

**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

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### **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.<sup>1</sup>

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

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### **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

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<sup>1</sup> 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).<sup>2</sup> (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.

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<sup>2</sup> 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



## **Attachment A**

### **Rule 5-110 Special Responsibilities of a Prosecutor (Modified Version of the Revisions Included in the Supreme Court Order S239387 Dated May 1, 2017 – Alternative A – Clean Version)**

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows\* or reasonably should know\* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. 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; and
- (E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) Promptly disclose that evidence to an appropriate court or authority, and
  - (2) If the conviction was obtained in the prosecutor's jurisdiction,
    - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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- (G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

### Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Nevertheless, rule 5-110 is not intended to require disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. 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.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to

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the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

## **Attachment A**

### **Rule 5-110 Special Responsibilities of a Prosecutor (Commission's Proposed Rule Adopted on May 25, 2017 – Alternative B – Clean Version)**

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows\* or reasonably should know\* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) Promptly disclose that evidence to an appropriate court or authority, and
  - (2) If the conviction was obtained in the prosecutor's jurisdiction,
    - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.



### Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. These obligations include, but are not limited to, the duty to disclose evidence or 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. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) 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.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to

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the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

## Attachment B

### **Rule 5-110 Special Responsibilities of a Prosecutor (Redline Comparison of Alternative A to the Revisions Included in the Supreme Court Order S239387 Dated May 1, 2017)**

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows\* or reasonably should know\* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. 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; and
- (E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
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- (G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

### Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Nevertheless, rule 5-110 is not intended to require disclosure of ~~cumulative information or~~ information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. 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.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted

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of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

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### **Rule 5-110 Special Responsibilities of a Prosecutor (Redline Comparison of Alternative B to the Revisions Included in the Supreme Court Order S239387 Dated May 1, 2017)**

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- (E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
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defendant did not commit, the prosecutor shall seek to remedy the conviction.

### Discussion

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[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) ~~and~~ are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. ~~Nevertheless, rule 5-110 is not intended to~~ These obligations include, but are not limited to, the duty to disclose evidence or 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. Paragraph (D) does not require disclosure of ~~cumulative information or information that is~~ protected from disclosure by federal or California laws and rules, as interpreted by ~~cases~~ case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and ~~rule 5-110~~ paragraph (D) 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.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

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[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.



## AGENDA ITEM

**703 MAY 2017**

**DATE:** May 5, 2017

**TO:** Members, Board of Trustees

**FROM:** Randall Difuntorum, Director, Professional Competence

**SUBJECT:** Proposed Amended Rules 5-110 and 5-220 of the Rules of Professional Conduct – Consideration Following Action by the Supreme Court

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### EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California (“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. The order is attached. The State Bar’s request was granted in part and denied in part. The order provides instructions for the State Bar’s further consideration of the parts of the proposal that were not approved. This agenda item presents a staff recommendation that the Court’s request for further consideration be assigned to the Commission for the Revision of the Rules of Professional Conduct (“Commission”).

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

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### BACKGROUND

The Rules of Professional Conduct of the State Bar of California (“rules”) are attorney conduct standards, the violation of which will subject an attorney to discipline. Pursuant to statute, amendments to the rules may be formulated by the Board of Trustees (“Board”) for submission to the Court for approval.<sup>1</sup>

At the Board’s October 1, 2016 meeting and upon the recommendation of the Commission, the Board adopted proposed amendments to rules 5-110 and 5-220. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. (See Board open agenda item [701 OCTOBER 2016](#) and the [Board minutes](#) for that meeting.)

The amendments to rule 5-110 adopted by the Board included proposed paragraph (D). Paragraph (D) would amend the existing duty of a prosecutor under rule 5-220, which requires a

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<sup>1</sup> Business and Professions Code section 6076 provides: “With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state.” Business and Professions Code section 6077, in part, provides: “The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar.”

## Attachment C

member, including a prosecutor, to refrain from suppressing “any evidence that the member or the member's client has a legal obligation to reveal or to produce.” Rather than incorporating by reference a prosecutor’s “legal obligation,” the proposed amended rule stated that a prosecutor must: “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.”

The amendments also included proposed paragraph (E) which provides that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

### DISCUSSION

#### I. Supreme Court Action

In its May 1, 2017 order, the Court approved the State Bar’s request to approve paragraphs (A), (B), (C), (F), (G), and (H) of proposed amended rule 5-110. These paragraphs carry forward the substance of current rule 5 110 requiring that criminal charges be supported by probable cause and add the following new provisions.

- A requirement that a prosecutor make reasonable efforts to assure the accused has been advised of the right to, and the procedure for, obtaining counsel, and has been given reasonable opportunity to obtain counsel.
- A prohibition against a prosecutor obtaining from an unrepresented accused a waiver of pretrial rights, unless the tribunal has approved the accused’s appearance in propria persona.
- A requirement that a prosecutor exercise reasonable care to prevent persons under the prosecutor’s supervision from making an extrajudicial statement the prosecutor would be prohibited from making under current rule 5-120, which governs extrajudicial statements generally.
- A requirement that a prosecutor disclose and/or conduct an investigation when the prosecutor is presented with “new, credible and material” evidence of a wrongful conviction.
- A requirement that when a prosecutor “knows of clear and convincing evidence” establishing that a wrongful conviction occurred, the prosecutor must seek to remedy the conviction.

Discussion paragraphs which provide guidance on these provisions were also approved. In addition, the Bar’s proposed new Discussion paragraph to rule 5-220 that cross references rule 5-110 was approved. The Court’s order states that these approved amendments are operative May 1, 2017.

