AGENDA ITEM

703 MAY 2016

DATE: **April 22, 2016**

TO: **Members, Regulation and Discipline Committee**
Members, Board of Trustees

FROM: **Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct**
Randall Difuntorum, Director, Professional Competence

SUBJECT: **Proposed Amended Rules 5-110 and 5-220 of the Rules of Professional Conduct – Return from Public Comment and Request for Additional Public Comment**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has been assigned to conduct a comprehensive study of the Rules of Professional Conduct and to recommend amendments where warranted. This agenda item requests that the Board of Trustees ("Board") authorize an additional 45-day public comment period on proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct. In accordance with action taken by the Board at its November 2015 meeting, the processing of these proposed rules is being expedited on a separate track from the Commission's anticipated comprehensive proposed amendments to the Rules of Professional Conduct. Following a 90-day public comment period that ended on February 9, 2016, the Commission modified its proposal. These modifications require the requested additional 45-day public comment period in order to continue the Board's consideration of possible adoption of these rules on an expedited basis.

Members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND

The Rules of Professional Conduct of the State Bar of California are attorney conduct rules, the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval.[1]

[1] Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state." Business and Professions Code section 6077, in part,

At the Board's November 2015 meeting, the Board authorized a 90-day public comment period on proposed amendments to Rules 5-110 and 5-220 of the Rules of Professional Conduct. The proposed amendments address the special duties of a prosecutor, including the duty to disclose exculpatory evidence. (See Board open agenda item 122 NOV 2015 and the Board minutes for that meeting.) The Board also agreed with the Commission's recommendation that the processing of these proposed amendments should be prioritized and handled on a separate track from the Commission's comprehensive proposed amendments to the Rules of Professional Conduct that are anticipated to be submitted to the Board in June of 2016. The Commission explained that it applied the following standard in deciding to recommend expedited consideration of a rule:

> "Expedited consideration of a rule should be considered by the Commission (i) only if the early adoption of a rule is necessary to respond to ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice, and (ii) only where failure to promulgate the rule would result in the continuation of serious harm."

The Commission's presentation to the Board in November identified proposed paragraph (D) of Rule 5-110 as a key provision that would amend the existing duty of a prosecutor under Rule 5-220, which requires a member, including a prosecutor, to refrain from suppressing "any evidence that the member or the member's client has a legal obligation to reveal or to produce." Rather than incorporating by reference a prosecutor's "legal obligation," the proposed amended rule would state that a prosecutor must: "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." In connection with this key provision, the Commission also reported that alternate language had been considered but did not receive the support of a majority of the Commission members. Set forth below is a redline/strikeout version of this alternate draft showing changes to the version the Commission recommended.

> (D) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to ~~Make~~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;

The essential difference between this alternate version and the Commission's recommended provision is that in the former the standard of "information. . . that tends to negate the guilt of the accused or mitigates the offense" is expressly qualified as a requirement that complies with existing law.[2] Following discussion, the Board determined that both versions of paragraph (D)

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provides: "The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar."

[2] The Commission's consideration of this alternate version of paragraph (D) included a related alternate version of Comment [3] stating that: "The disclosure obligations in paragraph (d) apply only with respect to controlling case law at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively."

should be included in the public comment proposal. As a result, the public comments received include comments that address the alternate version of paragraph (D). For ease of reference, the version supported by the Commission will be referred to as Alt. 1 and the other version included in the public comment will be referred to as Alt. 2.

Following consideration of public comments at the Commission's meeting on March 31 & April 1, 2016, the Commission modified proposed Rule 5-110 and determined that no modifications were needed for proposed Rule 5-220. The Commission's modified proposal is provided as Attachment 1. This agenda item presents the Commission's request that the Board authorize an additional 45-day public comment period in order to continue the Board's consideration of possible adoption of these rules on an expedited basis.

DISCUSSION

I. Public Comment

The 90-day public comment period ended February 9, 2016. A public hearing was held at the State Bar office in Los Angeles on February 3, 2016. A combined total of three hundred and twenty-one (321) public comments and testimony was received. Of these comments and testimony, three hundred and four (304) support Alt. 1 as drafted or the concept of Alt. 1, five (5) support Alt. 2 as drafted or the concept of Alt. 2, and twelve (12) did not expressly indicate a preference between Alt. 1 and Alt. 2. Public comment was received from prosecutors, defense attorneys, bar associations, ethics committees and other organizations. A summary of the public comment is provided as Attachment 2. The transcript of the February 3, 2016 public hearing is provided as Attachment 3.

Among the commenters supporting Alt. 1 are the following: the American Bar Association; the California Appellate Project – Los Angeles Office; the State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC"); the Innocence Project; Loyola Law School Project for the Innocent; and the State Bar's Office of the Chief Trial Counsel ("OCTC").

The commenters supporting Alt. 2 are the following: the California District Attorneys Association; attorney David Majchrzak; and the United States Department of Justice.

Points raised by those who support Alt. 1 include the following.

1. There is value in maintaining uniformity with other jurisdictions and the proposed rule would help avoid the risk of due process violations and ensure a full appellate record required to defend constitutional rights.

2. The proposed rule would appropriately apply to federal prosecutors consistent with local rules of federal courts that apply state ethics rules, and in compliance with federal statute - the McDade Act, 28 USC §530B (re duty of United States attorneys to comply with state ethics rules). As used in other jurisdictions, the proposed rule has not unleashed a flurry of disciplinary actions against prosecutors.

3. Federal prosecutors have been subject for decades to the Model Rule 3.8(d) standard and have not had any serious difficulty conforming their conduct to the rule's requirements. This standard is based on ABA Standards for Criminal Justice 3-3.11 that has been in existence since 1964.

4. Police and prosecutors often have a narrow interpretation of what is material and the rule is needed to require prosecutors to err on the side of disclosure to prevent wrongful convictions.

5. A prosecutor is supposed to administer justice, not just act as an advocate, and Brady violations are a problem of epic proportion. If evidence is exculpatory it should be provided to the defense so that the defense, not the prosecution, can make an evaluation as to the usefulness for the defense at trial.

Points raised by those who support Alt. 2 include the following.

1. Read properly, Alt. 2 does not limit pretrial discovery obligations with a Brady materiality standard. Instead, it expressly ties the prosecutor's responsibilities to statutory obligations as interpreted by case law which clearly does not have a Brady materiality limit.

2. Business and Professions Code § 6086.7 has been amended to require a referral to the State Bar if a court finds that a prosecutor deliberately withheld exculpatory evidence without any requirement that the evidence was material under Brady.

3. Alt. 2 is preferable to Alt. 1 because Alt. 1 imposes an overly broad duty to disclose evidence and there is an inherent problem with a rule that creates a standard that is broader than what is required by the substantive law.

4. The "tends to negate. . ." language leaves prosecutors with no reasonable means to know where the line is drawn. For example, it is not clear whether all impeachment evidence is exculpatory within the meaning of Penal Code § 1054.1(e).

5. For disciplinary purposes, the proposed rule should require actual knowledge on the part of an individual prosecutor.

II. Summary of Proposed Rule 5-110 as Modified after Consideration of Public Comments[3]

The Commission's modifications to the public comment version of proposed Rule 5-110 are set forth below.

Rule 5-110 [3.8] Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(A) ~~Refrain from prosecuting~~Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

[3] The Commission has not made any modifications to proposed amended Rule 5-220. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor." Although not modified, proposed Rule 5-220 should be included in the requested additional public comment period because proposed Rule 5-110 has been modified and the addition to Rule 5-220 is a cross reference to Rule 5-110.

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) The information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible alternative to obtain the information;

(F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the

defendant was convicted of an offense that the defendant did not commit.

(H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that ~~guilty~~guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment and 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. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 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.

[~~3A~~]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.

[~~4~~5] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[~~5~~6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant

individuals.

[~~6~~7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[~~7~~8] Under paragraph (H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[~~8~~9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

As indicated in the above rule text, on the main issue of Alt. 1 or Alt. 2, the Commission recommends Alt. 1. There were two members of the Commission who dissented because they support Alt. 2 and their respective dissenting statements are provided as Attachment 4. The Commission's response to these dissents is provided as Attachment 5.

1. Paragraph (A).

This provision carries forward the substance of current Rule 5-110. A member subject to proposed Rule 5-110 is described as a "prosecutor in a criminal case." This is arguably narrower than the current rule that applies to a "member in government service" who can "institute or cause to be instituted criminal charges." However, because only a member in government who also has prosecutorial powers can institute criminal charges, the scope of coverage should not change.

The knowledge standard in the current rule of "knows or should know" is replaced with "knows." The change conforms to the language used in the substantial majority of jurisdictions that have adopted a version of ABA Model Rule 3.8. "Know" is defined in ABA Model Rule 1.0(f) as "actual knowledge of the fact in question." Under the Model Rules, "a person's knowledge may be inferred from circumstances." By providing that knowledge can be inferred from the

circumstances, the intent is to prevent a lawyer from engaging in deliberate ignorance of important facts when those facts would have been obvious given the surrounding circumstances.

Modifications following public comment: In paragraph (A), the Commission has substituted the language "Not institute or continue to prosecute" for the phrase "Refrain from prosecuting" to provide greater specificity on the duty of a prosecutor to stop prosecuting a matter where the charges were initially supported by probable cause, but a subsequent change in circumstances results in the charges no longer being supported by probable cause.

2. Paragraph (B)

This would be a new provision in the rules. Derived from Model Rule 3.8(b), it would require a prosecutor to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and has been given reasonable opportunity to obtain counsel.

Modifications following public comment: None.

3. Paragraph (C)

This would be a new provision in the rules. Derived from Model Rule 3.8(c), it would provide that a prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights, unless the tribunal has approved the appearance of the accused *in propria persona*.

Modifications following public comment: None.

4. Paragraph (D)

This would amend the existing duty of a prosecutor under Rule 5-220 to refrain from suppressing any evidence that the member or the member's client has a legal obligation to reveal or to produce. Rather than incorporating by reference a prosecutor's legal obligation, the proposed amended rule would state that a prosecutor must: "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." It is nearly identical to Model Rule 3.8(d).

Modifications following public comment: The Commission recommends retaining Alt. 1. However, the Commission has modified the knowledge standard applicable to a prosecutor's determination of whether information "tends to negate the guilt of the accused or mitigates the offense." The Commission has added a "knows or reasonably should know" standard. The Commission has made the same change regarding mitigating information at sentencing. The change was made in response to public comment that inquired whether the term "known" in paragraph (d) is intended to mean knowledge of the existence of the evidence or information, or knowledge of the legal consequences of the evidence or information (negate guilt, mitigate). The Commission determined that knowledge of the existence of the evidence or information should require actual knowledge ("known") but that appreciation of the consequences of such evidence or information should be subject to an objective "knows or reasonably know" standard.

The Commission made a similar determination regarding its tentatively approved Rule 1.13 (organization as client), recommending that an organization's lawyer have actual knowledge of a constituent's misconduct but requiring an objective knowledge standard (knows or reasonably should know) for the legal consequences of the misconduct before a lawyer's duty to take corrective action within the organization is triggered.

5. Paragraph (E)

This would be a new provision in the rules. Derived from Model Rule 3.8(e), it would provide that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Modifications following public comment: None.

6. Paragraph (F)

This would be a new provision in the rules. Derived from Model Rule 3.8(e), it would require a prosecutor to exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 5-120. Rule 5-120 is the current rule that governs extra-judicial statements by a lawyer, including prosecutors.

Modifications following public comment: None.

7. Paragraph (G),

This would be a new provision in the rules. It is derived from Model Rule 3.8(g). Where a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor would be required to promptly disclose that evidence to an appropriate court or authority. In addition, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor would be required to: (a) promptly disclose that evidence to the defendant unless a court authorizes delay, and (b) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Modifications following public comment: None.

8. Paragraph (H)

This would be a new provision in the rules. It is derived from Model Rule 3.8(h). Where a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor would be required to seek to remedy the conviction. It is nearly identical to Model Rule 3.8(d).

Modifications following public comment: None.

9. Modifications following Public Comment to the Rule Discussion

Discussion sections [1] and [3] have been modified by the Commission. The other Discussion sections have not been changed with the exception of renumbering to accommodate the new numbering of prior Discussion section [3A] as Discussion section [4], and renumbering of all subsequent sections.

The modifications to Discussion section [1] include a clarification that all lawyers in government service remain bound by Rules 3-200 (Prohibited Objectives of Employment) and 5-220 (Suppression of Evidence). In part, this was added by the Commission because current Rule 5-110 applies to "a member in government service" but the proposed amended rule would only apply to "a prosecutor in a criminal case."

The modifications to Discussion section [3] clarify that the disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment. This responds to public comments that questioned whether impeachment material was covered by paragraph (D).

Regarding Discussion section [8], the Commission considered a motion to expand the safe harbor language to encompass paragraph (D). Public hearing testimony from the United States Department of Justice recommended this revision (see page 34 of the transcript of the February 3, 2016 public hearing). This change was defeated by a vote of 4 yes, 11 no, and no abstentions. The revision would have modified Discussion section [8] as follows:

> [8] A prosecutor's determination that evidence or information is not of such nature as to trigger the obligations of paragraphs (D), (G), or (H), though subsequently determined to have been erroneous, does not constitute a violation of this Rule, if the original determination was made in good faith based on all information known to the prosecutor at the time.

III. Request for Public Comment Authorization and an Expedited Process for Proposed Amended Rule 5-110.

With due consideration of the modifications made after public comment, the Commission continues to believe that the prioritized processing of proposed amended Rule 5-110, separate and apart from the Commission's comprehensive proposed amendments to the entire rules, is warranted to respond to ongoing harm to: (i) the rights of defendants in criminal matters where a prosecutor fails to disclose evidence; and (ii) public confidence in the administration of justice that follows from publicity concerning prosecutors' failures to disclose evidence that result in the wrongful convictions of persons accused of criminal violations.

If the Board agrees, proposed amended Rule 5-110 (and the conforming non-substantive amendment to Rule 5-220) would be released for a 45-day public comment period ending approximately on Monday, June 27, 2016. This additional public comment is needed to conform to the Board's policy requiring such public comment when substantive changes have been made to a proposal following an initial public comment period.

After the 45-day public comment period, the comments received would be considered by the Commission at its meeting on August 26, 2016. At that meeting, the Commission would decide to present to the Board either: (i) a further amended rule for additional public comment; or (ii) a

proposed rule recommended for adoption by the Board. It is anticipated that Board consideration of the Commission's recommendation would occur at the Board's meeting during the State Bar Annual Meeting (September 29 – October 2, 2016).

No amended rule would become operative unless and until the proposed rule is approved by the Supreme Court of California.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None. This agenda item only requests public comment authorization. A Board decision to adopt a rule amendment would be the subject of a separate agenda item.

BOARD BOOK IMPACT

None.

PROPOSED BOARD RESOLUTION

> **RESOLVED**, that the Board of Trustees authorize the release of proposed amended Rules 5-110 and 5-220 of the Rules of Professional Conduct, attached hereto as Attachment A, for public comment for a period of 45 days; and it is
>
> **FURTHER RESOLVED**, that this authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposal.

ATTACHMENT(S) LIST

- **A.** Clean Version of Proposed Amended Rules 5-110 and 5-220
- **B.** Synopsis of Public Comments and Public Hearing Testimony
- **C.** Transcript of the February 3, 2016 public hearing
- **D.** Minority Dissents of Commission Members George Cardona and Daniel Eaton
- **E.** Commission Response to Minority Dissents.

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) The information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible alternative to obtain the information;

(F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment and 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. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 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.

[5] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction

occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

Rule 5-220 Suppression of Evidence
(Commission's Proposed Rule – Clean Version)

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Discussion:

See rule 5-110 for special responsibilities of a prosecutor.

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments

TOTAL = 321 **Alt. 1 = 304**
Alt. 2 = 5
NA = 12
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	Position[1]	Rule	Comment	RRC Response
2016-119	Adams, Jesse M. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language.[2]	
2016-193	Afrashteh, Mona (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-127	Aguirre, Carmine (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-311	Alex, Marie F. (2-29-16)	No	Alt. 1	5-110	Prosecutors should ethically disclose all exculpatory evidence because that is the current state of the law in California.	
2016-323	American Bar Association (ABA), Thomas Susman (3-15-16)	Yes	Alt. 1	5-110	The proposed rule would appropriately apply to federal prosecutors. Federal prosecutors already comply with disclosure law drawn from various sources, including case law, statutes, and rules of criminal procedure. The ethics rule would not interfere in any way with federal prosecutors' other obligations. There is nothing anomalous or troubling about a state ethics rule that is more demanding than other law on the subject. In	

[1] Alt. 1 = Support Alt. 1 Draft and/or Concept Alt. 2 = Support Alt. 2 Draft and/or Concept NA = No Preference Expressly Indicated

[2] Recommends adoption of proposed rule 5-110(D), which clearly explains the duty of prosecutors to disclose all exculpatory evidence regardless of materiality, and recommends rejection of the alternative draft (ALT 2).

NOTE: Full text of comments available from State Bar staff upon request by contacting Audrey Hollins (audrey.hollins@calbar.ca.gov) or 415-538-2167.

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					general, ethics rules go beyond existing law, rather than merely restating or codifying existing law or incorporating it by references. (See, CRPC 2-100; ABA 4.2). Federal prosecutors' legal obligation to comply with state ethics rules that supplement existing legal restrictions has two undeniable bases. First, the obligation is generally established by local rules of the federal courts that make clear the state ethics rules applicable to attorneys in federal judicial proceedings. Second, and wholly apart from the federal court rules, the obligation is established clearly and unequivocally by federal statute (see, the McDade Act, 28 USC § 530B).	
2015-13	Anderson, Ed (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-225	Anderson, Johnnetta E. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-110	Arant, Adam (2-24-16)	No	Alt. 1	5-110	States that proposed rule comports with existing law and that proposed rule will incentivize prosecutors to turn over evidence.	

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2016-305	Archer, Jennifer (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutor should not be allowed to make determination of what is material or exculpatory.	
2015-50	Arfa, Faye (11-28-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-98	Ayala, Rose (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-129	Baldwin, Maureen (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2015-4	Barrett, Brendan (11-23-15)	No	Alt. 1	5-110	Written comments address rule 5-110. Agrees with proposed rule as needed to end prosecutor "gamesmanship". Believes the alternative draft is toothless.	
2015-3	Barrett, Brendan (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as needed to end prosecutor "gamesmanship". Believes the alternative draft is toothless.	
2016-100	Barrett, Brendan (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-224	Bartle, Rory (2-25-16)	No	Alt. 1	5-110	Proposed rule represents full and good faith exchange of information that helps all California citizens.	
2016-260	Batchelder, Elias (2-29-16)	No	Alt. 1	5-110	If a prosecutor is aware of exculpatory information, he should be ethically bound to disclose it. Regardless if defense	

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					counsel can point out it exists.	
2015-52	Becker, Mark (11-30-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to require prosecutors to disclose all exculpatory evidence, regardless whether prosecutors think it is material. Expressed concern that despite existing case law, prosecutors frequently fail to disclose all exculpatory evidence.	
2016-254	Beekman, Catherine (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-159	Bell, John T. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2/3/16 Public Hearing Testimony	Belshaw, Robert (Provided oral public hearing testimony on February 3, 2016. See pages 42-51 of the public hearing transcript.)	No	NA	5-110	Former attorney who was convicted of a felony. States that his case had Brady violations and other unethical conduct. Supports whatever version of the rule that would require prosecutors to pursue matters supported by probable cause and good faith. Recounted the Brady violations in his case and prosecutors' and jurists' acquiescence in such violations.	

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					Stated that prosecutors will offer some form of consideration for favorable witness testimony but say that the terms won't be discussed until after testimony. This is in an effort to avoid the appearance of tainted testimony. Recounts a story where he witnessed the prosecutor in his case solicit perjured testimony. Recounts his inability to access the evidence in his case that was favorable to him. References his written submissions as evidence that the prosecutor subverted justice**.** Stated that Bar panel attorneys are not always competent because many of them have private practices and that causes corner cutting or plea deals. Proposes a hotline for Brady violations.	
2016-243	Benkle, Seth (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule helps balance power in a system heavily weighed against defendants.	

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2016-97	Berkowitz, Barney (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-94	Bermant, Alison (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-124	Black, William (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-295	Bloom, Brian (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-201	Blum, Edward J. (2-25-16)	No	Alt. 1	5-110	Defendants need this proposed rule to be able to go to the Bar to report bad prosecutors because no one else in the system will punish them.	
2/3/16 Public Hearing Testimony	Blume, James (Provided oral public hearing testimony on February 3, 2016. See pages 63-73 of the public hearing transcript. See also testimony of Jose Castaneda who testified at the same time as Mr. Blume).	No	NA	5-110	Describes personal experience as a former police officer working directly with lawyers and judges as a basis for concerns about judicial and lawyer misconduct, including witness tampering.	
2016-314	Bobrow, Oscar (2-29-16)	No	Alt. 1	5-110	Supports ALT 1. During my career as a criminal defense attorney I have had countless situations where prosecutors have not turned what I believed to be material information for the preparation of my case. ALT 1	

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					would require the disclosure of all exculpatory evidence whether or not the prosecutor thinks such evidence is material or inconsequential to the outcome of the proceeding.	
2016-77	Bonner, Mark (2-1-16)	No	NA	5-110	Former prosecutor who disagrees with proposed rule because it would ethically require discovery beyond that required by current statutes and case authority. Contends that discovery rules should be promulgated through proper channels, not through the ethics rules.	
2016-203	Boskin, Pamela (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-161	Boudin, Chesa (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-67	Boyd, David (2-1-16)	No	NA	5-110	Disagrees with proposed rule as duplicative of existing law, confused, and unconstitutional, and will allow prosecutors to use the "flawed language" to their advantage but will not improve public confidence in the criminal justice system.	
				(C) and Disc. [2]	Believes paragraph (C) and discussion [2] implies a duty for prosecutors to advise or seek a waiver from suspects in situations where the law does not otherwise	

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					require (e.g. an uncharged suspect not in custody), which will discourage law enforcement from consulting with prosecutors early in the investigation. Also believes it is in tension with current rule 2-100(C)(3).	
				(E)	Believes paragraph (E) creates a conflict with the California Constitution with respect to a prosecutor's ability to present evidence. (Art. I, sec. 28(f)(2))	
2015-40	Boyle, Robert (11-25-15)	No	Alt. 1	5-110	Agrees with rule as a necessary mechanism to enforce fair dealing by prosecutors. Believes, based on personal experience as a defense attorney, that there is a consistent pattern of prosecutors failing to disclose evidence.	
2016-273	Brady, Christine (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-30	Braun, Geoffrey (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to send a clear message that all exculpatory evidence must be disclosed. Through examples expressed concern that violations resulted in harm to criminal defendants.	
2016-152	Brogna, Sheila (2-25-16)	No	Alt. 1	5-110	Proposed rule prevents reversals.	

