, 2016. See pages 42-51 of the public hearing transcript.)	No	NA	5-110	Former attorney who was convicted of a felony. States that his case had Brady violations and other unethical conduct. Supports whatever version of the rule that would require prosecutors to pursue matters supported by probable cause and good faith. Recounted the Brady violations in his case and prosecutors' and	The Commission believes the proposed rule provides the appropriate discipline standard for a prosecutor in a criminal case.

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					<p>jurists' acquiescence in such violations.</p> <p>Stated that prosecutors will offer some form of consideration for favorable witness testimony but say that the terms won't be discussed until after testimony. This is in an effort to avoid the appearance of tainted testimony.</p> <p>Recounts a story where he witnessed the prosecutor in his case solicit perjured testimony.</p> <p>Recounts his inability to access the evidence in his case that was favorable to him.</p> <p>References his written submissions as evidence that the prosecutor subverted justice.</p> <p>Stated that Bar panel attorneys are not always competent because many of them have private practices and that causes corner cutting or plea deals.</p> <p>Proposes a hotline for Brady violations.</p>	

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2016-243	Benkle, Seth (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule helps balance power in a system heavily weighed against defendants.	No response required.
2016-97	Berkowitz, Barney (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-94	Bermant, Alison (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-124	Black, William (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-295	Bloom, Brian (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-201	Blum, Edward J. (2-25-16)	No	Alt. 1	5-110	Defendants need this proposed rule to be able to go to the Bar to report bad prosecutors because no one else in the system will punish them.	No response required.
2/3/16 Public Hearing Testimony	Blume, James (Provided oral public hearing testimony on February 3, 2016. See pages 63-73 of the public hearing transcript. See also testimony of Jose Castaneda who testified at the same time as Mr.	No	NA	5-110	Describes personal experience as a former police officer working directly with lawyers and judges as a basis for concerns about judicial and lawyer misconduct, including witness tampering.	The Commission believes the proposed rule provides the appropriate discipline standard for a prosecutor in a criminal case. The Commission is not assigned to recommend rules governing conduct of judges, which is governed by the

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	Blume).					California Code of Judicial Ethics.
2016-314	Bobrow, Oscar (2-29-16)	No	Alt. 1	5-110	Supports ALT 1. During my career as a criminal defense attorney I have had countless situations where prosecutors have not turned what I believed to be material information for the preparation of my case. ALT 1 would require the disclosure of all exculpatory evidence whether or not the prosecutor thinks such evidence is material or inconsequential to the outcome of the proceeding.	No response required.
2016-77	Bonner, Mark (2-1-16)	No	NA	5-110	Former prosecutor who disagrees with proposed rule because it would ethically require discovery beyond that required by current statutes and case authority. Contends that discovery rules should be promulgated through proper channels, not through the ethics rules.	First, the Commission believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case. Second, the Commission disagrees with the commenter's assessment of the current state of the law regarding discovery in criminal cases. The California Supreme Court has interpreted the statutory standard set by Penal Code section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v.</i>

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						<i>Superior Court</i> (2010) 50 Cal.4th 890, 901.
2016-203	Boskin, Pamela (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-161	Boudin, Chesa (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-67	Boyd, David (2-1-16)	No	NA	5-110	Disagrees with proposed rule and concludes it is “duplicative [of existing law], confused, or unconstitutional,” and will allow prosecutors to use the “flawed language” to their advantage but will not improve public confidence in the criminal justice system.	The Commission believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case. As to the commenter’s assertion that the rule is “duplicative,” this discipline rule clearly provides in precise language that in addition to procedural sanctions that might be imposed by a presiding judge for prosecutorial misconduct, the prosecutor will also be subject to discipline.
				(C) and Disc. [2]	Believes paragraph (C) and discussion [2] implies a duty for prosecutors to advise or seek a waiver from suspects in situations where the law does not otherwise require (e.g. an uncharged suspect not in custody), which	Paragraphs (C and (E) are standards that have been adopted in other jurisdictions. The Commission is unaware that these provisions have caused the problems the commenter describes in those

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				(E)	will discourage law enforcement from consulting with prosecutors early in the investigation. Also believes it is in tension with current rule 2-100(C)(3). Believes paragraph (E) creates a conflict with the California Constitution with respect to a prosecutor's ability to present evidence. (Art. I, sec. 28(f)(2))	jurisdictions, nor did the Commission receive any input indicating the problems that are being raised by the commenter.
2015-40	Boyle, Robert (11-25-15)	No	Alt. 1	5-110	Agrees with rule as a necessary mechanism to enforce fair dealing by prosecutors. Believes, based on personal experience as a defense attorney, that there is a consistent pattern of prosecutors failing to disclose evidence.	No response required.
2016-273	Brady, Christine (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-30	Braun, Geoffrey (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to send a clear message that all exculpatory evidence must be disclosed. Through examples expressed concern that violations resulted in harm to criminal defendants.	No response required.
2016-152	Brogna, Sheila (2-25-16)	No	Alt. 1	5-110	Proposed rule prevents reversals.	No response required.

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2016-294	Brown, Aundrea (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-171	Brown, Lynette (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule adds clarity to prosecutors' duties.	No response required.
2016-68	Brown, Michael (2-2-16)	No	Alt. 1	5-110	Suggested additions to the rule regarding prosecutor compliance with probable cause requirement, an independent review process, and that prosecutors shall not condone harassment by police or officials.	Paragraph (a) continues the substance of the current rule that the Commission believes articulates a clear and enforceable disciplinary standard. Regarding harassment, other rules should be considered (see proposed rules 8.4 and 8.4.1). In addition, the Commission received input indicating that prosecutors should not be strictly responsible for the conduct of law enforcement officers who are not under the supervision of prosecutors and has drafted language to clarify that. See, e.g., proposed paragraph (F).
2016-174	Burk, Kristine (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Justice system served by clarity	No response required.

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					that proposed rule provides.	
2016-126	Byron, David J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-206	Caballero, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-104	Caine, Christopher J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-65	California Appellate Project – Los Angeles Office, Jonathan Steiner (1-29-16)	Yes	Alt. 1	5-110	Proposed rule helps to avoid risk of due process violations and ensure a full appellate record required to defend constitutional rights. Expressed belief that the rule should remove the uncertainty among prosecutors as to what constitutes their ethical obligations, including the duty to disclose evidence that is not “material.”	No response required.
2016-259	California District Attorneys Association (CDAA), Multiple Signatories (2-26-16)	Yes	Alt. 2	5-110	CDAA supports ALT 2. We do not believe ALT 2 seeks to limit pretrial discovery obligations with a <i>Brady</i> materiality standard – in fact, it expressly ties the prosecutor’s responsibilities to “statutory ... obligations, as interpreted by case law,” which have no <i>Brady</i> materiality limit.	Commission believes the ALT1 version of the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case, as reflected in California case law. (See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.)

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					<p>We agree with the “timeliness” obligation, as stated in Discussion paragraph [3]. We assume the Commission’s official Discussion section will have interpretive force with respect to any adopted rule comparable to official law revision commission comments with respect to statutes, i.e. they will be entitled to substantial weight in construing the rule. We note that this interpretation would be the same under ALT 2, which expressly ties the prosecutor’s obligations to statutory and case law, just as the Commission’s Discussion paragraph does.</p> <p>We believe that the language of the proposed rule should require personal knowledge and note that the rule language specifically refers to material “known to the prosecutor.” We note the California Public Defenders Assoc. and Calif. Attorneys for Criminal Justice agree that for discipline purposes, the rule requires actual knowledge of the individual prosecutor. CDAA agrees with CPDA and CACJ on this interpretation. While the</p>	<p>Concerning timeliness, the Commission has recommended adoption of the ABA Model Rule text language, as clarified by Comment [3]. The Commission believes that this approach provides the greatest flexibility in applying the rule to a particular set of circumstances.</p> <p>First, there are two knowledge standards in proposed paragraph (D).</p> <p>The “known” standard in paragraph (D) refers to the prosecutor’s knowledge of the <i>existence</i> of the evidence or information. That is an actual knowledge standard. Under the Model Rules, “a person’s knowledge may be inferred from circumstances.” By providing that knowledge can</p>

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					<p>Commission's Discussion paragraphs do not further address the point, the language itself seems clear.</p> <p>CDAAs agree with the removal of the requirement that evidence in mitigation of sentencing must be disclosed to the "tribunal."</p> <p>While the standard for the timing of disclosure is tied by the Commission's Discussion paragraph which points to statutes and court orders, the standard with respect to the type</p>	<p>be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>On the other hand, the "knows or reasonably should know" standard, which is also objective, applies to the prosecutor's knowledge of <i>legal effect</i> of the <i>known</i> information or evidence. Neither standard is intended to impose on prosecutors a blanket duty without more to search for exculpatory evidence or information.</p> <p>No response required.</p> <p>As to the phrase "tends to negate" being unclear, the Commission has made a change to paragraph (D) in order to clarify what the prosecutor must have</p>

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					<p>of evidence is not. The failure to anchor the meaning of “evidence or information,” “tends to negate ... guilt,” and “mitigates the offense,” to some specific or particular criteria leaves prosecutors without reasonable means to know where the lines are. This is a matter of great concern when crossing the lines could lead to professional discipline. As one example, California case law at this time does not make clear whether all witness impeachment evidence is “exculpatory” within the meaning of Penal Code sec. 1054.1(e).</p> <p>CPDA and CACJ argued in their Oct. 8 letter that prosecutors are free to ignore their duty to disclose exculpatory evidence because B&P Code sec. 6068.7 only requires mandatory referral to the state bar if a prosecutor’s withholding of evidence was “material” under <i>Brady</i>. This argument fails to acknowledge that 6086.7 has been amended to include as basis for a mandatory state bar referral, a finding by a court that a prosecutor deliberately withheld exculpatory</p>	<p>knowledge of. See response re “known,” above.</p> <p>The Commission was not persuaded by the argument presented by CPDA and CACJ and it did not provide a basis for the Commission’s decision to recommend the ALT1 version of the proposed rule. In any event, the Commission notes that the Supreme Court can establish rules of conduct independent from those established in the Business & Professions Code. See, e.g., <i>In re Lavine</i>, 2 Cal. 2d 324, 328, <i>reh’g denied and opinion</i></p>

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					evidence, without any requirement that the evidence was material under <i>Brady</i> , or that the case was reversed or judgment modified as a result. (B&P Code sec. 6068.7(a)(5); Pen. Code sec. 1424.5).	<i>modified</i> , 2 Cal. 2d 324 (1935).
2/3/16 Public Hearing Testimony	Mark Zahner, on behalf of California District Attorneys Association (CDAA), (Provided oral public hearing testimony on February 3, 2016. See pages 37-41 of the public hearing transcript.)				Not advocating that there shouldn't be a 5-110(D) at all, only that the existing rule, as captured in Alt. 2, is fair and easy to understand. The only problem with rule as proposed is the phrase "tends to negate" which is unclear as to its standard.	As noted, the Commission continues to believe that the ALT1 version of the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case, as reflected in California case law. (See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.) As to the phrase "tends to negate" being unclear, the Commission has made a change to paragraph (D) in order to clarify what the prosecutor must have knowledge of. The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of the evidence or information

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					<p>and knowledge of the <i>legal effect</i> of the <i>known</i> information or evidence. This is an actual knowledge standard. Under the Model Rules, “a person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>Current California law is already something beyond Brady and that’s absolutely acceptable. We think that the rule as proposed is ambiguous and it will be unclear to prosecutors what to do.</p> <p>Continue to urge adoption of Alt. 2 or, in the alternative, a safe harbor provision.</p>	<p>With the foregoing changes to the ABA Model Rule language, the Commission respectfully disagrees that the language in proposed paragraph (D) is “ambiguous”.</p> <p>Finally, as to the commenter’s recommendation of a “safe harbor” provision, the Commission continues to believe that such a provision would swallow the rule and render it unenforceable in violation of the Commission’s Charter.</p>

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2/3/16 Public Hearing Testimony	California United States Attorneys, Laura Duffy (Provided oral public hearing testimony on February 3, 2016. See pages 4-12 of the public hearing transcript.)	Yes	Alt. 2	5-110	Alt. 2 presents the more appropriate disciplinary standard for following reasons: 1) the change to federal discovery standards proposed in Alt. 1 should come from Congress and the federal courts. 2) Alt. 1 would create a conflict between the rule and the law by requiring federal prosecutors to disclose evidence not mandated by current federal law. 3) Alt. 1 would subject federal prosecutors to personal discipline despite compliance with federal law which would in turn incentivize defendants use of discipline as a tool during the case. 4) Alt. 1 would effectively expand federal discovery	The proposed rule includes the language that has been adopted in nearly every jurisdiction save one or two. It is the Commission's understanding that federal prosecutors are required to follow the Rules of Professional Conduct of the state in which the federal prosecutor is practicing law, to the same extent and in the same manner as other attorneys in that state. See, 28 U.S.C. § 530B. The Commission does not understand how the proposed rule might create a greater risk for federal prosecutors in California than in any other jurisdiction imposing the same ethical requirements on them.

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					<p>law to such a degree that federal prosecutors may turn over information that impacts the safety or privacy concerns of witnesses in order to avoid personal discipline.</p> <p>Alt. 2 is better because prosecutors should be held to the same standard as the law requires. However, if Commission is inclined to reject Alt. 2, please add mens rea requirement to proposed rule.</p>	The Commission believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case.
2015-35	Camarillo, Brandon (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-299	Carlisle, David (2-29-16)	No	Alt. 1	5-110	Proposed rule is step toward keeping our justice system equitable for all.	No response required.
2016-211	Carlson, Katherine (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-116	Carrasco, Gerald C. (2-24-16)	No	Alt. 1	5-110	Recited an example where failure to disclose existence of witness resulted in lost evidence due to witness's death.	No response required.
2016-217	Carrillo, Christian (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2015-31	Carrington, Felicia (11-24-15)	No	Alt. 1	5-110	Expressed concern, through examples, that investigators and process servers contribute to a prosecutor's ability to skirt their disclosure obligations.	As the Commission understands the commenter's concerns, if a subordinate does not disclose exculpatory information to the prosecutor, the prosecutor would be under no obligation to disclose it. The Commission believes that proposed Rules 5.1 through 5.3, which addresses a supervising lawyer's responsibility for subordinate lawyers, a subordinate lawyer's responsibility, and a lawyer's responsibility for nonlawyer assistants, respectively, will inhibit resort to such conduct as a means to avoid the application of the proposed rule.
2016-135	Carrington, Felicia (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-162	Case, Linda (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-43	Casebeer, Megan (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2/3/16 Public Hearing	Castaneda, Jose (Provided oral public	No	NA	5-110	Supports rule revision but also wants the Bar to do more regarding public complaints.	The Commission believes the proposed rule accurately articulates the appropriate

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Testimony	hearing testimony on February 3, 2016. See pages 63-73 of the public hearing transcript. See also testimony of James Blume who testified at the same time as Mr. Castaneda).				Describes personal experience with lawyers and judges as basis for specific concerns about judicial and lawyer misconduct. States dissatisfaction with the State Bar's handling of a specific disciplinary matter.	discipline standard for a prosecutor in a criminal case. The Commission is not assigned to recommend rules governing conduct of judges, which is governed by the California Code of Judicial Ethics.
2016-76	Chestnut, William (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-248	Cho, Rosy H. (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-304	Chorney, Jeff (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-115	Clark, Stephanie (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-15	Clarke, Joseph (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-169	Clemans, Victoria (2-25-16)	No	Alt. 1	5-110	States that courts favor prosecutors.	No response required.
2016-109	Coffino, Michael (2-24-16)	No	Alt. 1	5-110	Agrees with rule.	No response required.
2016-199	Cooney, Patricia (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept Synopsis of Public Comments						
No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-82	Coopersmith, Alanna (2-24-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-70	Cordell, Ladoris (Ret. Judge) (2-6-16)	No	Alt. 1	5-110	Agrees with proposed rule and the removal of the materiality standard. Provided personal observations as judge and police auditor indicating that police and prosecutors often have a narrow interpretation of what is material. Believes the rule is necessary to require prosecutors to err on the side of disclosure which will protect against wrongful convictions and reduce post-conviction litigation.	No response required.
2016-263	Cox, Jason (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutorial discovery violations are rampant. One way this happens is by claiming evidence is not material. The proposed rule is in line with existing case law. The basic concept is that materiality is a post-conviction standard for determining prejudice, not a pre-trial standard for determining a defendant's right to discovery in the first place.	No response required.

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**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2015-59	D'Agustino, Elena (12-4-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-190	Daly, Morgan (2-25-16)	No	Alt. 1	5-110	It's only fair that prosecutors disclose all exculpatory and mitigating evidence. This rule will help protect the innocent.	No response required.
2015-34	Dark, Patricia (11-25-15)	No	Alt. 1	5-110	Agrees with proposed rule as required by justice, to prevent wrongful convictions, avoid overcharging, and conserve public and judicial resources. Expressed concern that bench is unwilling to enforce existing law.	No response required.
2016-230	Davis, Ryan (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-117	Defilippis, Steve (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-258	Delgado, Jessica (2-29-16)	No	Alt. 1	5-110	Proposed rule is vital to maintaining or restoring the integrity of criminal justice system in California.	No response required.
2015-37	Dell'Anno, Anthony (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-298	Denton, Chuck (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-125	Diamond, Cindy A. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-212	Dice, Frank W. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-92	Diederichs, Michele (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-241	Dier, Wendy (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-75	DiSabatino, Frank (2-25-16)	No	Alt. 1	5-110	Agrees with the proposed rule.	No response required.
2016-324	District Attorney, San Diego County, Bonnie Dumanis (2-02-16)	No	NA	5-110	<p>1. The proposed rule is not only inconsistent with both constitutional and statutory law related to criminal discovery in California, but also creates a standard that will place prosecutors in jeopardy of violating ethical rules as it lacks clarity and includes terms not defined by case law.</p> <p>2. The language of proposed paragraph (D) uses the phrase "mitigate the offense" which can be so broadly interpreted as to</p>	<p>1. The Commission disagrees with the commenter's assessment that the rule is inconsistent with both constitutional and statutory law related to criminal discovery creates a broader disclosure requirement. The California Supreme Court has interpreted the statutory standard set by Penal Code section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.</p> <p>2. The Commission believes that the two knowledge standards in paragraph (D) are appropriate and provide the</p>

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					<p>put prosecutors in jeopardy over decisions that are not clearly defined by law.</p> <p>3. Proposed paragraph (B) asks prosecutors to make “reasonable efforts” to ensure that criminal defendants have been advised of the rights to counsel and have been given a “reasonable opportunity to obtain counsel.” This is a function of law enforcement and not the role of the prosecutor. The proposed rule does not provide clear guidance as to how a prosecutor would defend a “reasonable effort.”</p>	<p>proper balancing of interests – the disclosure of exculpatory information possessed by the prosecutor to the defense and the protection of prosecutors who attempt to comply with that obligation – by applying different knowledge standards. In this regard, the standard applicable to whether the evidence or information is exculpatory or mitigating is objective (“knows or reasonably should know”) and should not jeopardize a prosecutor who makes a determination that is reasonable.</p> <p>3. As the commenter notes, typically the police address this responsibility at the time of arrest. Consequently, a prosecutor’s obligation will depend on the particular facts and circumstances. When such an obligation might arise is not susceptible to a concise statement.</p>

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					4. Proposed paragraph (F) misunderstands the relationship that prosecutors have with law enforcement and imposes an unrealistic and unnecessary burden.	4. The Commission is aware of the relationship that normally exists between prosecutors and law enforcement personnel and has drafted paragraph (F) accordingly. Paragraph (F)'s duties apply only to persons "under the supervision or direction of the prosecutor."
2016-179	Djafar, Malike (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-96	Dobbyn, Gerard (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-45	Dodd, Peter (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-252	Dombois, Markus (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Non-disclosure is a systemic problem in some DA's offices.	No response required.
2016-136	Dove, Austin (2-24-16)	No	Alt. 1	5-110	Identifies instances where prosecutor has withheld evidence because the end justifies the means. Believes the proposed rule is a step in the right direction.	No response required.
2016-145(b)	Downing, Ariana (2-24-16)	No	Alt. 1	5-110	Likes bright line rule as it removes prosecutorial discretion as to materiality.	No response required.

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2016-186	Dudley, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-300	Edgar, Deedrea (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. The way to have a fair justice system and avoid wrongful convictions is to have rules that are fair, clear and enforceable.	No response required.
2/3/16 Public Hearing Testimony	Elihu, Azar (Provided oral public hearing testimony on February 3, 2016. See pages 86 of the public hearing transcript.)	No	NA	5-110	Prosecutors are vested with excessive authority. The probable cause standard to prosecute should be a reasonableness standard to avoid the filing of meritless cases. Ok with section (C) and Mr. Goodman's position on (D). Section (F) should be based on objective standard.	The probable cause standard is in current rule 5-110 and the Commission is unaware of any problems that its use has caused. The Commission thus believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case. In addition, the use of the "knows" in paragraph (a) is a defined term (see proposed rule 1.0.1) and actual knowledge under the definition can be inferred from the particular circumstances. No response required. See above response regarding the term "knows" as a defined term.

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					<p>The key word with regard to (H) is “promptly” because people struggle for years in jail.</p> <p>Overall, rules “should change to just divest in general the prosecutors from so much authority.” Defense attorneys should be allowed to inspect the evidence to determine if it’s material.</p>	<p>No response required.</p> <p>Any such changes suggested by the commenter would require changes to the Penal Code.</p>
2016-154	Erickson, Kristin A. (2-25-16)	No	Alt. 1	5-110	Proposed rule needed to “balance the scales.”	No response required.
2/3/16 Public Hearing Testimony	Falk, Richard (Provided oral public hearing testimony on February 3, 2016. See pages 21-25 of the public hearing transcript.)	No	NA	5-110	<p>Commission should adopt Crown Prosecutors rule 6.3 which provides that prosecutors should not bring more charges than are necessary to encourage a defendant to plead guilty to a few.</p> <p>Mr. Falk cites a number of authorities for the proposition that the current justice system’s reliance on plea bargaining has led to overcharging and therefore, a lack of justice.</p>	The Commission believes the proposed rule provides the appropriate discipline standard for a prosecutor in a criminal case. In any event, Crown Rule 6.3, by its use of the word “should” is aspirational and thus not appropriate in a set of disciplinary rules.
2016-320	Farrow, Susan (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2015-55	Faulkner, Aaron (11-30-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-32	Fernandez, Edward (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to restore balance and enforce the law. Believes, based on personal experience as former prosecutor, that prosecutors delay disclosure under belief they “know better,” and that the rule is not “surplusage.”	No response required.
2016-148	Field, Skip Allen (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-189	Fisher, Barbara E. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission’s proposed rule.	No response required.
2016-281	Folker, Jason M. (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-78	Foster, Jodea (2-3-16)	No	Alt. 1	5-110	Criminal defense attorney who agrees with rule and provides examples of prior prosecutorial conduct that she claims violated their professional obligations.	No response required.
2016-318	Foxall, Richard (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-247	Franco, Yolanda (2-26-16)	No	Alt. 1	5-110	Recounted examples from practice where attorney believes plea deals were proposed by prosecutors instead of producing exculpatory evidence.	No response required.

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2015-10	Friedman, Jennifer (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-27	Friedman, Jennifer (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-290	Galambos, Guy (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-284	Gallagher, Tracey (2-26-16)	No	Alt. 1	5-110	Recounts examples where prosecutors fail to timely turn over evidence.	No response required.
2016-166	Garber, Leonard (2-25-16)	No	Alt. 1	5-110	Proposed rule helps ensure fair system.	No response required.
2016-99	Garcia, Armando (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-287	Gardner, Abraham (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. This Rule would go a long way in answering our community's call for reforms to restore community faith in our criminal justice system.	No response required.
2016-151	Gardner, Renee Yvonne (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-276	Giambona, Salvatore (2-29-16)	No	Alt. 1	5-110	Prosecutors routinely fail to adhere to their constitutional duty to reveal evidence because there is no consequence. Proposed rule is step in right direction.	No response required.

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2016-80	Gilreath, Tawnya (2-8-16)	No	Alt. 1	5-110	Agrees with proposed rule but believes that it should apply equally in civil proceedings where people are being "prosecuted" for alleged code violations and losing their homes without probable cause or the right to counsel.	Both current and proposed rule 5-110 apply specifically to criminal cases, as does the corresponding ABA Model Rule 3.8, which has been adopted in some form in every jurisdiction in the country. Conduct of government lawyers in civil actions is addressed in current rule 3-200 and proposed Rules 3.1 and 3.2. The Commission also notes that current rule 5-220 addresses the obligations of any lawyer who is not acting as a prosecutor in a criminal case with respect to evidence.
2/3/16 Public Hearing Testimony	Gloude, Royal (Provided oral public hearing testimony on February 3, 2016. See pages 51-58 of the public hearing transcript.)	No	NA	NA	Among other materials, provided a copy of a July 6, 2015 letter from Robert Fellmeth to the Hon. Mark Stone, Chair, Assembly Judiciary Committee, concerning SB 387 (Jackson) regarding the State Bar Discipline System. (NOTE: Court reporter was unable to transcribe this speaker's complete testimony due to technical difficulties.)	No response provided as it appears these comments were not addressing the substance of the proposed rule.
2016-140	Glucroft, Lesa Morse (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-142	Glucroft, Robert (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-306	Goldstein Breyer, Joseph (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-147	Gottesman, Ann A. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-215	Graf, Sheryl (2-25-16)	No	Alt. 1	5-110	Agree with proposed rule because it promotes fair administration of justice.	No response required.
2016-228	Granger, Jennifer (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-106	Greenberg, Evan Charles (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-131	Groshan, Justin (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-232	Gundel, Jason (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-251	Gutierrez, Bonita (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-33	Guzman, Jorge (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-47	Haddox, David (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-128	Hagler, Thomas M. (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-296	Hall, Carrie (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-102	Hanania, Mitri (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-149	Hauser, Steven K. (2-24-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule. Justice demands full disclosure by the prosecution in criminal cases. There are too many wrongful convictions in California.	No response required.
2016-91	Henderson, Elaine (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-39	Henneman, Krista (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-213	Hennessy, Timothy (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. States that rule will bring California in line with rest of U.S. jurisdictions.	No response required.
2016-81(b)	Henschel, Brad (2-13-16)	No	NA	5-110	Agrees with the rule. Proposed rule doesn't go far enough in that it should require	No response required. The proposed rule focuses on a prosecutor's duty to ensure a

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					prosecutors to disclose when police lie to them. Contends that the rule fails to address the financial impact to the state.	defendant is afforded procedural justice. It is not apparent how a requirement that prosecutors disclose when police lie to them could be enforced.
2016-307	Hernandez, Juan (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-123	Hicks, Anthony (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-86(a)	Hingle, Michael (2-24-16)	No	Alt. 1	5-110	Rule is long overdue. Wants it to apply to federal prosecutors who are State Bar members also.	Federal prosecutors are required to follow the Rules of Professional Conduct of the jurisdiction in which the federal prosecutor is practicing law, to the same extent and in the same manner as other lawyers in that state. See, 28 U.S.C. § 530B. Thus, the rule applies to federal prosecutors.
2016-134	Horner, Robert B. (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-84	Hudson, Harry (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule and states that he has had cases where facts in report don't support allegations.	No response required.
2016-301	Innocence Project, Barry Scheck (2-29-16)	Yes	Alt. 1	5-110	We strongly support the letter from the Loyola Law School's Project for the Innocence responding to submissions by	No response required.

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					<p>Stacy Ludwig and Laura Duffy on behalf of Dept. of Justice and U.S. Attorneys respectively. We add two observations:</p> <p>First, the whole purpose of ABA 3.8(d) is to put forward a prospective, prophylactic rule to prevent Brady violations – the suppression of “material” exculpatory evidence. Before a trial that has not yet occurred, before knowing the defense evidence, being naturally subject to confirmation bias (the tendency to view information as confirming a pre-existing position, such as the defendant is guilty), it is a difficult, perhaps impossible cognitive task for a prosecutor to know for certain whether the failure to make “timely” disclosure of one or more facts (information) that “tends to negate the guilt” could ultimately prove to be, “material.” Federal prosecutors have been subject for decades to a 3.8(d) standard and have not had any serious trouble conforming their conduct to the requirements of the rule.</p> <p>Second, the dispute around this</p>	

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					issue is reminiscent of the controversy that arose two decades ago over whether federal prosecutors should be subject to state “no contact” ethics rules. Congress responded by passing the McDade Act (“an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State”) which, in effect, expressly rejected the idea that federal prosecutors should be exempt from state ethics rules like 3.8(d) that are intended to supplement and assist prosecutors to avoid constitutional violations. The McDade Act settled the “no contact” controversy and changed the behavior of prosecutors in state and federal courts. Adoption of 3.8(d) will do the same.	
2016-310	Innocence Project, Loyola Law School Project for the Innocent, Laurie Levenson & David Burcham	Yes	Alt. 1	5-110	This letter is a brief response to the public comments made by Stacy Ludwig and Laura Duffy, offered on behalf of Dept. of	No response required.

