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(Alternative A)**

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Attachment 5: Full Text of Public Comments

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	
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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 PUBLIC 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).

June 23, 2017

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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
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1617

TELEPHONE: (213) 765-1468

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, Alternative 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.

Justice Edmon and Mr. Difuntorum
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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.

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Justice Edmon and Mr. Difuntorum
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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

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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)
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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

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State Bar of California

Re: Proposed Amendment to RPC 5-110

June 29, 2017

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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

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Attorney at Law
Commenting on behalf of an organization	No
Name	Gregory M Alonzo
City	
State	
Email address	
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."</p> <p>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>
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Date	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Private Practice 39 years
Commenting on behalf of an organization	No
Name	Steven Alpers
City	Fremont
State	California
Email address	S.Alpers@comcast.net
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.	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Los Angeles County Alternate Public Defender
Commenting on behalf of an organization	Yes
Name	Michael Goodman
City	Los Angeles
State	California
Email address	mgoodman@apd.lacounty.gov
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 the Los Angeles County Alternate Public Defender prefers the original language that was submitted to the California Supreme Court by the State Bar, given the two current options, we prefer the language of Alternative B. In our view the original draft language did not create as much ambiguity by the inclusion of such language as the qualifiers, requiring "significant doubt" or "evidence on which the prosecution intends to rely...." In our view the Discussion Comment should be changed to state something akin 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 doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution." Nevertheless, between Alternative A and Alternative B, The Los Angeles County Alternate Public Defender prefers the language of Alternative B.</p>
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Submitted via:	

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

Professional Affiliation	Criminal defense attorney
Commenting on behalf of an organization	No
Name	Caley Anderson
City	Tulare
State	California
Email address	andersonc.84@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Alternative B is preferable. However, even alternative B remains quite ambiguous and lacks force due to murky language of qualification - "significant doubt" and "evidence on which the prosecution intends to rely" do not lend themselves well to easy and clear enforcement.</p> <p>Preferable in the discussion comment - "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>
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Whitney Antrim
City	San Diego
State	California
Email address	whitney.antrim@sdcounty.ca.gov
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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Solo Practitioner; former prosecutor
Commenting on behalf of an organization	No
Name	Charles W. Applegate
City	Santa Rosa
State	California
Email address	applegatelaw@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Alternative B is better than Alternative A, but it is not good enough. It would dilute the rule and create ambiguity with the needless and counterproductive 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."
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
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State	California
Email address	mjaye@oldsaclaw.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 B is drafted in a fashion that is preferable to Alternative A; however, it is still ambiguous. The problem lies in the terms "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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Katie Belisle
City	San Diego
State	California
Email address	katie.belisle@sdcounty.ca.gov
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.	I prefer alternative B it seems that it still creates ambiguity by including the qualifications "significant doubt" and "evidence on which the prosecution intends to rely".
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Date	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Lawyer
Commenting on behalf of an organization	No
Name	Terrence J Bennett
City	Vallejo
State	California
Email address	terrybennett8@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Delete the language suggesting that the prosecution can do less than fully comply with its Brady disclosure obligations as to both guilt/innocence issue as well as evidence tending to mitigate at sentencing. Prosecution has an affirmative obligation to positively disclose not just evidence the prosecution intends to use in its case in chief, but rather all information of potential value to the accused at trial and at sentencing.
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Attorney
Commenting on behalf of an organization	No
Name	Barney Berkowitz
City	San Jose
State	California
Email address	barney.berkowitz@pdo.sccgov.org
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Alison Bermant, Attorney at Law
Commenting on behalf of an organization	No
Name	Alison Bermant
City	Truckee
State	California
Email address	truckeelawyer@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	CPDA
Commenting on behalf of an organization	No
Name	william black
City	oroville
State	California
Email address	blackpi@comcast.net
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.	. " 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Heather Boxeth
City	
State	
Email address	
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>Oppose Alternative A</p> <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>Prosecutors should be held accountable to a professional standard that they have not been, especially when affecting individual rights of criminal defendants.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	court-appointed appellate criminal defense attorney
Commenting on behalf of an organization	No
Name	Nancy S Brandt
City	
State	
Email address	
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Public Defender
Commenting on behalf of an organization	No
Name	Aric M. Bright
City	Napa
State	California
Email address	aric.bright@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am opposed to Alternative A.</p> <p>I prefer Alternative B.</p> <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...."</p> <p>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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	attorney SF Juvenile defense
Commenting on behalf of an organization	No
Name	Sheila Brogna
City	San Francisco
State	California
Email address	sheila@sfchildrenslaw.net
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.	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Contra Costa Public Defender
Commenting on behalf of an organization	No
Name	Adam Burke
City	Oakland
State	California
Email address	adamburke82@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	California Attorneys for Criminal Justice, Board Member
Commenting on behalf of an organization	Yes
Name	Deedrea Edgar
City	Santa Barbara
State	California
Email address	daedgar@co.santa-barbara.ca.us
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 B is the only reasonable choice, Alternative A is very unreasonable and eliminate the meaning of the rule and its purpose. Justice requires evidence to be shared and avoid any injustices due to lack of proper disclosure.
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	California Attorneys for Criminal Justice
Commenting on behalf of an organization	Yes
Name	Ignacio Hernandez
City	Sacramento
State	California
Email address	Ignacio@Hernandezstrategy.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.	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
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	California Public Defenders Association
Commenting on behalf of an organization	Yes
Name	Michael Ogul
City	San Jose
State	California
Email address	michael.ogul@pdo.sccgov.org
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

Attachment 5: Full Text of Public Comments

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please note that while we believe that Alternative B is superior to Alternative A, we have objections to Alternative B as well. Please see the attached letter, pasted below for convenience.

The addition of Rule 5-110(d) to the Rules of Professional Conduct is a great step forward to promoting compliance with prosecutor's existing duties to disclose "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." With its implementation, California will finally join the other 49 states, the territories of Guam, US Virgin Islands, Puerto Rico and the District of Columbia in adopting ABA Model Rule 3.8.

However, we respectfully submit that Alternative A should be rejected, and although Alternative B is an improvement over Alternative A, Alternative B should be modified. Specifically, our concern is with the italicized portions of the second sentence of Alternative A, which states 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 the prosecution intends to rely;..." The italicized portions are problematic because they invite prosecutors to intentionally refuse to disclose exculpatory evidence and information unless they both subjectively believe that it will cast significant doubt on their evidence and that they have subjectively concluded that they will present the impacted evidence regardless. Both conditions are inconsistent with existing law and invite mischief. While the degree of harm created by the failure of a prosecutor to honor his or her disclosure duties may be relevant to the level of discipline to be imposed for the prosecutor's ethical violation, it does not discount the fact the violation has occurred. Indeed, as acknowledged by Greg Fortescue, the liaison from the California Supreme Court, at the May 25, 2017, meeting of the Rules Revision Commission, concerns about the adjective "significant" are well taken. He indicated that the second sentence was meant to serve as an incontrovertible illustrative example of discrediting information that a prosecutor has the duty to disclose, and was not meant to limit the first sentence of subdivision (d). Although the provision of an example was well intended, we agree with the Commission that any example would be better placed in the discussion comment, rather than in the text of the rule.

But although the placement of the example in the discussion comment instead of the text of the rule is an improvement, the text of the revised comment will 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..." Instead, the discussion comment would be better phrased by stating, "These obligations include, but are not limited to, the duty to disclose evidence or

	<p>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.” This language would leave no ambiguity and discourage prosecutors from suppressing exculpatory evidence based on their subjective beliefs.</p> <p>As pointed out in our May 8, 2017, letter to the Rules Revision Commission and the Board of Trustees, 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 both Alternative A and Alternative B, 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 destroy the witness’s credibility, 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 both alternatives.</p> <p>Moreover, 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 disclosed 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, Werdegarr, 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. Thus, applying Bacigalupo to the proposed language at</p>
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	<p>issue would create the following problem: although the prosecutor would be allowed to suppress information that discredited a prosecution witness if the prosecutor decided not to present that witness, disclosure of the suppressed information would be harmful to the defendant—and violate the constitutional requirements of <i>Bacigalupo</i> and <i>Brady</i>--where the suppressed information would have led the defense to a witness who not only would have impeached the withdrawn prosecution witness but would have presented affirmative facts supporting the defendant's innocence. Under these circumstances, the prosecutor's intentional suppression of the information would not be subject to discipline under the language at issue although it would violate the defendant's constitutional rights to due process of law. Respectfully, we believe that it would be wrong to provide a prosecutor with immunity from professional discipline under these circumstances. Indeed, we doubt that the Rules Revision Commission or the Supreme Court intends otherwise.</p> <p>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 <i>Smith v. Cain</i> (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 <i>Smith v. Cain</i>, No. 10-8145, November 8, 2011, available online as of May 5, 2017, at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf, p. 51, l. 24, through p. 52, l. 2.)</p> <p>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</p>
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Attachment 5: Full Text of Public Comments

	<p>crimes, and the entire state of California would be better served by making it clear that a prosecutor's ethical duty 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.</p> <p>Michael Ogul Deputy Public Defender, Santa Clara County Past President, California Public Defenders Association California State Bar No. 95812</p>
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Alameda County

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Santa Clara County

2nd Vice President
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Michael S. Ogul, 2015 / Charles Denton, 2016

CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

June 22, 2017

Mimi Lee

Office of Professional Competence, Planning and Development

The State Bar of California

180 Howard St.

San Francisco, CA 94105-1639

Dear Ms. Lee,

The addition of Rule 5-110(d) to the Rules of Professional Conduct is a great step forward to promoting compliance with prosecutor's existing duties to disclose "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." With its implementation, California will finally join the other 49 states, the territories of Guam, US Virgin Islands, Puerto Rico and the District of Columbia in adopting ABA Model Rule 3.8.

However, we respectfully submit that Alternative A should be rejected, and although Alternative B is an improvement over Alternative A, Alternative B should be modified. Specifically, our concern is with the italicized portions of the second sentence of Alternative A, which states 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 the prosecution intends to rely*;..." The italicized portions are problematic because they invite prosecutors to intentionally refuse to disclose exculpatory evidence and information unless they both subjectively believe that it will cast *significant* doubt on their evidence and that they have subjectively concluded that they will present the impacted evidence regardless. Both conditions are inconsistent with existing law and invite mischief. While the degree of harm created by the failure of a prosecutor to honor his or her disclosure duties may be relevant to the level of discipline to be imposed for the prosecutor's ethical violation, it does not discount the fact the violation has occurred. Indeed, as acknowledged by Greg Fortescue, the liaison from the California Supreme Court, at the May 25, 2017, meeting of the Rules Revision Commission, concerns about the adjective "significant" are well taken. He indicated that the second sentence was meant to serve as an incontrovertible illustrative example of discrediting information that a prosecutor has the duty to disclose, and was not meant to limit the first

sentence of subdivision (d). Although the provision of an example was well intended, we agree with the Commission that any example would be better placed in the discussion comment, rather than in the text of the rule.

