

Proposed Rule 5-110(D) Special Responsibilities of a Prosecutor (May 2017)
Alternative B – Synopsis of Public Comments

TOTAL = X A = X
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A / M / NI ¹	Comment	RRC Response
B-2017-161	Adlai, Tarik (6-29-17)	N	A	<p>Alt. A is deficient because, by limiting the duty of disclosure to evidence that could cast “significant doubt” is unknowable and often undeterminable in advance of the actual trial, thereby inviting prosecutors to rationalize concealing the evidence on the ground that they don’t anticipate it to be significant. The commentary to Alt. B which makes clear that the items covered “are not limited to evidence or information that is material” under <i>Brady</i> would avoid this deficiency.</p> <p>Furthermore, by limiting its scope to “evidence on which the prosecutor intends to rely,” Alt. A invites prosecutors to rationalize that, going into trial, they do not intend to rely on certain evidence, and therefore do not have to disclose evidence that would be favorable to the defense even if it did cast “significant doubt” on a particular item of evidence the prosecutor did intend to rely upon.</p>	
B-2017-164	Cox, Jason (6-29-17)	N	M	<p>First, the qualifier “significant” should be deleted. If left in, some prosecutors will almost certainly interpret that to condone withholding of exculpatory or impeaching information by the expedient of deeming it, in the prosecutor’s opinion, not significant.</p> <p>Second, the qualifying phrase “on which</p>	

¹ A = AGREE with proposed Rule M = AGREE with proposed Rule ONLY IF MODIFIED

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				<p>the prosecution intends to rely” should be deleted and replaced with “disclosed by the prosecution.” That would make the rule clearer, simpler, and less subject to evasion. A defendant is entitled to exculpatory and impeaching information regardless of whether the prosecution intends to call a particular witness or introduce a particular piece of evidence.</p> <p>The language about “intends to rely” should not be part of Rule 5-110(D) or the Discussion.</p>	
B-2017-167	Gazipura, Rick	N	M	The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above.	See response to Alonzo, Gregory B-2017-22.
B-2017-163	Goldscheider, Peter (6-29-17)	N	M	The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above.	See response to Alonzo, Gregory B-2017-22.
B-2017-165	Lance, Lisa (6-30-17)	N	M	The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above.	See response to Alonzo, Gregory B-2017-22.
B-2017-162	Munkelt, Stephen (6-29-17)	N	M	The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above.	See response to Alonzo, Gregory B-2017-22.
B-2017-166	Sheridan, Joanna (6-30-17)	N	M	The substance of this comment is identical or substantially similar to Alonzo, Gregory B-2017-22. See above.	See response to Alonzo, Gregory B-2017-22.

RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Attorney in private practice
Commenting on behalf of an organization	No
Name	Tarik S. Adlai
City	Pasadena
State	California
Email address	tadlai@adlailaw.com
If you have a preference (for either Alternative A or Alternative B), please indicate which proposed rule alternative you support. If you do not have a preference, select "Neither Alternative A or Alternative B".	Alternative B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Alternative A's focus on evidence that would cast "significant doubt" and limitation to undermining evidence the prosecution intended to rely on, instead of encompassing all evidence favorable to the defense, dilute and undermine the proposed rule and inject unnecessary ambiguity where clarity would be more desirable.
Attachment	State_Bar_2017-06-29_RPC_5-110.pdf (80k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	

TARIK S. ADLAI
ATTORNEY AT LAW

June 29, 2017

via Online Public Comment Form

Mimi Lee
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed Amendment to Rule 5-110

Gentlepersons:

I am writing to register my qualified support for Proposed Alternative B to amend current rule 5-110.

Proposed Alternative A is clearly unsatisfactory as it tends only to restate the status quo. Prosecutors already ought to be generally aware of their duty to disclose evidence favorable to the defense that might tend to raise significant doubt about the accuracy or admissibility of evidence. The current state of affairs, however, leads to problems because prosecutors may rationalize withholding evidence that they are aware of on the ground that it will not be material to the outcome. As a result, the judicial system is forced to adjudicate claims where evidence was deliberately concealed so as to force post-conviction litigation over the materiality of the withheld evidence.

Federal law recognizes that prosecutors in fact have a much broader duty. “The retrospective definition of materiality is appropriate only in the context of appellate review.” *United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013). Instead, “trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial.” *Id.*; see also *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009).

