

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

**ABA DEATH PENALTY REPRESENTATION PROJECT
ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
ABA SECTION OF LITIGATION
ABA SECTION OF STATE AND LOCAL GOVERNMENT LAW
ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY
ABA GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
ABA COMMISSION ON DOMESTIC VIOLENCE
NEW YORK STATE BAR ASSOCIATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NATIONAL ORGANIZATION OF BAR COUNSEL**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct be amended to
2 add new paragraphs (g) and (h) as follows:

3

4 (g) When a prosecutor knows of new, credible and material evidence creating
5 a reasonable likelihood that a convicted defendant did not commit an offense of which
6 the defendant was convicted, the prosecutor shall:

7
8 (1) promptly disclose that evidence to an appropriate court or authority, and

9
10 (2) if the conviction was obtained in the prosecutor's jurisdiction,

11
12 (A) promptly disclose that evidence to the defendant unless a court
13 authorizes delay, and

14
15 (B) undertake further investigation, or make reasonable efforts to cause an
16 investigation, to determine whether the defendant was convicted of an offense that the
17 defendant did not commit.

18
19 (h) When a prosecutor knows of clear and convincing evidence establishing
20 that a defendant in the prosecutor's jurisdiction was convicted of an offense that the
21 defendant did not commit, the prosecutor shall seek to remedy the conviction.

22
23 FURTHER RESOLVED, that the Comment [1] to 3.8 of the Model Rules of Professional
24 Conduct be amended as follows:
25

26 [1] A prosecutor has the responsibility of a minister of justice and not simply
27 that of an advocate. This responsibility carries with it specific obligations to see that the
28 defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient
29 evidence, and that special precautions are taken to prevent and to rectify the conviction of
30 innocent persons. The extent of mandated remedial action is a matter of debate and
31 varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of
32 Criminal Justice Relating to the Prosecution Function, which are the product of
33 prolonged and careful deliberation by lawyers experienced in both criminal prosecution
34 and defense. Competent representation of the sovereignty may require a prosecutor to
35 undertake some procedural and remedial measures as a matter of obligation. Applicable
36 law may require other measures by the prosecutor and knowing disregard of those
37 obligations or a systematic abuse of prosecutorial discretion could constitute a violation
38 of Rule 8.4.

39
40 FURTHER RESOLVED, that the Comment to 3.8 of the Model Rules of Professional
41 Conduct be amended by adding the following new paragraphs:

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43 [7] When a prosecutor knows of new, credible and material evidence creating
44 a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted
45 of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the
46 court or other appropriate authority, such as the chief prosecutor of the jurisdiction where
47 the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction,
48 paragraph (g) requires the prosecutor to examine the evidence and undertake further
49 investigation to determine whether the defendant is in fact innocent or make reasonable
50 efforts to cause another appropriate authority to undertake the necessary investigation,
51 and to promptly disclose the evidence to the court and, absent court-authorized delay, to
52 the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a
53 represented defendant must be made through the defendant's counsel, and, in the case of
54 an unrepresented defendant, would ordinarily be accompanied by a request to a court for
55 the appointment of counsel to assist the defendant in taking such legal measures as may
56 be appropriate.

57
58 [8] Under paragraph (h), once the prosecutor knows of clear and convincing
59 evidence that the defendant was convicted of an offense that the defendant did not
60 commit, the prosecutor must seek to remedy the conviction. Necessary steps may include
61 disclosure of the evidence to the defendant, requesting that the court appoint counsel for
62 an unrepresented indigent defendant and, where appropriate, notifying the court that the
63 prosecutor has knowledge that the defendant did not commit the offense of which the
64 defendant was convicted.

65
66 [9] A prosecutor's independent judgment, made in good faith, that the new
67 evidence is not of such nature as to trigger the obligations of sections (g) and (h), though
68 subsequently determined to have been erroneous, does not constitute a violation of this
69 Rule.

REPORT

In *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, the ABA's Section of Criminal Justice explored the systemic causes for wrongful convictions in our criminal justice system. Its report made numerous recommendations for systemic remedies to better ensure that individuals will not be convicted of crimes that they did not commit and that the innocent will be exonerated.¹ That report did not address the well established ethical obligations of a prosecutor toward innocent persons.

The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."² Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in Rule 3.8 of the ABA Model Rules of Professional Conduct, which identifies the "Special Responsibilities of a Prosecutor." Proposed Rules 3.8(g) and (h), and the accompanying Comments would rectify this omission.

