



State Bar of Georgia

Disciplinary Rules & Procedures Committee

AGENDA

February 24, 2021

Via Zoom

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State Bar of Georgia

Disciplinary Rules and Procedures

Name	Position	Term Expires
Mr. Harold Michael Bagley	Chairperson	2022
Mr. R. Gary Spencer	Vice Chairperson	2022
Mr. Paul T. Carroll, III	Member	2021
Hon. J. Antonio DelCampo	Member	2021
Ms. Erin H. Gerstenzang	Member	2023
Mr. John G. Haubenreich	Member	2021
Mr. Patrick H. Head	Member	2021
Ms. R. Javoyne Hicks	Member	2021
Mr. William Dixon James	Member	2021
Mr. Seth David Kirschenbaum	Member	2022
Mr. Edward B. Krugman	Member	2021
Mr. David Neal Lefkowitz	Member	2021
Mr. David S. Lipscomb	Member	2021
Prof. Patrick E. Longan	Member	2021
Ms. Jabu Mariette Sengova	Member	2022
Mr. H. Craig Stafford	Member	2023
Mr. William Hickerson Thomas, Jr.	Member	2023

Mr. Patrick John Wheale	Member	2021
Ms. Paula J. Frederick	Staff Liaison	2021

Disciplinary Rules and Procedure, s Committee
Meeting of January 8, 2021
Via Zoom

MINUTES

Chair Harold Michael Bagley called the meeting to order at 3:00 p.m.

Attendance:

Committee members: Harold Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang, John G. Haubenreich, Patrick H. Head, R. Javoyne Hicks, William D. James, Seth D. Kirschenbaum, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, Patrick E. Longan, H. Craig Stafford, William Thomas, Jr., and Patrick J. Wheale.

Staff: Paula J. Frederick, William D. NeSmith, III, Andreea Morrison, and Kathya S. Jackson.

Guests: Supreme Court Justice Peterson and Deputy Clerk Tia Milton.

Approval of Minutes:

The Committee approved the Minutes from the October 23, 2020 meeting.

Reports:

William NeSmith provided the Committee with the current status of previously amended rules.

R. Gary Spencer provided the Committee with an update regarding the changes to Rule 3.8. The subcommittee, Sherry Boston, and Charysse Alexander, US Attorney's Office liaison, will continue to work on a draft of the rule. The subcommittee will provide the Committee with a draft at its next meeting.

Action Item:

Possible revision to Part 7 of the GRPC

Erin Gerstenzang provided the Committee with an overview of the revisions drafted by the subcommittee. The Committee agreed to review the revisions and provide the subcommittee with comments. The subcommittee will provide the Committee with an updated draft at its next meeting.

Discussion Item:

ABA Rule 1.8(e)(3)

Paula Frederick provided the revised ABA Rule to the pro bono community for comments. The pro bono community is in favor of the changes. Paula Frederick will provide the Committee with a draft at its next meeting.

The next meeting will be before the Spring BOG meeting.

The meeting adjourned at 4:37 p.m.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- a. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- b. refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;
- c. ~~Reserved~~ comply with Rule 4.2.
- 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 that mitigates the offense;
- e. exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this rule;
- f. 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;
 2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 3. there is no other feasible alternative to obtain the information;and
- g. 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, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.
- h. promptly disclose new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted to an appropriate court or authority. If the conviction was obtained in the prosecutor's jurisdiction, the prosecutor shall promptly disclose that evidence to the defendant unless a court authorizes delay and 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.

- i. seek to remedy a conviction obtained in the prosecutor's jurisdiction when the prosecutor knows of clear and convincing evidence establishing that a defendant did not commit the offense.

The maximum penalty for a violation of this rule is ~~a public reprimand~~ disbarment.

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. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. 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: Misconduct.

[2] Reserved.

[3] Reserved.

[4] Paragraph (f) 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 (g) supplements Rule 3.6: Trial Publicity, 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): Trial Publicity.

[6] Reserved

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (h) 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 (h) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or 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.

[8] Under paragraph (i), 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 (h) and

(i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.



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February 22, 2021

Via Email: mbagley@deflaw.com
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Michael Bagley, Esq.
Chair, Disciplinary Rules Committee
State Bar of Georgia
Atlanta, Georgia

Dear Chairman Bagley:

The United States Department of Justice (“Department”), which includes the United States Attorneys for the Middle, Northern, and Southern Districts of Georgia, appreciates the opportunity to comment on the proposed revisions to Georgia Rule of Professional Conduct (“Georgia Rule”) 3.8. We fully support the goals underlying proposed sections (h) and (i).

The Department has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. Indeed, the Department’s Justice Manual imposes disclosure obligations upon federal prosecutors that go beyond the requirements of substantive law. *See, e.g.* Justice Manual (JM) Section 9-5.001 (prosecutors are advised to disclose exculpatory and impeachment information beyond that which is constitutionally and legally required); JM Section 9-5.002 (prosecutors are encouraged to provide discovery that is broader and more comprehensive than discovery rules and statutes require); and JM Section 9-5.003 (the Department’s policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence).

We take to heart Justice Sutherland’s admonition in *Berger v. United States*:

The United States Attorney is the representative not of an
ordinary party to a controversy, but of a sovereignty whose

obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). The Department of Justice would not countenance the continued incarceration of someone who was later found to be innocent of the crime for which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained—pre-trial, during trial, or after conviction.

We understand the Georgia General Assembly is considering legislation that would establish an oversight commission for Georgia prosecuting attorneys. We also understand that some of Georgia's District Attorneys are instead advocating for the addition of Rule 3.8(h) and (i) to allow the Georgia State Bar to provide oversight of prosecuting attorneys to ensure that they disclose substantial evidence of innocence post-conviction, and that the Georgia Rules of Professional Conduct require appropriate accountability of prosecuting attorneys in this context. We appreciate the District Attorneys' reasons for seeking to move forward expeditiously with a rules change; however, any rule change will affect thousands of prosecutors directly and thus, the significant issue addressed by the proposed rules requires a fulsome discussion and careful consideration by everyone potentially affected before proceeding further.

The language in the District Attorneys' proposed revisions is the exact language in the American Bar Association (ABA) Model Rule 3.8 and accompanying commentary. Significantly, despite the fact that the ABA adopted this language nearly 13 years ago, it has not been met with a ground-swell of approval by the bar authorities across the country. In fact, only five states have adopted the ABA's particular language and commentary.¹ And, only fourteen states have adopted a version that modifies—sometimes significantly—either the text or the commentary of the rule.²

¹ See Cal. R. Prof'l Conduct 3.8(f)-(g), cmts. [7]-[9]; Idaho R. Prof'l Conduct 3.8(g)-(h), cmts. [7]-[9]; Mont. R. Prof'l Conduct 3.8(g)-(h); S.D. R. Prof'l Conduct 3.8(g)-(h); W. Va. R. Prof'l Conduct 3.8(g)-(h), cmts. [7]-[9].