But although the placement of the example in the discussion comment instead of the text of the rule is an improvement, the text of the revised comment will 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....*” Instead, the discussion comment would be better phrased by stating, “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.” This language would leave no ambiguity and discourage prosecutors from suppressing exculpatory evidence based on their subjective beliefs.

As pointed out in our May 8, 2017, letter to the Rules Revision Commission and the Board of Trustees, 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 both Alternative A and Alternative B, 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 destroy the witness’s credibility, 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 both alternatives.

Moreover, 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 disclosed 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. Thus, applying *Bacigalupo* to the proposed language at issue

would create the following problem: although the prosecutor would be allowed to suppress information that discredited a prosecution witness if the prosecutor decided not to present that witness, disclosure of the suppressed information would be harmful to the defendant—and violate the constitutional requirements of *Bacigalupo* and *Brady*--where the suppressed information would have led the defense to a witness who not only would have impeached the withdrawn prosecution witness but would have presented affirmative facts supporting the defendant's innocence. Under these circumstances, the prosecutor's intentional suppression of the information would not be subject to discipline under the language at issue although it would violate the defendant's constitutional rights to due process of law. Respectfully, we believe that it would be wrong to provide a prosecutor with immunity from professional discipline under these circumstances. Indeed, we doubt that the Rules Revision Commission or the Supreme Court intends otherwise.

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* (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 5, 2017, at 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 making it clear that a prosecutor's ethical duty 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.



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

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Maria Cavalluzzi
City	Los Angeles
State	California
Email address	maria@cavalluzzi.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Law Office of Michael D. Chaney
Commenting on behalf of an organization	No
Name	Michael D. Chaney
City	Encino
State	California
Email address	LACrimAtty@yahoo.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	attorney
Commenting on behalf of an organization	No
Name	william chestnut
City	San Jose
State	California
Email address	williamchestnut@msn.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
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Courtney Chu
City	
State	
Email address	
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.	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	LA County Public Defender
Commenting on behalf of an organization	No
Name	Jimmy Chu
City	Los Angeles
State	California
Email address	jchu@pubdef.lacounty.gov
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>It is imperative to the integrity of our judicial system and to regain/retain public trust that prosecutors are held to the highest standards. Part of that should certainly include holding prosecutors accountable if they fail to make timely disclosure of exculpatory evidence or information. There is simply no reason why they should not be held accountable if they are knowingly assisting in sending innocent members of the public to jail by hiding favorable evidence.</p> <p>Personal observation and numerous incidents depicted in the media show innocent people convicted much too often and culpable prosecutors never held accountable. Alternative B will be a giant step in the right direction.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Santa Clara County Public Defender
Commenting on behalf of an organization	No
Name	Joseph Clarke
City	
State	California
Email address	
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Attorney at Law (California)
Commenting on behalf of an organization	No
Name	Michael R. Coghlan
City	South Pasadena
State	California
Email address	mcoghlan@pubdef.lacounty.gov
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>In our court, we have what is called "EDP" (Early Disposition Project). It is a special arraignment court where we do not only arraignments, but attempt to settle felony cases before they progress upwards to preliminary hearing and beyond. I am assigned to our EDP court. Most of the superior courts in L.A. County have an EDP court.</p> <p>Many times, a case will turn on a surveillance video. The defendant claims he never had a knife; the police report says he had a knife in his hand. There is a surveillance video mentioned in the police report.</p> <p>Surveillance videos are NOT provided in the initial discovery given to the defense at time of arraignment. In cases where a surveillance video is probably going to be dispositive, this is a fatal omission. Our DA's office refuses to put pressure on the police department (PD) to provide videos in the initial discovery. As such, we must "fly blind" in the EDP court.</p> <p>Well, of course, no competent attorney is going to plead out a client who claims he never had a knife when there is a video that will tell one way or the other, so we simply send the case on up (and out of the EDP court) for preliminary hearing. Our DA's office says, "don't worry - the video will be provided at least 30 days prior to trial."</p> <p>Seems to me this is PRECISELY the type of situation that should be remedied by the proposed Rule.</p> <p>M.R. Coghlan 626-356-5479 Pasadena Court</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Anthony E Colombo Jr
City	San Diego
State	California
Email address	anthonycolombolegal@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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Submitted via:	

JASON M. COX
Attorney at Law
P.O. Box 6280
Albany, CA 94706
(510) 528-8087
e-mail: jmcx@sbcglobal.net

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.

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Celia Cratch
City	Ventura
State	California
Email address	2celiac@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Although Alternative B is preferable to Alternative A, it still creates ambiguity because it includes 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal defense attorney and former prosecutor
Commenting on behalf of an organization	No
Name	Mani Dabiri
City	Irvine
State	California
Email address	md@thinkdefense.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 better than Alternative A, it would still dilute the rule and create ambiguity because it continues to include the qualifications "significant doubt" and "evidence on which the prosecution intends to rely...."</p> <p>Instead, the Discussion Comment should be changed to state as follows: "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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Stewart K. Dadmun
City	San Diego
State	California
Email address	stewart.dadmun@sdcounty.ca.gov
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.	By placing the word "significant" in front of doubt it gives a prosecutor a loop hole.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Law Student
Commenting on behalf of an organization	No
Name	Zachary Davina
City	San Francisco
State	California
Email address	zwdavina@usfca.edu
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal Trial Attorney
Commenting on behalf of an organization	No
Name	Stephen M. Defilippis
City	San Jose
State	California
Email address	flipsmd2005@yahoo.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

Attachment 5: Full Text of Public Comments

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

This is not an easy decision. I believe that Alternative B is certainly better than Alternative A, but it would continue to share the at least some level of the serious deficiencies of Alternative A. At the very least, it could have the unfortunate effect of diluting the rule by injecting ambiguity into the rule, due to its inclusion of the qualifiers "significant doubt" and "evidence on which the prosecution intends to rely...." I would suggest that 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."

My concerns come from a very real place, as I am a criminal trial attorney with over 3 decades of experience, over 150 trials under my belt, and significant experience dealing with Brady issues. It seems to me that this offending language does more than simply water down the prosecution's obligations. It provides them with an out, a way to justify the claim that they do not need to provide clearly exculpatory evidence by simply saying that they did not intend to rely on the evidence that it negates.

An excellent example of this occurred in a special circumstance homicide case that I tried twice in the early 2000's. Prior to the first trial, the Penal Code section 1026 doctors split on the issue of sanity. I called the favorable doctor during the sanity portion of the trial, and the prosecution called the other doctor during their case in chief. I cross examined the adverse doctor with information provided in a number of letters from the defendant's family members that the first prosecutor had turned over to me just prior to trial. The doctor had not seen those letters, and although they provided corroboration for the claims of legal insanity, he stuck to his opinion that the defendant was sane at the time of the commission of the crime. Fortunately, the case hung when two of the jurors would not change their votes that the defendant was insane (a result that was quite fortunate in that the defense expert, who will remain unnamed, literally imploded on the stand – I believe this was the last time he was allowed to testify in Santa Clara County). Later, when the case was sent out for the retrial of the sanity phase, The new prosecutor (who will also remain nameless) announced that he would not rely on that doctor's opinion of legal sanity. Fortunately, I called the doctor to find out what had happened, and he told me that he had requested the letters I had been referencing during cross-examination in the first trial, had receive them from the first prosecutor. He had again reviewed them and this time, they caused him to change his opinion and he now believed the defendant was insane at the time of the commission of the crime. He then advised me that he had told this to the prosecutor and asked if he should write a supplemental report, and the prosecutor had told him that it was not necessary, not to worry, and that he would "let the court know." Of course he didn't, nor did he tell me. If I

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	<p>had not called the doctor and discovered it, that change of opinion would never have been known.</p> <p>The language in Alternative A, and even the hypothetical in Alternative B, give the appearance that the prosecutor who even knows about the favorable evidence does not have to turn it over if he is not going to rely on facts that would be disproved by that evidence. That is the same type of claim that the prosecutor was trying to rely on in my case by claiming that he wasn't going to introduce an opinion that the defendant was legally sane. Fortunately, he was caught, and the trial judge ruled that he had concealed evidence. However, no immediate action was taken against the prosecutor, who had put a very mentally sick defendant at risk of life without the possibility of parole, when instead, he was clearly in need of the type of long term care that he is now receiving through Napa State Hospital. It was not until years later that it was deemed a violation of his professional duties, and even then, only a slap on the wrist was given. Certainly, more stringent rules should govern that process.</p> <p>Frankly, the example like what is contained in the proposed rules creates a dangerous precedent, under either alternative, as it provides the type of justification that could encourage a prosecutor of the wrong type to withhold evidence that they absolutely have to disclose. While most prosecutors abide by their duties, rules such as these need to be strong to address the few that don't.</p>
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Attachment 5: Full Text of Public Comments

Lee, Mimi

From: rdevine653@aol.com
Sent: Monday, July 03, 2017 4:34 PM
To: Lee, Mimi
Subject: Proposed Rule chang t0 5-110; 5-220.