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	(2-29-16) (Prof. Levenson also provided oral public hearing testimony on February 3, 2016 and provided additional written comment in support of oral testimony in letter dated February 1, 2016. See page 59 of the public hearing transcript.)				<p>Justice and U.S. Attorneys at the public comment hearing in L.A. Ms. Ludwig and Ms. Duffy do not represent all prosecutors who have served in the Dept. of Justice. As documented in a letter dated Feb. 1st, 2016, at least 100 former federal prosecutors have written in support of the Proposed Rule. As stated in the letter, they support the Proposed Rule because it better ensures that exculpatory evidence will be disclosed to the defendant. These former prosecutors have not perceived any difficulty in understanding or complying with the language of the Proposed Rule.</p> <p>Additionally, Ms. Duffy's suggestion that federal prosecutors cannot operate under the proposed standard is without merit. Rule 3.8(d) has been in effect throughout this country for almost a decade. In fact, it is based on ABA Standards for Criminal Justice: Prosecution Standard 3-3.11 that has been in effect since 1964. Federal prosecutors are quite accustomed to working under its</p>	

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					<p>standards, as Rule 3.8(d) has been adopted by states throughout the nation. Even many of California's federal prosecutors already embrace this approach.</p> <p>Current objections to ALT 1 are nothing more than an attempt to retain a "materiality" requirement for prosecutors' discovery obligations. ALT 2 creates a less protective, more complicated standard, by instructing prosecutors to rely on case law to determine whether their decisions regarding materiality can be justified if there is a failure to disclose exculpatory evidence.</p> <p>We support ALT 1. The rule is not designed, nor has it been used in other jurisdictions, to unleash a flurry of disciplinary actions against prosecutors. It is an easy-to-follow, plainly stated rule that, in fact, prevents prosecutors from making bad assessments as to how the defense is likely to use exculpatory evidence at trial.</p>	
2016-234(a)	Jafine, Kelly (2-25-16)	No	Alt. 1	5-110	Proposed rule help declare clear standard to prosecutors and imposes a sanction for	No response required.

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					miscarriages of justice.	
2016-64	Janoe, Bobby S. (1-15-16)	No	Alt. 1	5-110	Commenter provided personal story as convicted criminal defendant stating prosecutor failed to turn over exculpatory evidence and knowingly permitted perjured testimony, and that the conduct has not been addressed or investigated.	No response required.
2016-120	Johnson, Carla J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-214	Johnson, Cathy (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-183	Johnson, Ronald (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-87	Johnson, Todd (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-160	Jones, Ashley (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-216	Jones, Raymond (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-288	Jorjani, Raha (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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TOTAL = 321 Alt. 1 = 304
Alt. 2 = 5
NA = 12

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-74	Kasolas, George (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-18	Katano, Akio (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule to protect rights of citizens from overreaching and misconduct. Noted that Brady violations and prosecutorial misconduct are a "problem of epic proportion."	No response required.
2016-163	Kayfetz, Lael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-6	Kelly, Patrick (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-269	Kendall, Denise (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-38	Khorasani, Maryam (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-132	Kinsey, Jr., Edward W. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-89	Kirchick, Stuart D. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-289	Kopchak, Ryan (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-180	Kovaly, Jill (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-195	Kramer, Lauren (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule will bring California in line with Model Rule and will help curb prosecutorial abuse.	No response required.
2016-274	Krause, Tracy (2-29-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule holding prosecutors accountable for providing timely exculpatory discovery. Current system does not adequately protect defendants from the loss of exculpatory evidence that might make a difference in their jury trials.	No response required.
2015-41	Krueger, Angela (11-25-15)	No	Alt. 1	5-110	Agrees with rule as a needed incentive or tool to reduce cause of wrongful convictions. Agrees that rule apply to all exculpatory evidence because prosecutors cannot determine materiality prospectively. Expressed concern that despite existing law requiring disclosures (Pen. Code §1054.1), Brady violations are prevalent and no State Bar or Court action taken.	No response required.
2016-122	Krueger, Angela (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule minimizes the risks of wrongful conviction.	No response required.

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2016-200	Kuchar, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-8	Kulick, Kelley (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-235	Lagod, Alan M. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-227	Lai, Johnny (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. This will bring rules in line with existing California case law.	No response required.
2016-158	Laidley, Pierpont M. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule. Has first-hand experience with a prosecutor intentionally hiding exculpatory evidence. Rule needed to avoid convicting the innocent.	No response required.
2016-105	Lambe, James (2-24-16)	No	Alt. 1	5-110	Supports the Commission's proposed rule.	No response required.
2016-270	Landau, Jeffrey (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-187	Latimer, Denver (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-250	Lawrence, Helen (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-93	Lee, Sung (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-12	Leonard, Samuel (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-61	Leonard, Samuel (1-6-16)	No	Alt. 1	5-110	Noted error in Discussion par. [1]. Phrase reading "that guilty" should read "that guilt."	The Commission agrees and make the suggested change.
2/3/16 Public Hearing Testimony	Levenson, Prof. Laurie (credited as Lori Levinson in 2/3/16 public hearing transcript). (Provided oral public hearing testimony on February 3, 2016. See pages 59-62 of the public hearing transcript.)	No	Alt. 1	5-110	Agrees with the proposed rule. It makes a difference to take out of the equation prosecutors making materiality decisions because they make mistakes all the time. And those mistakes cost people their freedom. In response to Ms. Ludwig, DOJ lawyers have not understood the law. Surprised that Ms. Ludwig did not highlight rash of misconduct and Brady violations in this district. Committee did an excellent job drafting mens rea language in rule. In response to critique that it's not clear enough, it's clearer than having to look through all the case law for the standard.	No response required.

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					<p>Even if “tends to negate” is not clear enough, then maybe “any tendency to negate” could be helpful. But, we don’t want to move in the direction of saying prosecutors get to decide what is material.</p> <p>Proposed rule does not tamper with California discovery law.</p> <p>It is reported that the number of exonerations have gone up again and 75-80 percent of them are related to Brady violations.</p> <p>This rule is essential to fair trials as it says: prosecutors, don’t pretend to be defense lawyers. You’re not good at it.</p>	
2016-107	Levin, Sydney (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-278	Lindsey, Jelani J. (2-29-16)	No	Alt. 1	5-110	Agrees with Commission’s proposed rule.	No response required.
2016-121	Lockhart, Karen (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-62	Logan, William (1-7-16)	No	Alt. 1	5-110	Noted need for the proposed rule to address failures of prosecutors to comply with their duties.	The Commission believes the proposed rule accurately articulates the appropriate

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					Expressed concern that the rule will not have “enforcement teeth.”	discipline standard for a prosecutor in a criminal case. This more precise articulation of a prosecutor’s duties should facilitate both compliance and enforcement of the rule.
2016-156	London, Lori (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutor is supposed to administer justice, not just be an advocate.	No response required.
2016-112	Lopez, Gabriela (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-308	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee of the (PREC), Teresa Schmid (2-26-16)	Yes	Alt. 1	5-110	PREC supports the proposed amendments, and specifically opposed the so called “alternative 2” to proposed paragraph (D) of Rule 5-110.	No response required.
2016-73	Loughborough, James	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-51	Lozada, Paul (11-30-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-118	Lueck, John (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes that proposed rule doesn’t go far enough: there should be “sanctions” for not	No response required.

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					turning over evidence immediately after defendant has retained counsel; wants an affirmative duty on prosecutor to seek evidence controlled by third parties.	
2016-170	Lui, Marie (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-168	Lutes-Koths, Kimberly (2-25-16)	No	Alt. 1	5-110	Proposed rule is positive step in curtailing prosecutorial misconduct.	No response required.
2016-178	Lynch, David (2-25-16)	No	Alt. 1	5-110	Agrees because proposed rule requires full disclosure with exceptions where appropriate.	No response required.
2016-72	Majchrzak, David (2-24-16)	No	Alt. 2	5-110	1. The rule may require an overly broad duty of prosecutors to disclose evidence. There is an inherent problem with a rule creating a standard that requires broader disclosure than what substantive law requires. The proposed rule does not fill a gap in California law. Legislatures and courts have established a voluminous body of law defining criminal defendants' due process rights. An ethical rule does not change those due process rights. And it does not change the remedy available to the criminal defendant for any harm if those rights are violated.	1. The Commission disagrees that the rule creates a broader disclosure requirement. The California Supreme Court has interpreted the statutory standard set by Penal Code section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.

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					2. Any standard for failing to disclose information should have a requirement that the prosecutor knew that the information tended to negate the guilt of the accused or mitigate the offense. See, Mass. Rule 3.8, Cmt. 3(A).	<p>2. The Commission has made a change to paragraph (D) in order to clarify what the prosecutor must have knowledge of.</p> <p>The “known” standard in paragraph (D) refers to the prosecutor’s knowledge of the <i>existence</i> of the evidence or information. This is an actual knowledge standard. Under the Model Rules, “a person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>On the other hand, the “knows or reasonably show” standard, which has been added to paragraph (D), applies to the prosecutor’s knowledge of the <i>legal effect</i> of the <i>known</i> information or evidence.</p>

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					<p>3. The rule could be written more clearly. The rule should expressly address whether it is intended to include evidence or information that could be used to impeach prosecution witnesses. The rule does not clearly state whether it will address such obligation.</p> <p>4. Incorporating as much of the Comments into the rule as possible will aid in establishing the guidelines for prosecutors to follow.</p> <p>5. Regarding the word “timely,” in paragraph (d), I offer the following suggested language to more precisely state what “timely” means: “within the time required by statute, procedural rule, or court order, disclose to the defense all evidence or information that existing federal or California law requires to be produced and that the prosecutor</p>	<p>3. Regarding witnesses, the Commission has added a sentence to Comment [3] which states, in part, “[t]he disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment . . .” This language refers to impeachment material concerning government witnesses.</p> <p>4. The Commission disagrees. The comments to the rule either clarify the rule’s meaning or application and thus more appropriately belong in the Comment section to the rule.</p> <p>5. The Commission declined to make the recommended change with respect to the word “timely.” The rule comment as proposed adequately clarifies the meaning of timely.</p>

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					knows tends to negate the guilt of the accused, mitigates the offense, or impeaches prosecution witnesses, unless the court otherwise orders.”	
2016-253	Mann, David (2-28-16)	No	Alt. 1	5-110	Agrees with Commission’s proposed rule.	No response required.
2016-139	Martinez, Anna (2-24-16)	No	Alt. 1	5-110	Approves of the Commission’s proposed rule.	No response required.
2016-177	Masi, Mary (2-25-16)	No	Alt. 1	5-110	The rule doesn’t have real teeth but it’s a step in the right direction.	The Commission believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case. This more precise articulation of a prosecutor’s duties should facilitate both compliance and enforcement of the rule.
2016-103	Mayfield, Daniel Miller (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-172	McCarthy, Sarah (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-49	McIlroy, Julia (11-28-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-282	McKneely, Michael (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-173	McMillin, James (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-264	Miller, Eli (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-202	Miranda, Douglas (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-197	Moore, Artricia (2-25-16)	No	Alt. 1	5-110	Recounted experience as public defender where prosecutor fails to turn over evidence in his or her possession until the eve of trial without repercussion.	No response required.
2016-231	Morga, Maria (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-28	Morton, Jenna (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-220	Mowrer, Glen (2-25-16)	No	Alt. 1	5-110	Proposed rule will help remind prosecutors that they are supposed to be impartial administrators of their duty, not strictly there to convict.	No response required.
2016-246	Mowry, Shawn (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-184	Mueting, Lisa Bertolino (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-88	Muller, Barbara (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-25	Munkelt, Stephen (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule, noting that all other jurisdictions have a rule on the subject, which is needed to motivate prosecutors to disclose all exculpatory evidence.	No response required.
2016-95	Needle, Joshua (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Wants prosecutors to turn over more to defense counsel and have less discretion.	No response required.
2016-302	Newman, James (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-54	Nguyen, Hien Ngoc	No	Alt. 1	5-110	Agrees with proposed rule. No written comment.	No response required.
2015-29	Nguyen, Paul (11-24-15)	No	Alt. 1	5-110	Expressed concern, through examples, that prosecutors are sending innocent people to prison and suffering no consequences.	No response required.
2016-256	Nguyen, Sang (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-191	Nielsen, James (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-279	Northcutt, Alex (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-272	O'Brien-Kovari, Nicholas (2-29-16)	No	Alt. 1	5-110	Prosecutor should not be called upon to be gatekeeper of what is material. If they are incorrect, the case may be dismissed.	No response required.
2016-261	Ogul, Michael (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-20	Olsman, Matthew (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-36	Or, Lany (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-208	Or, Lany (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2/3/16 Public Hearing Testimony	Orange County District Attorney's Office, Peter Pierce (Provided oral public hearing testimony on February 3, 2016. See pages 77-79 of the public hearing transcript.)	No	Alt. 2	5-110	Proposed rule could subject prosecutors to disciplinary action based on arbitrary standards not tied to existing law. Cherishes playing by the rules. Served in Iraq and has seen what it's like for citizens in a military dictatorship or police state. He takes his responsibilities to the defense seriously. This is typical of California prosecutors. Disagrees that Brady violations are rampant or systemic.	The Commission disagrees with the commenter's assessment that the rule is "arbitrary." It believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case. The Commission notes that it has revised the rule to clarify the knowledge a prosecutor must possess to be subject to discipline under paragraph (D). See response to OCTC, 2016-

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					<p>Believes that majority of prosecutors take their responsibilities seriously.</p> <p>Discovery in white collar cases is extensive. In his last case, the defendant's rights were honored. If they weren't his conviction could be overturned. Under proposed rule, an inadvertent discovery violation could also result in discipline.</p> <p>Saddened that people think that additional sanctions are needed against state prosecutors to safeguard the rights of the accused.</p>	313.
2016-240	Orbelian, Wade (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-143	Oster, David (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-277	Otani, Kay (2-29-16)	No	Alt. 1	5-110	Proposed rule makes clear that prosecutor has an ethical duty as well as a legal duty to provide evidence.	No response required.
2016-229	Ourfalian, Vicky (2-25-16)	No	Alt. 1	5-110	<p>Boilerplate comment language. See footnote 2.</p> <p>Proposed rule promotes justice, fairness, and transparency. It</p>	No response required.

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					requires prosecutors to act as they already should – as administrators of justice.	
2016-114	Paine, Autumn (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-150	Paparian, William (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2015-17	Pena, Katarina (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-255	Pernik, William (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-165	Perry, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes proposed rule comports to existing California law.	No response required.
2016-155	Petersen, Justin (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-207	Petrosino, Sharon (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-221	Poston, Amber (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-21	Povalitis, Leslie (11-24-15)	No	Alt. 1	5-110	Believes to ensure justice, prosecutor's duty needs to be expressed in a rule of conduct.	No response required.

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2015-2	Pozzi, Kathleen (11-23-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-219	Proctor, Jennifer (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2/3/16 Public Hearing Testimony	Alternate Public Defender, Los Angeles County, Michael Goodman (Provided oral public hearing testimony on February 3, 2016. See pages 73-75 of the public hearing transcript.)	Yes	Alt. 1	5-110	Alt. 2. waters down what the rule is intended to accomplish: to give prosecutors an ethical, not just a legal reason, to provide discovery which is exculpatory in nature. Believes it's a mistake to allow prosecutors to decide what is material. Defense attorneys have a very different view of what is material. If we want prosecutors to turn over exculpatory evidence, we should take away any ambiguity. Defense attorneys should decide what is material and we shouldn't place prosecutors in the position of having to make those decisions.	
2016-309	Public Defender, Los Angeles County, Ronald Brown & Los Angeles County Alternate Public Defender, Janice Fukai (2-24-16)	Yes	Alt. 1	5-110	In order to promote the worthwhile goal of fewer erroneous convictions, the Commission should support the adoption of a rule of professional conduct that mirrors ABA Model Rule 3.8, by adopting ALT 1.	

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	(See above entry referencing public hearing testimony from Michael Goodman of the Los Angeles Alternate Public Defender's Office on behalf of Janice Fukai.)				Our experience is that non-compliance with <i>Brady</i> is pervasive. Limiting the duty to disclose to case or statutory law would result in disclosure of exculpatory information only if the information is "material." A prosecutor should never be in the position of himself or herself determining whether exculpatory evidence is material. If evidence is exculpatory it should be provided to the defense, so that the defense, not the prosecution, can evaluate the extent to which the evidence will support the intended defense at trial.	
2016-268	Public Defender, San Francisco City & County, Danielle Harris (2-29-16)	Yes	Alt. 1	5-110	1. The State Bar should approve proposed rule 5-110(D) as recommended by the Commission because the proposed rule clearly explains the duty of prosecutors to disclose all exculpatory evidence, as California statute and decisional law requires. In my experience, state discovery violations are rampant. Juries should hear all significant evidence, as determined by the court, not solely by prosecutors.	1. No response required.

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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					<p>2. 5-110(A) should be rejected because it eliminates the phrase “or should know;” and removes any temporal reporting requirement, such as “timely.” An individual prosecutor must be held to the standard of a reasonable prosecutor. Maintaining the “knows or should know” language insures as much.</p> <p>3. The requirement of “prompt” reporting when probable cause does not exist makes clear that the state has a duty to act quickly to ensure that no one faces criminal charges when probable cause is lacking. The proposed rule waters down an already minimal obligation and should be rejected.</p>	<p>2. The Commission disagrees with the commenter’s suggested changed. It believes that the knowledge standard, which precludes a prosecutor from engaging in conduct that amounts to “willful blindness” to the surrounding facts and circumstances, is the appropriate standard for initiating or maintaining charges.</p> <p>3. The Commission has revised paragraph (A) of the proposed rule to expressly prohibit a prosecutor from “continuing” charges unless probable cause exists. Implied in that absolute prohibition is the requirement that the prosecutor act promptly.</p>
2/3/16 Public Hearing Testimony	<p>Public Defender, San Francisco City & County, Danielle Harris</p> <p>(Ms. Harris also provided oral public hearing testimony on February 3, 2016. See pages 13-20 of the</p>				The State Bar should approve proposed rule 5-110(D) as recommended by the Commission because the proposed rule clearly explains the duty of prosecutors to disclose all exculpatory evidence, as California statute and decisional law requires.	See response to Harris, 2016-268, above.

TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
	public hearing transcript.)				<p>Ms. Harris highlights recent examples where, despite California law, prosecutors have failed to turn over evidence. The proposed rule will help ensure that a prosecutor's goal is justice.</p> <p>The proposed revision of subparagraph (a) should be rejected as it substitutes a subjective standard for an objective one. The current "knows or should know" standard makes clear that a prosecutor must act as a reasonable prosecutor should.</p>	
2015-9	Public Defender, Santa Clara County, Jung Le (11-24-15)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-23	Public Defender, Solano County, Lesli Caldwell (11-24-15)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-46	Public Defender, Sonoma County, Michael Perry (11-25-15)	Yes	Alt. 1	5-110	Agrees with the proposed rule as a needed requirement, noting that most other states already follow the same rule.	No response required.
2016-286	Public Defender, Yolo County, Tracie Olson (2-26-16)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-319	Ra, Sue (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-242	Ramirez, Joseph (2-26-16)	No	Alt. 1	5-110	Proposed rule addresses nationwide problems associated with disclosure. Proposed rule simply requires prosecutors to do what they are sworn to do.	No response required.
2016-275	Ramos, Carlos (2-29-16)	No	Alt. 1	5-110	Proposes that rule should include a definition of what is “timely” and that prosecutors should only be allowed to bring charges when evidence supports guilt beyond reasonable doubt, not just probable cause.	With respect to “timely,” the Commission believes the rule comment as proposed adequately clarifies the meaning of timely. As to the suggestion that the standard for filing charges be “guilt beyond a reasonable doubt,” that standard is the province of the jury. Moreover, current rule 5-110 includes the “probable cause” standard, which has traditionally been part of American criminal jurisprudence.
2016-133	Razzaq, Hadi (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-153	Rivera, Angelica (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-11	Robinson, Kevin (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-167	Robinson, Kevin (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-303	Rodriguez, James (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-238	Rodriguez, Mario (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-257	Rodriguez, Richard (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-210	Rogers, Heather (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-262	Ross, Julian (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-157	Roth-Furbush, Samra (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-181	Ruby, Sarah (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-111	Rudich, Kevin (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-137	Russell, Matthew (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-196	Rutgers, Gerritt (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-237	Ryan (2-25-16)	No	Alt. 1	5-110	Our justice system relies on honesty and accountability.	No response required.

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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-266	Saba, Natalie (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-42	Saban, Panteha (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-198	Saban, Panteha (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-1	Sable, Norman (11-23-15)	No	NA	5-110	Disagrees with use of "shall refrain" and suggests retaining the phrase "shall not."	In paragraph (A), the Commission deleted the phrase, shall "refrain from prosecuting"; and replaced it with, shall "not institute or continue to prosecute . . ."
2016-312	Sakoh, Miyuki (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-66	San Diego County Bar Association, Heather Riley (2-10-16)	Yes	NA	5-110	Believes both versions of (D) have ambiguities that need to be addressed for the rule to be a clear standard that succinctly states a lawyer's obligation with clarity and precision. Believes the language "evidence or information known to the prosecutor" is ambiguous and that it is unclear whether the rule is intended to reach only information "known" to the prosecutor and not what a prosecutor "should know." See suggested language in comment.	The Commission has made a change to paragraph (D) in order to clarify what the prosecutor must have knowledge of. The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of the evidence or information. This is an actual knowledge standard. Under the Model Rules, "a person's knowledge may be inferred from circumstances." By

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					<p>It is unclear what constitutes “evidence or information...that tends to negate the guilt of the accused or mitigates the offense...” and whether the rule is intended to require disclosure of impeachment evidence. See suggested language in comment.</p> <p>Alt 2 language “as interpreted by relevant case law” does not create a clear standard.</p> <p>Suggests a statement permitting lawyers to look to decisions in jurisdictions with analogous rules for guidance interpreting the rule.</p>	<p>providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>On the other hand, the “knows or reasonably show” standard, which has been added to paragraph (D), applies to the prosecutor’s knowledge of the <i>legal effect</i> of the <i>known</i> information or evidence.</p>
2/3/16 Public Hearing Testimony	(Marcella McLaughlin, ethics coordinator for the district attorney’s office, provided oral public hearing testimony on behalf of the San Diego County District Attorney’s Office on February 3, 2016. See pages 79-86 of the public hearing transcript.)				<p>Sees the policy concerns but wants a rule that can be realistically applied and followed.</p> <p>Recounts her professional history and states that she has concerns about how this rule would be applied on a daily basis.</p> <p>D.A.’s have a delicate balance of interests. While ensuring that defendant gets a fair trial, you also have to protect the interests of your victims, your witnesses and the community.</p>	<p>Please see responses to San Diego County District Attorney (Dumanis), 2016-324. The Commission again emphasizes that the rule comports with California Supreme Court precedent. See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.</p>

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					<p>Taking the power to judge materiality away from prosecutors will subject people to harm. She gives an example where letters from others inculcating a gang member may put the writers at harm.</p> <p>Believes that the law provides the proper safeguards and that the information presented regarding wrongful convictions doesn't reflect what's actually happening in California.</p>	
2016-141	San Francisco Public Defender Racial Justice Committee, Demarris Evans (2-24-16)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-101	Sandecki, Sheri (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-188	Sanders, Neal (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-144	Santana, Jesse (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-223	Scheidel, Kathleen (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-249	Schramm, Bethany (2-26-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2016-267	Schwarzbach, Zachariah (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-83	Scofield, Robert (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule as the proper language of Brady as it should be applied at the trial court level.	No response required.
2016-69	Sevilla, Charles (2-5-16)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to ensure that disclosures are made regardless of materiality. Despite recognition that these duties exist, concerned that the view of many prosecutors is that the duty is limited to material evidence.	No response required.
2016-113	Shea, George (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes that proposed rule comports with existing law.	No response required.
2016-182	Shear, Andrew (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-57	Shena, Sarah (12-1-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-7	Silver, Damon (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-90a	Silver, Damon (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	No response required.
2016-185	Smith, Colin (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-321	Smith, Tenette (2-29-16)	No	Alt. 1	5-110	Supports Commission's proposed rule.	No response required.
2016-222	Snyder, Amanda (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-218	Sok, Curtis (2-25-16)	No	Alt. 1	5-110	Proposed rule ensures that prosecutors will be strictly accountable for administering justice as opposed to winning.	No response required.
2016-291	Solga, Joseph (2-26-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	No response required.
2015-44	Soloman, Rachel (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-209	Solomon, Ilona (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-245	Sorensen, Jason (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-14	Sotorosen, Matthew (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-164	Spector, Simone (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.

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2016-283	Staley-Ngomo, Armilla (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2015-58	Start, Christine (12-2-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-313	State Bar of California, Office of Chief Trial Counsel (OCTC), Jayne Kim (2-26-16)	Yes	Alt. 1	5-110	<p>OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.</p> <p>The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office.</p> <p>1. 5-110(B) should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In</p>	<p>1. As the commenter notes, typically the police address this responsibility at the time of arrest. Consequently, a prosecutor's obligation will</p>

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					<p>many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Dept's in California are generally independent of prosecutors' offices.</p> <p>2. Regarding 5-110(D), the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will vary with the circumstances: and the rule "is not intended to impose timing requirements different from those established" by law. It may be advisable to clarify and state this concept in the text of the rule.</p> <p>3. 5-110(D) requires disclosure of all information that "tends to negate" guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is "not limited to evidence or information that is material as defined by <i>Brady</i> ... and its progeny." The discussion item notwithstanding,</p>	<p>depend on the particular facts and circumstances. When such an obligation might arise is not susceptible to a concise statement.</p> <p>2. The Commission declined to make the recommended change with respect to the word "timely" under 5-110(D). The rule comment as proposed adequately clarifies the meaning of timely.</p> <p>3. As to the phrase "tends to negate" being unclear, the Commission has made a change to paragraph (D) in order to clarify what the prosecutor must have knowledge of. The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of</p>

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					<p>language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission's intention within the text of the rule itself, namely, that a prosecutor's duty to disclose is broader than that which is material as defined in <i>Brady</i>.³ Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.</p> <p>Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information "known to the prosecutor." It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor's duty to search for exculpatory evidence or whether</p>	<p>the evidence or information and knowledge of the <i>legal effect</i> of the <i>known</i> information or evidence. This is an actual knowledge standard. Under the Model Rules, "a person's knowledge may be inferred from circumstances." By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>Furthermore, the Commission has added a sentence to Comment [3] which states, in part, "[t]he disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment . . ." This language refers to impeachment material concerning government witnesses.</p>

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³ Presumably, the Commission's intention is also that a prosecutor's duty to disclose would not be limited by criminal discovery statutes.

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Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept Synopsis of Public Comments						
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					a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.	The Commission believes the proposed rule provides the appropriate discipline standard for a prosecutor in a criminal case.
2016-322	State Bar of California, Standing Committee on Professional Responsibility and Conduct (COPRAC), Merri Baldwin (2-29-16)	Yes	Alt. 1	5-110	<p>COPRAC supports ALT 1 because we believe there is value in maintaining uniformity with other jurisdictions. In addition, ALT 2 would not create a more defined standard to the extent there is uncertainty as to what the current requirements imposed by law are. Making clear the disciplinary consequences of a prosecutor's failure to turn over exculpatory evidence in a timely manner would add significant public protection.</p> <p>Some COPRAC members voiced concern that, in interpreting the proposed rule, the State Bar could impose a disclosure standard different than that which exists in California law in circumstances in which the prosecutor made a reasoned decision as to whether evidence was exculpatory or not (certain forms of impeachment evidence, for example), and impose</p>	<p>No response required.</p> <p>With respect to the minority of COPRAC's concern, that discipline might be imposed on a prosecutor who made a "reasoned decision" about the exculpatory nature of the impeachment evidence, the Commission notes the requirement for determining whether or not evidence or information is exculpatory is an objective standard ("knows or</p>

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					<p>discipline for conduct that otherwise met the obligations set forth in law. However, the majority of the Committee supports adoption of the Rule and Comments as proposed by the Commission.</p> <p>COPRAC also examined the issues raised by George Cardona's thoughtful dissent from the adoption of paragraph (E) of the rule, governing subpoenas to attorneys, including his observation that many leading white-collar jurisdictions have not adopted the rule. However, as we looked further, we couldn't find any strong policy arguments in the literature against that part of the rule, or any sign that it has created law enforcement problems in the jurisdictions where it has been adopted. The common sense reason would appear to be that paragraph (E) of the rule, like paragraph (D), runs in parallel with a wide variety of discovery and evidentiary rules and internal prosecutorial guidelines—so that in fact the rule would not significantly alter current practice.</p>	<p>reasonably should know”) and thus a “reasoned decision” should not violate the rule.</p> <p>No response required.</p>

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2015-56	Streets, Phoenix (11-30-15)	No	Alt. 1	5-110	Believes proposed rule will assist in ensuring fair treatment and improving the relationship between law enforcement and the community.	No response required.
2015-53	Swarz, Sean (11-30-15)	No	Alt. 1	5-110	Expressed concern, through examples, that leaving prosecutors with discretion re Brady obligations has resulted in failures of prosecutors to disclose all exculpatory evidence.	No response required.
2016-244	Taylor, John (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-233	Templeton, Chet (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutors should not be the ones who determine whether something is material.	No response required.
2016-280	Theiss, Sara (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-239	Thiagarajah, Niranjan Fred (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-85	US Dept. of Justice, Professional Responsibility Advisory Office, Stacy Ludwig (2-24-16)	Yes	Alt. 2	5-110	U.S. DOJ disagrees with rule as follows: 1. Paragraph (D) would change federal prosecutors' duties in a manner rejected by the Federal Rules Committee; The rule's	1. It is the Commission's understanding that federal prosecutors are required to follow the Rules of

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					<p>departure from caselaw-based standard creates ambiguity; proposed rule is at odds with federal prosecutors' legal obligations and provides no mechanism to be in compliance with both;</p> <p>2. Paragraph (G) doesn't distinguish between prosecutors who are still involved in a case or work in the same office and those who have moved to another district;</p> <p>3. Paragraph (E) too greatly limits federal prosecutors' and grand juries' ability to investigate and prosecute criminal conduct. Provides alternative rule drafts that comport to concerns listed. Provides that if alternatives are not adopted, there should be a men rea requirement added to proposed rule.</p>	<p>Professional Conduct of the state in which the federal prosecutor is practicing law, to the same extent and in the same manner as other attorneys in that state. See, 28 U.S.C. § 530B. Further, the Commission believes the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal case.</p> <p>2. The rule cannot be an encyclopedic treatise on how to apply paragraphs (G) and (H). When considered in conjunction with proposed rules 5.1 through 5.3, prosecutors are afforded sufficient guidance.</p> <p>3. The Commission has not made the suggested change. The Commission believes paragraph (E) as drafted provides an appropriate balance between the needs of law enforcement and the protection of the lawyer-client relationship and integrity of the administration of the justice.</p>

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2/3/16 Public Hearing Testimony	US Dept. of Justice, Professional Responsibility Advisory Office, Stacy Ludwig (Also provided oral public hearing testimony on February 3, 2016. See pages 28-37 of the public hearing transcript.)				<p>Supports Alt. 2 because it creates clear and enforceable disciplinary standards which account for the differences between the state and federal substantive law to which standard is linked.</p> <p>Alt. 1 conflicts with federal law and uses undefined terms.</p> <p>If Commission does adopt Alt. 1, requests that rule incorporate an "intentionality" requirement so that the rule cannot be used as a tactical weapon against prosecutors. Three jurisdictions already have an intentionality requirement in their rule. One jurisdiction has read one into the rule. Other proposed rules have an intentionality requirement.</p> <p>Also requests a safe harbor provision to be in the substance of the rule itself, not the comment. Another proposed rule has a safe harbor provision.</p> <p>Also supports alternative versions of 5-110(g) and (h) because it distinguishes between situations where prosecutor is personally involved in a case and ones</p>	Please see responses to US Department of Justice (Ludwig), 2016-85, above. With respect to the comment on a "safe harbor," the Commission does not believe that placing the provision in the black letter is required, as the comment simply clarifies how the rule should be applied, an appropriate function for a comment.