Alternative A is deficient because, by limiting the duty of disclosure to evidence that could cast “significant doubt” would inject doubt and uncertainty as to the materials that need to be disclosed and would thereby undermine the very objective of the proposed rule. The threshold for “significant doubt” is unknowable and often undeterminable in advance of the actual trial, thereby inviting prosecutors to rationalize concealing the evidence on the ground that they don't anticipate it to be significant. The commentary to Alternative B which makes clear

that the items covered “are not limited to evidence or information that is material” under *Brady* would avoid this deficiency.

Furthermore, by limiting its scope to “evidence on which the prosecutor intends to rely,” Alternative A invites prosecutors to rationalize that, going into trial, they do not intend to rely on certain evidence, and therefore do not have to disclose evidence that would be favorable to the defense even if it did not cast “significant doubt” on a particular item of evidence the prosecutor did intend to rely upon. Whether or not the prosecution intends to rely on certain evidence, if the evidence is favorable to the defense or is reasonably likely to lead to the discovery of favorable evidence, it should be disclosed. Alternative A is deficient in this regard as well.

Sincerely,

/s/ *Tarik S. Adlai*

Tarik S. Adlai

TSA/mo

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June 29, 2017

Comments on proposed revisions to Rule of Professional Conduct 5-110(D)

I write to support the adoption of a modified version of Alternative B of the proposed Rule of Professional Conduct 5-110(D).

I have practiced criminal law for three decades. I have lectured on discovery issues at a number of CLE events, including the annual Capital Case Defense Seminar. I frequently hear complaints from other criminal defense attorneys, both public and private, across the state about pervasive prosecutorial discovery violations, and have seen the same in my own practice. These violations are so frequent and widespread as to be disturbingly routine. I see no evidence of that having improved significantly in recent years, despite several highly-publicized discovery scandals. To help remedy this problem, the new Rule 5-110(D) and its Discussion should be as clear and unambiguous as possible about the prosecution's discovery obligations.

Because of my interest in discovery law and practice, I have followed the proposed revisions to Rule 5-110(D) for some time, and I commented on the proposals that the State Bar was considering last year. I have studied the currently-proposed Alternatives A and B, and have concluded that Alternative B is better than Alternative A. Moving the second sentence of paragraph (D) to the Discussion section and slightly modifying the language helps to clarify that it is an example of the prosecution's discovery obligations, not a limitation on the rule stated in the first portion of Rule 5-110(D). That is significant, because the clearer the rule, the better.

However, I am concerned about some of the language in that sentence, and would

like to suggest two changes. As it stands now, in Alternative B that sentence says, “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.*” [Emphasis added.]

First, the qualifier “significant” should be deleted. If left in, some prosecutors will almost certainly interpret that to condone withholding of exculpatory or impeaching information by the expedient of deeming it, in the prosecutor’s opinion, not significant. That is far too similar to the prosecution deciding to withhold information because the prosecutor deems it not material, which the California Supreme Court has ruled that the prosecution may not do. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) We should not close that door only to open another one just like it. Case law has recognized that “it cannot be left up to the government to decide for the defense what is relevant and what is not.” (*People v. Jackson* (2005) 129 Cal.App.4th 129, 171.) Likewise, it cannot be left up to the government to decide for the defense what is significant and what is not. Our Supreme Court has held that “the prosecutor’s *Brady* disclosure obligations cannot turn on the prosecutor’s view of whether or how defense counsel might employ particular items of evidence at trial.” (*In re Miranda* (2008) 43 Cal.4th 541, 577.) Likewise, those obligations cannot turn on the prosecutor’s view of whether particular items of evidence are “significant.”

