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May 23, 2017

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

RE: California Public Defenders letter to the State Bar re: California Supreme Court  
Administrative Order 2017-04-26 (Response to Proposed Rule 5-100, Rules of  
Professional Conduct)

Dear Justice Edmon and President Fox,

The California District Attorneys Association will continue to rely primarily on the final letter we delivered to the committee on February 26, 2016, to state the technical reasons we support the order of the California Supreme Court issued on May 1, 2017.

However, I would note that the letter submitted by California Public Defenders Association (CPDA) on May 8, 2017, ultimately highlights the correctness of the guidance offered by the California Supreme Court. The CPDA letter attempts to make its point regarding the necessity for broader language in Rule 5-110 by insisting that their suggestions are "not meant to govern discovery disputes at trial." (CPDA May 8, 2017 letter at p. 2.) However, their conclusion that the rule should "firmly establish[ ] a culture that clearly requires the disclosure of all exculpatory evidence and information, whether or not it is material, significant, or only discredits evidence the prosecutor affirmatively intends to present at trial" (*Id.* at p. 4) demonstrates the opposite and confirms the correctness of the Supreme Court's suggestions.


The bulk of the letter is committed to delivering examples of scenarios of possible bad results that would be avoided should the broader language initially reviewed by the Court be reinstated. The problem with the argument is that if these scenarios do not violate existing law, then why should the California Bar enact an ethical rule that "clearly requires the disclosure" of such evidence. The function of the California Bar is to make sure the State's attorneys adhere to their existing legal obligations in an ethical manner, not change the underlying laws of the State. When the CPDA calls for a rule that "clearly requires" disclosure beyond current statutory and constitutional requirements, they are asking the State Bar to intrude into the realm of the Legislature.

The Supreme Court has struck a reasonable balance with their suggested language requiring a "duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or disclose other evidence." [Administrative Order 2017-04-26, Attachment 2.]

May 23, 2017  
Page 2

By adopting this standard, the California Supreme Court has addressed the issues surrounding the ethical behavior of prosecutors in a fair and evenhanded manner that recognizes existing law and the appropriate function of the State Bar.

Very truly yours,

A handwritten signature in black ink, appearing to be 'MZ' followed by a long horizontal line.

Mark Zahner  
Chief Executive Officer



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February 26, 2016

The Honorable Lee Edmon, Chair  
Jeffrey Bleich, Co-Vice-Chair  
Dean Zipser, Co-Vice-Chair  
Commission for the Revision of the Rules of Professional Conduct  
Audrey Hollins, Senior Administrative Assistant  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

RE: Comment on Proposed Revisions of Rules of Professional Conduct  
Proposed Rule 5-110(d)—Special Responsibilities of a Prosecutor

Dear Justice Edmon, Mr. Bleich, Mr. Zipser, and Ms. Hollins:

The California District Attorneys Association (CDA A) submits this public comment to proposed Rule of Professional Conduct 5-110(d).

The only substantial controversy about any part of the proposed rule concerns subdivision (d), for which two versions have been considered – Alternative 1 and Alternative 2. On October 23, the Commission, over two dissents, tentatively recommended the adoption of Alternative 1. While Commission proceedings in and since October have done much to give positive substance to the proposed rule, CDA A continues to believe the Alternative 1 version the Commission tentatively adopted on October 23 has significant shortcomings which can be easily remedied by the adoption of Alternative 2. CDA A further believes that criticisms leveled at Alternative 2 are not warranted.

The difference in language between Alt. 1 and Alt. 2 can be simply illustrated as follows. The bracketed, italicized language is in Alt. 2, but not in Alt. 1.

The prosecutor in a criminal case shall:

(d) [***comply with all statutory and constitutional obligations, as interpreted by 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.

CDA A has supported Alt. 2, as did the two commission members who dissented from the October recommendation.

CDAA submitted a letter of comment earlier in the Commission's proceedings. (October 1, 2015; see Board of Trustees Agenda Item 122 NOV 2015, Attachment G, hereafter CDAA 10/1/15 letter.) Several points raised in that letter have since been addressed in materials produced by the Commission in a manner that answers some of CDAA's concerns. Other points are of continuing concern to CDAA.

