

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, February 10, 2010 3:49 PM
To: McCurdy, Lauren
Cc: kevin_e_mohr@csi.com
Subject: Re: RRC 2/26-27 Meeting Agenda Item III.C Proposed Rule 3.8 [5-110]
Attachments: RRC - 5-110 [3-8] - Rule - DFT8.1 (02-08-10) - ANNOT-LAND.doc

Lauren:

First, I've attached an annotated version of Draft 8.1, that includes my annotations. I think this should be substituted for the draft Linda sent; in any event, there's no reason to include more than one draft and the attached annotated version will make it easier to refer to the public comment that led to the changes. The two versions are otherwise identical (I checked).

Second, you are correct that the same reasoning applies to the Rule & Comment comparison chart. We still have a few issues that need to be resolved before we can go into final mode on this Rule.

Thanks,

Kevin

McCurdy, Lauren wrote:
Kevin,

Another agenda item question for you . . . this is another case where Linda provided a revised clean rule draft, but dropped the annotations provided in your earlier draft. Do you think both versions should go in, or just Linda's?

I'm assuming that the Rule & Comment comparison chart is also premature, based on Linda's reasoning for waiting on the Dashboard and Introduction. Please confirm this.

Thanks.

Lauren

From: Foy, Linda [<mailto:Linda.Foy@jud.ca.gov>]
Sent: Wednesday, February 10, 2010 8:46 AM
To: Kevin Mohr; kevin_e_mohr@csi.com; Ellen Peck; Mark Tuft; McCurdy, Lauren
Subject: RRC 2/26-27 Meeting Agenda Item III.C Proposed Rule 3.8 [5-110]

Kevin, Lauren:

Attached are (1) revised Rule 3.8 and (2) revised Public Commenter Chart; please note that I did not have sufficient time to circulate these drafts to co-drafters Ellen and Mark before submission. In addition, I have not revised the Dashboard and Introduction pending final Commission approval of the Rule.

Please let me know if you have any questions.

Thanks very much,
Linda

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From: [Kevin Mohr](#)
To: [Linda Foy](#); [Ellen Peck](#); [Mark Tuft](#)
Cc: [Difuntorum, Randall](#); [McCurdy, Lauren](#); [Lee, Mimi](#); [Harry Sondheim](#)
Subject: RRC - 3.8 [5-110] - III.C. - Public Comment Chart, Draft 3 and Rule, Draft 8.
Date: Friday, February 05, 2010 9:47:49 AM
Attachments: [RRC - 5-110 \[3-8\] - Public Comment Chart - By Commenter - DFT3 \(02-03-10\)- Cf. to DFT2.3.pdf](#)
[RRC - 5-110 \[3-8\] - Rule - DFT8 \(02-03-10\) - Cf. to DFT6.1 \(09-01-09\) - LAND.doc](#)
[RRC - 5-110 \[3-8\] - Public Comment Chart - By Commenter - DFT3 \(02-03-10\)- Cf. to DFT2.3.doc](#)

Greetings Linda and other drafters:

I've attached the following:

1. Rule, draft 8 (2/3/10), redline, compared to Draft 6.1 (9/1/09), the public comment version ("PCD"), with annotations to reflect RRC decisions at the 1/22-23/10 meeting, open issues, and suggested changes I've made in response to public comment received.
2. Public Comment Chart, Draft 3 (2/3/10), redline, compared to Draft 2.3 (1/17/10), the draft considered at the 1/22-23/10 meeting. In Word and scaled PDF (for ease of printing).

NOTES:

A. RULE

1. I've renumbered the comments in the attached rule draft to conform them to numbering used in the Comment Comparison Chart. This caused some problems with the public comment submitted, as some commenters addressed their points to the clean version of the rule and others to the comparison chart. When our rule comments closely track the Model Rule comment, our approach has been to follow what is done in most other states, i.e., match up our numbering to the Model Rule numbering by numbering additional comments "[1A]," "[1B]," etc., and marking deleted comments as "[6] [RESERVED]," etc.
 - a. To simplify matters, I've also changed all the references to comments in the Public Comment Chart to conform to the attached rule draft.
2. Comment [1B] is an open issue. See my 1/22-23/10 meeting notes, III.J., at para. 3 (Note that cmt. [3] in the PCD is [1B] in the attached draft.)
 - a. Note that Linda and Ellen offered some suggestions in their response

to Totten's comment on 3.8(b). See pages 3-4 of the attached Public Comment Chart.

3. Comment [7] (comment [11] in the clean PCD) is also at issue. Bob made some suggestions re this comment. I agree w/ Bob's changes and I've tentatively implemented them to address concerns raised by Philip Cline re 3.8(g) and (h).

a. I've also implemented Bob's suggested response to Cline in the Public Comment Chart. See pp. 17-18 & note 5 of the attached Chart.

4. New Comment [10]. In response to a comment received from OCTC, I've added new Comment [10]. Randy and I have already proposed adding a reference to B&P Code 6131 in Rule 1.7 as an example of a non-consentable conflict.

a. I've also drafted a response to OCTC re this comment. See pp. 31-32 of attached Chart.

B. PUBLIC COMMENT CHART

1. As an initial matter, I've drafted stock responses to recurring issues based on our discussions at the 1/22-23/10 meeting, Bob Kehr's suggested language, and the Drafter's Notes in Draft 2.3 of the Public Comment Draft. Recurring issues including the use of "recommending" in 3.8(a), use of "reasonably should know" in 3.8(a), 3.8(f), etc. Rather than referring back to the Totten responses as we did in Draft 2.3, I've simply copied and pasted the stock responses throughout the rule. Therefore, I recommend that we simply moved the Totten responses back to their appropriate alphabetical order because there is no longer a reason to place Totten first. We don't have to do that now; staff can do that in the final version prepared for submission to RAC/BOG. With that change, we will also delete footnote 1.

a. Please confirm that you agree with the "stock" language. See responses to Totten re 3.8(a) and 3.8(f). They are in redline in the "RRC Response" column.

2. Also as a general matter, I've moved Bob's recommended language to which I did not hear any objection from the footnotes into the "RRC

Response" column. Bob's language appears in redline with gray highlighting throughout.

a. Please confirm that you agree with the insertion of Bob's language.