## **Attachment C**

The Court denied the request to approve proposed paragraphs (D) and (E) of rule 5-110. The Court's order includes instructions for the State Bar's further consideration of paragraph (D), including alternative revisions attached to the Court's order. The Court's approved version of rule 5-110 that became operative on May 1, 2017 indicates that paragraph (D) and the related Discussion paragraphs [3] and [4] are "reserved" rather than omitted completely. The Court's order seems to contemplate prompt action on paragraph (D), using the word "immediately" in inviting resubmission. However, the order specifically states the State Bar should determine if public comment is warranted and a public comment process would require at least a 30-day comment period.

Regarding the further consideration of paragraph (E), the order says that the State Bar can resubmit a revised proposal at "any time it deems appropriate" and some substitute language is provided for consideration. The Court's order directs the State Bar to make a determination on whether the duty imposed by paragraph (E) should be imposed on all lawyers, not only prosecutors. A place in the Court's approved rule 5-110 is not "reserved" for this duty and this makes sense because a duty of general application should not be included in the rule setting forth the special responsibilities of a prosecutor in a criminal matter.

### **II. Assignment to the Commission**

Staff recommends that the Board assign the further consideration of paragraphs (D) and (E) to the Commission. At the Board's meeting on March 9, 2017 and in connection with the Board's final step in the project to adopt comprehensive amendments to the rules, the Board appointed a nine member Commission (including one non-voting advisor) to assist the Board with any questions that the Court might have concerning the proposed rules. Justice Lee Edmon was appointed as the chair of the Commission. The term set by the Board terminates this extended Commission on March 9, 2018.

### **III. Time-Line for Action**

If the Board agrees, the following time-line for action would be pursued.

- Commission meeting third or fourth week of May to develop public comment proposals.
- Special set RAD teleconference third or fourth week of May, following the Commission meeting, to authorize public comment.
- A 30-day public comment period ending no later than the week of June 26, 2017.
- Commission meeting the week of June 26, 2017 to consider public comments and complete drafting.
- Board action on the Commission's recommendation at the Board's July 14, 2017 meeting.
- State Bar submission to the Supreme Court in August 2017.

### **FISCAL/PERSONNEL IMPACT**

None.

## **Attachment C**

### **RULE AMENDMENTS**

This agenda item only requests a process for considering possible amendments to the rules. A Board decision to adopt a rule amendment would be the subject of a separate agenda item. Board adopted amendments to the rules only become operative if approved by the Court.

### **BOARD BOOK IMPACT**

None.

### **PROPOSED BOARD RESOLUTION**

**RESOLVED**, that the Board of Trustees assigns the Commission for the Revision of the Rules of Professional Conduct of the State Bar of California to study the Supreme Court of California's May 1, 2017 order on proposed amended rules 5-110 and 5-220; and it is

**FURTHER RESOLVED**, that the Commission is directed to make recommendations to the Board for responding to the Court, including revised rule proposals.

### **ATTACHMENT(S) LIST**

- A. Supreme Court order filed on May 1, 2017 (case no. S239387)

S239387

MAY - 1 2017

ADMINISTRATIVE ORDER 2017-04-26

Jorge Navarrete Clerk

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**IN THE SUPREME COURT OF CALIFORNIA**

EN BANC

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**ORDER RE REQUEST FOR APPROVAL OF AMENDMENTS TO RULE 5-110 AND  
RULE 5-220 OF THE RULES OF PROFESSIONAL CONDUCT OF  
THE STATE BAR OF CALIFORNIA.**

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On January 9, 2017, the Board of Trustees of the State Bar of California filed a request for approval of recommended amendments to rule 5-110 and rule 5-220 of the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The request is granted in part and denied in part.

The request to add paragraphs (A), (B), (C), (F), (G), and (H), and Discussion paragraphs [1], [2], and [5] through [9] to rule 5-110, and to add a discussion paragraph to rule 5-220, is granted. These amendments are set forth in the approved versions of rule 5-110 and rule 5-220 appended as Attachment 1 to this order, and are effective May 1, 2017.

The request to add paragraph (D) to rule 5-110 and its related Discussion paragraphs [3] and [4], concerning prosecutors' ethical pretrial disclosure obligations, is denied. The court directs the Board to consider the alternative revisions set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. Additionally, the court requests that the Board explain the meaning of the terms "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3], or alternatively, consider removing this portion of the sentence from the Discussion paragraph. To the extent the Board chooses to recommend any revisions to rule 5-110(D) and Discussion paragraphs [3] and [4], the Board may submit such revisions for court approval immediately following its consideration of such revisions. For the present time, paragraph (D) and Discussion paragraphs [3] and [4] shall be designated as "reserved," as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

The request to add paragraph (E) to rule 5-110, regarding the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client, is denied. The court directs the Board to reconsider whether this is an ethical obligation that should be imposed on all attorneys, not only prosecutors. To the extent the Board chooses to recommend a more broadly applicable rule patterned on

### **Attachment C**

the language in proposed rule 5-110(E), the court directs the Board to reconsider whether substitution of the terms “reasonably necessary” for “essential” under proposed paragraph (E)(2), and “reasonable” for “feasible” under proposed paragraph (E)(3), would be appropriate. The Board may submit a recommendation for a new or revised rule on this subject matter at any time it deems appropriate.

In light of the court’s decision to not approve proposed rule 5-110(E), paragraphs (F), (G), and (H), and references thereto, shall be relabeled as paragraphs (E), (F), and (G), respectively, as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

It is so ordered.

**CANTIL-SAKAUYE**

---

*Chief Justice*

**WERDEGAR, J.**

---

*Associate Justice*

**CHIN, J.**

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*Associate Justice*

**CORRIGAN, J.**

---

*Associate Justice*

**LIU, J.**

---

*Associate Justice*

**CUÉLLAR, J.**

---

*Associate Justice*

**KRUGER, J.**

---

*Associate Justice*

**Attachment C**  
**ATTACHMENT 1**

**Rule 5-110 Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) *Reserved.*

(E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

**Discussion**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient

### **Attachment C**

evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*

[4] *Reserved.*

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.



