

**REPORT OF THE  
PROFESSIONAL RESPONSIBILITY COMMITTEE  
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

**PROPOSED PROSECUTORIAL ETHICS RULES**

**May, 2005**

**OVERVIEW**

The Association of the Bar's Professional Responsibility Committee undertook an examination of the ethics provisions governing prosecutors to determine whether the current disciplinary rules adequately reflect the unique role and responsibilities of these government lawyers. To the extent that the current provisions did not include obligations imposed upon prosecutors, the committee examined whether it should propose that New York's disciplinary code be revised. After careful study, the Committee recommends the adoption of additional ethical provisions in three distinct areas. These are:

1. Prosecutor's duty to convicted defendant when presented with evidence of innocence;
2. Standard for a prosecutor to take a case beyond the charging stage; and,
3. Prosecutor's special duty of candor to the court

In formulating these provisions, we reviewed pertinent case law and scholarly literature, and the current disciplinary provisions of jurisdictions throughout the United States. We focused upon New York's disciplinary rule, DR 7-103 ((Performing the Duty of Public Prosecutor or Other Government Lawyer) and the comparable Model Rule 3.8 (Special Responsibilities of a Prosecutors) adopted with modifications in most jurisdictions, as well as the proposal of the New York State Bar's Committee on Standards of Attorney Conduct (COSAC). COSAC is engaged in

a thorough review of the entire New York Code of Professional Responsibility and it made specific recommendations regarding the ethics provisions governing prosecutors. We set forth each of these provisions and the COSAC report at the end of this report. In making these recommendations, we take no position on the language of Rule 3.8 as proposed by COSAC.

## **BACKGROUND**

The longstanding recognition that a prosecutor is a “minister of justice” and not simply an advocate,<sup>1</sup> led to the 1969 adoption of a disciplinary provision that reflected a few of the prosecutor’s special responsibilities. That rule, DR 7-103 (Performing the Duty of the Public Prosecutor or Other Government Lawyer) has remained virtually unchanged since its 1969 adoption by the American Bar Association in the Model Code of Professional Responsibility. It addresses only the standard for instituting criminal charges and the disclosure of evidence obligation.

Fourteen years later when the ABA adopted the Model Rules, Rule 3.8 (Special Responsibilities of a Prosecutor) contained a few additional provisions about the prosecutor’s obligations to (1) the accused regarding obtaining counsel and to (2) unrepresented defendants. Despite the literature pointing to the necessity for additional disciplinary rules for prosecutors, R 3.8 has remained virtually unchanged since then except for adoption of two amendments limiting the issuance of subpoenas to lawyers (3.8(e)) and public statements by prosecutors (3.8(g)).<sup>2</sup>

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<sup>1</sup> See Model Code of Professional Responsibility EC 7-13; Model Rule of Professional Conduct R. 3.8, Comment.

<sup>2</sup> Monroe Freedman and Abbe Smith, *Understanding Lawyers Ethics* 305 et seq (2004); Bruce A. Green, *Prosecution Ethics As Usual*, 2003 U. Ill. L. Rev, 1573 (2003)(see notations in fn 7); Niki Kuckes, *Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Responsibility* (Dec 1, 1999)(hereinafter “Kuckes Report”); Ellen Yaroshefsky, “*It is Time to Take Prosecutorial Discipline Seriously*,” (forthcoming 8 U.D.C. L. Rev. 2005).

Some individual state ethics codes have added provisions to their version of R 3.8. See e.g., D.C. Rules of Professional Conduct R 3.8(d)(2000)(providing that a prosecutor shall not “intentionally avoid pursuit of evidence of information because it may damage the prosecution’s case or aid the defense”); Mass Rules of Prof’l Conduct R 3.8(h) (2001)(providing that a prosecutor shall “not assert personal knowledge or the facts in issue, except when testifying as a witness”); See Kuckes Report, fn 2.

The American Bar Association’s “Ethics 2000” Commission, whose recommendations were adopted nearly in their entirety in February 2002 by the ABA House of Delegates, did not expand Rule 3.8 or make substantive additions to the rules governing prosecutors. Despite submissions from some lawyers and academics and the comprehensive report of the Criminal Justice Standards Committee of the ABA Criminal Justice Section pointing out troubling prosecutorial conduct not addressed in ethics provisions, the substantive rule was not changed.

The New York State Bar Association has undertaken a revision of its entire disciplinary code. The NYSBA’s Committee on Standards of Attorney Conduct (COSAC), whose work will continue through 2006, issued for public comment its proposed Rule 3.8 concerning the special responsibilities of prosecutors. Modeled upon R 3.8, it makes a few additions to the current DR 7-103 and Model Rule 3.8. It does not address many of the concerns of commentators nor reflect many of the prosecutorial obligations imposed by case law. Significant among those is the prosecutor’s obligation to the factually innocent and its duty of candor.