Proposed Rules 3.8(g) and (h) and the accompanying Comments are based on provisions adopted by the House of Delegates of the New York State Bar Association on November 4, 2006 in the course of its comprehensive review of the state's disciplinary code.³ The rules had their genesis in a 2006 Report of the Association of the Bar of the City of New York ("ABCNY"),⁴ which considered various aspects of prosecutors' duties. Among other provisions, against the background of recent knowledge about the fallibility of the criminal justice process, the Report proposed a rule regarding the prosecutor's obligation when a convicted defendant may be innocent. The report stated: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post - conviction claims of innocence."⁵ The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent. These responsibilities include a duty to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.

¹ *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

² Other courts and commentators have echoed this understanding. See, e.g., *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

³ The proposed provisions are expected to be presented to the judiciary in 2008 as part of proposed comprehensive amendments to the New York Code of Professional Responsibility. The proposed Rules were adopted with the support of local bar associations and with virtually no opposition in the state bar's House of Delegates after a drafting process that involved significant input from state and federal prosecutors and representatives of the criminal defense bar.

⁴ Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 *The Record of the Association of the Bar of the City of New York* 69 (2006).

⁵ *Id.* at 73.

The ABCNY proposal was presented to the state bar's Committee on Standards of Attorney Conduct ("COSAC"),⁶ which agreed with the premise of the ABCNY proposal and drafted provisions that captured the substance of the proposal, and circulated them for a lengthy period of public comment. COSAC's original proposed Rules 3.8(g) and (h) received comment from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations and bar associations, and revised its proposals in light of suggestions received from around the state.⁷

The version adopted by the New York State Bar Association was closely examined and refined by the ABA Section of Criminal Justice, which drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership, including those who serve as representatives of other national organizations such as the National District Attorneys Association. It was then further refined in collaboration with the ABA Standing Committee on Ethics and Professional Responsibility, to ensure its general consistency with the philosophy, purposes, structure and style of the ABA Model Rules of Professional Conduct.

As the proposed provisions reflect, it is important to codify prosecutorial duties upon learning of possible false convictions. The obligations in the proposed rule are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The ABA Model Rules define "knows" to "denote[] actual knowledge of the fact in question"; therefore, indirect or imputed knowledge will not suffice.

The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct, rather than only in the provisions of the ABA Standards Relating to the Administration of Justice, which are not intended to be enforced, will express the vital importance that the profession places on this obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction.

⁶ COSAC is chaired by a former state bar president, Steven Krane, who now also chairs the ABA Standing Committee on Ethics and Professional Responsibility, and includes in its membership a diverse group of practitioners and academics from around the state with expertise in legal ethics. It was appointed to review the existing New York Code of Professional Responsibility in light of the 2002 amendments to the ABA Model Rules of Professional Conduct and to propose comprehensive revisions.

⁷ ABCNY and the New York County Lawyers Association supported the rule as did many prosecutorial and defense organizations, albeit with various suggested drafting changes. No one took issue with the underlying premise that prosecutors have professional duties upon learning that a wrongful conviction may have occurred. The comments were duly considered by COSAC, which then conducted a day-long meeting attended by representatives of more than thirty prosecutor, defender and bar association representatives. Extensive discussion during that meeting resulted in revisions to Rules 3.8(g) and (h) and the accompanying Comments.

Prosecutors' offices have institutional disincentives to comport with these obligations⁸ and, as courts have recognized, their failures are not self-correcting by the criminal justice process.⁹ Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities,¹⁰ with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. 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.

With the understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Comment specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions. A convicted defendant might easily complain that a prosecutor "knows" that the defendant is innocent. Indeed, the defendant may support a complaint by relying on much the same evidence that might have been presented at trial. We are confident, however, that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.

The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict,"¹¹ and, in particular, to prevent and rectify the conviction

⁸ See generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 8 B.U. L. Rev. 125 (2004).

⁹ See, e.g., *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

¹⁰ Prosecutors and their representative organizations involved in the drafting process generally agreed on the need to identify specific measures to be taken upon learning of new evidence of a convicted defendant's innocence. Accordingly, the proposed provisions specifically identify when a prosecutor's disciplinary obligations are implicated regarding disclosure, investigation, and remedial measures. Recognizing, however, that individual cases and jurisdictions differ, the rule does not prescribe particular investigative steps and remedial measures that must be pursued. Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate step may be to make, or join in, an application for executive clemency.

¹¹ ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c); accord *Berger v. United States*, 295 U.S. 78 (1935).

of innocent defendants.¹² For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review,¹³ and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence.¹⁴ These prior resolutions implicitly recognized the need to reexamine convictions in light of newly discovered, material exculpatory evidence. The proposed additions to the ABA Model Rules will codify public prosecutors' obligations to conduct such reexaminations.

Respectfully submitted,

Stephen J. Saltzburg
Chair, Section of Criminal Justice
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¹² See generally *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

¹³ Resolution 111F, approved August 2004.

¹⁴ ABA Standards on DNA Evidence, Standard 2.6(b).