3. Where a response is still required or the drafters have raised an issue for Commission consideration, I've highlighted the item in turquoise. In some instances, I've suggested a response (my suggested language will appear in redline). The following are public comments that require a response or to which I've suggested a response for your review:

a. Page 2. Totten recommendation that the Rule include the following: "This rule shall not prohibit good faith advocacy on the issue of guilt or probable cause."

b. Pages 3-4. Totten comments on 3.8(b). This is an outstanding issue in the Rule. See A.2., above.

c. Page 7. CDAA's first comment on 3.8(a).

d. Page 9. CDAA's comment on 3.8(c). Do you agree w/ Bob's proposed language?

e. Pages 11-15. All of George Cardona's comments require a response.

f. Pages 17-18. Cline comment re 3.8(g), (h). See item A.3., above, for how Bob has suggested resolving this issue.

g. Page 20. Bob Lee comment re Comment [2A].

h. Pages 21-22. Bob Lee's comments re 3.8(g), (h).

i. Page 23. Lieberstein comment on 3.8(a). See Drafters' Note. See also B.3.c., above.

j. Page 25. LACBA comments on 3.8(d) and (e).

k. Page 26. LACBA comment on 3.8(g). Please review Bob's suggested additional language.

l. Pages 26-27. LA District Attorney. See Bob's suggested additional

language.

m. Pages 28-29 & note 8. See Bob's suggested response to OCBA's concern re Comment [4]. Note that Bob also suggests further revisions to the Model Rule language. I'm not sure there is a compelling reason to make his suggested change.

n. Page 30. OCTC comment on 3.8(c). I don't understand the OCTC comment.

o. Pages 30-31. OCTC's comment on 3.8(e). See my suggested response.

p. Page 31. OCTC's comment re section 6131. See my suggested response and also see item A.4., above.

q. Page 32 & note 10. Pacheco on 3.8(d). See note that Bob Kehr has requested that the Commission discuss this. We didn't have time for it at our 1/22-23/10 meeting.

r. Page 33 & note 11 (on page 32). Pacheco on 3.8(e). See Harry's comment and my response in note 11. I think the response is fine as it is.

I think that about covers it. Please let me know if you have any questions or need any further assistance. Thanks,

Kevin

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Rule 3.8 Special Responsibilities of a Prosecutor

(Commission's Proposed Rule Following Review of Public Comments DRAFT 8.1 (2/8/10) – ANNOTATED)

A prosecutor in a criminal case shall:

- (a) refrain from ¹commencing or prosecuting² a charge that the prosecutor knows or reasonably³ should know 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, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law regarding the 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 and to the tribunal all unprivileged mitigating information known to the prosecutor, 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 the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including⁴ 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.
- (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 **RRC Action:** At the 1/22-23/10 meeting, deletion of “recommending” was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.J., at ¶. 1.a.(1).

² **RRC Action:** At the 1/22-23/10 meeting, deletion of “continuing to” and substituting “prosecuting” for “prosecute” was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.J., at ¶. 1.b.(1).

³ **RRC Action:** At the 1/22-23/10 meeting, retaining “reasonably” was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.J., at ¶. 1.c.(2).

⁴ **RRC Action:** At the 1/22-23/10 meeting, insertion of “persons under the supervision of the prosecutor, including” was deemed approved, as was the rejection of including “immediate” as a modifier of “supervision”. See 1/22-23/10 KEM Meeting Notes, III.J., at ¶. 2.c.

- (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.

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 and 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. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] 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.

[1B] Paragraph (b) does not⁵ expand upon the obligations imposed on prosecutors by applicable law. It does not require a prosecutor to advise the accused or a person under investigation of the right to counsel; nor does it prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.⁶

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent.

[2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of

⁵ **Drafters' Note:** Change made per Commission style. This change should assuage the concerns of CDAA. See Public Comment Chart.

⁶ **Drafters' Note:** At the 1/22-23/10 meeting, the drafters' recommendation to revise Comment [3] as indicated was discussed, but the deliberations were continued to the February 2010 meeting. See 1/22-23/10 KEM Meeting Notes, III.J., at ¶. 3.

information to the defense could result in substantial harm to an individual or to the public interest.

- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.
- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.

- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) 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)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule [1.0(i)], that the conviction should or should not be set aside. Alternatively, the prosecutor is required to 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. Consistent with the objectives of Rules 4.2 and 4.3, 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. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.⁷

⁷ **KEM Note:** The changes to Comment [7] implement suggestions Bob Kehr has made to respond to the comments of Philip Cline re paragraphs (g) and (h). See Public Comment Chart. The Commission has not yet approved these changes.

- [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. Necessary steps may 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 this Rule.

8

- [10] Prosecutors and former prosecutors, as well as lawyers associated with them in a law firm, are subject to additional prohibitions concerning the representation of persons they have prosecuted. See Business & Professions Code section 6131.⁹ See also Rule 1.7, cmt. [16].

⁸ **KEM Note:** This comment does not belong in this Rule. It belongs in Rule 1.9. It appears to have been inadvertently placed in this Rule.

⁹ **Drafters' Note:** This comment has been added in response to a comment from OCTC. Bus. & Prof. Code § 6131 provides:

“Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:

- a. Who directly or indirectly advises in relation to, or aids, or promotes the defense of any action or proceeding in any court the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor with whom such person is directly or indirectly connected as a partner.

b. Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof.

This section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally.”