## I. POINTS OF AGREEMENT

### A. No Materiality Requirement

The California criminal discovery statutes obligate prosecutors to provide the defense "any exculpatory evidence." (Pen. Code § 1054.1(e).) The California Supreme Court has twice unanimously stated this standard requires the prosecution to provide all exculpatory evidence, not just evidence that is "material" under *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny. (See *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Based on the statute and case law, CDAA agrees that prosecutors are obligated to provide all exculpatory evidence without a materiality limit on that obligation. Alternative 2 of the rule, which CDAA supports, makes it clear prosecutors are obligated by statute to make such disclosures.

With all due respect to the Commission, it erred in saying, "Alternative 2 seeks to limit pretrial discovery to only material disclosures a set forth in *Brady v. Maryland*, 373 U.S. 83 (1963)." (See Board of Trustees Agenda Item 122 NOV 2015, Supplemental Materials, Response to Dissents Regarding Proposed Rule 3.8(d) [5-110(d)], section A, third paragraph.) Alternative 2 does **not** seek to limit pretrial discovery obligations with a *Brady* materiality standard—in fact, it expressly ties the prosecutor's responsibilities to "statutory ... obligations, as interpreted by case law," which have no *Brady* materiality limit.

### B. Timeliness Obligation

The proposed rule states the prosecutor "shall make timely disclosure to the defense" of exculpatory and mitigating evidence. In the "Discussion" section following the text of the proposed rule as adopted on October 23, the Commission states that "A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities...." (See Board of Trustees Agenda Item 122 NOV 2015, Attachment A, p. 2.) CDAA assumes the Commission's official discussion points 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. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 947; *HLC Properties, Inc. v. Superior Court* (2005) 35 Cal.4th 54, 62; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 980.) CDAA agrees with the Commission that the timeliness component of the rule should be interpreted in this fashion.

It is noteworthy that this interpretation would be the same under Alternative 2, which expressly ties the prosecutor's obligations to statutes and case law, just as the Commission's discussion point does. Indeed, the discussion point and Alternative 2, while using some different language, appear to be the same in terms of intended and actual effect.

### C. Knowledge

CDAA previously expressed concern in our October 1 letter about the level of responsibility the proposed rule might impose with respect to information for which the government as a collective entity may have disclosure responsibility, but of which the individual prosecutor may not have had personal

knowledge. CDAA notes that the language of the proposed rule specifically refers to material “known to the prosecutor.” The California Public Defenders Association and California Attorneys for Criminal Justice, in their letter in support of the proposed rule, agree that for discipline purposes under the rule, actual knowledge of the individual prosecutor is required. (See Board of Trustees Agenda Item 122 NOV 2015, Attachment F, hereafter CPDA 10/8/15 letter.) CDAA agrees with CPDA and CACJ on this interpretation and application of the rule. While the Commission’s discussion points do not further address the point, the language itself seems clear.

#### D. Sentencing Mitigating Evidence Disclosed to the Tribunal

CDAA previously expressed concern in our October 1 letter about the requirement that evidence in mitigation of sentencing must be disclosed not only to the defense, but also to “the tribunal.” The proposed rule tentatively adopted on October 23 omits “the tribunal” from the disclosure requirement. CDAA agrees with this change from the ABA model version of the rule.

## II. POINTS OF CONTINUING CONCERN

### A. Scope of Material Covered By Proposed Rule

While the standard for the timing of disclosures is tied by the commission’s discussion points to statutes and court orders, the standard with respect to the type of evidence covered 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.