## **MISSION**

Our initial task was to review the literature to determine whether it was advisable to propose additional ethical rules for prosecutors. Recognizing the complex system of regulation of prosecutorial conduct including internal enforcement, judicial review, and disciplinary sanctions, our committee decided that a comprehensive review of all aspects of prosecutorial action was neither desirable nor workable. Nor was it deemed useful to enter into the longstanding controversies about certain prosecutorial obligations, notably the R. 4.2 no-contact rule debate and the ongoing issue regarding evidence that should be presented to a grand jury.

Instead, we identified a series of issues that were of greatest concern to the prosecutor's duty to justice. We were guided by the question of whether there are workable and enforceable standards that can augment the existing rules governing prosecutors. We asked whether a new rule would serve a useful purpose. We did not propose rules for most aspects of prosecutorial discretion, nor for the prosecutor's duty to victims. Neither did we suggest additional rules governing the prosecutor's responsibility when confronted with incompetent defense counsel.

We reviewed other obligations imposed upon prosecutors by case law, court rules, the ABA Standards on the Prosecution Function, custom and practice, and the ethical rules of other jurisdictions. While we continue to recognize that the nature of criminal prosecutions in 2005 may raise questions about a need for a comprehensive review of ethical obligations of

prosecutors, we declined to pursue that long term project. Instead, the three areas that we address are among the most useful and necessary to establish norms and provide enforceable rules.

## FORMAT OF THE REPORT

This report is presented as follows:

1. Proposed Rules set forth below (in bold)
2. Background
3. Comment to the Rule

The format of the Proposed Rules is not always consistent with the current structure of the New York Code or the Model Rules.

### I. PROSECUTOR'S OBLIGATION TO THE FACTUALLY INNOCENT

**A prosecutorial office shall:**

- (a) investigate the merits of a convicted person's innocence claim submitted to the prosecutorial office where the assertions made by the person, if true, would raise a reasonable probability that he did not commit the offense for which he was convicted, and he identifies new material evidence, whether or not defense counsel could have found it by the exercise of due diligence that supports his assertion;**
- (b) disclose to the convicted person any *Brady* material that comes to the prosecution's attention that was available prior to the defendant's conviction but not previously disclosed; and,**
- (c) where there is clear and convincing evidence that the person did not commit the offense, join in a motion to set aside the prior judgment.**

#### **Background**

a. In light of the large number of cases in which convicted defendants have been exonerated, most often as a result of DNA testing but also as a result of other proof that they were wrongfully convicted,<sup>3</sup> it is appropriate to obligate prosecutors' offices to give serious

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<sup>3</sup> Some of the literature on this subject is collected on the New York State Defenders Association website, at [http://www.nysda.org/NYSDA\\_Resources/nysda\\_resources.html#Innocence-WrongfulConvictions](http://www.nysda.org/NYSDA_Resources/nysda_resources.html#Innocence-WrongfulConvictions).

consideration and devote office resources to the consideration of credible post-conviction claims of innocence.

The literature recognizes such an obligation. Professor H. Richard Uviller, who is the former head of the appeals unit in the Manhattan D.A.'s office, posits that when there is "a firmly based charge that . . . an innocent person was convicted, . . . [a]ll efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the [prosecutor] . . . to urge immediate remedy to assist the court in righting the wrong." Uviller writes:

...where a post-judgment motion goes directly to the issue of guilt, the prosecutor is returned to the pre-adversary mode, and neutrality must resurface. A critical prosecution witness recants; a cop is accused of fabricating evidence in another case; a DNA test discloses that the defendant could not have been the rapist. Upon tenable grounds for such allegations, the prosecutor must resume the role of neutral investigator. A thorough and dispassionate investigation of the new development must be made, and, where the result warrants, the prosecutor must not hesitate to cancel the victorious judgment and see that justice is done in the light of the amplified or revised facts. We have read of instances in which DNA evidence has unequivocally contradicted eyewitness testimony, and the prosecutor refuses to join in the motion to set aside the prior judgment or to move to dismiss the charges after the court does so. This seems to me a grievous deviation from the role of neutral servant of justice, which the prosecutor is duty-bound to fulfill...a firmly based charge that a woeful mistake was made, that an innocent person was convicted, is not to be taken lightly. We know such mistakes are made (though we have no inkling how frequently) and each one threatens the probity of the entire system. All efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the people's representative, the guardian of the integrity of the process, to urge immediate remedy to assist the court in righting the wrong.<sup>4</sup>

Professor Bruce A. Green argues that there should be an ethical standard to confess error and seek redress when post-trial evidence indicates that an innocent person was convicted. *Ethics*

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<sup>4</sup> H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704-05 (2000).

