

III. **ACTION.**

A. **Report and Recommendation on Rule 5-110 (Performing the Duty of Member in Government Service) (including ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor)).**

**Materials Prepared For/Considered At Meeting:**

- RRC2 - [3.8][5-110] - Report & Recommendation - DFT3 (09-08-15)KEM-GSC-KEM-ML.docx
- RRC2 - [3.8][5-110] - Rule - DFT4 (10-16-15)-ANNOT - Cf. to DFT3.2 (09-18-15).docx
- RRC2 - [3.8][5-110] - Rule - DFT4 (10-16-15) - CLEAN.docx
- RRC2 - [3.8][5-110] - Rule - DFT4 (10-16-15) - Cf. to MR3.8.docx
- September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, KEM, Marlaud & Lee:  
2<sup>1</sup>
- September 2, 2015 OCTC Memo to Commission: 2
- April 20, 2015 OCTC Memo to Commission: 3
- September 25, 2015 Tuft Zahner (CDAA) Letter to Chair, Vice-Chairs & Commission: 60
- October 1, 2015 CDAA (McGrath) Letter to Chair, Bleich & Zipser (forwarded to RRC2, Advisors, Liaisons & Staff by 10/2/15 McCurdy Email)
- October 8, 2015 CPDA [Ogul] & CACJ [Thoma] Letter to Chair, Vice Chairs, Commission & McCurdy
- October 8, 2015 Sara Theiss Email to McCurdy
- October 9, 2015 Innocence Project (Scheck & Levenson) Letter to Chair, Vice-Chairs & Commission
- October 14, 2015 L.A. District Attorney (Lacey) Letter to Chair & Vice Chairs
- October 16, 2015 S.F. Public Defender [Adachi] Letter to Chair, Vice-Chairs & Commission
- October 19, 2015 Riverside Public Defender Email to McCurdy
- October 20, 2015 Contra Costa County P.D. Letter to Chair, Vice-Chairs & McCurdy
- October 20, 2015 Orange County P.D. Email to McCurdy

1. Chair [to proponents and opponents of Rule 3.8]: The Commission members have read the papers and letters; you do not need to repeat what is in the papers.

**Statements of Prosecutorial and Defense Representatives**

2. Chair: Notes that 15 minutes has been reserved for each side. Each side may allocate time as you wish. Asks attendees to introduce themselves.
  - a. Nancy Omalley (DA, Alameda)
  - b. Patrick McGrath (DA, Yuba)
  - c. David Angell (ADA, Santa Clara)
  - d. Bleich Rosen (DA, Santa Clara)
  - e. Steve Wagstaff (DA, San Mateo)
  - f. William Woods (L.A. District Attorneys Office)
  - g. Tuft Zahner (CDAA CEO)
  - h. David Klaus (PD Office, Alameda)
  - i. Michael Ogul (Homicide – Santa Clara)
  - j. Sara Theiss (State Public Defender)
  - k. Laurie Levenson (Innocence Project)

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<sup>1</sup> Numbers refer to page numbers in E-mail compilation dated 9/21/15.

- l. Nancy Haydt (CACJ)
- m. Gerald Uelman (Prof., Santa Clara Law School)
- n. Barry Scheck (Innocence Project)
- o. Ignazio Hernandez (CACJ)
- 3. Chair: Asks visitors to speak to the proposed Rule. Will alternate speakers, with a representative from the DAs first
- 4. McGrath: Patrick McGrath, Yuba County D.A.
  - a. Will discuss important issues relevant to ALT1 and ALT2
  - b. First, Wants to emphasize that ALT2 extends beyond Brady
    - (1) We are losing the point that the statute goes beyond Brady w/in 30 days of trial.
  - c. Second, we train to statutory and Constitutional obligations that DA's have.
    - (1) Should align rule w/ constitution and statutes.
    - (2) That is how we train; it is not "cognitively challenging."
    - (3) Other jurisdictions have faced this; a number of jurisdictions have looked at the rule and its relationship to case law and statutes and constitution and concluded that it is the appropriate limit.
  - d. Other DA's will also be focused on training what is required.
  - e. In summary, does not want a lawyer in his office who followed requirements of Prop. 115 to be subject to discipline.
- 5. Dean Uelman: Law Professor at Santa Clara School of Law.
  - a. Has taught Crim procedure, evidence, legal ethics among others.
  - b. Was a prosecutor in US Attorney's office in C.D. Cal.
  - c. Member of California Commission on Fair Administration of Justice.
  - d. Model Rule 3.8(d) sets a simple standard that every prosecutor can follow.
    - (1) Not sure why the CDAA opposes this?
    - (2) Perhaps it is because it directs prosecutors to do more than the constitutional or statutory minimum.
    - (3) *Brady*, etc., does not address the professionalism to which we should aspire; rather, *Brady* and its progeny address the fairness due to accused so that they have a fair trial.
    - (4) ABA Standard has been adopted by every jurisdiction.
  - e. Imposing discipline is not the goal of the rules; it is to aspire to professional standards.
  - f. Believes that D.A.'s oppose the rule because D.A.'s want to be able to retain independence to impose discipline internally and not be subject to an external agency, i.e. State Bar.
  - g. We faced stonewalling on the Commission on the Fair Administration of Justice.
  - h. Quotes from the Commission's report. Main point is that there are no consequences for D.A.'s who have violated their ethical responsibilities.
  - i. Should we adopt a uniform standard or leave it up to 58 separate D.A.'s to impose internal discipline? There should be a uniform standard.
- 6. Bleich Rosen (Santa Clara D.A.) – We are not saying no to any standard.
  - a. Santa Clara D.A. was first office to institute a conviction integrity office (headed by David Angell in the audience)