State Bar Board of Governors, The Bar should recommend the changes proposed in alternative B of the rule changes. It is clearer and more direct than alternative B. Thank you. Robert Devine # 86175

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Daniel A. Ditlof
City	Ventura
State	California
Email address	dditlof@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Santa Clara County Public Defenders Office
Commenting on behalf of an organization	No
Name	Gerard Dobbyn
City	San Jose
State	California
Email address	gdobbyn@yahoo.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Member
Commenting on behalf of an organization	No
Name	Markus Dombois
City	Martinez
State	California
Email address	stormlawyer@yahoo.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.	Although B is better than A, it still includes ambiguous and subjective language with "significant doubt" and "evidence on which the prosecution intends to rely...." This allows prosecutors to act both unilaterally and with subjective intent act in bad faith. To inject objectivity, the Discussion Comment should be changed to clarify that: "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." Thanks for your attention to this matter.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	former prosecutor/current appellate attorney
Commenting on behalf of an organization	No
Name	Julie Dunger
City	Ben Lomond
State	California
Email address	dungerlaw@comcast.net
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.	The court, not the prosecution, should decide whether exculpatory evidence is "significant." Alternative A transfers that authority to the individual prosecutor. The threshold for disclosure of exculpatory evidence should be as broad as possible and as early as possible in the trial process so that the court and the defense are not cut out of the discussion of whether that evidence is material to a contested issue or to the credibility of a witness.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Milly Durovic
City	San Diego
State	California
Email address	millydurovic@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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	I have been employed as a public defender for over 25 years
Commenting on behalf of an organization	No
Name	Youseef Elias
City	Oakland
State	California
Email address	youseef.elias@acgov.org
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.	Although Alternative B is a better than Alternative A, Alternative B 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	David Epps
City	San Jose
State	California
Email address	dweesq@aol.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.	Please register my support of Alternative B and opposition to Alternative A
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Karl Fenske
City	Los Angeles
State	California
Email address	kfenske@sbcglobal.net
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Kimberly Fitzgerald
City	San Rafael
State	California
Email address	kfitzgerald3@comcast.net
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Craig Foster
City	San Jose
State	California
Email address	craigwfoster@hotmail.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.	While 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	contract public defender and private criminal defense attorney
Commenting on behalf of an organization	No
Name	jodea foster
City	chico
State	California
Email address	jodealaw@sbcglobal.net
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 waters down the prosecution obligation and creates in essence a "loop hole" for a wayward DA to argue his/her way out of the consequences for not seeking justice properly. We see this all the time: a prosecutor says "I am the judge of what constitutes Brady material." These are systemic problems that need to be addressed aggressively. For that reason, I oppose Alternative A, and if my only other option is Alternative B, then I support Alternative B. But I believe that Alternative B could also be strengthened, with language such as "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." That type of language is helpful to close the "loop hole."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	deputy public defender
Commenting on behalf of an organization	No
Name	stephanie freidenreich
City	los angeles
State	California
Email address	sfreidenreich@pubdef.lacounty.gov
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 B is a correct and clear statement of the law.
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Criminal Defense Attorney
Commenting on behalf of an organization	No
Name	Sarah Garrick
City	San Diego
State	California
Email address	
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>In my professional opinion, Alternative B is better than Alternative A because, the qualifying language "significant doubt" and "evidence on which the prosecution intends to rely" leaves far too much latitude for the prosecution in deciding what to disclose, which seems to defeat the purpose of modifying the rule.</p> <p>While Alternative B is the better version, the Discussion Comment should also delete the qualifying language above, and simply state: "These obligations include, but are not limited to, the duty to disclose all 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>
Attachment	
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Submitted via:	

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
(831) 438-1221
rgazipura@gmail.com

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	State Bar of California
Commenting on behalf of an organization	No
Name	Jeffrey D. Gold
City	Norwalk
State	California
Email address	jeff@jeffreydgold.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.	
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Submitted via:	

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

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Dana Gross
City	Sonora
State	California
Email address	danaraegross@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I oppose Alternative A, with a strong preference for Alternative B, with modification:</p> <p>The Discussion Comment should be changed; it should read: "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>Although Alternative B is superior to Alternative A, it would continue to have the unfortunate effect of diluting the rule and creating ambiguity...</p> <p>It continues to include the qualifications: - "significant doubt" and - "evidence on which the prosecution intends to rely...."</p> <p>These things can be argued ad infinitum in court, if and when one has cause to raise this as an issue. If the rule is to have meaning, it must be strong, not weak. We must allow the rule to have an effect, and substantially commit to it, rather than create a mere token.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Andy Gutierrez
City	San Jose
State	California
Email address	andrew.gutierrez@pdo.sccgov.org
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

Attachment 5: Full Text of Public Comments

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I've been a practitioner for approximately 20 years. During that time there has been much wasted time litigating the contours of a prosecutor's obligation to disclose exculpatory evidence. Part of the problem has been disagreement about what the "Brady" obligation means and how that is to be distinguished from the separate statutory obligation under PC 1054.1(e) [obligation to disclose "any exculpatory evidence"]. Courts have had an easier time with the statutory phrase "exculpatory evidence" than the Brady standard, since the Brady standard employs the phrase "undermines confidence" in the outcome. My fear is that Alternative A, by using the term "significant" doubt, introduces the same "eye of the beholder" problem as in the Brady standard. Since disclosure of exculpatory evidence is so integral to our criminal justice system and public confidence, the rule should be as clear as possible and contain the least amount of subjectivity. The voter-approved PC 1054.1(e)'s standard is straightforward; if there is evidence of "any exculpatory evidence," it must be disclosed. I believe that Alternative B most closely hews to PC 1054.1(e).

I also believe that adding the language "on which he/she intends to rely" will again create more problems and litigation. As the former head of my office's research division (2012 to 2016) we had to litigate situations where prosecutors understood they had a problem key witness (investigating/arresting officer) and consequently chose to delete that witness from the witness list. By doing so the prosecution argued it had no obligation to disclose exculpatory evidence related to that investigating/arresting officer's conduct. We ended up in unnecessary and extensive litigation and the court ultimately concluded that the prosecution could not get around the duty to disclose simply because it elected not to call the investigating officer. In short, the phrase "on which he intends to rely" will swallow the rule and allow prosecutor's an escape hatch for exculpatory evidence. It also does not conform to the independent statutory obligation under PC 1054.1(e) which requires disclosure whether or not the prosecution intends to rely on that evidence.

Respectfully submitted,

Andy Gutierrez

Attachment

Attachment

Attachment

Date

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Submitted via:

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Criminal Defense Appeals
Commenting on behalf of an organization	No
Name	Christopher L Haberman
City	Visalia
State	California
Email address	clh@habermanesq.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	attorney in private practice
Commenting on behalf of an organization	No
Name	Sandra Payne Hagood
City	La Jolla
State	California
Email address	sandra@hagoodappellate.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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Carrie Hall
City	
State	
Email address	
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.	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."
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	John Hamasaki
City	San Francisco
State	California
Email address	john@hamasakilaw.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>As a criminal defense attorney practicing daily in the courts of the State of California, I believe that while both alternatives are flawed, Alternative B is a smarter and more practical than Alternative A.</p> <p>If we are truly concerned with ensuring due process for all who come before our courts, and fighting wrongful convictions and mass incarceration, 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 A is not helpful to the criminal justice system and ensuring a fair system of justice. 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...."</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Santa Clara County Public Defender's Office
Commenting on behalf of an organization	No
Name	Krista Henneman
City	San Jose
State	California
Email address	krista.henneman@pdo.sccgov.org
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>I am opposed to Alternative A.</p> <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>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Law Office of Kurt David Hermansen
Commenting on behalf of an organization	No
Name	Kurt David Hermansen
City	San Diego
State	California
Email address	kdh@kurt davidhermansen.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.	In my opinion, Alternative B is superior to Alternative A. Alternative A would dilute the rule and create ambiguity because it includes 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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Attorney/Temporary Judge
Commenting on behalf of an organization	No
Name	Michael E. Hingle
City	San Jose
State	California
Email address	michael@hingle-law.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Private practice criminal defense lawyer
Commenting on behalf of an organization	No
Name	Rick Horowitz
City	Fresno
State	California
Email address	rick@rhdefense.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>The language "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" is enough.</p> <p>Adding wiggle words like "significant doubt" or limiting the rule to evidence that the prosecution says it intends to rely is just a way of gutting the rule.</p> <p>Let's either have fairness in the trial process, or cut out the window dressing, and admit that we don't really want to force the prosecution to disclose evidence or information that the prosecutor knows or reasonably should know casts a doubt on the accuracy or admissibility of testimony.</p> <p>Failing to have an alternative C that just says, "prosecutors should quit gaming the system, and should turn over all evidence or information that is remotely exculpatory, including that which casts doubt on the guilt of the accused, mitigates the offense, or sentence, period, end of story, just do it," then alternative B is the best option.</p> <p>Just think of how many fewer exonerations would be needed if we had a rule that forced a return to the prosecution seeking justice, over tallying up wins at all costs, ethical, and otherwise.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	California Public Defenders Association
Commenting on behalf of an organization	No
Name	Gregory P. Humphries
City	Santa Monica
State	California
Email address	greg@gphlaws.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:</p> <p>"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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Independent Defense Counsel Office
Commenting on behalf of an organization	Yes
Name	Sylvia Perez MacDonald, Director
City	San Jose
State	California
Email address	sylvia.macdonald@ido.sccgov.org
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 B addresses the issues best by avoiding ambiguity and not diluting a prosecutor's responsibility. Alternative A would dilute the duties of counsel by adding ambiguity with language such as "significant doubt" and "evidence on which the prosecution intends to rely." These words give prosecutors justification not to comply. It is critical that prosecutors receive clear guidance, therefore, the language should be that "disclosure 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	L.A. Public Defender
Commenting on behalf of an organization	No
Name	Aaron Jansen
City	Los Angeles
State	California
Email address	ajansen@pubdef.lacounty.gov
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>The government's withholding of exculpatory evidence cuts to the heart of the accused's right to to process enshrined in the Bill of Rights. I've been a Deputy Public Defender for over 21 years and the prosecutor's refusal to timely turn over or failure to disclose exculpatory evidence is a serious problem that erodes confidence in our sense of justice.</p> <p>Presently there is no effective penalty deterrent because almost every judge refuses to hold prosecutors accountable in any meaningful way when instances of failure to to disclose exculpatory evidence is revealed. Excuses are the norm such as, "this specific prosecutor just got the case as a trial handoff" or "the officers didn't give it to the prosecutor," or the "defense did not do a discovery request."</p> <p>Alternative B is the stronger and broader of the two and therefore more likely to deter prosecutors from withholding exculpatory evidence and thereby circumventing the administration of justice.</p>
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Grace Jo
City	Los Angeles
State	California
Email address	graceyoungjo@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I oppose Alternative A and support Alternative B.</p> <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>
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Rebecca P Jones
City	San Diego
State	California
Email address	jones163313@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Public Defender, Los Angeles County
Commenting on behalf of an organization	No
Name	Akio Katano
City	Los Angeles
State	California
Email address	akiokatano@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Oppose A Approve B but request following modification:</p> <p>The qualifications that the duty includes information that "casts SIGNIFICANT doubt on the accuracy or admissibility of witness testimony or other evidence ON WHICH THE PROSECUTION INTENDS TO RELY" creates far too much ambiguity in the scope of the duty, and would allow the prosecution a great deal of leeway in intentionally withholding evidence. This dilution of the rule would lead to the withholding of evidence that has great exculpatory weight, or which could lead to the investigation and discovery of further evidence, to the disadvantage of the defendant.</p> <p>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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal Defense Attorney
Commenting on behalf of an organization	No
Name	Joseph Katz
City	Hanford
State	California
Email address	josephkatzlaw@yahoo.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

Attachment 5: Full Text of Public Comments

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

It is encouraging that, after so many years of witnessing some examples from time to time of the grossest, maddening and most inexcusable misconduct, ethics and discovery violations and suborning of perjury by District Attorney's offices, that now there is at least a discussion of consequences to a Deputy District Attorney for hiding or suppressing evidence. I have seen this happen with my own eyes again, and again, and again. I refer to Deputy District Attorneys who openly defy a direct Court order after a Motion to Compel and still will not turn over evidence which they are clearly obligated by the law to divulge. I refer to Deputy District Attorneys who take a year to hand over relevant and crucial discovery that they have had all along, and then within less than thirty days prior to a trial in which the maximum possible sentence is life in prison. I refer to Deputy District Attorneys who are still practicing in the State of California (but who should really no longer be licensed to practice law).

