RRC2 – Rule 3.8 [5-110][5-220]
E-mails, etc. – Revised (September 21, 2015)
Drafting Team: Rothschild (Lead), Cardona, Clopton, Peters, Tuft

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September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 5-110[3.8] was received and is attached. Please consider these comments prior to the September meeting. There is a reference to OCTC's April 2015 comment. Please let me know if you cannot locate that comment and I will send a copy.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

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B. Rule 5-110 and Model Rule 3.8 [Special Responsibilities of a Prosecutor]

Please see OCTC's April 20, 2015 Comment on this subject.

1. Additionally, the language in rule 5-110 should be retained as part of a new or revised rule regarding the responsibilities of a prosecutor. This rule prohibits a government attorney from instituting criminal charges when the government lawyer knows or should know that the charges are not supported by probable cause.

2. An amendment to the rule prohibiting a prosecutor from seeking to obtain a waiver of pretrial rights from an unrepresented accused unless and until a tribunal has approved the appearance of the accused in propria persona may infringe on the trial court's prerogatives and discretion. The better practice may be to allow the trial court to decide in specific instances whether the prosecutor acted improperly. If a prosecutor's conduct is determined to be improper by the court, OCTC and the State Bar Court can then determine whether the conduct warrants discipline.

3. OCTC supports adopting language similar to Model Rule 3.8(d) regarding the duty to make timely disclosure to the defense of all evidence and information known to the prosecutor that tends to negate the guilt of the accused or otherwise mitigates the offense.

4. Any amendment imposing a duty on a prosecutor regarding the issuance of a subpoena for the purpose of obtaining the testimony of a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding in order to present evidence about the lawyer's past or present client should take into consideration Evidence Code, section 956, regarding legal services sought to enable the commission of a crime or fraud.

5. A rule requiring a prosecutor to exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6 (see Model Rule 3.8(f)) should take into consideration the fact that law enforcement agencies are often independent of the prosecutor's office. In such circumstances, simply advising the independent agency of the prohibition may meet a reasonable care standard.

6. OCTC supports a rule that requires a prosecutor to disclose exculpatory evidence after a conviction when the prosecutor knows of new, credible, and material evidence, creating a likelihood that the defendant did not commit the crime for which he or she was convicted. In California, a prosecutor has a duty to disclose exculpatory evidence after a conviction, and OCTC can discipline attorneys for a violation of that duty pursuant to Business and Professions Code, section 6106. (In the Matter of Field, supra, 5 Cal. State Bar Ct. Rptr. at 178.)

April 20, 2015 OCTC Memo to Commission:

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H. New Rule Regulating Criminal Prosecutors

1. OCTC supports consideration of a new Rule of Professional Conduct addressing the duties and responsibilities of criminal prosecutors. OCTC takes no position, however, on whether to recommend a fast-track study of such a rule.
2. OCTC currently regulates and disciplines criminal prosecutors under the Business and Professions Code, sections 6068(a), 6103, 6106, and 6131, as well as, Rules of Professional Conduct, rules 2-100, 3-110, 5-110, 5-120, 5-200, 5-220, 5-300, 5-310, and 5-320. (See *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537; *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620; and *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597].) However, a new rule clarifying and reaffirming the duties and responsibilities governing criminal prosecutors in California may be appropriate and should be explored.
3. OCTC recommends that any new rule specifically address whether reckless or grossly negligent failures to comply with the rule will support a violation. A criminal prosecutor's duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *U.S. v. Hanna* (9th Cir. 1995) 55 Fed.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable.
4. If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical

obligations, not whether a failure to do so caused significant harm.[5] (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d __, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

September 12, 2105 Rothschild Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:

It looks like the legislature is interested in the same issue. AB 1328 passed last night and was sent to the governor. A copy is attached.

Attached:
RRC2 - [3.8][5-110] - AB1328 - Amended (09-04-15).pdf

September 13, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:

Toby and all: Here are my comments on this proposed Rule ---

1) Paragraph (a) would prohibit a prosecutor from prosecuting "a charge that the prosecutor knows is not supported by probable cause", but current rule 5-110 applies this prohibition when the prosecutor "knows or should know that the charges are not supported by probable cause." This change is noted in section VII.A.4 beginning at the foot of p. 18 of 33, and this is acknowledged at C. on p. 30 as being a substantive change, but it is not listed as an open issue in section IX on p. 32. I ask that it be treated as an open issue and discussed at our next meeting.

2) Also in paragraph (a), RRC-1 modified the MR language by adding a prohibition on recommending a prosecution that lacked probable cause. My concern is that there might be three different people involved - one who recommends a prosecution, one who makes the decision to commence a prosecution, and one who handles the prosecution. Omitting the recommender leaves open the possibility that the decider might not know, and the handler might now know until sometime later, what the recommender knew before the prosecution was commenced without probable cause.

3) I have a drafting nit in paragraph (b) that I hope you will treat as a friendly amendment, which is to change "the right to counsel" to "a right to counsel". The definite article should be used when the thing already has been mentioned or is so certain that it only could refer to one thing. It is my understanding that a state could have a right to counsel that exceeds federal standards, and the indefinite article should be used if that is right. I now see that section VIII.A.5 has examples of state variations.

4) And a more minor drafting nit: I think the comma in the middle of paragraph (c) is not needed.

[5] The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

5) I don't intend to comment in general on the suggested alternatives for paragraph (d), but I do have a concern about paragraph (d) that would apply to either alternative. Is the use of "tends to" aspirational in nature, and would it create risk to a prosecutor who, under the then-available facts, is not aware that a fact might tend to negate the guilt of the accused or mitigate the offense? Should we instead use "knows" or "knows or reasonably should know"?