- b. We're not here to say no or not do anything. We are instead taking the position that ALT1 is untethered to any meaningful standard.
  - c. ALT2, however, while it has its downsides, is preferable.
  - d. Problems:
    - (1) Protection of witnesses
    - (2) Delay of production
    - (3) Protection of victims; medical information
  - e. We're saying we're following very closely the case law and statutes.
7. Michael Ogul (Santa Clara P.D.'s Office):
- a. Has great respect for Bleich [Rosen] and David [Angell] and what they aspire to accomplish. Recognizes open file policy.
  - b. However, there is a lot of resistance in Rosen's office to giving us everything to which we are entitled.
  - c. Every time he files a motion, he hears "we know what our obligations are; we don't need a court order"
  - d. Cites to two cases where convictions were reversed for failure to turn over exculpatory information.
  - e. Pleased to hear that Mr. McGrath recognizes that prosecutors have a duty to turn over all information regardless of materiality.
    - (1) But see L.A. D.A. office's letter at page 4.
    - (2) But see CDAA letter to same effect.
  - f. Regarding concerns Mr. Rosen has raised, he notes there is a built-in protection in statute for prosecutors to seek a protective order where required – "unless otherwise ...." 1054.7.<sup>2</sup>
  - g. Reality is that nothing else has worked. The S.Ct. decision in *Barnett* has not worked. Only changing the rule will achieve the desired purpose.
  - h. Supporting aspects; we did not use the term "cognitively challenged."
  - i. U.S. v. Agurs, U.S. S.Ct. – if any doubt, turn it over.<sup>3</sup>
  - j. Also very concerned about proposed paragraph (i).
    - (1) "Reasonable independent judgment" – What is it? Why not the more rigorous professional judgment?
    - (2) Recent misconduct by line prosecutor in Santa Clara. Supervising D.A. testified that conduct was prevailing practice. This creates immunity where misconduct.

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<sup>2</sup> Penal Code § 1054.7 provides:

**1054.7.** The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

<sup>3</sup> *United States v. Agurs* (1976) 427 U.S. 99.

- (3) State Bar should be able to consider exercise of judgment as mitigation but it should not be an exception.
- k. Also a problem with Comment [3]. It is not the law.
  - (1) Even if “insubstantial,” it must be disclosed.
  - (2) See *People v. Carpenter* (1997) 55 Cal.4<sup>th</sup> 312.
- 8. Nancy O’Malley (D.A., Alameda County).
  - a. We have training to uphold prosecutor obligations.
  - b. The objective is not that we shall win but that justice shall be done. *Berger v. United States*, 295 U.S. 78 (1935).
  - c. Prosecutors’ obligations are clearly defined in case law and statutes.
  - d. The issue is whether there is adequate accounting.
    - (1) Prosecutors have obligation to self-report. Bus. & Prof. Code § 6068(o).
    - (2) Court has obligation to report the prosecutor’s misconduct. Bus. & Prof. Code § 6086.7.
  - e. Commission on Fairness: Did not suggest discipline for every failure to disclose; only those that are deliberate.
  - f. ALT1 goes far beyond current law. And it is untethered to any standard in case law or statute.
  - g. Also concern w/ turning over any information that might mitigate an offense. Maybe I’ll interpret background information as exacerbating the offense, while the defense lawyer will consider it mitigating. We need clear guidance on the term “mitigation”. It’s tethered to sentencing in the case law now.
- 9. Ogul: Requests to respond to Nancy O’Malley.
  - a. Spoke to existing disciplinary proceedings – 6086.7 re court reporting.
  - b. Only requires reporting to State Bar if misconduct caused a reversal or modification of judgment
  - c. As things stand now, State Bar might never know about serial failures to disclose.
  - d. Chair: New Penal Code § 1424.5 – how does that affect our discussion?<sup>4</sup>
  - e. Ogul: It goes part way there; uses a standard that provides for reporting if the prosecutor withholds exculpatory information “deliberately and intentionally” and it has resulted in “seriously limiting” the defense.
  - f. Still does not address those failures to disclose where there is no such “serious limitation”.

