

The Commonwealth of Massachusetts

DISTRICT ATTORNEY OF SUFFOLK COUNTY

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The Standing Advisory Committee on the Rules of Professional Conduct
c/o Barbara Berenson, Senior Attorney
John Adams Courthouse
One Pemberton Square
Boston, Massachusetts 02108

Re: Proposed Revisions of the Rules of Professional Conduct

Dear Members of the Standing Advisory Committee:

I am writing in response to the Notice Inviting Comments on the Proposed Amendments to the Rules of Professional Conduct.

Initially, I would like to thank the Committee for its service and for seeking to be vigilant in updating our rules of conduct as we all seek to recapture the high standing that our profession once held in the eye of the public, to which we all aspire, and which was undoubtedly based on the perception that the law was a noble calling performed by attorneys with great ethics and integrity. During my tenure as District Attorney I have sought to establish and maintain the highest ethical standards for my office, so that the public, the Court's, the attorneys, the victims, witnesses and defendants all recognize that this office is committed to fair and just investigations, prosecutions and outcomes in the criminal justice system.

No office knows better than mine the frustration of learning, long after obtaining a conviction in good faith, that another law enforcement office had information that established the actual innocence of the defendant. I believe that the disclosure of information which is set forth in the proposed rule is already required by the spirit, if not the letter, of current rule 3.8(d). Indeed, I have always instructed prosecutors in my office to behave accordingly. If the court is going to adopt a more explicit rule, I suggest that the language of the rule be as set forth on page 2, below. Further, the concerns I have about the recently submitted proposed language is set forth below on pages 3-4. In addition, I also hereby submit suggestions for other changes that I believe will help to restore the public perception that the law is a noble profession and that attorneys are ethical and honorable practitioners, on page 4 below.

Suffolk Proposal Re: Rule 3.8 (h) & (i):

If a new rule is adopted, this office recommends the following version of Proposed Rule 3.8(h):

(h) When a prosecutor knows there is a reasonable likelihood that a convicted defendant is actually innocent of an offense of which the defendant was convicted because of new, credible, and material evidence, the prosecutor shall promptly disclose that evidence:

- (1) to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant unless a court authorizes delay and cooperate in any further investigation that the court may direct; and
- (3) if the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred.

A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of this subsection (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

This office suggests that Proposed Rule 3.8(i) should be omitted. If not, following version should be adopted:

- (i) When a prosecutor knows of clear and convincing evidence establishing that a defendant is actually innocent, in a case prosecuted by the prosecutor's office, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of this subsection (i), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Concerns Re: Current Language of the Advisory Committee's Proposed Rule 3.8(h):

The proposed drafting of subparts (h) and (i), without an express good faith exception, exposes blameless prosecutors to potential disciplinary action. The absence of a good faith exception is problematic in particular as a prosecutor who deems a new source of information not credible may nonetheless be subjected to discipline.

There are innumerable instances and litigated cases in which post-conviction a co-defendant or a trial witness or previously unknown person suddenly writes a letter or affidavit claiming to have material information, such as the true identity of the perpetrator, or claiming to

be the perpetrator. Such claims are frequent and often wholly incredible. Yet under this rule any prosecutor who does not disclose such information will be subjected to disciplinary proceeding. So too, a prosecutor who does not believe that the information is material, or creates a “reasonable likelihood” will be subjected to disciplinary proceedings.

The proposal adopts the ABA model rule verbatim. Several States, however, have adopted the substance of the rule while improving the language and workability of the rule. Samples from Alaska, Delaware, New York, and Washington are appended.

The Committee no doubt had in mind serious felony cases in which the defendant remains in prison, but the rule is not so limited. Neither is the range of cases in which it comes to this office’s attention that an innocent person may have been convicted. Such cases include both defendants serving life sentences and defendants who have long since been released. In at least one case, this office notified a defendant falling under the latter category of evidence revealing a likelihood of a wrongful conviction and was met with silence. Presumably, the defendant in question was uninterested in revisiting a matter since settled in a way he deemed acceptable.

The requirements of prompt disclosure are sensible. The Proposed Rule, however, invariably requires the prosecutor to initiate further investigation. Such investigation may be unwelcome by a defendant who does not wish to pursue the matter or who wants to conduct his own investigation. Such investigation may be pointless, as in a case of an old misdemeanor conviction of a person not suffering from collateral consequences. Washington recognizes this to some extent, requiring only “reasonable efforts.” This, at least, is an improvement.

The inflexibility is unnecessary. The Proposed Rule requires disclosure to the court and to the defense, at which point the court, after hearing from the parties, can determine the most prudent method of proceeding. Alaska and Delaware recognize this, placing no inflexible requirement of investigation on prosecutors and allowing the court to determine the proper course of action after the notification.

Finally, the formulation of the triggering knowledge in Proposed Rule 3.8(h) is of concern. The ABA Model Rule addresses defendants who are, or may be, actually innocent. Although the Proposed Rule keeps the ABA’s language in the text, it suggests a different concept in the notes, deleting the ABA’s formulation of “the defendant is in fact innocent” and replacing it with the formulation “the defendant was in fact wrongfully convicted,” which could include numerous trial problems other than actual innocence. The Court should either return to the original formulation or adopt clarifying language, such as, “When a prosecutor knows there is a reasonable likelihood that a convicted defendant is actually innocent of an offense of which the defendant was convicted because of new, credible, and material evidence”

Concerns Re: Current Language of the Advisory Committee’s Proposed Rule 3.8 (i):

Proposed Rule 3.8(i) lacks clarity regarding what duty is imposed by the requirement of a “remedy”, appears redundant of proposed subsection (h), and arguably calls upon a prosecutor to vacate a conviction, an obligation a prosecutor has not legal authority to carry out. For these reasons the proposal should be rejected, or a version closer to the New York version, for example, provides the necessary flexibility while also being comprehensible: “the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.”

