

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

**Formal Opinion 2018-2: Prosecutor's post-conviction duties regarding potential wrongful convictions**

**TOPIC:**

Prosecutor's post-conviction duties regarding potential wrongful convictions

**DIGEST:** Rule 3.8(c) of the New York Rules of Professional Conduct (the "Rules") states a minimum standard of conduct "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 duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered. Rule 3.8(c) may be implicated in a variety of ways, including in cases where the defendant pleaded guilty, and its application depends on a fact-intensive inquiry. The terms "new", "credible", "material" and "evidence" have their ordinary, everyday meanings, and were not meant to incorporate legal standards derived from procedural rules, statutes or constitutional decisions. The rule does not apply unless the prosecutor, or the prosecutor's office, has actual knowledge of evidence that triggers the rule or consciously avoids acquiring such knowledge, but a prosecutor who does not know of new exculpatory evidence because of a failure to exercise reasonable diligence may have acted incompetently under Rule 1.1.

**RULES:** 1.0(k), 1.1, 3.8, 5.1, 5.3

**OPINION:**

Prosecutors have many of the same professional obligations as other lawyers, including the duty under Rule 1.1 to conduct their work competently. They also have unique responsibilities as government lawyers to see that justice is done. *See* Rule 3.8 Cmmt. [1]. This includes taking measures to avoid convicting innocent individuals.

The duty to seek justice continues even after a criminal proceeding ends, requiring the prosecutor to take steps to rectify wrongful convictions. In general, if a prosecutor learns new evidence making it likely that a convicted defendant may be innocent, the prosecutor must take certain steps: depending on the specific facts and circumstances, the prosecutor must investigate the evidence and disclose the evidence to the court and/or the defendant. This general responsibility is implicit in prosecutors' duty of competence and in their role as ministers of justice, as recognized well before New York's professional conduct rules specifically addressed the issue.<sup>1</sup>

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<sup>1</sup> *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); *Warney v. Monroe County*, 587 F.3d 113, 125 n.15 (2d Cir. 2009).

In 2012, the New York judiciary adopted Rule 3.8(c), (d) and (e) of the New York Rules of Professional Conduct (the “Rules”) to give expression to prosecutors’ minimum post-conviction duties.<sup>2</sup> Rule 3.8(c), on which this Opinion focuses, provides:

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 within a reasonable time:

- (1) disclose that evidence to an appropriate court or prosecutor's office; or
- (2) if the conviction was obtained by that prosecutor's office,
  - (A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;
  - (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
  - (C) 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.

Rule 3.8(d), in turn, addresses prosecutors’ obligation to seek a remedy upon coming to know of “clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor’s office, of an offense that the defendant did not commit.” Rule 3.8(e) establishes that a prosecutor does not violate Rule 3.8(c) or (d) if the prosecutor made a good-faith, but erroneous, judgment that new evidence did not trigger the obligation. The Rules apply not only to individual prosecutors but also to their offices.<sup>3</sup> Therefore, prosecutors’ offices have disclosure and investigative obligations when prosecutors in the office, individually or collectively, learn of new evidence that triggers the obligations of Rule 3.8(c).

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<sup>2</sup> Rules 3.8(c)-(e) had no equivalent in the former Code of Professional Responsibility. Earlier versions of these provisions were first recommended by a committee of the New York City Bar, and then recommended by the New York State Bar. Based on this work, these bar associations joined the Criminal Justice Section of the American Bar Association (ABA) and other entities in successfully proposing the adoption of Rules 3.8(g) & (h) of the ABA Model Rules of Professional Conduct. Thereafter, New York’s judiciary adopted Rules 3.8(c)-(e) after extensive discussion between the judiciary, state and federal prosecutors’ offices, and bar committees.

<sup>3</sup> See Rule 3.8 Cmnt. [6A] (“Reference to a ‘prosecutor’ in this Rule includes the office of the prosecutor and all lawyers allied with the prosecutor’s office who are responsible for the prosecution function.”); see also Rule 5.1(a) (“A law office shall make reasonable efforts to ensure that all lawyers in the firm conform to these rules.”); Rule 1.0(h) (providing that “firm” or “law firm” includes a government law office).

In general, the terms of Rules 3.8(c)-(e) are clear, and further useful guidance is provided by the accompanying Comments adopted by the New York State Bar Association, as well as by secondary writings on the New York Rules of Professional Conduct.<sup>4</sup> We write to make the following four points.