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					<p>where prosecutor may not have access to information about a case.</p> <p>All substantive information should be contained in the body of the rule, not the comments.</p> <p>If proposes rule is adopted, requests that safe harbor provision be included as an enumerated provision as opposed to in the comment.</p>	
2016-63	Valdez, T. David (1-19-16)	No	Alt. 1	5-110	Commenter provided personal story as convicted criminal defendant stating prosecution failed to turn over exculpatory evidence.	No response required.
2016-315	VanOosting, Peter (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-146	Venegas, Armando R. (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule and believes that it will even out the playing field.	No response required.
2016-130	Verlato, Richard C. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. CDAA should not be "loop-hole seekers."	No response required.
2016-204	Villalobos, Christina (2-25-16)	No	Alt. 1	5-110	Proposed rule would ensure that prosecution of cases would proceed more smoothly and would reduce opportunities for	No response required.

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 NA = 12

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept Synopsis of Public Comments						
No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					defendants to get their cases dismissed.	
2015-60	Vinegrad, Paul (12-5-15)	No	NA	5-110	Disagrees with proposed rule. Expressed concern that State Bar lacks authority to enact a rule that alters the discovery rules in criminal cases. See exclusivity provision in Pen. Code § 1054(e).	The Commission disagrees that the rule “alters the discovery rules in criminal cases.” The California Supreme Court has interpreted the statutory standard set by Penal Code section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.
2015-5	Voogd, Anthony (11-24-15)	No	NA	5-110	1. Suggests defining “prosecutor” and “prosecutorial discretion.”	The Commission does not believe that the terms “prosecutor” or “prosecutorial discretion” require definition. With respect to the former, the term “prosecutor in a criminal case” requires further clarification. Concerning the latter, “prosecutorial discretion” is not a disciplinary standard and similarly need not be further clarified. The Commission believes that as drafted, the proposed rule accurately articulates the appropriate discipline standard for a prosecutor in a criminal

TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					2. Believes that for rule 5-110 to be effective the Rules also need to adopt model rules 5.1-5.2 re supervisory and subordinate lawyers. Suggests adoption of all ABA model rules. Concerned that proposed rule may conflict with existing statutory law.	case. 2. Separately, the Commission has recommending proposed rules 5.1, 5.2, and 5.3, all based on the corresponding ABA Model Rules, which address the obligations of supervisory and subordinate attorneys.
2016-292	Walters, Phillip (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-285	Wasserman, Michael (2-26-16)	No	Alt. 1	5-110	Justice system attorneys are tasked with seeking justice. Withholding evidence is common. Proposed rule would enhance prosecutor's role as seeker of justice.	No response required.
2016-79	Webber, Stephen (2-6-16)	No	Alt. 1	5-110	Attorney agrees with proposed rule. Believes that the rule should be expanded to address the following issues: potential prosecutorial conflicts regarding grand jury proceedings and using public funds for prosecutors' vendettas. Attorney likewise suggests that violation of the rule should result in mandatory discipline. Attorney writes that rule should	The Commission believes the proposed rule accurately articulates the appropriate discipline standards for a prosecutor in a criminal case. The further conduct the commenter suggests be addressed is already addressed in current statutes, e.g., Bus. & Prof. Code § 6106, or in proposed rules, e.g., Rules 1.11 and 8.4. The Commission has revised

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TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					be expanded to address when prosecutor must cease prosecution and dismiss charges in light of new evidence. Attorney gives numerous examples of prosecutors continuing to pursue charges despite lacking probable cause.	paragraph (A) to address the commenter's concerns. Paragraph (A) prohibits a prosecutor from continuing to prosecute if probable cause no longer exists.
2016-205	Weir, Jon C. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-271	Welch, Jennifer (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-192	Wetmore, Matthew (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-226	Wright, Laura (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-316	Yaroshefsky, Ellen & Bruce Green (2-29-16)	No	Alt. 1	5-110	Supports adoption of the ALT1 version of the proposed rule. An ethics rule based on Rule 3.8(d), such as ALT 1, would not conflict with federal and state law. Federal prosecutors already comply with disclosure law drawn from various sources, including case law, statutes and rules of criminal procedure. The ethics rule does not excuse prosecutors from complying with other	No response required.

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TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

**Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					<p>disclosure obligations under the law or otherwise conflict with them, but builds upon prosecutors' other disclosure obligations.</p> <p>There is nothing anomalous or troubling about a state ethics rule that is more demanding than other law on the subject. In general, ethics rules go beyond existing law, rather than merely restating or codifying existing law or incorporating it by references. (See, CRPC 2-100; ABA 4.2).</p> <p>Federal prosecutors' legal obligation to comply with state ethics rules that supplement existing legal restrictions has two undeniable bases. First, the obligation is generally established by local rules of the federal courts that make clear the state ethics rules applicable to attorneys in federal judicial proceedings. Second, and wholly apart from the federal court rules, the obligation is established clearly and equivocally by federal statute (see, the McDade Act, 28 USC § 530B)</p>	

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TOTAL = 321 Alt. 1 = 304
 Alt. 2 = 5
 NA = 12

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept Synopsis of Public Comments						
No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
2016-293	Yellen, Amy (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-265	Yu, Linda (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	No response required.
2016-236	Zaky, Negad (2-25-16)	No	Alt. 1	5-110	Proposed rule creates clear standard that protects both prosecutors and defendants.	No response required.

TOTAL = 70 A = 65
D = 1
M = 3
NI = 1

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

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
X-5110-39	Abernethy, Ronald H. (6-28-16)	No	A	5-110	<p>Approves of the Commission's proposed rule. First, it is important to remind prosecutors of their duty, under existing California law, to timely disclose all exculpatory evidence and information, regardless of materiality.</p> <p>Second, given the recent amendment to the proposed rule, which now insulates prosecutors from discipline unless the prosecutor actually "know or reasonably should know" the information is exculpatory, prosecutors do not have to worry about being disciplined without having any culpable mental state.²</p>	No response required.
X-5110-4	Baker, Natasha (6-24-16)	No	A	5-110	Our judicial system is based on an innocent until proven guilty standard. Thus hiding exculpatory evidence undermines	No response required.

¹ **A** = Agree with the proposed Rule. **D** = Disagree with the proposed Rule. **M** = Agree only if modified. **NI** = The commenter did not indicate a position.

² Multiple commenters repeated this same comment as their own submission. For purposes of this synopsis table this repeated comment is designated as "boilerplate comment language."

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					the legitimacy and public confidence in such a system. Boilerplate comment language.	
X-5110-43	Balahadia, Dave (6-29-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-17	Barana, Victoria (6-26-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-10	Berkowitz, Barney (6-25-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-57	Bermant, Alison (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-25	Bertolino, Lisa J. (6-28-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-28	Bobrow, Oscar (6-24-16)	No	A	5-110	Supports rule and attaches a recent court ruling in a homicide case highlighting the issue. States that the behavior addressed in the ruling is not isolated.	No response required.
X-5110-48	Bollinger, Andre (6-30-16)	No	A	5-110	Proposed rule is necessary and in accordance with the ethical responsibilities of prosecutors in order to assure that those accused of crimes are not wrongfully convicted.	No response required.
X-5110-2	California District Attorneys Association, multiple signatories (6-22-16)	Yes	M	5-110	Cites to 2-26-16 letter as indicative of its position. Also requests that the comments section be changed to reflect that disclosure of impeachment	The language concerning impeachment material in Comment [3] is not intended to refer to impeachment material concerning defense witnesses,

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					evidence concerning defense witnesses is not warranted unless defense has made defense witness identity available in advance of trial.	as the California Supreme Court has held that such information is not exculpatory. See <i>People v. Tillis</i> (1998) 18 Cal.4th 284. The language refers to impeachment material concerning government witnesses.
X-5110-14	California Public Defenders Association, Joshua C. Needle (6-25-16)	Yes	A	5-110	There is nothing new in the rule regarding a prosecutor's obligation to see that justice is done and that defendants be treated with fairness. It is time that prosecutors took their obligations seriously or be sanctioned. Cites <i>Berger v. U.S.</i> for prosecutor's obligations.	No response required.
X-5110-24	Camp, Daniel (6-28-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-51	Cavalluzzi, Maria (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-35	Clarke, Joe (6-28-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-60	Clift, Casey (7-1-16)	No	A	5-110	Fair administration of justice demands that prosecutors not be advocates for conviction but rather the keeper of fairness to those standing accused of a crime. There are many examples of where prosecutors have run afoul of this proposed rule to the detriment of society's belief that	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					our justice system is fair and just.	
X-5110-1	Corn, Catherine Irene (6-12-16)	No	NI	5-110	Urges Bar to impose stricter standards on prosecutors barring them from “scaring witnesses” and pushing hard to win cases. A person should not be prosecuted on “he said, she said” arguments.	Commenter’s concerns re “scaring witnesses” are addressed in proposed Rules 8.4(c) and (d). The standard for initiating or continuing a prosecution is objective: probable cause.
X-5110-46	Cox, Jason (7-1-16)	No	A	5-110	<p>Proposed rule appropriately requires a prosecutor to disclose evidence to the extent already required by existing law.</p> <p>Nothing in the proposed rule changes attorney existing legal duties with regard to the exchange of information.</p> <p>Prosecutorial discovery violations are frequent and widespread. It is time for California to adopt a rule of professional conduct, like every other jurisdiction, that succinctly spells a prosecutor’s duty to disclose exculpatory evidence and information to the defense.</p>	No response required.
X-5110-66	Curatola, Robert J. (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-61	D’Agustino, Elena (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
X-5110-12	Defilippis, Stephen M. (6-25-16)	No	A	5-110	<p>Recounts an instance where a prosecutor withheld evidence in a special circumstances murder case.</p> <p>Modified boilerplate comment language.</p>	No response required.
X-5110-36	Dobbyn, Gerry (6-28-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-27	Dodd, Peter (6-24-16)	No	A	5-110	<p>Doesn't understand why prosecutors haven't been sanctioned in the past under Brady.</p> <p>Boilerplate comment language.</p>	No response required.
X-5110-55	Duquette, Richard (7-2-16)	No	A	5-110	Proposed rule will promote early disclosure of evidence and help resolve cases at earliest opportunity.	No response required.
X-5110-9	Duree, John (6-25-16)	No	A	5-110	<p>Failing to disclose exculpatory evidence is a recurring cause of convictions of innocent people.</p> <p>Criminal prosecutions are not just about justice, they are about competition between lawyers.</p> <p>Prosecutors have a huge advantage and are always on the "right" side of the political dynamic. Accordingly they win a huge majority of the cases. Prosecutors have a strong personal motivation to win.</p> <p>The hiding of exculpatory evidence frequently arises.</p>	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					There is every reason to fortify the judicial and ethical admonitions against failing to disclose exculpatory evidence.	
X-5110-54	Fischer, Barbara E. (7-1-16)	No	A	5-110	In favor of proposed rule. There must be consequences for thwarting justice.	No response required.
X-5110-32	Friedman, Jennifer (6-27-16)	No	A	5-110	Proposed rule is necessary. Comments suggest that prosecutors do not understand their obligations under existing law. The proposed rule is clear and easy to follow. It is the law in every other jurisdiction. Cites a recent study that shows little discipline of prosecutors despite evidence of misconduct.	No response required.
X-5110-30	Groshan, Justin (6-25-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-65	Hamilton, Kenneth (7-1-16)	No	A	5-110	The rule is consistent with prosecutor obligations. When those obligations are breaches a defendant's fundamental liberty interests may be infringed. Discipline for such misconduct is appropriate.	No response required.
X-5110-53	Harter, John (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-64	Hendrickson, Charles (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
X-5110-34	Henneman, Krista (6-27-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-41	Horner, Robert B. (6-28-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-37	Huerta, Joan (6-29-16)	No	A	5-110	Fully agrees with proposed rule. Boilerplate comment language. ²	No response required.
X-5110-50	Jafine, Kelly (7-1-16)	No	A	5-110	There is no punishment so prosecutors withholding discovery runs rampant. This is partially because judges are afraid of and beholden to the DA's office. The only remedy is adoption of the proposed rule. It will serve to clarify the prosecutor's obligations under the law and would help curtail the limited discovery training given to prosecutors. If prosecutors actually have something to lose, they may actually comply with the law.	No response required.
X-5110-11	Karowsky, Jan David (6-25-16)	No	A	5-110	Aghast at the attitude of many prosecutors' cavalier approach to turning over discovery. Local prosecutors have been caught withholding evidence without repercussion. For years, the local DA's office had a sign which read "It's all of us against all of them." This rule assures that prosecutors will comply with the	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					law and really seek justice rather than just win at all costs.	
X-5110-15	Katz, Joseph (6-25-16)	No	A	5-110	Slightly modified boilerplate comment language. ²	No response required.
X-5110-7	Kelly, Patrick H. (6-24-16)	No	A	5-110	Agrees with proposed rule.	No response required.
X-5110-5	Klein, Keri (6-24-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-44	Kim, Jong Y. (6-30-16)	No	A	5-110	We must make prosecutors disclose any and all evidence that will exculpate a defendant in order to prevent even one single innocent person from going to jail or prison.	No response required.
X-5110-21	Krupka, Vickie Fernandes (6-27-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-6	Mandell, Steven R. (6-24-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-63	McCarthy, Paul (7-1-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-29	McNamara, Susannah (6-25-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-18	Megdal, Sarah (6-27-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-56	Moss, Gary (7-1-16)	No	A	5-110	Modified boilerplate comment language. ²	No response required.

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
X-5110-26	Muller, Barbara J. (6-24-16)	No	A	5-110	Every other jurisdiction has this rule. The rule will help ensure that prosecutors uphold their oath to seek justice.	No response required.
X-5110-59	Ogul, Michael (7-1-16)	No	A	5-110	<p>Proposed rule would encourage prosecutors to disclose exculpatory information regardless of whether it is deemed material by the prosecutor. This will help reduce the number of wrongful convictions and excessive sentences that occur each year.</p> <p>The recent modification provides innocent prosecutors with added protection from discipline.</p> <p>The concern that late disclosure of defense witnesses will make it difficult to disclose impeachment evidence is inapposite because by definition, information that impeaches a defense witness is not exculpatory.</p>	No response required.
X-5110-22	Otani, Kay (6-27-16)	No	A	5-110	<p>Proposed rule is a good start. Cites Judge Kozinski article.</p> <p>Cites an example where someone was charged based on an invalid waiver of rights and states this rule could prevent that.</p> <p>Proposed rule will help upright prosecutors make and justify good decision while helping over-zealous ones avoid mistakes.</p>	No response required.

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					It is not enough to have an abstract punishment or reversal several years down the line. Proposed rule is step toward making prosecutors realize that they are not above the law. This will prevent convicting innocent people.	
X-5110-3	Pena, Katarina (6-24-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-31	Petrosino, Sharon L. (6-27-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-19	Pai, Irene (6-27-16)	No	A	5-110	Prosecutors who care to get it right are outnumbered by those who do not. For the latter, inactivity with regard to potentially exculpatory evidence is the easiest route. This proposed rule would help with the quality of prosecutors. This rule ensures that prosecutors utilize their immense power to focus on justice rather than winning at all costs.	No response required.
X-5110-22	Public Defender, State of California, Mary K. McComb (6-27-16)	Yes	A	5-110	Supports proposed rule but addresses comments regarding comment [3] and a prosecutor's duty to provide impeachment material. The rule doesn't bear upon impeachment material regarding defense witnesses but rather prosecution witnesses. Moreover, application of the rule has not been a problem in the	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					other 49 states who have such a rule.	
X-5110-38	Ramirez, Joseph (6-28-16)	No	A	5-110	Proposed rule sorely needed. Our profession and the public's trust in criminal justice are both diminished when prosecutors do not fulfill their legal obligations.	No response required.
X-5110-67	Ruzanna (7-1-16)	No	A	5-110	When a prosecutor interferes with defendant's constitutional rights, disciplinary action is not only appropriate but is necessary.	No response required.
X-5110-16	Saban, Pathena (6-26-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-68	Sanger, Robert M. (7-1-16)	No	A	5-110	Concurs with California Attorneys for Criminal Justice. While most prosecutors honor their obligation to disclosure exculpatory material, there have been all too many exceptions. Honoring this obligation is of critical importance to the liberty and lives of the public served by the Bar in general and prosecutors in particular. Proposed rule is an appropriate and long overdue addition to the Rule of Professional Conduct.	No response required.
X-5110-20	Schweitzer, Stefan (6-27-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-62	Scofield, Robert (7-1-16)	No	A	5-110	The revised version of the proposed rule is fair and	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					appropriate.	
X-5220-62	Scofield, Robert (7-1-16)	No	A	5-220	Supports the adoption of proposed rule.	No response required.
X-5110-40	Shea, George (6-28-16)	No	A	5-110	Agrees with proposed rule.	No response required.
X-5110-58	Sheela III, Barton (7-1-16)	No	A	5-110	Proposed rule is modeled after ABA rule and there is no reason to “water down” that rule for California prosecutors.	No response required.
X-5110-69	Sklan, Jeffrey (6-24-16)	No	M	5-110	<p>Prosecutors frequently feel that pre-trial, penal code section 1054 doesn’t require them to turn over all evidence. Defense should be provided all evidence at earliest possible juncture. Commission should work with legislature to draft changes to section 1054.</p> <p>Recounts recent story where client spent a year in jail while he was waiting for information in law enforcement’s possession since arrest. Despite infuriating the bench officer, nothing was done.</p> <p>Suggests that the judiciary become mandatory reporters of prosecutors’ violations. Hasn’t seen a judge report violations in his 38 years of practice.</p> <p>Unlike sanctions exceeding \$1000 in the civil area which must be reported, there is no</p>	<p>Making recommendations for amendments to Penal Code section 1054 is beyond the purview of the Commission’s charter. However, the California Supreme Court has interpreted the scope of section 1054.1 to require the disclosure of all exculpatory material, whether or not material. See <i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890, 901.</p> <p>Similarly, the Commission is not assigned to recommend rules governing the conduct of judges, which is governed by the California Code of Judicial Ethics.</p>

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					counterpart for prosecutors. If there is no consequence, it would be naïve to expect change.	
X-5110-23	Spicer, Adam (6-28-16)	No	A	5-110	Boilerplate comment language. ² Thinks we need this proposed rule at once.	No response required.
X-5110-45	State Bar of California, Office of Chief Trial Counsel, Gregory Dresser (6-27-16)	Yes	M	5-110	<p>Reiterates previous comments on proposed rule.</p> <p>Proposal published by Board of Trustees tracks ABA Rule 3.8 and is consistent with California law.</p> <p>1. Wants the rule to specify when a prosecutor must make efforts to ensure that someone has been advised of his or her right to counsel. Suggests that “timeliness” addressed in the discussion section should be addressed in the text of the rule.</p> <p>2. Recommends that the text of the rule explain that a prosecutor’s duty to disclose is broader than the Brady materiality standard. The text should also address whether it includes impeachment materials.</p>	<p>1. Concerning timeliness, the Commission has recommended adoption of the ABA Model Rule text language, as clarified by Comment [3]. The Commission believes that this approach provides the greatest flexibility in applying the rule to a particular set of circumstances.</p> <p>2. Concerning the recommendation that the rule text expressly state that the duty is broader than the material standard of <i>Brady</i>, there is nothing in the rule that suggests the duty is coextensive with Brady. The</p>

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					3. The “know or reasonably should know” standard does not address a prosecutor’s duty to search for exculpatory evidence or whether violation is based upon recklessness, gross negligence, or willful blindness.	<p>comment <i>clarifies</i> that the duty is broader than Brady; clarifying a rule is a proper function of a comment. Further, the Commission believes that incorporating the ABA rule text is important in furthering a national standard as charged in the Commission’s Charter.</p> <p>3. The rule does not impose a duty to search for exculpatory evidence. First, there are two knowledge standards in proposed paragraph (D). The Commission made this change after the first round of public comment revealed confusion as to what the prosecutor must have knowledge of.</p> <p>The “known” standard in paragraph (D) refers to the prosecutor’s knowledge of the <i>existence</i> of the evidence or information. That is an actual knowledge standard. Under the Model Rules, “a person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have</p>

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
						<p>been obvious given the surrounding circumstances.</p> <p>On the other hand, the “knows or reasonably should know” standard, which is also objective, applies to the prosecutor’s knowledge of <i>legal effect</i> of the <i>known</i> information or evidence. Neither standard imposes on prosecutors a blanket duty without more to search for exculpatory evidence or information.</p>
X-5110-42	State Bar of California, Standing Committee on Professional Responsibility and Conduct, Merri A. Baldwin (6-29-16)	Yes	A	5-110	Supports the adoption of proposed rule.	No response required.
X-5110-52	Swanson, David (7-1-16)	No	A	5-110	<p>Recounts story where prosecutor failed to turn over evidence. Until there is some penalty, this will not change.</p> <p>Boilerplate comment language.²</p>	No response required.
X-5110-13	Szocs, Steven L. (6-25-16)	No	A	5-110	<p>It’s time for CA to hold prosecutors accountable for their actions.</p> <p>Recounts two personal examples where prosecutors have failed to turn over known evidence and states that these examples seriously undermine the public’s confidence in the fairness of our</p>	No response required.

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Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					judicial system.	
X-5110-47	Theiss, Sara (6-30-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-49	United States Department of Justice, multiple signatories (7-1-16)	Yes	D	5-110	<p>1. Urges the Commission to reconsider proposed rule's "knowledge" requirement as it threatens to subject earnest prosecutors to discipline even for honest, understandable, or minor mistakes. Because some of the proposed rule's terms are undefined, the rule could snare even a scrupulous prosecutor by failing to provide clear notice of the expected standard. Proposed discipline only under a willful or intentional standard.</p>	<p>1. The Commission believes that the two knowledge standards in paragraph (D) are appropriate and provide the proper balancing of interests – the disclosure of exculpatory information possessed by the prosecutor to the defense and the protection of prosecutors who attempt to comply with that obligation – by applying different knowledge standards. Neither standard should be viewed as a "negligence" standard that will result in discipline for simple negligence. The Commission made this change after the first round of public comment revealed confusion as to what the prosecutor must have knowledge of.</p> <p>The "known" standard in paragraph (D) refers to the prosecutor's knowledge of the <i>existence</i> of the evidence or information. That is an actual knowledge standard. Under the Model Rules, "a person's knowledge may be inferred from circumstances." By</p>

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					<p>2. Reiterates position address in February 24, 2016, letter. First, that the rule should reflect that federal prosecutors are held to a different legal standard than California prosecutors. Second, that there are undefined terms in the proposed rule that are ambiguous. Third, imposing greater disclosure requirements on federal prosecutors will chill witness cooperation, be used as a tactical weapon, and require federal prosecutors to seek relief from over-burdened federal</p>	<p>providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.</p> <p>On the other hand, the “knows or reasonably should know” standard, which is also objective, applies to the prosecutor’s knowledge of <i>legal effect</i> of the <i>known</i> information or evidence. Neither standard is intended to impose on prosecutors a blanket duty without more to search for exculpatory evidence or information.</p> <p>2. The Commission considered each of the concerns expressed in the commenter’s February 24, 2016 letter during its consideration of the first round of public comment and declined to implement any of the suggested changes. The Commission believes that its previous positions continue to be correct.</p>

Attachment A-1

Appendix 11: Synopsis Charts of Public Comment Received on Proposed Rules 5-110 and 5-220

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Rule	Comment	RRC Response
					courts to avoid discipline. Fourth, the proposed rule will not eliminate unnecessary differences between California and the preponderance of the states. Fifth, there is no empirical data of “epidemic” Brady violations. Sixth, 5-110(G) ignores the practical reality that prosecutors who are unfamiliar with a case will be unable to assess evidence relating to whether a convicted defendant did not commit the offense. Finally, proposed alternative versions of (G) and (H) address the limited investigatory authority that prosecutors have post-conviction.	
X-5110-8	Vegas, Kim (6-25-16)	No	A	5-110	Boilerplate comment language. ²	No response required.
X-5110-33	Zernich, Robert J. (6-27-16)	No	A	5-110	States that home county has adequate and timely discovery but understands that this isn't the case in the rest of the state.	No response required.

Attachment A-1

TOTAL = 1	A = 1
	D = 0
	M = 0
	NI = 0

**Proposed Rule 5-220 Suppression of Evidence
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Rule	Comment	RRC Response
X-5220-40	Shea, George (6-28-16)	No	A	5-220	Agrees with proposed rule.	No response required.

Attachment A-2

Written Submissions from Public Hearing Speakers Who
Testified at February 3, 2016 Public Hearing Concerning
Proposed Rules 5-110 & 5-2201

Transcript of Public Hearing on the Revision of the Rules of Professional
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Attachment A-2

Written Submissions from Public Hearing Speakers Who
Testified at February 3, 2016 Public Hearing Concerning
Proposed Rules 5-110 & 5-220

Attachment A-2

Attachment A-2
Written Submissions from Public Hearing Speakers Who Testified at
February 3, 2016 Public Hearing Concerning Proposed Rules 5-110 & 5-220

Robert Belshaw

1. “Testimony Summary of Robert Doran Belshaw, Bar No. 107661, before State Bar of California Rules Revision Committee, Wednesday, February 3, 2016, 845 S. Figueroa Street, Los Angeles”
2. Exhibits 1 - 11, Various excerpts from court transcripts concerning case against Mr. Belshaw, and correspondence between Mr. Belshaw and Edi Faal, Esq. (2/14/06); Thomas Hsieh, Deputy Attorney General, Los Angeles and Steven Cooley, Los Angeles County District Attorney (11/1/07); Irene Wakabayashi, Deputy District Attorney, Los Angeles County District Attorney (11/13/07); and Russell Bradford, Document Examiner, Bradford Document Examinations (1/24/05).

Jose Castenada

1. Supreme Court Order S221442 concerning disbarment of attorney Jack Kenneth Conway (*In re Jack Kenneth Conway*) (11/20/14)
2. Table showing court cases submitted and assigned to Judge Holly Kendig (11/01/11) and Judge Hickok (12/09/11)

Richard Falk

1. Book entitled “The Prosecutor in Transnational Perspective,” by Erik Luna and Marianne L. Wade, New York: Oxford University Press, 2012
2. Excerpt from the Code for Crown Prosecutors, Selection of Charges, §§6.1 – 6.5
3. Article entitled “Plea Bargaining and the Innocent: It’s up to the judges to restore balance.” (source unknown)
4. Excerpt from article entitled “Incompetent Plea Bargaining and Extrajudicial Reforms,” by Stephanos Bibas, 2012, The Supreme Court – Comments
5. Excerpt from article entitled “The Unexonerated: Factually Innocent Defendants Who Plead Guilty,” by John H. Blume (Cornell Law School) and Rebecca K. Helm (Cornell University), 2014, Cornell Law Faculty Working Papers
6. Excerpt from article entitled “Why Should Prosecutors ‘Seek Justice?’,” by Bruce A. Green, 1998, Fordham Urban Law Journal

Attachment A-2

7. Copy of webpage from U.S. Department of Justice, Federal Bureau of Investigation (FBI), Criminal Justice Information Services Division, entitled “Crime in the United States 2012, Uniform Crime Reports” concerning Clearances
8. Web post concerning wrongful convictions and the case of Brian Banks (source unknown)
9. Web post titled “Ira Glass: My 11 favorite episodes of ‘This American Life’” reporting on a study by Florida Institute of Technology concerning the psychology of pleading guilty when innocent

Royal Glaude

1. Excerpt from California Rules of Professional Conduct containing text of Rule 5-110: Performing the Duty of Member in Government Service;
2. Excerpt from Rule 5-200 of the Rules of Professional Conduct
3. Excerpt from Proposed Rule 5-110: Special Responsibilities of a Prosecutor (10/23/15)
4. Excerpt from webpage concerning Nuremberg War Trials entitled “The Ministries Cases (The Nazi Judges Cases)” (2/2/16)
5. California Constitution, Article 1, Declaration of Rights
6. 14th Amendment to the United States Constitution
7. Cornell University Law School webpage re 18 U.S. Code §242 – Deprivation of rights under color of law
8. Letter dated July 6, 2015 from Robert Fellmeth, Executive Director, Center for Public Interest Law, University of San Diego School of Law, to Hon. Mark Stone, Chair, Assembly Judiciary Committee re SB 387 (Jackson) re State Bar Discipline System

Prof. Laurie Levenson

1. Letter dated 2/1/16 signed by 100 former state and federal prosecutors in support of proposed Rule 5-110, Alt. 1.

NOTE: These documents were submitted in connection with the testimony provided by these speakers at the February 3, 2016 public hearing, and are available upon request by contacting Lauren McCurdy, State Bar of California, Office of Professional Competence, San Francisco, CA 94105, lauren.mccurdy@calbar.ca.gov, or 415-538-2107.