## **Attachment C**

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

*(Adopted, eff. May 1, 2017.)*

### **Rule 5-220 Suppression of Evidence**

A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or produce.

#### **Discussion**

See rule 5-110 for special responsibilities of a prosecutor.

*(Adopted, eff. May 1, 2017.)*

**Attachment C**  
**ATTACHMENT 2**

**Proposed alternative revisions to Rule 5-110(D) and Discussion paragraphs [3] and [4] for consideration by the State Bar's Board of Trustees**

The prosecutor in a criminal case shall:

...

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know 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 that the prosecutor knows or reasonably should know~~ or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;. 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;

...

[3] The disclosure obligations in paragraph (D) ~~include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny.~~ Nevertheless, Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require disclosure of cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. 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.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

## Attachment A



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May 8, 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 Supreme Court Administrative Order 2017-04-26  
Response to Proposed Rule 5-110, Rules of Professional Conduct

Dear Justice Edmon and President Fox,

As you know, California is the only state in the country without a Rule of Professional Conduct incorporating ABA Model Rule 3.8, special duties of prosecutors. Indeed, the territories of Guam, US Virgin Islands, Puerto Rico, and the District of Columbia also have this rule. But not California. The California Rules Revision Commission and the Board of Trustees of the State Bar worked hard for well over a year to produce the best rule possible, proposed as Rule 5-110. Together, the Commission and the Board considered all viewpoints. Well over 90% of public comments supported the final version of the Rule, and the Rule was approved by similar margins of the Commission and the Board of Trustees, although the Board included four career prosecutors and other members who had worked as prosecutors, but no career defenders.

During the comprehensive evaluation and proceedings conducted by the Commission, prosecutors objected to the Rule—which provides that a prosecutor shall “make timely disclosure of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense”—because it “has no materiality limitation” (October 1, 2015, comment letter by California District Attorneys Association, p. 3), claiming that it “would abolish the materiality requirement” (October 14, 2015, comment letter by Los Angeles District Attorney Jackie Lacey, p. 2). These objections failed to acknowledge that there is *no* materiality requirement under existing California law. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Thus, it became abundantly clear that prosecutors understood the proposed rule would require them to disclose exculpatory evidence regardless of their subjective pre-trial assessment of materiality, but they did not understand that existing law required them to do so, and the only

## Attachment C

way to impress their existing duty upon them was to promulgate Rule 5-110 as overwhelmingly approved by the Commission and the Board of Trustees.

We are extremely grateful that the California Supreme Court has agreed that new Rule 5-110 should include the language quoted above, and that “[t]he disclosure obligations ... include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny.” (Supreme Court Administrative Order 2017-04-26, Attachment 2, Proposed Alternative Revision to Rule 5-110 discussion paragraph [3].) However, we are afraid that the modification suggested by the Court may have unintended consequences. The suggested modification would add the following sentence: “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;....” (*Id.* Attachment 2, Proposed Alternative Revision to Rule 5-110, subd. (D).)

We respectfully submit that the foregoing modification suffers from two problems that will cause detriment to the public by increasing the likelihood of wrongful convictions and miscarriages of justice.

By way of background, Rule 5-110 is not meant to govern discovery disputes at trial but is meant to foster compliance with existing discovery obligations by meaningfully providing clear warnings that violations of those obligations may subject the offending attorney to professional discipline. In order to achieve this purpose, the rule must avoid ambiguity. Especially when it comes to lawyers, whose very careers involve debating competing interpretations of governing provisions, such ambiguities must be avoided if at all possible.

Unfortunately, the modifier “significant” in the phrase describing “the duty to disclose information that casts *significant* doubt on the accuracy or admissibility of witness testimony or other evidence...” (emphasis added) invites disagreement over the degree to which the information hurts the evidence offered by the prosecution. Moreover, although California law specifically requires the prosecution to disclose exculpatory evidence or information *regardless of whether or not it is material* (*Barnett, supra*, 50 Cal.4th 890, 901; *People v. Cordova, supra*, 62 Cal.4th 104, 124), excluding information unless it casts *significant* doubt essentially limits the scope of information a prosecutor must disclose to *material* evidence. Indeed, it could be argued that “significant doubt” imposes a greater degree of magnitude than the materiality standard rejected in *Barnett* and *Cordova*, because the standard of materiality under *Brady v. Maryland* (1963) 373 US 83 is whether “there is a reasonable probability its disclosure would have altered the trial result” (*Cordova, supra*, 62 Cal.4th at p. 124)—i.e., by raising a *reasonable* doubt that the defendant is guilty—which is a lesser standard than a requirement of casting a *significant* doubt.<sup>1</sup>

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<sup>1</sup> The constitutional standard for determining whether suppression of exculpatory evidence requires reversal of a conviction is even lower than requiring a reasonable probability of altering the trial result: “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when

## Attachment C

Thus, as a practical matter, the proposed modification may result in some prosecutors, if not many or most, failing to honor their statutory duty to disclose *all* exculpatory evidence, whether or not it is material or significant.

Further, while at first blush it may seem that there is no need to require disclosure of evidence when its only value would be to discredit or exclude evidence that the prosecution does not intend to introduce, the realities of trial practice illustrate the contrary. For example, consider the situation where the prosecution discloses a report written by a police officer or a statement by a civilian witness, but the prosecutor later learns that the officer or witness is not reliable or credible because of additional information the prosecutor has learned, and the prosecutor therefore decides not to call them to testify. Under the proposed modification to Rule 5-110, the prosecutor would not have to disclose the impeaching information. Consequently, defense counsel would be unaware that the witness is not credible. But as so often occurs in trial practice, the police report or witness statement may include information that, on its face, is helpful to the defense, leading the defendant to present the witness at trial. The net result would see the prosecutor using the undisclosed information to discredit the witness, not only negating any possible benefit the defense hoped to achieve by calling the witness, but tarnishing the integrity of the entire defense because the jury would naturally associate it with the discredited witness. Whether or not such a scenario should be considered gamesmanship or sandbagging, it demonstrates that the failure to disclose the discrediting information was inimical to the search for truth and the interests of justice. These scenarios must be discouraged, not encouraged, but will be countenanced by the proposed modification.