Likewise the duty to seek a remedy based on “clear and convincing” evidence creates impossibly conflicting duties. For instance, a post-conviction forensic test, such as DNA, may indicate that some person other than the defendant may have been at the scene of a crime at some point in time, or may even have participated in the criminal conduct, and yet not exonerate the defendant. In these circumstances the defendant may seek post-conviction relief and a prosecutor who opposes the motion will face the very real threat of discipline if a court subsequently grants relief. This rule effectively removes the prosecutor from the adversarial system and leaves the people of the Commonwealth unrepresented by counsel.

As Alaska, Delaware, and Washington recognize, there is no need for this provision at all. The prosecutor is required to disclose the exculpatory evidence to the court and the defense. At that point, the court is capable of supervising the process and ensuring that a proper remedy for the situation is provided. There is no need to impose on the prosecutor the duty of seeking a remedy, where there is already a court and defense counsel alerted to the situation and able to make decisions about what sort of remedy would be most useful or desired by the defendant.

Concerns Re: Current Language of the Advisory Committee’s Proposed Rule 3.8 (a):

As to the proposed change to Rule 3.8 (a), this change should not be adopted. The current rule serves to protect people from unfounded prosecutions. This proposal does not reflect the ABA Model Rule, and it is not clear how this reformulation was arrived at or what proper purpose it serves. The proposed amendment would prohibit a prosecutor from notifying a person that charges may be brought in the future if supported by probable cause. So, as written, the proposal would prohibit conditional and truthful statements. In addition, the use of the word “threatening” in this context serves only to vilify prosecutors and to invite spurious and unfounded BBO complaints. Neither the ABA nor the federal rules contain this language. If any proposal along these lines is adopted it should apply to all attorneys and all causes or forms of legal action, rather than be limited to prosecutors and criminal cases.

New Proposals:

Rule 3.4

I would recommend the addition of certain language to sections (b) and (h) to make crystal clear to attorneys that certain conduct, which in the experience of prosecutors in my office is frequent, repetitive and unethical, is prohibited.

First, Rule 3.4 should be amended to include the following language (new language in italics):

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; *or make any statement to a person which misleads or misinforms that person about his or her duty to appear and testify in response to lawful process; or make any statement that could be perceived as inducement to any person to not appear and testify in response to lawful process; or offer anything of value to a person to not appear and testify in response to lawful process; or fail to preserve and maintain evidence relevant to any case or proceeding, or fail to provide such evidence upon lawful demand by any person, party or tribunal.*

Also add a new section (j) to read as follows:

[A lawyer shall not]

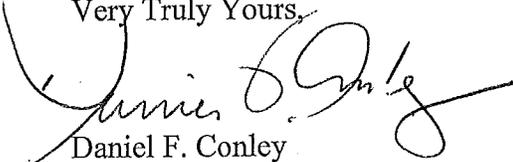
(4) fail to correct any false evidence or material misstatement by that attorney or his client, or any attorney who represents the same client;

(5) fail to correct any false evidence or material misstatement by a witness presented by or on behalf of the attorney's client; Rule 3.6

Add to (a):

Nor shall a lawyer make a statement which would be defamatory if not privileged by the litigation, or which serves no purpose other than to harass, embarrass or intimidate another person or party in relation to litigation. As the Committee reviews these comments, and the comments of others, I would be happy to assist in any way.

Very Truly Yours,


Daniel F. Conley
Suffolk County District Attorney

ADDENDUM

Alaska Rule of Professional Conduct 3.8. Special Responsibilities of a Prosecutor.

* * * *

(g) When a prosecutor knows of new and credible evidence creating a reasonable likelihood that a defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to the appropriate court, the defendant's lawyer, if known, and the defendant, unless a court authorizes delay or unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to the court and served on the defendant's lawyer and the defendant. For purposes of this rule: (1) the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently; (2) the term "credible" means evidence a reasonable person would find believable; (3) the phrase "appropriate court" means the court which entered the conviction against the defendant and, in addition, if appellate proceedings related to the defendant's conviction are pending, the appellate court which is conducting those proceedings; and (4) the phrase "defendant's lawyer" means the lawyer, law firm, agency, or organization that represented the defendant in the matter which resulted in the conviction.

Delaware Rule of Professional Conduct 3.8. Special responsibilities of a prosecutor

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(d) (2) when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred.

New York Rule of Professional Conduct 3.8. Special Responsibilities of Prosecutors and Other Government Lawyers

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(c) 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 within a reasonable time:

- (1) disclose that evidence to an appropriate court or prosecutor's office; or
- (2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) 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 (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Washington Rule of Professional Conduct 3.8. Special Responsibilities of a Prosecutor

(g) when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted the prosecutor shall:

- (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) make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

(h) [Reserved.]

(i) A prosecutor's independent judgment, made in good faith, that the evidence is not of such nature as to trigger the obligations of paragraph (g) of this Rule, through subsequently determined to have been erroneous, does not constitute a violation of this Rule.