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2016-294	Brown, Aundrea (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-171	Brown, Lynette (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule adds clarity to prosecutors' duties.	
2016-68	Brown, Michael (2-2-16)	No	Alt. 1	5-110	Suggested additions to the rule regarding prosecutor compliance with probable cause requirement, an independent review process, and that prosecutors shall not condone harassment by police or officials.	
2016-174	Burk, Kristine (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Justice system served by clarity that proposed rule provides.	
2016-126	Byron, David J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-206	Caballero, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-104	Caine, Christopher J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-65	California Appellate Project – Los Angeles Office, Jonathan Steiner (1-29-16)	Yes	Alt. 1	5-110	Proposed rule helps to avoid risk of due process violations and ensure a full appellate record required to defend constitutional rights. Expressed concern	

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					regarding the uncertainty among prosecutors as to what constitutes their ethical obligations, including the duty to disclose evidence that is not "specifically material."	
2016-259	California District Attorneys Association (CDAA), Multiple Signatories (2-26-16)	Yes	Alt. 2	5-110	CDAA supports ALT 2. We do not believe ALT 2 seeks to limit pretrial discovery obligations with a *Brady* materiality standard – in fact, it expressly ties the prosecutor's responsibilities to "statutory … obligations, as interpreted by case law," which have no *Brady* materiality limit. We agree with the "timeliness" obligation, as stated in Discussion paragraph [3]. We assume the Commission's official Discussion section will have interpretive force with respect to any adopted rule comparable to official law revision commission comments with respect to statutes, i.e. they will be entitled to substantial weight in construing the rule. We note that this interpretation would be the same under ALT 2, which expressly ties the prosecutor's obligations to statutory and case law, just as the Commission's Discussion paragraph does. We believe that the language of	

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					the proposed rule should require personal knowledge and note that the rule language specifically refers to material "known to the prosecutor." We note the California Public Defenders Assoc. and Calif. Attorneys for Criminal Justice agree that for discipline purposes, the rule requires actual knowledge of the individual prosecutor. CDAA agrees with CPDA and CACJ on this interpretation. While the Commission's Discussion paragraphs do not further address the point, the language itself seems clear. CDAA agrees with the removal of the requirement that evidence in mitigation of sentencing must be disclosed to the "tribunal." While the standard for the timing of disclosure is tied by the Commission's Discussion paragraph which points to statutes and court orders, the standard with respect to the type of evidence is not. The failure to anchor the meaning of "evidence or information," "tends to negate … guilt," and "mitigates the offense," to some specific or	

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					particular criteria leaves prosecutors without reasonable means to know where the lines are. This is a matter of great concern when crossing the lines could lead to professional discipline. As one example, California case law at this time does not make clear whether all witness impeachment evidence is "exculpatory" within the meaning of Penal Code sec. 1054.1(e). CPDA and CACJ argued in their Oct. 8 letter that prosecutors are free to ignore their duty to disclose exculpatory evidence because B&P Code sec. 6068.7 only requires mandatory referral to the state bar if a prosecutor's withholding of evidence was "material" under *Brady*. This argument fails to acknowledge that 6086.7 has been amended to include as basis for a mandatory state bar referral, a finding by a court that a prosecutor deliberately withheld exculpatory evidence, without any requirement that the evidence was material under *Brady*, or that the case was reversed or judgment modified as a result. (B&P Code sec. 6068.7(a)(5);	

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					Pen. Code sec. 1424.5).	
2/3/16 Public Hearing Testimony	Mark Zahner, on behalf of California District Attorneys Association (CDAA), (Provided oral public hearing testimony on February 3, 2016. See pages 37-41 of the public hearing transcript.)				Not advocating that there shouldn't be a 5-110(b) at all, only that the existing rule, as captured in Alt. 2, is fair and easy to understand. The only problem with rule as proposed is the phrase "tends to negate" which is unclear as to its standard. Current California law is already something beyond Brady and that's absolutely acceptable. We think that the rule as proposed is ambiguous and it will be unclear to prosecutors what to do. Continue to urge adoption of Alt. 2 or, in the alternative, a safe harbor provision.	
2/3/16 Public Hearing Testimony	California United States Attorneys, Laura Duffy (Provided oral public hearing testimony on February 3, 2016. See pages 4-12 of the public hearing transcript.)	Yes	Alt. 2	5-110	Alt. 2 presents the more appropriate disciplinary standard for following reasons: 1) the change to federal discovery standards proposed in Alt. 1 should come from Congress and the federal courts. 2) Alt. 1 would create a conflict between the rule	

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					and the law by requiring federal prosecutors to disclose evidence not mandated by current federal law. 3) Alt. 1 would subject federal prosecutors to personal discipline despite compliance with federal law which would in turn incentivize defendants use of discipline as a tool during the case. 4) Alt. 1 would effectively expand federal discovery law to such a degree that federal prosecutors may turn over information that impacts the safety or privacy concerns of witnesses in order to avoid personal discipline. Alt. 2 is better because prosecutors should be held to the same standard as the law requires. However, if Commission is inclined to reject Alt. 2, please add mens rea requirement to proposed rule.	
2015-35	Camarillo, Brandon (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-299	Carlisle, David (2-29-16)	No	Alt. 1	5-110	Proposed rule is step toward keeping our justice system equitable for all.	
2016-211	Carlson, Katherine (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-116	Carrasco, Gerald C. (2-24-16)	No	Alt. 1	5-110	Recited an example where failure to disclose existence of witness resulted in lost evidence due to witness's death.	
2015-31	Carrignton, Felicia (11-24-15)	No	Alt. 1	5-110	Expressed concern, through examples, that investigators and process servers contribute to a prosecutor's ability to skirt their disclosure obligations.	
2016-217	Carrillo, Christian (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-135	Carrington, Felicia (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-162	Case, Linda (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-43	Casebeer, Megan (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2/3/16 Public Hearing Testimony	Castaneda, Jose (Provided oral public hearing testimony on February 3, 2016. See pages 63-73 of the public hearing transcript.	No	NA	5-110	Supports rule revision but also wants the Bar to do more regarding public complaints. Describes personal experience with lawyers and judges as basis for specific concerns about	

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	See also testimony of James Blume who testified at the same time as Mr. Castaneda).				judicial and lawyer misconduct. States dissatisfaction with the State Bar's handling of a specific disciplinary matter.	
2016-76	Chestnut, William (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-248	Cho, Rosy H. (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-304	Chorney, Jeff (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-115	Clark, Stephanie (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-15	Clarke, Joseph (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-169	Clemans, Victoria (2-25-16)	No	Alt. 1	5-110	States that courts favor prosecutors.	
2016-109	Coffino, Michael (2-24-16)	No	Alt. 1	5-110	Agrees with rule.	
2016-322	Committee on Professional Responsibility and Conduct (COPRAC), Merri Baldwin (2-29-16)	Yes	Alt. 1	5-110	COPRAC supports ALT 1 because we believe there is value in maintaining uniformity with other jurisdictions. In addition, ALT 2 would not create a more defined standard to the extent there is uncertainty as to what the current requirements imposed by law are. Making clear	

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					the disciplinary consequences of a prosecutor's failure to turn over exculpatory evidence in a timely manner would add significant public protection. Some COPRAC members voiced concern that, in interpreting the proposed rule, the State Bar could impose a disclosure standard different than that which exists in California law in circumstances in which the prosecutor made a reasoned decision as to whether evidence was exculpatory or not (certain forms of impeachment evidence, for example), and impose discipline for conduct that otherwise met the obligations set forth in law. However, the majority of the Committee supports adoption of the Rule and Comments as proposed by the Commission. COPRAC also examined the issues raised by George Cardona's thoughtful dissent from the adoption of paragraph (E) of the rule, governing subpoenas to attorneys, including his observation that many leading white-collar jurisdictions have not	

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					adopted the rule. However, as we looked further, we couldn't find any strong policy arguments in the literature against that part of the rule, or any sign that it has created law enforcement problems in the jurisdictions where it has been adopted. The common sense reason would appear to be that paragraph (E) of the rule, like paragraph (D), runs in parallel with a wide variety of discovery and evidentiary rules and internal prosecutorial guidelines—so that in fact the rule would not significantly alter current practice.	
2016-199	Cooney, Patricia (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-82	Coopersmith, Alanna (2-24-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-263	Cox, Jason (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutorial discovery violations are rampant. One way this happens is by claiming evidence is not material. The proposed rule is in line with existing case law. The basic concept is that materiality is a post-conviction standard for determining	

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					prejudice, not a pre-trial standard for determining a defendant's right to discovery in the first place.	
2015-59	D'Agustino, Elena (12-4-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-190	Daly, Morgan (2-25-16)	No	Alt. 1	5-110	It's only fair that prosecutors disclose all exculpatory and mitigating evidence. This rule will help protect the innocent.	
2015-34	Dark, Patricia (11-25-15)	No	Alt. 1	5-110	Agrees with proposed rule as required by justice, to prevent wrongful convictions, avoid overcharging, and conserve public and judicial resources. Expressed concern that bench is unwilling to enforce existing law.	
2016-230	Davis, Ryan (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-117	Defilippis, Steve (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-258	Delgado, Jessica (2-29-16)	No	Alt. 1	5-110	Proposed rule is vital to maintaining or restoring the integrity of criminal justice system in California.	
2015-37	Dell'Anno, Anthony (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-298	Denton, Chuck (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-125	Diamond, Cindy A. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-212	Dice, Frank W. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-92	Diederichs, Michele (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-241	Dier, Wendy (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-75	DiSabatino, Frank (2-25-16)	No	Alt. 1	5-110	Agrees with the proposed rule.	
2016-179	Djafar, Malike (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-96	Dobbyn, Gerard (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-45	Dodd, Peter (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-252	Dombois, Markus (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Non-disclosure is a systemic problem in some DA's offices.	
2016-136	Dove, Austin (2-24-16)	No	Alt. 1	5-110	Identifies instances where prosecutor has withheld evidence because the end justifies the means. Believes the proposed rule is a step in the right direction.	

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2016-145(b)	Downing, Ariana (2-24-16)	No	Alt. 1	5-110	Likes bright line rule as it removes prosecutorial discretion as to materiality.	
2016-186	Dudley, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-300	Edgar, Deedrea (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. The way to have a fair justice system and avoid wrongful convictions is to have rules that are fair, clear and enforceable.	
2/3/16 Public Hearing Testimony	Elihu, Azar (Provided oral public hearing testimony on February 3, 2016. See pages 86 of the public hearing transcript.)	No	NA	5-110	Prosecutor are vested with excessive authority. The probable cause standard to prosecute should be a reasonableness standard to avoid the filing of meritless cases. Recounted story where cases were dismissed at court stage after a plea deal was offered due to lack of evidence. Ok with section (c) and Mr. Goodman's position on (d). Section (f) should be based on objective standard. The key word with regard to (h) is "promptly" because people	

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					struggle for years in jail. Overall, rules "should change to just divest in general the prosecutors from so much authority." Defense attorneys should be allowed to inspect the evidence to determine if it's material. The Bar gives prosecutors a slap on the wrist compared to those who commingle funds.	
2016-154	Erickson, Kristin A. (2-25-16)	No	Alt. 1	5-110	Proposed rule needed to "balance the scales."	
2/3/16 Public Hearing Testimony	Falk, Richard (Provided oral public hearing testimony on February 3, 2016. See pages 21-25 of the public hearing transcript.)	No	NA	5-110	Commission should adopt Crown Prosecutors rule 6.3 which provides that prosecutors should not bring more charges than are necessary to encourage a defendant to plead guilty to a few. Mr. Falk cites a number of authorities for the proposition that the current justice system's reliance on plea bargaining has led to overcharging and therefore, a lack of justice.	
2016-320	Farrow, Susan (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-55	Faulkner, Aaron (11-30-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-32	Fernandez, Edward (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to restore balance and enforce the law. Believes, based on personal experience as former prosecutor, that prosecutors delay disclosure under belief they "know better," and that the rule is not "surplusage."	
2016-148	Field, Skip Allen (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-189	Fisher, Barbara E. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-281	Folker, Jason M. (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-78	Foster, Jodea (2-3-16)	No	Alt. 1	5-110	Criminal defense attorney who agrees with rule and provides examples of prior prosecutorial conduct that she claims violated their professional obligations.	
2016-318	Foxall, Richard (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-247	Franco, Yolanda (2-26-16)	No	Alt. 1	5-110	Recounted examples from practice where attorney believes plea deals were proposed by prosecutors instead of producing exculpatory evidence.	

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2015-10	Friedman, Jennifer (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-27	Friedman, Jennifer (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-290	Galambos, Guy (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-284	Gallagher, Tracey (2-26-16)	No	Alt. 1	5-110	Recounts examples where prosecutors fail to timely turn over evidence.	
2016-166	Garber, Leonard (2-25-16)	No	Alt. 1	5-110	Proposed rule helps ensure fair system.	
2016-99	Garcia, Armando (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-287	Gardner, Abraham (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. This Rule would go a long way in answering our community's call for reforms to restore community faith in our criminal justice system.	
2016-151	Gardner, Renee Yvonne (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-276	Giambona, Salvatore (2-29-16)	No	Alt. 1	5-110	Prosecutors routinely fail to adhere to their constitutional duty to reveal evidence because there is no consequence. Proposed rule is step in right direction.	

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2016-80	Gilreath, Tawnya (2-8-16)	No	Alt. 1	5-110	Agrees with proposed rule but believes that it should apply equally in civil proceedings where people are being "prosecuted" for alleged code violations and losing their homes without probable cause or the right to counsel.	
2/3/16 Public Hearing Testimony	Gloude, Royal (Provided oral public hearing testimony on February 3, 2016. See pages 51-58 of the public hearing transcript.)	No	NA	NA	Among other materials, provided a copy of a July 6, 2015 letter from Robert Fellmeth to the Hon. Mark Stone, Chair, Assembly Judiciary Committee, concerning SB 387 (Jackson) regarding the State Bar Discipline System. (NOTE: Court reporter was unable to transcribe this speaker's complete testimony due to technical difficulties.)	
2016-140	Glucroft, Lesa Morse (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-142	Glucroft, Robert (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-306	Goldstein-Breyer, (2-29-16) Joseph	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-147	Gottesman, Ann A. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-215	Graf, Sheryl (2-25-16)	No	Alt. 1	5-110	Agree with proposed rule because it promotes fair administration of justice.	

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2016-228	Granger, Jennifer (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-106	Greenberg, Evan Charles (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-131	Groshan, Justin (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-232	Gundel, Jason (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-251	Gutierrez, Bonita (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-33	Guzman, Jorge (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-47	Haddox, David (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-128	Hagler, Thomas M. (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-296	Hall, Carrie (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-102	Hanania, Mitri (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-149	Hauser, Steven K. (2-24-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule. Justice demands full disclosure by the prosecution in criminal cases. There are too many wrongful convictions in	

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					California.	
2016-91	Henderson, Elaine (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-39	Henneman, Krista (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-213	Hennessy, Timothy (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. States that rule will bring California in line with rest of U.S. jurisdictions.	
2016-81(b)	Henschel, Brad (2-13-16)	No	NA	5-110	Proposed rule doesn't go far enough in that it should require prosecutors to disclose when police lie to them. Contends that the rule fails to address the financial impact to the state.	
2016-307	Hernandez, Juan (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-123	Hicks, Anthony (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-86(a)	Hingle, Michael (2-24-16)	No	Alt. 1	5-110	Rule is long overdue. Wants it to apply to federal prosecutors who are State Bar members also.	
2016-134	Horner, Robert B. (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	

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2016-84	Hudson, Harry (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule and states that he has had cases where facts in report don't support allegations.	
2016-301	Innocence Project, Barry Scheck (2-29-16)	Yes	Alt. 1	5-110	We strongly support the letter from the Loyola Law School's Project for the Innocence responding to submissions by Stacy Ludwig and Laura Duffy on behalf of Dept. of Justice and U.S. Attorneys respectively. We add two observations: First, the whole purpose of ABA 3.8(d) is to put forward a prospective, prophylactic rule to prevent Brady violations – the suppression of "material" exculpatory evidence. Before a trial that has not yet occurred, before knowing the defense evidence, being naturally subject to confirmation bias (the tendency to view information as confirming a pre-existing position, such as the defendant is guilty), it is a difficult, perhaps impossible cognitive task for a prosecutor to know for certain whether the failure to make "timely" disclosure of one or more facts (information) that "tends to negate the guilt" could ultimately prove to be, "material." Federal prosecutors	

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					have been subject for decades to a 3.8(d) standard and have not had any serious trouble conforming their conduct to the requirements of the rule. Second, the dispute around this issue is reminiscent of the controversy that arose two decades ago over whether federal prosecutors should be subject to state "no contact" ethics rules. Congress responded by passing the McDade Act ("an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State") which, in effect, expressly rejected the idea that federal prosecutors should be exempt from state ethics rules like 3.8(d) that are intended to supplement and assist prosecutors to avoid constitutional violations. The McDade Act settled the "no contact" controversy and changed the behavior of prosecutors in state and federal	

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					courts. Adoption of 3.8(d) will do the same.	
2016-234(a)	Jafine, Kelly (2-25-16)	No	Alt. 1	5-110	Proposed rule help declare clear standard to prosecutors and imposes a sanction for miscarriages of justice.	
2016-64	Janoe, Bobby S. (1-15-16)	No	Alt. 1	5-110	Commenter provided personal story as convicted criminal defendant stating prosecutor failed to turn over exculpatory evidence and knowingly permitted perjured testimony, and that the conduct has not been addressed or investigated.	
2016-120	Johnson, Carla J. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-214	Johnson, Cathy (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-183	Johnson, Ronald (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-87	Johnson, Todd (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-160	Jones, Ashley (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-216	Jones, Raymond (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-288	Jorjani, Raha (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-70	Judge Cordell, Ladoris (Ret.) (2-6-16)	No	Alt. 1	5-110	Agrees with proposed rule and the removal of the materiality standard. Provided personal observations as judge and police auditor indicating that police and prosecutors often have a narrow interpretation of what is material. Believes the rule is necessary to require prosecutors to err on the side of disclosure which will protect against wrongful convictions and reduce post-conviction litigation.	
2016-74	Kasolas, George (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-18	Katano, Akio (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule to protect rights of citizens from overreaching and misconduct. Noted that Brady violations and prosecutorial misconduct are a "problem of epic proportion."	
2016-163	Kayfetz, Lael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-6	Kelly, Patrick (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-269	Kendall, Denise (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-38	Khorasani, Maryam (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-132	Kinsey, Jr., Edward W. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-89	Kirchick,Stuart D. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-289	Kopchak, Ryan (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-180	Kovaly, Jill (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-195	Kramer, Lauren (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule will bring California in line with Model Rule and will help curb prosecutorial abuse.	
2016-274	Krause, Tracy (2-29-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule holding prosecutors accountable for providing timely exculpatory discovery. Current system does not adequately protect defendants from the loss of exculpatory evidence that might make a difference in their jury trials.	
2015-41	Krueger, Angela (11-25-15)	No	Alt. 1	5-110	Agrees with rule as a needed incentive or tool to reduce cause of wrongful convictions. Agrees	

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					that rule apply to all exculpatory evidence because prosecutors cannot determine materiality prospectively. Expressed concern that despite existing law requiring disclosures (Pen. Code §1054.1), Brady violations are prevalent and no State Bar or Court action taken.	
2016-122	Krueger, Angela (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule minimizes the risks of wrongful conviction.	
2016-200	Kuchar, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-8	Kulick, Kelley (11-24-15	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-235	Lagod, Alan M. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-227	Lai, Johnny (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. This will bring rules in line with existing California case law.	
2016-158	Laidley, Pierpont M. (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule. Has first-hand experience with a prosecutor intentionally hiding exculpatory evidence. Rule needed to avoid convicting the innocent.	

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2016-105	Lambe, James (2-24-16)	No	Alt. 1	5-110	Supports the Commission's proposed rule.	
2016-270	Landau, Jeffrey (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-187	Latimer, Denver (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-250	Lawrence, Helen (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-9	Le, Jung (11-24-15)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-93	Lee, Sung (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-12	Leonard, Samuel (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-61	Leonard, Samuel (1-6-16)	No	Alt. 1	5-110	Noted error in Discussion par. [1]. Phrase reading "that guilty" should read "that guilt."	
2/3/16 Public Hearing Testimony	Levenson, Prof. Laurie (credited as Lori Levinson in 2/3/16 public hearing transcript). (Provided oral public hearing testimony on February 3, 2016. See pages 59-62 of the public hearing transcript.)	No	Alt. 1	5-110	It makes a difference to take out of the equation prosecutors making materiality decisions because they make mistakes all the time. And those mistakes cost people their freedom. In response to Ms. Ludwig, DOJ lawyers have not understood the law. Surprised that Ms. Ludwig did not highlight rash of	

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					misconduct and Brady violations in this district. Committee did an excellent job drafting mens rea language in rule. In response to critique that it's not clear enough, it's clearer than having to look through all the case law for the standard. Even if "tends to negate" is not clear enough, then maybe "any tendency to negate" could be helpful. But, we don't want to move in the direction of saying prosecutors get to decide what is material. Proposed rule does not tamper with California discovery law. It is reported that the number of exonerations have gone up again and 75-80 percent of them are related to Brady violations. This rule is essential to fair trials as it says: prosecutors, don't pretend to be defense lawyers. You're not good at it.	

