

Attachment E



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May 24, 2017

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

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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,



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GD:is

Prosecutor rule edit reflects concerns

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It was fitting that the California Supreme Court's first order responding to the State Bar Board of Trustees' proposed revisions to the Rules of Professional Conduct addressed Proposed Rule 3.8, Special Responsibilities of a Prosecutor, modeled on ABA Rule 3.8, which would have replaced current Rule 5-110. That proposed rule (along with Rule 5-220, Suppression of Evidence) was sent by the board to the court on an expedited basis in October of last year, well ahead of the 70 odd rules revisions sent to the court in January. The unanimous order of the court, issued May 1, reflects that the court left its rubber stamp in the drawer and pulled out a very sharp blue editing pencil.

The rule, as proposed by the board, imposed a number of duties solely on prosecutors. These included provisions intended to require prosecutors to make disclosures and take affirmative efforts to address cases of possible "false convictions." Those provisions and other relatively non-controversial requirements regarding charging and protecting the rights of the accused were approved by the court and take effect immediately. However, the provision which was the most controversial, particularly in the prosecution community - the pretrial disclosure requirement - did not survive the court's editing pencil.

As proposed, the disclosure obligation, denominated paragraph D, would have required prosecutors to disclose all evidence or information known to the prosecutor that the prosecutor knows or should know tends to negate the guilt of the accused or mitigate the offense or the potential sentence. While this may sound rather reasonable and unremarkable on its face, one of the Discussion notes pertaining to D stated that "the disclosure obligations are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83" - the bedrock constitutional disclosure requirement imposed on prosecutors to safeguard the right to a fair trial. Not discussed, but equally true, is that this disclosure obligation was not tethered to or limited by the Criminal Discovery Act found in Penal Code Section 1054 et seq., including its definition of "exculpatory evidence" (Section 1054.1) and the timing requirements of that law, which require discovery be made at least 30 days prior to trial (Section 1054.7).

During the Rules Revision Commission process, the California District Attorneys Association (CDAA) sought amendments to the proposed rule, which was lifted bag and baggage from ABA Rule 3.8. The commission did agree to accept language regarding the prosecutor's knowledge of the existence and import of the evidence or information, which provided some protection from unwitting or good faith failures to disclose and a resulting disciplinary violation. However, the commission, and in turn the Board or Trustees, rejected the statewide prosecutors' suggestion that the rule be referenced to the Criminal Discovery Act and constitutional requirements. This became a significant concern within the prosecution community after the proposed rule was sent to the court. In the ensuing months a number of prosecutors under the aegis of CDAA huddled and began to circulate thought pieces arguing that the rule as proposed was susceptible to challenge as being inconsistent with the Criminal Discovery Act, preempted by that law, and, a violation of the separation of powers in that it constitutes judicial rule-making imposing on the otherwise lawful conduct of the prosecutor's office.

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At the Rules Revision Commission level, two of the commissioners, George S. Cardona, an assistant U.S. attorney in Los Angeles, and Daniel Eaton of Seltzer Caplan in San Diego, lodged separate dissents from the rule as proposed, both targeting the discovery requirement. Both commissioners focused their criticism on the rejection of the proposal to tie the disclosure requirement to existing statutory (the Criminal Discovery Act) and constitutional (*Brady*) requirements. Both attorneys also pointed out that the ABA rule had been given widely varied interpretations in a number of states and would, therefore, not serve to promote uniformity, but, rather, would cause uncertainty and confusion among prosecutors, defense attorneys, courts and disciplinary authorities.

The Supreme Court's Monday order seems to be a direct response to these criticisms and concerns. The court denied approval of paragraph D, the pretrial disclosure obligation provision, and its Discussion paragraphs. The court then took to the drafting role and offered an alternative for the Board of Trustees to consider on "remand." In doing so, the court gave consideration to advocates on both sides of the prosecutorial disclosure issue. The court retained the core language on the scope of the obligation - evidence or information that "tends to negate the guilt of the accused, mitigate the offense or mitigate the sentence." However, the court proposed language to beef up the disclosure obligation to include "the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely." This is essentially a duty to disclose (significant) "impeachment" evidence. This is an interesting development in that it could be an effort by the court to plug a hole in the Criminal Discovery Act. In *Kennedy v. Superior Court*, 145 Cal. App. 4th 359 (2006), the appellate court expressed skepticism that the statutory requirement to disclose "exculpatory evidence" reaches all possible "impeachment evidence." That court wrote, "there is reason to think the electorate intended to use the term 'exculpatory evidence' in its narrow sense and thus did not intend section 1054.1(e) to require the disclosure of impeachment evidence."

The court edited Discussion paragraph [3] that explains paragraph D. The court retained the language that the disclosure obligation is not limited to evidence that is "material" under *Brady*. That is a conclusion at odds with a number of other state supreme courts - Colorado, Ohio, Oklahoma and Wisconsin - but consistent the highest courts in the District of Columbia and Nevada. However, that is not of significant import because the Criminal Discovery Act, as construed by the courts, requires disclosure of all "exculpatory evidence" regardless of *Brady* "materiality." *People v. Cordova*, 62 Cal. 4th 104 (2015).

Most significantly for prosecutors, the court added this sentence to the Discussion note: "Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts." This passage does seem to tie or tether the disclosure obligation to both the substantive and procedural aspects of the Criminal Discovery Act and the "procedural" aspects of *Brady*, including such issues as timing and waiver - precisely what CDAA had sought before the Board or Trustees. If adopted by the board and approved by the court, this language should still the waters disturbed by the board's original proposal.

Mark Zahner, CEO of CDAA commented: "We acknowledge the action of the Supreme Court and their sensible approach to this situation. The ethical rule they suggest is logical and requires

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prosecutors to follow existing law. Prosecutors would expect nothing more or less."

Of additional significance, if the court eventually approves its own suggestions, it will liberate the California rule from the interpretative constraints of ABA Model Rule 3.8. For example, in a 2009 formal ethics opinion, the ABA Ethics Committee gave the scope of disclosure required by Rule 3.8 a very broad reading and suggested that the obligation is "free standing," that is, unrestrained by *Brady*, statute or court rule, and cannot be "waived" by a guilty plea, contrary to the holding of the U.S. Supreme Court in *United States v. Ruiz*, 536 U.S. 622 (2002). ABA Ethics Committee Formal Opinion 09-454.

The court also declined to approve paragraph E of the rule as proposed by the Board or Trustees, which would have significantly curtailed the ability of a prosecutor to subpoena a lawyer to a grand jury or other criminal proceeding to present evidence about a past or present client absent the existence of certain conditions. First, the court directed the board to consider imposing this obligation on all attorneys, not just prosecutors. Obviously, this limit would then extend only to defense attorneys in a criminal proceeding, except in the rarest cases. Whether this may prove to be a meddlesome limit on the right to present a defense or the effective assistance of counsel will await resolution in the courts. The court also suggested the qualifying language to permit calling an attorney as a witness be softened from "essential" to "reasonably necessary" and from "no other feasible alternative" to "no other reasonable alternative."

Whether the court's first shot at the proposed rules sent to it by the Board of Trustees for approval is a harbinger of how the other proposals will be met and ultimately fair is not apparent. To be sure, the court appears aware and sensitive to the proceedings of the commission and the board and the "administrative record" generated in those processes. Additionally, it does not appear the court is reticent to add its own hand to the rule drafting process, whether it be the precise language of the rule or its discussion notes.