On the other hand, 'Alternative A' is nothing more than iron pyrite. I have no confidence at all in, and no appreciation for, any proposed law that allows a District Attorney's Office to subjectively determine, in their own biased interests (particularly with grant cases, etc.), what casts "significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely". This sounds akin to a police department being in charge of conducting their own review of an officer shooting an unarmed man in a car seat, and determining that no misconduct or excessive force occurred. 'Alternative A' is nothing more than a wide open pasture gate, beckoning a Deputy District Attorney so inclined to embark on endless denials, sophistry, double-speak and other verbal gymnastics.

'Alternative B' is closer to a reasonable and credible rule of law that might actually result in a modification of behavior and an increase in circumspection of wayward Deputy District Attorneys. However, we already have standards in the long-standing rules governing discovery and nowhere in common usage (that readily comes to mind, at least) do we find Deputy District Attorneys allowed to determine what is and is not 'significant'. We should not start, now. We already have a standard and common parlance, and a vastly improved modification would be: "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." We should not encourage Deputy District Attorneys to lie about whether or not they were going to "rely" on evidence - when it is clear to any honest and reasonably ethical person that they very clearly DID intend, and even must have intended, to rely on the evidence. The last thing we should want to do is to encourage endless debates regarding the interpretation of the word, 'significant'.

Attachment 5: Full Text of Public Comments

	<p>Great energy has gone into addressing a persistent social injustice and long-standing miscarriage of law that now brings us to consider and debate meaningful change. Now is the time to build upon this welcome impulse and not stop short of the finish line. Please do not dilute this law and render it ineffective and meaningless. We have labored a long, long time on a very uneven playing field. This State deperately needs meaningful reform governing extremely inalcitrant District Attorneys Offices. Adopt 'Alternative B', with Mr. Ogul's improved and far more effective and meaningful language, and thereby help to rejuvenate ethics in California jurisprudence.</p> <p>Thank you.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	The Law Offices of Bryan R. Kazarian
Commenting on behalf of an organization	Yes
Name	Bryan R. Kazarian
City	Santa Ana
State	California
Email address	brk@kazarianatlaw.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.	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.
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Attorney/Law Professor
Commenting on behalf of an organization	No
Name	Patrick Kelly
City	San Jose
State	California
Email address	phkesq@pacbell.net
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	I am a public defender
Commenting on behalf of an organization	No
Name	Amy Kimpel
City	Fremont
State	California
Email address	amy.kimpel@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Nevada County Public Defender's Office
Commenting on behalf of an organization	No
Name	Keri Klein
City	Nevada City
State	California
Email address	keri.klein@co.nevada.ca.us
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am opposed to Alternative A and prefer Alternative B.</p> <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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	San Joaquin County Public Defender's Office
Commenting on behalf of an organization	No
Name	Christine Kroger
City	Stockton
State	California
Email address	ckroger@sjgov.org
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>We have a real problem in San Joaquin County with prosecutors playing fast and loose with the discovery rules. There needs to be as little ambiguity as possible in any rules governing their behavior with respect to this crucial aspect of due process and fairness in the criminal justice system. As such, I support Alternative B with a clarification:</p> <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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Tulare County Public Defender's Office
Commenting on behalf of an organization	No
Name	Angela Krueger
City	Visalia
State	California
Email address	akrueger2@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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I disagree with any proposal that qualifies a prosecutor's obligation to disclose exculpatory or impeaching information to the defense. Qualifying this obligation with terms such as "significant" leaves too much discretion in the hands of individual prosecutors, which I believe contributes to wrongful convictions. 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." That way, exculpatory and impeaching information can be brought to light, the risks of wrongful conviction do not rest in the hands of prosecutors alone, and the integrity of the justice system can be maintained.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	Yes
Name	Michele Kumaus
City	San Diego
State	California
Email address	
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal Defense Attorney - Private Practice
Commenting on behalf of an organization	No
Name	Jeffrey Lake
City	San Jose
State	California
Email address	jeff@carpenterandmayfield.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".	Neither Alternative A or Alternative B
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...."</p> <p>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>
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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."

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	CPDA
Commenting on behalf of an organization	No
Name	Susan Leff
City	San Francisco
State	California
Email address	leffs@hotmail.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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public defender
Commenting on behalf of an organization	No
Name	Zachary Linowitz
City	Martinez
State	California
Email address	zachary.linowitz@pd.cccounty.us
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	CACJ, National Lawyers Guild
Commenting on behalf of an organization	No
Name	Gabriela Lopez
City	Oakland
State	California
Email address	gabriela@oaklandclo.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Defense Attorney
Commenting on behalf of an organization	No
Name	Madeleine
City	San Diego
State	California
Email address	
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Dale Major
City	San Francisco
State	California
Email address	majordale@yahoo.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	San Diego County Public Defender
Commenting on behalf of an organization	No
Name	Marie Maloney
City	San Diego
State	California
Email address	marie.maloney@sdcounty.ca.gov
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Robert Marasco
City	San Diego
State	California
Email address	
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.	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	POWELL & ASSOCIATES
Commenting on behalf of an organization	No
Name	Sarah Marinho
City	San Jose
State	California
Email address	smarinho@rrpassociates.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.	I am opposed to Alternative A. As a criminal defense practitioner I have encountered prosecutors who improperly withhold evidence in bad faith and with impunity. 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	attorney
Commenting on behalf of an organization	No
Name	DAN MARMALEFSKY
City	Los Angeles
State	California
Email address	dmarmalefsky@MOFO.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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I prefer a blend of Alternatives A and B, which removes use of the word "significant" but includes the example that information casting doubt on a witness' credibility should be disclosed:</p> <p>(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 doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution.</p> <p>As a lawyer who has tried cases in CA and across the country for more than 35 years, I often find that a prosecutor's assessment of the importance of impeachment evidence differs dramatically from mine and from those of jurors who were able to consider such evidence over the objection of a prosecutor. The integrity of the fact-finding process should be governed by clear rules -- rather than importing amorphous standards such as what is considered "significant" or whether a prosecutor "intends to rely." The alternative wording above is simpler to apply and will limit post-conviction debates about the prosecutor's compliance with his or her ethical obligations.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Alternate Defender
Commenting on behalf of an organization	No
Name	Brian Matthews
City	San Jose
State	California
Email address	brian.matthews@outlook.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>I favor Alternative B because it is superior to Alternative A. I am concerned that Alternative B still dilutes the rule and creates ambiguity. I suggest that the Discussion comment state the following: "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 a witnesses testimony or other evidence disclosed by the prosecution."</p> <p>Thank you for the opportunity to offer comment.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Emery gilbert May
City	Laguna Niguel
State	California
Email address	Gil@gilmaylawyer.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.	
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	National Lawyers Guild
Commenting on behalf of an organization	No
Name	Daniel Miller Mayfield
City	San Jose
State	California
Email address	dan@carpenterandmayfield.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.	Any change here is positive, but let's remember the public trust that goes with being able to charge and convict individuals. 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.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Paul McCarthy
City	Oakland
State	California
Email address	p_mccarthy@sbcglobal.net
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 B is superior to Alternative A. But it still dilutes the rule and creates ambiguity re prosecutor's duties, due to inclusion of 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Sarah McCarthy
City	San Jose
State	California
Email address	sarah.mccarthy@pdo.sccgov.org
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Michael McKneely
City	Fresno
State	California
Email address	mike@fresnocriminalattorney.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>As a practicing criminal defense attorney this rule is of great concern to me. In my experience prosecutors do not understand their obligations, and do not seek out clarifying information. This rule would require them to know their obligations and would help to prevent the conviction of innocent people.</p> <p>Thank you</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Cheryl McLandrich
City	Berlin
State	
Email address	cheryl@legalwritingcalifornia.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>I spoke at the State Bar Board of Trustees in 2016 and I wholeheartedly believe that Version A waters down the rule and distills its effectiveness.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Leslie Edward McMillan
City	San Clemente
State	California
Email address	leslie7647@aol.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.	Neither version fully binds prosecutors to their duty under Brady to reveal all exculpatory evidence or evidence reflecting adversely on the credibility of their witnesses. However, there is no current State Bar ethics rule explicitly addressing prosecutors Brady obligations, and Alternative B is better than continuing that blatant omission from our ethics rules.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Arsh Mehan
City	Los Angeles
State	California
Email address	mehan1@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>It is essential that prosecutors be held liable for failing to disclose exculpatory information. We have seen numerous cases of prosecutors acting above the law, most recently in Contra Costa County where the District Attorney Scott Peterson has misused campaign funds for years and lied about it. It is no secret that he has acted inappropriately and arbitrarily for years.</p> <p>Prosecutors have the weight, power, and resources of the police departments, sheriff's offices, crime labs, and often other federal, state, and local agencies on their side.</p> <p>Prosecutors should err on the side of disclosure. Proposal B is better because it is not watered down. What is the purpose of a new rule of conduct if it has no clear directive?</p> <p>While Proposal B is better for this reason, it still falls short. It should include a statement that does not limit it to the listed behavior. Thank you for your attention to this important new rule.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Robert Meraz
City	Oakland
State	California
Email address	robert.meraz@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	While Alternative B is better than Alternative A, Alt. B would still water down the rule and create ambiguity since it still has the qualifications, "significant doubt," and "evidence on which the prosecution intends to rely..." The Discussion Comment should 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	In private practice; criminal defense
Commenting on behalf of an organization	No
Name	Marion D. Miller
City	Eureka
State	California
Email address	mmiller@saber.net
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>I agree wholeheartedly with the following input: 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>Thank you for this opportunity to comment, Marion Miller</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Lawyer
Commenting on behalf of an organization	No
Name	Richard J Moller
City	Redway
State	California
Email address	moller95628@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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public defender
Commenting on behalf of an organization	No
Name	Christina Moore
City	Oakland
State	California
Email address	christina.moore@acgov.org
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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Office of the State Public Defender
Commenting on behalf of an organization	No
Name	Maria Morga
City	Piedmont
State	California
Email address	mmorga@hotmail.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.	I oppose Alternative A. 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."
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Attachment 5: Full Text of Public Comments

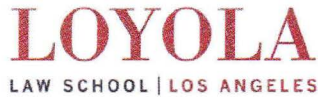
RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Dominique Moshier
City	Fresno
State	California
Email address	dominique.moshier@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I am opposed to Alternative A as it creates a loophole within the text of the rule which would directly contradict the purpose behind this rule. There are still problems with Alternative B, which should read in the Discussion Comment: "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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Laurie L. Levenson
Commenting on behalf of an organization	Yes
Name	Laurie L. Levenson
City	Los Angeles
State	California
Email address	laurie.levenson@lls.edu
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
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Submitted via:	



June 27, 2017

The Honorable Lee Smalley 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:

As you will see below, dozens of former prosecutors, former judges, academics and other concerned members of the criminal justice community have expressed an interest in commenting on recent changes to the proposed Comments for Rule 5-110(d). While we strongly endorse the addition of Rule 5-110(d) to the Rules of Professional Conduct as an important step toward promoting compliance with prosecutors' existing duties to disclose "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," we are concerned with the proposed language of both Alternatives A and B.