² See Alaska R. Prof'l Conduct 3.8(g); Ariz. R. Prof'l Conduct 3.8(g)-(i); Colo. R. Prof'l Conduct 3.8(g)-(h); Haw. R. Prof'l Conduct 3.8(c)-(d); Ill. R. Prof'l Conduct 3.8(g)-(i); Mass. R. Prof'l Conduct 3.8(i)-(k); N.M. R.

We submit that one reason why this rule has not been adopted by State Bars is because the text of the rule and its commentary is problematic in many respects. The proposed new sections of Rule 3.8 contain vague and undefined terms that would make it exceedingly difficult for prosecutors to ascertain their new heightened obligations while also imposing new duties that a prosecutor might not have the ability to fulfill. Given that the proposed revisions seek to impose the disciplinary sanction of disbarment, we think it is imperative that the proposed sections of the rule and comments be clarified to ensure that the new obligations are reasonable and clear. We also think the scope of the Rule should be expanded to include all lawyers in order to embody fully the ideals inherent in the proposed amendments. Thus, we respectfully request that the Georgia Bar Disciplinary Rules Committee (“Disciplinary Rules Committee”) and the Board of Governors consider our comments and alternate proposals (attached hereto as Attachments A and B) before taking any further action on the proposed Rules.³

I. The New Rule Should Apply to All Counsel.⁴

Proposed Georgia Rule 3.8(h) and (i) apply the duties they outline only to prosecutors. We think this limitation is inconsistent with the fundamental premise of the proposed rules. Instead of adding Georgia Rule 3.8 (h) and (i), we propose that the Georgia Bar adopt new Rule 8.6. (See Attachment A). Preventing the incarceration of the innocent is a core value of the judicial system and ameliorating a significant miscarriage of justice should concern all attorneys, not just prosecutors. Recognizing the difficulties and challenges that arise from the operation of other equally important values (*e.g.*, Georgia Rule 1.6’s confidentiality obligations), we, nonetheless, think that full expression of the values inherent in the District Attorneys’ proposed amendments to Georgia Rule 3.8 require extending a duty of disclosure to all members of the Bar—just as the neighboring state of North Carolina has done. See North Carolina Rules of Prof’l Conduct R. 8.6 (<https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-86-information-about-a-possible-wrongful-conviction/>).

Prof’l Conduct 16-308(G); N.Y. R. Prof’l Conduct 3.8(d)-(e); N.C. R. Prof’l Conduct 3.8(g)-(h); N.D. R. Prof’l Conduct 3.8(g)-(h); Tenn. R. Prof’l Conduct 3.8(g)-(h); Wash. R. Prof’l Conduct 3.8(g), (i); Wis. R. Prof’l Conduct SCR 20:3.8(g)-(h); Wyo. R. Prof’l Conduct 3.8(f)-(g). The District of Columbia Court of Appeals is currently considering whether to adopt a modified version of Model Rule 3.8(g) and (h).

³ We have focused here on Rule 3.8 (h) and (i). We also note that adding proposed Rule 3.8(c), which states that prosecutors should comply with Georgia Rule 4.2, is superfluous because prosecutors already are required to comply with that Rule. *See* Georgia Rules of Prof’l Conduct R. 4.2(b) (explicitly applying the Rule to government attorneys), and cmt. [2] (“Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.”). Adding this section to Georgia 3.8 might suggest that different or additional obligations are required and thereby inject ambiguity into the application of Georgia Rule 4.2 where none exists.

⁴ Much of the language and arguments in this section were adopted from the D.C. Bar Rules of Professional Conduct Review Committee, which addressed this same issue in years past.

Like prosecutors, criminal defense attorneys and other attorneys also may be likely to obtain post-conviction exculpatory (or inculpatory) information. *See, e.g., In re Riehlmann*, 891 So.2d 1239 (La. 2005) (former prosecutor diagnosed with terminal illness confessed to friend who was criminal defense attorney that he had suppressed exculpatory blood evidence in capital case); N.Y. State Bar Ass’n on Prof’l Ethics Op. No. 479 (1978) (criminal defense lawyer may not disclose client’s confession to the commission of other uncharged murders but, if moving body parts of the victims was a crime, that conduct would violate the rules of professional conduct); Story of Alton Logan, reported by CBS 60 Minutes, *26 Year Secret Kept Innocent Man in Prison* (Feb. 11, 2009) available at <http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml> (where two criminal defense attorneys were told by their client that he had committed murders for which Alton Logan had been convicted and was still serving a sentence decades later); Story of Lee Wayne Hunt reported by the New York Times, *When Law Prevents Righting a Wrong* (May 4, 2008) available at <http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html> (similar). *Cf. Attorney Grievance Comm’n of Maryland v. Sheinbein*, 812 A.2d 981, 996 (Md. 2002) (attorney encouraged and aided his son, who was believed to have engaged in murder, in absconding to another country to evade investigation; conduct constituted common law crime of obstructing or hindering a police officer and also constituted conduct prejudicial to the administration of justice). When an attorney who is not a prosecutor fails to disclose that an incarcerated person is innocent, that non-disclosure may raise public concerns in a way that is similar to public concerns raised based upon a prosecutor’s non-disclosure.

The obligations imposed on prosecutors are, generally, ones relating to aspects of the process that are uniquely within the prosecutor’s purview. Thus, the prosecutor has evidentiary disclosure obligations and limitations on what he or she may discuss publicly. But, notably, those obligations are all tied to ensuring that the prosecutor does not take advantage of his or her position of authority and greater knowledge. By contrast, obligations that reflect core societal values—such as the prohibition on making a misrepresentation to the Court (Georgia Rule 3.3(a)(1)) or engaging in conduct involving dishonesty, fraud, deceit and misrepresentation (Georgia Rule 8.4(a)(4))—are applied to all lawyers. Nor is the expansion of duties to lawyers relating to disclosing information or engaging in conduct beyond the confines of litigation all that unusual in this jurisdiction. For example, the Georgia Rules require a lawyer attorney to report to the appropriate professional authority serious ethics violations of another lawyer or a judge of which they have personal knowledge (Georgia Rule 8.3).