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<sup>4</sup> Probate Code § 1425(a) provides:

**1424.5.** (a) (1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant or material exculpatory evidence or information in violation of law, a court may make a finding, supported by clear and convincing evidence, that a violation occurred. If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(2) A court may hold a hearing to consider whether a violation occurred pursuant to paragraph (1).

- g. It is a step forward but not far enough.
- 10. William Woods (L.A. D.A.'s Office): former COPRAC member
  - a. Los Angeles was the first D.A. to establish a professional responsibility unit.
  - b. There is a potential for mischief with ALT1.
  - c. Report to State Bar accusing prosecutors of misconduct and D.A. must litigate this.
  - d. This is better done in the legislature, which chose not to change the statute despite the Commission on Fair Administration of Justice's Report.
  - e. ALT1 creates traps, recognized in the Wisconsin case of *Riek* [350 Wis.2d 684 (2013).]
- 11. Rothschild: Please respond to issue of *Barnett* case.
  - a. Is there a difference between ALT1 and ALT2?
  - b. Zahner: *Barnett* is case law; it provides guidance. Decided by judges, applying the statute.
  - c. Eaton: Does Barnett equal ALT1?
- 12. Chou: What he is trying to understand is how the rule applies in light of 1054.1(e).
  - a. Is there a difference?
  - b. Zahner: Tends to negate guilt is untethered. It might exceed what the courts have stated.
  - c. Chou: Does 1054.1(e) apply to mitigating evidence?
  - d. Zahner: There is case law. ALT1 does not provide any guidance. No case law interpreting the language. Entirely new term. Only way we will find out is if folks bumble along and violate the rule.
- 13. Krinsky: Would like views on California being in line with the rest of the country.
  - a. Zahner: In other states, there are a lot of different statutory schemes. It's irrelevant in some states. For example, in Colorado it is irrelevant because there is an open discovery statute.
  - b. Compare Wisconsin, which is not an open discovery statute. Alludes to number of California cases.
  - c. There are also a number of other states that have done similarly.
- 14. Barry Scheck: From a national perspective, we have been litigating wrongful conviction cases.
  - a. Don't bother with ALT2. ALT2 will not do anything. ALT1 is a clear standard.
  - b. In California, "exculpatory" is no different than "tends to negate guilt." That is the case law. It gives guidance to prosecutor.
  - c. If you don't adopt that standard, as dictated by *Barnett*, you will be out of line with the rest of the country.
  - d. If you have any qualms, e.g., to protect witnesses, get a court order. The rule recognizes that.
  - e. Must be willful and deliberate violations of the rule that will be disciplined.
  - f. If you have conviction integrity units, then accept this; it's guidance.
- 15. Eaton: Question re expediting 3.8.
  - a. O'Malley: Thought the delay was due to lack of engagement w/ prosecutors.
  - b. This day has given us opportunity to submit things in writing.
  - c. Eaton: Are you fine with expedited consideration?

