THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2016-3: PROSECUTORS' ETHICAL OBLIGATIONS TO DISCLOSE INFORMATION FAVORABLE TO THE DEFENSE

TOPIC: Duties of Public Prosecutors

DIGEST: Rule 3.8(b) requires a prosecutor to "make timely disclosure . . . 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." Unlike the federal constitutional duty of disclosure in *Brady v. Maryland*, 373 U.S. 83 (1963), and decisions that followed, Rule 3.8(b) obligates a prosecutor to disclose to the accused any relevant information known to the prosecutor that tends to negate the defendant's guilt or mitigate the charges or sentence regardless of the extent of its significance. Furthermore, once favorable information becomes known, its disclosure under Rule 3.8(b) must be "timely." If the evidence or information would be useful prior to trial (e.g., in conducting investigation or advising the defendant about a plea offer or potential guilty plea) the information must ordinarily be disclosed as soon as reasonably practicable, absent a court order authorizing delay or nondisclosure.

RULES: 1.0(f); 3.8(b); 3.8(c)

QUESTIONS:

1. Does Rule 3.8(b) require a prosecutor to disclose favorable evidence and information that is not necessarily "material" as that term is construed by federal or New York State constitutional decisions, and that need not necessarily be disclosed under federal or state constitutional decisions and other procedural rules and law?

2. What constitutes "timely disclosure" under Rule 3.8(b)?

OPINION:

I. INTRODUCTION

Rule 3.8 of the New York Rules of Professional Conduct (the "Rules") imposes special ethical duties on prosecutors and other lawyers representing the government in criminal litigation, including duties to the defendant. Rule 3.8(b), in particular, imposes an obligation to disclose certain information favorable to the accused. This opinion addresses two questions regarding the scope of that duty.[1]

[1] For brevity, we refer to both prosecutors and other lawyers representing the government in criminal litigation simply as "prosecutors."

II. AN OVERVIEW OF RULE 3.8(B) AND A PROSECUTOR'S LEGAL DISCLOSURE OBLIGATIONS

Rule 3.8(b) requires a prosecutor in a criminal litigation to:

> 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.

Prosecutors also have affirmative legal duties under federal constitutional case law to disclose certain exculpatory information to the defense. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, federal rules and statutory law and New York state law require a federal or state prosecutor to disclose certain prior statements (exculpatory or otherwise) of any witness the prosecutor intends to call at trial prior to when that witness testifies. *See* 18 U.S.C. § 3500 (the "Jencks Act"); *People v. Rosario*, 9 N.Y.2d 286 (1961). The scope of those duties entails questions of law on which we cannot opine. However, we observe that legal disclosure requirements, including a prosecutor's obligations under *Brady* and its progeny, often have been held to embrace only "material" information.

Though some have argued that Rule 3.8 is simply an ethical codification of *Brady*, there is no evidence to support that argument. While *Brady* has been held to require a prosecutor to disclose only "material" evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation. Further, in certain situations, Rule 3.8, which requires "timely" disclosure, may also require earlier disclosure than is required under some of the case law, statutes and rules.

III. ABA FORMAL OPINION 09-454

In 2009, the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") published Formal Opinion 09-454 (the "ABA Opinion" or "ABA Op."). That opinion extensively addressed the relationship between Model Rule 3.8(d)—which is substantively identical to New York Rule 3.8(b)—and a prosecutor's disclosure obligations under the United States Constitution. The ABA Opinion concluded that the drafters of Model Rule 3.8(d) "made no attempt to codify the evolving constitutional case law." ABA Op. at 3. In particular, the rule "does not implicitly include the materiality limitation recognized in the constitutional case law," but instead "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility." *Id.* at 2.

The ABA Committee, which based its conclusion on the history and background to the Model Rule, also identified reasonable textual limitations on a prosecutor's ethical duty to disclose information favorable to the accused. Specifically, the ABA Committee concluded that the "knowledge" requirement contained in the Model Rule requires only "actual knowledge," which "may be inferred from [the] circumstances," and that the Model Rule does not require a prosecutor

to investigate independently to uncover exculpatory information. ABA Op. at 5.[2] The ABA Committee also concluded that the Model Rule's requirement of "timely disclosure" meant that a prosecutor must disclose information "as soon as reasonably practical." *Id.* at 6.