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2016-107	Levin, Sydney (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-278	Lindsey, Jelani J. (2-29-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-121	Lockhart, Karen (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-62	Logan, William (1-7-16)	No	Alt. 1	5-110	Noted need for the proposed rule to address failures of prosecutors to comply with their duties. Expressed concern that the rule will not have "enforcement teeth."	
2016-156	London, Lori (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutor is supposed to administer justice, not just be an advocate.	
2016-112	Lopez, Gabriela (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2/3/16 Public Hearing Testimony	Los Angeles County Alternate Public Defender, Michael Goodman (Provided oral public hearing testimony on February 3, 2016. See pages 73-75 of the public hearing transcript.)	Yes	Alt. 1	5-110	Alt. 2. waters down what the rule is intended to accomplish: to give prosecutors an ethical, not just a legal reason, to provide discovery which is exculpatory in nature. Believes it's a mistake to allow prosecutors to decide what is material. Defense attorneys have a very different view of what is material. If we want prosecutors to turn over exculpatory	

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					evidence, we should take away any ambiguity. Defense attorneys should decide what is material and we shouldn't place prosecutors in the position of having to make those decisions.	
2016-309	Los Angeles County Public Defender, Ronald Brown & Los Angeles County Alternate Public Defender, Janice Fukai (2-24-16) (See above entry referencing public hearing testimony from Michael Goodman of the Los Angeles Alternate Public Defender's Office on behalf of Janice Fukai.)	Yes	Alt. 1	5-110	In order to promote the worthwhile goal of fewer erroneous convictions, the Commission should support the adoption of a rule of professional conduct that mirrors ABA Model Rule 3.8, by adopting ALT 1. Our experience is that non-compliance with *Brady* is pervasive. Limiting the duty to disclose to case or statutory law would result in disclosure of exculpatory information only if the information is "material." A prosecutor should never be in the position of himself or herself determining whether exculpatory evidence is material. If evidence is exculpatory it should be provided to the defense, so that the defense, not the prosecution, can evaluate the extent to which the evidence will support the intended defense at trial.	

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2016-73	Loughborough, James	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-310	Loyola Law School Project for the Innocent, Laurie Levenson & David Burcham (2-29-16) (Prof. Levenson also provided oral public hearing testimony on February 3, 2016 and provided additional written comment in support of oral testimony in letter dated February 1, 2016. See page 59 of the public hearing transcript.)	Yes	Alt. 1	5-110	This letter is a brief response to the public comments made by Stacy Ludwig and Laura Duffy, offered on behalf of Dept. of Justice and U.S. Attorneys at the public comment hearing in L.A. Ms. Ludwig and Ms. Duffy do not represent all prosecutors who have served in the Dept. of Justice. As documented in a letter dated Feb. 1st, 2016, at least 100 former federal prosecutors have written in support of the Proposed Rule. As stated in the letter, they support the Proposed Rule because it better ensures that exculpatory evidence will be disclosed to the defendant. These former prosecutors have not perceived any difficulty in understanding or complying with the language of the Proposed Rule. Additionally, Ms. Duffy's suggestion that federal prosecutors cannot operate under the proposed standard is without merit. Rule 3.8(d) has been in effect throughout this	

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					country for almost a decade. In fact, it is based on ABA Standards for Criminal Justice: Prosecution Standard 3-3.11 that has been in effect since 1964. Federal prosecutors are quite accustomed to working under its standards, as Rule 3.8(d) has been adopted by states throughout the nation. Even many of California's federal prosecutors already embrace this approach. Current objections to ALT 1 are nothing more than an attempt to retain a "materiality" requirement for prosecutors' discovery obligations. ALT 2 creates a less protective, more complicated standard, by instructing prosecutors to rely on case law to determine whether their decisions regarding materiality can be justified if there is a failure to disclose exculpatory evidence. We support ALT 1. The rule is not designed, nor has it been used in other jurisdictions, to unleash a flurry of disciplinary actions against prosecutors. It is an easy-to-follow, plainly stated rule that, in fact, prevents prosecutors from	

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					making bad assessments as to how the defense is likely to use exculpatory evidence at trial.	
2015-51	Lozada, Paul (11-30-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-118	Lueck, John (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes that proposed rule doesn't go far enough: there should be "sanctions" for not turning over evidence immediately after defendant has retained counsel; wants an affirmative duty on prosecutor to seek evidence controlled by third parties.	
2016-170	Lui, Marie (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-168	Lutes-Koths, Kimberly (2-25-16)	No	Alt. 1	5-110	Proposed rule is positive step in curtailing prosecutorial misconduct.	
2016-178	Lynch, David (2-25-16)	No	Alt. 1	5-110	Agrees because proposed rule requires full disclosure with exceptions where appropriate.	
2016-72	Majchrzak, David (2-24-16)	No	Alt. 2	5-110	The rule may require an overly broad duty of prosecutors to disclose evidence. There is an inherent problem with a rule creating a standard that requires broader disclosure than what substantive law requires.	

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					The proposed rule does not fill a gap in California law. Legislatures and courts have established a voluminous body of law defining criminal defendants' due process rights. An ethical rule does not change those due process rights. And it does not change the remedy available to the criminal defendant for any harm if those rights are violated. Any standard for failing to disclose information should have a requirement that the prosecutor knew that the information tended to negate the guilt of the accused or mitigate the offense. See, Mass. Rule 3.8, Cmt. 3(A). The rule could be written more clearly. The rule should expressly address whether it is intended to include evidence or information that could be used to impeach prosecution witnesses. The rule does not clearly state whether it will address such obligation. Incorporating as much of the Comments into the rule as possible will aid in establishing the guidelines for prosecutors to follow.	

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					Regarding the word "timely," in paragraph (d), I offer the following suggested language to more precisely state what "timely" means: "within the time required by statute, procedural rule, or court order, disclose to the defense all evidence or information that existing federal or California law requires to be produced and that the prosecutor knows tends to negate the guilt of the accused, mitigates the offense, or impeaches prosecution witnesses, unless the court otherwise orders."	
2016-253	Mann, David (2-28-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-139	Martinez, Anna (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-177	Masi, Mary (2-25-16)	No	Alt. 1	5-110	The rule doesn't have real teeth but it's a step in the right direction.	
2016-103	Mayfield, Daniel Miller (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-172	McCarthy, Sarah (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-49	McIlroy, Julia (11-28-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-282	McKneely, Michael (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-173	McMillin, James (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-264	Miller, Eli (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-202	Miranda, Douglas (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-197	Moore, Artricia (2-25-16)	No	Alt. 1	5-110	Recounted experience as public defender where prosecutor fails to turn over evidence in his or her possession until the eve of trial without repercussion.	
2016-231	Morga, Maria (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-28	Morton, Jenna (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-220	Mowrer, Glen (2-25-16)	No	Alt. 1	5-110	Proposed rule will help remind prosecutors that they are supposed to be impartial administrators of their duty, not strictly there to convict.	
2016-246	Mowry, Shawn (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-184	Mueting, Lisa Bertolino (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-88	Muller, Barbara (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-25	Munkelt, Stephen (11-24-15)	No	Alt. 1	5-110	Agrees with proposed rule, noting that all other jurisdictions have a rule on the subject, which is needed to motivate prosecutors to disclose all exculpatory evidence.	
2016-95	Needle, Joshua (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Wants prosecutors to turn over more to defense counsel and have less discretion.	
2016-302	Newman, James (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-54	Nguyen, Hien Ngoc	No	Alt. 1	5-110	Agrees with proposed rule. No written comment.	
2015-29	Nguyen, Paul (11-24-15)	No	Alt. 1	5-110	Expressed concern, through examples, that prosecutors are sending innocent people to prison and suffering no consequences.	
2016-256	Nguyen, Sang (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-191	Nielsen, James (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-279	Northcutt, Alex (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-272	O'Brien-Kovari, Nicholas (2-29-16)	No	Alt. 1	5-110	Prosecutor should not be called upon to be gatekeeper of what is material. If they are incorrect, the case may be dismissed.	
2016-313	Office of Chief Trial Counsel (OCTC), Jayne Kim (2-26-16)	Yes	Alt. 1	5-110	OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind. The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office. 5-110(B) should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an	

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					arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Dept's in California are generally independent of prosecutors' offices. Regarding 5-110(D), the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will vary with the circumstances: and the rule "is not intended to impose timing requirements different from those established" by law. It may be advisable to clarify and state this concept in the text of the rule. 5-110(D) requires disclosure of all information that "tends to negate" guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is "not limited to evidence or information that is material as defined by *Brady* … and its progeny." The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions.	

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					Consequently, it may be advisable to state the Commission's intention within the text of the rule itself, namely, that a prosecutor's duty to disclose is broader than that which is material as defined in *Brady*.[3] Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information "known to the prosecutor." It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor's duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.	

[3] Presumably, the Commission's intention is also that a prosecutor's duty to disclose would not be limited by criminal discovery statutes.

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2016-261	Ogul, Michael (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-20	Olsman, Matthew (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-36	Or, Lany (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-208	Or, Lany (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2/3/16 Public Hearing Testimony	Orange County District Attorney's Office, Peter Pierce (Provided oral public hearing testimony on February 3, 2016. See pages 77-79 of the public hearing transcript.)	No	Alt. 2	5-110	Proposed rule could subject prosecutors to disciplinary action based on arbitrary standards not tied to existing law. Cherishes playing by the rules. Served in Iraq and has seen what it's like for citizens in a military dictatorship or police state. He takes his responsibilities to the defense seriously. This is typical of California prosecutors. Disagrees that Brady violations are rampant or systemic. Believes that majority of prosecutors take their responsibilities seriously. Discovery in white collar cases is extensive. In his last case, the defendant's rights were honored. If they weren't his conviction	

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					could be overturned. Under proposed rule, an inadvertent discovery violation could also result in discipline. Saddened that people think that additional sanctions are needed against state prosecutors to safeguard the rights of the accused.	
2016-240	Orbelian, Wade (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-143	Oster, David (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-277	Otani, Kay (2-29-16)	No	Alt. 1	5-110	Proposed rule makes clear that prosecutor has an ethical duty as well as a legal duty to provide evidence.	
2016-229	Ourfalian, Vicky (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Proposed rule promotes justice, fairness, and transparency. It requires prosecutors to act as they already should – as administrators of justice.	
2016-114	Paine, Autumn (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-150	Paparian, William (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	

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2015-17	Pena, Katarina (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-255	Pernik, William (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-165	Perry, Michael (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes proposed rule comports to existing California law.	
2016-155	Petersen, Justin (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-207	Petrosino, Sharon (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-221	Poston, Amber (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-21	Povalitis, Leslie (11-24-15)	No	Alt. 1	5-110	Believes to ensure justice, prosecutor's duty needs to be expressed in a rule of conduct.	
2015-2	Pozzi, Kathleen (11-23-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-219	Proctor, Jennifer (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-308	Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC), Teresa Schmid (2-26-16)	Yes	Alt. 1	5-110	PREC supports the proposed amendments, and specifically opposed the so called "alternative 2" to proposed paragraph (D) of Rule 5-110.	
2016-138	Public Defenders for Racial Justice, Rebecca Susan Young (2-24-16)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Likes bright line rule.	
2016-319	Ra, Sue (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-242	Ramirez, Joseph (2-26-16)	No	Alt. 1	5-110	Proposed rule addresses nationwide problems associated with disclosure. Proposed rule simply requires prosecutors to do what they are sworn to do.	
2016-275	Ramos, Carlos (2-29-16)	No	Alt. 1	5-110	Proposes that rule should include a definition of what is "timely" and that prosecutors should only be allowed to bring charges when evidence supports guilt beyond reasonable doubt, not just probable cause.	
2016-133	Razzaq, Hadi (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-153	Rivera, Angelica (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-11	Robinson, Kevin (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-26	Robinson, Kevin (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-167	Robinson, Kevin (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-303	Rodriguez, James (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-238	Rodriguez, Mario (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-257	Rodriguez, Richard (2-28-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-210	Rogers, Heather (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-262	Ross, Julian (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-157	Roth-Furbush, Samra (2-25-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-181	Ruby, Sarah (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-111	Rudich, Kevin (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-137	Russell, Matthew (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-196	Rutgers, Gerritt (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-237	Ryan (2-25-16)	No	Alt. 1	5-110	Our justice system relies on honesty and accountability.	
2016-266	Saba, Natalie (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-42	Saban, Panteha (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-198	Saban, Panteha (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-1	Sable, Norman (11-23-15)	No	NA	5-110	Disagrees with use of “shall refrain” and suggests retaining the phrase “shall not."	
2016-312	Sakoh, Miyuki (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-66	San Diego County Bar Association, Heather Riley (2-10-16)	Yes	NA	5-110	Believes both versions of (D) have ambiguities that need to be addressed for the rule to be a clear standard that succinctly states a lawyer’s obligation with clarity and precision. Believes the language “evidence or information known to the prosecutor” is ambiguous and that it is unclear whether the rule is intended to reach only information “known” to the prosecutor and not what a	

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					prosecutor "should know." See suggested language in comment. It is unclear what constitutes "evidence or information…that tends to negate the guilt of the accused or mitigates the offense…" and whether the rule is intended to require disclosure of impeachment evidence. See suggested language in comment. Alt 2 language "as interpreted by relevant case law" does not create a clear standard. Suggests a statement permitting lawyers to look to decisions in jurisdictions with analogous rules for guidance interpreting the rule.	
2016-324	San Diego County District Attorney, Bonnie Dumanis (2-02-16)	No	NA	5-110	The proposed rule is not only inconsistent with both constitutional and statutory law related to criminal discovery in California, but also creates a standard that will place prosecutors in jeopardy of violating ethical rules as it lacks clarity and includes terms not defined by case law. The language of proposed paragraph (D) uses the phrase "mitigate the defense" which can be so broadly interpreted as to put prosecutors in jeopardy over	

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					decisions that are not clearly defined by law. Proposed paragraph (B) asks prosecutors to make "reasonable efforts" to ensure that criminal defendants have been advised of the rights to counsel and have been given a "reasonable opportunity to obtain counsel." This is a function of law enforcement and not the role of the prosecutor. The proposed rule does not provide clear guidance as to how a prosecutor would defend a "reasonable effort." Proposed paragraph (F) misunderstands the relationship that prosecutors have with law enforcement and imposes an unrealistic and unnecessary burden.	
2/3/16 Public Hearing Testimony	(Marcella McLaughlin provided oral public hearing testimony on behalf of the San Diego County District Attorney's Office on February 3, 2016. See pages 79-86 of the public hearing transcript.)				She's the ethics coordinator for the district attorney's office. Sees the policy concerns but wants a rule that can be realistically applied and followed. Recounts her professional history and states that she has concerns	

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					about how this rule would be applied on a daily basis. D.A.'s have a delicate balance of interests. While ensuring that defendant gets a fair trial, you also have to protect the interests of your victims, your witnesses and the community. Taking the power to judge materiality away from prosecutors will subject people to harm. She gives an example where letters from others inculpating a gang member may put the writers at harm. Believes that the law provides the proper safeguards and that the information presented regarding wrongful convictions doesn't reflect what's actually happening in California.	
2016-141	San Francisco Public Defender Racial Justice Committee, Demarris Evans (2-24-16)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-268	Harris, Danielle (2-29-16)	Yes	Alt. 1	5-110	The State Bar should approve proposed rule 5-110(D) as recommended by the Commission because the proposed rule clearly explains the duty of prosecutors to disclose all	

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					exculpatory evidence, as California statute and decisional law requires. In my experience, state discovery violations are rampant. Juries should hear all significant evidence, as determined by the court, not solely by prosecutors. 5-110(A) should be rejected because it eliminates the phrase "or should know;" and removes any temporal reporting requirement, such as "timely." An individual prosecutor must be held to the standard of a reasonable prosecutor. Maintaining the "knows or should know" language insures as much. The requirement of "prompt" reporting when probably cause does not exist makes clear that the state has a duty to act quickly to ensure that no one faces criminal charges when probable cause is lacking. The proposed rule waters down an already minimal obligation and should be rejected.	
2/3/16 Public Hearing	(Ms. Harris also provided oral public hearing testimony on				The State Bar should approve proposed rule 5-110(D) as recommended by the	

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Testimony	February 3, 2016. See pages 13-20 of the public hearing transcript.)				Commission because the proposed rule clearly explains the duty of prosecutors to disclose all exculpatory evidence, as California statute and decisional law requires. Ms. Harris highlights recent examples where, despite California law, prosecutors have failed to turn over evidence. The proposed rule will help ensure that a prosecutor's goal is justice. The proposed revision of subparagraph (a) should be rejected as it substitutes a subjective standard for an objective one. The current "knows or should know" standard makes clear that a prosecutor must act as a reasonable prosecutor should.	
2015-16	San Jose Public Defender, Malorie Street (11-24-15)	Yes	Alt. 1	5-110	Agrees with proposed rule as necessary to ensure fairness of the criminal justice system.	
2016-101	Sandecki, Sheri (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-188	Sanders, Neal (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-144	Santana, Jesse (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-223	Scheidel, Kathleen (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-249	Schramm, Bethany (2-26-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2016-267	Schwarzbach, Zachariah (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-83	Scofield, Robert (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule as the proper language of Brady as it should be applied at the trial court level.	
2016-69	Sevilla, Charles (2-5-16)	No	Alt. 1	5-110	Agrees with proposed rule as necessary to ensure that disclosures are made regardless of materiality. Despite recognition that these duties exist, concerned that the view of many prosecutors is that the duty is limited to material evidence.	
2016-113	Shea, George (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Believes that proposed rule comports with existing law.	
2016-182	Shear, Andrew (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-57	Shena, Sarah (12-1-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-7	Silver, Damon (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-90a	Silver, Damon (2-24-16)	No	Alt. 1	5-110	Approves of the Commission's proposed rule.	
2016-185	Smith, Colin (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-321	Smith, Tenette (2-29-16)	No	Alt. 1	5-110	Supports Commission's proposed rule.	
2016-222	Snyder, Amanda (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-218	Sok, Curtis (2-25-16)	No	Alt. 1	5-110	Proposed rule ensures that prosecutors will be strictly accountable for administering justice as opposed to winning.	
2015-23	Solano County Public Defender, Lesli Caldwell (11-24-15)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-291	Solga, Joseph (2-26-16)	No	Alt. 1	5-110	Agrees with Commission's proposed rule.	
2015-44	Soloman, Rachel (11-25-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-209	Solomon, Ilona (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2015-46	Sonoma County Public Defender, Michael Perry (11-25-15)	Yes	Alt. 1	5-110	Agrees with the proposed rule as a needed requirement, noting that most other states already follow the same rule.	
2016-245	Sorensen, Jason (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-14	Sotorosen, Matthew (11-24-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-164	Spector, Simone (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-283	Stanley-Ngomo, Armilla (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-58	Start, Christine (12-2-15)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2015-56	Streets, Phoenix (11-30-15)	No	Alt. 1	5-110	Believes proposed rule will assist in ensuring fair treatment and improving the relationship between law enforcement and the community.	
2015-53	Swarz, Sean (11-30-15)	No	Alt. 1	5-110	Expressed concern, through examples, that leaving prosecutors with discretion re Brady obligations has resulted in failures of prosecutors to disclose all exculpatory evidence.	
2016-244	Taylor, John (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	

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2016-233	Templeton, Chet (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. Prosecutors should not be the ones who determine whether something is material.	
2016-280	Theiss, Sara (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-239	Thiagarajah, Niranjan Fred (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-85	US Dept. of Justice, Professional Responsibility Advisory Office, Stacy Ludwig (2-24-16)	Yes	Alt. 2	5-110	U.S. DOJ disagrees with rule as follows: sub (D) would change federal prosecutors' duties in a manner rejected by the Federal Rules Committee; rule's departure from caselaw-based standard creates ambiguity; proposed rule is at odds with federal prosecutors' legal obligations and provides no mechanism to be in compliance with both; sub (G) doesn't distinguish between prosecutors who are still involved in a case or work in the same office and those who have moved to another district; sub (E) too greatly limits federal prosecutors' and grand juries' ability to investigate and prosecute criminal conduct. Provides alternative rule drafts that comport to concerns listed.	

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2/3/16 Public Hearing Testimony	(Also provided oral public hearing testimony on February 3, 2016. See pages 28-37 of the public hearing transcript.)				Provides that if alternatives are not adopted, there should be a men rea requirement added to proposed rule. Supports Alt. 2 because it creates clear and enforceable disciplinary standards which account for the differences between the state and federal substantive law to which standard is linked. Alt. 1 conflicts with federal law and uses undefined terms. If Commission does adopt Alt. 1, requests that rule incorporate an "intentionality" requirement so that the rule cannot be used as a tactical weapon against prosecutors. Three jurisdictions already have an intentionality requirement in their rule. One jurisdiction has read one into the rule. Other proposed rules have an intentionality requirement. Also requests a safe harbor provision to be in the substance of the rule itself, not the comment. Another proposed rule has a safe harbor provision. Also supports alternative versions	

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					of 5-110(g) and (h) because it distinguishes between situations where prosecutor is personally involved in a case and ones where prosecutor may not have access to information about a case. All substantive information should be contained in the body of the rule, not the comments. If proposes rule is adopted, requests that safe harbor provision be included as an enumerated provision as opposed to in the comment.	
2016-63	Valdez, T. David (1-19-16)	No	Alt. 1	5-110	Commenter provided personal story as convicted criminal defendant stating prosecution failed to turn over exculpatory evidence.	
2016-315	VanOosting, Peter (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-146	Venegas, Armando R. (2-24-16)	No	Alt. 1	5-110	Agrees with proposed rule and believes that it will even out the playing field.	
2016-130	Verlato, Richard C. (2-24-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2. CDAA should not be “loop-hole seekers.”	