Second, the qualifying phrase “on which the prosecution intends to rely” should be deleted and replaced with “disclosed by the prosecution.” That would make the rule clearer, simpler, and less subject to evasion. A defendant is entitled to exculpatory and impeaching information regardless of whether the prosecution intends to call a particular witness or introduce a particular piece of evidence. The defense may itself consider calling that witness or introducing that evidence, and must be aware of both harmful and helpful information about that witness or evidence. Also, pretrial disclosure of such evidence might lead the defense to other witnesses it decides to call or other evidence it decides to

introduce. “[D]iscovery is not limited to admissible evidence, but encompasses information which may lead to relevant evidence.” (*Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828.) “[T]he accused is entitled to any information which may *lead* to relevant evidence on an issue raised by the facts of the case.” (*People v. Memro* (1985) 38 Cal.3d 658, 686, original italics.) The current phrasing of the Discussion lends itself too easily to being misinterpreted to mean that the prosecution’s obligation to disclose exculpatory information applies only if and when the prosecutor forms the intent to rely on a witness or piece of evidence. The prosecution’s obligation is not dependent on that and the Discussion should avoid suggesting it is. The language about “intends to rely” should not be part of Rule 5-110(D) or the Discussion.

Thank you.

Lee, Mimi

From: Rick Gazipura <rgazipura@gmail.com>
Sent: Friday, June 30, 2017 10:41 AM
To: Lee, Mimi
Subject: proposed Rule 5-110(d) of the Rules of Professional Conduct.

Dear Ms. Lee,

I realize that I missed the deadline for comment by one day. However, I hope that my comment and opinion described below can be considered. Thanks very much.

Although Alternative B is superior to Alternative A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it continues to include the qualifications "*significant* doubt" and "*evidence on which the prosecution intends to rely....*" The Discussion Comment should be changed to state: "These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.

With that comment in mind, I oppose Alternative A and prefer Alternative B.

Rick Gazipura
Attorney at Law
4665 Scotts Valley Dr.
Scotts Valley CA 95066
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rgazipura@gmail.com

Lee, Mimi

From: PFGOLDS@aol.com
Sent: Thursday, June 29, 2017 4:59 PM
To: Lee, Mimi
Subject: Proposed Rule 5-110 D

Ms. Lee,

I am requesting that although better that Alternative A even Alternative B be strengthened as it is unnecessarily vague, too limited in the sense that it includes only evidence that casts a *“significant doubt” and “evidence on which the prosecution intends to rely....”*, rather than the standard reflected in Brady and its progeny defining the duty to disclose *evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”*

The dilution not only reflects a standard not found in the law now and thus will open up nothing more than new rounds of interpretation and litigation but also diminishes the prosecutor's duty to the extent that that new standard serves no one except those who are not willing to meet their current constitutional obligations.

Thank you.

Peter Goldscheider
Certified Criminal Law Specialist
Palo Alto

Lee, Mimi

From: Lisa Lance <Lisa.Lance@yolocounty.org>
Sent: Friday, June 30, 2017 8:43 AM
To: Lee, Mimi
Subject: Public comment on proposed Rule 5-110(d) of Rules of Professional Conduct

I oppose Alternative A

I prefer Alternative B

Additionally:

Although Alternative B is superior to Alternative A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it continues to include the qualifications "*significant* doubt" and "*evidence on which the prosecution intends to rely...*" The Discussion Comment should be changed to state: "These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution."

RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Stephen Munkelt
City	Nevada City
State	California
Email address	stephen@munkeltlaw.com
If you have a preference (for either Alternative A or Alternative B), please indicate which proposed rule alternative you support. If you do not have a preference, select "Neither Alternative A or Alternative B".	Alternative B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Although Alternative B is superior to Alternative A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it continues to include the qualifications "significant doubt" and "evidence on which the prosecution intends to rely...." The Discussion Comment should be changed to state: "These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.</p> <p>Alternative B and the change recommended here are consistent with the language and intent of the ABA Model Rules and the ABA standards for the prosecution function. They also more fully address the concerns expressed by Appellate courts, especially the Ninth Circuit, referencing an epidemic of prosecutorial misconduct which has become apparent over the last few years. over the last</p>
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Date	
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Submitted via:	

Lee, Mimi

From: Joanna P. Sheridan <jps@sfcrimlaw.com>
Sent: Friday, June 30, 2017 10:04 AM
To: Lee, Mimi
Subject: Comment on Rule rule 5-110(D)

Dear Mimi,

I missed the cut off date for public comment on rule 5-110(D) by one day, but I hope the following comment can be included:

Although Alternative B is superior to Alternative A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it continues to include the qualifications “significant doubt” and “evidence on which the prosecution intends to rely....”

The Discussion Comment should be changed to state: “These obligations include, but are not limited to, the duty to disclose evidence or information that a prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.”

Thank you,

Joanna

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