In our view, it is axiomatic that all “[m]embers of the bar are officers of the court.” *Theard v. United States*, 354 U.S. 278, 281 (1957); *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967); *United States v. Foster*, 226 A.2d 164, 166 (D.C. 1967). As officers and representatives of the court, we believe that all members of the Bar should be expected to conduct themselves in a manner that promotes confidence in the

administration of justice, including the administration of criminal justice. Certainly, if a member of the bar in possession of information about the serious ethics violations of a colleague or a judge has a disclosure obligation, one in possession of non-confidential exculpatory information indicative of the innocence of a convicted individual should as well.

Accordingly, we propose adding a new rule – Rule 8.6 – that extends the disclosure obligations to all lawyers. *See* Attachment A. While we think that proposed rule is the most desirable course of action, we propose another iteration (attachment B) in the event the Disciplinary Committee rejects the first proposal. We explain below the problems with the proposed sections of Georgia Rule 3.8 and our recommended solutions.

II. The Proposed Rule Places Impractical And Unrealistic Obligations On Prosecutors.

In many circumstances it will be difficult for a prosecutor to determine that evidence is “new, credible and material” thus triggering their obligation to disclose.⁵ It is unclear how a prosecutor who did not prosecute a case but who receives information about it can determine whether the information is “new, credible and material.” Some evidence, such as a DNA match obtained using methods that did not exist at the time of the conviction or a recent confession to a publicized crime in a prosecutor’s own district, may provide clear evidence that would trigger application of proposed Rule 3.8(h). In general, however, it would be difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is “new, credible and material,” particularly when the prosecutor was not aware of the evidence presented in the case, the legal issues that had been raised, or the credibility of the witnesses who testified at trial.

For example, proposed Rule 3.8(h), as drafted, could apply to a federal prosecutor in Augusta who hears from a bank robber with a history of heroin abuse whom she is preparing as a witness for trial that the bank robber previously committed a string of similar robberies with buddies in the Fort Lauderdale area. The prosecutor would not know whether this witness’s claim about the commission of robberies in Fort Lauderdale is new evidence suggesting a convicted person did not commit the crime. She would not

⁵ Of the 14 states that adopted a variation of Model Rule 3.8(g) and (h), Alaska and North Carolina adopted “new and credible.” *See* Alaska R. Prof’l Conduct 3.8(g); N.C. R. Prof’l Conduct 3.8(g)-(h). New Mexico adopted “new, credible, and material” but in Comment 8 defined “material” as having the same meaning “as construed under *Brady v. Maryland*, 373 U.S. 83 (1963), its progeny, and Rule 16-308(D)” (16-308(D) contains the language from Model Rule 3.8(d) relating to the prosecutor’s duty to disclose evidence or information that tends to negate the guilt of the accused or mitigates the offense). *See* N.M. R. Prof’l Conduct 16-308(G), cmt. [8]. The District of Columbia’s proposed version of Rule 3.8(g) and (h) contains different terminology: “When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit . . .” The remainder of the 14 states used the Model Rule’s “new, credible, and material” terminology. *See* Ariz. R. Prof’l Conduct 3.8(g)-(i); Colo. R. Prof’l Conduct 3.8(g)-(h); Haw. R. Prof’l Conduct 3.8(c)-(d); Ill. R. Prof’l Conduct 3.8(g)-(i); Mass. R. Prof’l Conduct 3.8(i)-(k); N.Y. R. Prof’l Conduct 3.8(d)-(e); N.D. R. Prof’l Conduct 3.8(g)-(h); Tenn. R. Prof’l Conduct 3.8(g)-(h); Wash. R. Prof’l Conduct 3.8(g), (i); Wis. R. Prof’l Conduct SCR 20:3.8(g)-(h); Wyo. R. Prof’l Conduct 3.8(f)-(g).

know how much to trust the robber's vague memory of particular locations he robbed, memories for which she would have no facts against which to test. And, were there some other defendant convicted of a roughly contemporaneous bank robbery in Fort Lauderdale who maintained his innocence, the prosecutor would not know whether her witness's admission bore materially on that case. Yet, the proposed rule might subject the Augusta prosecutor to discipline for failure to make these determinations even if the prosecutor was not aware of the evidence presented, the legal issues raised, or the credibility of the witnesses who testified during the trial in Fort Lauderdale.

Additionally, by disclosing evidence, a prosecutor who did not handle a case originally, but who elected to disclose the information to a court in an abundance of caution, may be viewed as conceding that the information is in fact new, credible and material, and put in doubt the actual guilt of a convicted defendant when the prosecutor is not in a position to evaluate the matter fully.

In short, although we would expect a prosecutor to engage in her best efforts in determining whether information is “new, material and credible,” there should be recognition that such an analysis, perhaps years after the fact, is difficult. As the introduction section of the Georgia Rules makes clear, “The Rules are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Georgia Rules of Prof'l Conduct, Scope [13]. Accordingly, we have proposed language clarifying that a prosecutor’s subjective intent should be used in determining adherence to this rule and have added it to Comment 18 of version of proposed Rule 3.8.

We also think the proposed rule should account for the fact that identifying exculpatory evidence is even more difficult for a prosecutor when it relates to a conviction in another jurisdiction. In such a situation, a prosecutor is even less likely to be able to determine whether the information presents “new, credible or material evidence” about the innocence of a convicted person. Therefore, we propose modifying the Rule to make clear that a prosecutor who discovers the triggering information has the option of disclosing the information to the prosecuting entity who is in the best position to evaluate the information: the Chief Prosecutor in the jurisdiction of conviction. The Chief Prosecutor can assign the matter to those people who are best equipped to investigate the information and make appropriate disclosures. This suggested modification is consistent with the ultimate goal of the Rule, which is to ensure that information raising a substantial question about the innocence of a convicted person is examined and acted upon appropriately in a timely manner.

III. The Level of “Knowledge” Triggering a Violation is Unclear.

Both subsections (h) and (i) apply when a prosecutor “knows” of particular evidence. Proposed Rule 3.8(h) applies 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.” Similarly, proposed Rule

3.8(i) applies 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.” Both formulations of the prosecutor’s duty are ambiguous, leaving open whether “knows of new, credible and material evidence” means that the prosecutor’s duty is triggered when she becomes aware of information that others later determine is “new, credible, and material evidence,” or whether the prosecutor's duty is triggered only when she is both aware of the information and aware that it is “new, credible and material.” The term “knows” is undefined in this Rule and its comments. The term “know” is defined in Georgia Rule 1.0(m) as “actual knowledge of the fact in question” but this definition is not helpful in distinguishing these two possible interpretations of the Rule. *See* Georgia Rules of Prof’l Conduct R. 1.0(m).