Bus. & Prof. Code § 6131 is cited in Rule 1.7 as an example of a non-consentable conflict.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Totten, Gregory D. District Attorney of Ventura County	D (in part)	Y	3.8(a)	<p>Proposed rule 3.8(a) broadens the liability of prosecutors in several ways that go beyond both rule 5-110 and ABA Model Rule 3.8. First, it extends the “reasonably should know” standard to the case after filing. Prosecutors often have large caseloads and have to prioritize when they will work on each case. Prosecutors also often receive “hand-off” cases that have previously been assigned to another prosecutor. If a prosecutor has received reports that arguably negate probable cause but has not yet read them because he or she was working on other cases, the State Bar could argue that the prosecutor has acted unethically in failing to act on information he “should have known.” The current requirement that an attorney act competently (Rule 3-110; Model Rule 1.1) is an adequate standard to address this concern.²</p> <p>If rule 3.8(a) is enacted as proposed, it will further empower the State Bar Court to discipline prosecutors for whatever it deems the prosecutor <i>should have known</i>. This would conceivably include facts that had not</p>	<p>The Commission notes that current Cal. Rule 5-100 already contains a “know or should know” standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor’s obligations. The Commission also discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and concluded that the revised standard provides greater client protection by imposing an objective “reasonableness” standard that ensures a prosecutor’s negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that “knows or reasonably should know” is a defined term in both the proposed Rules and the ABA Model Rules.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>even been uncovered or investigated by police if the State Bar determines that the prosecutor, or police agency members of the 'prosecution team,' <i>should have</i> found them out.</p> <p>The proposed language regarding "commencing, or continuing to prosecute a charge" is acceptable, but the application of the rule to "recommending" a charge is problematic and should be deleted. The rule is not clear as to what sort of recommendation is prohibited.</p> <p>Even if the language regarding "recommending" a charge is deleted, the rule should be amended to add language similar to the following: "This rule shall not prohibit good faith advocacy on the issue of guilt or probable cause." This is necessary to allow prosecutors to exercise the vigorous advocacy expected of all attorneys.</p> <p>ABA Model Rule 3.1 requires attorneys to assert positions only if they are "not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." But, Rule 3.1 provides an exception for criminal defense</p>	<p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>DRAFTER'S NOTE: The principal drafter requests the Commission to consider adding the proposed language re prosecutor's "good faith advocacy" in a Comment.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(b)	<p>attorneys. They “may nevertheless so defend the proceeding as to require that every element of the case be satisfied.” Clearly, a defense attorney is not prohibited from defending a client even if the attorney knows or should know that the defendant is guilty. We do not argue that the law should be otherwise. But, a problem arises when there is legitimate issue as to whether probable cause exists. The defense can make whatever arguments it wants with impunity. Prosecutors should be able to make good faith arguments without fear that if the court disagrees, the State Bar will discipline the prosecutor.</p> <p>The rule is unnecessary. The court has the duty to advise the defendant of the right to counsel (Pen. Code Sections 860, 987.) There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty.</p> <p>Proposed paragraph 3.8(b) could improperly expose prosecutors to discipline for <i>Miranda</i> violations by police.</p>	<p>The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have. See Comment [1B], which provides:</p> <p>[1B]Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.</p>
				Cmt. [1B]	Comment 1B states that paragraph (b) is not	DRAFTER'S NOTE: The principal drafter requests

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	<p>intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e., to make efforts to assure that the accused is advised of the right to, and procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel. The Comment in effect cancels out the rule for California prosecutors. I recommend that 3.8(b) be deleted.</p> <p>The proposed rule allows the prosecutor to seek a waiver of constitutional rights from an unrepresented defendant if the court has approved the appearance of the defendant in propria persona. But in Comment [2], the Commission has deleted the language about court approval. As a result, Comment [2] appears to impose an absolute prohibition of seeking the waiver of pretrial rights from an unrepresented defendant, and is inconsistent with the language of Rule 3.8(c). Comment [2] should be amended to put back the language, "Paragraph (c) does not apply, however, to an accused appearing pre se with the approval of the tribunal."</p> <p>I question the need for this rule. The rule is apparently designed to prevent the prosecution from attempting to take unfair advantage of an unrepresented defendant.</p>	<p>the Commission to consider either (1) narrowing or clarifying the scope of proposed paragraph 3.8(b) or (2) deleting proposed Comment [1B].</p> <p>Because the reference to a tribunal's having approved a defendant's appearance <i>in propria persona</i> has been added to the black letter rule in paragraph (c), it has been removed from Comment [2].</p> <p>The Commission agrees that the purpose of the proposed Rule is to prohibit a prosecutor from taking unfair advantage of an unrepresented defendant and also agrees that whether a defendant is represented</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(d)	<p>But if the case is going to be resolved by way of guilty plea, rather than by trial, the defendant <i>must</i> waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. The standard guilty plea forms include these waivers. Whether a defendant is represented by counsel or appears without counsel is the choice of the defendant, not of the prosecution. The only practical effect I can see from the proposed rule is that it may prohibit plea discussions with an unrepresented defendant, or presenting an unrepresented defendant with a guilty plea form, until after a court appearance at which the court approves (or acknowledges) that the defendant is representing himself.</p> <p>The application of the proposed rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The proposed rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling "approving" self-representation.</p>	<p>by counsel is the defendant's choice. The intended effect of the rule is precisely to prevent the prosecutor from engaging in plea discussion with an unrepresented defendant until the court has approved the defendant's request to appear <i>in propria persona</i>.</p> <p>No response necessary.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [2A] 3.8(f)	<p>The language added by the Commission, “comply with all constitutional obligations, as defined by relevant case law regarding,” is important. Without this language, the rule would overstate the prosecution’s disclosure obligations, and would improperly subject a prosecutor to discipline for failure to disclose even <i>immaterial</i> evidence that conceivably might be favorable.</p> <p>Comment [2A] is helpful in clarifying that a prosecutor should not be disciplined for conduct that was lawful at the time it occurred.</p> <p>The rule would create an imbalance between prosecutors and defense attorneys. Prosecutors would be expected to take reasonable care to prevent “investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution” from making certain extrajudicial statements.</p> <p>But under Model Rule 5.3, a defense attorney would have a comparable responsibility only as to persons over which the attorney has “direct supervisory authority.” Public release of inflammatory or inadmissible information from the defense can be just as damaging to the cause of justice as such statements from the</p>	<p>No response necessary.</p> <p>The Commission agrees with the commenter’s concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prosecution. The rule should be modified to impose comparable responsibilities on defense attorneys.	
10	Calhoun, Ronald District Attorney County of Kings	D	Y		I support Rod Pacheco's comments, listed below.	See RRC Response to comments from Rod Pacheco, District Attorney, County of Riverside, below.
4	California District Attorneys Association ("CDAA") Gary Lieberstein, President	M		3.8(a)	<p>The rule starts by saying, "A prosecutor in a criminal case shall . . ." without defining exactly what constitutes a criminal case. Current Rule 5-110 refers to criminal charges, before and after the filing of an actual case. The Proposed Rule does not make this distinction, giving rise to the question of when a prosecutor's responsibility arises. If Rule 3.8(b) and (c) are meant to apply to scenarios when no case has been filed in court, it could seriously impede law enforcement investigations. However, if by inclusion of a definition or comment, the rule makes clear that "criminal case" only applies to cases that have been filed in court, there is no objection.</p> <p>CDAA has significant concerns about the language "recommending, commencing or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause." Current Rule 5-110 is very clear on the</p>	<p>DRAFTER'S NOTE: The principal drafter requests the Commission to consider clarifying--either in the rule, in a comment or by a definition--when a prosecutor's duties under this rule are first triggered.</p> <p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a</p>