IV. SUBSEQUENT JUDICIAL INTERPRETATION OF THE ETHICAL DUTY OF DISCLOSURE

In the wake of the ABA Opinion, state courts have divided on whether a prosecutor's ethical duty of disclosure is coextensive with legal duties. Some state courts have agreed with the ABA that the ethical duty extends beyond the legal duty. *See In re Larsen*, No. 20140535, 2016 WL 3369545 (Utah June 16, 2016) (holding that the standards in *Brady* and a prosecutor's ethical obligations to disclose favorable material are "distinct"); *In re Kline*, 113 A.3d 202 (D.C. 2015) (D.C. version of the rule does not include "materiality" limitation); *Schultz v. Comm'n for the Lawyer Discipline of the State Bar of Tex.*, No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. of Disciplinary App. Dec. 17, 2015) (concluding that Texas Rule 3.09(d) is "broader than *Brady*"); *In re Disciplinary Action Against Feland*, 820 N.W.2d 672 (N.D. 2012) (rejecting argument that North Dakota equivalent to NY Rule 3.8(b) is coextensive with *Brady*); *see also*, *e.g.*, *Brooks v. Tenn.*, 626 F.3d 878, 892 (6th Cir. 2010) ("[T]he *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor."). Similarly, the Supreme Court of Massachusetts recently amended its version of Rule 3.8 and added a comment clarifying that "[t]he obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law." *See* Mass. S. Ct. Order dated Jan 6, 2016, available at www.mass.gov/courts/docs/sjc/rule-changes/rule-change-sjc-rule-307-january-2016.pdf.[3]

Other courts, however, have held that the ethical duty requires nothing more than applicable law. *See State ex rel. Okla. Bar Ass'n v. Ward*, 353 P.3d 509, 521 (Okla. 2015) (declining to adopt the ABA Committee's interpretation of Model Rule 3.8(d) and construing Oklahoma version of rule as "consistent with the scope of disclosure required by applicable law"); *In re Riek*, 350 Wis. 2d 684, 695-697 (2013) (declining to construe Wisconsin version of rule "to impose ethical obligations on prosecutors that transcend the requirements of *Brady*"); *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 419 (Ohio 2010) (declining to adopt an ethical duty that would "threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure").

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[2] The ABA Committee quoted the definition of "knowledge" in Model Rule 1.0(f), which is identical to NY Rule 1.0(k).

[3] The United States District Court for the District of Columbia has proposed a local rule that generally would require the government to disclose to the defense in criminal cases "any non-trivial information known to the government that tends to negate the defendant's guilt, mitigate the charged offense(s), or reduce the potential penalty . . . regardless of whether the information would itself constitute admissible evidence." *See* U.S. Dist. Ct. for the Dist. Of Columbia, Amended Notice of Proposed Rule Change and Opportunity to Comment, available at: http://bit.ly/29iWw9d.

V. THE TEXT AND HISTORY OF RULE 3.8(B) SUPPORT THE CONCLUSION THAT ITS DISCLOSURE OBLIGATIONS ARE DIFFERENT FROM LEGAL DISCLOSURE OBLIGATIONS

Like the ABA Committee, we believe that there is no evidence that Rule 3.8(b) contains an implicit materiality limitation or otherwise was intended merely to codify constitutional or statutory law. Our conclusion is based on the plain text of Rule 3.8(b) as well as the history and comments to the rule. The ABA Committee persuasively argues that its model provision, from which New York's rule is derived, is different from and, in some respects, more demanding than the constitutional case law. Nothing in its language or history suggests that the New York rule was meant to differ in this respect. Therefore, we join the ABA Committee and other jurisdictions noted above in concluding that Rule 3.8(b) was not meant to be coextensive with a prosecutor's legal disclosure obligations.