2000 and Beyond: Reform, Or Professional Responsibility As Usual?: Prosecutorial Ethics As Usual, 2003 Ill. L. Rev. 1573, 1593-94 (2003) (footnotes omitted). Recognizing the fallibility of the trial process, and noting that the ABA Model Rules of Professional Responsibility, R. 3.8(a) is “silent about the prosecutor’s duty in these circumstances, Green cites to *Young v. United States*, 315 U.S. 257, 258 (1942) and *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992) in arguing that there is a duty to “confess error” and seek redress when post-trial evidence indicates that an innocent person was convicted. (*Young* stated that “[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when . . . a miscarriage of justice may result from their remaining silent”).

b. Threshold for Initiating a Re-investigation

The federal statute “Advancing Justice Through DNA Technology Act of 2003”, in § 311, dealing with establishing rules and procedures governing applications for DNA testing by inmates in the Federal system, provides that “a court shall order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent of a qualifying offense, and the proposed DNA testing would produce **new material evidence** that supports such assertion and raises a reasonable probability that the applicant did not commit the offense.... Penalties are established in the event that testing inculpatates the applicant. Where test results are exculpatory, the court shall grant the applicant’s motion for a new trial or re-sentencing if the test results and other evidence establish by a preponderance of the evidence that a new trial would result in an acquittal of the offense at issue.” (emphasis added).

In another context, the Supreme Court in *Schlup v. Delo*, 115 S.Ct. 851 (1995) stated that “[t]o be credible, such a claim [of actual innocence] requires petitioner to support his allegations



of constitutional error with **new reliable evidence**--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial.”*Id.* at 866 (emphasis added).

Under New York CPL§440.10(g), a defendant is entitled to have a judgment vacation if he produces **new evidence** which “is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.”

### **Commentary**

(a) The 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. To vacate a conviction under New York Criminal Procedure Law sec. 440.10(g), the successful movant must produce **newly discovered evidence**, which is:

[n]ew evidence [that] has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.<sup>5</sup>

(emphasis supplied.)

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<sup>5</sup> CPL 440.10(g) codified the New York Court of Appeals’ decision fifty years ago in *People v. Salemi* 309 N.Y. 208, 216 (1955), which held that to justify setting aside a conviction, the evidence presented “1. ...must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence.”

**New material evidence** is defined for purposes of the rule to include evidence that could have been found by due diligence of counsel but was not. (Many, if not most, innocence claims arise in instances where the defense could have found the evidence). While evidence must be newly discovered to succeed on a new trial motion, a prosecutorial office's responsibility to serve the interests of justice should obligate it to go beyond that standard where a defendant supports a claim of factual innocence with new material evidence.

It is appropriate to impose a duty to investigate on a prosecutorial office when the defendant comes forward with evidence meeting the standard of "probability that had the evidence been received at trial the verdict would have been more favorable to the defendant."

(b) The proposed rule is based upon *Brady v. Maryland*, 373 US 83 (1963), *Imbler v. Pachtman* 424 US 409, 427 n. 25 (1976), and last year's Supreme Court decision in *Banks v. Dretke*, 540 U.S. 668 (2004).

*Brady* holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87 (1963).

While *the Brady* rule was fashioned in a pre-conviction context, the continuing nature of that duty was expressed in *Imbler v. Pachtman* and made explicit in *Banks v. Dretke*, notably for evidence in the prosecutor's possession at the time of the conviction. "...[T]he very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence [referring to DNA evidence sought post-conviction that could prove innocence beyond

any doubt]. And it does so out of recognition of the same systemic interests in fairness and ultimate truth.” *Harvey v. Horan*, 285 F.3d 298, 317 (4th Cir. 2002) (*Judge Luttig, concurring in denial of rehearing en banc*).

In *Imbler v. Pachtman*, 424 U.S. 409, the Court explicitly stated that a prosecutor “is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” *Imbler*, at 427, n. 25. In *Imbler*, after obtaining a murder conviction and a death sentence, a deputy district attorney discovered evidence that tended to corroborate the defendant’s alibi and undermine the credibility of one of the prosecution’s chief witnesses. The prosecutor wrote a letter to the Governor describing the newly discovered evidence and explaining that he felt he had “a duty to be fair and see that all true facts whether helpful to the case or not, should be presented.” *Id.* at 413. The affirmative steps taken by the district attorney to correct a potentially erroneous conviction provide a model of prosecutorial conduct to which all prosecutors should be obligated to adhere.

In *Banks v. Dretke* 540 U.S. 668, the Court granted a death row inmate habeas corpus relief where the prosecutor had failed to provide him with available exculpatory evidence both prior to trial and during the petitioner’s post-conviction litigation. The Supreme Court held that the state’s suppression of evidence of a witness’s informant status constituted “cause” for the petitioner’s failure to present such evidence in support of his *Brady* claim at the state post-conviction proceeding. The Court concluded that the petitioner had reasonably relied on the prosecution’s pre-trial promise to disclose all *Brady* material, and since the state had continued to deny that the witness was an informant at the state post-conviction proceeding, the petitioner

could not be faulted for having failed to produce the evidence.

Judge Luttig's analysis in *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002) of whether a prisoner has a post-conviction constitutional due process right of access to exculpatory evidence in the state's possession [particularly where the evidence, as in the case of DNA, could completely exonerate the prisoner] supports the soundness of this ethics provision.