Condoning a prosecutor's failure to disclose impeaching information where the prosecutor ultimately decides not to present the witness who would be impeached by that information overlooks another critical reason for the disclosure of exculpatory information: a defendant's due process rights under *Brady* are violated not merely where the suppressed evidence was itself material, but where its disclosure would have led the defendant to learn of other significant evidence by investigating the suppressed information. (*In re Bacigalupo* (2013) 55 Cal.4th 312, 337-340, conc. opn. Liu, J.) Justice Liu's concurring opinion in *Bacigalupo* was joined by Justices Cantil-Sakauye, Werdegar, and Corrigan, a majority of the court, and specifically concluded that suppression of evidence requires reversal under *Brady* where disclosure of the suppressed evidence would have led the defendant to other evidence that would have been material to his defense.

Exculpatory evidence and information should always be disclosed, whether or not it is material or significant. While those conditions are important in making the hindsight determination whether a failure to disclose requires a conviction to be vacated, they are alluring incentives for a prosecutor to refrain from disclosing exculpatory information if he personally believes that it is insignificant. And as any seasoned trial lawyer knows, it is common for prosecutors who have become personally convinced in the certitude of the defendant's guilt to dismiss exculpatory evidence as insignificant because of their belief that it would not make a difference. But as the late Justice Antonin Scalia chastised the prosecutor during oral arguments in *Smith v. Cain*

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the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434, quoting from *United States v. Bagley* (1985) 473 U.S. 667, 678.)

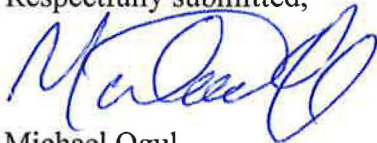


## Attachment C

(2012) 565 U.S. 73, prosecutors should “stop fighting as to whether it should be turned over[.] Of course, it should have been turned over... the case you’re making is that it wouldn’t have made a difference.” (Official Transcript of Proceedings on Oral Arguments in *Smith v. Cain*, No. 10-8145, November 8, 2011, available online as of May 8, 2017, at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/10-8145.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf), p. 51, l. 24, through p. 52, l. 2.)

We believe the purpose of the Rules of Professional Conduct is to encourage ethical behavior. An ethical prosecutor will disclose all exculpatory evidence and information without considering if it is insignificant or won’t matter anyway because the prosecutor isn’t going to call the affected witness to testify. Indeed, a prosecutor who refrains from disclosure because he concludes that the exculpatory information is insignificant risks not only the wrongful conviction of an innocent person and reversal if a reviewing court disagrees, finding instead that the evidence was material, but the possibility of facing a felony prosecution under Penal Code section 141, subdivision (c), for choosing not to disclose that evidence. Prosecutors, individuals accused of crimes, and the entire state of California would be better served by firmly establishing 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.

Respectfully submitted,



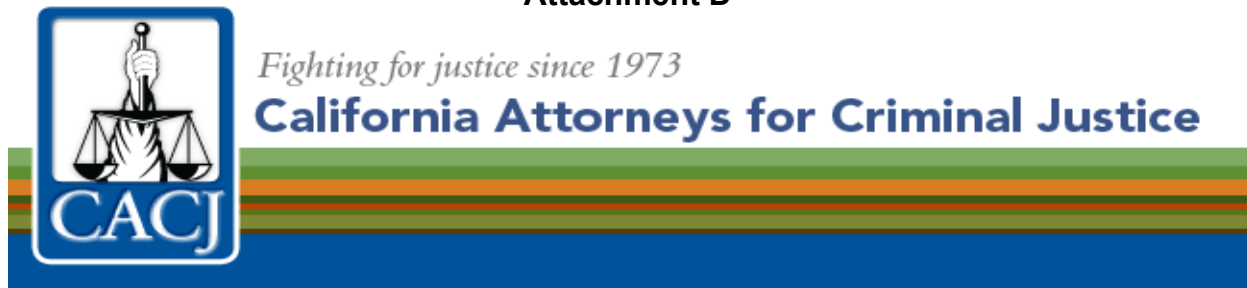
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## Attachment D



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May 10, 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 Supreme Court Administrative Order 2017-04-26 Response to Proposed Rule 5-110, Rules of Professional Conduct**

Dear Justice Edmon and President Fox,

After a year of negotiation and public commentary, the California Rules Revision Commission and the Board of Trustees of the State Bar proposed adoption of a modification to Rule 5-110 which incorporated ABA Model Rule 3.8, Special Duties of Prosecutors.<sup>1</sup> Including the language of Model Rule 3.8 clarifies a prosecutor's existing duty to disclose *all* unprivileged exculpatory or mitigating information known to a prosecutor, and, *all* exculpatory or mitigating evidence which reasonably should be known to the prosecutor.<sup>2</sup>

The California Supreme Court has recommended an amendment to Rule 5-110 which dilutes the prosecutor's present duty to disclose all mitigating information.<sup>3</sup> The Court limits the prosecutor's duty, requiring the prosecutor to disclose only *information that casts a significant* doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution relies.

