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CITY BAR

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February 3, 2010

Hon. Jonathan Lippman
Chief Judge
New York State Court of Appeals
230 Park Avenue, Suite 826
New York, NY 10169-0007

Dear Chief Judge Lippman:

The Association of the Bar of the City of New York writes to urge the addition of provisions to our State's new Rules of Professional Conduct ("New York Rules") to govern the conduct of criminal prosecutors who, after obtaining a conviction, learn of important new evidence indicating that the convicted defendant is likely to be innocent.

The provisions that we propose are consistent with those that the American Bar Association has recently added to Rule 3.8 of the Model Rules of Professional Conduct ("ABA Model Rules"). Those changes are as follows:

- (g) *When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:*
 - (1) *promptly disclose that evidence to an appropriate court or authority, and*
 - (2) *if the conviction was obtained in the prosecutor's jurisdiction,*
 - (A) *promptly disclose that evidence to the defendant unless a court authorizes delay, and*
 - (B) *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.*

- (h) *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, the prosecutor shall seek to remedy the conviction.*

We respectfully urge you to incorporate these or similar provisions into New York's Rule 3.8, which is titled "Special Responsibilities of Prosecutors and Other Government Lawyers." Attached as Exhibit A to this letter is a draft of the provisions we propose, which would be known as Rules 3.8(c) and 3.8(d) of New York Rule 3.8 (collectively, the "Proposals").

Historical Background

The ABA provisions were recently adopted in Wisconsin on the motion of the Wisconsin District Attorneys Association¹ and they are under study in other states,² but we are proud to note that they have their genesis in New York, beginning with a 2006 Report of the Association of the Bar of the City of New York ("ABCNY"). See "Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility," 61 *The Record of the Association of the Bar of the City of New York* 69 (2006). Against the background of recent knowledge about the fallibility of the criminal justice process, this Report proposed a rule regarding the prosecutor's obligation when a convicted defendant may be innocent. The Report stated: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post-conviction claims of innocence." *Id.* at 73. The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence showing that it is likely that a convicted person was innocent. These responsibilities include a duty to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.

The ABCNY proposal was presented to the New York State Bar's Committee on Standards of Attorney Conduct ("COSAC"), which agreed with the premise of the ABCNY proposal, drafted provisions that captured the substance of the proposal, and circulated them for a lengthy period of public comment. COSAC received comment from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations and bar associations. Thereafter, COSAC revised its proposals in light of suggestions received from around the State.³

¹ See Wisconsin Sup. Ct. Rule 20:3.8(g) and (h).

² Delaware, for instance, recently adopted a version of Rule 3.8(g), known there as Delaware Rule 3.8(d)(2), which provides, in relevant part, that "when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred."

³ ABCNY and the New York County Lawyers' Association supported the rule as did many prosecutorial and defense organizations, albeit with various suggested drafting changes. No one took issue with the underlying premise that prosecutors have professional duties upon learning that a wrongful conviction may have occurred. The comments were duly considered by COSAC, which then conducted a day-long meeting attended by representatives of more than thirty prosecutor, defender and bar association representatives. Extensive discussion during that meeting resulted in revisions to Rules 3.8(g) and (h) and the accompanying Comments.

The version adopted by the New York State Bar Association was closely examined and refined by the ABA Section of Criminal Justice, which drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership, including those who serve as representatives of other national organizations such as the National District Attorneys Association. It was then further refined in collaboration with the ABA Standing Committee on Ethics and Professional Responsibility, to ensure its general consistency with the philosophy, purposes, structure and style of the ABA Model Rules. Finally, it was adopted by the ABA House of Delegates without any significant opposition and, thereby, incorporated into the ABA Model Rules in 2008.

We were disappointed when similar provisions were not included in the New York Rules made effective in April 2009. Accordingly, our instant Proposals seek amendment to New York Rule 3.8 in a fashion similar to that of ABA Model Rule provisions 3.8(g) and (h).⁴

Rationale for the Proposals

The Proposals would codify unarguable professional obligations. The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”⁵ Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice.

The Proposals also address one aspect of a problem – the problem of wrongful criminal convictions – that is no less serious in New York than elsewhere. The New York State Bar Association’s Task Force on Wrongful Convictions has called attention to the problem of wrongful convictions and the need both to avoid and to remedy them. Most recently, Chief Judge Lippman established a permanent Justice Task Force on Wrongful Convictions in order to address this same problem. Much other work has been done in New York and throughout the country calling attention to this problem. All of this work underscores the central role of prosecutors.

