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May 8, 2017

The Honorable Lee Edmon, Chair
Commission for the Revision of the Rules of Professional Conduct
The Honorable James Fox, President
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

RE: California Supreme Court Administrative Order 2017-04-26
Response to Proposed Rule 5-110, Rules of Professional Conduct

Dear Justice Edmon and President Fox,

As you know, California is the only state in the country without a Rule of Professional Conduct incorporating ABA Model Rule 3.8, special duties of prosecutors. Indeed, the territories of Guam, US Virgin Islands, Puerto Rico, and the District of Columbia also have this rule. But not California. The California Rules Revision Commission and the Board of Trustees of the State Bar worked hard for well over a year to produce the best rule possible, proposed as Rule 5-110. Together, the Commission and the Board considered all viewpoints. Well over 90% of public comments supported the final version of the Rule, and the Rule was approved by similar margins of the Commission and the Board of Trustees, although the Board included four career prosecutors and other members who had worked as prosecutors, but no career defenders.

During the comprehensive evaluation and proceedings conducted by the Commission, prosecutors objected to the Rule—which provides that a prosecutor shall “make timely disclosure 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”—because it “has no materiality limitation” (October 1, 2015, comment letter by California District Attorneys Association, p. 3), claiming that it “would abolish the materiality requirement” (October 14, 2015, comment letter by Los Angeles District Attorney Jackie Lacey, p. 2). These objections failed to acknowledge that there is *no* materiality requirement under existing California law. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.) Thus, it became abundantly clear that prosecutors understood the proposed rule would require them to disclose exculpatory evidence regardless of their subjective pre-trial assessment of materiality, but they did not understand that existing law required them to do so, and the only

way to impress their existing duty upon them was to promulgate Rule 5-110 as overwhelmingly approved by the Commission and the Board of Trustees.

We are extremely grateful that the California Supreme Court has agreed that new Rule 5-110 should include the language quoted above, and that “[t]he disclosure obligations ... 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.” (Supreme Court Administrative Order 2017-04-26, Attachment 2, Proposed Alternative Revision to Rule 5-110 discussion paragraph [3].) However, we are afraid that the modification suggested by the Court may have unintended consequences. The suggested modification would add the following sentence: “This obligation includes the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely;....” (*Id.* Attachment 2, Proposed Alternative Revision to Rule 5-110, subd. (D).)

We respectfully submit that the foregoing modification suffers from two problems that will cause detriment to the public by increasing the likelihood of wrongful convictions and miscarriages of justice.

By way of background, Rule 5-110 is not meant to govern discovery disputes at trial but is meant to foster compliance with existing discovery obligations by meaningfully providing clear warnings that violations of those obligations may subject the offending attorney to professional discipline. In order to achieve this purpose, the rule must avoid ambiguity. Especially when it comes to lawyers, whose very careers involve debating competing interpretations of governing provisions, such ambiguities must be avoided if at all possible.

Unfortunately, the modifier “significant” in the phrase describing “the duty to disclose information that casts *significant* doubt on the accuracy or admissibility of witness testimony or other evidence...” (emphasis added) invites disagreement over the degree to which the information hurts the evidence offered by the prosecution. Moreover, although California law specifically requires the prosecution to disclose exculpatory evidence or information *regardless of whether or not it is material* (*Barnett, supra*, 50 Cal.4th 890, 901; *People v. Cordova, supra*, 62 Cal.4th 104, 124), excluding information unless it casts *significant* doubt essentially limits the scope of information a prosecutor must disclose to *material* evidence. Indeed, it could be argued that “significant doubt” imposes a greater degree of magnitude than the materiality standard rejected in *Barnett* and *Cordova*, because the standard of materiality under *Brady v. Maryland* (1963) 373 US 83 is whether “there is a reasonable probability its disclosure would have altered the trial result” (*Cordova, supra*, 62 Cal.4th at p. 124)—i.e., by raising a *reasonable* doubt that the defendant is guilty—which is a lesser standard than a requirement of casting a *significant* doubt.¹

¹ The constitutional standard for determining whether suppression of exculpatory evidence requires reversal of a conviction is even lower than requiring a reasonable probability of altering the trial result: “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when

Thus, as a practical matter, the proposed modification may result in some prosecutors, if not many or most, failing to honor their statutory duty to disclose *all* exculpatory evidence, whether or not it is material or significant.