- d. Zahner: Not sure what the expedited process is.
- e. Chair: There will be public comment in expedited process.
- 16. Langford: Wants to clarify what would be effect with ALT2 and section (i), as interpreted by relevant case law. Paragraph (i) appears to be a big out for prosecutors.
  - a. How does reasonable independent judgment work?
  - b. Ogul: Yes, agrees it would be a big out for prosecutors.
- 17. Krinsky: Please address L.A. D.A.'s point that the Court cannot enact a rule that goes beyond statute or case law. Second, if *Barnett* requires disclosure even if not material, is the proviso important?
  - a. Ogul: Written position of L.A. D.A. and CDAA is that ALT1 does not have a materiality requirement. This is a fundamental misunderstanding of disclosure obligations. So ALT1 needs to be enacted. The D.A.'s are resistant to decisional law. It is the law.
  - b. Ogul: To Zahner on materiality, it is materiality that is the difference between ALT1 and ALT2. "Tends to negate guilt" is in both ALT1 and ALT2.
  - c. *In re Steele*, 32 cal.4<sup>th</sup> 682. 1054.9 – post-conviction proceedings in death penalty case. In that case, prison killing, prisoner wanted to get evidence that he was trying to protect guards. Evidence could then lead to evidence that would convince jury to vote in favor of a life sentence rather than death. So mitigating can be exculpatory. Brady has also held that.
- 18. Levenson: Regarding Prop 115 response. Given what Mr. Ogul has explained re case law, there is no obstacle in ALT1. We have to address the materiality requirement. There were 131 cases in 2014 re Brady violations. The Rule is clear, across the board.
- 19. Chou: ALT1 – isn't it the same as ALT2?
  - a. Ogul: They are the same but you need the statement in the rule to drive across the point that materiality is not required.
  - b. As to whether it is wrong to impose discovery obligations beyond the law, this provision is all about discipline. Will tell prosecutors that they are potentially subject to discipline if they do not disclose. Nothing else has worked.
  - c. Eaton: If ALT2 and ALT1 are the same, what's wrong with ALT2?
  - d. Michael: Because there are repeated objections to not have a materiality standard in the Rule 3.8.
  - e. Eaton: Will it add another factor prosecutors to consider?
  - f. Ogul: It would focus their attention.
- 20. Fybel: Clear from *Barnett* there is no materiality requirement.
  - a. However, in both letters from CDAA and L.A. D.A., there is a statement that there is a materiality requirement. Suggests that that is how prosecutors are being trained.
  - b. Fybel: Will someone from the D.A.'s group here please comment on this; some don't seem to get that materiality is not required.
  - c. McGrath: There is an unfortunate focus on materiality.
    - (1) Has run training sessions for CDAA for over 10 years.
    - (2) We don't focus on materiality.
    - (3) There has been a renewed focus on *Brady* and materiality.



- (4) Refers to People v. Johnson.
  - (5) As to what is the difference between ALT1 and ALT2, you have to have guidance to prosecutors.
  - (6) ALT1 incorporates case law, decisional law. That's where guidance comes from.
  - (7) McGrath: From his perspective re paragraph (i), it applies to (d), (g) and (h).
21. Blumenthal: What should I look to for guidance? Other discipline cases from elsewhere in the country?
- a. McGrath: Only get guidance if there is an ethics opinion or if discipline has been imposed and reported.
  - b. Blumenthal: Won't we have issues w/ ALT2 as well?
  - c. McGrath: Guidance from other states will be helpful.
22. Fybel: Question for Mr. Ogul.
- a. Reference to section 6086.7 court referral to State Bar.
  - b. Commission for Fair Administration of Justice stated that the referral was not sufficient.
  - c. Revision to Code of Judicial Ethics now requires judges to report violations of rules or State Bar Act. Does that change your previous answer?<sup>5</sup>
  - d. Ogul: Not familiar with the Canon.
23. Ham: Paragraph (g) relates to post-conviction relief.
- a. If you do timely disclose under ALT1 or ALT2, is there any other impact?
  - b. Zahner: Agrees that (d) is not a materiality standard.
  - c. Ham: does the rule impose discipline for anything other than not disclosing in a timely fashion.
24. Michael McDermott: McGeorge graduate.
- a. Discusses dirty lawyer tricks.
  - b. When providing discovery, haystacking, i.e., hiding new discovery in the voluminous papers provided.
  - c. Secret communications re IR.S and DOJ.
  - d. Sought qualified immunity for bureaucrats.
  - e. In reality is a very dirty business.

### **Statements of Commission Members**

25. Chair: Asks Rothschild to summarize.
26. Rothschild: One change made to ALT1, i.e., disclosure to tribunal to address prosecutor's concerns re that requirement.
- a. Not sure why you would turn it over to judge.
  - b. Deleted from both ALT1 and ALT2.

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<sup>5</sup> See Cal. Code of Judicial Ethics, Canon 3D(2), which provides:

(2)Whenever a judge has personal knowledge,\* or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.

- c. Favors ALT1; to extent they do say the same thing, i.e., material is not required, but the rule needs to make it clear for prosecutors.

27. **MOTION** [11:50 a.m.]<sup>6</sup>[Rothschild, \_\_\_\_\_ (second)]: Recommend adoption of paragraph (d), ALT1, as revised by drafting team to delete reference to providing evidence to the tribunal.