A. The text of Rule 3.8(b) indicates that it was not meant to codify legal disclosure obligations

Nothing in the text of Rule 3.8(b) indicates that a prosecutor is obligated to disclose favorable evidence or information only if it is "material" under federal or New York State constitutional law. By its terms, the rule applies to any information known to the prosecutor that "tends to" negate guilt or mitigate the charge or sentence. As the ABA Committee noted, the rule extends beyond "admissible evidence"[4] and applies to information that may lead to admissible evidence favorable to the defense or to information that could assist the defense "in other ways, such as plea negotiations."

In contrast, later-adopted Rule 3.8(c) – which governs a prosecutor's post-conviction duties – expressly applies to "new, credible and *material* evidence" that creates a reasonable likelihood that a convicted defendant is actually innocent. R. 3.8(c) (emphasis added). The fact that the rule drafters explicitly included the materiality standard in Rule 3.8(c) but not in Rule 3.8(b) reinforces the conclusion that they did not in Rule 3.8(b) intend to simply codify a prosecutor's disclosure obligations under *Brady* and its progeny.

Additional textual evidence that Rule 3.8(b) was not intended to be coextensive with *Brady* is the rule's knowledge requirement. By its terms, the ethical disclosure obligation extends to information "known to the prosecutor." The Rules define "known" to mean "actual knowledge of the fact in question," which "may be inferred from the circumstances." R. 1.0(k). As the ABA Opinion concluded, the rule "does not establish a duty to undertake an investigation in search of exculpatory evidence." ABA Op. at 5. In this respect, too, Rule 3.8(b) is not a codification of disclosure obligations established by law. Rather, in this context the rule is less demanding than applicable legal disclosure obligations insofar as judicial decisions require prosecutors to make affirmative efforts to locate evidence and information that must be disclosed under the law.[5]

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[4] We express no opinion on the legal issue of whether *Brady* and its progeny require disclosure of inadmissible evidence.

[5] This Opinion does not address the extent to which trial prosecutors may be subject to discipline for violating legal duties, as distinct from exclusively ethical duties, of disclosure. *See, e.g.*, R.

B. The history and comments to Rule 3.8(b) confirm that it is not meant to codify legal disclosure obligations

The history of Rule 3.8(b) supports our conclusion that the rule should be interpreted consistently with its plain language. The provision is based on models drafted by the ABA— initially Disciplinary Rule 7-103(B) of the ABA Model Code of Professional Responsibility, and subsequently Rule 3.8(d) of the ABA Model Rules of Professional Conduct. The ABA Opinion reviews the drafting history of the model provisions and appropriately concludes that the models were not simply codifications of evolving constitutional requirements and, in particular, did not include a materiality requirement. Nothing in the New York drafting history suggests that the New York version of the rule was intended to have a substantially different meaning from the ABA models.[6]

The comments to Rule 3.8(b) also support our conclusion. As noted in Comment [1] to Rule 3.8, "[a]pplicable state or federal law may require *other measures* by the prosecutor" to ensure that the defendant "is accorded procedural justice" (emphasis added). Thus, the comment recognizes that a prosecutor's ethical and legal obligations are intended to augment one another.

Comparison of the different roles that ethical duties and legal duties play in advancing procedural fairness in criminal litigation also supports our conclusion. The comparison begins with recognition that there are broad similarities in the policies underlying the ethical duty and the constitutional duty. Both reflect the prosecutor's obligation to obtain a just result rather than solely to obtain a conviction. *Compare* Rule 3.8 Cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate") *with, e.g., U.S. v. Bagley*, 473 U.S. 667, 675 n.6 (1985) ("[T]he prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty. . . whose interest. . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'") (quoting *Berger v. U.S.*, 295 U.S. 78, 88 (1935)). Both recognize that justice demands a fair trial and an outcome on which the public can rely. *Compare* ABA Op. at 3 ("A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions.") *with Strickler v.*

3.4(a)(1), (3) & (6); *id.*, R. 8.4(d). Nor does it address supervisory prosecutors' ethical obligation to supervise the conduct of subordinate lawyers and non-lawyers and to ensure compliance with disclosure obligations. *See* R. 5.1 & R. 5.3.