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				3.8(b)	<p>issue, stating that charges shall not be filed “when the member knows or should know the charges are not supported by probable cause.” The addition of the “recommending” language is unnecessary, and apparently seeks to expand the group of persons that may face discipline. To attempt to throw the net around any lawyer with whom a prosecutor consults is an expansion of the rule that would be extremely unfair and unwarranted.</p> <p>CDAA is concerned about the standard “reasonably should know.” Again, current Rule 5-110 states simply, “knows or should know.” The current rule is adequate; the addition of the word “reasonably” only expands the opportunities to assail a prosecutor if, in hindsight, it could be argued that a prosecutor was negligently ignorant.</p> <p>It is CDAA’s position that Rule 3.8(b) is unnecessary and creates more ambiguity than clarity. CDAA would respectfully request that 3.8(b) be thereby deleted.</p> <p>This subsection is unclear as to whether the</p>	<p>charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and concluded that the revised standard provides greater client protection by imposing an objective “reasonableness” standard that ensures a prosecutor’s negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that “knows or reasonably should know” is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have.³ See Comment [1B], which provides:</p>

³ Bob Kehr has made the following observation:

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				3.8(c)	<p>duty extends to overseeing law enforcement agencies. If it does, it assumes a level of control or influence that may not be available between prosecutors and law enforcement in many jurisdictions.</p> <p>We believe existing law and practice more than adequately protects the rights of the defendants and that proposed Rule 3.8(c) is thereby unnecessary.</p> <p>There are many reasons why a defendant may want to waive a preliminary hearing, and to emphasize an apparent prohibition on suggesting this course of action is an unreasonable interference in the judicial process and negotiations between the People and a defendant.</p> <p>Rule 3.8(c) is not clear on what procedure is required to “approve the appearance of the accused <i>in propria persona</i>.”</p> <p>We have major concerns with the proposed rule that prosecutors would be expected to</p>	<p>[1B]Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.</p> <p>Whether existing law and practice adequately protect the rights of defendants is not the principal concern of the proposed Rule. Instead, the Commission’s recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors properly should be subject to professional discipline in addition to any other consequences that might result by court sanction or otherwise. The Commission also is not concerned about why an (unrepresented) accused might want to waive a preliminary hearing or what the procedure is for doing so. The former is a matter for the accused to consider in circumstances in which his or her constitutional rights have been protected and the latter is a legal issue.</p> <p>The Commission agrees with the commenter’s concerns and has revised paragraph (f) as follows:</p>

I would think that Comment [1B] should solve their concern about paragraph (b). Its message might come through more clearly if we were to remove the intention language from its first sentence and directly say that the Rule does not expand, etc. I don’t understand the CDAA comment about paragraph (c).

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				3.8(f)	<p>control what law enforcement officials might say publicly about a case.</p> <p>CDAA believe that the same standards should apply to both prosecutors and defense counsel; that is, that neither should engage in extrajudicial statements during the pendency of a filed criminal case nor should they allow anyone directly under their supervision to do so. However, once the duty of the prosecutor is extended to apply to statements by law enforcement, usually during a time when the prosecutor does not yet have jurisdiction over a case because it is still under police investigation, would be to set up an unrealistic standard of responsibility that a prosecutor in many cases would not be able to achieve. Such a proposed rule, in this light, is unwise and unfair.</p>	(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.
	CDAA			3.8(g)	<p>CDAA agrees wholeheartedly with the Minority Opinion explained in Rule 3.8(g). This disclosure requirement standard already exists in numerous cases following <i>Brady v. Maryland</i> and its progeny. Imposing discipline on a prosecutor who incorrectly (in hindsight) evaluates such material would also be patently unfair.</p>	<p>The Commission's recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors is a proper subject for professional discipline in addition to any other consequences that might result by court sanction or otherwise.</p>

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	CDAA			Cmt. [9]	CDAA believes that Comment [9] should be applied to all subsections of Proposed Rule 3.8. That is, there should be a “good faith” exception to holding a prosecutor liable for violation.	Comment [9] provides a good faith exception to a prosecutor’s exercise of what are by their nature discretionary judgments as to what evidence is “credible and material” under proposed paragraph 3.8(g) and what evidence is “clear and convincing” under paragraph (h). This tracks the logic of Model Rule 3.8 (g) and its Comment [9]. The other Rule provisions do not call on prosecutors to make similar judgments.
T	Cardona, George Department of Justice (also			3.8(c) & Cmt. [2]	We seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested individuals to improve their own positions through cooperation with law enforcement investigations. We ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing:	DRAFTER’S NOTE: The principal drafter requests the Commission to consider adding the proposed language to Comment [2].

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				3.8(g)	<p>“Nor does paragraph (c) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”</p> <p>Although we agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue,</p>	<p>The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether “new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” Specifically, in such a situation, the prosecutor does not have the requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined.</p>

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					<p>and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows:</p> <ol style="list-style-type: none"> 1. Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h). 2. There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger. 3. Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. 4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein: (i) the term "knows" is undefined in the proposed rule; (ii) we are concerned by the use of the term "material" without a correlating definition; (iii) we believe the proposed rule's use of the term "promptly" is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation; (iv) we are concerned with the 	

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				3.8(h)	mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.”	
				Cmt. [9]	5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein: (i) similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h).; (ii) most troubling is Proposed Rule 3.8(h)’s mandate that a prosecutor “shall seek to remedy the conviction.” This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Comment [8] does not sufficiently clarify what is intended.	<p>DRAFTER’S NOTE: The principal drafter requests the Commission to consider adding to proposed Comment [9] an explanation of the standard for the “good faith” exception to proposed Paragraphs 3.8(g) and (h), perhaps along the following lines:</p> <p>“For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted</p> <p>DRAFTER’S NOTE: The principal drafter requests</p>
				3.8(g),(h)	6. Proposed Comment [9]’s undefined “good faith” exception. The Comment leaves it unclear whether the standard is intended to be a subjective standard based on an analysis of the individual prosecutor’s intent, or an objective standard based on what a reasonable prosecutor would do in similar circumstances.	
					7. Potential conflict with other Rules of Professional Conduct and other applicable	

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				3.8(g),(h)	<p>laws. The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. In addition, there a numerous other confidentiality duties imposed on prosecutors.</p> <p>8. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.</p>	<p>the Commission to consider whether it intends proposed Paragraphs 3.8(g) and (h) to override a prosecutor's duties of confidentiality or other client duties and, if so, should add language to the proposed Rule or to a Comment so stating.</p> <p>The Commission recommends adoption of the proposed Paragraphs 3.8(g) and (h) in order to impose an affirmative duty upon a prosecutor who, in specified circumstances, may be in a position to assist in undoing a wrongful conviction. The potential misuse of the proposed Rule by prisoners who may have been properly convicted is not a consideration that outweighs the importance of the proposed duty.</p>
11	Cline, Philip District Attorney County of	D	Y	3.8(a)	The change in the language from Model Rule 3.8(a) to Proposed Rule 3.8(a) creates	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph

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	Tulare			3.8(f)	<p>two significant concerns. First, by changing the language from prosecuting to recommending to prosecute, it appears that there is an attempt to include any attorney with whom a prosecutor consults in the prosecution of the case. This would not only be extremely unfair and unwarranted, it would have an extreme chilling effect on the consultation and discussion of cases prior to filing.</p> <p>Second, by adding the language “reasonably should know is not supported by probable cause” diminishes rather than enhances the stated goal of greater certainty to prosecutors. It is unclear who defines the lowered knowledge standard. Who decides what a prosecutor should “reasonably” know? When does ignorance become negligent ignorance? The concern is that in any case in which there is an acquittal, a complaint of “negligent ignorance” could arise. The fact remains that some cases need to be tried before a jury, and some cases will be lost for any number of reasons that have nothing to do with whether the prosecutor “reasonably should” have believed the probable cause standard was met prior to filing the case.</p> <p>3.8(f) raises two concerns. First, it implies</p>	<p>(a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission notes that current Cal. Rule 5-100 already contains a “know or should know” standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor’s obligations. The Commission also discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and concluded that the revised standard provides greater client protection by imposing an objective “reasonableness” standard that ensures a prosecutor’s negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that “knows or reasonably should know” is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The Commission agrees with the commenter’s</p>

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				3.8(g)(h)	<p>that prosecutors are able to control what law enforcement officials might say publicly about a case. Law enforcement agencies hold their own press conferences and are not subject to the control of the prosecutor.</p> <p>Secondly, we recognize the duty to try our cases in the courtroom rather than the media. We feel that the same obligations should be imposed upon the defense bar. Since this rule does not attempt to apply the same standards to both the prosecution and the defense, we feel that is unwise and unfair.</p> <p>I agree with the minority's position on Proposed Rule 3.8(g)(h). If the conviction did not occur in my jurisdiction, how am I to know when information is "new, credible and material creating a reasonable likelihood. . . ." This imposes an obligation on us to step outside of our role as prosecutor and conduct investigations into criminal cases outside of our jurisdiction in order to protect ourselves from accusations of misconduct.</p>	<p>concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators</u>, 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.</p> <p>Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that newly discovered, credible and material evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. In light of this comment, the Commission has concluded that Comment [7] does not adequately explain the scope of a prosecutor's duties under paragraph (g) and has edited that Comment for clarity.</p>
6	COPRAC	M		3.8(a)	Some members of our Committee prefer the adoption of paragraph (a) of ABA Model Rule 3.8 rather than proposed Rule 3.8(a). They are concerned that it would be difficult	The Commission notes that current Cal. Rule 5-100 already contains a "know or should know" standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that

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				3.8(f)	<p>to fairly judge whether, given all the facts and circumstances relating to the case, the prosecutor reasonably should have known about the evidence.</p> <p>Paragraph (f) should be revised to read “not use investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”</p> <p>Prosecutors often have cooperation with other agencies, but usually do not have the control implied by this proposed rule, given the law enforcement officials answer to their own chain of command.</p>	<p>standard would likely cause confusion over a prosecutor’s obligations. The Commission also discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and concluded that the revised standard provides greater client protection by imposing an objective “reasonableness” standard that ensures a prosecutor’s negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that “knows or reasonably should know” is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The Commission agrees with the commenter’s concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.</p>
				Comment [6A]	<p>We recommend the deletion of the last two sentences of Comment [6A] (in the clean draft) for the same reason.</p>	<p>The Commission notes that this objection is addressed by the recommendation re proposed</p>

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						paragraph 3.8(f).
T	Lee, Bob District Attorney of Santa Cruz	D	Y	3.8(a)	The "reasonably should know" standard is vulnerable to a great deal of subjective interpretation and reasonable minds frequently differ as to what constitutes probable cause. If the "reasonably should know" standard is to be included in the Rule, the Rule must also include an express provision that a prosecutor's independent judgment, made in good faith, that probable cause exists will not violate the Rule.	The Commission notes that current Cal. Rule 5-100 already contains a "know or should know" standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor's obligations. The Commission also discussed the revision of the standard from "knows or should know," which is the current standard, to "knows or reasonably should know" at length and concluded that the revised standard provides greater client protection by imposing an objective "reasonableness" standard that ensures a prosecutor's negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that "knows or reasonably should know" is a defined term in both the proposed Rules and the ABA Model Rules.
				3.8(a)	The term "recommending" is unclear and overbroad. The word "recommending" should either be deleted from the proposed Rule or the Rule needs to be expressly limited to recommendations made to a court or grand jury.	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;
					The added language of the proposed rule	

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				3.8(d)	"comply with all constitutional obligations" is important.	No response necessary.
				Cmt. [2A]	The second sentence of this comment should be deleted because it appears to go beyond the constitutional standard set by the rule and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of favorable evidence.	The second sentence of proposed Comment [2A] is limited by, and does not conflict with, the black letter rule, which refers to evidence that "tends to negate the guilt of the accused or mitigates the offense" or mitigates the sentence.
				3.8(f)	Under proposed Rule 3.6, Trial Publicity, only a lawyer's own extrajudicial statements can subject the lawyer to discipline. However, proposed Rule 3:8 (f) for prosecutors appears to subject a prosecutor to discipline for the extrajudicial statements of other government employees over whom the lawyer has no direct supervisory responsibility. As written, this is an unclear, unworkable, and unfair rule to the extent that it seeks to hold individual prosecutors responsible for the actions of other government employees who are not under the prosecutor's direct supervision.	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.
				3.8(g), (h)	As the Commission's minority apparently recognizes, a prosecutor cannot be expected to know what constitutes "new, credible and material evidence" creating a reasonable likelihood that a convicted	The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether "new, credible and

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					<p>defendant did not commit a crime for purposes of proposed subdivision (g) (1) unless the crime occurred within the prosecutor's own jurisdiction. The prosecutor must be familiar with the evidence in the case in order to make such an assessment.</p> <p>In addition, Rule 3.8(g) apparently seeks to expand a court's legal authority to take action in a criminal case after conviction and judgment. The rule appears to assume that there is an appropriate court to which evidence regarding an out-of-jurisdiction conviction may be disclosed and a court which may authorize delayed disclosure for convictions within the prosecutor's own jurisdiction. However, once a defendant had been convicted and sentenced to prison, a trial court generally loses jurisdiction after 120 days to take any further action in the matter, with a few limited exceptions. (See Pen. Code, § 1170 (d).)</p> <p>If subdivisions (g) and (h) are adopted,</p>	<p>material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." Specifically, in such a situation, the prosecutor does not have the requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined.</p> <p>The proposed Paragraph 3.8(g) provides for disclosure to "an appropriate court or authority"; if the trial court no longer has jurisdiction, the disclosure may be made to the office of the prosecutor in the jurisdiction in which the conviction occurred.</p> <p>The Commission disagrees. As with other proposed Rules, language that clarifies the meaning or</p>

