

RRC3 – Rule 5-110(D)
Post-Agenda E-mails, etc. – Revised (May 22, 2017)

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May 18, 2017 Martinez Email to Difuntorum, McCurdy & Lee:

Randy, great report.

I too was puzzled by the sentence the Court added to Comment [3] regarding California discovery statutes. The proposed sentence can be viewed as gutting paragraph (D) and also setting a standard for Federal prosecutors by incorporating by reference the discovery obligations under Penal Code section 1054.1. One approach would be to use language like: "This Rule is not intended to govern the discovery obligations owed by prosecutors under California statutes or the California and U.S. Constitutions. See Penal Code § 1054.1."

I suspect the Court did not want to infringe on the Legislature's territory. On the other hand, if the Court's intent is to make the Rule co-extensive with the discovery statutes, then the fix lies in the black letter, not the Comment.

May 22, 2017 Mohr Email to Difuntorum, McCurdy & Lee:

A. Error in Attachment 6 to 5-110(D) Memo:

However, before I get into that, I want to bring your attention to an error in Attachment 6 to the 5-110(D) memo (redline version of proposed rule 5-110, as revised by the Supreme Court, including paragraph (D) and Discussion paragraphs 3 and 4).

The error is in paragraph (D). The version of (D) the Supreme Court suggested in Attachment 2 to its 5/1/2017 Order has the phrase "tends to" modifying not only negation of guilt but also mitigation of the offense and mitigation of the sentence. As drafted in Attachment 6 of the 5-110(D) memo, however, mitigation of offense and mitigation of sentence have been rendered as standalone clauses, untethered from the phrase "tends to." This has been accomplished by adding an "s" to the word "mitigate" in both of those clauses. It requires a close study of Attachment 2 to the Supreme Court order but it can be seen that the Supreme Court struck the "s" in both instances of "mitigate" as they appeared in the BOT's proposed version of the rule. In effect, the Court has adopted from the 1969 ABA Code of Professional Responsibility its DR 7-103(B), which provided:

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, *that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.* (Emphasis added.)

Paragraph (D) in Attachment 6 should be revised as follows:

(D) Make timely disclosure to the defense of all evidence or information known to

the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, ~~or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know~~ or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. This obligation includes the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely;

B. Proposed Rule 5-110(D) Issues:

Here are my responses to the issues identified by Staff:

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

Yes, with "tends to" modifying all three substantive duties regarding material that negates guilt, mitigates the offense, or mitigates the sentence. See above.

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

First, I am concerned that the phrase "significant doubt" might be construed as importing into the rule a materiality standard.

Second, concerning staff's suggestion that the sentence be qualified by using the phrase, "for example," I disagree. I am aware of no instance in which the phrase "for example" is used in the black letter of a rule. I did a quick search of the current Cal rules and that phrase appears twice, both in Discussion paragraphs. A similar search of the ABA Model Rules revealed 81 instances of the phrase, all in Comments to the rules, none in the black letter. If "for example" is used, it should be in the Discussion paragraph.

Third, on a more mundane, rule-drafting level, adding a sentence in a series of prohibitions that follow a single opening clause ("A prosecutor in a criminal case shall:") creates an awkward rule structure. A quick review of similar rule structures (e.g., 3.4, 1.16(a) and (b), 8.4) shows each paragraph following the introductory clause is a single sentence followed by a semi-colon. That is also true of MR 3.8, paragraphs (a) through (c), and (e) through (f). Paragraphs (g) and (h), added in 2008, are not part of the structure of (a) through (f).

The one exception I found is in 3.3(a)(3), but that paragraph is the last one in the series.

I don't think these observations are a reason to delete the sentence but we should at least consider what effect, if any, such a rule structure might have on future constructions of the rule.

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

I agree with the Court's change. I'm not sure that the deleted clause is necessary even if the second sentence of the Court's paragraph (D) were to be deleted.

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

I agree with the Court's change; I think its phrasing is less awkward. But see Point #6.

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

I agree with staff's observation that the sentence is ambiguous. My preferred interpretation would be that the Court does not want the rule to be used to game discovery in criminal proceedings. I am also concerned that the sentence might be too limited in applying only to "California courts," unless that term is intended to include federal courts sitting in California. My suggested revision of the sentence is: Nothing in this rule is intended to be applied [in criminal proceedings](#) in a manner inconsistent with statutory and constitutional provisions governing discovery in ~~California courts~~ [such proceedings](#).

If the intent is to limit this sentence to California state courts, then I would leave "California courts" at the end of the sentence. However, as the rule is intended to govern the conduct of federal prosecutors practicing in California, I'm not sure the sentence should be so limited.

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

I've reviewed my notes from the 10/23/15 Commission meeting when the stakeholders appeared. I've attached a PDF of those notes. Please see paragraph 41, with pertinent parts highlighted in yellow. It appears that the Commission was supposed to reconsider the inclusion of "cumulative" after public comment but, unfortunately, did not. I think on reconsideration, the Commission likely would have deleted the word in light of Michael Ogul's comments.

With the reference to "cumulative" left in, at best the second sentence would appear to narrow the scope of paragraph (D) and at worst, it would appear to contradict the relatively broad sweep and intent of the paragraph, something a comment should not do. I would delete the reference to cumulative rather than try to explain what was

intended by the phrase.

However, if it is believed "cumulative" should be left in, at least in reference to impeachment, then the following is a possibility:

Nevertheless, rule 5-110 is not intended to require disclosure of cumulative information [as to impeachment](#) or the disclosure of [exculpatory or impeachment](#) information that is protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders.

Attached:

RRC2 - [3.8][5-110] - 10-23-15 KEM Meeting Notes - DFT2.1 (10-25-15).pdf