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2016-204	Villalobos, Christina (2-25-16)	No	Alt. 1	5-110	Proposed rule would ensure that prosecution of cases would proceed more smoothly and would reduce opportunities for defendants to get their cases dismissed.	
2015-60	Vinegrad, Paul (12-5-15)	No	NA	5-110	Disagrees with proposed rule. Expressed concern that State Bar lacks authority to enact a rule that alters the discovery rules in criminal cases. See exclusivity provision in Pen. Code § 1054(e).	
2015-5	Voogd, Anthony (11-24-15)	No	NA	5-110	Suggests defining "prosecutor" and "prosecutorial discretion." Believes that for rule 5-110 to be effective the Rules also need to adopt model rules 5.1-5.2 re supervisory and subordinate lawyers. Suggests adoption of all ABA model rules. Concerned that proposed rule may conflict with existing statutory law.	
2016-292	Walters, Phillip (2-26-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-285	Wasserman, Michael (2-26-16)	No	Alt. 1	5-110	Justice system attorneys are tasked with seeking justice. Withholding evidence is common. Proposed rule would enhance prosecutor's role as seeker of justice.	
2016-79	Webber, Stephen (2-6-16)	No	Alt. 1	5-110	Attorney agrees with proposed rule. Believes that the rule should be expanded to address	

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					the following issues: potential prosecutorial conflicts regarding grand jury proceedings and using public funds for prosecutors' vendettas. Attorney likewise suggests that violation of the rule should result in mandatory discipline. Attorney writes that rule should be expanded to address when prosecutor must cease prosecution and dismiss charges in light of new evidence. Attorney gives numerous examples of prosecutors continuing to pursue charges despite lacking probable cause.	
2016-205	Weir, Jon C. (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-271	Welch, Jennifer (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-192	Wetmore, Matthew (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-226	Wright, Laura (2-25-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-316	Yaroshefsky, Prof. Ellen & Green, Prof. Bruce (2-29-16)	No	Alt. 1	5-110	An ethics rule based on Rule 3.8(d), such as ALT 1, would not conflict with federal and state law. Federal prosecutors already comply with disclosure law drawn from various sources, including	

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments

No.	Commenter/Signatory	Comment on Behalf of Group?	Position[1]	Rule	Comment	RRC Response
					case law, statutes and rules of criminal procedure. The ethics rule does not excuse prosecutors from complying with other disclosure obligations under the law or otherwise conflict with them, but builds upon prosecutors' other disclosure obligations. There is nothing anomalous or troubling about a state ethics rule that is more demanding than other law on the subject. In general, ethics rules go beyond existing law, rather than merely restating or codifying existing law or incorporating it by references. (See, CRPC 2-100; ABA 4.2). Federal prosecutors' legal obligation to comply with state ethics rules that supplement existing legal restrictions has two undeniable bases. First, the obligation is generally established by local rules of the federal courts that make clear the state ethics rules applicable to attorneys in federal judicial proceedings. Second, and wholly apart from the federal court rules, the obligation is established clearly and equivocally by federal statute	

Proposed Rule 5-110 Special Responsibilities of a Prosecutor Draft and/or Concept
Synopsis of Public Comments

No.	Commenter/Signatory	Comment on Behalf of Group?	Position[1]	Rule	Comment	RRC Response
					(see, the McDade Act, 28 USC § 530B)	
2016-293	Yellen, Amy (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-286	Yolo County Public Defender's Office, Tracie Olson (2-26-16)	Yes	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-265	Yu, Linda (2-29-16)	No	Alt. 1	5-110	Boilerplate comment language. See footnote 2.	
2016-236	Zaky, Negad (2-25-16)	No	Alt. 1	5-110	Proposed rule creates clear standard that protects both prosecutors and defendants.	

STATE BAR COURT

OF THE STATE OF CALIFORNIA

PUBLIC HEARING ON THE REVISION

OF THE RULES OF PROFESSIONAL CONDUCT

STATE BAR OF CALIFORNIA

845 SOUTH FIGUEROA STREET

LOS ANGELES, CALIFORNIA 90017

WEDNESDAY, FEBRUARY 3, 2016

APPEARANCES:

Panel Members:

JUSTICE LEE EDMON, Chairperson

GEORGE CARDONA

JUDGE KAREN CLOPTON

KEVIN MOHR

TOBY ROTHSCHILD

JOAN CROKER

Speakers:

Bob Kehr, Tobi Inlender, Jason Lee, Randall Difuntorum

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Briggs Reporting Company, Inc.
4455 Morena Boulevard
Suite 104
San Diego, California 92117
(310) 410-4151

Spelling corrections made to panel and speaker names by staff.

I N D E X

P R O C E E D I N G S

(10:00 a.m.)

MS. EDMON: All right. Good morning. It is about 10:00 a.m. on Wednesday, February 3, 2016, and we are here for a public hearing of the State Bar of California to receive testimony on proposed amendments to the Rules of Professional Conduct.

My name is Justice Lee Edmon, and I serve as chair of the State Bar's Commission for the Revision of the Rules of Professional Conduct.

The Rules of Professional Conduct are professional responsibility standards, the violation of which will subject an attorney to discipline. Pursuant to statute, Business and Professions Code Section 6077, the State Bar of California is charged with the responsibility of developing and adopting amendments to the rules for approval by the California Supreme Court. Amendments to the Rules of Professional Conduct do not become binding unless and until they are approved by the Supreme Court.

The State Bar staff has caused notice of this hearing to be issued by several methods, including a posting at the State Bar web site, the California Bar Journal, e-mail notifications to interested persons, a news release to the media and social media posts.

This proceeding in being audio recorded and

transcribed by a certified court reporter. Please speak clearly and state your name when you are recognized and called to testify. And if there are any intervening speakers, we ask that you re-state your name, so that your comments can be properly attributed.

This proceeding is accessible by teleconference and by a video-conference link to the San Francisco Office of the State Bar. Testimony may be offered by using any of these systems. This public hearing has been authorized by the Board of Trustees, which oversees the work of the Commission, and the transcript of this public hearing will be made available to the members of the Board.

If there is anyone here in Los Angeles or attending in San Francisco, or connected by teleconference who has not signed in, or otherwise informed Bar staff today about an intent to speak, then I ask that you express your intent now or sign in now with a Bar staff before we call for the first speaker.

If you are here in Los Angeles and have any written materials that previously have not been submitted, please give them now to Lauren McCurdy of the State Bar staff. She's standing right there in the doorway. If you are in San Francisco, then please give them to the Bar staff at that office.

If you are participating by teleconference, then

please e-mail any such materials to Angela.marlaud@calbar.ca.gov. Let me spell that out for you. Angela, A-N-G-E-L-A dot Marlod, M, as in Mary, A-R-L-A-U-D, at calbar, C-A-L-B-A-R, dot C-A, dot gov, G-O-V. Or fax them to Ms. Marlaud at 415-538-2171. I'll repeat that number, 415-538-2171.

Supporting written materials will become a part of the public record of this proceeding. In addition to this public hearing, a 90-day period to receive written public comment on the proposed rules has been authorized by the Board, and the deadline for submission of written public comment is February 29, 2016.

I'm going to take a moment just to introduce the Commission members who are on the panel here in the dais with me. To my far left is George Cardona. Next to George is Judge Karen Clapton. To my right is Professor Kevin Mohr. To his right is Toby Rothschild. And, finally, at our far right is Joan Croker.

I'm going to ask that you limit your remarks to no more than 10 minutes. We will have somebody be timing you and we'll give you a heads-up as you start to get close to your time limit.

And on that note, I'm going to ask Lauren, if you would, please, to call our first speaker.

MS. MCCURDY: Okay. And the first speaker is

Laura Duffy.

MS. DUFFY: Good morning.

MS. EDMON: Good morning.

MS. DUFFY: As introduced, my name is Laura Duffy. I am the United States Attorney for the Southern District of California. I've been the United States Attorney since 2010, however, I've been a federal prosecutor since 1993.

I'm appearing before you this morning on behalf of the four California United States Attorneys. Our offices together employ over 400 federal criminal prosecutors. And I mention that because proposed Rule 5-110(b) would impact not only those federal prosecutors, but also other department of justice prosecutors who litigate in California, as well as the cases that they litigate.

Most of the discussion that I've seen and I think that this will have on the merits of proposed Rule 5-110(d) really has focused on the effects that the rule would have on California state prosecutors, and the possible interplay between that rule, between that rule and state law and state cases. What I want to do today is add to that discussion and explain what impact and effect it would have on federal prosecutors and federal prosecutions.

Having considered the proposed rule, as well as the alternate two version to the rule, the California United States Attorneys endorse the alternate version. We believe

that it presents a more appropriate disciplinary standard for all prosecutors because it accounts for the differences between state and federal discovery law.

I want to start off by saying that the United States Department of Justice takes very seriously its discovery obligations, as it does its charge that convictions not be won but that justice is done. And we very strongly support efforts to ensure compliance with discovery obligations. In fact, the Department has taken many of those steps itself. Department policy's already required by the prosecutors to go well beyond what is required by federal discovery law, by Brady and its progeny.

Those policies require our prosecutors to disclose anything that is inconsistent with any element of any crime charged against a defendant. Those policies also require our prosecutors to disclosure anything that establishes a recognized affirmative defense.

Our policies require the disclosure of anything that might cast substantial doubt on the accuracy of our evidence, or that might have a significant bearing on the admissibility of prosecution evidence. And these policies state that in ordinary circumstances, information should be disclosed regardless of materiality. These policies are not identical to the proposed Rule 5-110(b), but the thrust is similar.

Prosecutors shouldn't think in terms of materiality. They should think more broadly. And the Department has adopted these policies to promote our core mission, which is to seek justice. And also, an important part of these policies is they create a buffer. A buffer to build a margin of error between our discovery practices and the demands of federal discovery law, so that we can help reduce the chances that any one federal case crosses over that legal threshold.

Our concern then really is not with the broad concepts behind proposed Rule 5-110(d), rather we are troubled by the implementation of those concepts through the application of the proposed disciplinary rule. And we think it's problematic for several reasons, and there are four reasons that I would like to discuss this morning.

First, federal discovery rules are set forth in part through the Federal Rules of Criminal Procedure. A committee of judges and professors, representatives from the defense bar, and representatives from DOJ continually review and propose amendments to those rules. And then they propose those to the United States Supreme Court for adoption.

That committee has considered repeated proposals to amend the federal rules to impose discovery obligations consistent with those that are proposed by your 5-110(d),

which does not have a materiality requirement, though the committee has repeatedly rejected those proposals. So what we have then is Rule 5-110(d), in effect doing what the federal system itself has declined repeatedly to do. And I will discuss more in a moment, but this also threatens to dramatically --

(Phone-in caller coming in over phone.)

MS. DUFFY: -- it threatens to --

MS. EDMON: If those of you on the phone would please mute your phones until we call on you, it will be most appreciated.

MS. DUFFY: -- it threatens to dramatically impact federal discovery law practice. And we would submit that, respectfully, that type of a change should emanate from Congress and should emanate from the federal courts. The alternate version of the Rule accounts for developments between state and federal law. The proposed Rule, as written, does not.

The second point that I want to make is that Rule 5-110(d) will affect prosecutors differently than it will affect state prosecutors -- federal prosecutors differently than it will affect state prosecutors, if what the California Public Defenders Association, the California Attorneys for Criminal Justice, and the Innocence Project say about California law, particularly discovery law, is

true.

They say that California law already requires state prosecutors to disclose exculpatory information consistent with 5-110(d), that is, without regard to materiality. And if that's true, the proposed rule essentially requires state prosecutors to no more than they are currently required to do under law and policy. Federal law though has no such requirement and has retained the materiality standard.

Federal prosecutors then will be faced with conflicting masters, which weighs as an additional concern that I want to discuss, but it is another reason why the California United States Attorneys believe that alternate two to the Rule is a better construction of the Rule.

The introductory language, the introductory clause in alternate two, which would require state prosecutors and federal prosecutors to comply with their obligations to disclose exculpatory evidence under existing law maintains --

(Music playing in background.)

MS. DUFFY: It's okay. I'm -- I've got a first grader. I'm used to like dealing with --

MS. EDMON: Thank you.

MS. DUFFY: It maintains the state prosecutor's duty to disclose without regard to materiality, which is

what's been represented under California law. But it avoids creating a conflict between the rule and federal discovery law, which will uniquely in fact impact federal prosecutors.

The third point that I wanted to make is, the Department of Justice, certainly all of the United States Attorneys in California, understand an embrace that federal -- that all prosecutors have a unique, different, higher duty and responsibilities than other lawyers do.

However, incorporating this higher standard into a rule of professional conduct really means that federal prosecutors can be personally disciplined for discovery violations even when they have completely and fully complied with every word of federal discovery law.

And this is because under the language of the proposed rule, prosecutors who fail to disclose non-material information that they don't believe would tend to negate guilt, might be disciplined if a disciplinary counsel viewed the evidence differently than the prosecutor him or herself and the federal judge who was involved in her litigation.

Additionally, defendants and their counsel may threaten to seek personal sanctions against prosecutors during litigation if a particular discovery request was not fulfilled. Some say that this is not the intent of 5-110(d), but the law -- or, excuse me, the rule as written would allow for that.

And we recognize that there have been assurances made, that there's no intent to use the rule in this way. But those assurances don't provide us much comfort because, I think we all have experienced instances in which rules and other tools are used in ways that they were not intended to be used.

MS. MCCURDY: Excuse me, Ms. Duffy. We're coming up on a minute out --

MS. DUFFY: Okay.

MS. MCCURDY: -- right about now.

MS. DUFFY: The last point that I wanted to make is that I think an accurate assessment of the proposed rule has to acknowledge that as a practical matter, the rule will effectively change and create a new federal discovery model, one that expands a current federal discovery practice, and one that adds a new arm of enforcement.

As far as expansion, one that expands what will be produced -- what will be sought to be produced in discovery by defendants, regardless of its true exculpatory value, and rejecting the materiality analysis by using phrases like, tends to negate and mitigates.

The proposed rule essentially have few, if any, boundaries, and because the meaning of those terms are unclear, they're going to have to be applied in the context of the facts of any particular case. And absent case law,

or absent guidance to do that, to define the scope of those terms, we -- this creates concern about whether prosecutors will face the prospect of misconduct allegation for failing to guess correctly what the extent of the rule is.

And because prosecutors may face personal consequences, I think what they may tend to do, is to turn over information that's not required under federal law and, thus, might jeopardize turning over things that impact the safety or the privacy concerns of witnesses.

Second, the Bar as an enforcement arm, I think we can all agree that the purpose of conduct rules should be to enhance the, and to build and enhance the trust the people have in lawyers and our profession, and the outcome of our justice system. But other courts who have considered this issue have observed that it is inappropriate for federal -- for, excuse me, for prosecutors to be held to different standards than they would be -- ethical standards and substantive law standards. And that conclusion makes sense.

Imagine, if you will, an athlete who is trying to reconcile conflicting rules by two different sets of referees on the playing field. Essentially, that is what 5-110 does to federal prosecutors. In every case it inserts a second set of referees, the federal bar, employing different rules from the federal courts that are attorneys are practicing before, to enforce our discovery obligations. It

doesn't make sense to have two different sets of referees on the same playing field.

Formally, I'll be making additional points in our letter, and as my colleague, Deputy Director of the Professional Responsibilities Advisory Office, Stacy Ludwig, is going to pick up from here. We believe, alternative two is the better construction of the rule, however, if the Commission is inclined not to adopt or re-review alternate two, we would ask that a mens rea requirement be added to the proposed rule.

For example, one that would impose discipline only if a prosecutor willfully and intentionally failed to disclose exculpatory information, or one that precluded discipline if, in a prosecutor's good-faith analysis, they saw information falling outside the rule.

Thank you very much for your time. I appreciate it.

MS. MCCURDY: Hello. In San Francisco, do we have any speakers?

MS. HARRIS: Yes.

UNIDENTIFIED SPEAKER: Nobody's here yet, but I know people are aware and wanted -- indicated that they will be here but they have not shown up yet.

MS. MCCURDY: Okay. We're going to turn to the telephone line. First, if those who are on the telephone

and intend to speak could identify yourselves, and then I will call one of you.

Go ahead.

MR. ZAHNER: Hi --

MS. HARRIS: Hi.

MR. ZAHNER: Go ahead.

MS. HARRIS: Danielle Harris.

MS. MCCURDY: Danielle Harris. Go ahead.

MS. HARRIS: Yes.

MS. MCCURDY: Next?

MR. ZAHNER: Mark Zahner.

MS. MCCURDY: Okay. Next. Is that it? No one else on the telephone? Okay.

With that, I'm going to turn --

MR. HERNANDEZ: Ignacio Hernandez.

MS. MCCURDY: Okay. Sorry. Can you say your first name again?

MR. HERNANDEZ: Ignacio.

MS. MCCURDY: Okay. Thank you.

Okay. We are going to call Danielle Harris. Please go ahead and speak.

MS. HARRIS: Thank you. My name, as I said, is Danielle Harris. Thank you for the opportunity to speak to the proposed amendments to Rule 5-110.

I fully support the proposed revision to 5-110(d),

and urge its adoption at the soonest possible time. I cannot, however, support the amendment in 5-110(a), and urge a return to the original language.

I am a Deputy Public Defender and one of two managing attorneys for the felony unit of the San Francisco Public Defender's Office. I have been trying criminal cases in San Francisco Superior Court since 1999. I continue to do so, and now also co-supervise a group of 36 felony trial lawyers as well.

The State Bar should approve the proposed Rule 5-110(d) as recommended because it clearly explains the duty of prosecutors to disclose all exculpatory evidence as California statute and decisional law requires.

My personal experience is that state discovery violations are rampant, as Justice Kozinski has now famously said, prosecutors will, quote, "keeping doing it because they have state judges who are willing to look the other way," unquote.

Until the courts start routinely reporting prosecutors for discovery violations, the Rules of Professional Responsibility are of admittedly limited use. But a rule which clearly and accurately states the prosecution's duty is the least we can do.

The California Supreme Court made the state's discovery obligation plain in its 2010 Barnett decision.

The court stated Penal Code Section 1054.1(e), "requires a prosecution to disclose any exculpatory evidence, not just material exculpatory evidence."

If there was an ambiguity about the statement in Barnett, it was eliminated in last year's People v. Cordova, quote:

> "California reciprocal discovery statute requires the prosecution to provide discovery of any exculpatory evidence. This provision requires the prosecution to provide all exculpatory evidence, not just evidence that is material under Brady and its progeny," unquote.

The proposed amendment to Rule 5-110(d) simply catches the rules up to the existing state of the law. Despite these repeated directments, the discovery violations continue. A colleague of mine, one of the attorneys I've supervised, just tried a three-strikes case in which the prosecution failed to disclose that an incriminating fingerprint was run through the state database and did not match her client.

Another colleague last year tried a felony battery and resisting police case, where the prosecution failed to disclose that the alleged victim/officer had been recently

disciplined for using excessive force. In the last two of four cases I have personally tried, I have had my request for late discovery jury instructions granted.

Further, my years in the trial courts have taught me that the prosecutors are not good at judging what is material. Time and time again we see juries strenuously disagreeing with the prosecution's opinion about the significance of certain evidence shown clearly by acquittals and convictions or severely reduced charges. Just one case example shows as much.

I've represented David in a street robbery case. There were three eye witnesses, the victim and two bystanders. One bystander followed the thief and saw him go into a building. A few minutes later he saw David emerge and the police then stopped David, as a bystander's behest, finding on David the stolen laptop. But both the victim and the other bystander told police that David was not the thief.

Despite the fact that two out of three eye witnesses exonerated David of the robbery, the state insisted on prosecuting and would only settle if David pled guilty to robbery for a five-year prison sentence.

We went to trial, and David, without testifying, thus, on the strength of the two eye witnesses, was acquitted. Apparently the DA's office did not think that

the testimony of two exonerating witnesses was material. That it would affect the outcome of the case. The jury obviously disagreed.

As the Court of Appeal said just recently in Lewis, quote:

> "We think it worth reminding prosecutors that their criminal discovery obligations are broader than their Brady obligations. And that the People's interest is not to win convictions, but instead to ensure that justice is done."

The proposed Rule 5-110(d) will serve as another such reminder and help to ensure that juries hear all significant evidence as determined by the court, not solely by the prosecution. If prosecutors are to set justice as the goal, the rule should be about adopted.

I will turn now to the proposed Rule 5-110(a). The proposed revision in (a) should be rejected as it substitutes a subjective standard for an objective one. The current version of the Rule reads:

> "A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the

charges are not supported by probable cause.

If after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending."

The revised version makes two substantive changes. It eliminates the phase, "or should know." It changes, "knows or should know," to read simply, "knows." And second, it removes any kind of temporal reporting requirement. Both changes should be rejected in favor of the existing rule.

The individual prosecutor must be held to the standard of a reasonable prosecutor. Maintaining the existing knows or should know language ensures as much. Knows or reasonably should know would do the same. Both standards are used throughout the Rules of Professional Conduct.

For example, knows or should know is used to define member obligations in Rule 3-410, 5-210, 3-200 and 3-700. Knows or reasonably should know is used in Rule 1-311,

3-310, 5-120. So the State Bar Court has said that, quote, "an attorney simply may not adopt ostrich-like behavior to avoid his or her professional responsibilities." The revised rule can be interpreted to allow as much.

A prosecutor has a duty to seek, maintain and absorb information needed to be well-informed about cases. A prosecutor who fails to do so may act willfully or negligently. Neither can be sanctioned. But this is especially true given that the probable cause standard is so much lower than the criminal trial standard. It could indeed be credibly argued that a prosecutor should not be permitted to proceed to trial unless there is a reasonable belief and proof beyond a reasonable doubt.

That the model rules that knowledge can be inferred from the circumstances does not solve the problem. A negligent prosecutor could fail to do the work required to have an adequate level of knowledge about a case. That prosecutor would not know the case, and his knowledge could not be inferred from the circumstances without reference to a reasonable prosecutor standard.

MS. EDMON: Ms. Harris, you have one more minute.

MS. HARRIS: As it stands, the currently language, utilizing the knows or should know language makes clear that a prosecutor must act as a reasonable prosecutor should. And the requirement of prompt reporting when probable cause

does not exist makes clear that the state has a duty to act quickly to ensure that no one faces criminal charges when probable cause is lacking. The proposed revision of Rule 5-110(a) waters down an already minimal obligation, and should be rejected.

In conclusion, as this federal and state appellate court see it repeatedly necessary to remind prosecutors of their role in the system, the State Bar should do its part by adopted a clear rule, holding the prosecution to its discovery obligation. The proposed Rule 5-110(d) says exactly that and should be adopted.

Conversely, the current version of Rule 5-110(a) holds prosecutors to the standard of a minimally reasonable prosecutor and requires action without delay when a charged case is not supported by probable cause. These minimal obligations should not be tempered, and the proposed revision of Rule 5-110(a) should be rejected. Thank you.

MS. EDMON: All right. Thank you very much.