**Transcript of Public Hearing on the Revision of the Rules of
Professional Conduct - February 3, 2016**

Attachment A-2

Attachment A-2

1 STATE BAR COURT
2 OF THE STATE OF CALIFORNIA
3
4 PUBLIC HEARING ON THE REVISION
5 OF THE RULES OF PROFESSIONAL CONDUCT
6
7 STATE BAR OF CALIFORNIA
8 845 SOUTH FIGUEROA STREET
9 LOS ANGELES, CALIFORNIA 90017
10 WEDNESDAY, FEBRUARY 3, 2016
11 APPEARANCES:
12 Panel Members:
13 JUSTICE LEE EDMON, Chairperson
14 GEORGE CARDONA
15 JUDGE KAREN CLOPTON
16 KEVIN MOHR
17 TOBY ROTHSCHILD
18 JOAN CROKER
19 Speakers:
20 Bob Kehr, Tobi Inlender, Jason Lee, Randall Difuntorum
21
22 Proceedings recorded by digital recorder; transcript
23 produced by:
24 Briggs Reporting Company, Inc.
25 4455 Morena Boulevard
Suite 104
San Diego, California 92117
(310) 410-4151

Attachment A-2

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P R O C E E D I N G S

(10:00 a.m.)

MS. EDMON: All right. Good morning. It is about 10:00 a.m. on Wednesday, February 3, 2016, and we are here for a public hearing of the State Bar of California to receive testimony on proposed amendments to the Rules of Professional Conduct.

My name is Justice Lee Edmon, and I serve as chair of the State Bar's Commission for the Revision of the Rules of Professional Conduct.

The Rules of Professional Conduct are professional responsibility standards, the violation of which will subject an attorney to discipline. Pursuant to statute, Business and Professions Code Section 6077, the State Bar of California is charged with the responsibility of developing and adopting amendments to the rules for approval by the California Supreme Court. Amendments to the Rules of Professional Conduct do not become binding unless and until they are approved by the Supreme Court.

The State Bar staff has caused notice of this hearing to be issued by several methods, including a posting at the State Bar web site, the California Bar Journal, e-mail notifications to interested persons, a news release to the media and social media posts.

This proceeding in being audio recorded and

1 transcribed by a certified court reporter. Please speak
2 clearly and state your name when you are recognized and
3 called to testify. And if there are any intervening
4 speakers, we ask that you re-state your name, so that your
5 comments can be properly attributed.

6 This proceeding is accessible by teleconference
7 and by a video-conference link to the San Francisco Office
8 of the State Bar. Testimony may be offered by using any of
9 these systems. This public hearing has been authorized by
10 the Board of Trustees, which oversees the work of the
11 Commission, and the transcript of this public hearing will
12 be made available to the members of the Board.

13 If there is anyone here in Los Angeles or
14 attending in San Francisco, or connected by teleconference
15 who has not signed in, or otherwise informed Bar staff today
16 about an intent to speak, then I ask that you express your
17 intent now or sign in now with a Bar staff before we call
18 for the first speaker.

19 If you are here in Los Angeles and have any
20 written materials that previously have not been submitted,
21 please give them now to Lauren McCurdy of the State Bar
22 staff. She's standing right there in the doorway. If you
23 are in San Francisco, then please give them to the Bar staff
24 at that office.

25 If you are participating by teleconference, then

1 please e-mail any such materials to
2 Angela.marlaud@calbar.ca.gov. Let me spell that out for you.
3 Angela, A-N-G-E-L-A dot Marlod, M, as in Mary, A-R-L-A-U-D,
4 at calbar, C-A-L-B-A-R, dot C-A, dot gov, G-O-V. Or fax
5 them to Ms. Marlaud at 415-538-2171. I'll repeat that
6 number, 415-538-2171.

7 Supporting written materials will become a part of
8 the public record of this proceeding. In addition to this
9 public hearing, a 90-day period to receive written public
10 comment on the proposed rules has been authorized by the
11 Board, and the deadline for submission of written public
12 comment is February 29, 2016.

13 I'm going to take a moment just to introduce the
14 Commission members who are on the panel here in the dais
15 with me. To my far left is George Cardona. Next to George
16 is Judge Karen Clapton. To my right is Professor Kevin
17 Mohr. To his right is Toby Rothschild. And, finally, at
18 our far right is Joan Croker.

19 I'm going to ask that you limit your remarks to no
20 more than 10 minutes. We will have somebody be timing you
21 and we'll give you a heads-up as you start to get close to
22 your time limit.

23 And on that note, I'm going to ask Lauren, if you
24 would, please, to call our first speaker.

25 MS. MCCURDY: Okay. And the first speaker is

1 Laura Duffy.

2 MS. DUFFY: Good morning.

3 MS. EDMON: Good morning.

4 MS. DUFFY: As introduced, my name is Laura Duffy.

5 I am the United States Attorney for the Southern District of
6 California. I've been the United States Attorney since
7 2010, however, I've been a federal prosecutor since 1993.

8 I'm appearing before you this morning on behalf of
9 the four California United States Attorneys. Our offices
10 together employ over 400 federal criminal prosecutors. And
11 I mention that because proposed Rule 5-110(b) would impact
12 not only those federal prosecutors, but also other
13 department of justice prosecutors who litigate in
14 California, as well as the cases that they litigate.

15 Most of the discussion that I've seen and I think
16 that this will have on the merits of proposed Rule 5-110(d)
17 really has focused on the effects that the rule would have
18 on California state prosecutors, and the possible interplay
19 between that rule, between that rule and state law and state
20 cases. What I want to do today is add to that discussion
21 and explain what impact and effect it would have on federal
22 prosecutors and federal prosecutions.

23 Having considered the proposed rule, as well as
24 the alternate two version to the rule, the California United
25 States Attorneys endorse the alternate version. We believe

1 that it presents a more appropriate disciplinary standard
2 for all prosecutors because it accounts for the differences
3 between state and federal discovery law.

4 I want to start off by saying that the United
5 States Department of Justice takes very seriously its
6 discovery obligations, as it does its charge that
7 convictions not be won but that justice is done. And we
8 very strongly support efforts to ensure compliance with
9 discovery obligations. In fact, the Department has taken
10 many of those steps itself. Department policy's already
11 required by the prosecutors to go well beyond what is
12 required by federal discovery law, by Brady and its progeny.

13 Those policies require our prosecutors to disclose
14 anything that is inconsistent with any element of any crime
15 charged against a defendant. Those policies also require
16 our prosecutors to disclosure anything that establishes a
17 recognized affirmative defense.

18 Our policies require the disclosure of anything
19 that might cast substantial doubt on the accuracy of our
20 evidence, or that might have a significant bearing on the
21 admissibility of prosecution evidence. And these policies
22 state that in ordinary circumstances, information should be
23 disclosed regardless of materiality. These policies are not
24 identical to the proposed Rule 5-110(b), but the thrust is
25 similar.

1 Prosecutors shouldn't think in terms of
2 materiality. They should think more broadly. And the
3 Department has adopted these policies to promote our core
4 mission, which is to seek justice. And also, an important
5 part of these policies is they create a buffer. A buffer to
6 build a margin of error between our discovery practices and
7 the demands of federal discovery law, so that we can help
8 reduce the chances that any one federal case crosses over
9 that legal threshold.

10 Our concern then really is not with the broad
11 concepts behind proposed Rule 5-110(d), rather we are
12 troubled by the implementation of those concepts through the
13 application of the proposed disciplinary rule. And we think
14 it's problematic for several reasons, and there are four
15 reasons that I would like to discuss this morning.

16 First, federal discovery rules are set forth in
17 part through the Federal Rules of Criminal Procedure. A
18 committee of judges and professors, representatives from the
19 defense bar, and representatives from DOJ continually review
20 and propose amendments to those rules. And then they
21 propose those to the United States Supreme Court for
22 adoption.

23 That committee has considered repeated proposals
24 to amend the federal rules to impose discovery obligations
25 consistent with those that are proposed by your 5-110(d),

1 which does not have a materiality requirement, though the
2 committee has repeatedly rejected those proposals. So what
3 we have then is Rule 5-110(d), in effect doing what the
4 federal system itself has declined repeatedly to do. And I
5 will discuss more in a moment, but this also threatens to
6 dramatically --

7 (Phone-in caller coming in over phone.)

8 MS. DUFFY: -- it threatens to --

9 MS. EDMON: If those of you on the phone would
10 please mute your phones until we call on you, it will be
11 most appreciated.

12 MS. DUFFY: -- it threatens to dramatically impact
13 federal discovery law practice. And we would submit that,
14 respectfully, that type of a change should emanate from
15 Congress and should emanate from the federal courts. The
16 alternate version of the Rule accounts for developments
17 between state and federal law. The proposed Rule, as
18 written, does not.

19 The second point that I want to make is that Rule
20 5-110(d) will affect prosecutors differently than it will
21 affect state prosecutors -- federal prosecutors differently
22 than it will affect state prosecutors, if what the
23 California Public Defenders Association, the California
24 Attorneys for Criminal Justice, and the Innocence Project
25 say about California law, particularly discovery law, is

1 true.

2 They say that California law already requires
3 state prosecutors to disclose exculpatory information
4 consistent with 5-110(d), that is, without regard to
5 materiality. And if that's true, the proposed rule
6 essentially requires state prosecutors to no more than they
7 are currently required to do under law and policy. Federal
8 law though has no such requirement and has retained the
9 materiality standard.

10 Federal prosecutors then will be faced with
11 conflicting masters, which weighs as an additional concern
12 that I want to discuss, but it is another reason why the
13 California United States Attorneys believe that alternate
14 two to the Rule is a better construction of the Rule.

15 The introductory language, the introductory clause
16 in alternate two, which would require state prosecutors and
17 federal prosecutors to comply with their obligations to
18 disclose exculpatory evidence under existing law
19 maintains --

20 (Music playing in background.)

21 MS. DUFFY: It's okay. I'm -- I've got a first
22 grader. I'm used to like dealing with --

23 MS. EDMON: Thank you.

24 MS. DUFFY: It maintains the state prosecutor's
25 duty to disclose without regard to materiality, which is

1 what's been represented under California law. But it avoids
2 creating a conflict between the rule and federal discovery
3 law, which will uniquely in fact impact federal prosecutors.

4 The third point that I wanted to make is, the
5 Department of Justice, certainly all of the United States
6 Attorneys in California, understand and embrace that federal
7 -- that all prosecutors have a unique, different, higher
8 duty and responsibilities than other lawyers do.

9 However, incorporating this higher standard into a
10 rule of professional conduct really means that federal
11 prosecutors can be personally disciplined for discovery
12 violations even when they have completely and fully complied
13 with every word of federal discovery law.

14 And this is because under the language of the
15 proposed rule, prosecutors who fail to disclose non-material
16 information that they don't believe would tend to negate
17 guilt, might be disciplined if a disciplinary counsel viewed
18 the evidence differently than the prosecutor him or herself
19 and the federal judge who was involved in her litigation.

20 Additionally, defendants and their counsel may
21 threaten to seek personal sanctions against prosecutors
22 during litigation if a particular discovery request was not
23 fulfilled. Some say that this is not the intent of 5-
24 110(d), but the law -- or, excuse me, the rule as written
25 would allow for that.

1 And we recognize that there have been assurances
2 made, that there's no intent to use the rule in this way.
3 But those assurances don't provide us much comfort because,
4 I think we all have experienced instances in which rules and
5 other tools are used in ways that they were not intended to
6 be used.

7 MS. MCCURDY: Excuse me, Ms. Duffy. We're coming
8 up on a minute out --

9 MS. DUFFY: Okay.

10 MS. MCCURDY: -- right about now.

11 MS. DUFFY: The last point that I wanted to make
12 is that I think an accurate assessment of the proposed rule
13 has to acknowledge that as a practical matter, the rule will
14 effectively change and create a new federal discovery model,
15 one that expands a current federal discovery practice, and
16 one that adds a new arm of enforcement.

17 As far as expansion, one that expands what will be
18 produced -- what will be sought to be produced in discovery
19 by defendants, regardless of its true exculpatory value, and
20 rejecting the materiality analysis by using phrases like,
21 tends to negate and mitigates.

22 The proposed rule essentially have few, if any,
23 boundaries, and because the meaning of those terms are
24 unclear, they're going to have to be applied in the context
25 of the facts of any particular case. And absent case law,

1 or absent guidance to do that, to define the scope of those
2 terms, we -- this creates concern about whether prosecutors
3 will face the prospect of misconduct allegation for failing
4 to guess correctly what the extent of the rule is.

5 And because prosecutors may face personal
6 consequences, I think what they may tend to do, is to turn
7 over information that's not required under federal law and,
8 thus, might jeopardize turning over things that impact the
9 safety or the privacy concerns of witnesses.

10 Second, the Bar as an enforcement arm, I think we
11 can all agree that the purpose of conduct rules should be to
12 enhance the, and to build and enhance the trust the people
13 have in lawyers and our profession, and the outcome of our
14 justice system. But other courts who have considered this
15 issue have observed that it is inappropriate for federal --
16 for, excuse me, for prosecutors to be held to different
17 standards than they would be -- ethical standards and
18 substantive law standards. And that conclusion makes sense.

19 Imagine, if you will, an athlete who is trying to
20 reconcile conflicting rules by two different sets of
21 referees on the playing field. Essentially, that is what 5-
22 110 does to federal prosecutors. In every case it inserts a
23 second set of referees, the federal bar, employing different
24 rules from the federal courts that are attorneys are
25 practicing before, to enforce our discovery obligations. It

1 doesn't make sense to have two different sets of referees on
2 the same playing field.

3 Formally, I'll be making additional points in our
4 letter, and as my colleague, Deputy Director of the
5 Professional Responsibilities Advisory Office, Stacy Ludwig,
6 is going to pick up from here. We believe, alternative two
7 is the better construction of the rule, however, if the
8 Commission is inclined not to adopt or re-review alternate
9 two, we would ask that a mens rea requirement be added to
10 the proposed rule.

11 For example, one that would impose discipline only
12 if a prosecutor willfully and intentionally failed to
13 disclose exculpatory information, or one that precluded
14 discipline if, in a prosecutor's good-faith analysis, they
15 saw information falling outside the rule.

16 Thank you very much for your time. I appreciate
17 it.

18 MS. MCCURDY: Hello. In San Francisco, do we have
19 any speakers?

20 MS. HARRIS: Yes.

21 UNIDENTIFIED SPEAKER: Nobody's here yet, but I
22 know people are aware and wanted -- indicated that they
23 will be here but they have not shown up yet.

24 MS. MCCURDY: Okay. We're going to turn to the
25 telephone line. First, if those who are on the telephone

1 and intend to speak could identify yourselves, and then I
2 will call one of you.

3 Go ahead.

4 MR. ZAHNER: Hi --

5 MS. HARRIS: Hi.

6 MR. ZAHNER: Go ahead.

7 MS. HARRIS: Danielle Harris.

8 MS. MCCURDY: Danielle Harris. Go ahead.

9 MS. HARRIS: Yes.

10 MS. MCCURDY: Next?

11 MR. ZAHNER: Mark Zahner.

12 MS. MCCURDY: Okay. Next. Is that it? No one
13 else on the telephone? Okay.

14 With that, I'm going to turn --

15 MR. HERNANDEZ: Ignacio Hernandez.

16 MS. MCCURDY: Okay. Sorry. Can you say your
17 first name again?

18 MR. HERNANDEZ: Ignacio.

19 MS. MCCURDY: Okay. Thank you.

20 Okay. We are going to call Danielle Harris.
21 Please go ahead and speak.

22 MS. HARRIS: Thank you. My name, as I said, is
23 Danielle Harris. Thank you for the opportunity to speak to
24 the proposed amendments to Rule 5-110.

25 I fully support the proposed revision to 5-110(d),

1 and urge its adoption at the soonest possible time. I
2 cannot, however, support the amendment in 5-110(a), and urge
3 a return to the original language.

4 I am a Deputy Public Defender and one of two
5 managing attorneys for the felony unit of the San Francisco
6 Public Defender's Office. I have been trying criminal cases
7 in San Francisco Superior Court since 1999. I continue to
8 do so, and now also co-supervise a group of 36 felony trial
9 lawyers as well.

10 The State Bar should approve the proposed Rule 5-
11 110(d) as recommended because it clearly explains the duty
12 of prosecutors to disclose all exculpatory evidence as
13 California statute and decisional law requires.

14 My personal experience is that state discovery
15 violations are rampant, as Justice Kozinski has now famously
16 said, prosecutors will, quote, "keeping doing it because
17 they have state judges who are willing to look the other
18 way," unquote.

19 Until the courts start routinely reporting
20 prosecutors for discovery violations, the Rules of
21 Professional Responsibility are of admittedly limited use.
22 But a rule which clearly and accurately states the
23 prosecution's duty is the least we can do.

24 The California Supreme Court made the state's
25 discovery obligation plain in its 2010 Barnett decision.

1 The court stated Penal Code Section 1054.1(e), "requires a
2 prosecution to disclose any exculpatory evidence, not just
3 material exculpatory evidence."

4 If there was an ambiguity about the statement in
5 Barnett, it was eliminated in last year's People v. Cordova,
6 quote:

7 "California reciprocal discovery
8 statute requires the prosecution to
9 provide discovery of any exculpatory
10 evidence. This provision requires the
11 prosecution to provide all exculpatory
12 evidence, not just evidence that is
13 material under Brady and its progeny,"
14 unquote.

15 The proposed amendment to Rule 5-110(d) simply
16 catches the rules up to the existing state of the law.
17 Despite these repeated directments, the discovery violations
18 continue. A colleague of mine, one of the attorneys I've
19 supervised, just tried a three-strikes case in which the
20 prosecution failed to disclose that an incriminating
21 fingerprint was run through the state database and did not
22 match her client.

23 Another colleague last year tried a felony battery
24 and resisting police case, where the prosecution failed to
25 disclose that the alleged victim/officer had been recently

1 disciplined for using excessive force. In the last two of
2 four cases I have personally tried, I have had my request
3 for late discovery jury instructions granted.

4 Further, my years in the trial courts have taught
5 me that the prosecutors are not good at judging what is
6 material. Time and time again we see juries strenuously
7 disagreeing with the prosecution's opinion about the
8 significance of certain evidence shown clearly by acquittals
9 and convictions or severely reduced charges. Just one case
10 example shows as much.

11 I've represented David in a street robbery case.
12 There were three eye witnesses, the victim and two
13 bystanders. One bystander followed the thief and saw him go
14 into a building. A few minutes later he saw David emerge
15 and the police then stopped David, as a bystander's behest,
16 finding on David the stolen laptop. But both the victim and
17 the other bystander told police that David was not the
18 thief.

19 Despite the fact that two out of three eye
20 witnesses exonerated David of the robbery, the state
21 insisted on prosecuting and would only settle if David pled
22 guilty to robbery for a five-year prison sentence.

23 We went to trial, and David, without testifying,
24 thus, on the strength of the two eye witnesses, was
25 acquitted. Apparently the DA's office did not think that

1 the testimony of two exonerating witnesses was material.
2 That it would affect the outcome of the case. The jury
3 obviously disagreed.

4 As the Court of Appeal said just recently in
5 Lewis, quote:

6 "We think it worth reminding
7 prosecutors that their criminal
8 discovery obligations are broader than
9 their Brady obligations. And that the
10 People's interest is not to win
11 convictions, but instead to ensure that
12 justice is done."

13 The proposed Rule 5-110(d) will serve as another
14 such reminder and help to ensure that juries hear all
15 significant evidence as determined by the court, not solely
16 by the prosecution. If prosecutors are to set justice as
17 the goal, the rule should be about adopted.

18 I will turn now to the proposed Rule 5-110(a).
19 The proposed revision in (a) should be rejected as it
20 substitutes a subjective standard for an objective one. The
21 current version of the Rule reads:

22 "A member in government service
23 shall not institute or cause to be
24 instituted criminal charges when the
25 member knows or should know that the

1 charges are not supported by probable
2 cause.

3 If after the institution of
4 criminal charges, the member in
5 government service having responsibility
6 for prosecuting the charges becomes
7 aware that those charges are not
8 supported by probable cause, the member
9 shall promptly so advise the court in
10 which the criminal matter is pending."

11 The revised version makes two substantive changes.
12 It eliminates the phrase, "or should know." It changes,
13 "knows or should know," to read simply, "knows." And
14 second, it removes any kind of temporal reporting
15 requirement. Both changes should be rejected in favor of
16 the existing rule.

17 The individual prosecutor must be held to the
18 standard of a reasonable prosecutor. Maintaining the
19 existing knows or should know language ensures as much.
20 Knows or reasonably should know would do the same. Both
21 standards are used throughout the Rules of Professional
22 Conduct.

23 For example, knows or should know is used to
24 define member obligations in Rule 3-410, 5-210, 3-200 and 3-
25 700. Knows or reasonably should know is used in Rule 1-311,

1 3-310, 5-120. So the State Bar Court has said that, quote,
2 "an attorney simply may not adopt ostrich-like behavior to
3 avoid his or her professional responsibilities." The
4 revised rule can be interpreted to allow as much.

5 A prosecutor has a duty to seek, maintain and
6 absorb information needed to be well-informed about cases.
7 A prosecutor who fails to do so may act willfully or
8 negligently. Neither can be sanctioned. But this is
9 especially true given that the probable cause standard is so
10 much lower than the criminal trial standard. It could
11 indeed be credibly argued that a prosecutor should not be
12 permitted to proceed to trial unless there is a reasonable
13 belief and proof beyond a reasonable doubt.

14 That the model rules that knowledge can be
15 inferred from the circumstances does not solve the problem.
16 A negligent prosecutor could fail to do the work required to
17 have an adequate level of knowledge about a case. That
18 prosecutor would not know the case, and his knowledge could
19 not be inferred from the circumstances without reference to
20 a reasonable prosecutor standard.

21 MS. EDMON: Ms. Harris, you have one more minute.

22 MS. HARRIS: As it stands, the currently language,
23 utilizing the knows or should know language makes clear that
24 a prosecutor must act as a reasonable prosecutor should.
25 And the requirement of prompt reporting when probable cause

1 does not exist makes clear that the state has a duty to act
2 quickly to ensure that no one faces criminal charges when
3 probable cause is lacking. The proposed revision of Rule 5-
4 110(a) waters down an already minimal obligation, and should
5 be rejected.

6 In conclusion, as this federal and state appellate
7 court see it repeatedly necessary to remind prosecutors of
8 their role in the system, the State Bar should do its part
9 by adopted a clear rule, holding the prosecution to its
10 discovery obligation. The proposed Rule 5-110(d) says
11 exactly that and should be adopted.

12 Conversely, the current version of Rule 5-110(a)
13 holds prosecutors to the standard of a minimally reasonable
14 prosecutor and requires action without delay when a charged
15 case is not supported by probable cause. These minimal
16 obligations should not be tempered, and the proposed
17 revision of Rule 5-110(a) should be rejected. Thank you.

18 MS. EDMON: All right. Thank you very much.

19 If I could ask, please, the folks on the
20 telephone, if we could ask you to moot -- mute your phones.
21 We are getting some feedback in the sound, so that it makes
22 it difficult to hear. So if you could mute until we call
23 you, that would be very helpful.

24 I'm going to take the prerogative here of the
25 chair just for a moment to acknowledge some additional

1 Commission members who are in the audience. We have with us
2 Bob Kehr (phonetic), with Tobi Inlender (phonetic) who is
3 our public member. We also have with us Jason Lee
4 (phonetic), who is our liaison to the Board of Trustees.
5 And finally, Randy Difuntorum, who is the Director of the
6 Office of Professional Competence at the State Bar, and he
7 is the lead staff for the Commission. So thank you all very
8 much for being here as well.

9 On that note, Lauren.

10 MS. MCCURDY: Okay. We're going to go ahead and
11 turn to San Francisco because that registrant is here. And
12 so, go ahead, Richard Falk (phonetic).

13 MR. FALK: Okay. I'm involved in -- I'm here to
14 comment on proposing a new rule for prosecutors. And it's
15 based on the code for the Crown Prosecutors in the case. In
16 their system it's 6.3 that says:

17 "Prosecutors should never go ahead
18 with more charges than are necessary
19 just to encourage a defendant to plead
20 guilty to a few."

21 The same way, they should never go ahead with a
22 mysterious charge just to encourage a defendant to plead
23 guilty to a less serious one.

24 The purpose of that rule, and I'm proposing that
25 rule to be incorporated into our system, is primarily the

1 problems with the plea bargaining process. There are dozens
2 if not hundreds of papers on the plea bargaining process and
3 the problems with it. And I have listed just a few of them,
4 and I want to just read a few statements from some of them,
5 just to get some flavor of aptitude supporting why the rule
6 would be important.

7 One is from Judge Rakoff that wrote:

8 "The drama inherent is regularly
9 portrayed in movies and television
10 programs as an open battle played out in
11 public before a judge and jury..."
12 In other words, trial.

13 "...but this is all a mirage. In
14 actuality, our criminal justice system
15 is almost exclusively a system of plea
16 bargaining, negotiated behind closed
17 doors and with no judicial oversight.
18 The outcome is very largely determined
19 by the prosecutor alone."

20 There are in, of course, some of the papers,
21 there's one called, "Incompetent Plea Bargaining and
22 Extrajudicial Reforms" by Stephos Bibas. And in there, it's
23 just a short quote, but:

24 "Today grand juries are rubber
25 stamped. The chief juries are absent in

1 most cases, and prosecutors use
2 mandatory and minimum -- mandatory
3 minimum and maximum sentences to try to
4 scam. Charging is now convicting, which
5 is sentencing. Plea bargaining itself
6 has undermined these checks and
7 balances, and judges need to use their
8 remedial powers to restore some
9 semblance of balance, however
10 imperfect."

11 Another paper, (indiscernible), we can have
12 defendants who plead guilty, by John Blume and Rebecca Helm
13 from Cornell Law School University. Just one sentence I
14 want to quote:

15 "In today's plea-driven market,
16 prosecutors have incentives to
17 overcharge in order to start bidding, so
18 to speak."

19 Let's see. There were studies done for what
20 happens in a plea bargaining process. There was a study
21 that Etchings (phonetic) and Durbin (phonetic) had set up at
22 -- I'm not sure which university it was. But they had
23 college students enrolled in a logic study.

24 If a student admitted that they cheated, they
25 would lose their promised compensation for participating in

1 the study. If they didn't admit, and an academic review
2 board found them guilty, they'd not only lose their
3 compensation but their faculty advisor would be informed,
4 and they'd be enrolled in mandatory ethics course.

5 The first setting, over half, 56.4-percent of the
6 students were wrongfully accused of cheating chose to plead
7 guilty. So -- because part of the difficulty is, after-the-
8 fact it's difficult to discover the true number of innocent
9 people that have been, you know, plead guilty, unless
10 there's evidence clearing undoubtedly nothing -- you know,
11 something unusual. So these studies that there doesn't seem
12 (indiscernible).

13 Another paper, Why Should Prosecutors "Seek
14 Justice"?, from Bruce Green. I think this is the one that's
15 historical -- yeah. This one is -- so what I did is I
16 looked back in history to find out when did things start
17 getting, you know, turning to be more of a problem.

18 And this paper was from 1998, and it wasn't as bad
19 then, apparently, because the characteristic of plea
20 bargaining in the system was such where many prosecutors
21 took pride in the balance of the role that they had and the
22 power that they had. And in seeking justice, which, of
23 course, is a duty of prosecutors.

24 But there were hints in that paper of issues with
25 the plea bargaining coming up, and the paper basically was

1 trying to go through the history of where the power of the
2 prosecutor comes from and what they represent, how they
3 represent the government and --

4 "Because the prosecutors are not
5 themselves the client, but merely
6 representatives of the deponent, they
7 must act in accordance with the client's
8 objective..."

9 I'm quoting now,

10 "...as reflected in the
11 constitution and statutes, as well as
12 history and tradition. Thus,
13 prosecutors are expected to employ
14 judgment and restraint in making these
15 decisions no matter that the principals
16 governing the prosecutor's decision-
17 making, for example, principals of equal
18 treatment and proportionality, which are
19 unrelated to the prosecutor's superior
20 power, may be elusive and ill-defined."

