



Legal Update

January 2016

Revised Rule of Professional Conduct Rule 3.8: Special Responsibilities of a Prosecutor

Effective Date: April 1, 2016

On January 7, 2016, the Supreme Judicial Court released an order revising Rule 3.8 of the Massachusetts Rules of Professional Conduct.

The following responsibilities were added to Rule 3.8:

- A prosecutor shall refrain from prosecuting when they lack a good faith belief that probable cause exists or can be developed through subsequent investigation.
- A prosecutor shall refrain from seeking as a condition of disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.
- Includes guidance on the handling of newly discovered evidence and wrongful convictions.

The following language was deleted from Rule 3.8:

- "not assert personal knowledge of the facts in issue, except when testifying as a witness;"
- "not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and"

The following footnotes have been added to Rule 3.8:

- 1A – Nothing in this rule "prohibits a prosecutor from declaring the intention to prosecute an individual for as yet uncharged criminal conduct if the prosecutor has a good faith belief that probable cause to support the charge can be developed through subsequent investigation."

- 3A – “[R]egardless of an individual’s right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating.”
- 6 (previous language stricken) – Prosecutors are subject to Rule 5.1 and 5.3 and thus, paragraph (f) reminds the prosecutor of the risks associated with improper extrajudicial statements in a criminal case. Paragraph (f) also requires a prosecutor “to take reasonable steps to prevent” the entire prosecution team, including law enforcement personnel, from making statements.
- 7 – “Paragraph (i) applies to new, credible and material evidence regardless of whether it could have previously been discovered by the defense.” Disclosure must be made promptly to defense counsel, or in the case of an unrepresented indigent person, request the court to appoint counsel.
- 8 – Once a prosecutor is aware through clear and convincing evidence that the defendant did not commit the crime of which they were convicted, paragraph (j) requires the prosecutor to take necessary steps to remedy the injustice including disclosure to the defendant, requesting the court appoint counsel to the indigent, unrepresented defendant, and notifying the court.