Specifically, on May 25, 2017, the Commission offered alternatives that state that the prosecutor's 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*" [Alternative A] or provide in the Rule's Discussion Comment [3] that "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*." [Alternative B] (emphasis added).

Although Commission members at the hearing indicated that this added language is intended to give just one example of how the rule would be implemented, we are concerned that prosecutors may rely on it to intentionally refuse to disclose exculpatory evidence and information unless they **both** subjectively believe that it will cast *significant* doubt on their evidence **and** that they have *subjectively concluded* that they *will present* the impacted evidence regardless. Both conditions are inconsistent with existing law and invite mischief.

The degree of harm created by the failure of a prosecutor to honor his or her disclosure duties may be relevant to the level of discipline to be imposed for the prosecutor's ethical violation, but it should not discount the fact that a violation has occurred. Therefore, we strongly urge that

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Alternative A be rejected and that the portion of the discussion comment quoted above for Alternative B be deleted in order to avoid ambiguity and discourage prosecutors from suppressing exculpatory evidence based on their subjective beliefs.

Thank you for consideration.

Sincerely,

A handwritten signature in purple ink, appearing to read 'L L L', with a stylized flourish at the end.

Laurie L. Levenson
Professor of Law & David W. Burcham Chair in Ethical Advocacy
Loyola Law School
Former Assistant United States Attorney
Central District of California

Ronald J. Nessim
Former Assistant United States Attorney
Central District of California

Matthew Umhofer
Former Assistant United States Attorney
Central District of California

Professor Erwin Chemerinsky
Founding Dean, UC Irvine School of Law
Dean, U.C. Berkeley School of Law

Professor Yxta Murray
Loyola Law School

Carol Gillam
Former Assistant United States Attorney
Central District of California

Professor Priscilla Ocen
Loyola Law School

Mary Fulginiti
Former Assistant United States Attorney
Central District of California

William Carter
Former Assistant United States Attorney
Central District of California

Attachment 5: Full Text of Public Comments

Professor Evan Lee
U.C. Hastings College of the Law
Fred Heather
Former Assistant United States Attorney
Central District of California

Professor Dan Simon
USC Gould School of Law

Mary Andruess
Former Assistant United States Attorney
Central District of California

Vicki Podberesky
Andruess / Podberesky

Professor Rebecca S. Lonergan
USC Gould School of Law

Hector Perez
Former Assistant United States Attorney
Central District of California

Professor Kevin Lapp
Loyola Law School

Gordon Greenberg
Former Assistant United States Attorney
Central District of California

Professor Linda Starr
Santa Clara University School of Law

Mark Byrne
Former Assistant United States Attorney
Central District of California

David Willingham
Former Assistant United States Attorney
Central District of California

Brad Brian
Former Assistant United States Attorney
Central District of California

Attachment 5: Full Text of Public Comments

Fred Heather
Former Assistant United States Attorney
Central District of California

James McGinnis
Former Assistant United States Attorney
Central District of California

John Libby
Former Assistant United States Attorney
Central District of California

James Spertus, Esq.
Former Assistant United States Attorney
Central District of California

Daniel Broderick
Former Assistant United States Attorney
Central District of California

Thomas Bienert
Former Assistant United States Attorney
Central District of California

Jeffrey Isaacs
Former Assistant United States Attorney
Central District of California

Daniel Shallman
Former Assistant United States Attorney
Central District of California

Debra Wong Yang
Former United States Attorney
Central District of California

William Price
Former Assistant United States Attorney
Central District of California

Nicola T. Hanna
Former Assistant United States Attorney
Central District of California

Attachment 5: Full Text of Public Comments

David Schindler
Former Assistant United States Attorney
Central District of California

Steven J. Olson
Former Assistant United States Attorney
Central District of California

Lourdes Baird
Former United States Attorney
Central District of California
Former, United States District Judge

Professor Heidi Rummel
USC Gould School of Law

David Wiechert
Former Assistant United States Attorney
Central District of California

Brian A. Sun
Former Assistant United States Attorney
Central District of California

Charles Kreindler
Former Assistant United States Attorney
Central District of California

Andrea Ordin
Former United States Attorney
Central District of California

Kenneth White
Former Assistant United States Attorney
Central District of California

Richard Drooyan
Former Assistant United States Attorney
Central District of California

Richard Marmaro
Former Assistant United States Attorney
Central District of California

Attachment 5: Full Text of Public Comments

John Carlton
Former Assistant United States Attorney
Central District of California

Christopher Tayback
Former Assistant United States Attorney
Central District of California

Eric L. Dobberteen
Former Assistant United States Attorney
Central District of California

Gerald F. Uelmen
Professor of Law Emeritus
Santa Clara University School of Law
Former Assistant United States Attorney
Central District of California

Hector Perez
Former Assistant United States Attorney
Central District of California

Miriam Krinsky
Former Assistant United States Attorney
Central District of California

Stephen G. Larson
Former Assistant United States Attorney
Central District of California
Former United States District Judge

James L. Sanders
Former Assistant United States Attorney
Central District of California

John Hueston
Former Assistant United States Attorney
Central District of California

Thomas J. Umberg
Former Assistant United States Attorney
Central District of California

Charles Pereyra
Former Assistant United States Attorney
Central District of California

Attachment 5: Full Text of Public Comments

Professor Carol Chase
Pepperdine Law School
Former Assistant United States Attorney
Central District of California

Jennifer Keller
Partner, Keller/Anderle LLP

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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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Attorney, self-employed
Commenting on behalf of an organization	No
Name	Christopher Nalls
City	Pasadena
State	California
Email address	chris@christophernalls.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>Alternative B is better than Alternative A -- though still flawed. Alternative B would continue to dilute the rule and create ambiguity by including the qualifications "significant doubt" and "evidence on which the prosecution intends to rely...." These are loopholes big enough to drive a truck through.</p> <p>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>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Janssen Malloy LLP
Commenting on behalf of an organization	No
Name	David S. Nims
City	Eureka
State	California
Email address	dsnims@janssenlaw.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.	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."
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Submitted via:	

Office of the State Public Defender

1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712



June 27, 2017

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

Re: California Supreme Court Administrative Order 2017-04-26
Response to Proposed Amended Rule 5-110(D), Rules of Professional Conduct

Dear Ms. Lee:

We are writing to comment on the alternative versions of proposed Rule 5.110(D) submitted for public comment by the Commission.

First, we commend the Commission for its hard work and the progress that has been made toward finally bringing California in line with all other U.S. jurisdictions that recognize the unique ethical responsibilities of prosecutors.

We wrote previously, on May 23, and May 24, 2017, to express reservations about some of the changes that the California Supreme Court recommended to proposed Rule 5.110(D) and its accompanying discussion paragraph. See Supreme Court of California, Administrative Order 2017-04-26 (May 1, 2017).

Alternative version B, recommended by the Commission following its meeting on May 25, 2017, addresses some but not all of our concerns.¹ Alternative B adds the following sentence to discussion paragraph [3] to proposed Rule 5.110(D):

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.***

(Bold and italics added.)

We agree with the Commission that the reference to “evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of

¹ Alternative version A, which leaves the Supreme Court’s proposed revisions essentially unchanged, does not address these concerns.

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Proposed Amended Rule 5-110(D)

June 27, 2017

Page 2 of 3

witness testimony or other evidence on which the prosecution intends to rely” is properly moved to the discussion section to avoid diluting the central text of Rule 5.110(D). Since this language was intended to be an example of impeachment evidence subject to disclosure and not to define or modify the entire category of exculpatory evidence, we also agree with the Commission’s addition of language to make that intention clear – e.g., “These obligations include, but are not limited to. . .”.

That said, alternative B retains language about which we and others raise concerns.

First, using the adjective “**significant**” to modify “doubt” introduces an unnecessary and counterproductive element of subjectivity to defining the prosecutor’s duty of disclosure. A prosecutor may recognize, for example, that evidence she possesses casts doubt on the accuracy of a witness’ testimony but if she considers the doubt less than “significant,” she will conclude it is ethically permissible to withhold the information from the defense. As we stressed in our earlier comments, when prosecutors go wrong, it is usually in their assessment of the significance of information to the defense.

Further, as our colleagues in the California Public Defenders Association (CPDA) stressed in their previous comments, the “significant doubt” standard is potentially even narrower than the materiality standard of *Brady v. Maryland* (1963) 373 U.S. 83. See CPDA Letter to Hon. Lee Edmon, et al., May 8, 2017, p. 2, citing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124. This makes the example in the second sentence of the comment inconsistent with the first sentence, which correctly states that the prosecutor’s duty of disclosure is *not* limited to evidence or information that is material under *Brady*. See *Turner v. United States*, slip op. at p. 10 (June 22, 2017) (broad discovery policy in which prosecution “discloses any ‘information that a defendant might wish to use’ . . . is as it should be.” (citations omitted).)

At the May 25, 2017 meeting, the California Supreme Court’s liaison to the Commission, Greg Fortescue, acknowledged that objections to the word “significant” were well-taken. While moving the sentence to the discussion section and modifying it is an improvement, “significant” remains problematic. It should be deleted.

Second, by describing the duty of disclosure as information that casts doubt on “witness testimony or other evidence **on which the prosecution intends to rely**,” the added language (in bold), even when relegated to the discussion section, introduces another ambiguity that could undermine the overall purpose of the rule. For example, if the prosecutor discovers information that casts doubt on the account of a witness who was critical to the police investigation, that information should be disclosed to the defense because it tends to negate guilt by exposing flaws in the police investigation and could lead to other admissible evidence favorable to the defense. See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 446 fn. 15 (evidence of slovenly police work diminishes probative force of prosecution evidence and is therefore exculpatory). But if the prosecutor treats the damaging information as belonging in the category of impeachment, she may rationalize withholding it from the defense, so long as she does not call the compromised witness to testify.

Attachment 5: Full Text of Public Comments

Proposed Amended Rule 5-110(D)

June 27, 2017

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Consistent with CPDA's earlier proposal, which we joined, we believe the discussion comment would be better phrased by stating, "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.*"

This would make clear that information that casts doubt on other investigatory evidence or information that has been disclosed to the defense in discovery must likewise be disclosed.