21 There was another quote. I don't have it in front
22 of me, but was one that I note that the -- it basically
23 commented that the limitations of the prosecutorial power,
24 particular with respect to the plea bargaining process and
25 not over-charging as well, is lacking, sorely lacking in the

1 Rules of Professional Conduct. And I would -- but I don't
2 have that here, so I apologize for that.

3 The other thing I looked up was the F.B.I.
4 statistic for the percent of crimes cleared by arrest or
5 exceptional means, and it varies by the type of crime,
6 anywhere from 11-percent to 62-percent. So the point there
7 that I'm making, is that it's not as if we're actually
8 solving all crimes, and that the power for plea bargaining
9 is, you know, a necessary element. A lot of crimes go
10 unsolved.

11 So if you're going to have a legal system, let's
12 have it be fair, and let's have it do it right. And if you
13 miss, you know, the few criminals, because you don't have
14 sufficient evidence, you know, get away with it, you know,
15 odds are that career criminals will try it again and they'll
16 get caught the next time. That's basically what
17 (indiscernible). So, it's better to do that than to have
18 innocent people plead guilty and go to jail and so on.

19 So, that is the extent of my comments, except for
20 to say that I personally experienced this issue, not from
21 plea bargaining myself, but from being a juror on a jury
22 trial. I did make similar comments with that regard back in
23 2006 in the rules of professional conduct hearing at that
24 time. There were other rules being looked at the time, but
25 this, the basic issues there were, there's a focus on

1 winning cases, and that focus, when you take it extremes,
2 is, it's abusive.

3 The personal extremes I had was that the jury
4 trial, as a member of the jury, and there were 56 counts
5 initially that the prosecutor had put forth. And,
6 fortunately, the judge by the end of the trial threw out 48
7 of those. (Indiscernible) but how long was taken to go
8 through all those?

9 They were -- particularly to these other 48 that
10 were thrown out, were certain types of securities law, and
11 it was being applied in a somewhat extreme ways or unusual
12 way that knocked them down to (indiscernible). So, if you
13 gave it some measure of the extreme way that prosecutors
14 would throw out their charges and, you know, the person in
15 the --

16 (Phone-in callers coming in over phone.)

17 UNIDENTIFIED SPEAKER: Yeah, but I left it over at
18 the new place.

19 MR. FALK: Okay. Somebody's on the --

20 MS. EDMON: Let me ask again, please. If you
21 could mute your lines. We're hearing voices.

22 You may proceed, Mr. Falk.

23 MR. FALK: So the defendant in this case had --
24 was a, what do I call it, a secondary player. It was a huge
25 securities law, like a billion-dollar valuation in the

1 internet case. There was a main person or a main person
2 that pled, and only got 14 months. Whereas, this person,
3 the book was thrown at them even though they were secondary
4 player, primarily because she had the -- was able to on the
5 side collect money, and I think the prosecutor was trying to
6 recover money. It didn't work, but it just, it showed -- as
7 a jury member, you know, we're all looking at it just like,
8 this really unfair, and the prosecutors were abusing their
9 power. So that was back in early 2006.

10 So, that's the extent of my comments. Please
11 consider all future -- you should look at the rest of the
12 Crown Rules as well. This is just one I picked out that fit
13 very nicely and very (indiscernible). The whole Crown Rules
14 and the way they deal with prosecutors and stuff, I think
15 should be looked at. Thank you very much. Do you have any
16 questions?

17 MS. EDMON: I think we have none. Thank you very
18 much.

19 MR. FALK: Okay.

20 MS. MCCURDY: In Los Angeles, our next speaker is
21 Stacy Ludwig.

22 MS. LUDWIG: Good morning. I am Stacy Ludwig. I
23 am the head of the Department of Justice's Professional
24 Responsibility Advisory Office. That's the U.S. Department
25 of Justice. And our office is responsible for providing

1 advice and training to all, approximately 10,500 Department
2 of Justice attorneys --

3 MR. BROWN: I'm sorry to burst in, but on the
4 phone we can't hear anything.

5 MS. EDMON: Okay. If I could ask you --

6 MR. BROWN: And I'll go back on mute.

7 MS. EDMON: Thank you.

8 If I could ask you to speak up, Ms. Ludwig.

9 MS. LUDWIG: Okay. Do you want me to start again
10 because they didn't --

11 MS. EDMON: Why don't you do that, and if you
12 could maybe raise your mic a bit, that might help.

13 MS. LUDWIG: My name is Stacy Ludwig. I am the
14 head of the U.S. Department of Justice's Professional
15 Responsibility Advisory Office. And our office is
16 responsible for providing all Department of Justice
17 attorneys, approximately 10,500 attorneys, advice and
18 training on the State Rules of Professional Conduct.

19 And having worked myself in the professional
20 responsibility arena for a number of years on committees
21 like the one today, I certainly appreciate the challenges
22 that the committee has in trying to assimilate all the
23 various concerns and try to come up with a proposed rule
24 that really balances all of the relevant interest.

25 The Department supports the alternative version of

1 proposed Rule 5-110(d). The -- we believe the alternative
2 version better satisfies the policy considerations and
3 guiding principles set forth by the California Supreme Court
4 and the Commission's charter. It creates clear and
5 enforceable disciplinary standards by linking ethical
6 obligations to substantive legal obligations whether imposed
7 by the California Supreme Court or under federal law.

8 It accounts for the differences between state and
9 federal substantive disclosure law. And to the extent that
10 the California law requires disclosure of favorable
11 information without regard to materiality, the alternate
12 version enforces that requirement. It also properly
13 incorporates applicable federal standards and holds
14 prosecutors accountable for adhering to those standards.

15 The alternate version eliminates ambiguities and
16 uncertainties by using language that provides specific
17 guidance, whereas the proposed rule conflicts with carefully
18 balanced federal law, and uses undefined terms. The
19 alternate version uses precise terms that are tied to
20 substantive legal requirements and the case law interpreting
21 those requirements.

22 In contrast, the proposed rule uses vague and
23 undefined terms, "tends to negate guilt, or mitigated the
24 offense," without tying the terms to any specific
25 definitions, so that will lead to uncertainty in

1 application.

2 The alternate version incorporates by specific
3 reference a well-defined and developed body of law and
4 accounts for evolution of substance of law over time. The
5 alternate version also promotes confidence in the legal
6 profession and the administration of justice, and provides
7 adequate protection to the public by holding prosecutors
8 personally accountable for failure to comply with their
9 legal obligation.

10 Although we think the alternative version is the
11 better choice, if the Commission determines to adopt the
12 proposed 5-110(d), we respectfully request that it
13 incorporate an intentionality requirement into the rule.

14 Although we understand that the rule's proponents
15 do not intend for it -- the rule to be used as a tactical
16 weapon against prosecutors, the risk exists, especially to
17 federal prosecutors who have different obligations under
18 federal law.

19 At least one court, the Wisconsin Supreme Court,
20 in *In Re Wright*, has recognized the potential for abuse of
21 the rule as a litigation tactic. Adding an intentionality
22 requirement will avoid this, and also accord with the
23 proponent's position that the rule is not intended to be a
24 trap for well-meaning prosecutors.

25 There are three jurisdictions already, Alabama,

1 the District of Columbia and Massachusetts, that have or
2 will have an intentionality requirement in the rule. In
3 addition, although the Colorado rule does not have an
4 intentionality requirement --

5 MR. BROWN: We're not able to hear anything on the
6 audio conference.

7 MS. EDMON: Okay. Who is speaking?

8 MS. LUDWIG: Let me try --

9 MR. BROWN: Sorry. This is Robert Brown from the
10 San Bernardino County District Attorney's Office. We cannot
11 tell if anything is going on because we cannot hear
12 anything.

13 MS. MCCURDY: Can you hear now? Can you hear it
14 now? Hello? On the phone, can you tell me if you can hear
15 my voice?

16 MR. BROWN: Now I can hear you.

17 MS. EDMON: But I don't hear the speaker.

18 MS. MCCURDY: Okay. We --

19 MR. BROWN: I can hear you speaking. We cannot
20 hear anything at the moment still.

21 MS. MCCURDY: Okay. Let's try this again. We've
22 got a riser on the mic. Go ahead. Sorry.

23 MS. EDMON: All right. We have replaced the mic.
24 Ms. Ludwig.

25 MS. LUDWIG: Yes. As I was saying, there are

1 three jurisdictions, Alabama, the District of Columbia and
2 Massachusetts, that have or will have an intentionality
3 requirement in the rule. In addition, although the Colorado
4 rule doesn't have an intentionality requirement, the court
5 has read an intentionality requirement into the rule.

6 Other courts have also stated or suggested that
7 prosecutors will not be disciplined absent a showing of
8 intent, even where the rule itself does not contain an
9 intentionality requirement.

10 In addition, it is not inconsistent to add a mens
11 rea requirement to the rule. A number of the other proposed
12 rules also contain an intentionality requirement, proposed
13 Rule 1.1 on the duty of competence:

14 "A lawyer shall not intentionally,
15 recklessly, with gross negligence or
16 repeatedly fail to perform legal
17 services with competence..."

18 Proposed Rule 1.3:

19 "...A lawyer shall not
20 intentionally, recklessly, with gross
21 negligence or repeatedly fail to act
22 with reasonable diligence in
23 representing a client..."

24 And also proposed Rule 8.4(c):

25 "...It is professional misconduct

1 for a lawyer to engage in conduct
2 involving dishonesty, fraud, deceit,
3 reckless or intentional
4 misrepresentation."

5 We also respectfully request adopting a safe-
6 harbor provision to the rule. One that would recognize that
7 prosecutors who make a reasonable decision under the
8 circumstances will not be disciplined. Currently, the safe-
9 harbor provision only applies to 5-110(g) and (h), and is
10 found in a comment.

11 We think that substantive information should be in
12 the rule itself, rather than simply in an interpretative
13 comment, and there's no principal reason, we respectfully
14 think, to exclude (d). Again, it accords with proponent's
15 position that the rule is not intended to be a trap for
16 well-meaning prosecutors.

17 And I also point out that another one of the
18 proposed rules, proposed Rule 8.5(b)(2), that deals with the
19 choice of law provision, and as we all know, is lawyer's
20 choice of law, is very difficult at times to figure out.
21 And that, I believe, is one of the reasons there is a safe-
22 harbor provision, so that a lawyer who guesses wrong with
23 respect to choice of law will not be disciplined.

24 Similarly, the decision with respect to precisely
25 what information should be turned over, can be very

1 complicated. And likewise, there also should be a safe
2 harbor to recognize that prosecutors who do their best job,
3 and have a reasonable belief that they've turned over
4 everything that should be turned over, should not be
5 disciplined.

6 I also want to talk about another version -- part
7 of the rule, and that is, proposed Rule 5-110(g) and (h).
8 And the Department also supports the alternate version of
9 those rules, because we also think that alternative versions
10 of 5-110(g) and (h) better satisfy the policy considerations
11 and guiding principals set forth by the California Supreme
12 Court and the Commission's charter.

13 It creates a clear and enforceable disciplinary
14 standard. It distinguishes between situations where a
15 prosecutor is personally involved in a case, or the
16 prosecutor's office is personally involved in the case, as
17 opposed to the proposed rule, which may leave any prosecutor
18 having to make the decision who does not have any knowledge
19 of or access to information about the case.

20 The proposed rule also promotes disclosure by
21 requiring a prosecutor to assume that evidence is true, and
22 that the information should be evaluated only based on the
23 element of the crime, of the convicted offense.

24 The proposed rule eliminates ambiguities and
25 uncertainties. The proposed rule actually may undermine

1 disclosures by requiring prosecutors to make assessments
2 about whether evidence is new, credible and material, terms
3 which are not defined in the rule and comments. And such
4 assessments may be impossible for prosecutors who do not
5 have knowledge of or access to additional information about
6 the case to make, for example, prosecutors in other
7 jurisdictions.

8 We also think that all of the substantive
9 information should be continued in the rule. The proposed
10 rule relies too heavily on the comments to define a
11 prosecutor's obligations, rather than incorporating all
12 substantive information into the rule itself.

13 I think, importantly, that there are only two
14 other jurisdictions that have adopted Model Rule 3.8(g) and
15 (g) verbatim, that is, Idaho and West Virginia. There are
16 approximately 12 other states that have adopted (g) and (h),
17 but notably, those states have modified (g) and (h) because
18 of the ambiguities in the rule and some of the
19 impracticalities of the rule.

20 We ask that if the proposed rule is adopted, that
21 the safe-harbor provision be included as a separate,
22 enumerated provision of the rule, rather than included in
23 the comment.

24 In conclusion, I'd like to say that the
25 alternative version of 5-110(d) holds prosecutors personally

1 accountable for complying with their obligations to disclose
2 exculpatory and impeachment evidence under carefully
3 balanced state and federal law, and provided added
4 flexibility by automatically incorporating any changes to
5 the law as interpreted by the courts.

6 The alternative version of 5-1011(g) and (h) also
7 avoids ambiguity and impracticality of the proposed rules
8 and encourages prosecutors to disclose potentially
9 exculpatory evidence to those persons who are in the best
10 position to assess and act on the evidence.

11 We will address our points further in more detail
12 in our written submissions. I thank you for allowing the
13 Department of Justice to provide comments to you today.

14 MS. EDMON: Thank you very much.

15 MS. MCCURDY: We are going to turn to the phone
16 participants, and the next speaker will be Mark Zahner.

17 Go ahead.

18 MR. ZAHNER: Hi. Can you hear me?

19 MS. MCCURDY: Yes.

20 MS. EDMON: We can.

21 MR. ZAHNER: Okay. Thank you. I'm Mark Zahner.
22 I'm with the California District Attorneys Association, and
23 I'm here representing the interests of the California
24 District Attorney Offices throughout the State.

25 I am not going to reiterate everything that the

1 representatives from Department of Justice had to say, and
2 I'm here really to address 5-110(b), but would -- I
3 completely agree with the points that they brought up in
4 regard to 5-110(d).

5 I think prosecutors up and down the state all
6 understand that there is a desire for California to adopt
7 new disciplinary rules. I am left sometimes with the
8 impression that our position on this is being interpreted
9 as, we don't think there should be a 5-110(b) at all.
10 That's not the case. There's no problem with 5-110(b) as we
11 asked to have it adopted in alternative two. But we feel
12 that that is a very fair and easy to understand rule.

13 If I could reflect on the representative from the
14 public defender's office -- had to say, she gave an example
15 of a case where there may have been violations of California
16 law in regard to discovery. And should alternative two be
17 adopted, that person would be as amendable, would be
18 completely amenable to discipline by the State Bar.

19 There is absolutely no desire on our part to
20 escape discipline for following -- or for failing the follow
21 California law. The only problem we have with the existing
22 rule as it is currently written, is it introduces
23 fundamentally a term of art, "tends to negate," and
24 prosecutors are just left to try to interpret what that
25 means. Does it mean Brady? Does it mean current California

1 case law? Does it mean 1054.1, to follow Barnett or
2 Cordova?

3 Alternative two --

4 (Phone-in callers coming in over the phone.)

5 UNIDENTIFIED SPEAKER: We're not wrapping the
6 glass stuff in the kitchen.

7 MR. ZAHNER: Okay. I wasn't thinking so, but that
8 was -- I'll continue --

9 MS. EDMON: Okay.

10 MR. ZAHNER: There's a big roll.

11 MS. EDMON: Glass wrappers.

12 Folks --

13 MR. ZAHNER: Should I go on?

14 MS. EDMON: Folks on the telephone, we are hearing
15 discussion in the background about glasses in the kitchen.
16 And we really need you to try to mute your phones so that
17 the speaker can be heard.

18 All right. You can proceed, Mr. Zahner.

19 MR. ZAHNER: Okay. Thank you very much.

20 Let me read where I was. So I -- the problem we
21 had continued to have -- and we, too, are going to submit
22 something in writing by the end of the month. It's really
23 on our part a failure to understand the problem with
24 alternative two. It seems to fit.

25 The Commission's desire is to have us follow

1 California law and understand that it means something beyond
2 Brady, that it means what Barnett says, and what Cordova
3 says and what 1054.1 and all the case law out there has to
4 say. And that's absolutely acceptable. However, that's not
5 what the current rule says. It establishes some other
6 standard by which prosecutors have to act. And we see that
7 as expanding California law, discovery law, through the
8 disciplinary process, which I don't suspect this body really
9 wants to do. That that's not their goal here.

10 So -- and, like I say, I really don't want to
11 reiterate everything that everybody had to have said so far,
12 but it seems that when this rule is interpreted in other
13 jurisdictions, there are some jurisdictions that are saying,
14 well, surely it means within the context of existing law.
15 And then there are other jurisdictions that say, no, it
16 doesn't mean within the context of existing law.

17 And so, just by looking at what other states have
18 done with this rule so far, the states that have adopted
19 this and had time to actually interpret what it means and
20 have people brought up on disciplinary action.

21 There's ambiguity when you look nationally at what
22 this rule even means unless it has that language that we're
23 suggesting, which would put it in the context of existing
24 case law. We think that it interjects ambiguity. It's
25 unclear for prosecutors, who are left wondering, well, what

1 the heck do I do? Do I follow the law and then end up in
2 trouble at the end of the day?

3 And that is, ultimately, an unfair and an unclear
4 position for prosecutors to be in. Everybody wants
5 prosecutors to be absolutely spot-on with the delivery of
6 discovery, to make sure that everything that's legally
7 required is delivered. And prosecutors, CDAA's, the elected
8 district attorneys throughout the state have no objection to
9 that, but that is not what is achieved with the adoption of
10 the rule as it currently stands.

11 And we would just continue to urge the adoption of
12 alternative two, or the content that was discussed
13 previously of the safe harbor, and was discussed by the
14 Commission some weeks ago and rejected. That would be an
15 equally attractive alternative. And with that, I am done
16 with my comments.

17 MS. EDMON: All right. Thank you very much, Mr.
18 Zahner.

19 MR. ZAHNER: All right. And I'm going to go on
20 mute and do nothing with it.

21 MS. EDMON: Thank you so much.

22 MS. MCCURDY: Okay. I don't believe there are
23 currently any speakers in San Francisco. So we're going to
24 return to Los Angeles, and then next speaker is Robert
25 Belshaw.

1 MR. BELSHAW: Can you hear me? I want to make
2 sure we're not having another problem here. Can I move this
3 up a little bit?

4 MR. BROWN: I can hear you on the phone.

5 MR. BELSHAW: Okay. Okay. Thank you very much.
6 I want to make sure you could hear me.

7 MS. EDMON: Thank you.

8 MR. BELSHAW: Yes. My name is Robert Belshaw.
9 I'm a former Bar member. I resigned with pending charges in
10 2003. I served as an arbitrator, mediator, volunteering
11 otherwise with the L.A. Superior Court. I was a judge pro
12 tem on Englewood for short period of time.

13 And I'm bringing to you a little bit of a
14 different perspective on this, because I'm a convicted
15 felon. I cannot visit my daughter when she's in jail. I
16 basically cannot work. I am eligible to return to State
17 Bar, but mentally and other reasons, I'm not really able to
18 do so right now.

19 I suffer from post traumatic stress disorder from
20 having been molested in the county jail. So the reason why
21 I submitted a rather lengthy, which you -- summary of what
22 occurred, is because my case runs the gamut of Brady
23 violations and other types of unethical conduct.

24 I do not want to repeat what other people have
25 said here today. I certainly agree that the rules need to

1 be clarified, however, when you make too many rules,
2 particular mens rea requirements and safe harbor
3 requirements, that leaves things further open to
4 interpretation. And district attorneys, with all due
5 respect, they have ways of getting around those things. If
6 you look at materiality, it's very easy for them to say, it
7 was not material in many ways. So, obviously, I support
8 whatever version that they have which will require
9 prosecutors to pursue matters with probable cause and good
10 faith.

11 I was arrested on 20 counts of insurance fraud.
12 The police report clearly indicated that I had nothing
13 whatsoever to do with the fraud. Even the masterminds
14 behind the suits, swoop and squat accidents, wrote in the
15 report, I had nothing to do with it. But as Mr. Falk
16 pointed out, I was made to withstand charges. I had no
17 prior Bar discipline. I resigned under pressure, and I was
18 strapped with a Bar panel attorney, who I believe did not
19 comply with Strickland. He basically teamed up with the
20 prosecution.

21 So one of the things that I do mention in my
22 summary is how jurists sometimes and prosecutors, they
23 acquiesce in these Brady violations. One of the egregious
24 things that happened in my case was subordination of
25 perjury. And in Brady matters, it just does not mean

1 documents. It could mean witnesses. And there's a lot of
2 Brady witness problems.

3 Typically, a prosecutor will offer some sort
4 consideration, but tell them that they do know what the deal
5 is until after they've testified. So when they testify,
6 they testify that, no, I have not offered consideration yet,
7 but it is a way to taint the testimony.

8 In my case, I personally witnessed two forms of
9 attempted subordination of perjury, and one was by the
10 district attorney himself. His name is in the papers that I
11 have submitted.

12 Mid-trial I was seated in the hallway, and there
13 were six insurance adjusters seated across the hall. And
14 the district attorney asked them to testify that when they
15 looked at medical reports, they always check the signature's
16 validity. One the adjusters protested. He said, "we do not
17 do that, sir." And I'm not -- I'm going to tell them that
18 you're coaching me, because we do not do such a thing.

19 Ultimately, after a discussion -- it's in one of
20 the exhibits here. I think it's Exhibit 6 or 7 -- one of
21 those adjusters was allowed to testify to that fact. There
22 was a discussion that he should not be allowed to testify to
23 that, because it was not part and parcel of what adjusters
24 do, and he did. He testified that he looks at signatures,
25 which I believe was perjury.

1 Worse, I was brought to the district attorney's
2 office with my attorney, and I was asked to testify against
3 Mr. Davis (phonetic), who had committed the fraud. I was
4 asked to testify that I knew something about the fraud,
5 which I absolutely did not know. The masterminds had
6 already basically said, Mr. Belshaw had nothing whatsoever
7 to do with this.

8 I was eventually acquitted on those counts,
9 however, I was told, you're going to testify on Mr. Davis
10 about the fraud counts. Well, obviously, I did not accept.
11 Later on I found out I was supposed to receive three years
12 in prison. Ultimately I served a seven-year-eight-month
13 sentence.

14 This brings Brady into account again. There were
15 \$330,000 of checks which were forged by my office manager,
16 Mr. Davis. Exhibit 9, there's a handwriting expert report,
17 clearly showing they were not my signatures, at least the
18 ones we were able to analyze, however, the \$330,000 in
19 checks were never turned over the prosecution.

20 Even if you look at Exhibit 6, I wrote to not only
21 -- I wrote to the city attorney and the district attorney
22 that were handling the habeas and the appeal. And they
23 wrote a letter back saying, you're not entitled to pretrial
24 discovery. All I wanted was those checks.

25 Instead, spreadsheets came into evidence listing

1 those checks as my having received them. My attorney did
2 object. If you look, I think at Exhibit 5, you'll see he
3 objected. This was the best evidence rule issue. And the
4 trial judge said, well, look, with so many checks, we can
5 assume that he authorized the signatures on the checks. So
6 there was not one handwriting expert at trial, including my
7 own.

8 One day in court my handwriting expert comes to
9 testify. Right in front of the jury, the foreman is sitting
10 right there. My lawyer walks up and says, here's the
11 handwriting report. I'm sending the expert home as we
12 agreed. I know the jury foreman heard it, because she sort
13 of blinked.

14 And then if you look at Exhibit 11, the trial
15 judge right in front of the jury says, "ladies and
16 gentlemen, due to the state of the evidence, we're sending
17 that witness home." Why is that important? Well, what it
18 means is, the jury knows now or thinks now that the expert
19 is not favorable. And what did my lawyer do in opening? He
20 promised my testimony. Then, when we refused to allow me to
21 do so, it was withdrawn.

22 So, in Exhibit 10, I bring up various ways in
23 which the prosecutor in his summation subverted justice. By
24 telling the court evidence of forgery should have come from
25 the witness stand. Well, obviously, prosecutors can comment

1 on the state of the evidence or lack thereof. What they
2 cannot do or should not do is violate Griffin by indirectly
3 saying that I should have testified when, of course, a jury
4 instruction so prohibits.

5 So, my case came from lack of probable cause and
6 all sorts of subtle violations of Brady throughout. There
7 was a missing witness I referred to, that nobody knew where
8 to find, despite three years' of investigation that
9 certainly would have cleared me.

10 What do -- what need the prosecutors do? Well,
11 they have to delve in a little deeper than becoming an
12 ostrich, as Ms. Hernandez pointed out. There should
13 probably be some sort of a mens rea requirement. There
14 should probably be some sort of safe harbor perhaps. But,
15 again, this brings an additional issue, additional
16 definitions we have to make. And by the time they get
17 through the federal courts, you have a severe problem.

18 What I am mostly concerned about is the time it
19 takes to resolve all of these problems. It took six years
20 for the federal court to basically shoo my habeas corpus
21 petition aside, while I waited for six years of that. It is
22 the harm that is caused to people.

23 Here I am a former Bar member that had a perfect
24 record. Had no problems. Who had to go to fire camp and
25 fight fires up there at the age of 58, to be able to get out

1 at an earlier time.

2 And a couple of other things here I did note in my
3 suggestions. I believe Bar panel attorneys, this I think
4 relates somewhat to the amount of charges. Bar panel
5 attorneys are not always competent because many of them have
6 private practices, as my attorney did.

7 As it turned out, my lawyer had a period of seven
8 years' experience. He was a former prosecutor when the Bar
9 panel president told me on the phone that I should have had
10 a lawyer who had at least 15 or 20 years of experience,
11 because this was an extremely protracted and complicated
12 case, with 200 pages of documents. And he said, I can't
13 understand how this person became appointed to you.

14 So, the tendency is, and I think this relates to
15 somewhat what Mr. Falk was saying, this leads to plea
16 bargains, because when your own attorney will not put you on
17 the witness stand. Imagine. He says I would make a poor
18 witness.

19 Now, imagine. He's telling me, I'm not going to
20 question you. Am I supposed to ask the questions of myself
21 in front of the jury? I had to sit behind my lawyer, which,
22 by the way, is a violation of law, during the entire time.

23 So, when you go through all of these problems, I
24 think Bar panel attorneys are often not competent because
25 they have private practices, and that causes corner cutting

1 or dealing, like my attorney did with the prosecutor in that
2 manner. The way -- I think it was, it was very poorly
3 handled.

4 So, you know, I would suggest, one thing I did
5 suggest in my paperwork, I do so today -- I don't know how
6 much time I have. But when I was in prison I was very glad
7 to have helped some other inmates that had Brady problems.
8 I know I shouldn't have been practicing law, I suppose, that
9 I was or was not, and three of them got relief because I saw
10 the problem.

11 The problem has to be seen early, and sometimes
12 when attorneys and some trial judges acquiesce in this
13 behavior, where does the ZQ's (phonetic) go for relief.
14 They often don't have anyplace to go.

15 My family didn't come to the trial because they
16 were all busy. My own lawyer is a Bar member, who was
17 involved in a eight-week trial and couldn't come. So you
18 can imagine my feeling when I didn't get help during the
19 case. I could have demanded to testify. I did not.

20 There was -- as far as the remainder of 5-110(d)
21 and (g), whatever -- where a prosecutor must right a wrong
22 should he see it, I suffered a four-year money laundering
23 enhancement that was added at the behest of Judge Ann Jones,
24 who handled the preliminary hearing. She said, mister --
25 why is Mr. Belshaw not charged with money laundering,

1 because Mr. Davis is? He says, "I'm sorry, your Honor."

2 She says, "I want you to add those charges."

3 So Judge Ann Jones on the record advised the
4 prosecutor to add those charges, and I suffered a three-year
5 tax sentence on money that I never received, plus a four-
6 year money laundering enhancement that my co-defendant
7 should have received, because all the money went into his
8 pockets. And I thought the prosecutor should have
9 intervened, because I know that was not justice.

10 And this ties in with the offer. Because I
11 refused to take the offer, what happens? Well, now you're
12 going to get a worse sentence. I believe that was malicious
13 on his part, because as the jurors on the bench know, a
14 judge may not punish a suspect or an accused by giving them
15 a larger sentence for having refused a deal, which is what
16 happened indirectly here.

17 So, obviously, you cannot -- should not be able to
18 do indirectly what you couldn't do directly. And I think
19 that's what happened here. So --

20 MS. MCCURDY: Mr. Belshaw, if you can wrap it up.

21 MR. BELSHAW: Good. I will wrap it up.

22 I really appreciate this. I had no idea I was
23 going to be here. How I got to the Bar web site was a total
24 accident. But I'm a victim. And I propose some sort of a
25 hotline. There's got to be some way that Brady violations

1 can be cut off early in the game, so that people don't
2 suffer, and their families don't suffer such an egregious
3 loss over a period of time. And I'm still suffering from
4 it.

5 So, I know I came at this at a little different
6 angle than the other people that have studied the law a
7 little carefully than I have. I haven't researched the
8 proposed alternates as much as I probably should have. But
9 in conjunction with what the people have said today,
10 actually I'm in agreement with most of it. Thank you.

11 MS. EDMON: Thank you very much.

12 MR. BELSHAW: You're welcome.

13 MS. MCCURDY: Okay. We are going to turn to the
14 phone, and our next speaker is Ignacio Hernandez.

15 Go ahead. Mr. Hernandez, are you on the line?
16 Okay. It's possible he dropped. So we will go to San
17 Francisco. I understand there is a speaker there now. And
18 I will call Royal Glaude.