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				Cmt. [9]	Comment [9] must also be incorporated into the new rule because reasonable minds frequently differ as to the credibility and materiality of newly discovered evidence.	application of these rule provisions is included in the Comment to the Rule rather than in the Rule itself.
T	Lieberstein, Gary District Attorney of Napa County	D	Y	Cmt. [1B]	We believe that current Rule 5-110 currently covers this area more than adequately. The commenter thinks Comment [1B] is particularly important in that it states that the proposed Rule is not intended to expand upon the obligations imposed upon prosecutors by applicable law. However, the commenter thinks that the Comment is in conflict with some parts of the rule.	The Commission agrees that proposed Rule 3.8 materially expands the disciplinary consequences for prosecutors, but after reviewing the current and proposed rules has concluded that this expansion is appropriate. Comment [1B] refers only to paragraph (b) of the proposed Rule. After reviewing paragraph (b), the Commission does not believe that it creates any expansion of prosecutors' obligations. The only expansion is that prosecutors act under the risk of professional discipline for certain conduct that otherwise would be improper.
				3.8(a)	Concerned with the phrase, "a prosecutor in a criminal case" as it is not clear. The current rule, 5-110, makes a very clear distinction between pre-filing and post-filing actions. When does a criminal case begin and when does it end?	DRAFTER'S NOTE: The principal drafter requests the Commission to consider clarifying--either in the rule, in a comment or by a definition--when a prosecutor's duties under this are first triggered. The Commission agrees and has deleted the words

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				3.8(b)	<p>Concerned about the term “recommending” and what sort of recommendation is prohibited. The term does not have any meaning in our profession. We suggest removing the word “recommending.”</p> <p>“Reasonably should know” causes us some concern because it could include facts that had not been uncovered or investigated if the State Bar determines the prosecutor <i>should have</i> found them. Opens the door to second guessing or “Monday morning quarterbacking.” We prefer “should know.”</p> <p>We are concerned about 3.8(b) in that it seems to put a duty on the prosecution that</p>	<p>“recommending” and “or continuing” from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission notes that current Cal. Rule 5-100 already contains a “know or should know” standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor’s obligations. The Commission also discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and concluded that the revised standard provides greater client protection by imposing an objective “reasonableness” standard that ensures a prosecutor’s negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that “knows or reasonably should know” is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The language of proposed paragraph 3.8(b) is identical to the language of the ABA Model Rule. Paragraph (b) requires only reasonable efforts by</p>

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				3.8(f)	we have an obligation to ensure that the police are making sure that they have advised of the right to counsel. We have no control over this aspect of law enforcement behavior. We are concerned with 3.8(f) in that the rule subjects a prosecutor to discipline, including potential disbarment, for statements made by independent police departments. This is very troubling and prosecutors should not be accountable for statements made by individuals over whom they have no supervision.	prosecutors and does not make them guarantors of police conduct. The Commission believes this places the correct burden on prosecutors. The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.
				3.8(g)	Our concern with 3.8(g) is how is a prosecutor from one county/jurisdiction supposed to know if discovered information is material or credible evidence that would lead toward exoneration in another county/jurisdiction in another part of the state?	Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that discovered evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. A prosecutor who discovers evidence related to a case but who does not have any basis to believe that it creates such a reasonable likelihood has no duty to act under the rule.
9	Los Angeles County Bar Association, Professional	M	Y	3.8(d)	Section (d) pertains to prosecutors' disclosure obligations. PREC recommends	DRAFTER'S NOTE: The principal drafter requests the Commission to consider adding the words

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	Responsibility and Ethics Committee			<p align="center">3.8(e)</p> <p align="center">3.8(g)</p>	<p>that the Section include both statutory and constitutional obligations. For this reason, the words “statutory and” should be inserted before the word “constitutional” in line one.</p> <p>Section (e) implicates prosecutors’ use of lawyers as witnesses against their current or former clients. This issue implicates prosecutors’ ethical obligations in criminal cases as well as related civil matters, such as <i>habeas corpus</i> cases and extradition proceedings, which also are handled by prosecutors. PREC recommends that the Section explicitly encompass civil proceedings that are related to criminal matters.</p> <p>With regard to Section (g), PREC recommends that no geographic limitation be placed on prosecutors’ obligation to “promptly disclose that evidence to the defendant unless a court authorizes delay” (presently in (g)(2)(A)). Accordingly, PREC recommends that the Rule read:</p> <p>“(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</p>	<p>“statutory and” as recommended by the commenter, as follows:</p> <p>“(d) comply with all statutory and constitutional obligations [etc.]”.</p> <p>DRAFTER’S NOTE: The principal drafter requests the Commission to consider adding a reference to civil proceedings as recommended by the commenter, as follows:</p> <p>“(e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding or civil proceeding related to a criminal matter [etc.]”.</p> <p>The Commission determined that when the conviction at issue was obtained outside the prosecutor’s jurisdiction, the prosecutor’s duties should not be as rigorous as when the conviction was obtained in the prosecutor’s jurisdiction. A prosecutor in one jurisdiction often will have no practical way of locating a convict in another jurisdiction. Where the conviction was not obtained in the prosecutor’s jurisdiction, it should be sufficient for the prosecutor to notify the relevant court or authority.</p>

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					<p>prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority;</p> <p>(2) promptly disclose that evidence to the defendant unless a court authorizes delay; and</p> <p>(3) if the conviction was obtained in the prosecutor's jurisdiction, 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."</p>	
8	Los Angeles County District Attorney's Office	D	Y		<p>We urge the Commission not to adopt, as presently drafted, proposed Rule 3.8. While this Department supports many of the requirements contained in the proposed rule, there are provisions which are unclear and may inhibit prosecutors' obligations to enforce the law.</p>	<p>The Commission has provided the public and interested stakeholders opportunity to provide input on the proposed rule, and many stakeholders have in fact attended RRC meetings to address their concerns and suggestions regarding the rule. The Commission decided to recommend adoption of proposed Rule 3.8 only after carefully considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also carefully considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected</p>