“(d) **[ALT 1]** 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;

**VOTE:** 10-2-1 [Mr. Chou abstaining]

**MOTION PASSES.**

28. Tuft: ALT2 disciplines violations of legal duties that exist.

- a. ALT1 asks us to adopt a national standard.
- b. That’s the difference. It is not aspirational. If look at rule in isolation, do not see the whole framework of how the rule works.
- c. Definitional section will make clear that the prosecutor must “KNOW”.
- d. There is no lack of guidance.
- e. Comment [3] is very important.
- f. Comment [3] explains the disclosure obligation.
- g. ABA Comment [3] recognizes that prosecutor may seek a protective order.  
(1) We should probably add that comment.
- h. Our obligation is to draft rules by which we are to be regulated. Rules that promote the fair administration of justice; that’s what this rule ALT1 does.
- i. ALT1 is the correct standard; we need a good reason to depart from the national standard. ALT1 does not depart from current law. It will be influenced by the law. It is not a trap for the unwary.
- j. There is a legitimate concern that it might expose prosecutors to bar complaints. But that is a risk for all of our rules; they might expose lawyers generally to discipline. Competence rule is similar.
- k. Unless a compelling reason for California not to, it should adopt the national standard.

29. Judge Stout: Will you address (i) separately?

30. Cardona: Also on drafting team. Wants to speak briefly.

- a. Should also consider Comment [3] and section (i).
- b. There was a vote last meeting to put the comment into section (i). Only intended to reach deliberate and willful acts of a prosecutor (*Schenk*).
- c. It is an objective, reasonable standard – requires objectively reasonable exercise of judgment.
- d. Cardona: ALT1 does present some issues but interpretation of language has been divergent.

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<sup>6</sup> Motion made @ 11:50 a.m., taken at 12:19 p.m. after discussion.



31. Chou: Agrees with Mr. Tuft's point; there has to be good reason to diverge.
- a. However, he is concerned w/ Prop. 115 question; rule subject to significant constitutional challenges if the duty is broader.
  - b. Not sure the ALT1 and ALT2 are similar in scope.
  - c. Chou: to Cardona re U.S. Atty's Manual.
  - d. Cardona: It states prosecutors should disclose beyond *Brady*, i.e., not limited to material.
  - e. Cardona: Still issues that remain open, e.g., *People v. Lewis* case that was cited in CPDA letter.
    - (1) Still issue re what is exculpatory, e.g., impeachment evidence. Some questions re 1054.1(e).
32. Eaton: Agree with points Mr. Tuft made but reaches an opposite conclusion.
- a. Quotes from Charter. Public protection & administration of justice.
  - b. Regardless of whether ALT1 or ALT2 is adopted it will have an effect.
  - c. But we also should consider and set forth a clear articulation of disciplinary standard. Prof. Uelman repeatedly referred to "aspirational". That is not our charge.
  - d. If no difference between 1 and 2, then we should choose the law.
  - e. Wisconsin and other states have not followed Model Rule. Does not think there will be a difference.
  - f. Also concerned about the mischief that has been alluded to by the prosecutors. Who will be putting forward the disciplinary complaints.
  - g. Supports expedited consideration but ALT1 is not the correct approach.
  - h. Difuntorum: Notes that AB 1328 – requires clear and convincing evidence in Penal Code § 1424.5 plus the obligation of judges to report. Cannot minimize the effect this will have on discipline.
    - (1) Sum: With all of the foregoing, they will have to be aware of the disciplinary sanctions that are down the road.
    - (2) There may be more to come.
33. Langford: What she sees after much research on the topic is that you just don't see cases where prosecutors disciplined within the State Bar system.
- a. She is fine with prosecutor as client; a prosecutor is unlikely to be disciplined.
  - b. Their "client" is the people; but no one is looking.
  - c. Discipline is usually private. To her, there is a real problem with discipline.
  - d. There are more complaints against PD's. For public protection, need ALT1.
34. Blumenthal: New statute has "clear and convincing" standard. Not sure whether that might mean either collateral estoppel effect or the Bar will give it great weight. We will see.
- a. Bar gets a lot of complaints about both DA's and PD's.
  - b. Case law already exists on prosecutorial misconduct.
  - c. Will get more focused complaints, from better sources.
  - d. But now there generally is no evidence, so can't even open a good investigation.
  - e. There are problems with both alternatives.
  - f. However, ALT1 does provide guidance from around the country. There will be further developments.

## **PARAGRAPH (i)**

35. Rothschild: Converted comment [7] from the September meeting draft [Draft 3.2] into paragraph (i).
- a. Voted on the concept only, of moving comment's concept into the black letter, with the understanding that the drafting team would come up with language. The intent is that a prosecutor not be disciplined for a decision that was not willful or deliberate.
  - b. Looking at comment to go with it – new Comment [8] – clarifies that it is an objectively reasonable standard.