A prosecutor should not be held professionally accountable simply because she is aware of the existence of potentially exculpatory information. The obligation under proposed Rules 3.8(h) and (i) should be triggered only when the prosecutor is aware of and appreciates the significance of the information. As set forth in our proposal, any new rules should be explicit on this point.

IV. The Terms “Material”, “Credible” and “Promptly” are Vague.

We are concerned about the vagueness of the terms “material,” “credible,” and “promptly” in the proposed rules because it will be difficult for prosecutors to interpret these rules and understand their obligations and for the rules to be enforceable. Indeed, courts have recognized that attorneys cannot be disciplined for violating rules that are unclear. *See, e.g. In re Kline*, 113 A.3d 202, 215-16 (D.C. 2015) (finding that it was inappropriate to discipline Kline because, without the benefit of the court’s opinion, his decision was “wrong but . . . not unreasonable” under the circumstances, including Kline’s lack of professional responsibility training, conflicting legal authority, the contrary comment to the D.C. Rule, and ABA Formal Opinion 09-454); *Att’y Grievance Comm’n v. Gansler*, 835 A.2d 548, 567-69 (Md. App. Ct. 2003) (concluding that, because there was “no settled definition” of a Maryland Rule of Professional Conduct, the Rule did “not provide adequate guidance” required to impose sanctions for violating the provision).

a. “Materiality” and “Credibility” are undefined terms.

Neither proposed Rule 3.8(h) nor the Comments define the terms “material.” Although some other Georgia Rules include the word “material,” neither those Rules nor their comments define the term.⁶ *See, e.g.,* Georgia Rules of Prof’l Conduct R. 1.7(a)(2) (2019) (prohibiting a lawyer from representing a client if there is “a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b)”); Georgia Rules of Prof’l Conduct R. 1.9(a) (2019) (prohibiting lawyer

⁶ “Material” appears in Georgia Rules 1.0(l) (in the definition of “informed consent”), 1.0(aa) (in the definition of “substantial”), 1.7, 1.9(b)(2), 1.10(b)(2), 1.11(b), 1.16(b), 3.3, 3.4(a), 4.1, 6.3(b), 7.1(a)(1), and 8.1.

from representing a client “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client[.]”); Georgia Rules of Prof’l Conduct R. 3.3(a)(1) and (4) (2019) (imposing upon a lawyer a duty to correct “material” false statements made to a court); Georgia Rules of Prof’l Conduct R. 4.1(a) (2019) (prohibiting a lawyer from knowingly making a “material” false statement of fact or law to a third person).

The term “material” has been construed broadly in substantially similar state rules of professional conduct to mean important, relevant to establish a claim or defense, or relevant to a fact finder. *See, e.g., In re Packaged Ice Antitrust Litigation*, Nos. 08-md-01952, 10-cv-11689, 2011 WL 611894, at *5 (E.D. Mich. Feb. 11, 2011) (materiality in context of rule of professional conduct regarding conflicts defined as information sufficient to reveal the conflict's scope and severity); *Def. v. Idaho State Bar*, 2 P.3d 147, 152 (Idaho 2000) (in context of rule of professional conduct regarding candor, defining material as “whether (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it”) (internal citations omitted); *Cohn v. Comm’n for Lawyer Discipline*, 979 S.W.2d 694, 698 (Tex. App. 1998) (upholding the trial court's ruling that a false statement to the tribunal was material, stating “We believe, that in the context of Rule 3.03(a)(1), materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding or increase the cost of litigation.”).

On the other hand, in the criminal context, the term “material” is usually defined in the *Brady/Giglio* jurisprudence, which defines evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* The language in the proposed Rule—“creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”—suggests the proposed Rule is intended to incorporate the definition of materiality embodied in the criminal law. Ultimately, however, it is unclear how the term “material” is to be interpreted.

“Credible” is likewise undefined in the proposed rules or elsewhere in the Georgia Rules. In addition, use of the term creates further issues for prosecutors who would seek to comply with the proposed rules because of the difficulty in trying to access the credibility of evidence when it relates to a conviction in another jurisdiction. Without access to other information or evidence in the case, a prosecutor is unlikely to be able to determine whether the information is “credible.”

Ultimately, confusion concerning the significance of new evidence could be remedied by using the term “substantial” in lieu of the terms “credible” and “material” because that term is defined in the Georgia Rules. (As discussed further below, the term “credible” also creates confusion regarding what degree and quality of evidence it takes to trigger the obligation to investigate under Rule 3.8(h) or to seek to remedy the conviction under Rule 3.8(i)). “Substantial” is defined in Georgia Rule 1.0(aa): “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.” Georgia Rules of Prof’l Conduct R. 1.0(aa). This term would provide a much clearer standard for prosecutors to adhere to in complying with post-conviction disclosure obligations.

b. “Promptly” is not defined in the Georgia Rules and is inconsistent with its use in other Rules.

Georgia Rule 3.8(h) states: “When the prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit on offense of which the defendant was convicted,” the prosecutor must “**promptly**” disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must “**promptly**” disclose the evidence to the defendant and undertake further investigation. Like “material,” and “credible,” the term “promptly” is not defined in the Georgia Rules, although it appears in several rules.⁷ See, e.g., Georgia Rules of Prof’l Conduct R. 1.4(a) (2019) (requiring a lawyer to “promptly” inform clients about certain matters and “promptly” comply with a client’s reasonable request for information); Georgia Rules of Prof’l Conduct R. 4.4(b) (2019) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to “promptly” notify the sender).

Based upon the construction of the term “promptly” used in the Georgia Rules, we expect that a court would construe the term to mean with some dispatch. Cf. *Cobb Publ’g, Inc. v. Hearst Corp.*, 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel’s firm “promptly”; the attorney was not screened until ten days after he started working at the new firm; court discounted firm's description of administrative delays in light of the fact that the firm knew prior to the attorney's arrival that he was working as opposing counsel on the case).

The term “promptly” in the context of the Rules referenced above, imposes a duty upon a lawyer to act swiftly when the lawyer already knows of the information that triggers the duty. In contrast, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is “new, credible and material,” particularly if the prosecutor did not handle the case in which the new information applies. It would not be fair for a court or bar authority to sanction a

⁷ “Promptly” appears in Georgia Rules 1.4(a), 1.12(b) & (c), 1.15(I)(c) & (d), 4.4(b), and 9.4(b).

prosecutor for taking the time to review the record of the conviction before acting on the information received.

Accordingly, we recommend that the term “promptly” be replaced with “timely” or “within a reasonable time”.⁸ It also would be helpful to amend the Comment to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and know that the evidence creates a reasonable likelihood that the defendant was convicted of an offense that the defendant did not commit.