Judge Luttig reasoned that it is

constitutionally intolerable for the government to withhold from the convicted, *for no reason at all*, the very evidence that it used to deprive him of his liberty, where he persists in his absolute innocence and further tests of the evidence could, given the circumstances of the crime and the evidence marshaled against the defendant at trial, establish to a certainty whether he actually is factually innocent of the crime for which he was convicted. The denial of access in this circumstance would not be . . . the strict equivalent of bad-faith destruction of potentially exculpatory evidence. *See Arizona v. Youngblood*, 488 U.S. 51. But in a system that prizes fairness and truth above all else, it comes so perilously close to such as not to be permitted.

285 F. 3d at 318.

While prosecutors do not yet have a post-conviction constitutionally mandated obligation to disclose exculpatory evidence, there should be a clear ethically mandated responsibility to do so at least to the extent that the evidence was available prior to the defendant's conviction and not disclosed. *See Kohn, Brian T., Brady Behind Bars: The Prosecutor's Disclosure Obligations Regarding DNA In the Post-Conviction Arena*, 1 *Cardozo Pub. L. Pol'y & Ethics J.* 35 (2003) (arguing for a more expansive post-conviction obligation compelled by the Supreme Court's decision in *Brady*, but by the ethical responsibilities of prosecutors as well).

(c) The appropriate standard for the prosecution to join in a motion to set aside a prior

judgment of conviction is “**clear and convincing evidence.**” *Miller v. Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108 (1997), one of the few cases to consider this issue in a post-conviction case reasoned:

In consideration of a proper balance of the interests at stake in the evaluation of a freestanding claim of actual innocence, of the well established jurisprudence regarding the functions of an appropriate burden of proof for a particular category of case, and of the remedy that would follow from a determination in a habeas proceeding of actual innocence, we conclude that the most appropriate standard of proof is as follows. First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by **clear and convincing evidence**<sup>6</sup>Id.

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<sup>6</sup> In describing the “clear and convincing evidence” standard, the Connecticut Court wrote:

The clear and convincing standard of proof is substantially greater than the usual civil standard of a preponderance of the evidence, but less than the highest legal standard of proof beyond a reasonable doubt. It “is sustained if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are *highly probably* true, that the probability that they are true or exist is *substantially greater* than the probability that they are false or do not exist.” (Emphasis added; internal quotation marks omitted.) [State v. Bonello](#), 210 Conn. 51, 66, 554 A.2d 277, cert. denied, [490 U.S. 1082](#), 109 S.Ct. 2103, 104 L.Ed.2d 664 (1989).

Although we have characterized this standard of proof as a “middle tier standard”; [J. Frederick Scholes Agency v. Mitchell](#), 191 Conn. 353, 358, 464 A.2d 795 (1983); and as “an intermediate standard”; [State v. Davis](#), *supra*, 229 Conn. at 293, 641 A.2d 370; between the ordinary civil standard of a preponderance of the evidence, or more probably than not, and the criminal standard of proof beyond a reasonable doubt, this characterization does not mean that the clear and convincing standard is necessarily to be understood as lying equidistant between the two. Its emphasis on the *high probability* and the *substantial greatness of the probability* of the truth of the facts asserted indicates that it is a very demanding standard and should be understood as such, particularly when applied to a habeas claim of actual innocence, where the stakes are so important for both the petitioner and the state. We have stated that the clear and convincing evidence standard “should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory.” (Internal quotation marks omitted.) [Lopinto v. Haines](#), 185 Conn. 527, 539, 441 A.2d 151 (1981). Thus, we see no functional difference between this standard, properly understood, and the formulations in [Herrera v. Collins](#), *supra*, 506 U.S. 390, 113 S.Ct. 853, of both the majority--“*a truly persuasive demonstration of ‘actual innocence’*” (emphasis added) *id.*, at 420, 113 S.Ct. at 871; and the concurring opinion of Justices O’Connor and Kennedy--“*extraordinarily high and truly persuasive demonstration[s] of actual innocence.*” (Internal quotation marks omitted.) *Id.*, at 426, 113 S.Ct. at 874. Indeed, in [Carriger v. Stewart](#), 95 F.3d 755, 757 (9th Cir.1996), the Court of Appeals equated the *Herrera* standard that the petitioner must “‘unquestionably establish [his] innocence’” with the clear and convincing evidence standard.

at 784-95, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom, as the habeas court did, no reasonable fact finder would find the petitioner guilty.

700 A.2d at 1130-31. Thus, if a defendant has made a sufficient showing to meet the “clear and convincing” standard, the prosecutor should join with the defendant in moving to vacate the conviction, rather than forcing the defendant to undergo the delay attendant upon court proceedings.