If I could ask, please, the folks on the telephone, if we could ask you to moot -- mute your phones. We are getting some feedback in the sound, so that it makes it difficult to hear. So if you could mute until we call you, that would be very helpful.

I'm going to take the prerogative here of the chair just for a moment to acknowledge some additional

Commission members who are in the audience. We have with us Bob Kehr (phonetic), with Tobi Inlender (phonetic) who is our public member. We also have with us Jason Lee (phonetic), who is our liaison to the Board of Trustees. And finally, Randy Difuntorum, who is the Director of the Office of Professional Competence at the State Bar, and he is the lead staff for the Commission. So thank you all very much for being here as well.

On that note, Lauren.

MS. MCCURDY: Okay. We're going to go ahead and turn to San Francisco because that registrant is here. And so, go ahead, Richard Falk (phonetic).

MR. FALK: Okay. I'm involved in -- I'm here to comment on proposing a new rule for prosecutors. And it's based on the code for the Crown Prosecutors in the case. In their system it's 6.3 that says:

> "Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few."

The same way, they should never go ahead with a mysterious charge just to encourage a defendant to plead guilty to a less serious one.

The purpose of that rule, and I'm proposing that rule to be incorporated into our system, is primarily the

problems with the plea bargaining process. There are dozens if not hundreds of papers on the plea bargaining process and the problems with it. And I have listed just a few of them, and I want to just read a few statements from some of them, just to get some flavor of aptitude supporting why the rule would be important.

One is from Judge Rakoff that wrote:

> "The drama inherent is regularly portrayed in movies and television programs as an open battle played out in public before a judge and jury..."

In other words, trial.

> "...but this is all a mirage. In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone."

There are in, of course, some of the papers, there's one called, "Incompetent Plea Bargaining and Extrajudicial Reforms" by Stephos Bibas. And in there, it's just a short quote, but:

> "Today grand juries are rubber stamped. The chief juries are absent in

most cases, and prosecutors use mandatory and minimum -- mandatory minimum and maximum sentences to try to scam. Charging is now convicting, which is sentencing. Plea bargaining itself has undermined these checks and balances, and judges need to use their remedial powers to restore some semblance of balance, however imperfect."

Another paper, (indiscernible), we can have defendants who plead guilty, by John Blume and Rebecca Helm from Cornell Law School University. Just one sentence I want to quote:

"In today's plea-driven market, prosecutors have incentives to overcharge in order to start bidding, so to speak."

Let's see. There were studies done for what happens in a plea bargaining process. There was a study that Etchings (phonetic) and Durbin (phonetic) had set up at -- I'm not sure which university it was. But they had college students enrolled in a logic study.

If a student admitted that they cheated, they would lose their promised compensation for participating in

the study. If they didn't admit, and an academic review board found them guilty, they'd not only lose their compensation but their faculty advisor would be informed, and they'd be enrolled in mandatory ethics course.

The first setting, over half, 56.4-percent of the students were wrongfully accused of cheating chose to plead guilty. So -- because part of the difficulty is, after-the-fact it's difficult to discover the true number of innocent people that have been, you know, plead guilty, unless there's evidence clearing undoubtedly nothing -- you know, something unusual. So these studies that there doesn't seem (indiscernible).

Another paper, Why Should Prosecutors "Seek Justice"?, from Bruce Green. I think this is the one that's historical -- yeah. This one is -- so what I did is I looked back in history to find out when did things start getting, you know, turning to be more of a problem.

And this paper was from 1998, and it wasn't as bad then, apparently, because the characteristic of plea bargaining in the system was such where many prosecutors took pride in the balance of the role that they had and the power that they had. And in seeking justice, which, of course, is a duty of prosecutors.

But there were hints in that paper of issues with the plea bargaining coming up, and the paper basically was

trying to go through the history of where the power of the prosecutor comes from and what they represent, how they represent the government and --

"Because the prosecutors are not themselves the client, but merely representatives of the deponent, they must act in accordance with the client's objective..."

I'm quoting now,

"...as reflected in the constitution and statutes, as well as history and tradition. Thus, prosecutors are expected to employ judgment and restraint in making these decisions no matter that the principals governing the prosecutor's decision-making, for example, principals of equal treatment and proportionality, which are unrelated to the prosecutor's superior power, may be elusive and ill-defined."

There was another quote. I don't have it in front of me, but was one that I note that the -- it basically commented that the limitations of the prosecutorial power, particular with respect to the plea bargaining process and not over-charging as well, is lacking, sorely lacking in the

Rules of Professional Conduct. And I would -- but I don't have that here, so I apologize for that.

The other thing I looked up was the F.B.I. statistic for the percent of crimes cleared by arrest or exceptional means, and it varies by the type of crime, anywhere from 11-percent to 62-percent. So the point there that I'm making, is that it's not as if we're actually solving all crimes, and that the power for plea bargaining is, you know, a necessary element. A lot of crimes go unsolved.

So if you're going to have a legal system, let's have it be fair, and let's have it do it right. And if you miss, you know, the few criminals, because you don't have sufficient evidence, you know, get away with it, you know, odds are that career criminals will try it again and they'll get caught the next time. That's basically what (indiscernible). So, it's better to do that than to have innocent people plead guilty and go to jail and so on.

So, that is the extent of my comments, except for to say that I personally experienced this issue, not from plea bargaining myself, but from being a juror on a jury trial. I did make similar comments with that regard back in 2006 in the rules of professional conduct hearing at that time. There were other rules being looked at the time, but this, the basic issues there were, there's a focus on

winning cases, and that focus, when you take it extremes, is, it's abusive.

The personal extremes I had was that the jury trial, as a member of the jury, and there were 56 counts initially that the prosecutor had put forth. And, fortunately, the judge by the end of the trial threw out 48 of those. (Indiscernible) but how long was taken to go through all those?

They were -- particularly to these other 48 that were thrown out, were certain types of securities law, and it was being applied in a somewhat extreme ways or unusual way that knocked them down to (indiscernible). So, if you gave it some measure of the extreme way that prosecutors would throw out their charges and, you know, the person in the --

(Phone-in callers coming in over phone.)

UNIDENTIFIED SPEAKER: Yeah, but I left it over at the new place.

MR. FALK: Okay. Somebody's on the --

MS. EDMON: Let me ask again, please. If you could mute your lines. We're hearing voices.

You may proceed, Mr. Falk.

MR. FALK: So the defendant in this case had -- was a, what do I call it, a secondary player. It was a huge securities law, like a billion-dollar valuation in the

internet case. There was a main person or a main person that pled, and only got 14 months. Whereas, this person, the book was thrown at them even though they were secondary player, primarily because she had the -- was able to on the side collect money, and I think the prosecutor was trying to recover money. It didn't work, but it just, it showed -- as a jury member, you know, we're all looking at it just like, this really unfair, and the prosecutors were abusing their power. So that was back in early 2006.

So, that's the extent of my comments. Please consider all future -- you should look at the rest of the Crown Rules as well. This is just one I picked out that fit very nicely and very (indiscernible). The whole Crown Rules and the way they deal with prosecutors and stuff, I think should be looked at. Thank you very much. Do you have any questions?

MS. EDMON: I think we have none. Thank you very much.

MR. FALK: Okay.

MS. MCCURDY: In Los Angeles, our next speaker is Stacy Ludwig.

MS. LUDWIG: Good morning. I am Stacy Ludwig. I am the head of the Department of Justice's Professional Responsibility Advisory Office. That's the U.S. Department of Justice. And our office is responsible for providing

advice and training to all, approximately 10,500 Department of Justice attorneys --

MR. BROWN: I'm sorry to burst in, but on the phone we can't hear anything.

MS. EDMON: Okay. If I could ask you --

MR. BROWN: And I'll go back on mute.

MS. EDMON: Thank you.

If I could ask you to speak up, Ms. Ludwig.

MS. LUDWIG: Okay. Do you want me to start again because they didn't --

MS. EDMON: Why don't you do that, and if you could maybe raise your mic a bit, that might help.

MS. LUDWIG: My name is Stacy Ludwig. I am the head of the U.S. Department of Justice's Professional Responsibility Advisory Office. And our office is responsible for providing all Department of Justice attorneys, approximately 10,500 attorneys, advice and training on the State Rules of Professional Conduct.

And having worked myself in the professional responsibility arena for a number of years on committees like the one today, I certainly appreciate the challenges that the committee has in trying to assimilate all the various concerns and try to come up with a proposed rule that really balances all of the relevant interest.

The Department supports the alternative version of

proposed Rule 5-110(d). The -- we believe the alternative version better satisfies the policy considerations and guiding principles set forth by the California Supreme Court and the Commission's charter. It creates clear and enforceable disciplinary standards by linking ethical obligations to substantive legal obligations whether imposed by the California Supreme Court or under federal law.

It accounts for the differences between state and federal substantive disclosure law. And to the extent that the California law requires disclosure of favorable information without regard to materiality, the alternate version enforces that requirement. It also properly incorporates applicable federal standards and holds prosecutors accountable for adhering to those standards.

The alternate version eliminates ambiguities and uncertainties by using language that provides specific guidance, whereas the proposed rule conflicts with carefully balanced federal law, and uses undefined terms. The alternate version uses precise terms that are tied to substantive legal requirements and the case law interpreting those requirements.

In contrast, the proposed rule uses vague and undefined terms, "tends to negate guilt, or mitigated the offense," without tying the terms to any specific definitions, so that will lead to uncertainty in

application.

The alternate version incorporates by specific reference a well-defined and developed body of law and accounts for evolution of substance of law over time. The alternate version also promotes confidence in the legal profession and the administration of justice, and provides adequate protection to the public by holding prosecutors personally accountable for failure to comply with their legal obligation.

Although we think the alternative version is the better choice, if the Commission determines to adopt the proposed 5-110(d), we respectfully request that it incorporate an intentionality requirement into the rule.

Although we understand that the rule's proponents do not intend for it -- the rule to be used as a tactical weapon against prosecutors, the risk exists, especially to federal prosecutors who have different obligations under federal law.

At least one court, the Wisconsin Supreme Court, in In Re Wright, has recognized the potential for abuse of the rule as a litigation tactic. Adding an intentionality requirement will avoid this, and also accord with the proponent's position that the rule is not intended to be a trap for well-meaning prosecutors.

There are three jurisdictions already, Alabama,

the District of Columbia and Massachusetts, that have or will have an intentionality requirement in the rule. In addition, although the Colorado rule does not have an intentionality requirement --

MR. BROWN: We're not able to hear anything on the audio conference.

MS. EDMON: Okay. Who is speaking?

MS. LUDWIG: Let me try --

MR. BROWN: Sorry. This is Robert Brown from the San Bernardino County District Attorney's Office. We cannot tell if anything is going on because we cannot hear anything.

MS. MCCURDY: Can you hear now? Can you hear it now? Hello? On the phone, can you tell me if you can hear my voice?

MR. BROWN: Now I can hear you.

MS. EDMON: But I don't hear the speaker.

MS. MCCURDY: Okay. We --

MR. BROWN: I can hear you speaking. We cannot hear anything at the moment still.

MS. MCCURDY: Okay. Let's try this again. We've got a riser on the mic. Go ahead. Sorry.

MS. EDMON: All right. We have replaced the mic. Ms. Ludwig.

MS. LUDWIG: Yes. As I was saying, there are

three jurisdictions, Alabama, the District of Columbia and Massachusetts, that have or will have an intentionality requirement in the rule. In addition, although the Colorado rule doesn't have an intentionality requirement, the court has read an intentionality requirement into the rule.

Other courts have also stated or suggested that prosecutors will not be disciplined absent a showing of intent, even where the rule itself does not contain an intentionality requirement.

In addition, it is not inconsistent to add a mens rea requirement to the rule. A number of the other proposed rules also contain an intentionality requirement, proposed Rule 1.1 on the duty of competence:

> "A lawyer shall not intentionally, recklessly, with gross negligence or repeatedly fail to perform legal services with competence..."

Proposed Rule 1.3:

> "...A lawyer shall not intentionally, recklessly, with gross negligence or repeatedly fail to act with reasonable diligence in representing a client..."

And also proposed Rule 8.4(c):

> "...It is professional misconduct

for a lawyer to engage in conduct involving dishonesty, fraud, deceit, reckless or intentional misrepresentation."

We also respectfully request adopting a safe-harbor provision to the rule. One that would recognize that prosecutors who make a reasonable decision under the circumstances will not be disciplined. Currently, the safe-harbor provision only applies to 5-110(g) and (h), and is found in a comment.

We think that substantive information should be in the rule itself, rather than simply in an interpretative comment, and there's no principal reason, we respectfully think, to exclude (d). Again, it accords with proponent's position that the rule is not intended to be a trap for well-meaning prosecutors.

And I also point out that another one of the proposed rules, proposed Rule 8.5(b)(2), that deals with the choice of law provision, and as we all know, is lawyer's choice of law, is very difficult at times to figure out. And that, I believe, is one of the reasons there is a safe-harbor provision, so that a lawyer who guesses wrong with respect to choice of law will not be disciplined.

Similarly, the decision with respect to precisely what information should be turned over, can be very

complicated. And likewise, there also should be a safe harbor to recognize that prosecutors who do their best job, and have a reasonable belief that they've turned over everything that should be turned over, should not be disciplined.

I also want to talk about another version -- part of the rule, and that is, proposed Rule 5-110(g) and (h). And the Department also supports the alternate version of those rules, because we also think that alternative versions of 5-110(g) and (h) better satisfy the policy considerations and guiding principals set forth by the California Supreme Court and the Commission's charter.

It creates a clear and enforceable disciplinary standard. It distinguishes between situations where a prosecutor is personally involved in a case, or the prosecutor's office is personally involved in the case, as opposed to the proposed rule, which may leave any prosecutor having to make the decision who does not have any knowledge of or access to information about the case.

The proposed rule also promotes disclosure by requiring a prosecutor to assume that evidence is true, and that the information should be evaluated only based on the element of the crime, of the convicted offense.

The proposed rule eliminates ambiguities and uncertainties. The proposed rule actually may undermine

disclosures by requiring prosecutors to make assessments about whether evidence is new, credible and material, terms which are not defined in the rule and comments. And such assessments may be impossible for prosecutors who do not have knowledge of or access to additional information about the case to make, for example, prosecutors in other jurisdictions.

We also think that all of the substantive information should be continued in the rule. The proposed rule relies too heavily on the comments to define a prosecutor's obligations, rather than incorporating all substantive information into the rule itself.

I think, importantly, that there are only two other jurisdictions that have adopted Model Rule 3.8(g) and (g) verbatim, that is, Idaho and West Virginia. There are approximately 12 other states that have adopted (g) and (h), but notably, those states have modified (g) and (h) because of the ambiguities in the rule and some of the impracticalities of the rule.

We ask that if the proposed rule is adopted, that the safe-harbor provision be included as a separate, enumerated provision of the rule, rather than included in the comment.

In conclusion, I'd like to say that the alternative version of 5-110(d) holds prosecutors personally

accountable for complying with their obligations to disclose exculpatory and impeachment evidence under carefully balanced state and federal law, and provided added flexibility by automatically incorporating any changes to the law as interpreted by the courts.

The alternative version of 5-1011(g) and (h) also avoids ambiguity and impracticality of the proposed rules and encourages prosecutors to disclose potentially exculpatory evidence to those persons who are in the best position to assess and act on the evidence.

We will address our points further in more detail in our written submissions. I thank you for allowing the Department of Justice to provide comments to you today.

MS. EDMON: Thank you very much.

MS. MCCURDY: We are going to turn to the phone participants, and the next speaker will be Mark Zahner.

Go ahead.

MR. ZAHNER: Hi. Can you hear me?

MS. MCCURDY: Yes.

MS. EDMON: We can.

MR. ZAHNER: Okay. Thank you. I'm Mark Zahner. I'm with the California District Attorneys Association, and I'm here representing the interests of the California District Attorney Offices throughout the State.

I am not going to reiterate everything that the

representatives from Department of Justice had to say, and I'm here really to address 5-110(b), but would -- I completely agree with the points that they brought up in regard to 5-110(d).

I think prosecutors up and down the state all understand that there is a desire for California to adopt new disciplinary rules. I am left sometimes with the impression that our position on this is being interpreted as, we don't think there should be a 5-110(b) at all. That's not the case. There's no problem with 5-110(b) as we asked to have it adopted in alternative two. But we feel that that is a very fair and easy to understand rule.

If I could reflect on the representative from the public defender's office -- had to say, she gave an example of a case where there may have been violations of California law in regard to discovery. And should alternative two be adopted, that person would be as amendable, would be completely amenable to discipline by the State Bar.

There is absolutely no desire on our part to escape discipline for following -- or for failing the follow California law. The only problem we have with the existing rule as it is currently written, is it introduces fundamentally a term of art, " tends to negate," and prosecutors are just left to try to interpret what that means. Does it mean Brady? Does it mean current California

case law? Does it mean 1054.1, to follow Barnett or Cordova?

Alternative two --

(Phone-in callers coming in over the phone.)

UNIDENTIFIED SPEAKER: We're not wrapping the glass stuff in the kitchen.

MR. ZAHNER: Okay. I wasn't thinking so, but that was -- I'll continue --

MS. EDMON: Okay.

MR. ZAHNER: There's a big roll.

MS. EDMON: Glass wrappers.

Folks --

MR. ZAHNER: Should I go on?

MS. EDMON: Folks on the telephone, we are hearing discussion in the background about glasses in the kitchen. And we really need you to try to mute your phones so that the speaker can be heard.

All right. You can proceed, Mr. Zahner.

MR. ZAHNER: Okay. Thank you very much.

Let me read where I was. So I -- the problem we had continued to have -- and we, too, are going to submit something in writing by the end of the month. It's really on our part a failure to understand the problem with alternative two. It seems to fit.

The Commission's desire is to have us follow

California law and understand that it means something beyond Brady, that it means what Barnett says, and what Cordova says and what 1054.1 and all the case law out there has to say. And that's absolutely acceptable. However, that's not what the current rule says. It establishes some other standard by which prosecutors have to act. And we see that as expanding California law, discovery law, through the disciplinary process, which I don't suspect this body really wants to do. That that's not their goal here.

So -- and, like I say, I really don't want to reiterate everything that everybody had to have said so far, but it seems that when this rule is interpreted in other jurisdictions, there are some jurisdictions that are saying, well, surely it means within the context of existing law. And then there are other jurisdictions that say, no, it doesn't mean within the context of existing law.

And so, just by looking at what other states have done with this rule so far, the states that have adopted this and had time to actually interpret what it means and have people brought up on disciplinary action.

There's ambiguity when you look nationally at what this rule even means unless it has that language that we're suggesting, which would put it in the context of existing case law. We think that it interjects ambiguity. It's unclear for prosecutors, who are left wondering, well, what

the heck do I do? Do I follow the law and then end up in trouble at the end of the day?

And that is, ultimately, an unfair and an unclear position for prosecutors to be in. Everybody wants prosecutors to be absolutely spot-on with the delivery of discovery, to make sure that everything that's legally required is delivered. And prosecutors, CDAA's, the elected district attorneys throughout the state have no objection to that, but that is not what is achieved with the adoption of the rule as it currently stands.

And we would just continue to urge the adoption of alternative two, or the content that was discussed previously of the safe harbor, and was discussed by the Commission some weeks ago and rejected. That would be an equally attractive alternative. And with that, I am done with my comments.

MS. EDMON: All right. Thank you very much, Mr. Zahner.

MR. ZAHNER: All right. And I'm going to go on mute and do nothing with it.

MS. EDMON: Thank you so much.

MS. MCCURDY: Okay. I don't believe there are currently any speakers in San Francisco. So we're going to return to Los Angeles, and then next speaker is Robert Belshaw.

MR. BELSHAW: Can you hear me? I want to make sure we're not having another problem here. Can I move this up a little bit?

MR. BROWN: I can hear you on the phone.

MR. BELSHAW: Okay. Okay. Thank you very much. I want to make sure you could hear me.

MS. EDMON: Thank you.

MR. BELSHAW: Yes. My name is Robert Belshaw. I'm a former Bar member. I resigned with pending charges in 2003. I served as an arbitrator, mediator, volunteering otherwise with the L.A. Superior Court. I was a judge pro tem on Englewood for short period of time.

And I'm bringing to you a little bit of a different perspective on this, because I'm a convicted felon. I cannot visit my daughter when she's in jail. I basically cannot work. I am eligible to return to State Bar, but mentally and other reasons, I'm not really able to do so right now.

I suffer from post traumatic stress disorder from having been molested in the county jail. So the reason why I submitted a rather lengthy, which you -- summary of what occurred, is because my case runs the gamut of Brady violations and other types of unethical conduct.

I do not want to repeat what other people have said here today. I certainly agree that the rules need to

be clarified, however, when you make too many rules, particular mens rea requirements and safe harbor requirements, that leaves things further open to interpretation. And district attorneys, with all due respect, they have ways of getting around those things. If you look at materiality, it's very easy for them to say, it was not material in many ways. So, obviously, I support whatever version that they have which will require prosecutors to pursue matters with probable cause and good faith.

I was arrested on 20 counts of insurance fraud. The police report clearly indicated that I had nothing whatsoever to do with the fraud. Even the masterminds behind the suits, swoop and squat accidents, wrote in the report, I had nothing to do with it. But as Mr. Falk pointed out, I was made to withstand charges. I had no prior Bar discipline. I resigned under pressure, and I was strapped with a Bar panel attorney, who I believe did not comply with Strickland. He basically teamed up with the prosecution.

So one of the things that I do mention in my summary is how jurists sometimes and prosecutors, they acquiesce in these Brady violations. One of the egregious things that happened in my case was subordination of perjury. And in Brady matters, it just does not mean

documents. It could mean witnesses. And there's a lot of Brady witness problems.

Typically, a prosecutor will offer some sort consideration, but tell them that they do know what the deal is until after they've testified. So when they testify, they testify that, no, I have not offered consideration yet, but it is a way to taint the testimony.

In my case, I personally witnessed two forms of attempted subordination of perjury, and one was by the district attorney himself. His name is in the papers that I have submitted.

Mid-trial I was seated in the hallway, and there were six insurance adjusters seated across the hall. And the district attorney asked them to testify that when they looked at medical reports, they always check the signature's validity. One the adjusters protested. He said, "we do not do that, sir." And I'm not -- I'm going to tell them that you're coaching me, because we do not do such a thing.