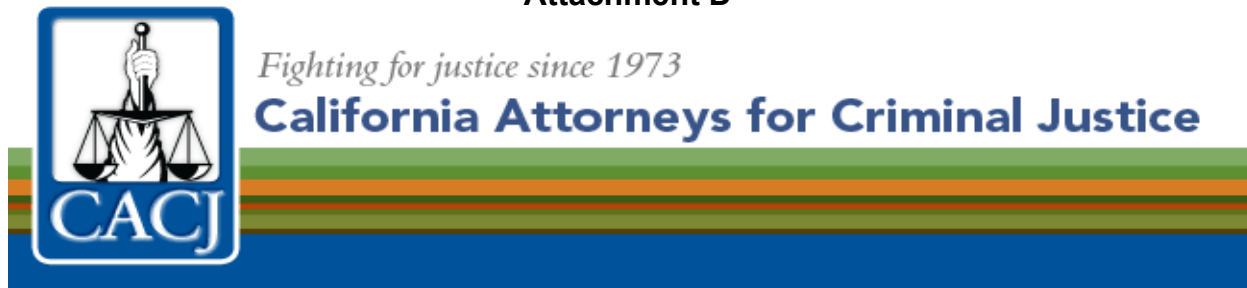
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<sup>1</sup> Forty-nine states, Guam, the U.S. Virgin Islands, and the District of Columbia have adopted a version of ABA Model Rules of Professional Conduct Rule 3.8-Special Responsibilities of a Prosecutor (Rule 3.8). ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454(2009).

California is the only state that has not adopted attorney ethics codes that are substantially similar to the ABA Model Rule. David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L. J. Online 203, 222 (2012).

<sup>2</sup> *Barnett V. Superior Court* (2010) 50 Cal.4<sup>th</sup> 890, 901; *People v. Cordova* (2015) 62 Cal.4<sup>th</sup> 104, 124 [California law requires the prosecution to disclose exculpatory evidence or information regardless of materiality.]

<sup>3</sup> *Ibid.*



The Court's recommended modification not only contravenes the Court's own holdings in *Barnett* and *Cordova*, but invites prosecutors to hide exculpatory evidence by withholding testimony of a witness or witnesses who could be favorable to the defendant's guilt or sentencing. The Court's recommendation relies on the prosecutor's subjective view of the value of evidence, which has proven time and again to be flawed. The State Bar's proposed Rule 5-110 unambiguously establishes a prosecutor's ethical obligation to disclose *all* exculpatory and mitigating information. There is no reason that any ethical prosecutor should oppose this language.

**1. This is not the time to be soft on prosecutor misconduct.**

"A prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice."<sup>4</sup>

Prosecutor misconduct, the act of withholding of exculpatory evidence, is recognized as a major factor in convicting the innocent. The current Rules of Professional Conduct clearly have not been sufficient to deter prosecutor misconduct.<sup>5</sup> Exonerations involving prosecutor misconduct occur nationally at the rate of over 100 per year. The National Registry of Exonerations<sup>6</sup> [NRE] documents 2023 exonerations from 1989 to May 10, 2017.<sup>7</sup>

From 1989 through 2016, the NRE documents 174 California exonerations.<sup>8</sup> In these cases, prosecutor misconduct – primarily *Brady* violations, along with false or perjured testimony, and false or perjured accusations – were a significant factor in a defendant's unjust conviction.

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<sup>4</sup> Bennett L. Gershman, *Prosecutorial Misconduct*, (2d ed., Thompson/West, 2007).

<sup>5</sup> The ambiguity in the current rules of conduct, and the fact that there are no practical consequences to a prosecutor who fails to disclose exculpatory evidence suggest that without stricter rules and improved disciplinary proceedings, Prosecutor Misconduct will persist. Thomas Sullivan and Maurice Possley, The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform, 105 *Journal of Criminal Law and Criminology* 881-946 (2015).

<sup>6</sup> The National Registry of Exonerations is a joint project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan School of Law, and Michigan State School of Law. "The Mission of the National Registry of Exonerations is to provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions by learning from past errors." See, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx>.

<sup>7</sup> <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

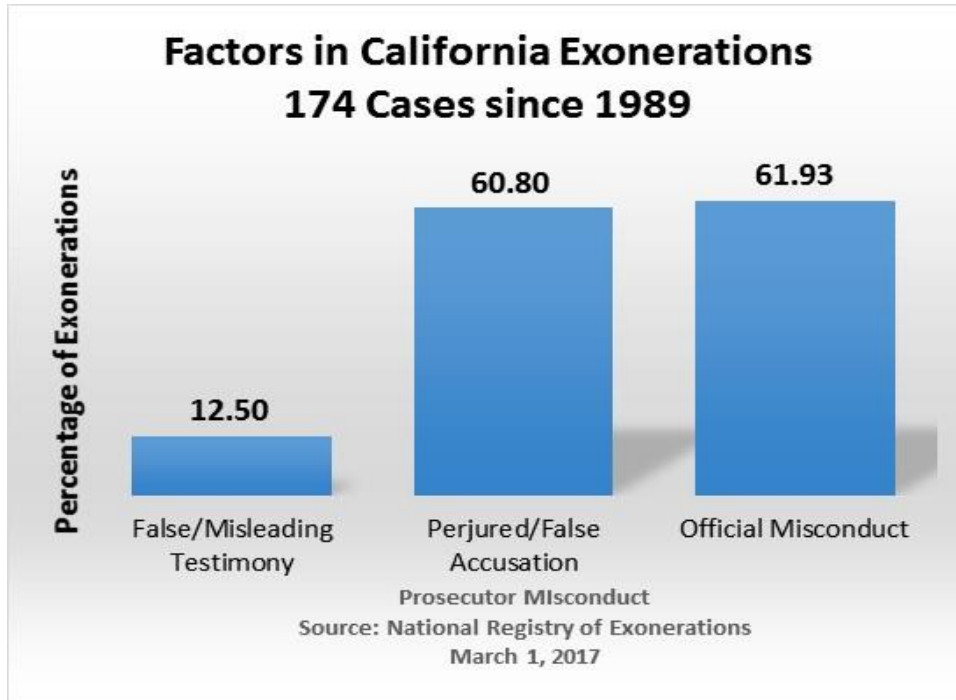
<sup>8</sup> See Attachment A, California Exonerations.