[6] We note that ABA Model Rule 3.8(d) requires a prosecutor to make timely disclosure of "all evidence or information known to the prosecutor," while New York Rule 3.8(b) requires a prosecutor to make timely disclosure of "*the existence* of evidence or information" (emphasis added). The phrase "the existence of evidence or information" was carried over from the old DR 7-103(B) of the New York Code of Professional Responsibility, which was based on the former ABA Model Code of Professional Responsibility, which contained the same phrase. Although the drafters of the ABA Model Rules removed the word "existence," they made it clear at the time that this change was not intended to make any substantive changes to Rule 3.8 as compared to the former DR 7-103(B). *See* Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 Ill. L. Rev. 1573, 1586. We therefore see no substantive difference between the ABA Rule requiring a prosecutor to disclose "evidence or information" and the New York Rule requiring the disclosure of the "existence of evidence or information."

Greene, 527 U.S. 263, 289-90 (1999) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.") (quotation omitted). Both acknowledge that procedural fairness may be denied by withholding evidence from criminal defendants. *Compare* Rule 3.8 Cmt. [1] (A prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence.") *with California v. Trombetta*, 467 U.S. 479, 485 (1984) (The Due Process Clause's standard of fundamental fairness "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense.").

But there are significant differences in the respective functions of the duties and the remedies for a prosecutor's violation of them. A constitutional challenge to a prosecutor's withholding of information can be brought only by the defendant, and the remedy for a violation is a relatively blunt instrument: reversal or vacatur of the defendant's conviction or sentence. The courts have determined that this remedy is warranted only where the failure to disclose information favorable to the defense deprived the defendant of a fair trial. *See*, *e.g.*, *Strickler*, 527 U.S. at 289-90. In contrast, an ethics complaint may be lodged by a court, a lawyer or any member of the public, and if the Disciplinary Committee or Grievance Committee determines that an ethical violation warranting discipline has occurred, the committee has broad discretion to fashion an appropriate sanction, ranging from a confidential letter of caution to disbarment, that does not affect the criminal case. *See* N.Y. R. Prof. Cond. Preamble [11] ("[T]he Rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations."). Where the proceeding focuses more on the public at large than the particular defendant, and where the remedy can be more finely calibrated to the specific circumstances of the violation, "the potential prejudice to the defendant may affect the severity of the sanction imposed, [but] it should not affect the initial determination whether there has been a violation." *Feland*, 820 N.W.2d at 678.

For all of these reasons, we see no basis to construe Rule 3.8(b), contrary to its plain language and drafting history, as being coextensive with constitutional and statutory law.

As indicated above, the conclusion that a prosecutor's ethical obligation to disclose evidence favorable to the defense is not coextensive with legal obligations has not been adopted uniformly.[7] In declining to reach that conclusion, the Oklahoma Supreme Court reasoned that in criminal cases, "'[m]anagement, regulation and supervision of discovery [is] preeminently a trial court function,'" subject to appellate review. *Ward*, 353 P.3d at 521-522 (quoting *In re Attorney C*, 47 P.3d 1167, 1173 (Colo. 2002)). That court further reasoned that the role in criminal discovery of a court enforcing ethical duties[8] "is limited to those 'cases in which conduct occurs that reflects

[7] One sharp critic of the ABA Opinion nonetheless has acknowledged that Model Rule 3.8 "imposes broader disclosure obligations on prosecutors than what is constitutionally required." Kirsten M. Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 Am. U. L. Rev. 1729, 1731 (2012) (hereinafter "Schimpff").

[8] In Oklahoma, criminal convictions are reviewed by the Court of Criminal Appeals, whereas the Oklahoma Supreme Court reviews disciplinary proceedings, so compliance with legal duties and

upon the character of the prosecutor: conduct that cannot fully be addressed by orders relating to the underlying case.'" *Id.* (quoting *In re Attorney C*, 353 P.3d at 1174).

