

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and
for said Commonwealth on the seventh day of January, in the year
two thousand and sixteen:

present,

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. FRANCIS X. SPINA</u>)	
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<u>HON. ROBERT J. CORDY</u>)	Justices
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<u>HON. MARGOT BOTSFORD</u>)	
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<u>HON. FERNANDE R.V. DUFFLY</u>)	
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. GERALDINE S. HINES</u>)	

ORDERED: That Chapter Three of the Rules of the Supreme
Judicial Court of Massachusetts is hereby amended as follows:

Rule 3:07	By striking out Mass. R. Prof. C. 3.8 and the comments thereto and inserting in lieu thereof the new Mass. R. Prof. C. 3.8 and the comments thereto, as attached hereto.
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The amendment accomplished by this order shall take effect
on April 1, 2016.

ORDERED:

<u>RALPH D. GANTS</u>)	Chief Justice
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<u>FRANCIS X. SPINA</u>)	
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<u>ROBERT J. CORDY</u>)	Justices
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<u>MARGOT BOTSFORD</u>)	
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<u>FERNANDE R.V. DUFFLY</u>)	
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<u>BARBARA A. LENK</u>)	
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<u>GERALDINE S. HINES</u>)	

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;
- (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 a court first has obtained from the accused a knowing and intelligent written waiver of counsel;
- (d) make 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:
 - (1) the prosecutor reasonably believes:
 - (i) the information sought is not protected from disclosure by any applicable privilege;
 - (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (iii) there is no other feasible alternative to obtain the information; and
 - (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:
 - (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from

making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

- (2) take reasonable steps to prevent 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 or this Rule;
- (g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and
- (h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.
- (i) When, because of new, credible, and material evidence, a prosecutor knows that there is 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) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and
 - (2) if the conviction was obtained by that prosecutor's office,
 - (i) disclose that evidence to the appropriate court;
 - (ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;
 - (iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and
 - (iv) undertake or assist in any further investigation as the court may direct.
- (j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.
- (k) 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 (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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, 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 government 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 and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[1A] While a prosecutor may not threaten to prosecute a charge that the prosecutor knows is not supported by probable cause, this rule does not prohibit 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.

[2] Paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term “accused” means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm.

[3A] The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless 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.

[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 client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement

of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which 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 take reasonable steps to prevent all those assisting or associated with the prosecution team, but not under the direct supervision or control of the prosecutor, including law enforcement personnel, from making improper extrajudicial statements. A prosecutor's issuing the appropriate cautions to such persons will ordinarily satisfy the obligations of paragraph (f).

[7] Consistent with the objectives of Rules 4.2 and 4.3, disclosure under paragraph (i) 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. Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly.

[8] Under paragraph (j), once the prosecutor knows that clear and convincing evidence establishes that the defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the injustice. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.