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In 2016, 9 defendants were exonerated of charges including murder and child sex abuse.<sup>9</sup> Of these, 1 case involved false or misleading testimony, 7 cases involved perjured testimony or false accusation that would have come to light with full disclosure, and 5 involved other official misconduct including failure to disclose exculpatory evidence.

To date in 2017, 2 defendants have been exonerated. Official misconduct, including false and misleading testimony and failure to disclose exculpatory evidence were factors in both unjust convictions.

- 2. The cost of withheld evidence in exonerations, civil judgments and settlements, and the public's trust in the justice system justifies an unambiguous statement by the State Bar that a prosecutor has an absolute obligation to disclose any and all information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence.**

The costs of prolonged criminal litigation that results from prosecutorial misconduct can be staggering. Each reversal requires investigation; some require retrials and multiple appeals.

In some cases, the cost of exoneration can be estimated. Among the 174 exonerations reported in the NRE, we've selected the cases below of as examples of exonerations due to prosecutor misconduct.

<sup>9</sup> See Attachment.



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In each case exculpatory evidence was withheld; prosecutors introduced false testimony and fabricated evidence; and/or charged defendants knowing that the defendants were not involved in the crime.

Exoneree	Age	Charge	Sentence	Conviction Date	Exoneration Date	Settlement
Anthony Obie	19	Murder	LWOP	1995	2011	\$8.3m
Reggie Cole	18	Murder	Life	1994	2009	\$15m
Glenn Nickerson	29	Murder	LWOP	2987	2003	\$1m
Brenda Kniffen	29	Child Sex Abuse	Life	1984	1996	\$275,000
Bruce Lisker	17	Murder	Life	1985	2009	\$7.6m
Franky Carrillo	16	Murder	Life	1992	2011	\$10.8m
Herman Atkins	19	Sex Assault	47 years	1988	2000	\$2m
Timothy Gantt	47	Murder	LWOP	1994	2008	\$512,600
Caramad Conley	18	Murder	LWOP	1994	2011	\$3.5m
Susan Mellen	42	Murder	LWOP	1998	2014	\$597,200
Marco Milla	19	Murder	LWOP	2002	2015	\$654,000

In many of these cases, prosecutors argued that the evidence withheld was not material or that it *did not cast significant doubt on the accuracy or admissibility of testimony*. In none of these cases was a prosecutor held accountable for withholding evidence favorable to the defendant.<sup>10</sup>

These cases represent a fraction of California cases where municipalities, counties and the state paid for prosecutors' disregard of their disclosure obligations under *Brady*, *Barnett* and *Cordova*.

The cost for ongoing proceedings in cases of egregious systemic prosecutor misconduct, notably the Orange County case of *People v. Scott DeKraai*, is unknown. However, it would be reasonable to estimate the cost of ongoing litigation to be in the tens of millions of dollars. After years of litigation, it is widely believed that there is still exculpatory evidence being withheld in the cases of DeKraai and other defendants entrapped by the decades-long jailhouse snitch scandal. Apparently, the mandate of current Rule 5-110 was ambiguous to the Orange County District Attorneys. The existence of the State Bar's proposed Rule 5-110 would clarify the Orange County prosecutors' duties to disclose all mitigating and all exculpatory evidence.

<sup>10</sup> It is rare that a prosecutor is reported to the state bar for misconduct, and, even more rare that a prosecutor is disciplined. In 2010, the Northern California Innocence Project identified 707 cases from 1997 to 2009 where prosecutor misconduct was identified by a court. Of those, only 6 prosecutors were disciplined. Ridolfi, Kathleen M.; Possley, Maurice; and Northern California Innocence Project, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009" (2010). Northern California Innocence Project Publications. Book 2, at p. 3.



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### **Conclusion**

The Rules of Professional Conduct are intended to guide and encourage ethical behavior. The frequency and cost of exonerations suggests that prosecutors need more, *not more ambiguous*, language defining their obligation of discovery.

There is nothing in the State Bar's proposed Rule 5-110 subd. (D) that imposes an unreasonable burden on ethical prosecutors. It is in the interest of defendants and the citizens of California to know that the State Bar has imposed the unambiguous requirement that prosecutors disclose *all* exculpatory and mitigating evidence.

Respectfully submitted,

A handwritten signature in blue ink that reads "Nancy Haydt".

Nancy Haydt  
Attorney at Law, SBN 196058  
Past Member, Board of Governors  
California Attorneys for Criminal Justice

A handwritten signature in black ink that reads "Cris Lamb".

Cris Lamb, President  
California Attorneys for Criminal Justice





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Mark Zahner

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.]

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May 23, 2017  
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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 'MS' followed by a long horizontal line.

Mark Zahner  
Chief Executive Officer



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Mark Zahner

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.

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Re: Comment on Proposed Revisions of Rules of Professional Conduct, Proposed Rule 5-110(d)

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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



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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.

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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.

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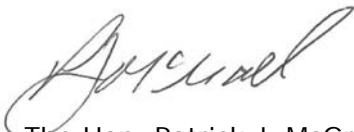
obligations. Alternative 2 tethers the ethics and discipline rules to the existing criminal discovery framework. Alternative 1 leaves the ethics and discipline process adrift—open-ended in the requirements for prosecutors, leaving them to speculate as to their obligations, with an ethics rule being subject 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>

CDAAs support 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.

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

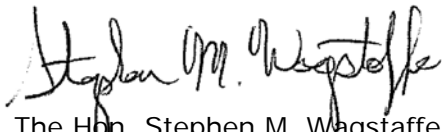
Sincerely yours,



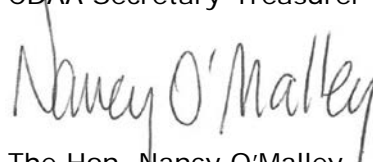
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CDAAs President



The Hon. Birgit Fladager  
Stanislaus County District Attorney  
CDAAs Secretary-Treasurer



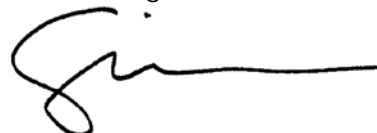
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Imperial County District Attorney  
CDAAs Past President

<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.