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						the final form of the RRC's recommendation.
3	Orange County Bar Association	M	Y	3.8(a)	<p>The language of the ABA Model Rule is clear and ensures client protection. The Commission's proposal to include "recommending, commencing, or continuing to prosecute a charge" could have a chilling effect upon discussions preceding the actual filing of a charge. Moreover, the Commission's language is internally inconsistent, in that the introductory phrase that a "prosecutor in a criminal case shall . . ." connotes that a criminal lawsuit has been initiated, and would therefore exclude the "recommending" phase of the litigation.</p> <p>The OCBA opposes the inclusion of the phrase "or reasonably should know" on the grounds it (1) is vague as to whether an objective or subjective test would be applied, (2) would impose disciplinary consequences for potential negligence, and (3) would be impractical as applied, since it would require review of a prosecutor's work product at each stage of the prosecution to determine what the prosecutor should have known regarding whether the charges are supportable.</p>	<p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p style="padding-left: 40px;">A prosecutor in a criminal case shall:</p> <p style="padding-left: 40px;">(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission notes that current Cal. Rule 5-100 already contains a "know or should know" standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor's obligations. The Commission also discussed the revision of the standard from "knows or should know," which is the current standard, to "knows or reasonably should know" at length and concluded that the revised standard provides greater client protection by imposing an objective "reasonableness" standard that ensures a prosecutor's negligent ignorance will not excuse compliance with the Rule. In addition, the</p>

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				Comment [4]	In Comment [4], the OCBA suggests that the Commission delete the word "genuine" as unnecessary.	<p>Commission notes that "knows or reasonably should know" is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The Commission disagrees with the commenter's suggestion. The phrase "genuine need" appears in the corresponding Model Rule Comment, and there does not appear to be any materially better alternative. Simply removing the word "genuine" would suggest that prosecutors may subpoena lawyers when there any need to do so. That change would make the Comment inconsistent with paragraph (e), which limits prosecutors to situations of genuine need and which describes when there is a genuine need for a lawyer's testimony.</p>
13	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	M		3.8(a)	OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by "recommending" for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences of opinion? What if the opinion is based on differences about what is admissible evidence?	<p>The Commission agrees that the term "recommending" is problematical and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p>
				3.8(b)	OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make	Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of

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				3.8(c)	<p>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. In most situations, police, not the prosecutor, are involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them?</p> <p>The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pre-trial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.</p>	<p>police conduct. The Commission believes this places the correct burden on prosecutors.</p> <p>The Commission's recommendation of the proposed paragraph 3.8(c) is based on its agreement with the Model Rule concept that the proposed Rule will prevent prosecutors from overreaching with respect to unrepresented defendants that may result in waiver of important pre-trial rights.</p>
				3.8(f)	<p>Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use 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</p>	<p>The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with</u></p>

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					3.6. While in principle laudable, this (paragraph) seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement official is an elected position.	the prosecutor in a criminal case, from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
				3.8(e)	OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.	The Commission is uncertain what point the commenter is making. Paragraph (e) is not intended to address waivers of either the lawyer-client privilege or lawyer work product. That is more properly addressed in evidence rules and the law of evidence.
				3.8(g)	OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.	No response necessary.
				Cmt.	OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under B&P Code section 6131 . This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.	The Commission agrees and has added a comment concerning this Code section. The Code section is also referenced in the Comment to proposed Rule 1.7.

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5	Pacheco, Rod District Attorney, County of Riverside	D		3.8(b)	Proposed Rule 3.8(b) creates an affirmative duty upon prosecutors to ensure that an “accused” is advised of and given the opportunity to obtain counsel. I strongly oppose this rule as vague, unnecessary, and unfair.	The proposed language of paragraph (b) is identical to that of the ABA Model Rule and does not affirmatively require the prosecutor to advise the defendant of the right to counsel. ⁴
				Cmt. [1B]	Proposed Comment 1B states that Proposed Rule 3.8(b) is not intended to expand the obligations imposed on prosecutors by applicable law, but neither federal nor California law imposes the affirmative duties outlined by the Proposed Rule.	Comment [1B] refers only to paragraph (b) of the proposed Rule. After reviewing paragraph (b), the Commission concludes that it does not create any expansion of prosecutors’ obligations. The only expansion is that prosecutors act under the risk of professional discipline for certain conduct that otherwise would be improper.
				3.8(d)	Proposed Rule 3.8(d) sets forth the <i>Brady</i> obligation and expands upon it by requiring a prosecutor to disclose to the defense <i>and the tribunal</i> all unprivileged mitigating <i>sentencing</i> information. While I concur in the adoption of the rule as it comports with <i>Brady</i> and limits discipline to information <i>knowingly</i> suppressed by the prosecutor, and while I applaud the clarifying language added by the Comment (i.e., “comply with all constitutional obligations, as defined by relevant case law”), I am concerned about the rule’s apparent requirement that the	DRAFTER’S NOTE: The principal drafter requests the Commission to consider the commenter’s recommendation to remove the language “and to the tribunal” as described.

⁴ See footnote **Error! Bookmark not defined.** on page 24 for Bob Kehr’s suggested response to concerns re paragraph (b).

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				3.8(e)	<p>prosecution <i>affirmatively advocate</i> mitigating evidence on behalf of the defense.</p> <p>As such, I recommend removing the language "and to the tribunal" from Proposed Rule 3.8(d).</p> <p>I object to requirements (2) and (3) as being unnecessary and unfairly exposing prosecutors to discipline. If the prosecution has determined that the information sought is not privileged or work product (and thus there would be no infringement upon the attorney-client privilege), the prosecutor's presentation of evidence and duty to advocate on behalf of the People should not be limited by such artificial constraints.</p> <p>There is no meaningful public policy or rationale to support requirements (2) and (3) other than a desire to shield defense attorneys. In sum, this rule would hamper</p>	<p>The language of proposed paragraph 3.8(e) substantially follows that of the ABA Model Rule. Requirements (2) and (3) are intended to protect the attorney-client relationship from compromise or undue interference from subpoenas issued by a prosecutor in a grand jury or other criminal proceeding.⁵</p>

⁵ Harry Sondheim does not believe the response addresses Pacheco's concerns. He states: "I do not believe the RRC Response is an adequate justification for requirements (2) and (3). We say they "are intended to protect the attorney-client relationship...." Pacheco's point is that if the information is not privileged, the subpoena is not an "infringement upon the attorney-client privilege," i.e. there is no impact upon the relationship."