19 Go ahead.

20 MR. GLAUDE: I'd like to start off with --

21 MS. MCCURDY: Sir. Mr. Glaude, can you speak
22 and make sure that --

23 UNIDENTIFIED SPEAKER: Is the microphone off?

24 MS. MCCURDY: Yeah, it's below.

25 UNIDENTIFIED SPEAKER: That helps.

1 MS. MCCURDY: Go ahead. Thank you.

2 MR. GLAUDE: First off I'd like to thank
3 (indiscernible war, and speak not as a reverend
4 (indiscernible) stick to our plan, (indiscernible), middle
5 of the bar, my own topic. And I'm glad I'm (indiscernible)
6 this came before me for a number of reasons. But it's hard
7 to be on the same page with most professionals, but I know a
8 couple lawyers and realtors. They know the system
9 especially.

10 But I want to start off with Judge Honorable Mark
11 Stoner, Chair of the Assembly of the Judicial Committee.
12 And in July 6th, 2015, he had done some stuff. I found
13 about this here (indiscernible). So, in the process of
14 doing this, we all started (indiscernible) is because what
15 we're dealing with is a (indiscernible). And in the
16 processes of (indiscernible) it came from the
17 (indiscernible) regarding the California State Bar, that it
18 is not consistently protected the public. Now that's why
19 I'm, I really expressing concerns, especially what's really
20 going (indiscernible). Okay.

21 And then, the disciplinary process, one concern
22 that I had when I ran across this hearing, is that there was
23 already a rule 5-110, and this is dealing with members of
24 the Bar who work in Government service. And everybody was
25 looking at (indiscernible). It was (indiscernible) been

1 decided. And they already have a rule. And that rule is 5-
2 200. An attorney (indiscernible) and I went to some other
3 attorney (indiscernible) heard about this (indiscernible).

4 Now an attorney goes before the bench, and there's
5 a disrespect for the tribunal, he or she is (indiscernible)
6 to be a judge. That's already a violation. And the reason
7 why I'm saying that is, is because I'm seeing that when
8 we're looking at this other stuff, that was on the State Bar
9 about this new draft and everything, I could understand this
10 stuff to a certain extent. But I'm a little confused why
11 they have the State Bar Court.

12 And I believe that (indiscernible) State Bar
13 (indiscernible) so you have like (indiscernible) whatever
14 they do in the State Bar Court. Initially beyond that is
15 (indiscernible) intertwining that with the public.
16 (indiscernible) greater than this. Okay.

17 And the reason why I'm saying that is that I ran
18 across this on a discussion (indiscernible), number one, and
19 it said a prosecutor had the responsibility of a master of
20 justice, and not typically that of an adversary. Okay.
21 (indiscernible) regular citizen under (indiscernible) some
22 of these (indiscernible) are doing it (indiscernible). That
23 I kind of learned a lot from them. Okay.

24 So, when I look at that discussion one, I
25 (indiscernible) our trials. And I want you to understand

1 something on there. So what I get is that I -- here's what
2 he told me. (indiscernible) new age of being
3 (indiscernible), really causes it all when you get to the
4 (indiscernible), and, essentially, of doing what this
5 attorney (indiscernible) a while back. And then I thought
6 about. And I just looked the other day, yesterday, last
7 night, and I looked up the Goldberg war trials. The
8 minister (indiscernible).

9 I'll tell you the reason I bring this up here.
10 Because (indiscernible) it's really that the attorneys
11 (indiscernible) State Bar really are also ministers of
12 justice, because that's what we advocate. And then for me,
13 as a layman, I think they're staying, a minister of justice
14 is (indiscernible) State Bar. And when you hold a public
15 position you have other (indiscernible) State Bar offices.
16 They (indiscernible). And I looked at those (indiscernible)
17 you get there by (indiscernible) in their cars getting
18 (indiscernible) what they got.

19 So I looked at this (indiscernible) I was told to
20 look at the Lowenberg (phonetic) trial. I was going to read
21 a small portion of it. And the purpose of reading this, it
22 goes with the last (indiscernible) mystery of justice. And
23 he is (indiscernible) prison (indiscernible) and that did
24 affect the officials of the ministry of prosecutors and
25 judges.

1 The basic principals control conduct within the
2 ministry of justice. I understand they have the separation
3 of power. They've got the Legislature and Congress doing
4 their laws.

5 I agreed with Judge Stall (phonetic) when he says
6 that these matters don't need the Attorney General's Office
7 to (indiscernible), just be in the personnel's office. That
8 prosecuting private citizen, they're dealing with all the
9 time. And that's why I look at that and think, wow, that's
10 (indiscernible).

11 So, I told her get in touch with the State of
12 California Attorney General's Office. When it deals with
13 that stuff, you know, they can't really get into something
14 that deals with the State Bar. You know, the legislature
15 makes laws. But it does refer to the fact that both -- we
16 have a system of checks and balances.

17 And in the process of doing that, we have the
18 California Constitution. It's a declaration of one --
19 there's 28 (indiscernible) this is going through Brady.
20 They have a right talented -- you guys are definitely
21 planted here for the American citizen. But turning to the
22 Government rights (indiscernible) the evidence. Okay. And
23 that's part of the California Constitution.

24 So I look at the (indiscernible) office. And the
25 AD says, yeah, we understand that, but we have no

1 jurisdiction over the State Bar. Where because. So that,
2 therefore, they do have jurisdiction, but not in that level.

3 So we have the 14th Amendment that should deal
4 with your processes and also raise -- and it was taken from
5 the (indiscernible) to the limit, which supports the
6 declaration for review of the State of California people of
7 the -- limited to the State Bar, who say, well, we're going
8 to protect the public.

9 There's a -- I believe the law will tell you, the
10 law (indiscernible). I also believe that attorneys desire
11 just enough to be around something (indiscernible). They
12 know (indiscernible) so that the public rushing in.

13 There's a Title 18 Section 242, and that's
14 deprivation of rights under color of law. Okay. And when
15 you're dealing with these situations, these situations
16 themselves, it's obvious, and we'd all have to raise a foul
17 because -- over at the State Bar, and (indiscernible).

18 So I think those things would grow old
19 (indiscernible). Then it turns (indiscernible). What we
20 have to say about courthouse time. I think you
21 (indiscernible) has to go to an investigation will cause a
22 worse problem, and I was looking partially to me when I
23 looked at it. No thought reaches from the objection of the
24 State Bar -- not the necessary Bar, but as a skill in this
25 case, those accounts will spring forth that are stuck in

1 2000. Now, those are understood.

2 Some of the guys, like (indiscernible) guy, are
3 (indiscernible) state laws, state laws and other stuff. And
4 so they've got these guys here for (indiscernible) law
5 (indiscernible) test drive. So, I think they're from the
6 State Bar Court. And the State Bar Court should go -- can't
7 properly prosecute, so it can't protect the loss of
8 (indiscernible). It can't protect the laws of the
9 (indiscernible), or can we protect the prosecution from the
10 federal government? So I think it's kind of dangerous for
11 the (indiscernible) and attitude to come together to make
12 the laws.

13 But I do believe with Judge Stoll, Judge Stoll on
14 the judiciary committee, that a certain something with the
15 Attorney General's Office, mainly separate administrative
16 law of the Supreme Court from the private law practices of
17 the Executive Office. Okay. If we have to go set up a
18 ruckus, then it should go to the Federal Bureau of
19 Investigation, because they're going to have jurisdiction
20 over the Bar. That's important to that side, there was a
21 power (indiscernible). And that's why I mention so many
22 things, because that's why we got (indiscernible).

23 And so, are we at the entrance of simple things?
24 I'm all done. I mean, I've got to repeat everything for the
25 paperwork. I believe evidence brought up against our

1 military and our veterans (indiscernible). When it goes
2 through (indiscernible), they (indiscernible). So I think
3 the issue of it is (indiscernible), you need to address
4 these issues, and you've got a job here.

5 I know there's a lot I don't know, but I know this
6 doesn't (indiscernible). You don't want to cater to him.
7 This guy is pink. What I just do (indiscernible), black is
8 pink. And now we'd better turn it to about races. I don't
9 want to get too deep in this stuff, but there's
10 (indiscernible). So that (indiscernible). If you guys have
11 any questions, fine. (indiscernible) real quick what I
12 have. But other than that, I'm (indiscernible).

13 MS. EDMON: All right. Thank you very much, Mr.
14 Glaude.

15 MR. GLAUDE: Thank you.

16 MS. MCCURDY: Okay. Our next speaker will be in
17 Los Angeles, and it is Jose Castenada (phonetic).

18 UNIDENTIFIED SPEAKER: Jose Castaneda. He's here.
19 He's probably at the restroom.

20 MS. EDMON: Okay.

21 UNIDENTIFIED SPEAKER: I can (indiscernible) the
22 work, so.

23 MS. MCCURDY: Did you? Okay. Well, we'll just,
24 we'll go to the next speaker.

25 All right. Then we will move to Professor Laurie

1 Levenson.

2 MS. LEVENSON: Thank you very much. It's a
3 pleasure to be back before this group, and I appreciate your
4 patience each time I'm here.

5 As you know, I'm a professor at Loyola Law School.
6 I am a former federal prosecutor. I am currently the
7 director of Loyola's Project for the Innocent. All of these
8 aspects play into my comments and my remarks today.

9 I was not here, but I had an associate take notes
10 when U.S. Attorney Laura Duffy made her remarks, and I know
11 that Mr. Cardona is on your panel. And I know that she
12 mentioned that she was there on behalf of four U.S.
13 attorneys.

14 I have now submitted, I hope you have in your
15 packet, a letter that is signed by, I think about 100 former
16 federal and state prosecutors, including the former attorney
17 general of California, the former district attorney of Los
18 Angeles, six United States attorneys, four federal judges, a
19 collection of state judges, and then, as you can see, former
20 assistant United States attorneys and deputy district
21 attorneys.

22 And all of these people signed on for alternative
23 one. Because, frankly, they understand why this makes a
24 difference. It makes a difference to take out of the
25 equation prosecutors making materiality decisions, because

1 they make mistakes all the time. And those mistakes cost
2 people their freedom.

3 I do not want to, and never have wanted to make
4 this proposal about prosecutors versus defense lawyers. I
5 have enormous respect for prosecutors on the federal and
6 state side. But when I look at the leaders of our criminal
7 justice community, and I am sure that every member of this
8 panel will recognize names on those letters, these are
9 people that have dedicated their lives to our criminal
10 justice system. And, frankly, it took me two days to get
11 those signatures, and more are coming in.

12 It's because they know we have a problem, and we
13 know we have a direct solution to that problem. It's the
14 one we've been talking about for the last several months. I
15 do appreciate that Ms. Ludwig came out from the Department
16 of Justice to talk about the training and their perspective.
17 But the truth is, is that her lawyers have not understood
18 the law.

19 And I had hoped for and was surprised that she did
20 not address the rash of misconduct and Brady violations that
21 we've had right here in our own district, that have led to
22 our judges, federal judges, head of the Ninth Circuit and
23 otherwise, not only dismissing cases, but making a call for
24 reform.

25 In terms of mens rea language, this Committee has

1 done an excellent job in drafting it. It does refer
2 specifically that it has to be evidence known to the
3 prosecutors. This is not a "gotcha" provision.

4 In terms of what else there needs to be, I hear
5 that it's not simple enough. Well, it's a lot simpler than
6 telling prosecutors, go look through all the case law you
7 might find that you might think's controlling, and decide
8 whether or not you can fit within a exception or not.

9 If "tends to negate" is not clear enough, maybe we
10 want to use "any tendency to negate." But we don't want to
11 move in the other direction of saying, you get to decide how
12 material it is, because that's where the problem has been.

13 I also note the remarks by Mr. Mark Zahner today
14 from the California District Attorneys Association. Again,
15 they go to the words, "tends to negate," and I think it is
16 actually far-fetched to claim that they don't know what
17 those words mean.

18 Frankly, if that's what's happening, we're in real
19 trouble. But it does reflect what we heard at our last
20 hearing in San Francisco, where you had some prosecutors who
21 said, sure, we understand the California law to being that
22 we turn it all over.

23 And then we had representatives from our district
24 attorney's office saying, no, no, no, it's the Brady
25 standard, which is a post-conviction standard for having a

1 new trial. That's the one that goes into our discovery law.

2 We have submitted letters and briefs, and we've
3 spoken to the fact of what California law provides. This
4 panel will not be tampering with anything in California
5 discovery law. What we have proposed does comport with the
6 California Supreme Court's decisions in this area. So all
7 prosecutors actually have to do is follow that, and not try
8 to pouch it in language and materiality.

9 Ironically, I will end with this. While I've been
10 in this hearing and listening to the remarks of colleagues,
11 there was a news story that came across from Associated
12 Press. And it reported that the number of exonerations went
13 up yet again. We now have a record number. Over time that
14 we know of, we've had 1,730 exonerations. And, again, what
15 the statistics show is that 75- to 80-percent of those had
16 this type of misconduct, Brady violations, or if the other
17 side want to say, confusion, but I don't think it is.

18 I think that this ethic rule will make the move
19 that is so essential to fair trials, which is to say to
20 prosecutors, don't pretend to be defense lawyers. You're
21 not good at it. That's what our letter, in fact, from all
22 of these former prosecutors said. From the highest, to our
23 judges, to those who are street prosecutors, we were not
24 good at it, and that's why we support this rule. Thank you.

25 MS. EDMON: Thank you.

1 MS. MCCURDY: I'm going to turn to the phone, and
2 just see if Ignacio -- sorry, Ignacio Hernandez is on the
3 line. Okay. We are going to go to our next Los Angeles
4 speaker, and that is Jose Castaneda.

5 MR. CASTANEDA: Good morning.

6 MS. EDMON: Good morning.

7 MR. CASTANEDA: Thank you for giving us the
8 opportunity to address some of the issues. And when I
9 obtained the revision rule, a special responsibilities, I
10 saw that, you know, I do support this proposed rule, new
11 version, but I also wish that some more could be done with
12 the State Bar and the way they look at complaints by the
13 public.

14 My attorney got disbarred on November 20th, 2014.

15 MR. BLUME: And he lost his case.

16 MR. CASTANEDA: And I lost all my cases. And I
17 will -- I'm a vexatious litigant. And according to an order
18 by Judge Daniel Buckley, my name is Jose Castaneda, also
19 known as Mr. James Blume.

20 MR. BLUME: Okay. Hold on a second.

21 MR. CASTANEDA: And as you can see, we're both
22 people.

23 MR. Blume: He was convicted of being a vexatious
24 litigant, but he's not admitting to being one. See, that's
25 part of the -- what we're talking about here, let's redo a

1 subject thesis or opening statement here.

2 Basically, what me and him are talking about is
3 called, "judicial racketeering, judicial facilitation,"
4 using the courts to commit crimes and violating rights. So,
5 no offense, I was laughing -- it was you, sir, because when
6 you were at camp and stuff, you were set up, and -- yeah,
7 you know. I'm probably one of the guys that set you up.

8 We do deals all the time in court. I'm a former
9 police officer. I brang copies of my two badges. I have
10 attorneys and judges calling me at home, telling me what
11 they tell me to say, to get these people hooked, on or off.
12 It's called, "judicial racketeering, judicial facilitation,
13 judicial perversion and judicial treason." Or you could
14 change it to administrate, if this is an administrative
15 hearing.

16 Now, I'm -- a lot of you people are green, you're
17 virgins. You really don't know what's going on. But when
18 the judge is calling me at home and telling me to change my
19 statement, there's something wrong here.

20 Mr. Castaneda, the reason why I'm talking with
21 him, is I've been ordered to be Mr. Castaneda. So we have
22 two Castaneda's here by court order, and we bring the
23 exhibits. My Exhibit 1's, first of all, police officer.
24 I'm a police officer for two law enforcement agencies, a
25 former Marine with a security clearance. Because I was

1 stationed at El Toro, I got security clearance to be around
2 jet fighters, bombs. I had to refuel them.

3 After that my country called me back again.
4 Because I had the security clearance, I went to Army
5 National Guard, became a counselor for the Army National
6 Guard troops, okay. We put in the chaplain's office for
7 suicides, everything else. I'd seen a lot of dead bodies in
8 my life because I worked in the military, as well as
9 policing.

10 I'm the guy that you will see in your -- I will
11 testify under oath, underneath the penalty of perjury under
12 Penal Code 118. I'm raising my right hand. And I'm going
13 to tell you the truth, the whole truth and nothing but the
14 truth, so help you God. Nobody here has done that.

15 To me, this whole thing's a joke, because if it's
16 not underneath the penalty of perjury and under Penal Code
17 126, which states it's a felony, stating something that you
18 know is a lie to anybody hearing a court, but we do it all
19 the time. We commit fraud. What are you going to do about
20 it? Not a thing. That's why I'm here for an FBR, a filer's
21 bill of rights.

22 If something happens in any type of incident, and
23 this is where you should go at. I don't care if it's
24 criminal or civil, because there's all criminal acts in all
25 courts. Criminal acts are committed in criminal court. I

1 could testify to that. I even got the proof. The
2 difference between me and you is, I'm tired of the crap,
3 okay.

4 I was on the news on Channel 11 trying to open
5 this up. Judicial racketeering, judicial facilitation,
6 judicial perversion of the laws, judicial treason, because I
7 can't even get a jury trial. How can I serve in the Marine
8 Corps, be a police officer, see this poor man, and I feel
9 you, because I was there watching you in the camp. But you
10 know what, so what? You should have bribed the judge.
11 That's all you had to do.

12 Judge De Vanon on court documents, on court tapes
13 -- and I hope this is being taped, but it doesn't matter
14 because if you're Mexican, you can't get your tapes. It's
15 federal law. Federal Rules of Civil Procedure. Who cares?
16 The law only works if you pay for it, or if you bribe a
17 judge. And if you're Mexican or Black, forget it. The
18 rules don't even apply to you.

19 MR. CASTANEDA: He asked me for a bribe on record.

20 MR. BLUME: You get screwed up.

21 On his, the Judge asked him for a bribe. He said,
22 no, so he lost his case. And then do you know what judicial
23 stalking is? I want to change this law. You guys got to
24 get a hold of this. They stalk you. So if one judge says,
25 you don't pay up, then he keeps hearing all your motions

1 until you become a vexatious litigant. That's judicial
2 entrapment. Hello. Why don't you just plant evidence on
3 me? I mean, I'd laugh at this.

4 This is so funny. Because of my training, being
5 shot twice, United States Marine Corps, United States Army,
6 United States MP, because I love the country, I support it.
7 And, you know, I'm over 50 years old and the Navy calls me.
8 But now I'm not going to serve this country no more. I had
9 it. I had it. You guys make me sick. If you're an
10 attorney, you're a piece of shit -- excuse me. That's just
11 my personal opinion. If you're a judge, you're a more piece
12 of shit. I will never swear again allegiance to this
13 country again, and I did it three times, but never again. I
14 had it with you guys.

15 But I blame the attorneys and the judges and the
16 politicians. And I blame you because you're not going after
17 the -- I'm asking for an FBR. I'm not asking to retry my
18 cases. I don't care, screw me. I don't care. I'm a Marine.
19 We're worthless. We're supposed to be punished. We got
20 nothing coming when we signed up and we knew it. But when
21 you are coming here as judges, and you're sworn to uphold
22 the law, and half you guys don't --

23 MR. CASTANEDA: I presented plenty of evidence in
24 my cases against, obviously, Mr. Jack Conway (phonetic), and
25 not only was he lying to different judges, he lying to

1 commission a jury, he lied to Judge Rita Miller. He lied to
2 Judge De Vanon, Judge Simpson, Judge Pluim.

3 So this guy was lying repeatedly in every way, and
4 I kept raising a, you know, I kept saying, I kept
5 complaining, he's lying, he's lying. He was even lying
6 about when I contracted him, and I have a contract dated
7 December 17th, 2009 -- and '08.

8 On May 8, 2009, Judge Rita Miller placed him under
9 oath, because the issue was a free speech case, where this
10 attorney, Sonia Mercado had appear at my trial, and she was
11 the one behind the accusation that I had stole millions from
12 the estate of my brother.

13 My brother died in jail, and nothing was provided
14 as far as how he died, you know. All of the sudden millions
15 are missing, and I'm the one that is getting the point --
16 that I'm being blamed for it. When I complained, when I
17 posted that on the internet, that's when the lawsuit came.
18 But I had the great misfortune of paying him \$10,000, and he
19 did nothing except -- not even appear for the hearings,
20 because he hired somebody else, Ivan Shulmer (phonetic), who
21 contradicts what he was saying.

22 So, from what I learned from Mr. Blume, is that
23 evidence doesn't lie. And when judges are ignoring that --
24 I mean, I'm just trying to remove myself from a vexatious
25 litigant list, and I could not even get a hearing in the

1 superior court. Not one hearing, or not an evidentiary
2 hearing.

3 In his case, they give him every single case that
4 he filed, and 3,500 posting a security. In my case they
5 wanted \$50,000. Fifty-thousand dollars for a case. So the
6 law gets manipulated in the civil courts as well. Not only
7 in the criminal but --

8 MR. BLUME: What he's saying is, we both got
9 convicted at the same time of being a vexatious litigant,
10 okay, because they named me and him the same person. What
11 judge would make a court order to say, Mr. Castaneda is also
12 James Blume, and James Blume -- that's abuse of process,
13 abuse of -- it's a court order. We'll show it to you. Please
14 bring this in. Please.

15 And prosecute me for perjury. Bring it on. I'm a
16 United States Marine. I mean what I say, and I say what I
17 mean. I swear underneath the penalty of perjury in front of
18 God and country, which you -- it just makes me so sick.
19 Because if they make me a Mexican and lose my case -- and
20 what does Donald Trump say? I mean, come on. Look at where
21 this is really going, you guys.

22 Mexicans come over the border to what, to make
23 crimes. They make me a Mexican, I'm losing all my cases.
24 And I'm a former police officer. And sometimes I take
25 cases, civil and criminal, and I help these people win,

1 because I know the law really well.

2 I graduated with 90-percent in the policy academy,
3 and I also taught law enforcement classes. I have an AA
4 Degree, a Bachelor's Degree. Mr. Castaneda has a Bachelor's
5 Degree. And we're basically being screwed by tricks and
6 tactics that we could use in the Bar, in the courts, by
7 attorneys and judges in concert. I could show you so many
8 tricks and tactics if you contact me. My number is (323)
9 663-1397. Please call me. I've got tons of evidence. I've
10 even got judges that say, I can't appeal my own vexatious
11 litigant. I've got it right here in writing.

12 MR. BELSHAW: Can you repeat that?

13 MR. BLUME: -- by Judge Buckley.

14 MR. BELSHAW: Can you repeat that?

15 MR. BLUME: (323) 663-1397. I've got a list of
16 all the dirty judges, and what they asked of me to do when I
17 was a police officer.

18 MR. BELSHAW: What is your name, sir?

19 MR. BLUME: My name is James Blume, United States
20 Marine Corps.

21 MR. BELSHAW: How do you spell your last name?

22 MR. BLUME: B-L-U-M-E.

23 MR. BELSHAW: Okay. Thank you.

24 MR. BLUME: Sure. Call me and I'll give you a
25 hand on some of this.

1 MR. CASTANEDA: Last, you know, the internet is
2 giving us opportunity to see all the people that have been
3 subjected to this type of behavior by officers of the court,
4 you know, sworn officers, that they're supposed to adhere to
5 the letter of the spirit of the law.

6 And it's really troubling to see that the State
7 Bar fails so many times to even look at my case until now,
8 Mr. Conway has finally been disbarred for a case that took
9 place in Pasadena. He was lying to Judge Syed (phonetic) so
10 that he was eligible to practice law.

11 The attorney that filed two cases for me, I also
12 paid him 7,500. All he did was file two cases. So they
13 take your money and run. The cases were settled, but, you
14 know, what happens, you know?

15 MR. BLUME: This is important. The same common
16 theme is, if you notice, everybody who files a court case,
17 check with the original complaint. Follow these people.
18 This isn't hard. This is elementary. The original
19 complaint never matches the final decision. The judge has
20 half the time their heads up their (sensored). It doesn't
21 make sense, and there's something wrong.

22 MS. EDMON: Mr. Blume. Mr. Blume, I'm going to
23 have to ask you to wrap it up.

24 MR. BLUME: Yes. Thank you.

25 MR. CASTANEDA: Go ahead.

1 MR. BLUME: Do you want me to do a closing -- MR.

2 CASTANEDA: Go ahead.

3 MR. BLUME: Basically, ma'am, we know now it's --
4 and I feel for some of these people here. And, basically,
5 we don't want to vent. You know, I feel sorry for you and,
6 no offense, but I'm used to being, you know, always being
7 jerked around.

8 But what we're tired of is -- and you've got to
9 understand something. This is judicial or administrative
10 treason. They're doing it all across the state. The same
11 tricks, the same tactics. Attorneys, bait and switch of
12 attorneys. Conway comes in. He decides not to, and he puts
13 in another attorney. He doesn't even know what the case is
14 about.

15 Lady, you've got to see some of these tricks and
16 tactics used over and over again for just criminal. Please
17 contact me. I'm glad you took my number. I could show you
18 a list of these tricks. They bait and switch of evidence.
19 They bait and switch of attorneys. They bait and switch of
20 the actual -- from what you started in your complaint, they
21 change it. They -- it's called judicial manipulation, while
22 they do judicial facilitation. I mean, they're using -- I
23 mean, one attorney told me, I just have to make up a fake
24 case, bribe the judge, and make money.

25 MS. EDMON: Mr. Blume, your time is up.

1 MR. BLUME: Thank you, ma'am. Thank you for
2 having me.

3 MR. CASTANEDA: Thank you so much.

4 MS. EDMON: Thank you.

5 MS. MCCURDY: Okay. We -- our next speaker in Los
6 Angeles is Michael Goodman.

7 MS. EDMON: Do you want to take a break? Well,
8 Lauren, can you -- is there anybody else on the telephone?
9 I don't know if there's anybody else who's not identified
10 themselves yet.

11 MS. MCCURDY: We can check.

12 Anyone on the telephone who wishes to speak?

13 MS. EDMON: Okay. Thank you.

14 MS. MCCURDY: Michael Goodman.

15 MR. GOODMAN: Thank you. Good morning. I'm
16 Michael Goodman. I'm the head deputy of the Appellate
17 Division of the Los Angeles County Alternate Public
18 Defender's Office, and I'm speaking today on behalf of the
19 head of our department, Janice Fukai.

20 MS. EDMON: I'm sorry. Could you state your name
21 again.

22 MR. GOODMAN: Michael Goodman. It's G-O-O-D-M-A-
23 N.

24 MS. EDMON: Thank you very much.

25 MR. GOODMAN: We are in support of alternate one

1 of the revision of Rule 5-110(d). We believe that the
2 alternate number two, which adds in a materiality
3 requirement waters down the rule in a way that allows
4 prosecutors to avoid the import of what this rule is
5 intended to accomplish, and that is, primarily, I think
6 really to give prosecutors an ethical reason, not just a
7 legal reason, in order to provide discovery which is
8 exculpatory in nature.

9 Allowing prosecutors to decide whether or not
10 something is or is not material is a mistake. My office has
11 over 200 lawyers. As the head of our appellate department,
12 I get telephone calls on a daily basis for lawyers that are
13 in pitched battles over discovery.

14 With prosecutors arguing something isn't material
15 and doesn't need to be turned over, and defense lawyers
16 routinely, ultimately getting that evidence and winning
17 cases by virtue of being in possession of that evidence.

18 We have a very different view of what's material
19 than what prosecutors do. And forcing prosecutors to look
20 to case law to decide what is or is not material means that
21 this rule will have no teeth. If we want a rule that's
22 going to compel prosecutors to turn over evidence which is
23 exculpatory in nature, we should take away any ability for
24 that rule to be ambiguous.

25 We should just say, if it has an exculpatory value

1 at all, prosecutors should turn that over to the defense,
2 and let the defense decide whether or not it's exculpatory
3 to the defense or not, and let the defense decide whether or
4 not it's material and should be presented at trial.

5 We don't have the same view of what's material
6 that prosecutors do, and we shouldn't put prosecutors in a
7 position of having to decide whether or not the defense will
8 or won't decide something is material and should be
9 presented at trial.

10 When evidence turns out not to be material and
11 that evidence is withheld, that might be the reason why an
12 appellate court chooses not to find harmful error, and not
13 set aside a conviction. But it is only pretrial -- excuse
14 me, prior to any appellate action in a case happening that a
15 defense lawyer can take that evidence, investigate that
16 evidence, and determine whether or not that evidence can be
17 used in a way that is or is not beneficial to the defense.

18 We cant let prosecutors be the ones that decide a
19 defense attorney should litigate his or her case, and we
20 urge you to adopt alternate number one of Rule 5-110(d).
21 Thank you.

22 MS. EDMON: Thank you very much.

23 We seem to have lost Lauren. And I think that the
24 members of the panel may need to take a brief break. So
25 let's take five minutes and then come back, and we'll talk

1 among ourselves about how we're going to proceed. Because
2 there are still a fair number of speakers who have not been
3 heard, and we need to figure out what we're going to do
4 about lunch. And so, let's take a break and we'll get back
5 together in five minutes.

6 (Proceedings recessed briefly.)

7 MS. EDMON: Again, thank you all very much.

8 And Lauren, I will ask you to call the next
9 speaker, please.

10 MS. MCCURDY: Okay. I'm going to check again on
11 the phone. We've returned. Is there anyone on the phone
12 who would like to present comments? Okay.