## Attachment D



# CPDA

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*A Statewide Association of Public Defenders and Criminal Defense Counsel*

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May 8, 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 Supreme Court Administrative Order 2017-04-26  
Response to Proposed Rule 5-110, Rules of Professional Conduct

Dear Justice Edmon and President Fox,

As you know, California is the only state in the country without a Rule of Professional Conduct incorporating ABA Model Rule 3.8, special duties of prosecutors. Indeed, the territories of Guam, US Virgin Islands, Puerto Rico, and the District of Columbia also have this rule. But not California. The California Rules Revision Commission and the Board of Trustees of the State Bar worked hard for well over a year to produce the best rule possible, proposed as Rule 5-110. Together, the Commission and the Board considered all viewpoints. Well over 90% of public comments supported the final version of the Rule, and the Rule was approved by similar margins of the Commission and the Board of Trustees, although the Board included four career prosecutors and other members who had worked as prosecutors, but no career defenders.

During the comprehensive evaluation and proceedings conducted by the Commission, prosecutors objected to the Rule—which provides that a prosecutor shall “make timely disclosure of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense”—because it “has no materiality limitation” (October 1, 2015, comment letter by California District Attorneys Association, p. 3), claiming that it “would abolish the materiality requirement” (October 14, 2015, comment letter by Los Angeles District Attorney Jackie Lacey, p. 2). These objections failed to acknowledge that there is *no* materiality requirement under existing California law. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Thus, it became abundantly clear that prosecutors understood the proposed rule would require them to disclose exculpatory evidence regardless of their subjective pre-trial assessment of materiality, but they did not understand that existing law required them to do so, and the only

## Attachment D

way to impress their existing duty upon them was to promulgate Rule 5-110 as overwhelmingly approved by the Commission and the Board of Trustees.

We are extremely grateful that the California Supreme Court has agreed that new Rule 5-110 should include the language quoted above, and that “[t]he disclosure obligations ... include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny.” (Supreme Court Administrative Order 2017-04-26, Attachment 2, Proposed Alternative Revision to Rule 5-110 discussion paragraph [3].) However, we are afraid that the modification suggested by the Court may have unintended consequences. The suggested modification would add the following sentence: “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;....” (*Id.* Attachment 2, Proposed Alternative Revision to Rule 5-110, subd. (D).)

We respectfully submit that the foregoing modification suffers from two problems that will cause detriment to the public by increasing the likelihood of wrongful convictions and miscarriages of justice.

By way of background, Rule 5-110 is not meant to govern discovery disputes at trial but is meant to foster compliance with existing discovery obligations by meaningfully providing clear warnings that violations of those obligations may subject the offending attorney to professional discipline. In order to achieve this purpose, the rule must avoid ambiguity. Especially when it comes to lawyers, whose very careers involve debating competing interpretations of governing provisions, such ambiguities must be avoided if at all possible.

Unfortunately, the modifier “significant” in the phrase describing “the duty to disclose information that casts *significant* doubt on the accuracy or admissibility of witness testimony or other evidence...” (emphasis added) invites disagreement over the degree to which the information hurts the evidence offered by the prosecution. Moreover, although California law specifically requires the prosecution to disclose exculpatory evidence or information *regardless of whether or not it is material* (*Barnett, supra*, 50 Cal.4th 890, 901; *People v. Cordova, supra*, 62 Cal.4th 104, 124), excluding information unless it casts *significant* doubt essentially limits the scope of information a prosecutor must disclose to *material* evidence. Indeed, it could be argued that “significant doubt” imposes a greater degree of magnitude than the materiality standard rejected in *Barnett* and *Cordova*, because the standard of materiality under *Brady v. Maryland* (1963) 373 US 83 is whether “there is a reasonable probability its disclosure would have altered the trial result” (*Cordova, supra*, 62 Cal.4th at p. 124)—i.e., by raising a *reasonable* doubt that the defendant is guilty—which is a lesser standard than a requirement of casting a *significant* doubt.<sup>1</sup>

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<sup>1</sup> The constitutional standard for determining whether suppression of exculpatory evidence requires reversal of a conviction is even lower than requiring a reasonable probability of altering the trial result: “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when



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Thus, as a practical matter, the proposed modification may result in some prosecutors, if not many or most, failing to honor their statutory duty to disclose *all* exculpatory evidence, whether or not it is material or significant.

Further, while at first blush it may seem that there is no need to require disclosure of evidence when its only value would be to discredit or exclude evidence that the prosecution does not intend to introduce, the realities of trial practice illustrate the contrary. For example, consider the situation where the prosecution discloses a report written by a police officer or a statement by a civilian witness, but the prosecutor later learns that the officer or witness is not reliable or credible because of additional information the prosecutor has learned, and the prosecutor therefore decides not to call them to testify. Under the proposed modification to Rule 5-110, the prosecutor would not have to disclose the impeaching information. Consequently, defense counsel would be unaware that the witness is not credible. But as so often occurs in trial practice, the police report or witness statement may include information that, on its face, is helpful to the defense, leading the defendant to present the witness at trial. The net result would see the prosecutor using the undisclosed information to discredit the witness, not only negating any possible benefit the defense hoped to achieve by calling the witness, but tarnishing the integrity of the entire defense because the jury would naturally associate it with the discredited witness. Whether or not such a scenario should be considered gamesmanship or sandbagging, it demonstrates that the failure to disclose the discrediting information was inimical to the search for truth and the interests of justice. These scenarios must be discouraged, not encouraged, but will be countenanced by the proposed modification.