(d) This rule imposes an obligation not only upon the individual prosecutor, but upon the **office** that prosecuted the defendant. In carrying out the requirements of this Rule, the prosecutor’s office should insure that there is an appropriate procedure in place to implement this responsibility. The prosecutor’s office should also consider recommending that a witness be granted immunity if he/she wishes to testify at a post-conviction hearing at variance with his/her trial testimony, so as to safeguard the convicted person’s opportunity to obtain essential exculpatory testimony. *See* Bennett Gershman, *The Prosecutor’s Duty to Truth*, 14 Geo. J. Legal Ethics 309, 335 (2001) (suggesting that prosecutors have the duty to immunize potentially truthful defense witnesses); *United States v. Chitty*, 760 F. 2d 425 (2d Cir. 1985) (holding that due process requires granting of immunity to defense witnesses to safeguard defendant’s right to essential exculpatory testimony and right to compulsory process); *United States v. DePalma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (prosecutor’s denial of immunity to defense witnesses while building case through immunity grants to government witnesses denied defendant fair trial); *People v. Shapiro*, 50 N.Y. 2d 747, 409 N.E.2d 897, 905 (N.Y.1980) (after prosecutor’s threats drove defense witnesses from stand, court authorized new trial only if prosecutor extended

immunity to those witnesses).

## **II. STANDARD TO TAKE CASE BEYOND THE CHARGING STAGE**

### **Proposed Rule 3.8(a)**

**A prosecutor or other government lawyer in a criminal case shall:**

- (a) Not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.**

### **Background**

Both New York Disciplinary Rule 7-103 and Model Rule 3.8 require probable cause to institute criminal charges, but neither address the standard to take a case beyond the charging stage. New York Disciplinary Rule DR 7-103 “Performing the Duty of Public Prosecutor or Other Government Lawyer” states:

- (a) A public prosecutor or other government lawyers shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

The New York State Bar Association Committee on Standards of Attorney Conduct (COSAC) has proposed the following rule: (See attached for the COSAC 3.8 recommendation)

The prosecutor shall:

Not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.

As the attached COSAC commentary states, this rule follows DR 7-103 in “making clear

that government lawyers who assist or bring about a criminal prosecution are subject to the Rule's requirements and that the required intent is both subjective ("knows") and objective ("reasonably should know").

We believe that the standard to continue a case beyond the charging stage must be higher than probable cause. We consider "evidence to support a prima facie showing of guilt" to be an appropriate standard in most cases but suggest adding commentary regarding mitigation as described below.

In some cases, there may not be admissible evidence to establish a prima facie case but the prosecutor has a firm belief in the guilt of the defendant based upon excluded evidence, e.g., a suppressed tangible item or confession. In such case, we believe that if the prosecutor proceeds to trial on evidence later deemed insufficient as a prima facie showing, the prosecutor's belief in the defendant's guilt, based upon that the inadmissible evidence, should be considered as a mitigating factor. We therefore propose the following be added in commentary to the rule:

**(1) In considering the imposition of any sanctions under this section, evidence known to the prosecutor but unavailable or inadmissible in a court of law which might have tended to establish a prima facie showing of guilt may also be considered by the tribunal as a mitigating factor in the prosecutor or other government lawyer's actions.**



### III. PROSECUTOR'S DUTY OF CANDOR

#### Proposed Rule

**The prosecutor has a duty of candor to the Court:**

- (a) ***Duty to correct false testimony*** -- The prosecutor has the duty to correct testimony of his witness that he knows or reasonably should know is false, by asking questions designed to elicit corrections and truthful testimony. If the prosecutor has reason to believe that his witness has committed perjury, the prosecutor must immediately bring that fact to the Court's attention.
- (b) ***Duty as to the presentence report*** -- The prosecutor has the obligation of correcting any errors in the pre-sentence report that work to the detriment of the defendant, regardless of whether they are noticed by defense counsel.
- (c) ***Duty to disclose material facts to the Court***-- A prosecutor shall not knowingly fail to disclose to the tribunal a material fact with the knowledge that the tribunal may tend to be misled by such failure.

#### Background

1. General -- The Disciplinary Rules and the Model Rules have rules specifically addressed to prosecutors (see DR 7-103; MR 3.8), but neither rule addresses the topic covered by the proposed rule – aspects of the prosecutor's obligation of candor to the Court. The question of prosecutorial candor is spelled out by Bruce Green in *Ethics 2000 and Beyond: Reform, Or Professional Responsibility As Usual?: Prosecutorial Ethics As Usual*, 2003 Ill. L. Rev. 1573, 1593-94 (2003) (footnotes omitted):

[D]oes the prosecutor have special disclosure obligations to the court? There is case law that suggests a number of unique obligations, including a duty: (1) to disclose to the tribunal material facts necessary to correct the court's apparent or possible misunderstandings of the facts bearing on the court's decision; (2) to refrain in closing arguments from drawing inferences from circumstantial evidence that are contradicted by extra-record evidence which the prosecutor knows to be accurate; (3) to refrain from seeking a legal ruling that the prosecutor knows to be contrary to law; (4) to call the court's attention to legal or procedural

errors; and (5) to correct testimony of a prosecution witness, including testimony elicited by defense counsel on cross-examination, if the prosecutor knows or reasonably should know it is false. On these disclosure questions, . . . Rule 3.8 is silent, and it is unclear whether they are adequately answered by the provisions on candor and confidentiality applicable to lawyers generally.