13 In Los Angeles, the next person up is Peter
14 Pierce.

15 MR. PIERCE: Good morning. I'm Peter Pierce and
16 I'm a Senior Deputy District Attorney with the Orange County
17 District Attorney's Office. I'm also on the Civic Action
18 Committee of the Association of Orange County District
19 Deputy Attorneys. Not surprisingly, we oppose the proposed
20 change, alternative one. And the substantive reasons for
21 that have been articulated not only today, but in the CDA
22 letter to the Commission dated October 1st, 2015.

23 And in summary, we oppose the proposed changes
24 because the revisions could subject state prosecutors or
25 deputy DA's to disciplinary actions based upon new and

1 arbitrary standards that are not tethered to current
2 statutory rules or case law.

3 But rather than echo the CDAA's detailed
4 opposition letter, and echo the comments that have been made
5 by my colleagues this morning, I would like to instead give
6 the Commission a personal perspective of a career deputy DA.

7 As a Deputy DA and state prosecutor, one the key
8 aspects of my job that I cherish is the requirement that I
9 must play by the rules. And that I cannot obtain a
10 conviction without honoring the rights of the accused by
11 strict standards.

12 I bring up on a personal note that I currently
13 serve, for the last five-and-a-half years, within our
14 offices, white collar or major fraud unit. I have done
15 that. I was sent to the unit -- or I came back to the unit
16 in 2009 after a 15-month mobilization in the United States
17 Army Reserve, which included a combat tour in Iraq in 2008.

18 I bring up my Iraq -- my service in Iraq, not to
19 be self-righteous, or at least not to be entirely self-
20 righteous, but to let the Commission know that I have seen
21 what it's like for citizens to live in a military
22 dictatorship or a police state.

23 And I thank goodness that the United States, the
24 State of California, is not such a police state. And I take
25 my responsibilities to the defense, especially discovery,

1 very seriously. And I submit that I am not unique as a
2 state prosecutor, but that I am typical.

3 With all due respect to Judge Kozinski, I disagree
4 with his assertion that Brady violations are rampant or
5 systemic. I believe that the overwhelming majority of state
6 prosecutors are honest, hardworking civil servants, who take
7 their responsibility serious, and that includes the
8 responsibilities to the accused, and including especially
9 regarding discovery.

10 The proposed revision, as I've said earlier, could
11 now subject these state prosecutors, these civil servants,
12 to disciplinary sanctions based on an arbitrary standard not
13 tied to case law or to statutory rules regarding discovery.

14 I can tell the Commission from first-hand
15 experience, something they probably already know, that
16 discovery in so-called "white collar" or major fraud cases
17 is often extensive.

18 My last case, which ended just two weeks ago,
19 involved almost 11,000 pages of discovery. The defendant's
20 rights were honored, all his rights, including discovery
21 rights. The discovery rights were not honored if the
22 defendant's rights had not been honored or violated, his
23 conviction could have been overturned.

24 Under the proposed changes, not only could his
25 conviction already have been -- could have been overturned,

1 but because of an inadvertent discovery violation, and
2 again, regarding 11,000 pages of discovery, by conceivably
3 any member of the prosecution team, could potentially result
4 in disciplinary actions against me.

5 And I must tell the Commission that it saddens me
6 to think that there are members of our profession that think
7 that such additional sanctions are needed against state
8 prosecutors to safeguard the rights of the accused. I, we,
9 do not believe that they are needed. They will, in the end,
10 make our job, our already tough job harder, not easier, and
11 our job is to seek justice.

12 Therefore, like my colleagues who have previously
13 spoken this morning, I strongly urge the Commission not to
14 adopt the proposed alternative one of 5-110(d) Rule, but
15 rather to adopt its alternative. And I thank the Commission
16 for its time today.

17 MS. EDMON: Thank you.

18 MS. MCCURDY: Okay. We're going to turn Marcella
19 McLaughlin here in Los Angeles.

20 MS. MCLAUGHLIN: Good afternoon.

21 MS. EDMON: Good afternoon.

22 MS. MCLAUGHLIN: Thank you for this opportunity to
23 speak to you. I am from the San Diego District Attorney's
24 Office, and I represent that office today. I also have a
25 letter that was prepared by District Attorney Bonnie

1 Dumanis, that I brought with me today, and will be submitted
2 to you for your consideration.

3 I join in my colleagues' comments. Mr. Zahner and
4 Ms. Duffy from the U.S. Attorney's Office, the woman -- I'm
5 sorry, I forget her name, from Department of Justice, and
6 Mr. Price (phonetic) who just spoke.

7 We certainly see the issues, we certainly see the
8 policy considerations behind this, and what the Committee
9 seeks to achieve. What we want is a rule that can be
10 realistically applied and followed.

11 I, just by way of background, I'm a Deputy
12 District Attorney. I'm the ethics coordinator for the
13 District Attorney's Office. So I -- my role is to advise
14 and train 300 deputy district attorneys as they seek to
15 follow their ethical obligations as they do their jobs.

16 That's a job I only very, very recently came into,
17 very timely for this issue. I stepped right into it, so to
18 speak. But before that, I was a prosecutor. I've been a
19 prosecutor for 16 years. I started out as a deputy city
20 attorney, so I prosecuted everything from the lowest
21 infraction to every garden variety misdemeanor you could
22 think of, for five years, in the City Attorney's Office in
23 San Diego, before coming to the District Attorney's Office
24 where I've been for the last 11 years.

25 So I feel that I can speak with some experience as

1 to how this rule would really apply in the day-to-day life
2 of a prosecutor, from the lowest case to the most serious
3 and violent felony. And I do have some concerns, I really
4 do, about that.

5 First and foremost in my mind as a prosecutor, is
6 the right of the defendant to a fair trial, and his or her
7 due process rights, it really is. But it is such a
8 difficult rule, and you do accept that.

9 When you become a DA, you get it, you understand
10 that that -- you have the highest responsibility in the
11 room. And that you get to wear that white hat, but you have
12 to carry the greatest responsibility there. And you're --
13 it's a very delicate balance of things throughout. It's a
14 delicate balance of interests that we face.

15 And the whole time that you are seeking to ensure
16 that this accused person gets a fair trial, you have to
17 protect the interest of your victims, your witnesses, and
18 the community.

19 And so, I recently spoke to -- the County Bar
20 Association has an ethics committee, and they're currently
21 reviewing this rule. And they may or may not be making a
22 recommendation to the County Bar on the issue.

23 And had a very interesting and lively discussion
24 with them about the application of the rule to my job. And
25 some of them had some questions about it, you know, who had

1 never practiced in the area of criminal prosecution. And
2 the feeling was, you know, what's so hard about it? You
3 know, hey, just hand it over. You know, it's if
4 exculpatory, you know, just hand it over, just give it to
5 them.

6 And, you know, that seems to be kind of the
7 feeling behind this rule of, you know, let's take it out of
8 your hands. You're not in the best position as the
9 prosecutor to decide what's material. Just give it to the
10 defense, give it to the judge. Let them decide. They're in
11 the best position to do it.

12 And I have to say, it does not give me comfort to
13 have that decision taken away from me completely by this
14 rule. Not because I want to -- because I'm fearful of being
15 divested of that power, or I'm fearful that I will lose some
16 sort of influence as a prosecutor, but because I understand
17 what that means. That I will be subjecting people to harm.
18 That, you know, people to us and they trust us with this.

19 That there is a abuser out there, there's a drug
20 dealer out there, there's a violent criminal out there, and
21 there are issues to consider when people come to you and
22 they want you to prosecute a case. And they trust you to be
23 that person to protect them from harm.

24 And so when you use terms in a rule like, tend to
25 -- tend to -- I think Mr. Zahner pointed them out. When you

1 use words like -- sorry, "tends to negate" or "mitigate."
2 And I'm a, you know, a prosecutor. I'm trying think about,
3 you know, what those are going to mean, and I'm fast-
4 forwarding to having to respond to an ethical violation.

5 And, for instance, it's a gangs case, and I have
6 an incredibly violent gang member who's in custody for a
7 serious offense. And I have a series of letters written by
8 other inmates in custody about him, that are actually
9 inculcating him.

10 They're actually all writing to me because the
11 know he's being prosecuted, and they inculcating him for the
12 offense, because they want probably some favorable
13 treatment. And they want to get him in trouble.

14 And I'm reading these letters, and I'm thinking,
15 hey, there's some information here that possibly his defense
16 attorney might be able to use in some way down the line,
17 that could somehow mitigate this offense. And I'm really
18 thinking this through. Is that something I should disclose?
19 But if I do that, that will put these people in incredible
20 harm, because the person I'm prosecuting has incredible
21 influence and power in the prison system.

22 And I'm obviously basing this -- you know, it's a
23 hypothetical facts, but I'm basing this on true situations.
24 And this case actually is probably going to settle. It's
25 not going to trial because of the circumstances of this

1 defendant's case.

2 So, these are the scenarios I'm talking about that
3 we're faced with every day. So, what we -- that is what
4 we're dealing with here. And, you know, what we are really,
5 really seeking here is a clear standard to follow, and we
6 have those.

7 And I know what you keep hearing from us, from the
8 different speakers against this rule and in support of
9 alternate two, is that we have those standards. And, you
10 know, by adopted alt two, by putting that into an ethical
11 role which we currently don't have, you're sending that
12 message.

13 We understand 1054. We have 1054.7 right now
14 which we use. When we are in doubt, we go to the court
15 under 1054.7, and we say, your Honor, we have something.
16 It's -- we think it could be exculpatory. We want you to
17 make the decision because it's sensitive. And if it's not,
18 then we get a protective order and we deal with it that way.

19 So we understand Brady, Winters, Barnett and
20 Cordova. And we also -- you know, you're sitting here and
21 you're hearing these things anecdotally, but please put them
22 in the context. You know, you heard about this exoneration
23 report today from Mr. Levenson. You know, four, only four
24 of those exonerations were in California. Only one of those
25 was in federal court. You're hearing a lot of anecdotal

1 information.

2 And you hear about the famous case from Judge
3 Kozinski, United States v. Olsen, and the line of cases that
4 he cites. Only one of those cases was, I believe, a
5 California case, Hubele Arribe (phonetic). And I do not
6 believe that was intentional misconduct. It was a third
7 party who had a video tape from a SART exam, that was not
8 produced, and I do not believe that was intentional
9 misconduct or withholding by the prosecution.

10 So, please, as a Committee, I urge you to please
11 put this in the context of what the urgency really is around
12 this issue, and think about that when you are considering
13 what type of rule it is we really need.

14 It's very easy to sign on to a letter when you're
15 not in the trenches, okay. When -- it's easy to say, yes,
16 that sounds good to us, when you're not, you know, in there
17 fighting the fight every day.

18 The letter that Ms. Dumanis submitted addresses
19 this, my comments, also other things. There were some other
20 parts of the rule, 5-110(b), 5-110(f) and -- (e) and (f),
21 excuse me, that just seemed out of context and not based on
22 any information I saw, or we could see, that were public
23 policy issues or problems. You know, is there a rash of
24 Sixth Amendment violations out there that prosecutors now
25 need to sort of be tasked with addressing?

1 The extra judicial statements by police, again, we
2 addressed that in our letter. Is that a problem that law
3 enforcement is doing that? That is not something that I've
4 seen, or that we've seen.

5 The abuse of subpoena power. That seems strange.
6 I know that the State Bar is very concerned with public
7 protection, and we respect and understand that, but that
8 seemed more about protecting civil attorneys more than
9 anything else.

10 So, in closing, we respectfully, again, we do seek
11 to be ethical, we do seek to follow the rules. We
12 respectfully ask though that we have a rule that we can
13 realistically follow. And we thank you very much for your
14 time today. Thank you.

15 MS. EDMON: Thank you.

16 MS. MCCURDY: Is there anyone on the telephone who
17 would like to speak? Okay.

18 In Los Angeles our next speaker will be James
19 Bloom (phonetic).

20 MR. BLUME: I already spoke.

21 MS. MCCURDY: Sorry.

22 MS. EDMON: Thank you.

23 MS. MCCURDY: Okay. I apologize if I mispronounce
24 this. Is it Azar Elihu?

25 MS. ELIHU: Hello. My name is Azar Elihu. I am a

1 criminal defense lawyer in practice in good standing with
2 the State Bar. I have been in practice since 2000. I serve
3 as a volunteer arbitrator with L.A. County Bar, and with the
4 State Bar, I hear fee disputes between clients and former
5 lawyers.

6 And I have published several articles with the
7 Daily Journal, California Lawyer Magazine. And my last
8 article was also was published in the Criminal Law Journal
9 of the State Bar regarding dismiss or expunge. That was
10 based on my case in the Court of Appeal.

11 I am not as prepared as the rest of the speakers,
12 as I saw the proposed rule in the California E-Bar Journal a
13 couple days ago in the e-mail that I got. So, I printed out
14 the rule 5-110 and I have suggestion regarding these rules.

15 First of all, the district attorney's office and
16 the prosecutors are vested with excessive authority by the
17 penal code, and often state court judges give in to those
18 authorities, because perhaps they are concerned about the
19 reelection.

20 Rule 5-110(a), first these rules are making it
21 subjective, as there are no speakers mentioned. They make
22 it too subjective and leaving room for evasion by the
23 prosecutors.

24 Section (a):

25 "A prosecutor in a criminal case

1 shall refrain from prosecuting a charge
2 that is not supported by probable
3 cause..."

4 We should not leave the, whether it's supported by
5 probable cause to the D.A. It should be a reasonable
6 standard, the same way that US v. Strickland needs a
7 competency of a lawyer based on an objective, reasonable
8 standard. It's often cases are filed by the district
9 attorney's office or city attorney that have no merit.

10 A few years ago I was representing a driver who
11 was charged with hit and run. The case was filed, the court
12 here. And the police report was devoid of any evidence
13 implicating the driver. There were three passengers in the
14 car and a pedestrian who had made statement in the police
15 report that the police car drove and hit the driver, the
16 defendant.

17 The case was assigned to the junior deputy D.A.,
18 and she would not give in. She was not willing to dismiss
19 the case. I just -- my job is -- I do my job, you do your
20 job. And I said, your job is to find the truth. And she
21 was coming up with different deals, and I said, no deal. I
22 like to put this case before the jury to see how the system
23 work.

24 And on eight of 10 of the trial, a senior deputy
25 walked in the court, profusely apologize and dismiss the

1 case. And she said, this case shouldn't have been charged.
2 We see that, I would say not very often, but it happens a
3 lot when cases have no merit.

4 And so, section (a) should be different from
5 prosecuting a charge that is not supported by probable
6 cause. A police officer may not know, but a filing deputy
7 will definitely know if this case has merit. And when it
8 excessively lack merit, it should not be charged.

9 Section (c):

10 "...Not seek to obtain from
11 unrepresented accused a waive of
12 important pretrial right unless the
13 tribunal has approved appearance of the
14 accused in propria persona..."

15 This is fine. I have no problem with that. I
16 join Mr. Mike Goodman, the APD, on section (d), that is too
17 much -- too subjective.

18 Section (f):

19 "...The prosecutor in a criminal
20 case shall prevent persons under the
21 supervision or direct of the prosecutor
22 exercise reasonable care..."

23 Again, leaves them with some discretion and some
24 room to nagivate through the misconduct. So, we should --
25 this rule should be enacted the same with the penal code.

1 They are narrowly tailored to promote justice and to apprise
2 the defendant of the wrongdoing. The same way should be
3 with these rules. They should be based on a reasonable
4 standard and not subjective.

5 Section (h) should be amended to --

6 "...When a prosecutor knows by
7 clear and convincing evidence that the
8 defendant in the prosecutor jurisdiction
9 is wrongfully convicted, the prosecutor
10 shall seek promptly to remedy the
11 conviction."

12 Promptly is -- should be a key word, because
13 sometimes these wrongfully convicted defendants struggle for
14 years in state and federal court to rectify the wrong.

15 At section seven on -- once the prosecutor knows
16 by clear and convincing evidence that the defendant was
17 wrongfully convicted, "the prosecutor must seek to," again,
18 "promptly remedy the conviction."

19 Again, you know, I am handling a post-conviction
20 case right now. It's from San Bernardino. And in that
21 case, before trial, the co-defendant came forward. It was
22 like a gang case. Said, "I did it. This guy didn't do it."
23 The shooting. They were -- one was charged with conspiracy,
24 the other was charged with attempted murder. With murder,
25 and the co-defendant came forward, said, "I did this,"

1 before trial. No one listened. He didn't testify. His
2 lawyer did not allow him to testify, the co-defendant.

3 The other defendant was convicted and he's serving
4 56 to life now. So now we have to open the case, get a new
5 investigator to go around and to prove that the co-
6 defendant, my client hasn't -- did not commit the crime.

7 Overall, the rules should change to just divest in
8 general the prosecutors from so much authority. And to
9 allow the defense lawyer, like to inspect the evidence, so
10 they could decide whether the evidence is material, and not
11 leave it on the discretion of the prosecutors. And they are
12 very good prosecutors. I've deal with many, some of very --
13 most of them are very decent, very ethical, very
14 professional.

15 And there are some, you know, unethical, that have
16 been reprimanded. But, in general, when prosecutors commit
17 serious misconduct, the State Bar will give them a slap on
18 the wrist, compared to other lawyers who may commit some
19 minor misconduct, like commingling the fund, and they may
20 get disbarred. Submit. Thank you.

21 MS. EDMON: Thank you.

22 MS. MCCURDY: Is there anyone on the phone that
23 wishes to address the panel?

24 Okay. In Los Angeles, the next speaker is Sue
25 Frowen. Did I pronounce that --

1 MS. FROWEN: I never signed up to speak.

2 MS. MCCURDY: You didn't? You're just an
3 observer? Okay.

4 Just to confirm, is there anyone in San Francisco?

5 UNIDENTIFIED SPEAKER: Not at this time.

6 MS. MCCURDY: Okay. Thank you, Randall.

7 Okay. Justice Edmon, do you want to adjourn
8 temporarily?

9 MS. EDMON: All right. Thank you all very much
10 for participating today in this very important process.
11 Yes, sir, Mr. Castaneda?

12 MR. CASTANEDA: May I ask a question to the panel,
13 if I may? Just one question. Very simple. It won't take
14 more than one minute.

15 My understanding is that there are audio tapes in
16 the court system, and that's from Mr. Gene Wzorek, who I've
17 been in contact because he wrote a book called, "Death of
18 the Justice System." And it pertained to the City of
19 Chicago, Gene Wzorek v. the City of Chicago.

20 And what happened was, that they gave him, set him
21 up for 350 -- \$250,000. And when they went to appeal,
22 everything changed. One of the law professors here in, I
23 think it's Orange County, was involved in the case. He was
24 the second -- he was the, I guess, the law clerk for Justice
25 Stevens.

1 And Mr. Wzorek told me that he was the one that
2 stole the tapes. When you have a question regarding
3 something that was said in court, how do you go to the
4 record if the court clerks -- the court transcripts are
5 being changed? It's hard for the average person to even get
6 a bite of the apple, so they say.

7 But the audio tapes, and my understanding from
8 what he had was, that the 93 U.S. attorneys have control of
9 those tapes. So it's regarding a case called, I guess, me
10 versus officer of the court, where he was challenging what
11 was being said in court in the transcripts and the tapes,
12 so.

13 MS. EDMON: I'm sorry, Mr. Castenada. I don't
14 think any of us have any information about that particular
15 case.

16 MR. CASTANEDA: Thank you.

17 MS. EDMON: All right. At this point we are going
18 to adjourn. I thank all of the speakers and attendees. It
19 is now, just for the record, 12:28 p.m. And this public
20 hearing is adjourned. Everybody have a good afternoon.
21 Thank you very much for participating.

22 (Proceedings concluded.)
23
24
25

1 CERTIFICATION OF TRANSCRIBER

2 I, Holly Martens, do hereby certify that the
3 foregoing 93-page transcript of proceedings, recorded by
4 digital recording, represents a true and accurate
5 transcript, to the best of my ability, of the hearing in the
6 matter of Public Hearing on Revision of the Rules of
7 Professional Conduct, held on February 3, 2016.

8
9
10 Date

3/2/16

Transcriber

Holly Martens

COMMISSION REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild

Co-Drafters: George Cardona, Karen Clopton, Winston Peters, Mark Tuft

I. CURRENT ABA MODEL RULE

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting 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, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (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;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case

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from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

- (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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

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[3] 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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, 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.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may

include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.8 [5-110]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.8 [5-110]

Vote: 11 (yes) – 1 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.8 [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) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.
- (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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[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.

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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 this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

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

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

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

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

IV. COMMISSION'S PROPOSED RULE
(REDLINE TO CURRENT CALIFORNIA RULE 5-110)

Rule 3.8 [5-110] ~~Performing the Duty of Member in Government Service~~ Special Responsibilities of a Prosecutor

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.
- (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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[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 this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

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

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the

appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

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

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

V. RULE HISTORY

Rule 5-110 originated as rule 7-102 and was adopted effective January 1, 1975. Rule 7-102, titled "Performing the Duty of Member of the State Bar in Government Service," was based on ABA DR 7-103. Rule 7-102, as adopted, provided:

A member of the State Bar in government service shall not institute or cause to be instituted criminal charges when he knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, he shall promptly so advise the court in which the criminal matter is pending.

In 1986, the State Bar Committee on Professional Responsibility and Conduct ("COPRAC") rules subcommittee studied ABA Model Rule 3.8 but did not recommend it for adoption by the Board. COPRAC noted that California's rule 7-102 already addressed the concept in paragraph (a) of Model Rule 3.8, which prohibits a prosecutor from prosecuting an accused without probable cause. It was also COPRAC's position that the remainder of Model Rule 3.8 addressed the legal and procedural relationship between a prosecutor and the accused. Because this relationship is subject to constant refinement as a result of legislation and constitutional decisions which serve to define it, COPRAC did not recommend adoption of these other provisions.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-102 was renumbered 5-110 and became operative on May 27, 1989. No substantive amendments were recommended at that time. The Commission also considered ABA Model Rule 3.8 and again determined that rule 5-110 was preferable to the ABA Model Rule, as it was much broader (the conduct of a member who knows that criminal charges are not supported by probable cause, as well as the conduct of a member who

should know such charges are not supported by probable cause, are encompassed by the proposed rule). In addition, rule 5-110 required a member to advise the court of the lack of probable cause after the case was filed, whereas Model Rule 3.8(a) speaks only of prosecuting a charge, which is ambiguous as to a prosecutor's duty if evidence subsequently shows that probable cause no longer exists. The amendments made in 1989 conformed the revised rule to the definition of a "member" in rule 1-100 and removed references to gender.

A member ~~of the State Bar~~ in government service shall not institute or cause to be instituted criminal charges when ~~he~~ the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a the member ~~of the State Bar~~ in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, ~~he~~ the member shall promptly so advise the court in which the criminal matter is pending.

(See enclosure 2, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

The 1987 amendment was the last revision of rule 5-110.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

OCTC refers the Commission to its prior comments to the Commission and the Board of Trustees about this rule. This rule is currently being considered by the Board of Trustees.

OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.

The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed Rule would enhance notice to the membership and enforcement by this office.

1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police departments in California are generally independent of prosecutors' offices.

Attachment A-3

Commission Response: The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.

2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made “timely” is addressed in discussion point 3 which states that a “disclosure’s timeliness will vary with the circumstances: and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.

Commission Response: The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what Comment [3] does.

3. 5-110(D) [3.8(d)] requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Comment [3] then states that the disclosure obligation is “not limited to evidence or information that is material as defined by Brady . . . and its progeny.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission’s intention within the text of the rule itself, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in *Brady*. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.

Commission Response: The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the “materiality” standard in *Brady* and its progeny.

4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information “known to the prosecutor.” It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.

Commission Response: The Commission addressed this issue in a previous draft of the Rule.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Eight comments agreed with the proposed Rule, three comments disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537
- *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620
- *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597]
- *Kyles v. Whitley* (1995) 514 U.S. 419, 437
- *In re Brown* (1998) 17 Cal.4th 873, 879
- *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461
- *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952
- *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss]
- *In re Kline* (2015) 2015 A.3d____, 2015 WL 1638151
- *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678

See also, Reports and Recommendations of the California Commission for the Fair Administration of Justice, posted at: <http://www.ccfaj.org/rr-pros-official.html> [last visited June 16, 2015].

- Official Report and Recommendations on Reporting Misconduct (October 18, 2007).
- Official Report and Recommendations on Prosecutorial Duty To Disclose Exculpatory Evidence (March 6, 2008).

Regarding statistics cited by the Innocence Project, see Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases*, National Association of Criminal Defense Lawyers (2014), posted at: <http://www.nacdl.org/discoveryreform/materialindifference/>.

B. ABA Model Rule Adoptions

Model Rule 3.8(a), (b), (c) & (f) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor,” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf [Last accessed on 2/7/17].
- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.¹ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).² Six states have adopted a version of the rule that is substantially different from Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).³

Model Rule 3.8(d) Adoptions. Model Rule 3.8(d), which requires a prosecutor to timely disclose to the defense evidence or information that the prosecutor knows “tends to negate the guilt of the accused or mitigate the offense,” is of special concern to the Study Group and so is treated separately in this subpart.

- Forty jurisdictions have adopted Model Rule 3.8, paragraph (d) verbatim.⁴ Eight jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.⁵ Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule

¹ The twenty-eight states are: Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming.

² The seventeen jurisdictions are: Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, North Dakota, Ohio, Tennessee, Texas, and Vermont.

³ The six states are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

⁴ The forty jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁵ The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

3.8(d).⁶ Only California lacks a counterpart to Model Rule 3.8(d). Attached as Attachment 1 is a document showing the variations in the ten jurisdictions that have diverged from the Model Rule.

Model Rule 3.8(e) Adoptions. Model Rule 3.8(e) prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless three enumerated conditions are satisfied. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(e),” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf [Last visited 2/7/17]
- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.⁷ Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).⁸ Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule.⁹ California also has not adopted any version of paragraph (e).

⁶ The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

(d) 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.

⁷ The twenty-four jurisdictions are: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

⁸ The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

⁹ The seventeen jurisdictions are: Alabama, Arkansas, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Michigan, Mississippi, New York, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

Model Rule 3.8(g) & (h) Adoptions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(g) (h),” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf
- Two states have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.¹⁰ Eleven states have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).¹¹ Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h).¹²

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a), provide that a prosecutor’s duty not to prosecute without probable cause includes both a duty not to commence a prosecution as well as not to continue to prosecute.
 - Pros: It clarifies the scope of prohibited conduct under paragraph (a) and carries forward similar language in current rule 5-110. The first Commission proposed similar language.
 - Cons: The change is unnecessary; the word “prosecute” includes both the commencing and maintenance of a prosecution.
2. In paragraph (a), recommend adoption of a knowledge standard, i.e., the prosecutor must know that the prosecution is not supported by probable cause before the duty to refrain from prosecution is triggered.
 - Pros: The knowledge standard, which is found in the Rule 3.8 counterpart in every other jurisdiction is the appropriate standard for imposing discipline on a prosecutor. “Know” is defined in Model Rule 1.0(f) as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from putting his or her head in the sand and claiming not to have known of the facts when the facts would have been obvious given the surrounding circumstances. That would appear to be a sufficiently rigorous standard for Rule 3.8(a). The same definition was recommended by the first Commission and adopted by the Board, and it is

¹⁰ The two states are: Idaho and West Virginia.

¹¹ The eleven states are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

¹² The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

anticipated that this Commission will make a similar recommendation. (See, e.g., Report & Recommendation for Proposed Rule 4.2 [2-100], which also contemplates a similar definition.) The standard in current rule 5-110, “knows or should know,” is unnecessary for the same reasons that a “grossly negligent” or “reckless” standard is unnecessary. (See Section IX.B.1, below.)

- Cons: Current rule 5-110, which similarly addresses a prosecutor’s duty not to prosecute criminal charges when probable cause is absent, has a “knows or should know” standard. There is no compelling reason to change that standard.
 - Note: See also Section IX.B.1, below, concerning the recommended rejection of a “reckless” or “gross negligence” standard.
3. Recommend adoption of Model Rule 3.8(b), modified to limit its application to situations where the right to counsel exists.
- Pros: The revision accurately describes the law, i.e., that the prosecutor’s obligation applies when a person has a right to counsel under the Sixth Amendment (when adversary judicial criminal proceedings have been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment) or (as Texas and Wyoming have made clear) under *Miranda*’s prophylactic procedures derived from the Fifth Amendment (when conducting a custodial interrogation). (See Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of A Prosecutor the State of Rule 3.8*, 22 Geo. J. Legal Ethics 463, 477-79 (2009).) Limiting the paragraph as indicated is appropriate in a disciplinary rule.
 - Cons: None identified.
4. Recommend adoption of Model Rule 3.8(c), modified to delete a reference to preliminary hearings, and to add a qualification where a court has approved the accused’s pro per appearance. This recommendation also includes the recommended adoption of proposed Comment [1], which is based on Model Rule Comment [2], modified to reflect the proposed changes to the black letter.
- Pros: The *pro per* qualifying language appears in a Comment to the Model Rule; similar to the first Commission, this Commission determined it is an appropriate limitation that belongs in the black letter and not a Comment. Deleting the reference to preliminary hearings is necessary because waiver of a preliminary hearing by an unrepresented accused conflicts with Penal Code § 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can only waive a preliminary hearing if represented by counsel.