36. **MOTION** [12:20 p.m.][Rothschild, Cardona (second)]: Adopt paragraph (i) as proposed by the drafting team (applies to (d), (g) and (h)):

“(i) A prosecutor who, exercising reasonable independent judgment, determines that evidence does not come within the scope of paragraphs (d), (g), or (h) and takes no action, does not violate this Rule even if the prosecutor's determination is later found to be error.”

**VOTE:** 4-9-1 [Mr. Bleich abstaining]  
**MOTION FAILS.**

- a. Tuft: Proposed comment (i) originates w/ Cmt. [9] of Model Rule.
  - (1) Adding (d) to (i) is unprecedented. This would be a mistake.
  - (2) Will water down the protections.
- b. Martinez: Difference is that (g) and (h) involve an accused who has already been at trial. The contexts are completely different.
- c. Langford: Agrees. This is better as mitigation in the discipline context.
  - (1) Even if later found to be error. Does not look like we're protecting the public.
- d. Cardona: This is one of few points on which defense and prosecutors agreed.
  - (1) No discipline for conduct that is not willful or deliberate.
- e. Tuft: That argument would apply to existing legal obligations to comply with Brady. We should not use this; it would make enforcement impossible.
- f. Cardona: Disagrees. Discipline should be limited to intentional conduct.

37. **MOTION** [12:31 p.m.]: Paragraph (i) with its application only to paragraphs (g) and (h):

“(i) A prosecutor who, exercising reasonable independent judgment, determines that evidence does not come within the scope of paragraphs (g) or (h) and takes no action, does not violate this Rule even if the prosecutor's determination is later found to be error.”

**NO VOTE. MOTION WITHDRAWN.**

- a. Ham: If the prosecutor “knows” under (g), then why do we let them off the hook?
- b. Cardona: This is in the Comment to the Model Rule.

- (1) If we don't include this, we are intending more than the ABA Model Rule.
- c. Tuft: The trigger is that a decision was made and later determined to be erroneous.
- d. Mohr: Explains that paragraph (i), in an attempt to more accurately describe what conduct is being excused, turns the Model Rule comment on its head.
- (1) MR comment provides:
- “[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.”
- (2) Under MR comment, the focus is on the prosecutor's determination of whether the new evidence is “credible and material,” i.e., if in good faith the prosecutor makes the wrong determination about the evidence, the prosecutor should not be prosecuted.
- (3) In proposed paragraph (i), on the other hand, the focus is more on the prosecutor's decision not to act. It confuses what conduct requires the good faith determination.
- (4) It is very difficult to put into the black letter a provision that addresses conduct (determination of the information's relevance, i.e., whether it is credible and material, when the rule prohibition for which paragraph (i) provides a safe harbor is the prosecutor's failure to disclose the credible and material evidence.
- (5) The concept should be in a comment.
- e. Next Chair: May need to revisit the vote at the September meeting to move the concept of comment [7] into the black letter.
- f. Mohr: Again, explains why the concept should be in a comment.
- g. Tuft: Agrees with Mr. Mohr; the concept does not provide an exception to the rule and should remain as a comment; it is clarifying.
- h. Rothschild: Withdraw motion; Clinch concurs.

38. **MOTION** [12:41 p.m.][Rothschild, Clinch (second)]:  
Reconsider September meeting vote to move the concept of Comment [7] (i.e., Model Rule 3.8, cmt. [9]) into the black letter.  
**NO VOTE TAKEN.** Unanimous consent on reconsideration.  
**MOTION PASSES.**

39. **MOTION** [12:43] [Cardona, Tuft (second)]: Recommend adoption of Model Rule 3.8, comment [9] (will be Comment [8]):  
“[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.”  
**VOTE:** 13-0-1 [Mr. Eaton abstaining]  
**MOTION PASSES.**

**COMMENT [3]**

40. Rothschild: Old Comment [3] was underinclusive. Have added some guidance on the scope of paragraph (d). Also added a provision re timely.