Professor Bennett L. Gershman, in *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309 (2001), provides a comprehensive analysis of these legal duties imposed on prosecutors. The proposed rules address three of these issues.

### **Comment**

1. Paragraph (a) -- If a prosecutor knows or reasonably should know that a witness has offered false testimony, the prosecutor must ask questions designed to elicit a correction. The prosecutor should be permitted to lead the witness at such times, although leading might otherwise be improper. If the prosecutor realizes that a witness is not simply mistaken, but is committing perjury, then the prosecutor has the obligation to bring that fact to the attention of the court immediately. The obligation to bring perjured testimony to the court's attention applies regardless when the prosecutor learns of the perjury -- that is, whether during or after the testimony (or even after the trial). See *United States v. Wallach*, 935 F. 2d 445 (2d Cir. 1991).

2. Paragraph (b) -- The burden of candor on the prosecutor is especially great during the sentencing phase of proceedings because the prosecutor exercises such tremendous influence at that phase. It has been often noted that prosecutors exercise a tremendous amount of discretion in connection with sentencing (especially in the federal courts); prosecutors have a great deal of input into the content and terms of pre-sentence reports that are authored by probation departments. Courts rely extensively upon these in sentencing. Thus, paragraph (d) focuses on an area -- sentencing -- in which the prosecutor's function is very different from that

of the defense counsel, and in which the prosecutor's role as "minister of justice" is especially clear. Thus, the prosecutor must correct any error that works to the detriment of the defendant.

3. Paragraph (c) -- Paragraph (c) is similar to New Jersey's version of 3.3 of the Model Rules, which provides that: "A lawyer shall not knowingly fail to disclose to the tribunal a material fact with the knowledge that the tribunal may tend to be misled by such failure." For the purposes of this paragraph, the definition of "tribunal" does not include a jury.

Application of such a rule to defense counsel could be problematic, because it could run counter to defense counsel's obligation to zealously defend the interests of the client. Paragraph (c) replaces the word "lawyer" with "prosecutor."

#### **IV. DUTIES SHOULD EXTEND TO PROSECUTOR'S OFFICE**

##### **Proposed Amendment to Rule's Definitions**

We propose that 22 N.Y.C.R.R §1200-01(b), the definition of "law firm" should be amended to include prosecutor's offices as follows (the proposed new language is underlined):

**a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization, a prosecutor's office, and a qualified legal assistance organization.**

New York's Disciplinary Rules apply in most instances to lawyers and law firms. While the definition of "law firm" is understood to include a prosecutor's office, the term is not sufficiently specific.

## **V. CURRENT NY CODE AND MODEL RULE PROVISIONS**

### **DR 7-103 “Performing the Duty of Public Prosecutor or Other Government Lawyer”**

- (a) A public prosecutor or other government lawyers shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.
- (b) A public 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, known to the prosecutor or other government lawyer, which tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

### **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) make reasonable efforts to assure that the accused has been advised of the right to , and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigation information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless 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;
- (f) except for statements that are necessary to inform the public of the nature and extent of the

prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

**See COSAC Proposed Rule (attached)**

October 5, 2004

## PROPOSED NEW YORK VERSION OF MODEL RULE 3.8 Special Responsibilities of Prosecutors

### INTRODUCTION

The Committee on Standards of Attorney Conduct (“the Committee”) of the New York State Bar Association (NYSBA) is considering a revision of the rules of professional conduct governing New York lawyers. This project will continue through 2004 and 2005. The Committee is issuing for purposes of professional and public comment this proposed New York version of Model Rule 3.7. The proposed rule will be reconsidered in the light of submitted comments before the Committee recommends that the NYSBA House of Delegates adopt the rule.

The Committee invites interested persons or organizations to submit comments to the Committee by letter or e-mail to:

Kathleen M. Baxter, Esq.  
New York State Bar Association  
One Elk Street  
Albany, NY 12207  
E-mail: <kbaxter@nysba.org>

Comments may be submitted at any time, but will be most effective if received within six weeks of the date of publication of the proposed rule.

Proposed Rule 3.8 concerns the special responsibilities of prosecutors. Paragraph (a) of the Proposed Rule requires a prosecution not be instituted without probable cause or continued without evidence sufficient to establish a prima facie showing of guilt. Paragraph (b) prohibits conduct that would prevent the accused from exercising the right to counsel. Paragraph (c) prevents a prosecutor from seeking waiver of important pretrial rights from an unrepresented accused. And paragraph (d) requires a prosecutor make timely disclosure to the defense of evidence or information negating guilt or mitigating the offense or sentence.