- Cons: None identified.
5. Recommend adoption of Model Rule 3.8(d), which provides a prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate guilt or mitigate the offense. This recommendation also includes the recommended adoption of proposed Comment [2], which is intended to clarify that paragraph (d)'s scope is intended to be broader than *Brady*'s obligations.
- Pros: The Model Rule language is intended to impose a duty on prosecutors that is broader than *Brady*'s materiality standard. The provision is arguably more closely aligned with the current position of OCTC, which has informed the Commission that it can discipline a prosecutor for failure to disclose exculpatory evidence without proving materiality:

If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.¹³ (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d ___, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

See OCTC April 20, 2015 Memo to Commission, Section H., at p. 4.

Further, the Model Rule language also aligns with the position taken by the Innocence Project in its submissions to the Commission, the concept being that a prosecutor's determination of whether evidence or information is exculpatory or mitigating should not depend on its materiality under the Constitutional *Brady* standard because materiality often can only be determined after the fact. Instead, the disclosure should occur at the trial court level before a falsely accused defendant suffers the harm of a wrongful conviction. The Model Rule standard, which requires disclosure of evidence and information "that tends to

¹³ The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

negate the guilt of the accused or mitigate the offense” is intended to accomplish that objective.¹⁴

Finally, the provision provides for an exception when the prosecutor believes a protective order is required, for example, to protect a witnesses or the public interest.

- Cons: Although the ABA has opined that the Model Rule language is intended to be broader than *Brady*, the jurisdictions that have addressed the issue are split on whether the provision is broader than,¹⁵ or coextensive with *Brady*.¹⁶

¹⁴ See April 10, 2015 Letter from Professors Laurie Levenson and Barry Scheck to Commission, at page 2 (“Rule 3.8(d) was enacted by the American Bar Association to obviate the cognitively difficult problem prosecutors face in complying with the *Brady v. Maryland* standard which requires them to determine *before* a trial has been held whether undisclosed information will be considered “material” by an appellate court many years later. Rule 3.8(d) is designed to be broader and independent of *Brady*, requiring “timely” and prophylactic disclosure of all information that *could be Brady* or impeachment evidence (anything that “tends to negate guilt or mitigate punishment”) in order to make sure *Brady* violations do not occur.”)

¹⁵ The District of Columbia, North Dakota, and the U.S. District Court for the District of Nevada have evaluated the scope of the pertinent ethical rule in their jurisdiction and concluded it is broader than *Brady*. (See *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) [holding that Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny]; *In re Disciplinary Action Against Feland* (N.D.2012) 820 N.W.2d 672, 678 [holding that a prosecutor’s ethical obligation to disclose evidence to the defense is broader than the duty under *Brady* or the criminal discovery rule]; *United States v. Acosta* (D. Nev. 2005) 357 F.Supp.2d 1228 [ordering the government, over objection, to disclose to the defense 60 days before trial all evidence that negates guilt or mitigates the crime, and concluding that the *Brady* standard of materiality makes sense only in the context of appellate review].) Virginia has issued an ethics opinion to the same effect. (See Virginia Legal Ethics Comm. Op. 1862 (2012) (“Timely Disclosure of Exculpatory Evidence and Duties to Disclose Information in Plea Negotiations”).) The New York State District Attorney’s Association has issued a best practices manual that clarifies that 3.8(d) disclosure is independent and broader than “materiality.” (See *The Right Thing: Ethical Guidelines for Prosecutors*, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK at 12 (2012), available at <http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf>.) The United States Attorney’s Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA’s broad interpretation of 3.8(d).

¹⁶ Courts that have found Model Rule 3.8(d) coextensive with *Brady* are: *In re Attorney C* (Colo. 2002) 47 P.3d 1167 [holding that Rule 3.8(d) contains a “materiality standard” and rejecting the hearing board’s conclusion that the rule incorporates a “broader and more encompassing” standard]; *In re Riek* (Wis. 2013) 834 N.W.2d 384 [rejecting the Office of Lawyer Regulation’s argument that “SCR 20:3.8(f)(1) requires disclosure of favorable evidence or information without regard to its ‘materiality’” and instead construing the rule “in a manner consistent with the scope of disclosure required by the United States Constitution, federal or Wisconsin statutes, and court rules of procedure”]; *Disciplinary Counsel v. Kellogg-Martin* (Ohio 2010) 923 N.E.2d 125 [holding that “DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady*”]

In addition, the Commission is unaware of any case in which a prosecutor has been disciplined absent a showing of materiality. It is questionable whether Rules of Professional Conduct that are intended to function as minimum standards for discipline should include what is arguably an aspirational standard for the breach of which discipline is not imposed. In addition, as several public comments to the first Commission asserted, an ethical rule that effectively imposes on prosecutors discovery obligations beyond those imposed by statutory and constitutional requirements may conflict with statutory provisions adopted by California Prop. 115, which added Penal Code Chapter 10, commencing with Section 1054, which defines discovery obligations in criminal cases, and which begins with a section (Section 1054) which states that the chapter “shall be interpreted” to, among other things, “provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” (Penal Code Section 1054(e).) Penal Code Section 1054.1(e) requires prosecutors to disclose to the defense “any exculpatory evidence” that is “in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of the investigating agencies.” Penal Code Section 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

v. Maryland or Crim.R. 16”]; *State ex rel. Okla. Bar Ass’n v. Ward* (Okla. 2015) 2015 OK 48 [construing ORPC Rule 3.8(d) “in a manner consistent with the scope of disclosure required by applicable law”]; *United States v. Weiss* (D. Colo 2006) 2006 U.S. Dist. LEXIS 45124 [rejecting defendants’ argument that the rules of professional conduct mandate “that the Government’s disclosure obligation is higher than the standards set in *Brady* and *Giglio* and holding that disclosure “is only necessary for information that is material”].

See also *In re Jordan* (La. 2005) 913 So. 2d 775 [holding that Respondent violated Rule 3.8(d) by “fail[ing] to produce evidence which was clearly exculpatory” and that Respondent “should have resolved this issue in favor of disclosure”]. *Jordan* case has been cited by courts both for the proposition that a prosecutor’s ethical are broader than those imposed by law and that a prosecutor’s duty merely parallels that laid out in *Brady* and its progeny. (See *Riek, supra* at pp. 390, citing *Jordan*, *Kellog-Martin*, and *Attorney C* for the proposition that “several jurisdictions rendered decisions construing their equivalent of SCR 20:3.8(f) consistent with the requirements of *Brady* and its progeny.”) (Compare *In re Kline, supra*, 113 A.3d at p. 211 [disagreeing “that a fair reading of [Jordan] supports the [Riek] court’s decision”].)

See also Steven Koppell, *An Argument Against Increasing Prosecutors’ Disclosure Requirements Beyond Brady*, 27 Geo. J. Legal Ethics 643 (2014) [arguing that ABA Formal Ethics Opinion 09-454 (Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense) “is in conflict with *Brady* and should not be implemented in any state.”].

6. Recommend adoption of Model Rule 3.8(e).

- Pros: It is an important public policy to protect the lawyer-client relationship. (Compare proposed Rule 4.2 [2-100].) Subpoenaing a lawyer to present evidence in a criminal matter about a client will necessarily drive a wedge between them and destabilize the relationship.
- Cons: First, California has not had a rule similar to this, but to the knowledge of the drafting team unwarranted subpoenas to attorneys have not posed a significant issue, either in civil or criminal cases. Second, the ability to issue subpoenas to attorneys, and the issues posed by such subpoenas are not unique to prosecutors and do not flow from the special obligations or responsibilities of prosecutors, making this an unusual addition to a rule supposedly unique to prosecutors. Third, subparagraphs (2) and (3) of Model Rule 3.8(e) create a unworkable standard that would be virtually impossible to satisfy: the information must be “essential” to the investigation and there must be “no other feasible alternative.”

B. Concepts Rejected (Pros and Cons):

1. Include a provision that would specify that reckless or grossly negligent failures to comply with the Rule’s proscriptions will support a finding of a violation.

- Pros: A criminal prosecutor’s duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable. (See 4/20/15 OCTC Memo, at p. 4 which is available upon request.)
- Cons: The appropriate standard is “knowledge,” not reckless or gross negligence. (See Section IX.A.1, concerning paragraph (a), above.) It is not accurate that a prosecutor has a “duty to search for exculpatory evidence.” Rather, the prosecutor has a duty not to ignore evidence that has been revealed during the criminal investigation. A knowledge standard, which recognizes that knowledge can be inferred from the surrounding circumstances, provides the requisite incentive for a prosecutor to pursue an evidentiary thread that could lead to discovery of exculpatory or mitigating evidence.

Attachment A-3

2. Include a statement in paragraph (d), that the disclosure obligations in paragraph (d) are not limited to those disclosures required by an accused's constitutional rights.
 - Pros: This explanatory provision that delimits the intended scope of proposed paragraph (d), which has been included as proposed Comment [2], belongs in the blackletter.
 - Cons: A provision that explains the intended scope of a blackletter rule provision is more appropriately placed in a Comment.
3. Include in paragraph (e), the first Commission's proposed addition of a "civil proceeding related to a civil matter."
 - Pros: Habeas corpus proceedings are technically civil proceedings that are related to criminal matters.
 - Cons: A habeas proceeding often involves an allegation of ineffective assistance of counsel that would typically require the necessity to take testimony of the defense lawyer in the criminal proceeding. The defense lawyer may not always be willing to cooperate and a subpoena will be necessary. A rule of professional conduct should not interfere with that process.
4. Include as a second sentence in proposed Comment [2] or [2A] (whichever the Commission approves) the second sentence in the first Commission's Comment [2A]: "The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense."
 - Pros: Clarifies that subsequent events will not excuse a failure of the prosecutor to satisfy the prosecutor's express obligations under paragraph (d) to disclose exculpatory or mitigating evidence or information.
 - Cons: The sentence, which is not found in either the Model Rule or the rules of any of the jurisdictions that have adopted the Model Rule language, is unnecessary surplusage. Whichever version of Rule 3.8(d) is adopted, the Rule itself will impose obligations that must be complied with and will provide no basis for subsequent events excusing a failure to comply with those obligations.
5. Include Model Rule 3.8, Cmts. [3] and [4], concerning paragraphs (d) and (e), respectively.
 - Pros: The Comments provide guidance on applying the referenced paragraphs.
 - Cons: The Comments simply restate the black letter rule.

6. Include the first Commission's proposed Comment [6A].¹⁷

- Pros: The Comment does not explain how to interpret or comply with the Rule but merely refers to other duties under Rule 3.3 (Candor To Tribunal).
- Cons: The Comment provides an important reminder that by withholding exculpatory or mitigating evidence and information, a prosecutor is violating his or her duty to the tribunal.

7. Include the first Commission's proposed Comment [10].¹⁸

- Pros: The Comment belongs in a conflict of interest rule, not in a rule concerning a *current* prosecutor's duties.
- Cons: None identified.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Paragraph (a) substitutes a knowledge standard for current rule 5-110's standard of "knows or should know". (See Sections IX.A.2 and IX.B.1, above.)
2. Paragraph (b) is a new provision in the Rules. (See Section IX.A.3, above.)
3. Paragraph (c) is a new provision in the Rules. (See Section IX.A.4, above.)
4. Paragraph (d) is a new provision in the Rules, but arguably does not change a prosecutor's duties under current law. (See Sections IX.A.5 and V. and OCTC comments, above.)
5. Paragraph (e) is a new provision in the Rules.
6. Paragraph (f) is a new provision in the Rules.

¹⁷ The proposed comment provided:

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. (See Rule 3.3, Comment [12].)

¹⁸ The proposed comment provided:

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16].

7. Paragraphs (g) and (h) are new provisions in the Rules.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member.”
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Although a new provision, paragraph (d) is arguably a non-substantive change under current California law. (See Sections IX.A.7 and V. and OCTC comments, above.)

E. Alternatives Considered:

1. Instead of proposed paragraphs (g) and (h), which are based on Model Rule 3.8(g) and (h), an alternative was proposed.¹⁹

¹⁹ The alternative provision would provide:

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Messrs. Cardona and Eaton submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

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- (g) Upon receipt of evidence that, if true, would show that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose the evidence to the court or the chief prosecutor for the jurisdiction where the conviction occurred;
 - (2) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and the evidence appears on its face to be new and credible and to create a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
 - (i) promptly disclose that evidence to an appropriate court or other authority and to the defendant unless a court authorizes delay in disclosure to the defendant, or
 - (ii) promptly undertake further investigation or review, or make reasonable efforts to cause an investigation promptly to occur. If the prosecutor determines, after prompt investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in paragraph (g)(2)(i).

If the prosecutor determines that the evidence constitutes clear and convincing evidence establishing that the defendant was convicted of an offense that the defendant did not commit, the prosecutor shall notify the court of that determination and either move to vacate the conviction or request that the court appoint counsel for an unrepresented indigent defendant to assist the defendant in pursuing efforts to remedy the conviction.

Comment

* * *

[#] The requirement for disclosure set forth in paragraph (g)(1) applies even if the prosecutor receiving the information did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction.

[#] Consistent with the objectives of Rules 4.2 and 4.3, disclosure pursuant to paragraph (g)(2)(i) 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. The post-conviction disclosure duty applies to new and credible evidence that creates a reasonable possibility that a defendant did not commit an offense regardless of whether that evidence could previously have been discovered by the defense.

[#] A prosecutor's reasonable independent judgment that evidence is not of such nature as to trigger the obligations of paragraph (g), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed amended Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

**Commission Member Dissent, Submitted by Daniel Eaton,
on the Recommended Adoption of Proposed Rule 3.8(d)**

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not “comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor’s obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor’s obligations in this area undoubtedly will “promote confidence in the legal profession and the administration of justice.” (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be “necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice” and “where failure to promulgate the rule would result in the continuation of serious harm.” (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project’s several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission's charter.

Directive two of the Charter admonishes us to "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted "is not aspirational." That was flatly contradicted by the speaker those who argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism "to which all members of the profession should *aspire*." (Emphasis added.) Dean Uelmen added that a prosecutor's "aspirations" should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that "the primary purpose" of the rule, as the Commission ultimately adopted it, "is aspirational." Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: "Do we want a very simple *aspirational* standard?" (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to "help promote a national standard with respect to professional responsibility issues whenever possible." The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is "consistent [and coterminous] with the requirements of *Brady* and its progeny." (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *in re Attorney C.* (Colo. 2002) 47 P.3d 1167.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission's Charter says: "The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission's response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

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There are two responses to the Commission's assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art, 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to

reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

**Commission's Response to Dissent Submitted by Daniel Eaton
on the Recommended Adoption of Proposed Rule 3.8(d)**

First, Proposed Rule 3.8(d) is not aspirational. In fact, it is an effort to provide a clear articulation of the standard that some of the testifying prosecutors claimed they already follow. A major reason to adopt Alternative #1 for Rule 3.8(d) is to get all prosecutors on the same page and ensure the uniformity in discovery practices that will safeguard the integrity of the criminal process. As was evident at the October 23, 2015 Commission meeting, some District Attorneys' Offices claim that they disclose all evidence or information that would tend to negate the guilt of the accused or mitigate the offense, while others submitted letters arguing that they should be able to consider materiality in deciding what evidence to disclose. Under California law, prosecutors have a duty to disclose all exculpatory information, not just evidence they deem material.¹ Alternative #1 does not "aspire" to have prosecutors fulfill their ethical duties.² It plainly explains what that duty is.

For similar reasons, the Commission was not persuaded by the dissent's second argument that Alternative #1 to Rule 3.8(d) should not be adopted because a handful of jurisdictions have been flexible in defining a prosecutor's disclosure obligations. The Charter for this Commission plainly states that it should, among other things: (1) work to promote public confidence in the legal profession and the administration of justice, and ensure adequate protection to the public; (2) not set forth standards that are "purely" aspirational objectives; (3) focus on revisions that are necessary to eliminate differences between California's rules and the rules used by a preponderance of the states to help

¹ *People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40] (California Penal Code § 1054.1, subdivision (e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny"). See also *Barnett v. Superior Court*, 50 Cal.4th 890, 901 (2010) (discovery of exculpatory evidence not governed by materiality).

² Mr. Eaton takes out of context Dean Gerald Uelmen's reference to "aspirational" standards. In context, Dean Uelmen was referring to his work as Executive Director of the 2008 California Commission on the Fair Administration of Justice. That Commission focused on prosecutors' widespread indifference to their discovery obligations and the need for more compliance. For years, Dean Uelmen, as well as other leaders of the California legal community, have sought to have prosecutors comply with their ethical and legal duties, including those involving discovery. As stated in oral comments at the Commission meetings, Public Defenders continue to face difficulty in getting prosecutors to comply with their discovery obligations. (Comments of Michael Ogul, President of California Public Defenders Association).

Attachment A-4

promote a national standard wherever possible; and (4) eliminate ambiguities and uncertainties.

Every other state in the nation, as well as the U.S. Department of Justice, has adopted the language of Alternative #1. No other jurisdiction has adopted the language of Alternative #2. This is for good reason. Alternative #2 sends prosecutors into the perpetual morass of trying to continually determine what so-called “relevant case law” might say about how, if at all, they should consider materiality in deciding whether to disclose potentially exculpatory information. Alternative #2 seeks to limit pretrial discovery to only material disclosures as set forth in *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194]. We rejected that standard, as has the California Supreme Court, because it is not a standard that was either designed or intended to govern a prosecutor’s pretrial ethical duties for disclosing exculpatory information. To the contrary, it is a standard that governs whether a new trial should be granted after there has been a trial in which necessary disclosures were not made.

The Commission meetings at which stakeholders attended revealed that prosecutors either do not understand, or have been ignoring, their responsibility to provide exculpatory information to the defense. Contrary to what the dissent suggests, we do not expect that years of litigation will be needed to resolve how prosecutors can meet their obligations under Rule 3.8(d). Unlike Alternative #2 that requires perpetual analysis and reference to new case law, Alternative #1 plainly states that if information “tends to negate the guilt of the accused” or “mitigate the offense,” it must be disclosed. This is an easy standard to understand and apply, as evidenced by the experience of the vast majority of states that have adopted the rule.

Commission members agreed that the public has lost confidence in our criminal justice system. With case after case of discovery violations that have led to wrongful convictions, there is a pressing need for a rule that does not signal to prosecutors that they should do their own analysis of materiality and case law before deciding whether to turn over potentially exculpatory information. Instead, the rule proposed by the overwhelming majority of the Commission, Alternative #1, will promote public confidence; it will set forth a concrete, not merely aspirational, ethical standard; and it will bring California into line with the rest of the nation. It will also eliminate the ambiguities and uncertainties that have led District Attorney Offices in this state to express conflicting views, like those that surfaced at the Commission meetings, about when they are required to disclose exculpatory information. In fact, written submissions to the Commission from the CDAA and from the Los Angeles County District Attorney both indicate that requiring turning over of information that does not meet the materiality test would be a major change in the law. The Supreme Court has held that the language of Alternative #1 is the current law of California as set forth in Penal Code § 1054.1(e) (requiring the disclosure of “any exculpatory evidence”), *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83] and *People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40] (decided 3 days after the Commission adopted Rule 3.8).

**Commission Member Dissent, Submitted by George Cardona,
on the Recommended Adoption of Proposed Rule 3.8**

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

Proposed Rule 3.8(d)

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Commission's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.³ The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

³ I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions." The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for defining what constitutes information that "tends to negate the guilt of the accused or mitigates the offense. . . ." This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California's disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness's testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" As explained by the First Commission, its addition of the highlighted introductory clause was to clarify "that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law." This approach was based on the Commission's determination that ABA Model Rule 3.8(d) "was in conflict with California statutory law," in particular, "California statutory law that had been approved with the passage of Proposition 115 in 1991." This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission's proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence." The California Supreme Court has explained that this pretrial disclosure obligation is not limited to "just material exculpatory evidence," and that if, prior to trial, a defendant "can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." Barnett v. Superior Court (2010) 50

Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83].⁴ For “exculpatory evidence,” therefore, proposed Rule 3.8(d) and the California statutes appear to align. What constitutes “exculpatory evidence” falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

For example, in People v. Lewis (2015) 240 Cal.App.4th 257 [192 Cal.Rptr.3d 460, 468], the court recognized that “whether exculpatory evidence includes impeachment evidence may be unsettled.” (citing Kennedy v. Superior Court (2006) 145 Cal.App. 4th 359, 378 [51 Cal.Rptr.3d 637].) If California courts ultimately conclude that impeachment evidence constitutes “exculpatory information” within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission’s proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission’s proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts’ interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that “tends to negate the guilt of the accused” does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear that “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” California Penal Code § 1054(e).⁵ The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

Finally, a primary driver to the Commission’s recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong

⁴ At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and

the showing required to demonstrate, post-trial, a violation of the prosecutor’s duty to disclose exculpatory evidence: “The showing that defendants must make to establish a violation of the prosecution’s duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence.... To prevail on a claim the prosecution violated this duty, defendants challenging a conviction ... have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” Id.

⁵ Similarly, California Penal Code § 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” United States v. Agurs (1976) 427 U.S. 97, 108; see also Cone v. Bell (2009) 556 U.S. 449, 470 n. 15 (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); Kyles v. Whitley (1995) 514 U.S. 410, 439-40 (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.”) (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular “requires disclosure by prosecutors of information beyond that which is ‘material’ to guilt as articulated in Kyles v. Whitley (1995) 514 U.S. 419, and Strickler v. Greene (1999) 527 U.S. 263, 280-91.” United States Attorneys’ Manual § 9-5.001(C).⁶ As Mr. Eaton notes, it is simply wrong to say that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

* * * * *

**Commission’s Response to Dissent Submitted by George Cardona
on the Recommended Adoption of Proposed Rule 3.8**

As noted above, the majority of the Commission believes that it is important to clarify that the standard for disclosure does not include prosecutors deciding the extent to which evidence that “tends to negate the guilt of the accused or mitigates the offense” is material to the case. Only Alternative #1 makes that clear. This dissent demonstrates exactly why it is necessary to set forth a clear standard for disclosure. Mr. Cardona poses questions of whether disclosure is required even if the prosecutor assumes that the evidence is trivial or of “minimal significance.” California law has answered that

⁶ In footnote 15 on page 19 of the Report and Recommendation, the Commission states, “The United States Attorney’s Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA’s broad interpretation of 3.8(d).” It is true that, as referenced above, the United States Attorney’s Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA’s interpretation of its Model Rule 3.8(d).

question; it requires the disclosure of any exculpatory evidence, even if prosecutors do not believe it is of significance. As became evident in stakeholder input at Commission meetings, prosecutors are not in the best position to determine what evidence is or is not important to the defense. Thus, a clear rule of disclosure will prevent prosecutors from making erroneous assessments of the exculpatory potential of evidence, as has occurred in the many cases brought to the Commission's attention. Contrary to what the dissent suggests, Proposed Rule 3.8(d) provides very clear guidance. The only problem is that some prosecutors do not like the guidance it provides.

Furthermore, the Commission determined that adoption of Proposed Rule 3.8(d) does not violate Proposition 115. As noted, California law already requires disclosure of "any exculpatory evidence" and the California Supreme Court has held that a defendant is entitled to such evidence without having to show its materiality. *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83]. See also *People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40]. The dissent argues that a conflict *may* develop between a prosecutor's duties under the rule and under case law, but none exists at this time and there is no reason to believe that one will develop in the future.⁷ California is, therefore, free to adopt Proposed Rule 3.8(d), a rule that best protects the integrity of the criminal justice system.⁸

Finally, this dissent argues that Rule 3.8(d) is not needed because prosecutors have gotten the message and promise to abide by their disclosure obligations in the future. While we take in good faith the representations made by a handful of prosecutors who attended the meeting, we note that the problem with discovery violations has been ongoing and, in the eyes of some judges, has escalated significantly. The former Chief Judge of the United States Court of Appeals for the Ninth Circuit recently wrote of the "epidemic" of *Brady* violations. *United States v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626. Several stakeholders provided oral comments at Commission meetings regarding the ongoing problems with discovery from prosecutors. Surprisingly, even though fellow prosecutors admitted that they should not be determining materiality before making discovery disclosures, even as late as the Commission's last consideration of this proposal, the Los Angeles County District Attorney was still arguing that it is the prerogative of her prosecutors to make materiality determinations before providing discovery.

Proposed Rule 3.8(d) is not intended to punish prosecutors. It is a responsible measure to address preventable miscarriages of justice. Adopted across the nation, it has not been used as a tactical weapon to give the defense an advantage in criminal

⁷ In fact, there is no reason to believe that such a conflict will develop. Even before *Barnett*, *supra*, the California Supreme Court recognized in the case of *In re Steele* (2004) 32 Cal.4th 682, 701-702 [10 Cal. Rptr. 3d 536], that exculpatory evidence under California's discovery statutes includes evidence that "weakens the strength of" prosecution evidence. As developed, California law equates "exculpatory" with evidence that impeaches prosecution witnesses or detracts from the strength of prosecution evidence.

⁸ The reference to the first Rules Revision Commission's work does not reflect that its work was completed before the *Barnett* and *Cordova* cases.

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proceedings. Rather, it is an ethical standard that guides prosecutors in ensuring that defendants receive fair trials. It is time for California to adopt it.

* * * * *

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
 D = 3
 M = 1
 NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-12	Loyola Law School Innocence Project (7-22-16)	Y	A	3.8	California is last jurisdiction to adopt such a rule. The rule will help reduce wrongful convictions. It is a fair rule that only requires prosecutors to disclose information known or reasonably should be known to them. The rule will prevent injustice and will actually make prosecutors jobs easier for them.	No response required.
X-2016-16	Santiago, David (8-1-2016)	No	M	3.8	Rule should be expanded to include non-criminal cases. DAs will often prolong cases in search of experts who agree with them. Duty to disclose should also include materials used to impeach DA witnesses or that may undermine the legality of the charge/civil petition being filed.	The rule addresses criminal cases only because of the unique nature of prosecutor's role in such cases. There are other rules that address some of the concerns in civil cases, such as Rules 1.3, 3.2 and 3.4.
X-2016-32j	Law Professors (Zitrin) (07-25-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that	No response required.

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¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					"tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	
X-2016-43aa	COPRAC (Baldwin) (8-12-16)	Y	A	3.8	Supports the rule.	No response required.
X-2016-49	Domenic Lombardo (8-19-16)	N	A	3.8	Rule will do a better job of making sure prosecutors adhere to their Brady duties especially in light of Penal Code section 1424.5.	No response required.
X-2016-52j	Law Professors (Zitrin) (08-24-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that "tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	No response required.

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X-2016-54	Paul Cadman (8-30-16)	N	D	3.8	<p>The last thing we need are more rules. Saddling honest, hard-working lawyers with more rules is a waste of time.</p> <p>Recounts example of honest prosecutor he knows and claims that rule creates a de facto presumption of dishonesty among prosecutors.</p> <p>Dishonest lawyers on both sides of criminal cases will be exposed. Don't need new rules.</p>	The Commission was presented with substantial evidence that the issues addressed by proposed Rule 3.8 are necessary to assure a fair trial to defendants. In addition, this Rule will bring California into alignment with the majority of states, one of the charges of the Commission.
X-2016-68j	Law Professors (Zitrin) (9-21-16)	Y	A	3.8	See X-2016-32j Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-69	California Police Chiefs Association (Ken Courney) (9-19-16)	Y	D	(f)	<p>No legal authority provides that prosecutors have such authority over law enforcement.</p> <p>Rule would muzzle law enforcement with regard to duties not associated with providing evidentiary testimony in a criminal trial.</p>	The Commission disagrees with the commenter's assessment of the proposed Rule. Paragraph (f) does not change the relationship between prosecutors and law enforcement, but rather states that prosecutors must control public statements of <i>any person they do supervise</i> . If a prosecutor has no supervisory authority over law enforcement personnel, the prosecutor cannot control their public comments. Comment 5 only notes that the prosecutor's

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						duties for those he or she does not supervise is to “issue the appropriate cautions.”
X-2016-93k	Los Angeles County Public Defender (Brown) (9-23-16)	Y	A	3.8	Supports adoption of a rule that mirrors ABA Model Rule 3.8, as the Commission has done.	No response required.
X-2016-105	California State Sheriffs Association (Coyne) (9-27-16)	Y	D	(f)	<p>Paragraph (f) would inappropriately direct prosecutors to exert control over law enforcement officers employed by outside agencies.</p> <p>Paragraph (f) would potentially conflict with law enforcement duties to communicate with public.</p> <p>Paragraph (f) creates unreasonable expectation that prosecutor and control the statements made by law enforcement and would thus invite defense counsel’s allegations of misconduct, jeopardizing otherwise meritorious cases.</p>	See response to California Police Chiefs Association, X-2016-69, above.
X-2016-104ap	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	NI		<p>Refers Commission to OCTC’s prior comments to the Board of Trustees on this rule.</p> <p>OCTC’s foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the</p>	

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					<p>public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.</p> <p>The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office.</p> <p>1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Departments in California are generally independent of prosecutors' offices.</p> <p>2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will</p>	<p>1. The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.</p> <p>2. The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what</p>

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					<p>vary with the circumstances: and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.</p> <p>3. 5-110(D) [3.8(d)] requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is “not limited to evidence or information that is material as defined by Brady ... and its progeny.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission’s intention within the text of the rule itself, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in Brady. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.</p>	<p>Comment [3] does.</p> <p>3. The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the “materiality” standard in Brady and its progeny.</p>

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					4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information “known to the prosecutor.” It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.	4. The Commission addressed this issue in a previous draft of the Rule.
Public Hearing	Ogul, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 58-59 of the public hearing transcript.)	N	A	3.8	Prosecutor’s concerns regarding discipline for not disclosing impeachment materials are unfounded because impeachment evidence doesn’t meet the definition of exculpatory.	No response required.

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