Condoning a prosecutor's failure to disclose impeaching information where the prosecutor ultimately decides not to present the witness who would be impeached by that information overlooks another critical reason for the disclosure of exculpatory information: a defendant's due process rights under *Brady* are violated not merely where the suppressed evidence was itself material, but where its disclosure would have led the defendant to learn of other significant evidence by investigating the suppressed information. (*In re Bacigalupo* (2013) 55 Cal.4th 312, 337-340, conc. opn. Liu, J.) Justice Liu's concurring opinion in *Bacigalupo* was joined by Justices Cantil-Sakauye, Werdegar, and Corrigan, a majority of the court, and specifically concluded that suppression of evidence requires reversal under *Brady* where disclosure of the suppressed evidence would have led the defendant to other evidence that would have been material to his defense.

Exculpatory evidence and information should always be disclosed, whether or not it is material or significant. While those conditions are important in making the hindsight determination whether a failure to disclose requires a conviction to be vacated, they are alluring incentives for a prosecutor to refrain from disclosing exculpatory information if he personally believes that it is insignificant. And as any seasoned trial lawyer knows, it is common for prosecutors who have become personally convinced in the certitude of the defendant's guilt to dismiss exculpatory evidence as insignificant because of their belief that it would not make a difference. But as the late Justice Antonin Scalia chastised the prosecutor during oral arguments in *Smith v. Cain*

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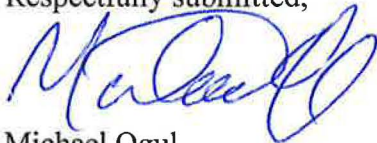
the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434, quoting from *United States v. Bagley* (1985) 473 U.S. 667, 678.)

## Attachment D

(2012) 565 U.S. 73, prosecutors should “stop fighting as to whether it should be turned over[.] Of course, it should have been turned over... the case you’re making is that it wouldn’t have made a difference.” (Official Transcript of Proceedings on Oral Arguments in *Smith v. Cain*, No. 10-8145, November 8, 2011, available online as of May 8, 2017, at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/10-8145.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf), p. 51, l. 24, through p. 52, l. 2.)

We believe the purpose of the Rules of Professional Conduct is to encourage ethical behavior. An ethical prosecutor will disclose all exculpatory evidence and information without considering if it is insignificant or won’t matter anyway because the prosecutor isn’t going to call the affected witness to testify. Indeed, a prosecutor who refrains from disclosure because he concludes that the exculpatory information is insignificant risks not only the wrongful conviction of an innocent person and reversal if a reviewing court disagrees, finding instead that the evidence was material, but the possibility of facing a felony prosecution under Penal Code section 141, subdivision (c), for choosing not to disclose that evidence. Prosecutors, individuals accused of crimes, and the entire state of California would be better served by firmly establishing 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.

Respectfully submitted,



Michael Ogul  
Deputy Public Defender, Santa Clara County  
Past President, California Public Defenders Association  
California State Bar No. 95812

Professor Laurie L. Levenson  
David W. Burcham Chair in Ethical Advocacy  
Loyola Law School  
Former Assistant U.S. Attorney, Central District of California (1981-1989)  
Founding Director, Loyola's Project for the Innocent  
California State Bar No. 97067

Barry Scheck  
Founder and Co-Director, Innocence Project, Benjamin N. Cardozo School of Law  
Past President, National Association of Criminal Defense Lawyers  
California State Bar No. 62646

Charles M. Sevilla  
Past President, California Attorneys for Criminal Justice  
California State Bar No. 45930



## Attachment D

**From:** Ogul, Michael S [mailto:Michael.Ogul@pdo.sccgov.org]  
**Sent:** Thursday, May 25, 2017 10:21 AM  
**To:** McCurdy, Lauren; Difuntorum, Randall; Laurie Levenson  
**Cc:** 'Michael Ogul'  
**Subject:** clean proposed version of 5-110(d)

Randy, Lauren and Laurie:

Here is a clean version of the text as contained in last night's email (and posted in the agenda), with the typo corrected:

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know 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 that the prosecutor knows or reasonably should know or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;. This obligation includes the duty to disclose information that the prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution, and any other evidence a prosecutor knows or reasonably should know is favorable to the defense; and

...

Take care,

Michael

Michael Ogul  
Deputy Public Defender  
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408.299.7817  
[Michael.Ogul@pdo.sccgov.org](mailto:Michael.Ogul@pdo.sccgov.org)

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## Office of the State Public Defender

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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.

## Attachment D

California Supreme Court Administrative Order 2017-04-26

Re Proposed Amended Rule 5-110

May 23, 2017

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### **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."<sup>1</sup> 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

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<sup>1</sup> 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.

## Attachment D

California Supreme Court Administrative Order 2017-04-26

Re Proposed Amended Rule 5-110

May 23, 2017

Page 3 of 4

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

**Attachment D**

California Supreme Court Administrative Order 2017-04-26

Re Proposed Amended Rule 5-110

May 23, 2017

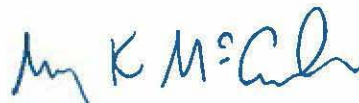
Page 4 of 4

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  
Deputy State Public Defender

## Attachment D

**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,

Mary K. McComb  
State Public Defender

Christina A. Spaulding  
Supervising Deputy State Public Defender

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Attachment E



THE STATE BAR  
OF CALIFORNIA

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OFFICE OF CHIEF TRIAL COUNSEL

Gregory Dresser, *Interim Chief Trial Counsel*

Fax: 213-765-1029  
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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

## Attachment E

Justice Edmon and Mr. Difuntorum  
May 24, 2017  
Page 2

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  
Interim Chief Trial Counsel

GD:is

## Prosecutor rule edit reflects concerns

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Published in Daily Journal on May 4, 2017

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 with 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.