On the following pages the left-hand column contains the text of the proposed rule (in bold type), followed by comments on the rule’s text that illuminate and explain its meaning and application. The right-hand column contains the Committee’s commentary on the text and its comments; the commentary states the policy choices made in accepting or departing from New York’s current disciplinary rule on the topic or the ABA Model Rule of the same number.

The columnar pages are followed by a Reporter’s Note that contains: (1) a brief history of ABA Rule 3.8 and its New York equivalent DR 7-103; (2) a discussion of the major departures of the Proposed Rule 3.8 from both ABA Rule 3.8 and DR 7-103; (3) the major policy issues raised by Proposed Rule 3.8; and (4) an appendix containing the text of the proposed rule, the corresponding provisions of ABA Model Rule 3.8 and of New York’s current disciplinary rules and other law.

**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

**A prosecutor or other government lawyer in a criminal case shall:**

**(a) not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt;**

**(b) not seek to prevent the accused from exercising the right to counsel;**

**(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;**

**(d) except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, (i) 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 to mitigate the offense, and (ii) in connection with sentencing, disclose to the defense and to the tribunal all [unprivileged] information known to the prosecutor that tends to mitigate the sentence;**

**COMMENTARY**

¶ (a) follows DR 7-103 in making it clear that government lawyers who assist or bring about a criminal prosecution are subject to the Rules’s requirements and that the required intent is both subjective (“knows”) and objective (“reasonably should know”). ¶ (a) adopts the language of the 1984 Halpern report in its first clause; and follows D.C. in requiring a slightly higher standard (a prima facie showing of guilt) to take a charge to trial or continue the trial.

¶ (b), which has no counterpart in the New York code, also departs from ABA Rule 3.8(b) in stating the prosecutor’s obligation to protect an accused’s right to counsel in negative rather than affirmative language.

¶ (c), which has no counterpart in DR 7-103, is identical to its ABA counterpart.

¶ (d) is similar to ABA Rule 3.8(d), except that the “except clause” is moved from the end of ¶ (d) to its beginning to make it clear that the clause modifies everything that follows. The provision differs from DR 7-103(B) in two respects: the rule relates the nature of the disclosure obligation to the stage of the proceeding, treating the trial and sentencing stages separately; and the except clause recognizes the authority of a court in a particular case to alter the prosecutor’s responsibility by means of a protective order. The word “unprivileged” is bracketed because the Subcommittee desires further consideration of whether this qualification is necessary or desirable.



**[(e) 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 or the work product doctrine;**

**(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;]**

**(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.**

¶ (e) is virtually identical to its ABA counterpart. The paragraph is placed in brackets because the subcommittee is divided on whether it should be included in the rule. ¶ (e)(1) differs from ABA Rule 3.8(e)(1) in making it clear that the work product doctrine, as well as the attorney-client privilege, protects client files. There is no counterpart to ¶ (e) in DR 7-103.

¶ (f) is identical to ABA Rule 3.8(f). There is no counterpart to ¶ (f) in DR 7-103.

COMMENT	COMMENTARY
<p>[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. Applicable New York or federal 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.</p> <p>[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing <i>pro se</i> with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.</p> <p>[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.</p>	<p>Comment [1] follows ABA Comment [1] except that two sentences referring to the ABA Standards of Criminal Justice Relating to the Prosecution Function and other law have been deleted and a reference to “New York or other [applicable] federal law” added to the last sentence.</p> <p>Comment [2] is identical to ABA Comment [2].</p> <p>Comment [3] is identical to its ABA counterpart.</p>

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Comment [4] is identical to its ABA counterpart.

Comment [5] is identical to ABA Comment [5], except that the reference to one paragraph of Rule 3.6 in the last sentence has been changed to reflect the changed numbering of the proposed rule. The intent, as in ABA Comment [5], is to refer to the "safe harbor" paragraph and the "right to respond" paragraph.

Comment [6] is identical to its ABA counterpart.

## REPORTER'S NOTE

### A. Relevant History

1. *ABA Model Rule 3.8*. The text of Rule 3.8 has remained substantially unchanged since its original adoption in 1983, although two amendments have struggled with the wording of former paragraph (f) [now paragraph (e)] that seeks to limit the issuance of lawyer subpoenas in grand jury or other criminal proceedings to those situations in which there is a genuine need to penetrate lawyer confidentiality. Originally adopted in 1990, the subpoena provision was amended in 1995 to reflect court decisions and prosecutorial objections that a part of the rule that required judicial approval of lawyer subpoenas amended criminal procedure codes and was not a rule of professional ethics. A 1994 amendment added a new paragraph (g) [now (f)] permitting prosecutors to make statements "necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose," even if those statements may heighten "public condemnation of the accused." Stylistic amendments proposed by the Ethics 2000 Commission were approved by the ABA in 2002: former paragraph (e), dealing with prosecutors exercising reasonable care to prevent law enforcement personnel from making improper statements, was moved to become a second sentence of former paragraph (g), which also deals with trial publicity, and paragraphs (f) and (g) were renumbered as (e) and (f). A new Comment [6] was added discussing improper extrajudicial statements by law enforcement personnel.