Ultimately, after a discussion -- it's in one of the exhibits here. I think it's Exhibit 6 or 7 -- one of those adjusters was allowed to testify to that fact. There was a discussion that he should not be allowed to testify to that, because it was not part and parcel of what adjusters do, and he did. He testified that he looks at signatures, which I believe was perjury.

Worse, I was brought to the district attorney's office with my attorney, and I was asked to testify against Mr. Davis (phonetic), who had committed the fraud. I was asked to testify that I knew something about the fraud, which I absolutely did not know. The masterminds had already basically said, Mr. Belshaw had nothing whatsoever to do with this.

I was eventually acquitted on those counts, however, I was told, you're going to testify on Mr. Davis about the fraud counts. Well, obviously, I did not accept. Later on I found out I was supposed to receive three years in prison. Ultimately I served a seven-year-eight-month sentence.

This brings Brady into account again. There were $330,000 of checks which were forged by my office manager, Mr. Davis. Exhibit 9, there's a handwriting expert report, clearly showing they were not my signatures, at least the ones we were able to analyze, however, the $330,000 in checks were never turned over the prosecution.

Even if you look at Exhibit 6, I wrote to not only -- I wrote to the city attorney and the district attorney that were handling the habeas and the appeal. And they wrote a letter back saying, you're not entitled to pretrial discovery. All I wanted was those checks.

Instead, spreadsheets came into evidence listing

those checks as my having received them. My attorney did object. If you look, I think at Exhibit 5, you'll see he objected. This was the best evidence rule issue. And the trial judge said, well, look, with so many checks, we can assume that he authorized the signatures on the checks. So there was not one handwriting expert at trial, including my own.

One day in court my handwriting expert comes to testify. Right in front of the jury, the foreman is sitting right there. My lawyer walks up and says, here's the handwriting report. I'm sending the expert home as we agreed. I know the jury foreman heard it, because she sort of blinked.

And then if you look at Exhibit 11, the trial judge right in front of the jury says, "ladies and gentlemen, due to the state of the evidence, we're sending that witness home." Why is that important? Well, what it means is, the jury knows now or thinks now that the expert is not favorable. And what did my lawyer do in opening? He promised my testimony. Then, when we refused to allow me to do so, it was withdrawn.

So, in Exhibit 10, I bring up various ways in which the prosecutor in his summation subverted justice. By telling the court evidence of forgery should have come from the witness stand. Well, obviously, prosecutors can comment

on the state of the evidence or lack thereof. What they cannot do or should not do is violate Griffin by indirectly saying that I should have testified when, of course, a jury instruction so prohibits.

So, my case came from lack of probable cause and all sorts of subtle violations of Brady throughout. There was a missing witness I referred to, that nobody knew where to find, despite three years' of investigation that certainly would have cleared me.

What do -- what need the prosecutors do? Well, they have to delve in a little deeper than becoming an ostrich, as Ms. Hernandez pointed out. There should probably be some sort of a mens rea requirement. There should probably be some sort of safe harbor perhaps. But, again, this brings an additional issue, additional definitions we have to make. And by the time they get through the federal courts, you have a severe problem.

What I am mostly concerned about is the time it takes to resolve all of these problems. It took six years for the federal court to basically shoo my habeas corpus petition aside, while I waited for six years of that. It is the harm that is caused to people.

Here I am a former Bar member that had a perfect record. Had no problems. Who had to go to fire camp and fight fires up there at the age of 58, to be able to get out

at an earlier time.

And a couple of other things here I did note in my suggestions. I believe Bar panel attorneys, this I think relates somewhat to the amount of charges. Bar panel attorneys are not always competent because many of them have private practices, as my attorney did.

As it turned out, my lawyer had a period of seven years' experience. He was a former prosecutor when the Bar panel president told me on the phone that I should have had a lawyer who had at least 15 or 20 years of experience, because this was an extremely protracted and complicated case, with 200 pages of documents. And he said, I can't understand how this person became appointed to you.

So, the tendency is, and I think this relates to somewhat what Mr. Falk was saying, this leads to plea bargains, because when your own attorney will not put you on the witness stand. Imagine. He says I would make a poor witness.

Now, imagine. He's telling me, I'm not going to question you. Am I supposed to ask the questions of myself in front of the jury? I had to sit behind my lawyer, which, by the way, is a violation of law, during the entire time.

So, when you go through all of these problems, I think Bar panel attorneys are often not competent because they have private practices, and that causes corner cutting

or dealing, like my attorney did with the prosecutor in that manner. The way -- I think it was, it was very poorly handled.

So, you know, I would suggest, one thing I did suggest in my paperwork, I do so today -- I don't know how much time I have. But when I was in prison I was very glad to have helped some other inmates that had Brady problems. I know I shouldn't have been practicing law, I suppose, that I was or was not, and three of them got relief because I saw the problem.

The problem has to be seen early, and sometimes when attorneys and some trial judges acquiesce in this behavior, where does the ZQ's (phonetic) go for relief. They often don't have anyplace to go.

My family didn't come to the trial because they were all busy. My own lawyer is a Bar member, who was involved in a eight-week trial and couldn't come. So you can imagine my feeling when I didn't get help during the case. I could have demanded to testify. I did not.

There was -- as far as the remainder of 5-110(d) and (g), whatever -- where a prosecutor must right a wrong should he see it, I suffered a four-year money laundering enhancement that was added at the behest of Judge Ann Jones, who handled the preliminary hearing. She said, mister -- why is Mr. Belshaw not charged with money laundering,

because Mr. Davis is? He says, "I'm sorry, your Honor." She says, "I want you to add those charges."

So Judge Ann Jones on the record advised the prosecutor to add those charges, and I suffered a three-year tax sentence on money that I never received, plus a four-year money laundering enhancement that my co-defendant should have received, because all the money went into his pockets. And I thought the prosecutor should have intervened, because I know that was not justice.

And this ties in with the offer. Because I refused to take the offer, what happens? Well, now you're going to get a worse sentence. I believe that was malicious on his part, because as the jurors on the bench know, a judge may not punish a suspect or an accused by giving them a larger sentence for having refused a deal, which is what happened indirectly here.

So, obviously, you cannot -- should not be able to do indirectly what you couldn't do directly. And I think that's what happened here. So --

MS. MCCURDY: Mr. Belshaw, if you can wrap it up.

MR. BELSHAW: Good. I will wrap it up.

I really appreciate this. I had no idea I was going to be here. How I got to the Bar web site was a total accident. But I'm a victim. And I propose some sort of a hotline. There's got to be some way that Brady violations

can be cut off early in the game, so that people don't suffer, and their families don't suffer such an egregious loss over a period of time. And I'm still suffering from it.

So, I know I came at this at a little different angle than the other people that have studied the law a little carefully than I have. I haven't researched the proposed alternates as much as I probably should have. But in conjunction with what the people have said today, actually I'm in agreement with most of it. Thank you.

MS. EDMON: Thank you very much.

MR. BELSHAW: You're welcome.

MS. MCCURDY: Okay. We are going to turn to the phone, and our next speaker is Ignacio Hernandez.

Go ahead. Mr. Hernandez, are you on the line? Okay. It's possible he dropped. So we will go to San Francisco. I understand there is a speaker there now. And I will call Royal Glaude.

Go ahead.

MR. GLAUDE: I'd like to start off with --

MS. MCCURDY: Sir. Mr. Glaude, can you speak and make sure that --

UNIDENTIFIED SPEAKER: Is the microphone off?

MS. MCCURDY: Yeah, it's below.

UNIDENTIFIED SPEAKER: That helps.

MS. MCCURDY: Go ahead. Thank you.

MR. GLAUDE: First off I'd like to thank (indiscernible war, and speak not as a reverend (indiscernible) stick to our plan, (indiscernible), middle of the bar, my own topic. And I'm glad I'm (indiscernible) this came before me for a number of reasons. But it's hard to be on the same page with most professionals, but I know a couple lawyers and realtors. They know the system especially.

But I want to start off with Judge Honorable Mark Stoner, Chair of the Assembly of the Judicial Committee. And in July 6th, 2015, he had done some stuff. I found about this here (indiscernible). So, in the process of doing this, we all started (indiscernible) is because what we're dealing with is a (indiscernible). And in the processes of (indiscernible) it came from the (indiscernible) regarding the California State Bar, that it is not consistently protected the public. Now that's why I'm, I really expressing concerns, especially what's really going (indiscernible). Okay.

And then, the disciplinary process, one concern that I had when I ran across this hearing, is that there was already a rule 5-110, and this is dealing with members of the Bar who work in Government service. And everybody was looking at (indiscernible). It was (indiscernible) been

decided. And they already have a rule. And that rule is 5-200. An attorney (indiscernible) and I went to some other attorney (indiscernible) heard about this (indiscernible).

Now an attorney goes before the bench, and there's a disrespect for the tribunal, he or she is (indiscernible) to be a judge. That's already a violation. And the reason why I'm saying that is, is because I'm seeing that when we're looking at this other stuff, that was on the State Bar about this new draft and everything, I could understand this stuff to a certain extent. But I'm a little confused why they have the State Bar Court.

And I believe that (indiscernible) State Bar (indiscernible) so you have like (indiscernible) whatever they do in the State Bar Court. Initially beyond that is (indiscernible) intertwining that with the public. (indiscernible) greater than this. Okay.

And the reason why I'm saying that is that I ran across this on a discussion (indiscernible), number one, and it said a prosecutor had the responsibility of a master of justice, and not typically that of an adversary. Okay. (indiscernible) regular citizen under (indiscernible) some of these (indiscernible) are doing it (indiscernible). That I kind of learned a lot from them. Okay.

So, when I look at that discussion one, I (indiscernible) our trials. And I want you to understand

something on there. So what I get is that I -- here's what he told me. (indiscernible) new age of being (indiscernible), really causes it all when you get to the (indiscernible), and, essentially, of doing what this attorney (indiscernible) a while back. And then I thought about. And I just looked the other day, yesterday, last night, and I looked up the Goldberg war trials. The minister (indiscernible).

I'll tell you the reason I bring this up here. Because (indiscernible) it's really that the attorneys (indiscernible) State Bar really are also ministers of justice, because that's what we advocate. And then for me, as a layman, I think they're staying, a minister of justice is (indiscernible) State Bar. And when you hold a public position you have other (indiscernible) State Bar offices. They (indiscernible). And I looked at those (indiscernible) you get there by (indiscernible) in their cars getting (indiscernible) what they got.

So I looked at this (indiscernible) I was told to look at the Lowenberg (phonetic) trial. I was going to read a small portion of it. And the purpose of reading this, it goes with the last (indiscernible) mystery of justice. And he is (indiscernible) prison (indiscernible) and that did affect the officials of the ministry of prosecutors and judges.

The basic principals control conduct within the ministry of justice. I understand they have the separation of power. They've got the Legislature and Congress doing their laws.

I agreed with Judge Stall (phonetic) when he says that these matters don't need the Attorney General's Office to (indiscernible), just be in the personnel's office. That prosecuting private citizen, they're dealing with all the time. And that's why I look at that and think, wow, that's (indiscernible).

So, I told her get in touch with the State of California Attorney General's Office. When it deals with that stuff, you know, they can't really get into something that deals with the State Bar. You know, the legislature makes laws. But it does refer to the fact that both -- we have a system of checks and balances.

And in the process of doing that, we have the California Constitution. It's a declaration of one -- there's 28 (indiscernible) this is going through Brady. They have a right talented -- you guys are definitely planted here for the American citizen. But turning to the Government rights (indiscernible) the evidence. Okay. And that's part of the California Constitution.

So I look at the (indiscernible) office. And the AD says, yeah, we understand that, but we have no

jurisdiction over the State Bar. Where because. So that, therefore, they do have jurisdiction, but not in that level.

So we have the 14th Amendment that should deal with your processes and also raise -- and it was taken from the (indiscernible) to the limit, which supports the declaration for review of the State of California people of the -- limited to the State Bar, who say, well, we're going to protect the public.

There's a -- I believe the law will tell you, the law (indiscernible). I also believe that attorneys desire just enough to be around something (indiscernible). They know (indiscernible) so that the public rushing in.

There's a Title 18 Section 242, and that's deprivation of rights under color of law. Okay. And when you're dealing with these situations, these situations themselves, it's obvious, and we'd all have to raise a foul because -- over at the State Bar, and (indiscernible).

So I think those things would grow old (indiscernible). Then it turns (indiscernible). What we have to say about courthouse time. I think you (indiscernible) has to go to an investigation will cause a worse problem, and I was looking partially to me when I looked at it. No thought reaches from the objection of the State Bar -- not the necessary Bar, but as a shill in this case, those accounts will spring forth that are stuck in

2000. Now, those are understood.

Some of the guys, like (indiscernible) guy, are (indiscernible) state laws, state laws and other stuff. And so they've got these guys here for (indiscernible) law (indiscernible) test drive. So, I think they're from the State Bar Court. And the State Bar Court should go -- can't properly prosecute, so it can't protect the loss of (indiscernible). It can't protect the laws of the (indiscernible), or can we protect the prosecution from the federal government? So I think it's kind of dangerous for the (indiscernible) and attitude to come together to make the laws.

But I do believe with Judge Stoll, Judge Stoll on the judiciary committee, that a certain something with the Attorney General's Office, mainly separate administrative law of the Supreme Court from the private law practices of the Executive Office. Okay. If we have to go set up a ruckus, then it should go to the Federal Bureau of Investigation, because they're going to have jurisdiction over the Bar. That's important to that side, there was a power (indiscernible). And that's why I mention so many things, because that's why we got (indiscernible).

And so, are we at the entrance of simple things? I'm all done. I mean, I've got to repeat everything for the paperwork. I believe evidence brought up against our

military and our veterans (indiscernible). When it goes through (indiscernible), they (indiscernible). So I think the issue of it is (indiscernible), you need to address these issues, and you've got a job here.

I know there's a lot I don't know, but I know this doesn't (indiscernible). You don't want to cater to him. This guy is pink. What I just do (indiscernible), black is pink. And now we'd better turn it to about races. I don't want to get too deep in this stuff, but there's (indiscernible). So that (indiscernible). If you guys have any questions, fine. (indiscernible) real quick what I have. But other than that, I'm (indiscernible).

MS. EDMON: All right. Thank you very much, Mr. Glaude.

MR. GLAUDE: Thank you.

MS. MCCURDY: Okay. Our next speaker will be in Los Angeles, and it is Jose Castenada (phonetic).

UNIDENTIFIED SPEAKER: Jose Castaneda. He's here. He's probably at the restroom.

MS. EDMON: Okay.

UNIDENTIFIED SPEAKER: I can (indiscernible) the work, so.

MS. MCCURDY: Did you? Okay. Well, we'll just, we'll go to the next speaker.

All right. Then we will move to Professor Laurie

Levenson.

MS. LEVENSON: Thank you very much. It's a pleasure to be back before this group, and I appreciate your patience each time I'm here.

As you know, I'm a professor at Loyola Law School. I am a former federal prosecutor. I am currently the director of Loyola's Project for the Innocent. All of these aspects play into my comments and my remarks today.

I was not here, but I had an associate take notes when U.S. Attorney Laura Duffy made her remarks, and I know that Mr. Cardona is on your panel. And I know that she mentioned that she was there on behalf of four U.S. attorneys.

I have now submitted, I hope you have in your packet, a letter that is signed by, I think about 100 former federal and state prosecutors, including the former attorney general of California, the former district attorney of Los Angeles, six United States attorneys, four federal judges, a collection of state judges, and then, as you can see, former assistant United States attorneys and deputy district attorneys.

And all of these people signed on for alternative one. Because, frankly, they understand why this makes a difference. It makes a difference to take out of the equation prosecutors making materiality decisions, because

they make mistakes all the time. And those mistakes cost people their freedom.

I do not want to, and never have wanted to make this proposal about prosecutors versus defense lawyers. I have enormous respect for prosecutors on the federal and state side. But when I look at the leaders of our criminal justice community, and I am sure that every member of this panel will recognize names on those letters, these are people that have dedicated their lives to our criminal justice system. And, frankly, it took me two days to get those signatures, and more are coming in.

It's because they know we have a problem, and we know we have a direct solution to that problem. It's the one we've been talking about for the last several months. I do appreciate that Ms. Ludwig came out from the Department of Justice to talk about the training and their perspective. But the truth is, is that her lawyers have not understood the law.

And I had hoped for and was surprised that she did not address the rash of misconduct and Brady violations that we've had right here in our own district, that have led to our judges, federal judges, head of the Ninth Circuit and otherwise, not only dismissing cases, but making a call for reform.

In terms of mens rea language, this Committee has

done an excellent job in drafting it. It does refer specifically that it has to be evidence known to the prosecutors. This is not a "gotcha" provision.

In terms of what else there needs to be, I hear that it's not simple enough. Well, it's a lot simpler than telling prosecutors, go look through all the case law you might find that you might think's controlling, and decide whether or not you can fit within a exception or not.

If "tends to negate" is not clear enough, maybe we want to use "any tendency to negate." But we don't want to move in the other direction of saying, you get to decide how material it is, because that's where the problem has been.

I also note the remarks by Mr. Mark Zahner today from the California District Attorneys Association. Again, they go to the words, "tends to negate," and I think it is actually far-fetched to claim that they don't know what those words mean.

Frankly, if that's what's happening, we're in real trouble. But it does reflect what we heard at our last hearing in San Francisco, where you had some prosecutors who said, sure, we understand the California law to being that we turn it all over.

And then we had representatives from our district attorney's office saying, no, no, no, it's the Brady standard, which is a post-conviction standard for having a

new trial. That's the one that goes into our discovery law.

We have submitted letters and briefs, and we've spoken to the fact of what California law provides. This panel will not be tampering with anything in California discovery law. What we have proposed does comport with the California Supreme Court's decisions in this area. So all prosecutors actually have to do is follow that, and not try to pouch it in language and materiality.

Ironically, I will end with this. While I've been in this hearing and listening to the remarks of colleagues, there was a news story that came across from Associated Press. And it reported that the number of exonerations went up yet again. We now have a record number. Over time that we know of, we've had 1,730 exonerations. And, again, what the statistics show is that 75- to 80-percent of those had this type of misconduct, Brady violations, or if the other side want to say, confusion, but I don't think it is.

I think that this ethic rule will make the move that is so essential to fair trials, which is to say to prosecutors, don't pretend to be defense lawyers. You're not good at it. That's what our letter, in fact, from all of these former prosecutors said. From the highest, to our judges, to those who are street prosecutors, we were not good at it, and that's why we support this rule. Thank you.

MS. EDMON: Thank you.

MS. MCCURDY: I'm going to turn to the phone, and just see if Ignacio -- sorry, Ignacio Hernandez is on the line. Okay. We are going to go to our next Los Angeles speaker, and that is Jose Castaneda.

MR. CASTANEDA: Good morning.

MS. EDMON: Good morning.

MR. CASTANEDA: Thank you for giving us the opportunity to address some of the issues. And when I obtained the revision rule, a special responsibilities, I saw that, you know, I do support this proposed rule, new version, but I also wish that some more could be done with the State Bar and the way they look at complaints by the public.

My attorney got disbarred on November 20th, 2014.

MR. BLUME: And he lost his case.

MR. CASTANEDA: And I lost all my cases. And I will -- I'm a vexatious litigant. And according to an order by Judge Daniel Buckley, my name is Jose Castaneda, also known as Mr. James Blume.

MR. BLUME: Okay. Hold on a second.

MR. CASTANEDA: And as you can see, we're both people.

MR. Blume: He was convicted of being a vexatious litigant, but he's not admitting to being one. See, that's part of the -- what we're talking about here, let's redo a

subject thesis or opening statement here.

Basically, what me and him are talking about is called, "judicial racketeering, judicial facilitation," using the courts to commit crimes and violating rights. So, no offense, I was laughing -- it was you, sir, because when you were at camp and stuff, you were set up, and -- yeah, you know. I'm probably one of the guys that set you up.

We do deals all the time in court. I'm a former police officer. I brang copies of my two badges. I have attorneys and judges calling me at home, telling me what they tell me to say, to get these people hooked, on or off. It's called, "judicial racketeering, judicial facilitation, judicial perversion and judicial treason." Or you could change it to administrate, if this is an administrative hearing.

Now, I'm -- a lot of you people are green, you're virgins. You really don't know what's going on. But when the judge is calling me at home and telling me to change my statement, there's something wrong here.

Mr. Castaneda, the reason why I'm talking with him, is I've been ordered to be Mr. Castaneda. So we have two Castaneda's here by court order, and we bring the exhibits. My Exhibit 1's, first of all, police officer. I'm a police officer for two law enforcement agencies, a former Marine with a security clearance. Because I was

stationed at El Toro, I got security clearance to be around jet fighters, bombs. I had to refuel them.

After that my country called me back again. Because I had the security clearance, I went to Army National Guard, became a counselor for the Army National Guard troops, okay. We put in the chaplain's office for suicides, everything else. I'd seen a lot of dead bodies in my life because I worked in the military, as well as policing.

I'm the guy that you will see in your -- I will testify under oath, underneath the penalty of perjury under Penal Code 118. I'm raising my right hand. And I'm going to tell you the truth, the whole truth and nothing but the truth, so help you God. Nobody here has done that.

To me, this whole thing's a joke, because if it's not underneath the penalty of perjury and under Penal Code 126, which states it's a felony, stating something that you know is a lie to anybody hearing a court, but we do it all the time. We commit fraud. What are you going to do about it? Not a thing. That's why I'm here for an FBR, a filer's bill of rights.

If something happens in any type of incident, and this is where you should go at. I don't care if it's criminal or civil, because there's all criminal acts in all courts. Criminal acts are committed in criminal court. I

could testify to that. I even got the proof. The difference between me and you is, I'm tired of the crap, okay.

I was on the news on Channel 11 trying to open this up. Judicial racketeering, judicial facilitation, judicial perversion of the laws, judicial treason, because I can't even get a jury trial. How can I serve in the Marine Corps, be a police officer, see this poor man, and I feel you, because I was there watching you in the camp. But you know what, so what? You should have bribed the judge. That's all you had to do.

