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

TOTAL = 3	*A = 3*
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A / M / NI[1]	Comment	RRC Response
A-2017-1	Goodman, Paul Samuel (6-29-17)	N	A	I have worked as a criminal defense attorney in the past. During that time I have heard more than once a prosecutor say that in a case where there were two defendants, but evidence that only one person committed the crime, they would cheerfully attempt to obtain convictions for both. Many prosecutors ignore their duties to promote their careers. I support Alt. A.	
A-2017-3	Los Angeles County Public Defender Office (Emling) (6-29-17)	Y	A	Of the two options presented for public comment, we support Alt. A, though in our view, the original language, reflected in the Supreme Court's order concerning Rule 5-110, rather than the Bar's proposed modified language, is the best alternative. We believe the Bar's modified version unnecessarily repeats the phrase "that a prosecutor knows or reasonably should know." Repeating that phrase, which is used initially in the first sentence of the Court's proposed rule, is superfluous and redundant. We also believe the sentence: "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	

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

TOTAL = 3	*A = 3*
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A / M / NI[1]	Comment	RRC Response
				which the prosecution intends to rely." In our view, for this language to have the full force and effect envisioned by the Supreme Court, the language should be contained within the rule itself and not left to the Discussion section of the rule. To the extent that a rule is defined and interpreted principally by the plain meaning of the rule itself, for this part of the rule to have its intended effect, it should be part of the rule, not merely an advisory, non-compulsory discussion point.	
A-2017-2	State Bar Office of Chief Trial Counsel (Moawad) (6-29-17)	Y	A	OCTC supports the Commission's Alternative A of subsection (D) of Rule 5-110 of the Rules of Professional Conduct as the better option. OCTC notes that both alternatives still leave to interpretation what information "casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely" and when the information must be disclosed. This may make the rule difficult to enforce in some circumstances. Nonetheless, Alterative A, is the more definitive, clearer, and enforceable version of the rule. OCTC supports Alternative A's Comment 3 because it provides needed guidance.	

TOTAL = 3	*A = 3*
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A / M / NI[1]	Comment	RRC Response
				OCTC also supports the deletion of the prior proposal's language about cumulative disclosures because the language was confusing and could be misinterpreted. OCTC supports proposed Comment 4 to Alternative A 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. OCTC is still concerned that the proposed rule does not address the 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.	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Paul Samuel Goodman
City	Oakland
State	California
Email address	paulsgoodman@gmail.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 A - Modified Version of the Revisions Included in the Supreme Court Order S239387
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	In the past, I have worked as a criminal defense attorney. In that time, I have, on more than one occasion, heard prosecutors say that that in a case where there were two defendants, but evidence that only one person committed the crime, they would cheerfully attempt to obtain convictions for both. Many prosecutors view criminal defendants as less than human, and ignore their duties to promote their careers. I support Alternative A of Proposed rule 5-110.
Attachment	
Attachment	
Attachment	
Date	
File :	
Submitted via:	

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
19-513 Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, California 90012
(213) 974-0318

KELLY G. EMLING
ACTING PUBLC DEFENDER

EXECUTIVE OFFICE

June 23, 2017

Mimi Lee
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

This letter is in response to the State Bar's request for public comment regarding reconsideration of the proposed Rules of Professional Conduct, Rule 5-110(D).

Of the two options presented for public comment, Alternative A and Alternative B, the Public Defender's Office writes now in support of Alternative A, though in our view, the original language, reflected in the Supreme Court's order concerning Rule 5-110 (California Supreme Court Administrative Order 2017-04-26, S239387), rather than the Bar's proposed modified language, is the best alternative.

Our preference for the original language proposed by the California Supreme Court rather than the modified language proposed by the California State Bar simply reflects our view that the Bar's modified version unnecessarily repeats the phrase "that a prosecutor knows or reasonably should know." Repeating that phrase, which is used initially in the first sentence of the Court's proposed rule, is superfluous and redundant.