While Penal Code section 1054.1(e) and case law make it clear the prosecutor is obligated to turn over all “exculpatory” evidence, issues may arise as to whether that standard is the same as the standard of “evidence that tends to negate the guilt of the accused or mitigates the offense” under the disciplinary rule. To use just one specific example, California case law at this time does not make clear whether all witness impeachment evidence is “exculpatory” within the meaning of 1054.1(e). Two reported appellate cases (one quite recently) have addressed the point without deciding it, calling the issue “far from clear” and “unsettled.” (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 377-378; *People v. Lewis* (2015) 240 Cal.App.4th 257, 266.) Should California case law ultimately determine that not all impeachment evidence is “exculpatory” under 1054.1(e), a California prosecutor would not be required by the statutes to disclose such information. Yet if rule 5-110(d) was viewed as an alternative authority to require prosecutors to make such disclosures, a prosecutor could become the object of state bar investigation and discipline, despite having fulfilled all the duties under California’s comprehensive criminal discovery rules. Compare this suggested scenario with the actual scenario in *Disciplinary Counsel v. Kellogg-Martin* (Ohio Sup. Ct. 2010) 923 N.E.2d 125. There, the prosecutor faced disciplinary charges over failing to turn over impeachment evidence before the defendant entered a guilty plea as part of a plea bargain. The Ohio Supreme Court held that both the constitutional obligation and the obligation under the Ohio criminal discovery rules did not require disclosure. However, the disciplinary board argued that the Ohio version of ethics rules should hold a prosecutor in violation even if the evidence was not otherwise legally required to be disclosed.

Prosecutors have legitimate reasons for concern about divergence between discovery obligations under statutes and court orders, and those which may be advanced through the tactical use of ethics rules as litigation tools. Kirsten Schimpff<sup>1</sup> has documented how in 2009 the ABA Ethics Committee issued Formal Opinion 09-454, which (among other things) interpreted Model Rule 3.8(d) to impose on

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<sup>1</sup> Assistant General Counsel of the Washington State Bar Association and Visiting Assistant Professor at Seattle University School of Law.

prosecutors ethical discovery obligations that conflict with the Jencks Act (18 U.S.C. § 3500, the federal statute dealing with the discovery disclosure of witness statements), after attempts to change the rule through the statutory process had proved not fully satisfactory to those seeking a different rule. Schimpff, *Rule 3.8, The Jencks Act, And How The ABA Created A Conflict Between Ethics And The Law On Prosecutorial Disclosure*, 61 Am. U. L. Rev. 1729 (2012). Irwin Schwartz, a criminal practitioner and past president of the National Association of Criminal Defense Lawyers (NACDL), presented a paper in 2010 to a national seminar for federal defenders, in which he advocated using Rule 3.8(d) as an affirmative tool in litigation to achieve discovery disclosures that might not otherwise be required by statute or ordered by a court. (See Schwartz, "Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information"; the paper can be viewed online at [https://www.fd.org/pdf\\_lib/fjc2010/fjc2010\\_strategy\\_exculpatory.pdf](https://www.fd.org/pdf_lib/fjc2010/fjc2010_strategy_exculpatory.pdf).) Schwartz's paper was also published in the March, 2010 edition of *The Champion*, the magazine of NACDL.

Alternative 2 would link the issue of what evidence is covered by the rule to discernible statutory obligations, which include the obligation to disclose all exculpatory evidence. Even while California case law on discovery develops (as does any body of case law), it remains the body of case law setting the parameters for criminal practice in this state. Alternative 1, without any further explication or clarification, leaves the obligation ambiguous, without any defined parameters or limits.

#### B. CPDA and CACJ Reasons for Adopting Rule Alternative 1

CPDA and CACJ argued in their October 8 letter that prosecutors feel free to ignore their duty to disclose exculpatory evidence because under Business and Professions Code section 6086.7, a mandatory referral to the state bar only occurs if the attorney's misconduct leads to "modification or reversal of a judgment in a judicial proceeding based in whole or in part on the [attorney's] misconduct..." and a prosecutor's withholding of evidence can only lead to reversal if the evidence was material under *Brady*. (See CPDA letter of October 8, at p. 8.) 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 evidence, without any requirement that the evidence was material under *Brady*, or that the case was reversed or judgment was modified as a result. (Bus. & Prof. Code § 6086.7(a)(5); Pen. Code § 1424.5, as enacted in Statutes 2015, Chapter 467 (AB 1328).)<sup>2</sup>

This provision in Business and Professions Code section 6086.7 not only undercuts CPDA's and CACJ's argument that the structure of the mandatory bar referral statute allows prosecutors to ignore their statutory obligations, it also shows that California laws relating to the enforcement of criminal discovery obligations are part of an integrated statutory scheme. Actual or perceived deficiencies in this scheme can be investigated and addressed through the legislative process. The State Bar has a rightful place through the rules and discipline process in ensuring that all attorneys comply with the requirements and procedures of litigation. But California has a comprehensive framework, established through statutes and case law, for criminal discovery. The State Bar should not take on the role of redesigning and remodeling the criminal litigation process.

