MEMO

IV. A. **Rule 5-110 & 5-220 (ABA MODEL RULE 3.8)**

Meeting Date **June 26, 2015**

Drafting Team **Rothschild (L), Cardona, Clopton, Peters, Tuft**

The drafting team for Rule 5-110 & 5-220 (ABA Model Rule 3.8) will provide an oral status report. Included in the agenda are public comments received in response to the request for public comment. The following is a list of the comments:

- Susan Shalit
- Margaret Thum

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation Member of the State Bar of California

Commenting on behalf of an organization
- Yes
- No

* **Name** Susan Shalit

* **City** San Francisco

* **State** California

* **Email address** (You will receive a copy of your comment submission.) spamhere@sonic.net

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Rule 5-110 Performing the Duty of Member in Government Service

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After 30 years in a practice which included criminal defense, I can say that the below facts in Peeople v. Velasco-Palacios, in which the prosecuting attorney fabricated evidence to gain an unfair advantage, is unfortunately not uncommon: Ambitious young prosecutors who mostly care about their win-loss record and their future career often not only outright lie about the facts, but even more frequently withhold Brady (exculpatory) evidence from opposing counsel. I would like to see (1) the Rules more specifically address these ongoing unfair & unconstitutional power-plays by government/prosecuting lawyers, and (2) the Rules be applied equally to them. For instance, the particular liar and fabricator referred in Velasco-Palacios, summarized below per CCAP, immediately should be disciplined. (FYI: It is common perception that government lawyers can lie and cheat with impunity, safe in the knowledge that the State Bar will not come down on them.)

Summary per CCAP:
Case Name: People v. Velasco-Palacios , District: 5 DCA , Case #: F068833
Opinion Date: 3/23/2015 , DAR #: 3297
Case Holding:
Dismissal of charges is appropriate remedy where a prosecutor falsified an interrogation transcript to include an admission by the defendant. Appellant was charged with lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)). During plea negotiations, the prosecutor gave defense counsel a transcript of appellant's police interrogation that indicated appellant had admitted to police that he was a child molester. Based on the transcript, defense

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* **Date** 05/01/2015

File : 2015-002 Susan Shalit [5-110]

Submitted via: Online

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Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Margaret Thum

*** City** Pebble Beach

*** State** California

*** Email address** (You will receive a copy of your comment submission.) margaret@thumlaw.com

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Rule 5-110 Performing the Duty of Member in Government Service

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Rule 5-110 should be strengthened to clarify the responsibility of attorneys representing government agencies, especially attorneys acting in an outside counsel role, i.e., attorneys not employed by the agency but by an outside law firm, such as:

(1) if a public records request is made to an agency, an independent contracting attorney cannot hold information at his or her office that enables the agency to answer that it does not have requested information.

(2) the attorney cannot represent agency officers, e.g., council, commission, or Board members, in litigation, e.g., depositions, where it is the council member's activities that are at issue. In my public interest work, agency attorneys have an inherent conflict of interest, especially when they have advised an agency to take a certain position and in depositions or at trial they shield evidence or improperly coach deponents to support the advice given to the agency. In every corporate position I've held, it is company policy that the corporate attorney represents the corporation, not the individual officer. In my experience, this same principle has not transferred into the public agency realm.

(3) outside attorneys cannot represent multiple local agencies, especially when two or more of those agencies are entering into contracts. It seems impossible to obtain a legitimate waiver of the conflict of interest when the ultimate beneficiary is the public who has no say in objecting

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margaret@thumlaw.com

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* **Date** 05/01/2015

File : 2015-003 Margaret Thum [5-110]

Submitted via: Online

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(3) outside attorneys cannot represent multiple local agencies, especially when two or more of those agencies are entering into contracts. It seems impossible to obtain a legitimate waiver of the conflict of interest when the ultimate beneficiary is the public who has no say in objecting to the waiver. In my experience, an outside attorney can become too political in currying favor amongst his/her public agency clients, e.g., financial assistance/grants being given only or primarily to agencies represented by the outside attorney. This severely harms not only the public, but also destroys the public's overall trust in attorneys and the worth of our profession.