As our Proposals and the recent ABA revisions reflect, it is important to codify prosecutorial duties upon learning of possible false convictions. The obligations in the Proposals are triggered when a prosecutor either “knows” of new, credible and material evidence creating a reasonable likelihood of a convicted defendant’s innocence or “knows” of clear and convincing evidence establishing the convicted defendant’s innocence. The New York Rules define “knows” to “denote[] actual knowledge of the fact in question” (*see* New York Rule 1.0(k)); therefore, indirect or imputed knowledge will not suffice.

⁴ We note that although proposed Rules 3.8(g) and (h) were not included in the recently adopted Rule 3.8, the New York State Bar Association incorporated the substance of ABA Model Rule provisions 3.8(g) and (h) into the Comments to the NY Rules. *See* Comments [6B] - [6E] to NY Rule 3.8. The Comments, of course, are not themselves grounds for discipline, and thus our Proposals seek to incorporate the substance of those Comments into the Rule itself.

⁵ Other courts and commentators have echoed this understanding. *See, e.g., Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

The obligation to avoid and rectify convictions of innocent people, to which our Proposals give expression, is a fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct will express the vital importance that the profession places on this obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices may have institutional disincentives to comport with these obligations⁶ and, as courts have recognized, their failures are not self-correcting by the criminal justice process.⁷ Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The Proposals are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities,⁸ with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, while a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation, the prosecutor will be called upon to decide whether that information is nevertheless sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant.

The proposed provisions will not impose undue burdens on prosecutors to justify their work. Prosecutors take their ethical and professional obligations seriously, and we believe that the judiciary and its institutions, understand that they do. A convicted defendant might easily complain that a prosecutor "knows" that the defendant is innocent. Indeed, the defendant may support a complaint by relying on much the same evidence that might have been presented at trial. We are confident, however, that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.

Finally, the Proposals give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict" (ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c)), and, in particular, to prevent and rectify the conviction of innocent defendants. Throughout the drafting processes in New York State and nationally that led to the adoption of ABA Model Rule 3.8(g) and (h), not a single prosecutor challenged the premise that when presented with newly discovered, material, credible, exculpatory evidence, prosecutors should reexamine convictions and attempt to rectify wrongful convictions if they determine that

⁶ See generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 8 B.U. L. Rev. 125 (2004).

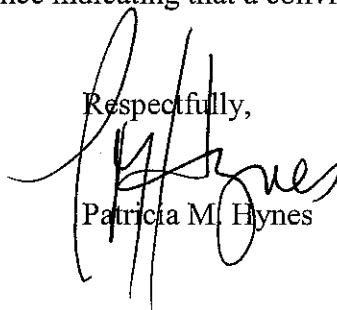
⁷ See, e.g., *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

⁸ Prosecutors and their representative organizations involved in the drafting process generally agreed on the need to identify specific measures to be taken upon learning of new evidence of a convicted defendant's innocence. Accordingly, the Proposals specifically identify when a prosecutor's disciplinary obligations are implicated regarding disclosure, investigation, and remedial measures. Recognizing, however, that individual cases and jurisdictions differ, the Proposals do not prescribe particular investigative steps or remedial measures that must be pursued.

an innocent person was convicted. The instant Proposals to the New York Rules will codify public prosecutors' obligations to conduct such reexaminations.

For the foregoing reasons, we urge that New York's Rule 3.8, "Special Responsibilities of Prosecutors and Other Government Lawyers," be amended by adding proposed subdivisions 3.8(c) and (d), as set forth in attached Exhibit A, setting forth the special obligations of criminal prosecutors who learn of important new evidence indicating that a convicted defendant is likely to be innocent.

Respectfully,

A handwritten signature in black ink, appearing to read "P. Hynes", written over the typed name. The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Patricia M. Hynes

EXHIBIT A

Proposed changes to New York Rule of Professional Conduct 3.8 in *italics*:

**RULE 3.8:
SPECIAL RESPONSIBILITIES OF PROSECUTORS
AND OTHER GOVERNMENT LAWYERS**

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

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

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

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

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

(B) 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.

(d) *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, the prosecutor shall seek to remedy the conviction.*