41. **MOTION** [1:33 p.m.] [Rothschild, Tuft (second)]: Adopt Cmt. [3] as amended during the discussion of the motion:  
[3] **[To be included only if Commission favors para. (d), ALT1]** The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* and its progeny. Although this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information, ~~the disclosure of information that is insubstantial or speculative,~~ or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases or court orders. 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.  
**VOTE:** 12-0-0  
**MOTION PASSES.**

- a. Tuft: Perhaps add sentence from MR Comment [3].
  - (1) Best to make it a separate comment. RRC1 had a separate comment on protective order.
  - (2) Chair: We'll address that after this vote.
- b. Langford: Doesn't comment [3] conflict with existing law?
  - (1) Tuft: Doesn't think so.
  - (2) Langford: Michael Ogul stated that *Barnett* states otherwise.
  - (3) Tuft: You have to read the whole sentence.
- c. Ogul: Grammatical setup of sentence is confusing. Wants to take out "or the disclosure of information that is insubstantial or speculative."
  - (1) Asking for a friendly amendment.
  - (2) Chair: Confirms that Mr. Rothschild and Mr. Tuft agree that Mr. Ogul's suggestion is a friendly amendment.
- d. Ham: What does cumulative mean?
  - (1) Blumenthal: If other side already has information, no violation of *Brady* if you do not disclose the information.
- e. Mohr: Seeks to confirm that movants also want to delete the reference to "cumulative".
- f. Difuntorum: If add something afterwards, must go out for public comment. If, however, we include it but delete it, then we need not go forward with a second period of public comment.

g. Chair: Confirms that we will come back and revisit the issue of whether the reference to “cumulative” should be deleted after public comment. Confirms that the Commission members all agree with this approach.

- h. Tuft: To confirm, we will leave in cumulative but take out the reference to “insubstantial or speculative”.
- i. Mohr: Reads the provision that is subject to the vote.

42. **MOTION** [1:52 p.m.] [Tuft, Rothschild (second)]: Recommend adoption of Model Rule 3.8, cmt. [3]:  
“[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.”  
**VOTE:** 13-0-0  
**MOTION PASSES.**

43. **MOTION:** [1:54 p.m.] [Rothschild, Langford (second)]: Approve entire rule, as amended during the meeting.  
**VOTE:** 11-1-1 (Mr. Ham abstaining)  
**MOTION PASSES.**

## **SHOULD RULE IMPLEMENTATION BE EXPEDITED?**

- 44. Chair: Asks Mr. Difuntorum to explain the schedule for expediting the rule.
- 45. Mr. Difuntorum: Provides background on the rule approval process:
  - a. Commission must present rule to Regulation and Discipline Board Committee (“RAD”). If RAD approves, rule will:
  - b. Go out for public comment, maybe public hearing.
  - c. Drafting team: Will reviews public comment and make recommendations based on its consideration.
  - d. Commission as a whole will then consider the public comment and post-Public Comment rule (assuming drafting team has recommended changes).
  - e. Further recommendation is sent to RAD.
  - f. RAD makes recommendation to full Board.
  - g. Petition filed with the Court.
  - h. Notes that while all of this is going on, Commission must continue to work w/in its schedule on all of the other rules.
  - i. Possible Dates:
    - (1) Agenda item for November RAD meeting. Need rule ready 10 days pre-RAD (11/19/15). Can consider request for public comment.
    - (2) Jan. 23-24, 2016 meeting. 45-day public comment.
    - (3) Special set RAD meeting in February, to BOT in March. Out the door to the Court. If recirculate, then will back up the process.

- j. Krinsky: Recommends that entire BOT make the decision for public comment so we will need to have it to them by 11/20 meeting.
  - (1) Should also consider a public hearing in January because of the holidays.
- k. Eaton: Who holds public hearing?
  - (1) Difuntorum/Rothschild: The Commission or select members of the Commission.
  - (2) Krinsky: Members of RAD should be able to come if they want.
- l. Eaton: What is public hearing?
  - (1) Difuntorum: Typically the medium of comment is written.
  - (2) However, RRC has typically set a date for the hearing.
  - (3) Hear the comments, ask questions if so inclined.
- m. Eaton: What actually goes out for public comment?
  - (1) Chair: The rule itself.
- n. Difuntorum: Still in flux on the date. May have to change some dates if feasible.
- o. Difuntorum: Discusses what rule should get expedited.
  - (1) There are a lot of provisions in 3.8 that have not been identified by the Innocence Project as needed to be expedited.
  - (2) We can send up a different rule on an expedited basis: (a), (d), (g) and (h).
  - (3) Would not include paragraphs (b), (c), (e), or (f).
  - (4) In sum, send up only those provisions that are necessary to respond to the urgency raised by the Innocence Project and other proponents of the rule.
- p. Tuft: What does expedite mean for this Rule?
  - (1) Do we want to get this important rule to the S.Ct. ASAP to protect due process of accuseds?
  - (2) Benefit of expedition is that S.Ct. gets this rule to consider in advance of the comprehensive set of rules and it can be considered by itself.
  - (3) Thinks the D.A.'s will come back with a big push back; do it expeditiously, but not necessarily as fast as possible.
- q. Bleich: Does not think we need to pick out only the urgent pieces.
  - (1) Deprives other interested parties of the context in which the rule exists.
  - (2) The other provisions are part of a larger set of prosecutor obligations.
  - (3) No strong view re March or April, but is concerned with delaying the consideration of the rule by S.Ct. We're already 7 months into the process of considering this rule and it is still not before the Supreme Court.
- r. Chair: What is next BOT meeting after March?
  - (1) Difuntorum: May 12-13, 2016.
- s. Krinsky: Also does not think we should deconstruct the rule. Public should see the whole rule.
- t. Langford: Prefers a slow expedited process.
  - (1) Should not put out any rule in parts that does not provide the full context.
- u. Difuntorum: Agrees that rule is ready to go up.
  - (1) However, concern regarding other related rules.
  - (2) Consider paragraph (f) re trial publicity.