We do not think that the Oklahoma Supreme Court's concerns that, in criminal litigation, the trial court should play the preeminent role in overseeing discovery and that ethical proceedings should be limited to conduct that cannot be fully addressed in the underlying litigation compel the conclusion that ethical disclosure duties are coextensive with legal duties. Indeed, under our interpretation of Rule 3.8(b), the role of trial courts in overseeing discovery in criminal litigation will remain unchanged, as those courts are not charged with enforcing Rule 3.8(b). For the same reason, conduct violating Rule 3.8(b) could not be "fully addressed" in the underlying litigation, which resolves the Oklahoma Supreme Court's second concern.

In declining to follow the ABA Opinion's conclusion that the legal rules and ethical rules are not coextensive, the Wisconsin Supreme Court reasoned that adopting that conclusion "would impose inconsistent disclosure requirements on prosecutors" and that "[d]isparate standards are likely to generate confusion and could too easily devolve into a trap for the unwary." *In re Riek*, 834 N.W.2d at 390. But we see no inconsistency in an ethical standard that is higher than the constitutional standard, because compliance with the higher standard satisfies the lower standard. To the extent there is any potential for confusion, it would likely result from uncertainty regarding the rule—which we hope to dispel through this Opinion—and not from the mere existence of a higher ethical standard.[9]

Indeed, the United States Supreme Court has noted that "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations" than under *Brady* [*Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (citing, *inter alia*, Model Rule 3.8(d))], and that *Brady* "requires less of the prosecution than" Model Rule 3.8(d) [*Kyles v. Whitley*, 514 U.S. 419, 436 (1995)]. The Court made those observations without expressing any concern about intruding upon the trial court's role, creating inconsistency or generating potential for confusion.

C. Evidence and information covered by Rule 3.8(b) must ordinarily be disclosed as soon as reasonably practicable after the prosecutor knows of it

Rule 3.8(b) requires "timely disclosure" of certain favorable evidence and information known to the prosecutor. The ABA Opinion concluded that this means that such evidence and information

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compliance with ethical duties are ultimately reviewed by different courts. *See Ward*, 353 P.3d at 521-22.

[9] In holding that the ethical obligation is coextensive with the legal obligation, the Ohio Supreme Court suggested, without elaboration, that the implications of the opposite conclusion were self-evidently undesirable:

> We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than *Brady* and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does not require disclosure. This holding would in effect expand the scope of discovery currently required of prosecutors in criminal cases.

must be disclosed "as soon as reasonably practical." ABA Op. 09-454 at 6. We agree that evidence and information that tends to negate the guilt of the accused is generally useful to the defense for any of various purposes even at the earliest stages of a criminal proceeding. Early disclosure of favorable information allows the defense to use it in pre-trial investigation and strategy as well as in any decision about whether to plead guilty. *Id; see also In re Larsen*, No. 20140535, 2016 WL 3369545 (Utah June 16, 2016) (holding that timely disclosure under Utah Rule 3.8(d) (the analogue to New York Rule 3.8(b)) requires prosecutors to disclose information "as soon as reasonably practicable"). Therefore, once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or that otherwise falls within the rule's disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable.

The ABA Opinion's interpretation of "timely disclosure" has been criticized as "contrary to the common understanding of the word 'timely'" and "at odds with the distinction made throughout the Model Rules themselves between actions that are required to be accomplished 'timely' and those that are required to be accomplished 'promptly.'" Schimpff at 1768.

We acknowledge the possibility that "timely" can be used to incorporate legal duties outside the Rules, where the rule in question itself is solely incorporating legal duties.[10] However, the Rules elsewhere appear to equate "timely" with "as soon as practical" in situations where the duty in question is established by the Rules themselves, not exclusively by other law. In particular, Rule 1.11 provides that the disqualification of a lawyer who knows confidential government information is not imputed to the lawyer's firm "only if the disqualified lawyer is *timely* and effectively screened" from relevant matters. R. 1.11(c) (emphasis added). Similarly, the definition of "screened" provides that it "denotes the isolation of a lawyer from any participation in a matter through the *timely* imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law." R. 1.0(t) (emphasis added). In elaborating on that timing requirement, the comments state that "[i]n order to be effective, screening measures must be implemented *as soon as practicable* after a lawyer or law firm knows or reasonably should know that there is a need for screening."[11] R. 1.0 Cmt. [10] (emphasis added).

