

DATE: May 25, 2017

TO: Members, Board of Trustees Regulation and Discipline Committee

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Reconsideration of Proposed Rule 5-110(D) of the Rules of Professional Conduct – Request for Release for Public Comment

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California (“Supreme Court”) issued an order on the State Bar’s request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar’s request was granted in part and denied in part. Proposed rule 5-110(D) and related Discussion paragraphs concerning pretrial disclosure obligations were not approved but the Supreme Court’s order provides instructions for the State Bar’s further consideration. The Board of Trustees (“Board”) referred this matter to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) for study and development of revised rule proposals. This item requests that the Regulation and Discipline Committee circulate, for a 30-day public comment period, proposed amendments to rule 5-110 developed by the Commission following a study of the Supreme Court’s order.¹

Members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND

Attachment C is Board agenda item 703 MAY 2017. This agenda item provides the relevant background for this matter including the full text of the Supreme Court’s May 1, 2017 order.

DISCUSSION

At its meeting on May 25, 2017, the Commission studied the instructions provided by the Supreme Court and considered letters submitted by the following prosecutor and defense counsel stakeholders: California Attorneys for Criminal Justice (CACJ); California District Attorneys Association (CDAA); California Public Defenders Association (CPDA); and Office of

¹ Attachment A provides the clean text of alternative drafts of proposed amended rule 5-110 that are recommended for public comment circulation. Attachment B provides redline/strikeout versions of each alternative draft that show changes to the version provided in the Supreme Court’s order.

the State Public Defender (OSPD).² (Attachment D provides the full text of these letters.) The Commission also considered a written comment from the Office of the Chief Trial Counsel and an article by attorney Gary Schons that appeared in the May 4, 2017 Daily Journal. (Attachment E provides the OCTC comment and the article.) Following study, the Commission drafted two alternative versions of proposed rule 5-110 for which a 30-day public comment period is requested. (Attachment A provides the clean text of the alternative drafts.) (Attachment B provides redline/strikeout versions of each alternative draft that show changes to the version provided in the Supreme Court's order.)

Alternative A of Proposed Rule 5-110: The purpose of this version is to obtain public comment on the language suggested in the Supreme Court's order. This version implements only two changes to that language.

First, at the Commission's meeting the Commission was informed that the Supreme Court subsequently considered a modification to the sentence that the Court originally suggested for addition at the end of paragraph (D). This modification adds the words "knows or reasonably should know." As modified the sentence would read: "This obligation includes the duty to disclose information that *a prosecutor knows or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely."

Second, the Supreme Court's order questioned the meaning of the reference to "cumulative disclosures of information" in Discussion paragraph [3] and in response the Alternative A draft of the rule deletes this reference. The Commission believes that the issue of cumulative disclosures adds unnecessary ambiguity and recommends deletion of that concept.

Alternative B of Proposed Rule 5-110: This version is the Commission's recommended proposal for Rule 5-110. Like the Alternative A draft, this version deletes the reference to "cumulative disclosures of information" in Discussion paragraph [3]. However, for the sentence that the Supreme Court suggested for addition at the end of paragraph (D), the Commission is recommending that the sentence be revised and moved to Discussion paragraph [3]. The Commission's modifications are intended to frame that sentence as an example of impeachment information that would trigger the disclosure duty and avoid any potential interpretation that the sentence functions to limit the governing "tends to negate" standard set forth in paragraph (D). As an example, the Commission believes this sentence is properly placed in the Discussion rather than in paragraph (D). Some other minor changes are implemented and can be seen in the redline/strikeout version of Alternative B.

The Commission requests authorization for a 30-day public comment period on the alternative drafts of proposed rule 5-110. The Commission believes that this approach preserves the greatest flexibility for the Board to adopt a rule after consideration of the public comments received. Representatives of the Commission will attend the Board Committee's May 30, 2017 teleconference meeting to present each alternative draft.

FISCAL/PERSONNEL IMPACT

None.

² Visitors also attended the Commission's meeting, including but not limited to the following: Professor Laurie Levenson (Loyola Law School); Nancy Haydt (CACJ); Jacqueline Goodman (CACJ); Michael Ogul (CPDA); Katherine Bonaguidi (CACJ); and Mark Zahner (CDAA).

RULE AMENDMENTS

This agenda item requests authorization for a 30-day public comment period on proposed amendments to the Rules of Professional Conduct. Board action to adopt the amendments would occur only after the public comment process. Rule of Professional Conduct amendments adopted by the Board do not become binding and operative unless and until they are approved by the Supreme Court of California.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation and Discipline Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation and Discipline Committee authorizes staff to make available, for public comment for a period of 30-days, alternative versions of proposed amended rule 5-110 of the Rules of Professional Conduct, as set forth in Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT(S) LIST

- A.** Clean text of alternative drafts of proposed amended rule 5-110 that are recommended for public comment circulation
- B.** Redline/strikeout versions of each alternative draft that show changes to the version provided in the Supreme Court's order
- C.** Board Agenda Item 703 MAY 2017 (including the Supreme Court's May 1, 2017 order)
- D.** Full text of letters received from prosecutor and defense counsel stakeholders
- E.** OCTC written comment and article by attorney Gary Schons