V. Federal Prosecutors have Limited Capacity to Investigate Independently.

Proposed Georgia Rule 3.8(h)(2) imposes a duty to “undertake further investigation, or make reasonable efforts to cause an investigation” if the conviction that is now in question occurred in the prosecutor’s jurisdiction. Federal prosecutors are not investigators and have neither the general investigative powers nor the staff or financial resources to investigate every possible legal theory or claim of additional evidence. Unlike District Attorneys, United States Attorney’s Offices do not employ in-house criminal investigators who could be used to investigate this type of matter. Thus, we propose that any new rule take this fact into account and make it clear—like other states have done—that “a prosecutor undertake an investigation” only where it is possible to do so.⁹ We think it is appropriate for the proposed rule to require that prosecutors make reasonable efforts to cause an investigation by the appropriate law enforcement agencies charged with the responsibility for investigating crimes when a conviction is obtained in the prosecutor’s jurisdiction.

VI. The Standard for Initiating an Investigation Must Be Clear.

The threshold standard for initiating an investigation into the validity of a conviction is critical. Proposed Rule 3.8(h)(2) triggers the prosecutor’s obligation to act if she learns 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.” As stated above, several Georgia Rules include the term “material,” but neither the Rules

⁸ See Colo. R. Prof’l Conduct 3.8(g)-(h); N.Y. R. Prof’l Conduct 3.8(d)-(e); Mass. R. Prof’l Conduct 3.8(i)-(k).

⁹ Alaska, Colorado, Hawaii, North Carolina, New Mexico do not have a “duty to investigate” in Rule 3.8. See Alaska R. Prof’l Conduct 3.8(g); Colo. R. Prof’l Conduct 3.8(g)-(h); Haw. R. Prof’l Conduct 3.8(c)-(d); N.C. R. Prof’l Conduct 3.8(g)-(h); N.M. R. Prof’l Conduct 16-308(G). Several states, including the following, have modified language regarding the duty to investigate to make it more explicit that the matter may be referred to a law enforcement agency or another prosecutorial agency for investigation: Arizona (Ariz. R. Prof’l Conduct 3.8(g)-(i)) (“make reasonable efforts to inquire into the matter or refer to appropriate law enforcement or prosecutorial agency for its investigation into the matter”); Massachusetts (Mass. R. Prof’l Conduct 3.8(i)-(k)) (“undertake or assist in any further investigation as the court may direct”); New York (N.Y. R. Prof’l Conduct 3.8(d)-(e)) (“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.”); Washington (Wash. R. Prof’l Conduct 3.8(g), (i)) (“make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation.”)

nor their comments define it. “Credible” is not used in the text of another rule or defined anywhere in the Georgia Rules. The proposed rule leaves unanswered the question of what degree of corroboration is required before the prosecutor must initiate an investigation into the validity of the conviction. The proposed rule uses the phrase “creating a reasonable likelihood that a convicted defendant did not commit an offense,” but the definition of “reasonable” in Georgia Bar Rule 1.0(v) provides little guidance as to what that means: “‘Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.” *See* Georgia Rules of Prof’l Conduct R. 1.0(v).

Because it is very common for convicted defendants serving prison sentences, or their family members and friends, to write letters to the prosecutor claiming they were wrongly convicted, proposed Rule 3.8(h)(2) should state more clearly what level of evidence will trigger the obligation to investigate. Is a letter, standing alone, sufficient to trigger the obligation under proposed Rule 3.8(h)(2)? Is a press conference where the defendant’s family stands with a lawyer proclaiming their loved one’s innocence sufficient to trigger the obligation? Is a protest outside a courthouse sufficient to trigger the obligation?

For these and the reasons stated above, we propose revising the first paragraph of proposed Rule 3.8(h) by removing “credible” and “material” and using the term “substantial” instead because that term is defined in Georgia Rule 1.0(aa). We also propose adding more information to Rule 3.8’s Comments to clarify that not every piece of information raising a question about whether a person was convicted of an offense that the person did not commit triggers the prosecutor’s Rule 3.8(h) obligations because determining a defendant’s innocence requires an evaluation of the entire case.

VII. Prosecutors have Limited Ability to “to Remedy the Conviction.”

Under proposed Georgia Rule 3.8(i), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor “shall seek to remedy the conviction.” Proposed Comment [8] states,

Necessary steps [to remedy the conviction] *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.

(Emphasis added.) The Comment suggests that the duty to “seek to remedy the conviction” may be satisfied by disclosure, notice, and, at most, a motion to the court for appointment of counsel for an indigent defendant. Although the proposed comment is helpful in explaining the scope of the obligation, it does not resolve the problem created by this section of the proposed rule because it is not clear that notice, disclosure, and a motion for appointment of counsel is all that is required to “remedy” a conviction.

In its report accompanying the recommendation to amend Model Rule 3.8, even the ABA's Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

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 steps may be to make, or join in, an application for executive clemency.

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. Several state bar authorities have made substantive revisions to the Model Rule's language, perhaps in recognition of the problematic terminology in the Model Rule.¹⁰ Thus, even if Georgia were to adopt proposed Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more. This is problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction.

As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Federal Rule of Criminal Procedure 33(a) ("Rule 33"), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within 14 days of the verdict. *See* Fed. R. Crim. P. 33(b).

Under 28 U.S.C. § 2255 ("Section 2255"), a defendant may challenge a conviction on constitutional or other legal grounds, but, with a few limited exceptions, must do so within one year of the judgment of conviction, the occurrence of the constitutional

¹⁰ Alaska, Hawaii, New Mexico, North Carolina, and Washington rules contain no "remedy the conviction" language. *See* Alaska R. Prof'l Conduct 3.8(g); N.M. R. Prof'l Conduct 16-308(G); N.C. R. Prof'l Conduct 3.8(g)-(h); Wash. R. Prof'l Conduct 3.8(g), (i). Others have modified the language: Arizona (Ariz. R. Prof'l Conduct 3.8(g)-(i)) ("take appropriate steps, including giving notice to the victim, to remedy the conviction"); Colorado (Colo. R. Prof'l Conduct 3.8(g)-(h)) ("take steps in appropriate court, consistent with applicable law, to set aside the conviction"); New York (N.Y. R. Prof'l Conduct 3.8(d)-(e)) (" . . . shall seek a remedy consistent with justice, applicable law, and the circumstances of the case."). The remaining six states with a modified version of Model Rule 3.8, track the Model Rule language regarding "remedying the conviction" either verbatim or very close to verbatim. *See* Haw. R. Prof'l Conduct 3.8(c)-(d); Ill. R. Prof'l Conduct 3.8(g)-(i); Mass. R. Prof'l Conduct 3.8(i)-(k); N.D. R. Prof'l Conduct 3.8(g)-(h); Tenn. R. Prof'l Conduct 3.8(g)-(h); Wis. R. Prof'l Conduct SCR 20:3.8(g)-(h); Wyo. R. Prof'l Conduct 3.8(f)-(g).

violation, the establishment of the constitutional right, or the date that new facts would be discoverable.¹¹ Thus, even if a court or bar authority were to construe proposed Georgia Rule 3.8(i) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Rule 3.8(h), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to “remedy” a conviction.