2. *New York DR 7-103* is identical to DR 7-103 of the ABA Model Code of Professional Responsibility except that stylistic changes have removed two male gender references.

3. *The Halpern Report* in 1984 recommended the adoption of ABA MR 3.8 with one change in the text and the deletion of several sentences from then Comment [1] which discussed the ABA Standards of Criminal Justice Relating to Prosecution Function. The text change preserved the language of paragraph (A) of DR 7-103 so that MR 3.8(a) would read "The prosecutor in a criminal case shall: (a) not institute or cause to be instituted or prosecute criminal charges that the prosecutor knows are not supported by probable cause" instead of "(a) refrain from prosecuting a charge that prosecutor knows is not supported by probable cause."

### B. Major Differences Between Proposed Rule 3.8 and ABA Rule 3.8

1. The proposed rule applies to "a public prosecutor or other government lawyer in a criminal case" rather than "a prosecutor." The change, following DR 7-103(A), makes it clear that a government lawyer who has assisted or caused a prosecutor's violation of the rule is culpable.

2. Paragraph (a) has been modified in several respects: first, "institute or cause to be instituted" is substituted for "prosecuting"; second, the intent standard is changed from "knows" to "knows or reasonably should know;" and third, before a prosecutor may take a charge to trial or continue to prosecute it, the charge must be supported by a prima facie showing of guilt. The first two changes stem from DR 7-103(A); the third follows the D.C. version of Rule 3.8(a).

3. Paragraph (b) has been converted from an affirmative duty to assist an accused in obtaining counsel to a prohibition against interfering with the accused's right to counsel.

### **C. Major Differences Between Proposed Rule 3.8 and DR 7-103**

1. Paragraph (a), following the D.C. version of Rule 3.8(a), provides that a charge must be supported by a prima facie showing of guilt to be taken to trial or continued.

2. Paragraphs (b) and (c) of the proposed rule are not included in DR 7-103. They deal, respectively, with protection of an accused's right to counsel and with efforts to have an unrepresented accused waive important pretrial rights. Paragraphs (e) and (f) also have no counterpart in DR 7-103; they deal with subpoenas to lawyers and extrajudicial statements.

3. Paragraph (d), unlike DR 7-103(B), follows ABA Rule 3.8(d) in stating the prosecutor's obligation to disclose exculpatory information to the defendant in terms of the stage of the proceeding: before trial and before sentencing. However, the substance of both rules is much the same.

### **D. Major Policy Issues Raised by Proposed Rule 3.8**

1. *Paragraph (a): scienter, application, standard for taking a case to trial.* In paragraph (a), should the intent standard be actual knowledge (as in ABA Rule 3.8(a)) or "knows or reasonably should know" as in DR 7-103(A)? Should the paragraph apply to "other government lawyers" who "cause a prosecution to be instituted"? Should a prima facie showing of guilt be required before a prosecutor may take a charge to trial or pursue it?

2. *Accused's right to counsel.* Should paragraph (b), dealing with the accused's right to counsel, be phrased as a duty not to prevent the exercise of the right, as in the proposed rule, or as an affirmative duty to assist the right, as in ABA Rule 3.8(b)?

3. *Waiver of important pretrial rights.* Should paragraph (c), prohibiting the prosecution from seeking waiver of important pretrial rights of an unrepresented accused, be included in the proposed rule?

4. *Disclosure obligations.* Should paragraph (d), dealing with the disclosure obligations of prosecutors, follow the language of ABA Rule 3.8(d) or that of DR 7-107(B)?

5. *Restrictions on subpoenas to lawyers.* Should paragraph (e), regulating subpoenas to lawyers for client information, be included in Proposed Rule 3.8?

6. *Preventing extrajudicial statements.* Should paragraph (f), dealing with prohibited extrajudicial statement by prosecutors and exercising reasonable care in preventing such statements by other law enforcement personnel, be included in Proposed Rule 3.8?

### **APPENDIX: TEXTS OF NEW YORK PROPOSED RULE, ABA MODEL RULE AND CURRENT NEW YORK DISCIPLINARY RULE**

**Proposed New York Rule 3.8: Special Responsibilities of a Prosecutor**

A prosecutor or other government lawyer in a criminal case shall:

(a) not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt;

(b) not seek to prevent the accused from exercising the right to counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, (i) 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 to mitigate the offense, and, (ii) in connection with sentencing, disclose to the defense and to the tribunal all [unprivileged] information known to the prosecutor that tends to mitigate the sentence;

[(e) 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 or the work product doctrine;

(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;]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

**ABA Model 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) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection

with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless 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;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

**New York DR 7-103: Performing the Duty of Public Prosecutor or Other Government Lawyer.**

A. A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

B. A public 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, 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 punishment.

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