Alternatively, the second sentence should be deleted altogether from the discussion comment to avoid introducing ambiguity that could lead prosecutors to withhold exculpatory evidence based on their subjective beliefs about its significance or because they decide not to "rely on" the testimony or evidence that has been called into doubt.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary K. McComb". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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

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

Professional Affiliation	Attorney
Commenting on behalf of an organization	No
Name	Kara Oien
City	Chula Vista
State	California
Email address	kara.oien@sdcounty.ca.gov
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>Even if a prosecutor may not intend to rely on the favorable evidence, it may still cast reasonable doubt and the longstanding rule is that the prosecutor is to turn over any favorable evidence.</p> <p>As an example, if evidence points to a third part committing the alleged act, the prosecution will obviously not "intend to rely" on such evidence. However, this evidence is potentially exculpatory and should be provided to the defense to be able to investigate and explore the issue. Leaving the qualification of "significant doubt" in there precludes any follow up investigation that the prosecution will not do because it will weaken their case. It makes the prosecution have to guess at what the defense will be and gives the prosecutor the authority to simply say..."I don't think it would have mattered..."</p>
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Jared W. Olen
City	Los Angeles
State	California
Email address	jolen@pubdef.lacounty.gov
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>Alternative A would fail to conform to the disclosure standards set forth in Brady v. Maryland and subsequent cases. While Alternative A includes initially strong, pro-disclosure language, the last clause waters down the disclosure obligation and would create significant doubt about a prosecutor's ethical duties to disclose exculpatory evidence. What does "significant doubt" mean? Why should ethical disclosure obligations be limited to only evidence upon which the prosecution "Intends to rely?" This clause departs from the well-defined Brady standard and provides an almost complete defense to any Brady violation.</p> <p>We are talking about evidence which may reveal someone's innocence, or, at the very least, significant problems in the prosecution's ability to prove its case beyond a reasonable doubt. Prosecutors as ministers of justice must ensure that a criminal defendant receives all exculpatory evidence---not just the evidence that they determine is "significant."</p> <p>Please reject Alternative A.</p> <p>Best regards,</p> <p>Jared W. Olen Deputy Public Defender SBN #291768</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Post Graduate Law Clerk at the Monterey County Public Defender
Commenting on behalf of an organization	No
Name	Rebecca Orloff
City	Mill Valley
State	California
Email address	rkorloff@aol.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 B is far superior to Alternative A.
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Public Defender/CPDA Member
Commenting on behalf of an organization	No
Name	Karen Osborne
City	Los Angeles
State	California
Email address	kosborne@pubdef.lacounty.gov
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>Alternative B is far superior to Alternative A.</p> <p>However, Alternative B can also be improved, specifically, by deleting the italicized words above and rephrasing</p> <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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Attorney
Commenting on behalf of an organization	No
Name	Asit Panwala
City	San Francisco
State	California
Email address	asit@panwalalaw.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 B is superior to Alternative A. However, both versions suggest that the prosecutor must only disclose evidence that casts a "significant" doubt upon the People's evidence. The qualifier "significant" waters down this rule and allows prosecutors an "out" by claiming that the undisclosed evidence did not create a "significant" doubt.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Katarina Pena
City	
State	California
Email address	
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.	While 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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Miguel Peñalosa
City	San Diego
State	California
Email address	mapenalosa@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Public Defender, Santa Clara County, 9 years
Commenting on behalf of an organization	No
Name	Meghan Piano
City	SAN JOSE
State	California
Email address	meghan.piano@pdo.sccgov.org
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.	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."
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Christian E. Picone
City	San Jose
State	California
Email address	christian.picone@berliner.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>Alternative B is far superior to Alternative A. However, Alternative B would continue to dilute the rule and create 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." I believe that a clear rule will prevent failures to disclose and in turn tie up judicial resources. Frankly, more disclosure benefits society because we will have more faith in legal determinations when the taint of lack of disclosure is not at issue.</p>
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Date	
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Lawyer
Commenting on behalf of an organization	No
Name	Sam Polverino
City	San Jose
State	California
Email address	spolverino@sjlawyer.net
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 B is clearly the best alternative. Lawyers are trained to look for the answer that is the most general and least specific to advance their case. The best rule is the one which leaves the least doubt as to its meaning. The objective of any rule should be to guide with the least room for doubt. B is therefore the best alternative.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Employee of a government agency
Commenting on behalf of an organization	No
Name	Alexander Post
City	San Francisco
State	California
Email address	post_alex@hotmail.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 B is better than keeping the language in the rule, under Alternative A. Better still would be to eliminate the unnecessary qualifiers "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." That language is much less ambiguous, and thus easier for a prosecutor to follow.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender Association of San Diego County
Commenting on behalf of an organization	Yes
Name	Troy A. Britt
City	San Diego
State	California
Email address	troy.britt@sdcounty.ca.gov
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>Ironically, as I submit this comment, the State Bar Court is prosecuting a Deputy District Attorney from Orange County for failing to disclose evidence. The current proposal to modify Rule 5-110 (d) would leave no doubt that prosecutors have an ethical obligation to disclose evidence and subject prosecutors to professional discipline for failing to make timely disclosure of exculpatory evidence or information.</p> <p>While we prefer Alternative B, we would, however, eliminate the qualifications found in the Discussion Comment which include "significant doubt" and "evidence on which the prosecution intends to rely" These qualifiers only dilute the rule and create ambiguity. Instead, the Discussion Comment should read: "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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Monterey County Public Defender
Commenting on behalf of an organization	Yes
Name	Susan Chapman
City	Salinas
State	California
Email address	chapmanse@co.monterey.ca.us
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Suzanne Quirk
City	San Diego
State	California
Email address	smq@cox.ent
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	David Reagan
City	Oakland
State	California
Email address	dtreagan@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Alternative B with modifications to increase the scope of the information required to be disclosed beyond the somewhat constrained "significant doubt" and "evidence on which the prosecution intends to rely."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	LA
Commenting on behalf of an organization	No
Name	Rita
City	Los Angeles
State	California
Email address	
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Madelyn Roderigues
City	Oakland
State	California
Email address	madelynjacoby@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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public defender
Commenting on behalf of an organization	No
Name	Lisa Romo
City	Oakland
State	California
Email address	Lisa.Romo@ospd.ca.gov
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal Attorney/ ADJUNCT professor
Commenting on behalf of an organization	No
Name	Kathryn Ross
City	Oakland
State	California
Email address	katie@kathyrnrosslaw.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Employee of a Government Organization
Commenting on behalf of an organization	No
Name	John J. Sage
City	Yuba City (Residence) Woodland (Work)
State	California
Email address	john.sage@comcast.net
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Andrew Salera
City	Riverside
State	California
Email address	aesalera@rivco.org
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	deputy public defender
Commenting on behalf of an organization	No
Name	Michael Saltzman
City	Los Angeles
State	California
Email address	mjs320@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Alternative B is superior to Alternative A, but it would still dilute the rule and create ambiguity because it includes the qualifiers "significant doubt" and "evidence on which the prosecution intends to rely...." Please change the Discussion Comment to say: "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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Melissa Sandoval
City	Lynwood
State	California
Email address	mely.sandoval@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Jesse I. Santana
City	Yuba City
State	California
Email address	jesse@santanalaw.net
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.	I oppose Alternative A. I support Alternative B with the modifications suggested by the CACJ.
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	William B. Sasnett, Jr.
City	Yucca Valley
State	California
Email address	wbsasnett@verizon.net
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.	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 qualifiers "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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	San Diego County Office of the Primary Public Defender
Commenting on behalf of an organization	No
Name	Brian Schmidt
City	San Diego
State	California
Email address	bdschmidt07@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am absolutely opposed to Alternative A because it includes language that waters down the requirement to release exculpatory evidence. The phrases "significant doubt" and "on which the prosecution intends to rely" imply the prosecution is not required to disclose certain information if it does not raise "significant doubt" in their own minds. My concern is that the prosecution could claim they never have to release potential exculpatory information because it never raises "significant" doubt, if it did, they wouldn't be prosecuting the case. Such a result would absolutely prevent defendant's from receiving a fair trial.</p> <p>Alternative B is better than A, but still includes the objectionable language. A better alternative is including the following in the comment section instead: "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>Thank you, Brian Schmidt</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	State Bar Active Member
Commenting on behalf of an organization	No
Name	Ivan Schwartz
City	San Diego
State	California
Email address	ibsesq@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 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...."</p> <p>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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Attorney
Commenting on behalf of an organization	No
Name	Robert G. Scofield
City	Woodland
State	California
Email address	research@omsoft.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>I prefer Alternative B to A. But I would delete the language in B that refers to "evidence on which the prosecution intends to rely." Like the additional language in Alternative A, this invites people to interpret an example as the essence of the rule. In this way, the additional language in both A and B tends to dilute the rule.</p> <p>And this rule, without language such as "evidence on which the prosecution tends to rely" has been recognized by at least the federal courts. Here's how. The federal trial courts figured out that the Brady materiality standard is incoherent at the trial level because at the trial level there was no way to determine whether the disputed evidence would change the outcome of a case. See United States v. Sudikoff (C.D.Cal. 1999) 36 F.Supp.2d 1196 and the discussion in United States v. Olson (9th Cir. 2013) 704 F.3d 1172 at p. 1183, fn. 3.</p> <p>Thus Alternative B, without the language "evidence on which the prosecution intends to rely," reflects the law as found in some federal cases. And this law is the only coherent statement of Brady principles at the trial level. I fear that both Alternative B, and especially Alternative A, can be interpreted in a way that dilutes a prosecutor's ethical duties.</p> <p>I am sure that some California state judges have also figured out that the Brady materiality standard is incoherent at the trial level. But we just don't see those judges opinions like we see the opinions of the federal judges in the Federal Supplement.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Public Defender
Commenting on behalf of an organization	No
Name	Jessica S Self
City	Modesto
State	California
Email address	selfj@stancounty.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...."</p> <p>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>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal Defense Attorney
Commenting on behalf of an organization	No
Name	Charles M. Sevilla
City	San Diego
State	California
Email address	chuck@charlessevilla.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>I have written the State Bar on this issue last year (attached) and presented to the Bar Trustees in September of 2016</p> <p>. While I support B or A, I agree with others who have stated, that "Alternative B can also be improved, by rephrasing the Discussion Comment so it reads: "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>
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Submitted via:	

LAW OFFICE OF CHARLES SEVILLA
ATTORNEY AT LAW
1010 SECOND AVENUE, SUITE 1825

CHARLES M. SEVILLA
WWW.CHARLESSEVILLA.COM

SAN DIEGO, CALIFORNIA 92101-4902

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(619) 232-2222

EMAIL
CHUCK@CHARLESSEVILLA.COM

FAX 232-3711

February 5, 2016

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

RE: Amendment to Rules of Professional Conduct 5-110

Dear Ms. Hollins,

I write in support of the proposed amendment to the Rules of Professional Conduct, specifically 5-110(D), which would essentially incorporate into our rules ABA rule 3.8. That proposed provision states in pertinent part that the prosecutor must:

(D) 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.