Judge De Vanon on court documents, on court tapes -- and I hope this is being taped, but it doesn't matter because if you're Mexican, you can't get your tapes. It's federal law. Federal Rules of Civil Procedure. Who cares? The law only works if you pay for it, or if you bribe a judge. And if you're Mexican or Black, forget it. The rules don't even apply to you.

MR. CASTANEDA: He asked me for a bribe on record.

MR. BLUME: You get screwed up.

On his, the Judge asked him for a bribe. He said, no, so he lost his case. And then do you know what judicial stalking is? I want to change this law. You guys got to get a hold of this. They stalk you. So if one judge says, you don't pay up, then he keeps hearing all your motions

until you become a vexatious litigant. That's judicial entrapment. Hello. Why don't you just plant evidence on me? I mean, I'd laugh at this.

This is so funny. Because of my training, being shot twice, United States Marine Corps, United States Army, United States MP, because I love the country, I support it. And, you know, I'm over 50 years old and the Navy calls me. But now I'm not going to serve this country no more. I had it. I had it. You guys make me sick. If you're an attorney, you're a piece of shit -- excuse me. That's just my personal opinion. If you're a judge, you're a more piece of shit. I will never swear again allegiance to this country again, and I did it three times, but never again. I had it with you guys.

But I blame the attorneys and the judges and the politicians. And I blame you because you're not going after the -- I'm asking for an FBR. I'm not asking to retry my cases. I don't care, screw me. I don't care. I'm a Marine. We're worthless. We're supposed to be punished. We got nothing coming when we signed up and we knew it. But when you are coming here as judges, and you're sworn to uphold the law, and half you guys don't --

MR. CASTANEDA: I presented plenty of evidence in my cases against, obviously, Mr. Jack Conway (phonetic), and not only was he lying to different judges, he lying to

commission a jury, he lied to Judge Rita Miller. He lied to Judge De Vanon, Judge Simpson, Judge Pluim.

So this guy was lying repeatedly in every way, and I kept raising a, you know, I kept saying, I kept complaining, he's lying, he's lying. He was even lying about when I contracted him, and I have a contract dated December 17th, 2009 -- and '08.

On May 8, 2009, Judge Rita Miller placed him under oath, because the issue was a free speech case, where this attorney, Sonia Mercado had appear at my trial, and she was the one behind the accusation that I had stole millions from the estate of my brother.

My brother died in jail, and nothing was provided as far as how he died, you know. All of the sudden millions are missing, and I'm the one that is getting the point -- that I'm being blamed for it. When I complained, when I posted that on the internet, that's when the lawsuit came. But I had the great misfortune of paying him $10,000, and he did nothing except -- not even appear for the hearings, because he hired somebody else, Ivan Shulmer (phonetic), who contradicts what he was saying.

So, from what I learned from Mr. Blume, is that evidence doesn't lie. And when judges are ignoring that -- I mean, I'm just trying to remove myself from a vexatious litigant list, and I could not even get a hearing in the

superior court. Not one hearing, or not an evidentiary hearing.

In his case, they give him every single case that he filed, and 3,500 posting a security. In my case they wanted $50,000. Fifty-thousand dollars for a case. So the law gets manipulated in the civil courts as well. Not only in the criminal but --

MR. BLUME: What he's saying is, we both got convicted at the same time of being a vexatious litigant, okay, because they named me and him the same person. What judge would make a court order to say, Mr. Castaneda is also James Blume, and James Blume -- that's abuse of process, abuse of -- it's a court order. We'll show it to you. Please bring this in. Please.

And prosecute me for perjury. Bring it on. I'm a United States Marine. I mean what I say, and I say what I mean. I swear underneath the penalty of perjury in front of God and country, which you -- it just makes me so sick. Because if they make me a Mexican and lose my case -- and what does Donald Trump say? I mean, come on. Look at where this is really going, you guys.

Mexicans come over the border to what, to make crimes. They make me a Mexican, I'm losing all my cases. And I'm a former police officer. And sometimes I take cases, civil and criminal, and I help these people win,

because I know the law really well.

I graduated with 90-percent in the policy academy, and I also taught law enforcement classes. I have an AA Degree, a Bachelor's Degree. Mr. Castaneda has a Bachelor's Degree. And we're basically being screwed by tricks and tactics that we could use in the Bar, in the courts, by attorneys and judges in concert. I could show you so many tricks and tactics if you contact me. My number is (323) 663-1397. Please call me. I've got tons of evidence. I've even got judges that say, I can't appeal my own vexatious litigant. I've got it right here in writing.

MR. BELSHAW: Can you repeat that?

MR. BLUME: -- by Judge Buckley.

MR. BELSHAW: Can you repeat that?

MR. BLUME: (323) 663-1397. I've got a list of all the dirty judges, and what they asked of me to do when I was a police officer.

MR. BELSHAW: What is your name, sir?

MR. BLUME: My name is James Blume, United States Marine Corps.

MR. BELSHAW: How do you spell your last name?

MR. BLUME: B-L-U-M-E.

MR. BELSHAW: Okay. Thank you.

MR. BLUME: Sure. Call me and I'll give you a hand on some of this.

MR. CASTANEDA: Last, you know, the internet is giving us opportunity to see all the people that have been subjected to this type of behavior by officers of the court, you know, sworn officers, that they're supposed to adhere to the letter of the spirit of the law.

And it's really troubling to see that the State Bar fails so many times to even look at my case until now, Mr. Conway has finally been disbarred for a case that took place in Pasadena. He was lying to Judge Syed (phonetic) so that he was eligible to practice law.

The attorney that filed two cases for me, I also paid him 7,500. All he did was file two cases. So they take your money and run. The cases were settled, but, you know, what happens, you know?

MR. BLUME: This is important. The same common theme is, if you notice, everybody who files a court case, check with the original complaint. Follow these people. This isn't hard. This is elementary. The original complaint never matches the final decision. The judge has half the time their heads up their (sensored). It doesn't make sense, and there's something wrong.

MS. EDMON: Mr. Blume. Mr. Blume, I'm going to have to ask you to wrap it up.

MR. BLUME: Yes. Thank you.

MR. CASTANEDA: Go ahead.

MR. BLUME: Do you want me to do a closing -- MR. CASTANEDA: Go ahead.

MR. BLUME: Basically, ma'am, we know now it's -- and I feel for some of these people here. And, basically, we don't want to vent. You know, I feel sorry for you and, no offense, but I'm used to being, you know, always being jerked around.

But what we're tired of is -- and you've got to understand something. This is judicial or administrative treason. They're doing it all across the state. The same tricks, the same tactics. Attorneys, bait and switch of attorneys. Conway comes in. He decides not to, and he puts in another attorney. He doesn't even know what the case is about.

Lady, you've got to see some of these tricks and tactics used over and over again for just criminal. Please contact me. I'm glad you took my number. I could show you a list of these tricks. They bait and switch of evidence. They bait and switch of attorneys. They bait and switch of the actual -- from what you started in your complaint, they change it. They -- it's called judicial manipulation, while they do judicial facilitation. I mean, they're using -- I mean, one attorney told me, I just have to make up a fake case, bride the judge, and make money.

MS. EDMON: Mr. Blume, your time is up.

MR. BLUME: Thank you, ma'am. Thank you for having me.

MR. CASTANEDA: Thank you so much.

MS. EDMON: Thank you.

MS. MCCURDY: Okay. We -- our next speaker in Los Angeles is Michael Goodman.

MS. EDMON: Do you want to take a break? Well, Lauren, can you -- is there anybody else on the telephone? I don't know if there's anybody else who's not identified themselves yet.

MS. MCCURDY: We can check.

Anyone on the telephone who wishes to speak?

MS. EDMON: Okay. Thank you.

MS. MCCURDY: Michael Goodman.

MR. GOODMAN: Thank you. Good morning. I'm Michael Goodman. I'm the head deputy of the Appellate Division of the Los Angeles County Alternate Public Defender's Office, and I'm speaking today on behalf of the head of our department, Janice Fukai.

MS. EDMON: I'm sorry. Could you state your name again.

MR. GOODMAN: Michael Goodman. It's G-O-O-D-M-A-N.

MS. EDMON: Thank you very much.

MR. GOODMAN: We are in support of alternate one

of the revision of Rule 5-110(d). We believe that the alternate number two, which adds in a materiality requirement waters down the rule in a way that allows prosecutors to avoid the import of what this rule is intended to accomplish, and that is, primarily, I think really to give prosecutors an ethical reason, not just a legal reason, in order to provide discovery which is exculpatory in nature.

Allowing prosecutors to decide whether or not something is or is not material is a mistake. My office has over 200 lawyers. As the head of our appellate department, I get telephone calls on a daily basis for lawyers that are in pitched battles over discovery.

With prosecutors arguing something isn't material and doesn't need to be turned over, and defense lawyers routinely, ultimately getting that evidence and winning cases by virtue of being in possession of that evidence.

We have a very different view of what's material than what prosecutors do. And forcing prosecutors to look to case law to decide what is or is not material means that this rule will have no teeth. If we want a rule that's going to compel prosecutors to turn over evidence which is exculpatory in nature, we should take away any ability for that rule to be ambiguous.

We should just say, if it has an exculpatory value

at all, prosecutors should turn that over to the defense, and let the defense decide whether or not it's exculpatory to the defense or not, and let the defense decide whether or not it's material and should be presented at trial.

We don't have the same view of what's material that prosecutors do, and we shouldn't put prosecutors in a position of having to decide whether or not the defense will or won't decide something is material and should be presented at trial.

When evidence turns out not to be material and that evidence is withheld, that might be the reason why an appellate court chooses not to find harmful error, and not set aside a conviction. But it is only pretrial -- excuse me, prior to any appellate action in a case happening that a defense lawyer can take that evidence, investigate that evidence, and determine whether or not that evidence can be used in a way that is or is not beneficial to the defense.

We cant let prosecutors be the ones that decide a defense attorney should litigate his or her case, and we urge you to adopt alternate number one of Rule 5-110(d). Thank you.

MS. EDMON: Thank you very much.

We seem to have lost Lauren. And I think that the members of the panel may need to take a brief break. So let's take five minutes and then come back, and we'll talk

among ourselves about how we're going to proceed. Because there are still a fair number of speakers who have not been heard, and we need to figure out what we're going to do about lunch. And so, let's take a break and we'll get back together in five minutes.

(Proceedings recessed briefly.)

MS. EDMON: Again, thank you all very much.

And Lauren, I will ask you to call the next speaker, please.

MS. MCCURDY: Okay. I'm going to check again on the phone. We've returned. Is there anyone on the phone who would like to present comments? Okay.

In Los Angeles, the next person up is Peter Pierce.

MR. PIERCE: Good morning. I'm Peter Pierce and I'm a Senior Deputy District Attorney with the Orange County District Attorney's Office. I'm also on the Civic Action Committee of the Association of Orange County District Deputy Attorneys. Not surprisingly, we oppose the proposed change, alternative one. And the substantive reasons for that have been articulated not only today, but in the CDA letter to the Commission dated October 1st, 2015.

And in summary, we oppose the proposed changes because the revisions could subject state prosecutors or deputy DA's to disciplinary actions based upon new and

arbitrary standards that are not tethered to current statutory rules or case law.

But rather than echo the CDAA's detailed opposition letter, and echo the comments that have been made by my colleagues this morning, I would like to instead give the Commission a personal perspective of a career deputy DA.

As a Deputy DA and state prosecutor, one the key aspects of my job that I cherish is the requirement that I must play by the rules. And that I cannot obtain a conviction without honoring the rights of the accused by strict standards.

I bring up on a personal note that I currently serve, for the last five-and-a-half years, within our offices, white collar or major fraud unit. I have done that. I was sent to the unit -- or I came back to the unit in 2009 after a 15-month mobilization in the United States Army Reserve, which included a combat tour in Iraq in 2008.

I bring up my Iraq -- my service in Iraq, not to be self-righteous, or at least not to be entirely self-righteous, but to let the Commission know that I have seen what it's like for citizens to live in a military dictatorship or a police state.

And I thank goodness that the United States, the State of California, is not such a police state. And I take my responsibilities to the defense, especially discovery,

very seriously. And I submit that I am not unique as a state prosecutor, but that I am typical.

With all due respect to Judge Kozinski, I disagree with his assertion that Brady violations are rampant or systemic. I believe that the overwhelming majority of state prosecutors are honest, hardworking civil servants, who take their responsibility serious, and that includes the responsibilities to the accused, and including especially regarding discovery.

The proposed revision, as I've said earlier, could now subject these state prosecutors, these civil servants, to disciplinary sanctions based on an arbitrary standard not tied to case law or to statutory rules regarding discovery.

I can tell the Commission from first-hand experience, something they probably already know, that discovery in so-called "white collar" or major fraud cases is often extensive.

My last case, which ended just two weeks ago, involved almost 11,000 pages of discovery. The defendant's rights were honored, all his rights, including discovery rights. The discovery rights were not honored if the defendant's rights had not been honored or violated, his conviction could have been overturned.

Under the proposed changes, not only could his conviction already have been -- could have been overturned,

but because of an inadvertent discovery violation, and again, regarding 11,000 pages of discovery, by conceivably any member of the prosecution team, could potentially result in disciplinary actions against me.

And I must tell the Commission that it saddens me to think that there are members of our profession that think that such additional sanctions are needed against state prosecutors to safeguard the rights of the accused. I, we, do not believe that they are needed. They will, in the end, make our job, our already tough job harder, not easier, and our job is to seek justice.

Therefore, like my colleagues who have previously spoken this morning, I strongly urge the Commission not to adopt the proposed alternative one of 5-110(d) Rule, but rather to adopt its alternative. And I thank the Commission for its time today.

MS. EDMON: Thank you.

MS. MCCURDY: Okay. We're going to turn Marcella McLaughlin here in Los Angeles.

MS. MCLAUGHLIN: Good afternoon.

MS. EDMON: Good afternoon.

MS. MCLAUGHLIN: Thank you for this opportunity to speak to you. I am from the San Diego District Attorney's Office, and I represent that office today. I also have a letter that was prepared by District Attorney Bonnie

Dumanis, that I brought with me today, and will be submitted to you for your consideration.

I join in my colleagues' comments. Mr. Zahner and Ms. Duffy from the U.S. Attorney's Office, the woman -- I'm sorry, I forget her name, from Department of Justice, and Mr. Price (phonetic) who just spoke.

We certainly see the issues, we certainly see the policy considerations behind this, and what the Committee seeks to achieve. What we want is a rule that can be realistically applied and followed.

I, just by way of background, I'm a Deputy District Attorney. I'm the ethics coordinator for the District Attorney's Office. So I -- my role is to advise and train 300 deputy district attorneys as they seek to follow their ethical obligations as they do their jobs.

That's a job I only very, very recently came into, very timely for this issue. I stepped right into it, so to speak. But before that, I was a prosecutor. I've been a prosecutor for 16 years. I started out as a deputy city attorney, so I prosecuted everything from the lowest infraction to every garden variety misdemeanor you could think of, for five years, in the City Attorney's Office in San Diego, before coming to the District Attorney's Office where I've been for the last 11 years.

So I feel that I can speak with some experience as

to how this rule would really apply in the day-to-day life of a prosecutor, from the lowest case to the most serious and violent felony. And I do have some concerns, I really do, about that.

First and foremost in my mind as a prosecutor, is the right of the defendant to a fair trial, and his or her due process rights, it really is. But it is such a difficult rule, and you do accept that.

When you become a DA, you get it, you understand that that -- you have the highest responsibility in the room. And that you get to wear that white hat, but you have to carry the greatest responsibility there. And you're -- it's a very delicate balance of things throughout. It's a delicate balance of interests that we face.

And the whole time that you are seeking to ensure that this accused person gets a fair trial, you have to protect the interest of your victims, your witnesses, and the community.

And so, I recently spoke to -- the County Bar Association has an ethics committee, and they're currently reviewing this rule. And they may or may not be making a recommendation to the County Bar on the issue.

And had a very interesting and lively discussion with them about the application of the rule to my job. And some of them had some questions about it, you know, who had

never practiced in the area of criminal prosecution. And the feeling was, you know, what's so hard about it? You know, hey, just hand it over. You know, it's if exculpatory, you know, just hand it over, just give it to them.

And, you know, that seems to be kind of the feeling behind this rule of, you know, let's take it out of your hands. You're not in the best position as the prosecutor to decide what's material. Just give it to the defense, give it to the judge. Let them decide. They're in the best position to do it.

And I have to say, it does not give me comfort to have that decision taken away from me completely by this rule. Not because I want to -- because I'm fearful of being divested of that power, or I'm fearful that I will lose some sort of influence as a prosecutor, but because I understand what that means. That I will be subjecting people to harm. That, you know, people to us and they trust us with this.

That there is a abuser out there, there's a drug dealer out there, there's a violet criminal out there, and there are issues to consider when people come to you and they want you to prosecute a case. And they trust you to be that person to protect them from harm.

And so when you use terms in a rule like, tend to -- tend to -- I think Mr. Zahner pointed them out. When you

use words like -- sorry, "tends to negate" or "mitigate." And I'm a, you know, a prosecutor. I'm trying think about, you know, what those are going to mean, and I'm fast-forwarding to having to respond to an ethical violation.

And, for instance, it's a gangs case, and I have an incredibly violent gang member who's in custody for a serious offense. And I have a series of letters written by other inmates in custody about him, that are actually inculpating him.

They're actually all writing to me because the know he's being prosecuted, and they inculpating him for the offense, because they want probably some favorable treatment. And they want to get him in trouble.

And I'm reading these letters, and I'm thinking, hey, there's some information here that possibly his defense attorney might be able to use in some way down the line, that could somehow mitigate this offense. And I'm really thinking this through. Is that something I should disclose? But if I do that, that will put these people in incredible harm, because the person I'm prosecuting has incredible influence and power in the prison system.

And I'm obviously basing this -- you know, it's a hypothetical facts, but I'm basing this on true situations. And this case actually is probably going to settle. It's not going to trial because of the circumstances of this

defendant's case.

So, these are the scenarios I'm talking about that we're faced with every day. So, what we -- that is what we're dealing with here. And, you know, what we are really, really seeking here is a clear standard to follow, and we have those.

And I know what you keep hearing from us, from the different speakers against this rule and in support of alternate two, is that we have those standards. And, you know, by adopted alt two, by putting that into an ethical role which we currently don't have, you're sending that message.

We understand 1054. We have 1054.7 right now which we use. When we are in doubt, we go to the court under 1054.7, and we say, your Honor, we have something. It's -- we think it could be exculpatory. We want you to make the decision because it's sensitive. And if it's not, then we get a protective order and we deal with it that way.

So we understand Brady, Winters, Barnett and Cordova. And we also -- you know, you're sitting here and you're hearing these things anecdotally, but please put them in the context. You know, you heard about this exoneration report today from Mr. Levenson. You know, four, only four of those exonerations were in California. Only one of those was in federal court. You're hearing a lot of anecdotal

information.

And you hear about the famous case from Judge Kozinski, United States v. Olsen, and the line of cases that he cites. Only one of those cases was, I believe, a California case, Hubele Arribe (phonetic). And I do not believe that was intentional misconduct. It was a third party who had a video tape from a SART exam, that was not produced, and I do not believe that was intentional misconduct or withholding by the prosecution.

So, please, as a Committee, I urge you to please put this in the context of what the urgency really is around this issue, and think about that when you are considering what type of rule it is we really need.

It's very easy to sign on to a letter when you're not in the trenches, okay. When -- it's easy to say, yes, that sounds good to us, when you're not, you know, in there fighting the fight every day.

The letter that Ms. Dumanis submitted addresses this, my comments, also other things. There were some other parts of the rule, 5-110(b), 5-110(f) and -- (e) and (f), excuse me, that just seemed out of context and not based on any information I saw, or we could see, that were public policy issues or problems. You know, is there a rash of Sixth Amendment violations out there that prosecutors now need to sort of be tasked with addressing?

The extra judicial statements by police, again, we addressed that in our letter. Is that a problem that law enforcement is doing that? That is not something that I've seen, or that we've seen.

The abuse of subpoena power. That seems strange. I know that the State Bar is very concerned with public protection, and we respect and understand that, but that seemed more about protecting civil attorneys more than anything else.

So, in closing, we respectfully, again, we do seek to be ethical, we do seek to follow the rules. We respectfully ask though that we have a rule that we can realistically follow. And we thank you very much for your time today. Thank you.

MS. EDMON: Thank you.

MS. MCCURDY: Is there anyone on the telephone who would like to speak? Okay.

In Los Angeles our next speaker will be James Bloom (phonetic).

MR. BLUME: I already spoke.

MS. MCCURDY: Sorry.

MS. EDMON: Thank you.

MS. MCCURDY: Okay. I apologize if I mispronounce this. Is it Azar Elihu?

MS. ELIHU: Hello. My name is Azar Elihu. I am a

criminal defense lawyer in practice in good standing with the State Bar. I have been in practice since 2000. I serve as a volunteer arbitrator with L.A. County Bar, and with the State Bar, I hear fee disputes between clients and former lawyers.

And I have published several articles with the Daily Journal, California Lawyer Magazine. And my last article was also was published in the Criminal Law Journal of the State Bar regarding dismiss or expunge. That was based on my case in the Court of Appeal.

I am not as prepared as the rest of the speakers, as I saw the proposed rule in the California E-Bar Journal a couple days ago in the e-mail that I got. So, I printed out the rule 5-110 and I have suggestion regarding these rules.

First of all, the district attorney's office and the prosecutors are vested with excessive authority by the penal code, and often state court judges give in to those authorities, because perhaps they are concerned about the reelection.

Rule 5-110(a), first these rules are making it subjective, as there are no speakers mentioned. They make it too subjective and leaving room for evasion by the prosecutors.

Section (a):

"A prosecutor in a criminal case

shall refrain from prosecuting a charge that is not supported by probable cause..."

We should not leave the, whether it's supported by probable cause to the D.A. It should be a reasonable standard, the same way that US v. Strickland needs a competency of a lawyer based on an objective, reasonable standard. It's often cases are filed by the district attorney's office or city attorney that have no merit.

A few years ago I was representing a driver who was charged with hit and run. The case was filed, the court here. And the police report was devoid of any evidence implicating the driver. There were three passengers in the car and a pedestrian who had made statement in the police report that the police car drove and hit the driver, the defendant.