#### III. CONCLUSION

Since CPDA, CACJ and the Commission are committed to impressing upon prosecutors their responsibility to fulfill both their constitutional *and* their statutory obligations to disclose exculpatory evidence, it should follow they would embrace Alternative 2, which expressly incorporates both of those

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<sup>2</sup> How this escaped the attention of CPDA and CACJ is unclear, since in their same October 8 letter (at p. 4) they cite the same bill, which amended B&P 6086.7 and added PC 1424.5, for the definition of disclosure requirements as to both evidence and information.

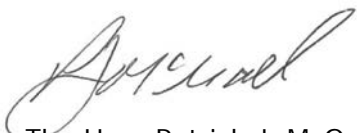
obligations. Alternative 2 tethers the ethics and discipline rules to the existing criminal discovery framework. Alternative 1 leaves the ethics and discipline process adrift—open-ended in the requirements for prosecutors, leaving them to speculate as to their obligations, with an ethics rule being subject to use as a litigation weapon in a fashion for which it should not be intended. The Commission, through its discussion points, wisely tied the timeliness issue to existing statutes and laws. It should do the same for the scope of material covered. Indeed, it is difficult to understand why timeliness is tied clearly to the existing procedural rules, and scope of information is not. The justification the Commission gives is the assertion that Alternative 2 is meant to establish the *Brady* materiality standard, a claim which is—with all due respect—mistaken, as is noted above.

The work of this commission and the State Bar must be to achieve real world solutions to real problems, the scope of which are realistically understood. It should not be driven by anecdotal evidence or melodramatic hyperbole, like the oft quoted lament of Judge Alex Kozinski that, “There is an epidemic of *Brady* violations abroad in the land.” (*U.S. v. Olsen* (9th Cir. 2013) 737 F.3d 625, at 626, Kozinski, J. dissenting from denial of rehearing en banc.)<sup>3</sup>

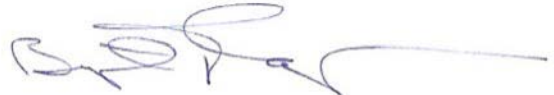
CDAA supports the proposition that prosecutors should understand and fulfill their special responsibilities, including the statutory duty to disclose exculpatory evidence. Deficiencies in this area should be addressed by clear rules, not by creating rules that expand the duties of prosecutors beyond those required by California law, and beyond a clear understanding as to what those duties are. Alternative 2 would accomplish the former, while Alternative 1 embodies the latter.

CDAA respectfully urges the Commission to modify proposed rule 5-110, and include the additional language in Alternative 2.

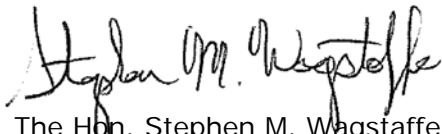
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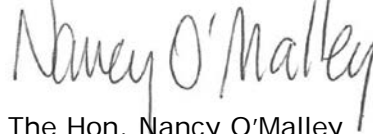
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Yuba County District Attorney  
CDAA President



The Hon. Birgit Fladager  
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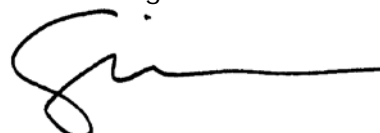
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Imperial County District Attorney  
CDAA Past President

<sup>3</sup> Judge Kozinski's chain citation of 29 cases to support his point draws on jurisdictions nationwide, over the 16-year span from 1998 to 2013, and includes three cases from California. In that time period, California alone saw over 3 million convictions in cases arising from felony arrests. (See California Dept. of Justice, *Crime in California 2014*, Table 37, p. 49.) Whatever problem may exist with respect to *Brady* compliance, Judge Kozinski's proffered evidence hardly demonstrates an epidemic.