Beyond our preference for the original language proposed by the Supreme Court is the question of choosing between Alternative A and Alternative B. That choice relates primarily to the following sentence.

> "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."

The question regarding this language is, in summary, whether this language should be included as part of the rule itself (Alternative A), or only in paragraph [3] of the Discussion section of the rule (Alternative B).

In our view, for this language to have the full force and effect envisioned by the Supreme Court, the language should be contained within the rule itself and not left to the Discussion section of the rule. To the extent that a rule is defined and interpreted principally by the plain meaning of the rule itself, for this part of the rule to have its intended effect, it should be part of the rule, not merely an advisory, non-compulsory discussion point.

For the reasons noted in this comment, the Public Defender's Office recommends and supports adoption of Alternative A and further support adopting Alternative A using the original language as proposed by the California Supreme Court.

Date: 6/29/17

Signature: Kelly G. Emling
KELLY G. EMLING
Acting Public Defender

THE STATE BAR
OF CALIFORNIA

OFFICE OF CHIEF TRIAL COUNSEL

Steven J. Moawad, *Chief Trial Counsel*

845 SOUTH FIGUEROA STREET, LOS ANGELES, CALIFORNIA 90017-2515 TELEPHONE: (213) 765-1468
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1617

June 29, 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 Rule 5-110 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 again 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 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.

California should have an unambiguous and enforceable Rule of Professional Conduct addressing the duty of criminal prosecutors to disclose exculpatory evidence. Both current proposals make the rule clearer than the previous proposal and remove unnecessary duplicative language. OCTC supports the Commission's Alternative A of subsection (D) of Rule 5-110 of the Rules of Professional Conduct as the better option.

OCTC notes that both alternatives still leave to interpretation what information "casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely" and when the information must be disclosed. This may make the rule difficult to enforce in some circumstances. Nonetheless, Alterative A, is the more definitive, clearer, and enforceable version of the rule.

Alternative A states in the rule that the obligation to disclose "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." The language is intended to clarify the prior sentence and provide an example of the type of information that must minimally be disclosed and not be the only information that must be disclosed. Alternative A provides important clarification of what must minimally be disclosed by the prosecutor under the rule.

It also provides notice to prosecutors that an improper failure to provide exculpatory information can result in them being disciplined by the Supreme Court.[1]

Alternative B places the same language in its Comment 3, but adds the language "include, but 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." Statements defining what information must be disclosed should generally be written into the rule and not in a Comment to the rule. Here, the sentence clarifies the rule and thus belongs in the rule. Further, the Comments are not binding and courts have interpreted the rules contrary to the Comments in the rules. (See e.g. *In re Kline* (D.C. 2015) 113 A.3d 202, 207-208.) Specifically, OCTC is concerned that the use of the term "include, but not limited to" in the second sentence of Comment 3 makes the rule more ambiguous and, thus, provides less notice of what conduct is included in the rule. The proposed language of Comment 3 of Alternative B will make the rule more difficult to enforce, especially in comparison to Alternative A.

OCTC supports Alternative A's Comment 3 because it provides needed guidance. OCTC also supports the deletion of the prior proposal's language about cumulative disclosures because the language was confusing and could be misinterpreted.

OCTC supports proposed Comment 4 to Alternative A 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.[2]

OCTC is still concerned that the proposed rule does not address the 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.

Also, if there is going to be a proposed rule addressing the conditions required for a criminal prosecutor to issue a subpoena to present evidence about an attorney's former or current client, the rule should apply to all attorneys, not just criminal prosecutors. OCTC 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 also agrees with

---

[1] Prosecutors have been disciplined under the State Bar Act and the current Rules of Professional Conduct for failing to disclose exculpatory evidence. (See e.g. *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171.)

[2] This same Comment is in Alternative B.

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,

Steven J. Moawad
Chief Trial Counsel