Prosecutors have argued that this is unnecessary as they have an ethical duty to follow the law pointing to Penal Code section 1054 and Brady v. Maryland (1963) 373 U.S. 83, 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.") Too often, prosecutors have adopted an appeals court view of what Brady consists. They have argued that the exculpatory evidence must be "material" to be turned over pre-trial. Materiality means the type of evidence that would change the outcome. That view is wrong,¹ but it has been exercised to deny exculpatory (including impeaching) evidence. (See United States v.

¹ "Favorable" does not mean evidence of innocence. It is a lower standard requiring only a showing of benefit to the defense. (Gantt v. Roe (9th Cir. 2004) 389 F.3d 908, 912.) Evidence may be favorable under Brady even if it "may seem inculpatory on its face," so long as the defendant can use it to make a

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Olsen (9th Cir. 2013) 704 F.3d 1172, 1183 fn. 3.) As Judge Kozinski noted recently, “There is reason to doubt that prosecutors comply with these obligations fully. The U.S. Justice Department, for example, takes the position that exculpatory evidence must be produced only if it is material.” “Criminal Law 2.0,” 44 Geo. L.J. Ann. Rev. Crim. Proc, p. vii (2015).

As I understand it, the ABA rule has been adopted in some form in all the other states. I cannot understand the prosecution resistance to this change. It is not as if a new era of great learning has swept prosecutorial offices in the last twenty years to make unnecessary this change. No doubt, training in prosecutorial offices has improved, but while one can teach law and ethics, it doesn’t mean students will learn it.

Thus, the ethical discovery problem is probably more acute with young prosecutors eager to make their way by winning cases. As a former Louisiana prosecutor (Marty Stroud III) stated when explaining how he had convicted and had sentenced to death an innocent man (Glenn Ford): “I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning.”

This rule change gives the State Bar a tool to cut through rationalizations about interpretations of appeal decisions on the scope of discovery obligations. As the Commentary to the proposed rule states: “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.”

While it has always been a rule of ethics to obey the law, that has proven inadequate to assure prosecutors turn over exculpating (including impeaching) evidence. This rule change should help “raise the bar” to an acceptable legal, moral and ethical level. As we have seen, discovery violations lead to wrongful convictions.

For the above reasons, I support adoption of the rule change.

Yours truly,

Charles Sevilla

point helpful to his defense. (U.S. v. Howell (9th Cir. 2000) 231 F.3d 615, 625 [“That the information withheld may seem inculpatory on its face in no way eliminates or diminishes the government's duty to disclose evidence of a flawed police investigation]; *see also* People v. Coddington (2000) 23 Cal.4th 529, 589-590 [at trial, “[e]vidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution”].)

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Attorney

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	MICHAEL T. SHANNON
City	San Marino
State	California
Email address	michaelttshannon@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	B is preferable. However, B should change the qualifying phrase "significant doubt" to "reasonable doubt," or simply "doubt," without qualification. B should also leave out the phrase "evidence on which the prosecution intends to rely." That phrase greatly weakens the discovery obligation.
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	CACJ, CPDA
Commenting on behalf of an organization	No
Name	George Shea
City	Fairfax
State	California
Email address	geoirishbox@yahoo.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.	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."
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Submitted via:	

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

Professional Affiliation	Private criminal defense lawyer
Commenting on behalf of an organization	No
Name	Laura Sheppard
City	San Diego
State	California
Email address	lrsheppardlaw@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Alternative B is far preferable to Alternative A, due to the additional language in discussion comment section 3. However, Alternative B would continue to have the unfortunate effect of diluting the rule and creating ambiguity because it includes the qualifications "significant doubt" and "evidence on which the prosecution intends to rely...."</p> <p>The Discussion Comment 3 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>Thank you!</p>
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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

--

Joanna P. Sheridan, Esq.
Law Offices of Douglas L. Rappaport
260 California Street, Suite 1002
San Francisco, CA 94111
Tel: (415) 989-7900
Fax: (415) 989-7950
Email: jps@sfcrimlaw.com

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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Criminal defense attorney in private practice
Commenting on behalf of an organization	No
Name	David Silldorf
City	San Diego
State	California
Email address	dsilldorf@silldorflaw.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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Damon Silver
City	
State	California
Email address	dsilver@pdo.sccgov.org
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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Govt
Commenting on behalf of an organization	No
Name	Aminder Singh
City	Castro Valley
State	California
Email address	aminder.singh@acgov.org
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Deputy Public Defender
Commenting on behalf of an organization	No
Name	Matthew Slentz
City	Modesto
State	California
Email address	slentzm@stancounty.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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Orange county assistant public defender
Commenting on behalf of an organization	Yes
Name	Arlene speiser
City	santa ana
State	California
Email address	arlene.speiser@pubdef.ocgov.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>Thank you for your consideration.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Dmitry Stadlin
City	San Jose
State	California
Email address	ds@stadlinlaw.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.	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."
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Employee of a government agency
Commenting on behalf of an organization	No
Name	Angela Stangle
City	
State	
Email address	
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".	Neither Alternative A or Alternative B
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

June 21, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 5-110 [3.8] – Special Responsibilities of a Prosecutor

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 5-110 [3.8] – Special Responsibilities of a Prosecutor – Alternative A and Alternative B, and has the following comments.

The Committee supports adoption of Alternative B. The Committee agrees that the language suggested by the Supreme Court for addition at the end of paragraph (D) (as revised by the Commission) should be moved to the Discussion section of the rule. It is the Committee's understanding, based on the materials it reviewed, that the suggested language is intended simply as an example of impeachment information that would trigger a disclosure obligation. As such, it is appropriately included in the Discussion rather than the text of the rule itself. Placement of the suggested language in the Discussion will also help to avoid any confusion or suggestion that the language somehow qualifies the "tends to negate" standard articulated in the substantive text of paragraph (D). We understand that the example is not intended to qualify that standard.

We further note the Supreme Court's suggested inclusion, in Discussion subparagraph [3], of the statement "Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts," which statement is incorporated into Alternative B proposed by the RRC. We do not read this statement, or the materials prepared by the RRC, to suggest that this statement is a qualification of the "tends to negate" standard set forth in the text of paragraph (D) of the rule. Nor do we understand the statement to be a substantive move back to "Alternative 2" of the proposed rule that was issued for public comment by the RRC in May 2016. Based on that understanding, we do not object to inclusion of this statement in the Discussion.

Thank you for your consideration of our comments.

Very truly yours,

Attachment 5: Full Text of Public Comments

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Legal Investigator (Criminal defense)
Commenting on behalf of an organization	No
Name	Edward Stein
City	San Mateo
State	California
Email address	edstein22@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I would OPPOSE Alternative A
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Los Angeles Public Defender
Commenting on behalf of an organization	No
Name	Nick Stewart-Oaten
City	Los Angeles
State	California
Email address	nstewart-oaten@pubdef.lacounty.gov
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 B is better than Alternative A, but is still a problem, because it includes caveats regarding "significant doubt" and evidence "on which the prosecution intends to rely. It would be far better to clarify that the obligation includes turning over evidence that the prosecution "knows or should know" casts doubt on the admissibility or accuracy of evidence against the defendant.
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	past president, California Attorneys for Criminal Justice
Commenting on behalf of an organization	No
Name	Scott A. Sugarman
City	San Francisco
State	California
Email address	scott@sugarmanandcannon.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>I strongly prefer Alternative B to Alternative A. However, even that alternative creates doubt and ambiguity by the use of the terms "significant doubt" and "evidence on which the prosecution intends to rely." The object here should be simple and clear -- encourage prosecutors to disclose any evidence or information that may aid the defendant. Any close call should be ruled in favor of disclosure, not secrecy. The Discussion Comment should also be amended to provide the the prosecutor's obligation includes, but is not limited to disclosure of information or evidence the prosecutor knows or reasonably should know casts doubt on the accuracy or admissibility of any testimony or evidence relevant to the question of the defendant's guilt or punishment.</p> <p>Scott A. Sugarman Sugarman & Cannon</p>
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	A member of the California State Bar
Commenting on behalf of an organization	No
Name	Annie Taylor
City	Fresno
State	California
Email address	anniektaylor@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Sara Theiss
City	Oakland
State	California
Email address	saratheiss@aol.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>I oppose Alternative A and support Alternative B.</p> <p>Alternative A significantly weakens the rule previously proposed by this Committee and adopted by the trustees, which I had supported. Language added by the Court is problematic, i.e., "significant doubt" and "evidence on which the prosecution intends to rely...." The rule should be clear cut regarding a prosecutor's duty to make timely disclosure to the defense of exculpatory evidence and information. This language should be deleted from the rule and at most, added to the Comment as just one example of when a prosecutor is obligated to disclose evidence to the defense. It should in no way limit the rule or provide grounds for a subjective interpretation of the rule under which a prosecutor would feel justified, for example, in only disclosing evidence at the last minute on the grounds that she had just recently "intended to rely" on some evidence or other.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Private Attorney
Commenting on behalf of an organization	No
Name	N. Fred Thiagarajah
City	Newport Beach
State	California
Email address	nfredthia@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 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 still waters down the rule and allows loopholes because of the qualifications of "significant doubt" and "evidence on which the prosecution intends to rely". The sentence should be changed to:</p> <p>"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>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Law Office of Kathryn A. Thickstun
Commenting on behalf of an organization	No
Name	Kathryn A. Thickstun
City	San Diego
State	California
Email address	kathickstun@cox.net
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.	Although Alternative B is superior to Alternative A, it would dilute the rule and create 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."
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Submitted via:	