The case was assigned to the junior deputy D.A., and she would not give in. She was not willing to dismiss the case. I just -- my job is -- I do my job, you do your job. And I said, your job is to find the truth. And she was coming up with different deals, and I said, no deal. I like to put this case before the jury to see how the system work.

And on eight of 10 of the trial, a senior deputy walked in the court, profusely apologize and dismiss the

case. And she said, this case shouldn't have been charged. We see that, I would say not very often, but it happens a lot when cases have no merit.

And so, section (a) should be different from prosecuting a charge that is not supported by probable cause. A police officer may not know, but a filing deputy will definitely know if this case has merit. And when it excessively lack merit, it should not be charged.

Section (c):

> "...Not seek to obtain from unrepresented accused a waive of important pretrial right unless the tribunal has approved appearance of the accused in propria persona..."

This is fine. I have no problem with that. I join Mr. Mike Goodman, the APD, on section (d), that is too much -- too subjective.

Section (f):

> "...The prosecutor in a criminal case shall prevent persons under the supervision or direct of the prosecutor exercise reasonable care..."

Again, leaves them with some discretion and some room to nagivate through the misconduct. So, we should -- this rule should be enacted the same with the penal code.

They are narrowly tailored to promote justice and to apprise the defendant of the wrongdoing. The same way should be with these rules. They should be based on a reasonable standard and not subjective.

Section (h) should be amended to --

"...When a prosecutor knows by clear and convincing evidence that the defendant in the prosecutor jurisdiction is wrongfully convicted, the prosecutor shall seek promptly to remedy the conviction."

Promptly is -- should be a key word, because sometimes these wrongfully convicted defendants struggle for years in state and federal court to rectify the wrong.

At section seven on -- once the prosecutor knows by clear and convincing evidence that the defendant was wrongfully convicted, "the prosecutor must seek to," again, "promptly remedy the conviction."

Again, you know, I am handling a post-conviction case right now. It's from San Bernardino. And in that case, before trial, the co-defendant came forward. It was like a gang case. Said, "I did it. This guy didn't do it." The shooting. They were -- one was charged with conspiracy, the other was charged with attempted murder. With murder, and the co-defendant came forward, said, "I did this,"

before trial. No one listened. He didn't testify. His lawyer did not allow him to testify, the co-defendant.

The other defendant was convicted and he's serving 56 to life now. So now we have to open the case, get a new investigator to go around and to prove that the co-defendant, my client hasn't -- did not commit the crime.

Overall, the rules should change to just divest in general the prosecutors from so much authority. And to allow the defense lawyer, like to inspect the evidence, so they could decide whether the evidence is material, and not leave it on the discretion of the prosecutors. And they are very good prosecutors. I've deal with many, some of very -- most of them are very decent, very ethical, very professional.

And there are some, you know, unethical, that have been reprimanded. But, in general, when prosecutors commit serious misconduct, the State Bar will give them a slap on the wrist, compared to other lawyers who may commit some minor misconduct, like commingling the fund, and they may get disbarred. Submit. Thank you.

MS. EDMON: Thank you.

MS. MCCURDY: Is there anyone on the phone that wishes to address the panel?

Okay. In Los Angeles, the next speaker is Sue Frowen. Did I pronounce that --

MS. FROWEN: I never signed up to speak.

MS. MCCURDY: You didn't? You're just an observer? Okay.

Just to confirm, is there anyone in San Francisco?

UNIDENTIFIED SPEAKER: Not at this time.

MS. MCCURDY: Okay. Thank you, Randall.

Okay. Justice Edmon, do you want to adjourn temporarily?

MS. EDMON: All right. Thank you all very much for participating today in this very important process. Yes, sir, Mr. Castaneda?

MR. CASTANEDA: May I ask a question to the panel, if I may? Just one question. Very simple. It won't take more than one minute.

My understanding is that there are audio tapes in the court system, and that's from Mr. Gene Wzorek, who I've been in contact because he wrote a book called, "Death of the Justice System." And it pertained to the City of Chicago, Gene Wzorek v. the City of Chicago.

And what happened was, that they gave him, set him up for 350 -- $250,000. And when they went to appeal, everything changed. One of the law professors here in, I think it's Orange County, was involved in the case. He was the second -- he was the, I guess, the law clerk for Justice Stevens.

And Mr. Wzorek told me that he was the one that stole the tapes. When you have a question regarding something that was said in court, how do you go to the record if the court clerks -- the court transcripts are being changed? It's hard for the average person to even get a bite of the apple, so they say.

But the audio tapes, and my understanding from what he had was, that the 93 U.S. attorneys have control of those tapes. So it's regarding a case called, I guess, me versus officer of the court, where he was challenging what was being said in court in the transcripts and the tapes, so.

MS. EDMON: I'm sorry, Mr. Castenada. I don't think any of us have any information about that particular case.

MR. CASTANEDA: Thank you.

MS. EDMON: All right. At this point we are going to adjourn. I thank all of the speakers and attendees. It is now, just for the record, 12:28 p.m. And this public hearing is adjourned. Everybody have a good afternoon. Thank you very much for participating.

(Proceedings concluded.)

CERTIFICATION OF TRANSCRIBER

I, Holly Martens, do hereby certify that the foregoing 93-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript, to the best of my ability, of the hearing in the matter of Public Hearing on Revision of the Rules of Professional Conduct, held on February 3, 2016.

_____ _____

Date Transcriber

Attachment C:

Written Submissions from Public Hearing Speakers Who Testified at February 3, 2016 Public Hearing Concerning Proposed Rules 5-110 & 5-220

Robert Belshaw

1. "Testimony Summary of Robert Doran Belshaw, Bar No. 107661, before State Bar of California Rules Revision Committee, Wednesday, February 3, 2016, 845 S. Figueroa Street, Los Angeles"
2. Exhibits 1 - 11, Various excerpts from court transcripts concerning case against Mr. Belshaw, and correspondence between Mr. Belshaw and Edi Faal, Esq. (2/14/06); Thomas Hsieh, Deputy Attorney General, Los Angeles and Steven Cooley, Los Angeles County District Attorney (11/1/07); Irene Wakabayashi, Deputy District Attorney, Los Angeles County District Attorney (11/13/07); and Russell Bradford, Document Examiner, Bradford Document Examinations (1/24/05).

Jose Castenada

1. Supreme Court Order S221442 concerning disbarment of attorney Jack Kenneth Conway (*In re Jack Kenneth Conway*) (11/20/14)
2. Table showing court cases submitted and assigned to Judge Holly Kendig (11/01/11) and Judge Hickok (12/09/11)

Richard Falk

1. Book entitled "The Prosecutor in Transnational Perspective," by Erik Luna and Marianne L. Wade, New York: Oxford University Press, 2012
2. Excerpt from the Code for Crown Prosecutors, Selection of Charges, §§6.1 – 6.5
3. Article entitled "Plea Bargaining and the Innocent: It's up to the judges to restore balance." (source unknown)
4. Excerpt from article entitled "Incompetent Plea Bargaining and Extrajudicial Reforms," by Stephanos Bibas, 2012, The Supreme Court – Comments
5. Excerpt from article entitled "The Unexonerated: Factually Innocent Defendants Who Plead Guilty," by John H. Blume (Cornell Law School) and Rebecca K. Helm (Cornell University), 2014, Cornell Law Faculty Working Papers
6. Excerpt from article entitled "Why Should Prosecutors 'Seek Justice?,'" by Bruce A. Green, 1998, Fordham Urban Law Journal
7. Copy of webpage from U.S. Department of Justice, Federal Bureau of Investigation (FBI), Criminal Justice Information Services Division, entitled "Crime in the United States 2012, Uniform Crime Reports" concerning Clearances
8. Web post concerning wrongful convictions and the case of Brian Banks (source unknown)
9. Web post titled "Ira Glass: My 11 favorite episodes of 'This American Life'" reporting on a study by Florida Institute of Technology concerning the psychology of pleading guilty when innocent

Royal Glaude

1. Excerpt from California Rules of Professional Conduct containing text of Rule 5-110: Performing the Duty of Member in Government Service;
2. Excerpt from Rule 5-200 of the Rules of Professional Conduct
3. Excerpt from Proposed Rule 5-110: Special Responsibilities of a Prosecutor (10/23/15)
4. Excerpt from webpage concerning Nuremberg War Trials entitled "The Ministries Cases (The Nazi Judges Cases)" (2/2/16)
5. California Constitution, Article 1, Declaration of Rights
6. 14th Amendment to the United States Constitution
7. Cornell University Law School webpage re 18 U.S. Code §242 – Deprivation of rights under color of law
8. Letter dated July 6, 2015 from Robert Fellmeth, Executive Director, Center for Public Interest Law, University of San Diego School of Law, to Hon. Mark Stone, Chair, Assembly Judiciary Committee re SB 387 (Jackson) re State Bar Discipline System

Prof. Laurie Levenson

1. Letter dated 2/1/16 signed by 100 former state and federal prosecutors in support of proposed Rule 5-110, Alt. 1.

NOTE: These documents were submitted in connection with the testimony provided by these speakers at the February 3, 2016 public hearing, and are available upon request by contacting Lauren McCurdy, State Bar of California, Office of Professional Competence, San Francisco, CA 94105, lauren.mccurdy@calbar.ca.gov, or 415-538-2107.

Dissent of George S. Cardona From Proposed Rule 3.8

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

a. **Proposed Rule 3.8(d)**

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Drafting Team's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.[1] The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and

[1] I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

case law interpreting those authorities and the California and federal constitutions." The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for defining what constitutes information that "tends to negate the guilt of the accused or mitigates the offense. . . ." This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California's disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness's testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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 . . . ." As explained by the First Commission, its addition of the highlighted introductory clause was to clarify "that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law." This approach was based on the Commission's determination that ABA Model Rule 3.8(d) "was in conflict with California statutory law," in particular, "California statutory law that had been approved with the passage of Proposition 115 in 1991." This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission's proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence." The California Supreme Court has explained that this pretrial disclosure obligation is not limited to "just material exculpatory evidence," and that if, prior to trial, a defendant "can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." Barnett v. Superior Court, 50 Cal.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010).[2] For "exculpatory evidence," therefore, proposed Rule 3.8(d) and the California statutes appear to align. What constitutes "exculpatory evidence" falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

[2] At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and the showing required to demonstrate, post-trial, a violation of the prosecutor's duty to disclose exculpatory evidence: "The showing that defendants must make to establish a violation of the prosecution's duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence…. To prevail on a claim the prosecution violated this duty, defendants challenging a conviction … have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial." Id.

For example, in People v. Lewis, 240 Cal.App.4th 257, 192 Cal.Rptr.3d 460, 468 (2015), the court recognized that "whether exculpatory evidence includes impeachment evidence may be unsettled." (citing Kennedy v. Superior Court, 145 Cal.App. 4th 359, 378, 51 Cal.Rptr.3d 637 (2006).) If California courts ultimately conclude that impeachment evidence constitutes "exculpatory information" within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission's proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission's proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts' interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that "tends to negate the guilt of the accused" does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." California Penal Code § 1054(e).[3] The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

Finally, a primary driver to the Commission's recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976); see also Cone v. Bell, 556 U.S. 449, 470 n. 15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); Kyles v. Whitley, 514 U.S. 410, 439-40 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.") (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular "requires

[3] Similarly, California Penal Code § 1054.5(a) states that "[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the cas against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties."

disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-91 (1999)." United States Attorneys' Manual § 9-5.001(C).[4] As Mr. Eaton notes, it is simply wrong to say that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

b. Proposed Rule 3.8(e)

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is "essential" to successful completion of the prosecutor's investigation; and (3) there is no other "feasible" alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent. While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission's proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

First, while the Commission's proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors' use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be "essential" to the investigation and that there be "no other feasible alternative" for obtaining that

[4] In footnote 16 on page 22 of the Drafting Team's Report and Recommendation, the drafting team states, "The United States Attorney's Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA's broad interpretation of 3.8(d)." It is true that, as referenced above, the United States Attorney's Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA's interpretation of its Model Rule 3.8(d).

information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship. The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting "reasonably necessary" for "essential." As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: "It is a difficult, if not impossible, task to decide *ex ante* what evidence will be 'essential' to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of 'evidence reasonably necessary to the successful prosecution' is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution." The First Commission also modified subsection (3) by substituting "reasonable" for "feasible," explaining that this was "to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If 'feasible' means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If 'feasible' means that the alternative is reasonable, the more familiar term 'reasonable' should be used." Again, the First Commission's proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission's meetings, if there is uncertainty whether the First Commission's or ABA's balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission's recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA's more stringent limitation.

For all these reasons, I dissent from the Commission's recommendation of its proposed Rule 3.8(e).

DISSENT OF DANIEL E. EATON FROM RULE 3.8 AS ADOPTED

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar to "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."

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor's obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor's obligations in this area undoubtedly will "promote confidence in the legal profession and the administration of justice." (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be "necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice" and "where failure to promulgate the rule would result in the continuation of serious harm." (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project's several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission's charter.

Directive two of the Charter admonishes us to "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted "is not aspirational." That was flatly contradicted by the speaker those who argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism "to which all members of the profession should *aspire*." (Emphasis added.) Dean Uelmen added that a prosecutor's "aspirations" should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that "the primary purpose" of the rule, as the Commission ultimately adopted it, "is aspirational." Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: "Do we want a very simple *aspirational* standard?" (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to "help promote a national standard with respect to professional responsibility issues whenever possible." The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is "consistent [and coterminous] with the requirements of *Brady* and its progeny." (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *in re Attorney C.* (Colo. 2002) 47 P.3d 1167.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission's Charter says: "The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission's response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

There are two responses to the Commission's assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of

the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art, 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

RESPONSE TO DISSENTS REGARDING PROPOSED RULE 3.8(d)

Following consideration of the proposed rule at four meetings at which stakeholders were present and addressed the Commission, , the Commission voted 12-2 to adopt Proposed Rule 3.8(d). Although dissenting positions by Daniel Eaton and George Cardona were noted, they were rejected for the following reasons:

A. Response to Dissent of Daniel Eaton

First, Proposed Rule 3.8(d) is not aspirational. In fact, it is an effort to provide a clear articulation of the standard that some of the testifying prosecutors claimed they already follow. A major reason to adopt Alternative #1 for Rule 3.8(d) is to get all prosecutors on the same page and ensure the uniformity in discovery practices that will safeguard the integrity of the criminal process. As was evident at the October 23, 2015 Commission meeting, some District Attorneys' Offices claim that they disclose all evidence or information that would tend to negate the guilt of the accused or mitigate the offense, while others submitted letters arguing that they should be able to consider materiality in deciding what evidence to disclose. Under California law, prosecutors have a duty to disclose all exculpatory information, not just evidence they deem material.[1] Alternative #1 does not "aspire" to have prosecutors fulfill their ethical duties.[2] It plainly explains what that duty is.

For similar reasons, the Commission was not persuaded by the dissent's second argument that Alternative #1 to Rule 3.8(d) should not be adopted because a handful of jurisdictions have been flexible in defining a prosecutor's disclosure obligations. The Charter for this Commission plainly states that it should, among other things: (1) work to promote public confidence in the legal profession and the administration of justice, and ensure adequate protection to the public; (2) not set forth standards that are "purely" aspirational objectives; (3) focus on revisions that are necessary to eliminate differences between California's rules and the rules used by a preponderance of the states to help promote a national standard wherever possible; and (4) eliminate ambiguities and uncertainties.

Every other state in the nation, as well as the U.S. Department of Justice, has adopted the language of Alternative #1. No other jurisdiction has adopted the language of Alternative #2. This is for good reason. Alternative #2 sends prosecutors into the perpetual morass of trying to continually determine what so-called "relevant case law" might say about how, if at all, they

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[1] *People v. Cordova*, __ Cal. 4th __, 194 Cal.Rptr.3d 40, 2015 WL 6446488, *12 (Oct. 26, 2015) (California Penal Code § 1054.1, subdivision (e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny"). See also *Barnett v. Superior Court*, 50 Cal.4th 890, 901 (2010) (discovery of exculpatory evidence not governed by materiality).

[2] Mr. Eaton takes out of context Dean Gerald Uelmen's reference to "aspirational" standards. In context, Dean Uelmen was referring to his work as Executive Director of the 2008 California Commission on the Fair Administration of Justice. That Commission focused on prosecutors' widespread indifference to their discovery obligations and the need for more compliance. For years, Dean Uelmen, as well as other leaders of the California legal community, have sought to have prosecutors comply with their ethical and legal duties, including those involving discovery. As stated in oral comments at the Commission meetings, Public Defenders continue to face difficulty in getting prosecutors to comply with their discovery obligations. (Comments of Michael Ogul, President of California Public Defenders Association).

should consider materiality in deciding whether to disclose potentially exculpatory information. Alternative #2 seeks to limit pretrial discovery to only material disclosures as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). We rejected that standard, as has the California Supreme Court, because it is not a standard that was either designed or intended to govern a prosecutor's pretrial ethical duties for disclosing exculpatory information. To the contrary, it is a standard that governs whether a new trial should be granted after there has been a trial in which necessary disclosures were not made.

The Commission meetings at which stakeholders attended revealed that prosecutors either do not understand, or have been ignoring, their responsibility to provide exculpatory information to the defense. Contrary to what the dissent suggests, we do not expect that years of litigation will be needed to resolve how prosecutors can meet their obligations under Rule 3.8(d). Unlike Alternative #2 that requires perpetual analysis and reference to new case law, Alternative #1 plainly states that if information "tends to negate the guilt of the accused" or "mitigate the offense," it must be disclosed. This is an easy standard to understand and apply, as evidenced by the experience of the vast majority of states that have adopted the rule.

Commission members agreed that the public has lost confidence in our criminal justice system. With case after case of discovery violations that have led to wrongful convictions, there is a pressing need for a rule that does not signal to prosecutors that they should do their own analysis of materiality and case law before deciding whether to turn over potentially exculpatory information. Instead, the rule proposed by the overwhelming majority of the Commission, Alternative #1, will promote public confidence; it will set forth a concrete, not merely aspirational, ethical standard; and it will bring California into line with the rest of the nation. It will also eliminate the ambiguities and uncertainties that have led District Attorney Offices in this state to express conflicting views, like those that surfaced at the Commission meetings, about when they are required to disclose exculpatory information. In fact, written submissions to the Commission from the CDAA and from the Los Angeles County District Attorney both indicate that requiring turning over of information that does not meet the materiality test would be a major change in the law. The Supreme Court has held that the language of Alternative #1 is the current law of California as set forth in Penal Code § 1054.1(e) (requiring the disclosure of "any exculpatory evidence"), *Barnett v. Superior Court*, 50 Cal.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010) and *People v. Cordova*, __ Cal.4th __, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at *12 (2015) (decided 3 days after the Commission adopted Rule 3.8).

B. Response to Dissent of George S. Cardona

As noted above, the majority of the Commission believes that it is important to clarify that the standard for disclosure does not include prosecutors deciding the extent to which evidence that "tends to negate the guilt of the accused or mitigates the offense" is material to the case. Only Alternative #1 makes that clear. This dissent demonstrates exactly why it is necessary to set forth a clear standard for disclosure. Mr. Cardona poses questions of whether disclosure is required even if the prosecutor assumes that the evidence is trivial or of "minimal significance." California law has answered that question; it requires the disclosure of any exculpatory evidence, even if prosecutors do not believe it is of significance. As became evident in stakeholder input at Commission meetings, prosecutors are not in the best position to determine what evidence is or is not important to the defense. Thus, a clear rule of disclosure

will prevent prosecutors from making erroneous assessments of the exculpatory potential of evidence, as has occurred in the many cases brought to the Commission's attention. Contrary to what the dissent suggests, Proposed Rule 3.8(d) provides very clear guidance. The only problem is that some prosecutors do not like the guidance it provides.

Furthermore, the Commission determined that adoption of Proposed Rule 3.8(d) does not violate Proposition 115. As noted, California law already requires disclosure of "any exculpatory evidence" and the California Supreme Court has held that a defendant is entitled to such evidence without having to show its materiality. *Barnett v. Superior Court*, 50 Cal.4th 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010). *See also People v. Cordova*, __ Cal. 4th __, 194 Cal.Rptr.3d 40, 2015 WL 6446488, at *12 (2015). The dissent argues that a conflict *may* develop between a prosecutor's duties under the rule and under case law, but none exists at this time and there is no reason to believe that one will develop in the future.[3] California is, therefore, free to adopt Proposed Rule 3.8(d), a rule that best protects the integrity of the criminal justice system. [4]

Finally, this dissent argues that Rule 3.8(d) is not needed because prosecutors have gotten the message and promise to abide by their disclosure obligations in the future. While we take in good faith the representations made by a handful of prosecutors who attended the meeting, we note that the problem with discovery violations has been ongoing and, in the eyes of some judges, has escalated significantly. The former Chief Judge of the United States Court of Appeals for the Ninth Circuit recently wrote of the "epidemic" of *Brady* violations. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013). Several stakeholders provided oral comments at Commission meetings regarding the ongoing problems with discovery from prosecutors. Surprisingly, even though fellow prosecutors admitted that they should not be determining materiality before making discovery disclosures, even as late as the Commission's last consideration of this proposal, the Los Angeles County District Attorney was still arguing that it is the prerogative of her prosecutors to make materiality determinations before providing discovery.

Proposed Rule 3.8(d) is not intended to punish prosecutors. It is a responsible measure to address preventable miscarriages of justice. Adopted across the nation, it has not been used as a tactical weapon to give the defense an advantage in criminal proceedings. Rather, it is an ethical standard that guides prosecutors in ensuing that defendants receive fair trials. It is time for California to adopt it.

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[3] In fact, there is no reason to believe that such a conflict will develop. Even before *Barnett*, *supra*, the California Supreme Court recognized in the case of *In re Steele*, 32 Cal.4th 682, 701-02 (2004), that exculpatory evidence under California's discovery statutes includes evidence that "weakens the strength of" prosecution evidence. As developed, California law equates "exculpatory" with evidence that impeaches prosecution witnesses or detracts from the strength of prosecution evidence.

[4] The reference to the first Rules Revision Commission's work does not reflect that its work was completed before the *Barnett* and *Cordova* cases.