- (3) The more parts there are to a rule, the more interlocked they are with the other rules.
  - (4) We should not have to talk about trial publicity now.
  - v. Bleich: S.Ct. can do what it wants to do. We're sending it on expedited basis for (d), (g) and (h). We are also providing context.
    - (1) Court can review the entire rule or only the three paragraphs.
    - (2) We should not send a piecemeal version to the public or to the Court.
  - w. Tuft: We went through this with 1-650.
    - (1) Referencing 5-120 will not affect anyone else.
    - (2) We are doing what we have set out to do.
    - (3) Is not arguing that we should slow it down, no. Wants this to be a "slow" process so that we can get it right.
  - x. Fybel: Giving it to S.Ct. to review out of order; early, so they can approve it early and it will become effective earlier.
    - (1) Clarifies that the rule can be adopted immediately.
  - y. Chair: Confirms that the rule will have a regular 90-day public comment period.
  - z. Fortescue: Court will want a recommendation"
    - (1) Expedited consideration?
    - (2) Expedited approval?
46. QUESTION: Early approval or just early consideration?
- a. Bleich: Understanding is that we have been studying this rule for early approval by the Supreme Court.
    - (1) Reason for acting that there is consensus on both sides that we need a rule; there is an urgency.
    - (2) Even in the first Commission this was recognized.
    - (3) Gap that affects rights and liberties of those in the criminal justice system.
  - b. Fybel: Agrees completely.
  - c. Tuft: In ordinary course, Court would get whole bundle of rules and that will take time.
    - (1) This deserves separate consideration and decision on approval and enactment.
    - (2) Otherwise, the rule will not become operative until spring 2018 if history is any indication.
  - d. Clinch: Supreme Court invited the Commission to expedite rule.
    - (1) Fortescue: Corrects that statement; the S.Ct. simply stated that it invited the Commission to consider developing a process for expediting rules.

47. **MOTION** [2:32 p.m.] [Rothschild, Clinch (second)]: Process the entire as early as possible for Supreme Court consideration and approval.  
**VOTE**: 13-0-0  
**MOTION PASSES.**

- a. Dean Z: Earlier, the Expediting Working Group concluded that the Rule satisfied the standard for consideration.

- b. Difuntorum: Reads the standard for expedited consideration:  
“Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule is necessary to respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to promulgate the rule would result in the continuation of serious harm.”
  - c. Chair: We will go to BOT for full 90-day public comment.
  - d. Chair: In response to Mr. Tuft’s concern re Mr. Cardona not being here, can we circulate a draft for mail ballot.
  - e. Eaton: Is Cardona going to vote?
    - (1) Chair: No.
    - (2) Andrew Tuft: No need to discuss it further. Mr. Cardona need not vote on the motion to expedite.
  - f. Difuntorum: Notes that the rule that will go up to the Court will have to be in current Cal. Rule format.
    - (1) Notes that staff has prepared a rule in that format.
    - (2) Rule is distributed.
48. Chair: Asks the Commission to take time to read the rule.
- a. The Commission reads the entire rule in California format.
  - b. Further revisions are suggested (See Draft 4.1)
49. Difuntorum: Should we include a cross-reference in 5-120 as a conforming amendment?

  - a. Chair: Confirms Commission consensus to do so.
50. Fortescue: Do we lose anything by substituting “prosecutor” for “lawyer in government service.”
- a. Stan: Mentions that Commissions sometimes conduct the prosecutions, e.g., medical marijuana.
  - b. Tuft: “Cause to be prosecuted”. We are narrowing it.
  - c. Stan: There are quasi-criminal actions also.
  - d. Tuft: We have narrowed the rule.