



The State Bar of California

Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective November 1, 2018)

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, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and
- (e) 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 3.6.
- (f) 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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) 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.
- (g) 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.

Comment

[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.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[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) 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. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[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 (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) 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 (f) 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 (f) 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 4.2.)

[8] Under paragraph (g), 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 paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

**NEW RULE OF PROFESSIONAL CONDUCT 3.8
(Former Rule 5-110)
Special Responsibilities of a Prosecutor**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 5-110 (Performing the Duty of a Member in Government Service) in accordance with the Commission Charter. Proposed Rule 3.8 (Special Responsibilities of a Prosecutor) amends current rule 5-110 and addresses the duties of government lawyers, including a criminal prosecutor. In particular, the proposed rule states that it is the responsibility of a criminal prosecutor to make timely disclosure to the defense of exculpatory information.

Rule As Issued For 90-day Public Comment

At its November 20, 2015 meeting, the Board considered and granted a Commission request to authorize proposed amendments to current rules 5-110 and 5-220 (Suppression of Evidence) for a 90-day public comment period, and that the processing of these proposed amendments be prioritized and handled separately from the Commission’s comprehensive proposed amendments to the rules. After the conclusion of the 90-day public comment period, which included a public hearing on February 3, 2016, the Commission met on March 31 and April 1, 2016 to consider all of the public comments received. In response to the public comments, the Commission further revised proposed rule 5-110¹ and, at the Board’s May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to seek input on these changes.

The 45-day public comment period ended on July 1, 2016. The Commission considered the public comments received at its meeting on August 26, 2016. Following discussion, no changes were made to the proposal and the Commission voted to recommend Board adoption. The Board considered the Commission’s recommendation at the Board’s meeting on October 1, 2016. After a presentation by the Commission and oral comments from interested persons who attended the Board’s meeting, the Board voted to adopt the Commission’s proposed rules as recommended. State Bar staff also was directed to prepare a petition for submitting the proposed rules to the Supreme Court of California for approval. Board adopted amendments to the rules are not binding and operative unless and until they are approved by the Supreme Court of California. (See Business and Professions Code sections 6076 and 6077.) State Bar staff submitted the proposed amended rules to the Supreme Court on January 9, 2017 (Supreme Court case number S239387).

The Board’s action to adopt proposed amended rules 5-110 and 5-220 on an expedited basis as rule revisions that fit the framework of the current rules does not obviate the need for the Commission to prepare versions of those rules for inclusion in the Commission’s recommendation for comprehensive amendments to the entire rules because the Commission is recommending a new rule numbering system patterned on the Model Rules as well as other formatting and style changes that impact the entire rules.

¹ Proposed amended rule 5-220 was not modified by the Commission following consideration of public comment. That proposal would remain simply the addition of a Discussion section sentence stating: “See rule 5-110 for special responsibilities of a prosecutor.”

In addition, the final decision to approve and implement proposed amended rules 5-110 and 5-220 rests with the Supreme Court. The Supreme Court might determine that the proposed amendments to rule 5-110 should be implemented together with the comprehensive rule revisions and not on a separate expedited basis. Accordingly, the Commission has prepared a version of proposed amended rule 5-110 formulated as a proposed rule 3.8 that could be acted on by the Supreme Court and implemented as a part of the State Bar's comprehensive revisions that are presently under consideration. Proposed rule 3.8 is substantively identical to proposed amended rule 5-110 and is summarized in the Board materials at the State Bar website link below.

<http://board.calbar.ca.gov/Agenda.aspx?id=11335&tid=0&show=100011596&s=true#10018785>

Finally, even if the Supreme Court determines to implement amendments on an expedited basis, at the subsequent time when the State Bar's comprehensive revisions are considered by the Court, a version of amended rule 5-110 renumbered as rule 3.8 (and conformed to the format and style of the new rules) would be appropriate for consideration by the Court.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule. Members of the Commission submitted dissents to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 3.8 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018. Omitted asterisks for defined terms were added.

Rule ~~5-110~~3.8 Special Responsibilities of a Prosecutor
(Redline Comparison to the California Rule Operative Until October 31, 2018)

The prosecutor in a criminal case shall:

- (~~Aa~~) ~~Not~~not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (~~Bb~~) ~~Make~~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;
- (~~Gc~~) ~~Not~~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;
- (~~Dd~~) ~~Make~~make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (~~Ee~~) ~~Exercise~~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~~3.6.
- (~~Ff~~) 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~~promptly disclose that evidence to an appropriate court or authority, and
 - (2) ~~If~~if the conviction was obtained in the prosecutor's jurisdiction,
 - (~~ai~~) ~~Promptly~~promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (~~bii~~) ~~Undertake~~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.
- (~~Gg~~) 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:~~Comment

[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~~ This rule is intended to achieve those results. All lawyers in government service remain bound by rules ~~3-200~~3.1 and ~~5-220~~3.4.

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

[4] The exception in paragraph (~~D~~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 (~~E~~e) supplements rule ~~5-420~~3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (~~E~~e) is not intended to restrict the statements which a prosecutor may make which comply with rule ~~5-420~~3.6(~~B~~b) or ~~5-420~~3.6(~~C~~c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See ~~rule 3-110~~, ~~Discussion~~rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (~~E~~e) 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 (Ff) 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 (Ff) 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~~4.2.)

[8] Under paragraph (Gg), 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~~paragraphs (Ff) and (Gg), though subsequently determined to have been erroneous, does not constitute a violation of this rule ~~5-110~~.