



THE STATE BAR
OF CALIFORNIA

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Justice Lee Edmon
Randall Difuntorum
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comment on proposed revisions to Rules 5-110 and 5-220 of the Rules of Professional Conduct

Dear Justice Edmon and Mr. Difuntorum:

The Office of Chief Trial Counsel (OCTC) thanks the Commission for the opportunity to express its comments on the issues the Supreme Court referred to the State Bar in the Supreme Court's May 1, 2017 Order. With any revision to any of the Rules of Professional Conduct, OCTC wants to assure that the rules (1) protect the public; (2) are discipline rules that are not purely aspirational; and (3) are clearly written so as to be understood by the membership and enforceable by our office. Also, the Comments to the Rules should be used sparingly and only to elucidate, and not to expand, upon the rules themselves.

OCTC supports the Supreme Court's proposed revisions to subsection (D) of Rule 5-110. The revisions make the rule clearer and remove unnecessary duplicative language. The proposed rule, however, still does not address a prosecutor's duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437 and *In re Brown* (1998) 17 Cal.4th 873, 879 [prosecutor's duty to search for exculpatory evidence]). OCTC believes this should be part of the rule.

OCTC supports the Supreme Court's recommended changes to the first sentence in Comment 3 of Rule 5-110. Revised subsection (D) of Rule 5-110 appears to address the issue discussed in the stricken part of the first sentence in Comment 3.

OCTC supports the recommended changes to the second sentence of Comment 3 of Rule 5-110, because the language is clearer than the previous proposal.

The Supreme Court requested an explanation of the meaning of the terms "cumulative disclosures of information" in the second sentence of Comment 3 to Rule 5-110. OCTC interprets "cumulative disclosures of information" to mean if the prosecutor has already provided the information to the defense, or the prosecutor knows that the defense already has that information, the prosecutor does not

have to disclose that information again. OCTC submits that it might be helpful to re-write the sentence to make its meaning clear and unambiguous. Perhaps the use of the word “duplicative,” instead of “cumulative,” would be appropriate.

The Supreme Court’s suggested new third sentence to Comment 3 reads: “Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts.” This sentence appears to state that there is no requirement that a prosecutor disclose information that is protected from disclosure by the discovery statutes and rules. Further, the rule is not violated if the prosecutor complies with California’s discovery requirements for criminal matters. The new sentence also appears to complement, and further explain, the next sentence: “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 and the California and federal constitutions.” Thus, read together, the two sentences indicate that, at some time prior to the trial, exculpatory information must be disclosed, unless it is protected from disclosure by law. But, if the prosecutor is required to disclose the information, the timeliness of the required disclosure will be depend on the circumstances and will generally not be different than the time requirements established by the discovery rules or statutes, procedural rules, court orders, and case law interpreting those authorities, and the California and federal constitutions.

OCTC supports proposed new Comment 4, because it is in the public’s interest to allow prosecutors in certain circumstances to obtain a protective order, preventing disclosures that could result in substantial harm to an individual or the public interest, such as the disclosure of the identity or address of a witness.

If there is going to be a rule addressing the conditions required for a prosecutor to issue a subpoena to present evidence about a former or current client, the rule should apply to all attorneys, not just prosecutors. OCTC also agrees with the Supreme Court’s suggestion that such a rule substitute the term “reasonably necessary” for the term “essential” in what was subsection (E)(2) of the former proposal. The term “reasonably necessary” is a fairer, more definite and understandable, and more appropriate term. California should not discipline attorneys who honestly and reasonably believed the proposed witness was reasonably necessary. Likewise, OCTC agrees with the Supreme Court’s suggestion that such a rule substitute the term “reasonable” for the term “feasible” in what previously was subsection (E)(3). Again, the term “reasonable” is fairer, more definite, clearer, and more appropriate than “feasible.”

Very truly yours,

Gregory Dresser
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