6) I have a question for those who opposed proposed paragraph (e), saying that the issue is not specific to the criminal context. Is there any authority on this topic in the civil context other than the line of cases on attempts to depose opposing counsel? See Carehouse Convalescent Hospital v. Superior Court, 143 Cal. App.4th 1558 (2006).

7) If the Commission decides to retain paragraph (f) in the form recommended by the drafting team, the concluding phrase ("or this Rule") should be removed b/c there would be nothing in the Rule that prohibits public statements.

8) Did the drafting team discuss the possible application of paragraphs (g) and (h) to a former prosecutor? Is current employment a precondition to the application of their obligations? Does a prosecutor's obligation as a minister of justice end with the termination of the job?

9) Regarding proposed Comment [5]:

a. The first two sentences appear only to repeat the Rule. If that is right, they could be removed.

b. The third sentence (In the 9th line: "Consistent with ...") speaks of the objectives of Rules 4.2 and 4.3, but why speak of consistency with the objectives of those Rules? Is this intended to say that Rules 4.2 and 4.3 would not apply because the prosecutor is not representing a client at that point in time when paragraphs (g) and (h) would come into play? If so, this Comment either would violate the directions that we should not have Comments that are in conflict with the Rule or the direction to avoid best practices guidance. If the Commission considers the 4.2 and 4.3 references material to paragraphs (g) and (h), shouldn't these communication obligations be added to the Rule to comply with the instructions given to the Commission?

c. I have a similar thought about the final portion of the third sentence ("... 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."). Isn't this the sort of best practices advice that we are supposed to exclude?

10) Regarding proposed Comment [6]:

a. The second sentence speaks of disclosure to the convicted defendant, but that is not needed b/c already required by paragraph (g). Any evidence that meets the "clear and convincing" standard of paragraph (h) will meet the "credible and material" standard of paragraph (g).

b. A minor drafting suggestion on the second sentence - Beginning the sentence with "Depending on the circumstances" makes redundant the later use of "where appropriate".

11) Is there any possible confusion over whether the term "prosecutor" refers only to the head of a prosecutorial office. RRC-1 added the following Comment: "The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function." While I'm not certain about "office of the prosecutor" b/c the Rules don't provide for the discipline of law firms, the issue involved seems to me to be important.

My thanks to everyone involved in putting together this excellent and informative Report.

September 16, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

1. Shouldn't paragraph (f) read as follows (see strike-over):

> (f) exercise reasonable care to prevent ~~other~~ 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 ~~or this Rule~~.

The deletions of the first part of the ABA rule makes these words unnecessary.

2. Paragraph (f) seems to apply to persons over which the prosecutor would not have control. I suggest deleting "or other persons assisting or associated with the prosecutor" which seems inconsistent with persons "under the supervision or direction of the prosecutor." OCTC makes a valid point that law enforcement agencies are often independent of the prosecutor's office.

3. Questions: Is the second sentence of Comment [1] consistent with Penal Code § 859b which addresses situations where the accused is not represented by counsel? Section 859b provides in relevant part -- "immediately upon the appearance of counsel, or <u>if none appears</u>, after waiting a reasonable time therefor as provided in Section 859…."

> It also states: "Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later." The statute further provides that "[w]henever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment or plea and the defendant has remained in custody for 10 or more court days solely on that complaint, unless" either "(a) [t]he defendant personally waives his or her right to preliminary examination within the 10 court days" or "(b) [t]he prosecution establishes good cause for a continuance beyond the 10-court day period."

Isn't the time for a preliminary hearing an important pretrial right? Should the comment address this area at all? What is the purpose of what seems a rather cryptic reference to "voluntary cooperation in an ongoing law enforcement investigation" (language apparently derived from the RRC-1 draft)?

4. Shouldn't the second sentence of ABA Comment [2] be reinstated since it makes an important point about the purpose of paragraph (c) and notes that a waiver from a *pro se* is permitted with the approval of the tribunal?

September 18, 2015 Difuntorum Email to Drafting Team, cc Mohr, A. Tuft., McCurdy & Lee:

In anticipation of discussion of the expediting question, please see below for a possible time-line for Board and Commission processing. It assumes approval by the Commission at the September meeting, no material changes after a formal public comment period, and Board concurrence all along the way. –Randy D.

Rule 3.8 Approved at 9/25&26/15 RRC Meeting – one 45-day public comment period

October 30, 2015	Agenda materials for BOT November meeting due
November 19-20, 2015	BOT Meeting (SF) Request for approval of 45-day public comment circulation
Nov. 21, 2015 – Jan. 11, 2016	45-day public comment period
Jan. 22 & 23, 2016	RRC Meeting (LA) Consideration of public comments received
March 10-11, 2016	BOT Meeting (LA) Request for approval of proposed rule for submission to Supreme Court
April-May, 2016	Submission of proposed rule to Supreme Court for adoption

September 18, 2015 Clopton Email to Difuntorum, cc Drafting Team, Mohr, A. Tuft, McCurdy & Lee:

Thanks Randy, those are a lot of assumptions but I am optimistic.

September 18, 2015 Mohr Email to Drafting Team, cc Difuntorum, A. Tuft, McCurdy & Lee:

We've revised the rule and I've attached draft 3.2 (9/18/15), compared to draft 3 (the version in the Report). In addition to the revisions agreed to during the telephone conference to paragraphs (b), (c) and (f), and comment [5], we found another errant comma, this one after the word "counsel" in paragraph (b), that we've deleted. The comma does not appear in either the Model Rule or RRC1's proposed rule.

Please let us know if you have any questions. Thanks,

Attached:
RRC2 - [3.8][5-110] - DFT3.2 (09-18-15)RD-AT-KEM - Cf. to DFT3.docx