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May 23, 2017

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

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

Dear Justice Edmon and Commission members:

We are writing to agree with and join in the comments made by the California Public Defenders Association (CPDA) in their letter dated May 8, 2017, and the comments made by California Attorneys for Criminal Justice (CACJ), in their letter dated May 10, 2017, about the revisions the California Supreme Court has proposed to Rule 5-110(D) and Discussion paragraphs 3 and 4. These letters are attachments 2 and 3, respectively, to Mr. Difuntorum's memorandum to the Commission dated May 16, 2017, containing the staff analysis and recommendations (hereafter cited as "Memo"). We raise one additional objection to the Court's suggested revisions. We are submitting our comments at this stage, rather than during a later public comment period, since the Commission has the option to submit alternative language for public comment.

Overall, while we are pleased that the California Supreme Court has approved much of the proposed rule, we are concerned that some of the Court's proposed revisions use ambiguous language that threatens to undermine the laudable goal of finally bringing California in line with every other state that has already adopted a version of the American Bar Association's Model Rule 3.8 concerning the special responsibilities of prosecutors to disclose information favorable to the defense.

Our comments track the six issues outlined in Mr. Difuntorum's memorandum:

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

We agree with the staff analysis and have no comment on this change.

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

We agree with the staff analysis that this change appears intended to move the concept of impeachment evidence to the black letter portion of the rule, but that the particular language the Court proposes is ambiguous and problematic. On one hand, the Court's proposed change clarifies that the prosecutor's duty to disclose extends not only to impeachment evidence in a narrow sense but includes information that relates to the accuracy or admissibility of both witness testimony and "other evidence on which the prosecution intends to rely."¹ On the other hand, the "casts significant doubt" language could be construed to limit the prosecutor's duty of disclosure generally, reintroducing a subjective, qualitative element that could – like the materiality standard – eviscerate the prosecutor's duty of disclosure. In fact, as the CPDA letter points out, the "significant doubt" standard is potentially even narrower than the materiality standard of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). CPDA Letter, at 2.

As we noted in our previous comments, the Supreme Court has expressed repeatedly the hope that "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (citing *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *United States v. Bagley*, 473 U.S. 667, 711 n.4 (1985) (Stevens, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108 (1976)). Time and again, however, when prosecutors are asked to make a subjective judgment about the significance of information to the defense, they err on the side of nondisclosure. This is why there have been increasing calls for the United States Supreme Court to clarify that a prosecutor's federal constitutional obligation is to "disclose all favorable evidence, regardless of the prejudice, or lack of prejudice, that nondisclosure might cause the defense" and that the prejudice inquiry is relevant only to determining whether violations of that duty require reversal of a conviction. Brief for Texas Public Policy Foundation et al., as Amici Curiae Supporting Petitioners, at 21, *Turner v. United States*, Nos. 15-1503 & 15-1504 (U.S. filed Feb. 3, 2017).

Certainly the state's rules of professional conduct should establish an unambiguous standard, so that the ethical prosecutor will not have doubts in the first place about his or her duty to disclose evidence favorable to the defense.

We agree with the staff analysis that, at a minimum, the Court's proposed language should be revised to make clear that the "significant doubt" restriction does not modify the prosecutor's obligation generally.

Equally important, we believe that although identifying categories of evidence that should be covered by the disclosure obligation is helpful, absent a general duty to disclose favorable evidence, the language proposed may invite unwelcome and unnecessary parsing of disclosure duties. In other words, although we approve of the language specifying that a prosecutor must

¹ We defer to CPDA's explanation of why the limitation to evidence on which the prosecution intends to rely is problematic. CPDA Letter, at 3.

disclose evidence concerning the “accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely,” the scope of disclosure duties should also include a general duty to disclose evidence “favorable to the defense.” For instance, when the prosecution decides not to rely on a given piece of evidence because other information casts doubt upon its reliability, that evidence and information may nonetheless be favorable to the defense case and subject to disclosure. Therefore, we propose the second sentence be modified as follows:

This obligation includes the duty to disclose information that casts ~~significant~~ doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely, and any other evidence a prosecutor knows or reasonably should know is favorable to the defense.

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.

We have no objection to this change, provided that it is made clear in the text of the rule itself that impeachment evidence is included.

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

No objection.

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

We object to the addition of the language of the new third sentence and recommend that it be deleted.

The Court’s added language is again ambiguous. Discussion paragraph [3] already makes clear that the rules of professional conduct are not intended to impose *timing* requirements different from those established by statutes, procedural rules, court orders and case law. As CPDA notes, the rule is “not meant to govern discovery disputes at trial but . . . to foster compliance with existing discovery obligations.” CPDA Letter, at 2. This is consistent with the “more limited intent” discussed in the staff analysis – to make clear that the ethical rule is not intended to supplant existing discovery rules in the trial court. Memo, at 4.

On the other hand, the staff analysis notes that the language could be construed in the other direction, so that “the substantive and procedural aspects of the Criminal Discovery Act” define the scope of the ethical rule. Memo, at 4. We are concerned that this language could therefore reintroduce the rejected “alt. 2” attempt to limit the scope of a prosecutor’s ethical obligations to “relevant case law.” The problem with this, as we noted in our prior comments, is that much of the relevant case law comes from criminal appeals and habeas cases that often turn on the degree

of prejudice to the defendant. Equating a prosecutor's duty of disclosure with the standard for prejudicial, reversible error encourages an ethical race to the bottom. The language introduces potential watering down of the prosecution's responsibility and should be omitted.

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

We agree with the staff analysis that the reference to "cumulative disclosures of information" is unnecessary, since materiality is not the operative standard for disclosure, and it should therefore be deleted. Memo, at 5.

Sincerely,



Mary K. McComb
State Public Defender



Christina A. Spaulding
Supervising Deputy State Public Defender



Elias Batchelder
Deputy State Public Defender



Samuel Weiscovitz
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From: Christina Spaulding [mailto:Christina.Spaulding@ospd.ca.gov]
Sent: Wednesday, May 24, 2017 4:08 PM
To: Difuntorum, Randall; McCurdy, Lauren
Cc: Mary McComb
Subject: Clarification of OSPD Position

Dear Justice Edmon and Commission members:

In our letter of May 24, we proposed changes to the language the California Supreme Court added to the text of Rule 5.110(D). Our intention was to address the concerns (which we share) raised by CPDA in their Letter to the Board of Trustees and clarify that the prosecutor's duty of disclosure is not properly limited to information that casts doubt on evidence "on which the prosecution intends to rely." As we explained "when the prosecution decides not to rely on a given piece of evidence because other information casts doubt upon its reliability, that evidence and information may nonetheless be favorable to the defense case and subject to disclosure."

We proposed solving the problem by adding an alternative catch-all phrase to the end of the sentence. Upon further reflection, we believe the problem would be better addressed by also eliminating the "intends to rely" language and modifying the Court's proposed revision as follows:

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~~, disclosed by the prosecution, and any other evidence the prosecutor knows or reasonably should know is favorable to the defense.

Sincerely,

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