The courts and Congress’ legitimate desire for finality of judgments have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. Ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people’s desire for finality of criminal convictions is an equally compelling interest to be served. “[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan,

No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.”

Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Justice Harlan further opined:

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . This drain on society’s resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to

¹¹ Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600. If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1).

continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection, and debate, struck the balance they deem to be appropriate between finality and innocence. The proposed revisions to Georgia Rule 3.8 may be construed to alter this balance without being subject to the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions that sufficient weight has been given to the costs to the government or society that may arise if the proposed revisions are adopted. Rules of professional conduct should not try to address matters of substantive or procedural law. The regulations interpreting 28 U.S.C. 530B, the statute that makes rules of professional conduct applicable to federal government attorneys, clearly state that the statute “should not be construed in any way to alter federal substantive, procedural or evidentiary law.” 28 C.F.R. § 77.1(b) (2007); *accord Stern v. United States Dis. Ct. for the Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000).

Accordingly, we suggest that the requirement for remedying the conviction be eliminated from proposed Rule 3.8(i) because the main remedies proscribed by the rule—the notice provisions—already are covered by other provisions of the proposed rule. Alternatively, we recommend that the comment make clear that a prosecutor is responsible for curing the conviction only to the extent those remedies are within the prosecutor’s control.

VIII. The Rule Should Include a Subjective Standard of Intent.

The proposed Comment [9] to Georgia Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in “good faith” that the new evidence does not trigger the duty to notify and disclose under proposed subparts (h) and (i).¹² Usually, the term “good faith” is used to describe a “state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” *Efron v. Kalmanovitz*, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the proposed Comment to require that a bar authority or a court determine whether a prosecutor has violated the rule by examining the prosecutor’s subjective intent. We believe that is the appropriate standard to use.

¹² The language in Georgia’s proposed Comment 9 is the same as Model Rule 3.8, Comment 9.

However, the term “good faith” is used elsewhere in the Georgia Rules and is not always interpreted in this way.¹³ For example, Georgia Rule 3.1 provides,

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Georgia Rules of Prof’l Conduct R. 3.1 (2019). To avoid any confusion, we submit that the subjective standard of intent should be made clear. We have added language regarding the prosecutor’s subjective intent in Comment 18.

IX. The Safe Harbor Provision Should be Included in the Body of the Rule.

The safe harbor provision set forth in proposed Comment [9] should be included in the text of the Rule. Seven states—Arizona, Hawaii, Illinois, Massachusetts, North Carolina, New York, and Washington—have included the safe harbor language—or language similar to it—in the text of Rule 3.8.¹⁴ This makes sense because otherwise, the safe harbor provides little protection for prosecutors who act in good faith given that the rules and not the comments are controlling. *See* Georgia Rules of Prof’l Conduct, Preamble, Scope and Terminology, [21] (“The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”) *see, also In re Kline*, 113 A.3d 202, 209 (D.C. 2015) (holding that the text of the rule is controlling and suggesting that the comments may not carry any weight). This proposed revision is consistent with other Georgia Rules, which include safe harbor provisions in the body of the rule. *See* Georgia Rule of Prof’l Conduct R. 5.2(b); Georgia Rule of Prof’l Conduct R. 8.5(b)(2). Ultimately, this protection is necessary because the proposed rule suggests disbarment is a potential sanction for breach of its terms.

CONCLUSION

For all of the foregoing reasons, we request that the Georgia Rules of Professional Conduct be amended in one of the following ways:

1. We highly recommend that the Disciplinary Rules Committee consider sponsoring the adoption of new Rule 8.6, which would apply to all attorneys, not just prosecutors. *See* Attachment A, Rule 8.6 “Disclosing

¹³ “Good faith” appears in Georgia Rules 1.2(d), 1.6(b)(3), and 3.1(b).

¹⁴ *See* Ariz. R. Prof’l Conduct 3.8(g)-(i); Haw. R. Prof’l Conduct 3.8(c)-(d); Ill. R. Prof’l Conduct 3.8(g)-(i); Mass. R. Prof’l Conduct 3.8(i)-(k); N.C. R. Prof’l Conduct 3.8(g)-(h); N.Y. R. Prof’l Conduct 3.8(d)-(e); Wash. R. Prof’l Conduct 3.8(g), (i). The proposed DC rule also includes the safe harbor provision in the text of the rule.

Substantial Exculpatory Information About A Convicted Person.”

2. If proposed Rule 8.6 is rejected, then we recommend that the Disciplinary Rules Committee sponsor Rule 3.8 as revised in Attachment B.

We appreciate your consideration of our comments and proposed alternatives and look forward to the opportunity for further discussion. This is an important issue that merits full discussion and careful consideration among all those potentially affected by the proposed rule before moving forward.

Respectfully submitted,

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**RULE 8.6 DISCLOSING SUBSTANTIAL EXCULPATORY INFORMATION
ABOUT A CONVICTED PERSON**

(a) A lawyer who knows of evidence that the lawyer knows raises a substantial question creating a reasonable likelihood that a person was convicted of an offense that the person did not commit shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

- (1) the court where the person's conviction was obtained;
- (2) the chief prosecutor in the jurisdiction where the conviction was obtained;
- (3) the person's attorney of record; and
- (4) the convicted person.

If the identity and location of none of the individuals and entities listed above in subsection 8.6(a)(1)-(4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

(c) A lawyer's determination that the information is not of such nature as to trigger the obligations of paragraph (a), though subsequently determined to have been erroneous, does not constitute a violation of this rule if that determination was made in good faith. A lawyer does not violate paragraph (a) by failing to notify a person or persons or court whose identity or location remains unknown to the lawyer after undertaking reasonable efforts.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar and requires each member of the Bar to disclose substantial exculpatory information about a convicted person when such a disclosure is not prohibited by the attorney's other legal or ethical obligations.