KEM response to Harry (principal drafter concurs): I think the simple fact that the prosecutor is attempting to require the lawyer to provide evidence against the client interferes with the attorney-client relationship. Without (2) and (3), prosecutors could subpoena lawyer's files with impunity. There were be no downside for them. In civil litigation, a lawyer must demonstrate a "substantial need" to obtain evidence the other side has developed (e.g., the witness the other side interviewed is no longer available). There is no requirement that the evidence be "privileged." Our system is adversarial; each side is responsible for putting on its own case and obtaining its evidence. In criminal cases, there are constitutional concerns as well. We should retain (2) and (3), as has every other jurisdiction.

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				3.8(f)	<p>the ascertainment of truth which is essential to the fair administration of justice.</p> <p>Accordingly, I propose deleting requirements (2) and (3).</p> <p>I strongly oppose this rule as it is overbroad, ambiguous, and unfairly subjects prosecutors to discipline for statements of others, even individuals over which the prosecutor has no direct supervision. The Proposed Rule appears to have no outer limits regarding over whom the prosecutor must exercise control and the steps the prosecutor must take to avoid discipline.</p>	<p>The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.</p> <p>Proposed paragraph (h) is framed in terms of a prosecutor "taking steps to remedy the conviction" in order to capture the wide range of possible actions that may be appropriate in various circumstances. The illustrations provided in proposed Comment [12] provide guidance regarding what might constitute appropriate steps to remedy in particular situations.</p>
				3.8(h)	<p>Accordingly, I recommend deletion of this Proposed Rule.</p> <p>Proposed Rule 3.8(h) sets forth a heightened degree of responsibility for prosecutors when they know of "clear and convincing evidence" of a defendant's innocence. While the Proposed Comment cites examples of steps a prosecutor may take to "remedy" a conviction, the outer limits of this proposed affirmative obligation remain ambiguous and the Proposed Rule leaves prosecutors with little guidance as to the specific actions they must take in order to avoid discipline under this section. I recommend the Commission clarify the</p>	

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					obligations proposed by this rule.	
T	Paulson, David W. District Attorney of Solano County	D	Y	3.8(a)	<p>Proposed rule 3.8 (a) changes the existing rule from: "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause..." to "A prosecutor in a criminal case shall (a) refrain from <u>recommending, commencing, or continuing to prosecute</u> a charge the prosecutor <u>knows or reasonably should know</u> is not supported by probable cause."</p> <p>Magistrates often disagree with the prosecutor's assessment of probable cause. A magistrate's discharge of the defendant "would become almost a prima facie case for an action against that prosecutor with the State Bar.</p> <p>A prosecutor can still include dismissed charges in an information and the defendant can challenge them under Penal C. 995. However, a prosecutor is less likely to proceed with dismissed charges in an information given the possibility a lost Penal C. 995 motion would be used against him or her in a bar complaint.</p> <p>The "knew or should have known" standard will likely have a significant impact on the</p>	<p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission notes that current Cal. Rule 5-100 already contains a "know or should know" standard</p>

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					<p>way domestic violence cases are prosecuted. Currently, many domestic violence cases are prosecuted notwithstanding the fact the victims recant or are uncooperative. The standard will inhibit prosecutors from aggressively pursuing these cases when it can be easily argued the, prosecutor "should have known" there was no "probable cause" since the victim was uncooperative.</p> <p>Likewise, cases involving criminal street gangs often have proof problems due to uncooperative witnesses. Changes to Rule 3.8 will likely curtail the number of gang prosecutions because, prosecutors again will fear being reported to the State Bar if these cases are dismissed.</p> <p>The change from "the prosecutor" to "a prosecutor who recommends" will affect interactions among lawyers within prosecutors' offices. Experienced lawyers will refrain from advising new prosecutors. This likely will have the unintended consequence of increasing the number of bad prosecutions by decreasing the amount of advice new lawyers will receive.</p>	<p>and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor's obligations. The Commission also discussed the revision of the standard from "knows or should know," which is the current standard, to "knows or reasonably should know" at length and concluded that the revised standard provides greater client protection by imposing an objective "reasonableness" standard that ensures a prosecutor's negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that "knows or reasonably should know" is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The commenter's concerns should be addressed by the deletion of "recommending" from paragraph (a).</p>

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12	Rackauckas, Tony District Attorney County of Orange	D	Y		<p>I am in complete agree with the arguments advanced by Rod Pacheco, above. I therefore respectfully urge, as he did, the deletions of the following proposed rules: Rule 3.8(b), Rule 3.8(e)(2), Rule 3.8(e)(3) and Rule 3.8(f).</p> <p>I also respectfully urge that the language “and to the tribunal,” be deleted from Rule 3.8(d) and clarify a prosecutor’s affirmative obligations under Rule 3.8(h).</p>	See Response to comments from Rod Pacheco, District Attorney, County of Riverside, above.
7	Santa Clara County Bar Association	M	Y		The SCCBA strongly recommends that the RRC pull proposed Rule 3.8 from Batch 5 to take further time and public input from the appropriate criminal justice participants to draft a rule that makes more sense for this jurisdiction. The Model Rule is much too broad and undefined in major respects to be of benefit in its current form.	The Commission is recommending adoption of proposed Rule 3.8 only after carefully considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also carefully considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected the final form of the RRC’s recommendation.
r	Sylva, Julianne	D	N		I disagree with proposed rule 3.8 because the substitution of the “ordinary negligence standard” in this rule is a completely subjective standard and would subject prosecutors to years of litigation anytime that they make a disputable decision.	The Commission notes that current Cal. Rule 5-100 already contains a “know or should know” standard and is not aware of any evidence suggesting that such a standard is inappropriate. Changing that standard would likely cause confusion over a prosecutor’s obligations. The Commission also discussed the revision of the standard from “knows or should know,” which is the current standard, to “knows or reasonably should know” at length and

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					<p>Furthermore, it is of great concern to me that the Commission is promoting this rule to "increase client protection" without considering the need to promote public safety or even due process as defined in the Fifth and Fourteenth Amendments of the U.S. Constitution.</p> <p>Please do not adopt this rule as it stands.</p>	<p>concluded that the revised standard provides greater client protection by imposing an objective "reasonableness" standard that ensures a prosecutor's negligent ignorance will not excuse compliance with the Rule. In addition, the Commission notes that "knows or reasonably should know" is a defined term in both the proposed Rules and the ABA Model Rules.</p> <p>The proposed Rule does not alter a prosecutor's duties when seeking a conviction but does subject a prosecutor to professional discipline for certain conduct that already is improper. The commenter does not suggest how the imposition of such discipline might decrease public safety or interfere with due process.</p>