*First*, and most importantly, the Rules governing conduct of prosecutors were adopted solely for purposes of professional discipline. Like other rules, they “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” NY Rules, Scope, para. [6]. These Rules are not meant to state the limit of what prosecutors and their offices can or should do to rectify wrongful convictions. Many prosecutors’ offices develop, and train prosecutors regarding, obligations that are considerably more demanding and detailed than the disciplinary rule.<sup>5</sup>

*Second*, prosecutors have not only a general duty to seek justice but also a professional obligation of competence. *See* Rule 1.1 (requiring “competent representation”). Rules 3.8(c)-(e) were not meant to establish the full extent of prosecutors’ post-conviction duty, as a matter of competence, to investigate and rectify wrongful convictions. In some situations, ignoring new potentially exculpatory evidence will reflect incompetent prosecutorial work, regardless of whether Rule 3.8(c) is triggered. Rule 3.8(c) presupposes that prosecutors receiving new evidence of innocence will make certain threshold determinations, such as whether the evidence is credible and material, and conduct any inquiry necessary to ascertain whether the investigation contemplated by Rule 3.8(c) is needed.

*Third*, Rule 3.8(c) may be implicated in a variety of ways. New evidence potentially triggering the rule may include new exculpatory evidence of various kinds, such as evidence of an alibi, an account of an eyewitness or accomplice, or physical or forensic evidence such as DNA evidence. But Rule 3.8(c) may also be triggered by new evidence that tends to discredit the proof at trial, such as a recantation, information impeaching a key witness, or new forensic research that casts doubt on the reliability of earlier forensic evidence. Moreover, the rule may be triggered when the defendant pled guilty as well as when the defendant was convicted following a trial, since a guilty plea does not foreclose the possibility that the defendant was in fact innocent. Ultimately, the rule’s application depends on a fact-intensive inquiry.

*Finally*, insofar as state or federal prosecutors have post-conviction obligations under procedural rules, statutes or constitutional case law to disclose or investigate exculpatory information or to rectify wrongful convictions, such legal obligations do not determine prosecutors’ duties under Rules 3.8(c) and (d). *See also* NYCBA Formal Op. 2016-3 (2016) (concluding that prosecutor’s pre-trial disclosure obligations under Rule 3.8(b) are not coextensive with any obligations under substantive law). Moreover, because the terms of Rule 3.8(c) generally have ordinary, everyday

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<sup>4</sup> In particular, see Roy D. Simon & Nicole Hyland, *Simon’s New York Rules of Professional Conduct Annotated* 1255-72 (2017 ed.).

<sup>5</sup> *See* New York University School of Law, Center on the Administration of Criminal Law, “Establishing Conviction Integrity Units in Prosecutors’ Offices”, available at: [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf).

meanings, they were not meant to incorporate legal standards where the same words are used elsewhere in a specialized or restrictive way.

For example, “new” has its everyday meaning in Rule 3.8(c): the evidence was not previously known to the prosecutor or the defense. This is not the same as “newly discovered” evidence for purposes of formal post-conviction proceedings. Prosecutors are familiar with the concept of newly discovered evidence which may justify re-opening criminal proceedings under procedural law. The concept comes with a host of interpretive and limiting meanings. In New York State post-conviction proceedings, a conviction may be vacated based on newly discovered evidence only if, among other criteria, the defendant establishes that the new evidence in question could not have been produced by the defendant at trial, if the defendant exercised due diligence. *See* N.Y. Crim. Pro. Law § 440.10(g). By contrast, “new” evidence under Rule 3.8(c) may include previously unknown evidence that might have been available to the defense at the time of trial if only defense counsel had exercised due diligence.<sup>6</sup>

Likewise, the reference to “evidence” in Rule 3.8(c) is not limited to proof that may be admissible under rules of evidence applicable to judicial proceedings. Exculpatory information is potentially subject to disclosure under the rule regardless of its admissibility under evidence law. This makes practical sense because such information may lead to admissible evidence, provide a basis for an application for executive clemency, or contribute to relieving the convicted defendant of collateral burdens of a conviction.