Further, while at first blush it may seem that there is no need to require disclosure of evidence when its only value would be to discredit or exclude evidence that the prosecution does not intend to introduce, the realities of trial practice illustrate the contrary. For example, consider the situation where the prosecution discloses a report written by a police officer or a statement by a civilian witness, but the prosecutor later learns that the officer or witness is not reliable or credible because of additional information the prosecutor has learned, and the prosecutor therefore decides not to call them to testify. Under the proposed modification to Rule 5-110, the prosecutor would not have to disclose the impeaching information. Consequently, defense counsel would be unaware that the witness is not credible. But as so often occurs in trial practice, the police report or witness statement may include information that, on its face, is helpful to the defense, leading the defendant to present the witness at trial. The net result would see the prosecutor using the undisclosed information to discredit the witness, not only negating any possible benefit the defense hoped to achieve by calling the witness, but tarnishing the integrity of the entire defense because the jury would naturally associate it with the discredited witness. Whether or not such a scenario should be considered gamesmanship or sandbagging, it demonstrates that the failure to disclose the discrediting information was inimical to the search for truth and the interests of justice. These scenarios must be discouraged, not encouraged, but will be countenanced by the proposed modification.

Condoning a prosecutor's failure to disclose impeaching information where the prosecutor ultimately decides not to present the witness who would be impeached by that information overlooks another critical reason for the disclosure of exculpatory information: a defendant's due process rights under *Brady* are violated not merely where the suppressed evidence was itself material, but where its disclosure would have led the defendant to learn of other significant evidence by investigating the suppressed information. (*In re Bacigalupo* (2013) 55 Cal.4th 312, 337-340, conc. opn. Liu, J.) Justice Liu's concurring opinion in *Bacigalupo* was joined by Justices Cantil-Sakauye, Werdegar, and Corrigan, a majority of the court, and specifically concluded that suppression of evidence requires reversal under *Brady* where disclosure of the suppressed evidence would have led the defendant to other evidence that would have been material to his defense.

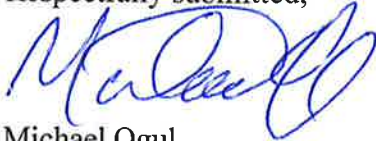
Exculpatory evidence and information should always be disclosed, whether or not it is material or significant. While those conditions are important in making the hindsight determination whether a failure to disclose requires a conviction to be vacated, they are alluring incentives for a prosecutor to refrain from disclosing exculpatory information if he personally believes that it is insignificant. And as any seasoned trial lawyer knows, it is common for prosecutors who have become personally convinced in the certitude of the defendant's guilt to dismiss exculpatory evidence as insignificant because of their belief that it would not make a difference. But as the late Justice Antonin Scalia chastised the prosecutor during oral arguments in *Smith v. Cain*

the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434, quoting from *United States v. Bagley* (1985) 473 U.S. 667, 678.)

(2012) 565 U.S. 73, prosecutors should “stop fighting as to whether it should be turned over[.] Of course, it should have been turned over... the case you’re making is that it wouldn’t have made a difference.” (Official Transcript of Proceedings on Oral Arguments in *Smith v. Cain*, No. 10-8145, November 8, 2011, available online as of May 8, 2017, at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf, p. 51, l. 24, through p. 52, l. 2.)

We believe the purpose of the Rules of Professional Conduct is to encourage ethical behavior. An ethical prosecutor will disclose all exculpatory evidence and information without considering if it is insignificant or won’t matter anyway because the prosecutor isn’t going to call the affected witness to testify. Indeed, a prosecutor who refrains from disclosure because he concludes that the exculpatory information is insignificant risks not only the wrongful conviction of an innocent person and reversal if a reviewing court disagrees, finding instead that the evidence was material, but the possibility of facing a felony prosecution under Penal Code section 141, subdivision (c), for choosing not to disclose that evidence. Prosecutors, individuals accused of crimes, and the entire state of California would be better served by firmly establishing a culture that clearly requires the disclosure of all exculpatory evidence and information, whether or not it is material, significant, or only discredits evidence the prosecutor affirmatively intends to present at trial.

Respectfully submitted,



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