[2] A disclosure that is otherwise mandated by this Rule is not required where it would involve a violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interest. Information that is confidential information under Rule 1.6 is "otherwise protected by Rule 1.6" within the meaning of Rule 8.6(b). See Rule 1.6, cmt. [5]. Rule 1.6(b) and (c) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule. Rule 1.6(d) requires disclosure of confidential information as required by law.

39 [3] A lawyer’s obligations under this Rule are triggered only when the lawyer is aware of
40 and appreciates the significance of the information. In other words, the duty under
41 section (a) is triggered only when the lawyer becomes aware of information, knows that it
42 is “substantial” and knows that it creates a reasonable likelihood that a person was
43 convicted of a crime that the person did not commit.

44 [4] Not every piece of information raising a question about the convicted person's
45 innocence need be disclosed. Rather, this rule limits the disclosure requirement to
46 information that is sufficient to cause a lawyer to believe there is a substantial question
47 about the correctness of the conviction. The term “substantial” refers to the degree of
48 concern the particular information triggers about the correctness of the conviction, and
49 not the quantum of information of which the lawyer is aware. See Rule 1.0(aa). The
50 phrase “reasonable likelihood” refers to the degree of concern the particular information
51 triggers about whether the person was convicted of an offense that the person did not
52 commit, and not the quantum of evidence of which the lawyer knows. See Rule 1.0(v)
53 for the definition of “reasonable.”

54 [5] When a lawyer cannot readily ascertain the identity of any individual or entity to
55 whom disclosure is required (the court where the conviction was obtained, the chief
56 prosecutor of the jurisdiction where the conviction was obtained, the attorney of record,
57 or the convicted person), then disclosure to appropriate professional authorities is
58 required. In most instances, that authority will be the Office of Bar Counsel in Georgia,
59 or the equivalent office in the jurisdiction where the underlying crime occurred or where
60 the attorney principally practices.

61 [6] A disclosure made to a represented person pursuant to Rule 8.6(a)(4) is authorized by
62 law and does not violate Rule 4.2(a) of these Rules.

63 [7] Nothing in this Rule is intended to discourage the disclosure of information that raises
64 a substantial question about whether a person was convicted of an offense that the person
65 did not commit. A disclosure of information pursuant to this Rule is not an admission or
66 concession that such information raises a substantial question about whether a person was
67 convicted of an offense that the person did not commit and should not be considered as
68 such in any subsequent litigation. Information an attorney has already disclosed to a
69 convicted person or the person’s defense attorney of record pre-conviction need not be
70 disclosed again post-conviction in order to comply with this Rule. In order to comply
71 with paragraph (a), a lawyer need not disclose information that the lawyer knows was
72 previously disclosed.

1 RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

2 The prosecutor in a criminal case shall:

- 3 (a) refrain from prosecuting a charge that the prosecutor knows is not supported by
4 probable cause;
- 5 (b) refrain from making any effort to prevent the accused from exercising a reasonable
6 effort to obtain counsel;
- 7 (c) Reserved.

8
9 ~~(e) comply with Rule 4.2;~~

10 (d) make timely disclosure to the defense of all evidence or information known to the
11 prosecutor that tends to negate the guilt of the accused or that mitigates the offense;

12 (e) exercise reasonable care to prevent persons who are under the direct supervision of
13 the prosecutor from making an extrajudicial statement that the prosecutor would be
14 prohibited from making under subsection (g) of this rule;

15 (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present
16 evidence about a past or present client unless the prosecutor reasonably believes:

17 (1) the information sought is not protected from disclosure by any applicable
18 privilege;

19 (2) the evidence sought is essential to the successful completion of an ongoing
20 investigation or prosecution; and

21 (3) there is no other feasible alternative to obtain the information; and

22 (g) except for statements that are necessary to inform the public of the nature and extent
23 of the prosecutor's action and that serve a legitimate law enforcement purpose,
24 refrain from making extrajudicial comments that have a substantial likelihood of
25 heightening public condemnation of the accused.

26 (h) When a prosecutor knows of new and substantial ~~credible and material~~ evidence that
27 the prosecutor knows ~~creates~~ a reasonable likelihood that a convicted defendant
28 did not commit an offense of which the defendant was convicted, the prosecutor
29 shall:

30 (1) ~~promptly~~ timely disclose that evidence to the chief prosecutor of the jurisdiction
31 where the conviction was obtained, or an appropriate court or authority, and

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

33 (i) ~~promptly~~ timely disclose that evidence to the defendant unless a court
34 authorizes delay, and

Commented [AC(1): The addition of 4.2 to Rule 3.8 is superfluous. It already applies to prosecutors. See Georgia Rule 4.2, cmt. 2.

Commented [AC(2): Using the same terminology as is used in Georgia Rule 3.8(d).

(ii) 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.

(i) When a prosecutor knows of evidence that the prosecutor knows is clear and convincing evidence establishing that a defendant was convicted in a prosecution in 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.

[i] 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 (h) and (i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. A prosecutor does not violate subparagraph (h) by failing to notify a person whose identity or location remains unknown to the prosecutor after undertaking reasonable efforts.

Commented [AC(3)]: Except for the phrase "evidence that the prosecutor knows," the language comes from New York Rule 3.8(d). The added language ensures that the prosecutor is held to an appropriate knowledge standard.

Commented [AC(4)]: The language in the first sentence was taken from the Model Rule, Comment 9. Seven states—Arizona, Hawaii, Illinois, Massachusetts, North Carolina, New York, and Washington—have included the safe harbor language—or language similar to it—in the text of Rule 3.8. (Five States adopted ABA's Model Rule 3.8 verbatim. Fourteen others adopted a modified version. This paragraph is one of the paragraphs modified.) In addition, the Georgia Rules also have a safe harbor provision in Rules 5.2(b) and 8.5(b)(2).

The maximum penalty for a violation of this rule is disbarment.

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. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. 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: Misconduct.

[2] Reserved.

[3] Reserved.

[4] Paragraph (f) 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 (g) supplements Rule 3.6: Trial Publicity, 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

74 opprobrium of the accused. Nothing in this Comment is intended to restrict the
75 statements which a prosecutor may make which comply with Rule 3.6 (b) or 3.6 (c): Trial
76 Publicity.

77 [6] Reserved.

78 [7] Rectifying the conviction and preventing the incarceration of an innocent person are
79 core values of the judicial system and matters of vital concern to the legal profession.
80 When a prosecutor knows of new and substantial evidence and knows that the evidence
81 raises a reasonable likelihood that a defendant was convicted of a crime that the
82 defendant did not commit, paragraph (h) requires timely disclosure to the chief
83 prosecutor, court, other authority, such as a state or federally funded public defender's
84 office, or the defendant as set forth in Rule 3.8(h)(1) and (2), depending upon where the
85 conviction occurred.