If the obligation under Rule 3.8(c) is triggered, the prosecutor need not disclose the entire file, but only new evidence that is “new”, “material” and “credible”. The terms “material” and “credible” do not have special meanings derived from statutes or case law. The term “material”

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<sup>6</sup> The distinction between “new” evidence under Rule 3.8(c) and “newly discovered” evidence under procedural law is supported by the 2006 New York City Bar report on the initially-proposed rules. *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) (the “City Bar Report”). The City Bar Report proposed that a prosecutor should be required to re-investigate a case post-conviction upon the receipt of “new material evidence” of innocence. The phrase was adopted from 18 U.S.C. § 3600(a), which provides for court-ordered DNA testing where, *inter alia*, “[t]he proposed DNA testing of the specific evidence may produce new material evidence that would . . . support the theory of defense . . . [and] raise a reasonable probability that the applicant did not commit the offense.” The report explained that “[t]he term ‘*new material evidence*’ is distinct from ‘newly discovered evidence,’ a term found in New York’s post-conviction statute and law. The reason for the distinction is to recognize that the prosecutor’s ethical obligation to the factually innocent may be different from its legal obligation.” In particular, the report explained, “newly discovered evidence” under N.Y. Crim. Pro. Law § 440.10(g) does not include evidence that the defendant could have produced at trial with due diligence on his part. In contrast, “new material evidence” under the proposed ethics rule would “include evidence that could have been found by due diligence of counsel but was not. The report noted that “many, if not most, innocence claims arise in instances where the defense could have found the evidence.”

is not intended to incorporate the standard of materiality for review under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, relating to prosecutors’ disclosure obligation under the U.S. Constitution. Under case law, previously-undisclosed exculpatory evidence is “material” to a conviction if “the new evidence is sufficient to ‘undermine confidence’ in the verdict.” See *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). In Rule 3.8(c), however, “material” simply means that the new evidence contributes significantly to creating a reasonable likelihood of the convicted defendant’s innocence. See *Simon & Hyland*, *supra*, at 1256. Likewise, “credible” has its ordinary meaning: To be “credible”, evidence must simply be trustworthy or worthy of belief.

The one term in the rule that does not necessarily have its ordinary, everyday meaning is “knows.” Rule 3.8(c) is triggered only 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.” Knowledge is a defined term in the Rules. A lawyer “knows” a fact when the lawyer has “actual knowledge of the fact in question [which may be] inferred from the circumstances.” Rule 1.0(k). Conscious avoidance of the fact in question may also constitute knowledge under the Rules, as under criminal law.<sup>7</sup> Moreover, a prosecutor who does not know of new exculpatory evidence because of a failure to exercise reasonable diligence may have acted incompetently under Rule 1.1.<sup>8</sup> But Rule 3.8(c) does not itself hold a prosecutor responsible for failing to disclose new evidence of which the prosecutor was unaware due to negligence, as distinguished from conscious disregard.<sup>9</sup>

## Conclusion

Rule 3.8(c) states a minimum standard of conduct “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 duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered. Rule 3.8(c) may be implicated in a variety of ways, including in cases where the defendant pleaded guilty, and its application depends on a fact-intensive inquiry. The terms “new”, “credible”,

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<sup>7</sup> See NYCBA Formal Op. 99-02 (1999) (“Lawyers have an obligation not to shut their eyes to what was plainly to be seen . . . . A lawyer cannot escape responsibility by avoiding inquiry.”) (quoting ABA Informal Op. 1470 (1981)).

<sup>8</sup> Cf. **Error! Main Document Only.** ABA Formal Op. 09-454 (2009) (“Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.”); see also NYCBA Formal Op. 2015-3 (2015).

<sup>9</sup> Additionally, as noted, Rule 3.8(e) provides that if a prosecutor knows of new evidence that must be disclosed or that requires an investigation under Rule 3.8(c), but the prosecutor erroneously believes “that the new evidence is not of such nature as to trigger the obligations of” section (c) – e.g., the prosecutor does not believe that the evidence is credible or material – the prosecutor’s conduct does not violate the rule if the “prosecutor’s independent judgment [was] made in good faith.”

“material” and “evidence” have their ordinary, everyday meanings, and were not meant to incorporate legal standards derived from procedural rules, statutes or constitutional decisions. The rule does not apply unless the prosecutor, or the prosecutor’s office, has actual knowledge of evidence that triggers the rule or consciously avoids acquiring such knowledge, but a prosecutor who does not know of new exculpatory evidence because of a failure to exercise reasonable diligence may have acted incompetently under Rule 1.1.