

# STATE BAR OF CALIFORNIA

## COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

### OPEN SESSION ACTION SUMMARY

Wednesday, July 5, 2017  
(10:30 am – 4:30 pm)

State Bar of California  
845 So. Figueroa Street  
Room 2F-G, 2nd Floor  
Los Angeles, CA 90017

**Members Present:** Lee Edmon (Chair), George Cardona, Danny Chou (SF), Daniel Eaton, Tobi Inlender (Public Member), Kevin Mohr, Toby Rothschild, Mark Tuft.

**State Bar Staff Present:** Allen Blumenthal (Office of Chief Trial Counsel) (by teleconference), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Andrew Tuft (Office of Professional Competence), Mimi Lee (Office of Professional Competence), Lauren McCurdy (Office of Professional Competence, by teleconference), and Carissa Andresen (Office of General Counsel, by teleconference) (SF).

**Others Present:** James Blume, Jose Castaneda, William Fabricius (by teleconference), Greg Fortescue (Supreme Court staff), Sharon Kramer (teleconference), Professor Laurie Levenson (Innocence Project) (by teleconference), Michael Ogul (CPDA) (by teleconference), Heather Rosing (Advisor), Harry Sondheim (by teleconference), Christ Spaulding (State Public Defender) (by teleconference), and Eugene Zurich (by teleconference).

#### I. CHAIR'S REMARKS

##### A. Oral Report

The Chair asked Mr. Difuntorum to report on the Commission's future meeting schedule. A meeting for August 29, 2017 has been tentatively scheduled if the Court sends a letter of inquiry on any rules that have been submitted to date. Otherwise, the next meeting is scheduled for October 24, 2017 in Los Angeles. The Chair reported that she will present the proposed rules that the Commission recommends today to the Board at its July 13, 2017 with the assistance of Mr. Cardona and Professor Mohr.

#### II. CONSENT AGENDA

##### A. Regular Meeting on January 20-21, 2017 (Open Session)

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's May 25, 2017 meeting.

All members present voted yes.

### III. ACTION

#### A. Reconsideration of Proposed Rule 5-110(D) – Post-Public Comment

The Chair recognized Prof. Levenson, Mr. Ogul, and Ms. Spaulding for public comment. The Chair called for discussion of the rule 5-110(D) public comments. Mr. Difuntorum asked Mr. A. Tuft to report on the public comments received. Following discussion, the Commission adopted proposed rule 5-110, Alternative B, with the sentence referring to “significant doubt” and “intends to rely” moved to the Discussion paragraph, as set forth below.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. ~~These~~For example, these obligations include, ~~but are not limited to~~at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows\* or reasonably should know\* casts [significant] doubt on the accuracy or admissibility of witness testimony ~~or other evidence~~ on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts Alternative B of proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California.

All members present voted yes.

The Chair recognized Mr. Tuft who expressed concerns with the second sentence of Discussion paragraph [3]. Following discussion, the Commission considered deleting the second sentence of Discussion paragraph [3], with the proviso that if the motion failed, it can be revisited if the Commission cannot agree on the language for that sentence. Upon motion made and seconded, a vote was taken to delete the second sentence, but the motion failed (2 yes, 5 no, 0 abstain).

After further discussion, the Commission adopted the second sentence of Discussion paragraph [3], which included “cast significant doubt,” as set forth below.

~~These~~For example, these obligations include, ~~but are not limited to~~at a minimum, the duty to disclose impeachment 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.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts the second sentence of Discussion paragraph [3] of proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes, except Mr. Eaton, Ms. Inlender, and Mr. Tuft who voted no.

The Commission adopted the third sentence of Discussion paragraph [3] without “However” at the beginning of the sentence, as set forth below.

Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts the third sentence of Discussion paragraph [3] of proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

The Commission adopted the blackletter and Discussion paragraphs of proposed rule 5-110 (including the revised paragraph (D) and Comments [3] and [4]) and authorized the resubmission of proposed Rule 3.8 to reflect the changes made to rule 5-110.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

The Chair recognized Mr. Cardona who presented the public commenter table and the responses to the public comments on rule 5-110. The Commission adopted the table and responses.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts the public commenter table and responses to comments for proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California.

All members present voted yes.

**B. Reconsideration of Proposed Rule 5-110(E)**

The Chair recognized Mr. Rothschild who reported on a recent amicus brief petition. After discussion, the Commission adopted 3 alternative versions of a proposed rule for submission to the Board for public comment authorization.

Upon motion made, seconded and adopted, it was

**RESOLVED**, that the Commission hereby adopts 3 alternate versions of proposed amended rule 5-110(E) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary to be circulated for public comment.

All members present voted yes.

In submitting all 3 versions to the Board Committee on Regulation and Discipline for public comment circulation, the Commission agreed that the three versions should be designated as "Alternative 1," "Alternative 2," and "Alternative 3" with the first alternative being a revision to proposed rule 3.4 stating a subpoena restriction imposed on all lawyers, second alternative being a revision to proposed rule 3.8 that would apply only to prosecutors, and the third being a revision to proposed rule 3.8 that would also apply only to prosecutors but would have a narrower scope than Alternative 2. There was no objection to using this approach for designating the alternate versions.

***CLOSED SESSION***

*None\**

\*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

\*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.