86 [8] The notification obligations in paragraph (h) assume that the prosecutor knows, or
87 through reasonable efforts can ascertain, the identity and location (i.e., mailing address,
88 email address, or telephone number) of the defendant, authority, or court to be notified.
89 A prosecutor does not violate subparagraph (h) by failing to notify a person or a court
90 whose identity or location remains unknown to the prosecutor after undertaking
91 reasonable efforts. A prosecutor may provide notification directly to the defendant
92 without violating Rule 4.2.

93 [9] A prosecutor's obligations under section (h) are triggered only when the prosecutor is
94 aware of and appreciates the significance of the evidence. In other words, the duty under
95 section (h) is triggered only when the prosecutor becomes aware of evidence, knows that
96 it is "new" and "substantial" and knows that it raises a reasonable likelihood that a
97 defendant was convicted of a crime that the defendant did not commit.

98 [10] Not every piece of evidence that raises a question about whether a defendant was
99 convicted of an offense that the defendant did not commit need be disclosed. Whether
100 evidence is substantial within the meaning of this rule may be difficult to assess for a
101 prosecutor who was not involved in the prosecution of the original case and who does not
102 have access to the underlying case information. The passage of time may make the
103 assessment even more difficult.

104 Thus, this rule limits the disclosure requirement to evidence that is "substantial," which
105 means evidence that is of clear and weighty importance that is sufficient to cause a
106 lawyer to believe there is a "reasonable likelihood" that a defendant was convicted of an
107 offense that the defendant did not commit. See Rule 1.0(aa) for the definition of
108 "substantial." The phrase "reasonable likelihood" refers to the degree of concern the
109 particular evidence triggers about whether the defendant was convicted of an offense that
110 the defendant did not commit, and not the quantum of evidence of which the lawyer
111 knows. See Rule 1.0(v) for the definition of "reasonable."

112 [11] Evidence is considered "new" when it was unknown to the trial prosecutor at the
113 time the conviction was entered or, if known to the trial prosecutor, was not disclosed to

the defense. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the evidence was not available to the trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to the trial prosecutor; or recent testing was performed, which was unavailable at the time of trial. There may be other circumstances when information would be deemed new evidence.

[12] A prosecutor's disclosure obligation under Rule 3.8(h) is not triggered until the prosecutor has had a reasonable amount of time to make an appropriate inquiry, if necessary, into the facts of the conviction so as to be able to determine and know that the evidence is new and substantial and that it creates a reasonable likelihood that the defendant was convicted of an offense that the defendant did not commit. Once the disclosure obligation under Rule 3.8(h) is triggered, disclosure under Rule 3.8(h) should occur in a timely manner.

[13] A prosecutor who knows of evidence and knows that it could raise a substantial question about whether a defendant was convicted of an offense that the defendant did not commit may, but is not required to, disclose that evidence as directed in paragraph (h)(1) or (h)(2)(i) without further inquiry into whether the evidence actually raises such a question. A prosecutor's disclosure of evidence pursuant to this Rule is not an admission or concession that such evidence raises a substantial question about whether a defendant was convicted of an offense that the defendant did not commit and should not be considered as such in any subsequent litigation.

[14] If the conviction was obtained in the prosecutor's jurisdiction, paragraph Rule 3.8(h)(2) requires the prosecutor to take additional action. First, Rule 3.8(h)(2)(i) requires the prosecutor to timely disclose the evidence to the defendant absent a court-authorized delay. Circumstances under which a delay may be sought include when awaiting results from forensic analysis or testing; when disclosure would endanger the safety of a witness or other person; when necessary to preserve the confidentiality of a sensitive investigation related to the evidence, the success of which could be jeopardized if the investigation became public; or for other reasons that further the interests of justice.

Second, paragraph (h)(2)(ii) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation.

Federal prosecutors and state prosecuting attorneys who do not employ in-house criminal investigators may satisfy their obligations under this paragraph by providing the evidence to an entity that has authority to investigate, the chief judge of the jurisdiction where the conviction was obtained, the attorney who currently represents the defendant, or directly to the defendant. A prosecutor may provide notification directly to the defendant without violating Rule 4.2.

Commented [AC(5)]: This language came from Comment [8A] of Colorado Rule 3.8.

Commented [AC(6)]: New York's Rule 3.8 contains this language in the text of the rule, not the comment: Rule 3.8(c)(2)(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 ..."

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153 [15] In order to comply with paragraph (h), a prosecutor need not disclose evidence that
154 the prosecutor knows was previously disclosed, and a prosecutor need not take steps to
155 initiate an investigation when the prosecutor knows another prosecutor is already doing
156 so.

157 [16] Under paragraph (i), once the prosecutor knows of evidence and knows that it is
158 clear and convincing evidence that the defendant was convicted of an offense that the
159 defendant did not commit, the prosecutor must seek a remedy that is consistent with
160 justice, applicable law, and the circumstances of the case . The amount of evidence
161 needed to satisfy the “clear and convincing” threshold in this paragraph should be
162 interpreted consistent with other legal standards in Georgia: “[B]eyond a reasonable
163 doubt” is more than “clear and convincing evidence,” which is more than “preponderance
164 of the evidence,” which, in turn, is more than mere “probable cause.” *Monroe v. Sigler*,
165 256 Ga. 759, 761, 353 S.E.2d 23, 25 (1987).

166 If a prosecutor’s authority to “remedy” a conviction is limited by state or federal
167 substantive, procedural, or evidentiary laws such as Title 18, United States Code, Section
168 2255 and Federal Rule of Criminal Procedure [Rule 33](#), the prosecutor may satisfy the
169 obligation under this paragraph by disclosing the evidence to the defendant, requesting
170 that the court appoint counsel for an unrepresented defendant and, where appropriate,
171 notifying the court that the prosecutor has knowledge that the defendant did not commit
172 the offense of which the defendant was convicted. A prosecutor may provide notification
173 directly to the defendant without violating Rule 4.2.

174 In order to comply with paragraph (i), a prosecutor need not seek to remedy a conviction
175 where the prosecutor knows another prosecutor is already doing so.

176 [17] The duty under section (i) is triggered only when the prosecutor becomes aware of
177 the evidence and knows that it is clear and convincing evidence that the defendant was
178 convicted of an offense that the defendant did not commit.

179 [18] A prosecutor’s subjective intent should be used in determining adherence to this
180 rule.

Commented [AC(7): Are there equivalent state laws or rules of appellate procedure that should be added here?