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

Professional Affiliation	Deputy Public Defender
Commenting on behalf of an organization	No
Name	Kelton Tobler
City	San Bernardino
State	California
Email address	ktobler@pd.sbcounty.gov
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>The terms "significant" and "on which the prosecution intends to rely" in Alternative A create holes in proposed Rule 5-110(d) big enough for the steamroller of dubious and overzealous prosecution to proceed unhindered. As a deputy public defender, I interact daily with well-meaning prosecutors who have very different ideas than I do about what constitutes significant doubt. Even in Alternative B, "significant doubt" in the comment should be amended to remove the qualifier "significant" or read "doubt, which any reasonable attorney, bench officer, or juror could view as significant."</p> <p>Even worse, Alternative A allows the prosecutor to avoid disclosure of information casting the gravest doubt, so long as the prosecutor chooses not to rely upon the doubtful evidence. The prosecutor may find out Eyewitness A lied to police and wasn't even present at the commission of the crime, but as long as the prosecutor omits Eyewitness A from his witness list, he need not explain why. That the prosecutor should be given the ability to justify this evasion under Alternative A is preposterous. At the very least, this information would prompt defense investigation of whether Eyewitness A's dishonesty is completely independent of all witnesses and evidence on which the prosecutor still intends to rely. Otherwise the prosecutor is left to make this determination, from her inherently and unavoidably biased perspective (no matter how fair-minded she believes herself to be), with defense counsel unaware the question even exists. The phrase "on which the prosecution intends to rely" should be omitted even from the Alternative B comment, lest prosecutors argue this phrase in the comment "informs" the proper understanding of the rule.</p>
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	ADO Santa Clara County
Commenting on behalf of an organization	No
Name	MICHELLE TODUS
City	SAN JOSE
State	California
Email address	michelle.todus@ado.sccgov.org
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.	
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Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Stanford Law School Clinical Faculty
Commenting on behalf of an organization	No
Name	Ronald Christopher Tyler
City	Stanford
State	California
Email address	rtyler@law.stanford.edu
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.	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."
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Submitted via:	

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	U.S. Department of Justice
Commenting on behalf of an organization	Yes
Name	Stacy M. Ludwig
City	Washington
State	Washington DC
Email address	Stacy.Ludwig2@usdoj.gov
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.	Letter Opposing the Adoption of Alternative A and Proposing Modification to Alternative B to Directly and Explicitly Link a Prosecutor's Ethical Obligations to Disclose Exculpatory and Impeachment Information to the Substantive Law, Consistent with the Supreme Court of California's Revisions
Attachment	Letter_to_the_Commission_for_the_Revision_of_the_Rules_of_Professional_Conduct_2017-06-27.pdf (179k)
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Submitted via:	



U.S. Department of Justice

June 27, 2017

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
c/o Mimi Lee
Office of Professional Competence, Planning, and Development
180 Howard Street
San Francisco, CA 94105

Re: Revisions to Proposed California Rule of Professional Conduct 5-110(D)

Dear Commission Members:

On behalf of the U.S. Department of Justice (“the Department”), including the over 400 Department attorneys who practice in California, we write to oppose the adoption of Alternative A to proposed California Rule 5-110(D) and propose modifying Alternative B to directly and explicitly link a prosecutor’s ethical obligation to disclose exculpatory and impeachment information to the substantive law, consistent with the Supreme Court of California’s revisions. We also write to urge the Commission to retain language in the proposed Rule’s Discussion explaining that the Rule does not require the cumulative disclosure of information, including where a prosecutor previously has disclosed the information in a different form. We offer proposed language in our modifications to Alternative B. We are grateful for the opportunity to comment and want to thank the Commission for their important work on the revisions to proposed California Rule 5-110(D).

As the revisions proposed by the Supreme Court of California make clear, the Court intends for California Rule 5-110(D) to be consistent with—not broader than—constitutional and statutory provisions governing discovery. For the reasons set forth more fully in our February 24, 2016 letter to the Commission, we strongly believe that the ethical obligations in proposed California Rule 5-110(D) should be linked directly and explicitly to a prosecutor’s substantive legal obligations to disclose exculpatory and impeachment information. By linking the obligations, the proposed Rule automatically would incorporate any developments in state and federal discovery law—including the extent to which impeachment evidence must be disclosed¹—and would account for the significantly different obligations imposed on prosecutors by both California and federal courts and legislatures. To the extent that the California courts and legislature already require prosecutors to disclose exculpatory and impeachment information

¹ See, e.g., Kennedy v. Super. Ct., 145 Cal. App. 4th 359, 377 (Cal. Ct. App. 2006) (“[T]here is reason to think the electorate intended to use the term ‘exculpatory evidence’ in its narrow sense and thus did *not* intend section 1051.1(e) to require the disclosure of impeachment evidence.”).

without regard to materiality²—a requirement that the Federal Rules Committee repeatedly has rejected—that obligation would be incorporated into the proposed Rule by reference.

Because both Alternative A and Alternative B impose ethical disclosure obligations on federal prosecutors that are inconsistent with their obligations under the substantive law, we oppose both alternatives. We also oppose Alternative A because we agree with the Commission that the second sentence of paragraph (D) is better placed in Discussion paragraph [3].³ In addition, we strongly believe that, instead of omitting any reference to the cumulative disclosure of information in the Discussion, the proposed Rule should define the phrase.

We agree with the Office of Chief Trial Counsel that, where a prosecutor knows that information already is in the possession of or previously has been disclosed to the defense, the prosecutor should not be required to disclose the information to the defense (again).⁴ A prosecutor also should not be required to disclose information where the prosecutor previously has disclosed the information in a different form. For example, where a prosecutor discloses to the defense a summary of exculpatory or impeachment information contained in the prosecutor's notes of a conversation with a witness—which legally are protected from disclosure as attorney work-product—the prosecutor should not also be required to disclose the notes themselves or, alternatively, have to obtain a protective order to withhold the notes. As long as the substance of the information is disclosed to the defense, the prosecutor should satisfy the obligation under proposed Rule 5-110(D). We assume that, by removing the language addressing cumulative disclosures, the Commission did not intend to suggest that Rule 5-110(D) would permit discipline under these circumstances, and instead premised its decision on some other basis—perhaps a belief cumulative disclosures need not be addressed because it is obvious that they are not required. We believe, however, that it is important to make this point explicit in the Discussion, and propose language that does so below.

If the Commission is inclined to adopt Alternative B, we ask that it be modified, based on the Supreme Court of California's proposed revisions and the Commission's earlier alternate version of the proposed Rule, as follows:

The prosecutor in a criminal case shall:

* * *

(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

² See People v. Cordova, 62 Cal. 4th 104, 124 (2015) (concluding that Cal. Penal Code § 1054.1(e) requires disclosure of “all exculpatory evidence, not just evidence that is material under Brady and its progeny”) (citing Barnett v. Super. Ct., 50 Cal. 4th 890, 901 (2010)).

³ See Mem. from Randall Difuntorum, Dir., Prof'l Competence, to Members, Bd. of Trustees Reg. & Discipl. Comm. at 2 (May 25, 2017), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017566.pdf>.

⁴ Letter from Gregory Dresser, Interim Chief Trial Counsel, Office of Chief Trial Counsel, to Justice Lee Edmon and Randall Difuntorum, Office of Prof'l Competence, Planning and Dev. at 1-2 (May 25, 2017), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017578.pdf>.

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;

* * *

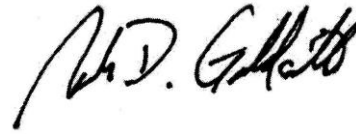
[3] Nothing in this rule is intended to be applied in a manner inconsistent with constitutional and statutory provisions governing discovery in California and federal courts. Under California law, the disclosure obligations in paragraph (D) are not limited to evidence or information that is material 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.

[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.

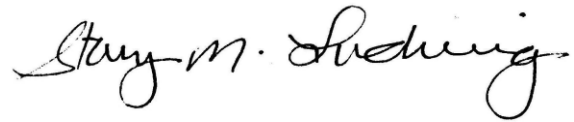
This proposal creates a clear and enforceable disciplinary standard that eliminates ambiguities and uncertainties for prosecutors by directly linking their ethical obligations to the substantive law. Moreover, such a Rule is wholly consistent with the Supreme Court of California's revisions to the proposed Rule, which make clear that "[n]othing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts."⁵ If the Commission decides not to adopt our proposal, we think that Alternative B better incorporates the Supreme Court of California's revisions to the proposed Rule.

⁵ See 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, Admin. Order 2017-04-26, S239387, Attach. 2 (Cal. May 1, 2017) (*en banc*), http://www.calbar.ca.gov/Portals/0/documents/ethics/2d_RRC/AdministrativeOrder2017-04-26.pdf.

Sincerely,

A handwritten signature in black ink, appearing to read "A.D. Goldsmith". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Andrew D. Goldsmith
Associate Deputy Attorney General
National Criminal Discovery Coordinator
Office of the Deputy Attorney General

A handwritten signature in black ink, appearing to read "Stacy M. Ludwig". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stacy M. Ludwig
Director
Professional Responsibility Advisory Office

Attachment 5: Full Text of Public Comments

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

Professional Affiliation	Santa Clara County Public Defender
Commenting on behalf of an organization	No
Name	Gilda Valeros
City	San Jose
State	California
Email address	gilda.valeros@pdo.sccgov.org
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.	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."
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Date	
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Submitted via:	

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

Professional Affiliation	Monterey County Public Defender's Office
Commenting on behalf of an organization	No
Name	Christopher Van Meir
City	Salinas
State	California
Email address	vanmeircm@co.monterey.ca.us
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Public Defender
Commenting on behalf of an organization	No
Name	Stacy Vinyard
City	San Jose
State	California
Email address	svinyard.kdo@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 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>I work in a county in which it is a struggle to obtain any Brady material from the DAs.</p>
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Submitted via:	

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

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Kendall Wasley
City	Davis
State	California
Email address	kendall@dawsonwasleylaw.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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Member of the state bar
Commenting on behalf of an organization	No
Name	Marsanne Weese
City	San Francisco
State	California
Email address	marsanne.weese@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 B - Commission's Proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Attorney
Commenting on behalf of an organization	No
Name	William Weigel
City	San Jose
State	California
Email address	william.weigel@pdo.sccgov.org
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.	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."
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	
Commenting on behalf of an organization	No
Name	Jim Weintre
City	
State	
Email address	
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 continues the effect of 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." Furthermore, the "evidence on which the prosecution intends to rely...." defeats the purpose of Brady evidence depriving defendants of the their rights under the US Constitution 5th, 6th, 8th, and 14th because the prosecution can manipulate the purpose of discovery and a trial, i.e. the search for truth, and choose not to put on certain evidence connected to Brady evidence thereby hiding the Brady discovery.</p>
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RRC3 Proposed Rules Public Comment Form 5-110(D)

Professional Affiliation	Criminal defense solo in practice since 1981
Commenting on behalf of an organization	No
Name	Paul Wellenkamp
City	Hayward
State	California
Email address	wellenkamplaw@sbcglobal.net
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>Having practiced criminal defense for many years, I know that, on occasion, prosecutors withhold information. This Rule is necessary and it will benefit the practice for all involved. I am concerned, however, that qualifying the disclosures by the term "significant" will render the rule ineffective. Prosecutors rarely decide to withhold information they know to be exonerating. Instead, prosecutors withhold information which they assess as unimportant. Prosecutors often are not in a position to make that call, because they lack other information and because of the natural bias litigators have. For these reasons, I support CACJ's proposal to change the Discussion Comment 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 doubt on the accuracy or admissibility of witness testimony or other evidence disclosed by the prosecution."</p>
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