

**Rule 5-110 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule ALT-B Adopted on 5/25/17 Showing Revisions
Recommended in Public Comments Received by 5:00 pm on 6/29/17)¹**

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;² 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.

¹ Three commenters prefer ALT-A over ALT-B (see A-2017-1 Goodman, A-2017-2 OCTC and A-2017-3 Los Angeles County Public Defender). One of these comments specifies a recommended language change. The Los Angeles County Public Defender would modify the second sentence of ALT-A's paragraph (D) to delete the phrase "that a prosecutor knows or reasonably should know" which was added by the Commission. This commenter prefers the original paragraph (D) language provided in the attachment to the Court's May 1st order. In addition, OCTC's comment letter supporting ALT-A asserts that the rule should include the concept that a prosecutor is required to search for exculpatory evidence citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437 and *In re Brown* (1998) 17 Cal.4th 873, 879.

² One commenter would substitute the following language for all of (D):

"Comply with all constitutional and statutory obligations, as interpreted by relevant case law, to 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;" (see B-2017-3 U.S. Dept. of Justice).

Another commenter would restore the Supreme Court's original second sentence in (D) with some changes as follows:

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 disclosed by the prosecution intends to rely~~; (See B-2017-147 Marmalefsky.)

- (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" or "casts doubt"]³ on the accuracy or admissibility of witness testimony or other evidence ["on which the prosecution intends to rely" or "disclosed by the prosecution"]⁴. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws

³ Substituting "casts doubt" for "casts significant doubt" is supported by multiple commenters (see for example B-2017-22 Alonzo).

⁴ Substituting "disclosed by the prosecution" for "on which the prosecution intends to rely" is supported by multiple commenters (see for example B-2017-22 Alonzo).

Public commenters also note the options of deleting this entire sentence (see B-2017-2 Office of the State Public Defender) or deleting just the phrase "on which the prosecution intends to rely" (see B-2017-92 Scofield).

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.⁵

[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 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

⁵ One commenter would substitute the following language for all of [3]:

"Nothing in this rule is intended to be applied in a manner inconsistent with constitutional and statutory provisions governing discovery in California and federal courts. Under California law, 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, and include the duty to disclose information that the 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 California or federal laws and rules, as interpreted by case law or court orders. Paragraph (D) also does not require disclosure of information that the prosecutor knows is already in the possession of or previously has been disclosed to the defense, including where a prosecutor previously has disclosed the information in a different form. 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." (See B-2017-3 U.S. Dept. of Justice.)

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.