Thus, whether or not an ethical rule uses the term "timely" to reference external legal timing requirements is a rule-specific inquiry turning on whether the particular rule merely incorporates a legal duty or establishes an independent ethical duty. Since Rule 3.8(b) establishes an

[10] For example, Rule 8.4(g) appears to use "timely" in that fashion. *See* R. 8.4(g) ("Where there is a tribunal with jurisdiction to hear a complaint [of unlawful discrimination in the practice of law], if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance."); *see also* Roy D. Simon with Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated*, at 1968 (2016) (interpreting "timely brought" under Rule 8.4(g) to mean "fil[ed] in such a tribunal by the applicable deadline").

[11] Nor do the Rules appear to draw a consistent distinction between "timely" and "promptly." For example, Rule 1.11 provides that effective screening procedures must be implemented "promptly," which seems to be used there interchangeably with "timely" to denote "as soon as practicable."

independent ethical duty of disclosure, the timing of disclosure would not logically incorporate the timing requirements of external law. Moreover, timeliness depends on the purposes for which disclosure must be made. With respect to favorable evidence that must be disclosed under Rule 3.8(b), as discussed above, the purpose of disclosure ordinarily includes not only facilitating a potential trial defense but also assisting the defense prior to trial – e.g., enabling the defendant to weigh the strength of the prosecution's case in order to make a better informed decision whether to plead guilty, and enabling the defense lawyer to conduct a more effective investigation and better prepare for trial. In general, for disclosure to serve all of its contemplated functions, we agree with the ABA Opinion that "for the disclosure of information to be timely" under Rule 3.8(b), "it must be made early enough that the information can be used effectively" [ABA Op. 09-454 at 6], which will ordinarily be before trial.[12] This requirement is consistent with a prosecutor's role as a "minister of justice and not simply that of an advocate." Rule 3.8, Cmt. [1]. Where timely disclosure might be harmful – e.g., where it might lead to witness tampering or obstruction of justice – the rule contemplates that the prosecutor may be relieved of the responsibility to make timely disclosure "by a protective order of a tribunal."[13]

VI. CONCLUSION:

Rule 3.8(b) requires a prosecutor to disclose evidence and information known to the prosecutor that tends to negate the defendant's guilt, mitigate the degree of the offense, or reduce the sentence. The rule does not contain the materiality limitation of state or federal constitutional case law. Further, the rule requires that disclosure to the defense be "timely", which ordinarily would be as soon as reasonably practicable. This may require a New York prosecutor to disclose favorable evidence and information pursuant to the rule at an earlier time than the prosecutor is required to disclose evidence and information under substantive law.

[12] Evidence or information that would be useful solely to impeach a witness will not invariably "tend to negate the guilt of the accused" and therefore be subject to the Rule. Disclosure of impeachment evidence or information, where required, may be timely during or shortly before trial if the information is useful at trial but not for pretrial advice-giving, negotiation, investigation or preparation. *Cf. U.S. v. Ruiz*, 536 U.S. 622 (2002).

[13] This Opinion focuses on whether Rule 3.8(b) incorporates a "materiality" limitation in the constitutional sense and on the meaning of the rule's timeliness requirement – two threshold questions that we regard as most basic and significant. It leaves various other questions regarding Rule 3.8(b) to another day. Among other things, we do not attempt to identify whether and, if so, when arguably favorable evidence or information might be regarded as so inconsequential, tangential or incredible that it cannot fairly be said to "tend[] to negate the guilt of the accused." Nor do we consider whether Rule 3.8(b) has any application following a conviction and sentencing, or whether a prosecutor's ethical duty of disclosure at that point is established exclusively by Rule 3.8(c) which, as noted above, governs prosecutors' post-conviction duties.