REPORT OF THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Comments on Proposed Rule 3.8: Special Responsibilities of a Prosecutor

October 4, 2006

Background

This Report, prepared by the Committee on Professional Responsibility (the "PRC") of the Association of the Bar of the City of New York (the "City Bar"), considers and responds to comments recently made by several prosecutors' organizations on the text of COSAC's proposed Rule 3.8: Special Responsibilities of a Prosecutor. This is the third time in recent months that the City Bar has expressed its views on the issue of prosecutorial ethics.

First, in May 2005 the City Bar issued a report, authored by the PRC and published in the Spring 2006, Volume 61, Issue No. 1 of *The Record*, entitled "Proposed Prosecutorial Ethics Rules." Although that report took no official position on the then-existing predecessor version of COSAC's proposed Rule 3.8, the report addressed three broad areas: (i) a prosecutor's obligation to the factually innocent; (ii) the standards governing when it is appropriate to take a case beyond the charging stage; and (iii) a prosecutor's duty of candor to the court. In the first and third of these areas, the report proposed entirely new rules, and the PRC's analysis of a prosecutor's obligation to the factually innocent was subsequently incorporated into COSAC's revised proposed Rule 3.8, becoming subsections 3.8(g) and (h). As for the second area, the report contained a brief discussion of COSAC's proposed Rule 3.8(a).

Second, in May 2006 the City Bar sent COSAC a report, also authored by the PRC (the "May 2006 PRC Report"), that included, among commentary on several other rules, brief comments on COSAC's proposed Rule 3.8.

After the City Bar's two reports were released, three separate prosecutorial entities -- the four United States Attorneys for the Districts of New York (the "U.S. Attorneys"), the District Attorneys Association of New York (the "state prosecutors") and the Manhattan District Attorney (the "Manhattan D.A.") -- separately offered detailed critiques of COSAC's proposed Rule 3.8. Thereafter, the PRC undertook a further and comprehensive review of proposed Rule 3.8. This Report, a product of that review, closely examines each of the subsections of the proposed Rule, and offers comments on the Rule that attempt to reach a common ground among the views previously expressed by the City Bar, and the more recent comments of the prosecutors.

The Report addresses, in turn, each of the subsections of the Proposed COSAC Rule 3.8. With respect to each subsection, we first give a summary of the prosecutor commentary and then discuss the City Bar's recommendations.

I. Proposed Rule 3.8(a) and Comment [1]

(a) [A 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; . . . .

[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

This proposed rule and commentary would set minimum thresholds for: (i) the quantum of evidence and (ii) the mental state of the prosecutor at each of the two broad stages of prosecution -- *i.e.*, the charging phase and the trial phase.

COSAC suggests that the proposed rule "follows DR 7-103" by making the standards for prosecutors both subjective (focusing on what the prosecutor actually "knows") and objective (imposing liability for what the prosecutor "reasonably should know"). With respect to the trial phase requirements, COSAC claims that the rule would follow the standard set in the District of Columbia by requiring "a slightly higher standard (a prima facie showing of guilt) to take a charge to trial or continue the trial."

A. Prosecutor Commentary

All three prosecutors' submissions are critical of this proposed rule in two respects.

First, they oppose imposition of the "reasonably should know" objective standard. As the Manhattan D.A. puts it, the rule "should deal with attorney misconduct, not instances of flawed judgment." The U. S. Attorneys point out that the proposed rule goes markedly further than existing DR 7-103(A), which provides that a prosecutor shall not bring charges when he or she "knows or it is obvious" that the charges are not supported by probable cause. "It is obvious" certainly seems to be a much higher standard than "reasonably should know" -- much like the difference between the "clear and convincing" and "preponderance" standards. The U.S. Attorneys argue that such an expanded notion of prosecutor liability is unwarranted because it potentially would mean that every time a trial court dismisses even a single count of a charging instrument on insufficiency grounds, the prosecutor is exposed to a potential disciplinary violation. The state prosecutors offer perhaps the most persuasive doctrinal opposition to this aspect of the proposed rule. Citing *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976), a case establishing the absolute immunity of prosecutors from civil liability based upon

prosecutorial charging decisions, they note that the proposed rule suffers from the same defects as a regime in which prosecutors are subject to such civil liability. If prosecutors were subject to discipline when they fail to obtain a conviction, the "apprehension of such consequences" in each case would undermine the prosecutors' "fearless and impartial policy" of "stricter and fairer law enforcement." *Pachtman*, 424 U.S. at 430.

Second, the prosecutors oppose any requirement that a prosecutor cease "continu[ing] to prosecute" a charge for which it does not have prima facie evidence of guilt. Rather, they argue, the prima facie standard should be reserved solely for the *trial* stage and not pre-trial practice such as plea bargaining. The prosecutors cite examples where the proposed rule would be inapposite, for instance: (i) where a key witness has died after the grand jury presentation and indictment, but prior to trial; or (ii) where a witness who is a domestic violence victim, or victim of any other kind of violence, has second thoughts about testifying against the defendant out of fear. In such cases, standard prosecutorial practice calls for plea bargaining for the most appropriate disposition consistent with the defendant's true conduct -- without misrepresenting any facts, of course, but certainly without "throwing in the towel" the moment that a key complaining witness vacillates about his or her desire to testify. As the U.S. Attorneys put it, "prima facie" evidence of guilt is strictly "a trial concept" and should remain so. Finally, the prosecutors point out that D.C. Rule 3.8(c), upon which the proposed rule was apparently based, refers solely to prosecuting "to trial" -- in contrast to the broader "continue to prosecute" language of the proposed rule.

B. City Bar Recommendation

We believe that the prosecutors' criticisms are sound and we recommend removing the phrase "*or reasonably should know*" from both places in which it appears in the proposed rule. This phrase imposes a burden on prosecutors that is inconsistent with well-established notions of prosecutorial immunity and would interfere with prosecutors' fair and good faith attempts to comply with the demands of their office.

Consistent with the prior positions of the City Bar, we recommend keeping an objective standard in the rule. We believe that the objective standard in the rule should be consistent with the "it is obvious" standard of existing DR 7-103(A). The edit could be accomplished by replacing "*reasonably should know*" with the word "*obviously*" on both occasions in which it appears.

In addition, we recommend removing the phrase "*or continue to prosecute*" to make clear that the requirement that a prosecutor cease a prosecution where he or she does not possess evidence supporting a "prima facie case" against a defendant is a requirement that applies solely at the trial stage and not earlier.

II. Proposed Rule 3.8(b) and Comment [1A]

(b) [A prosecutor shall] not seek to prevent a person under investigation or the accused from exercising the right to counsel; . . . .

[1A] Paragraph (b) does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.

COSAC points out that this provision has no counterpart in the New York Code and notes that it departs from ABA Rule 3.8(b) in two respects: (1) the obligation is stated in negative instead of affirmative language, and (2) it applies to "a person under investigation" as well as the accused.

A. Prosecutor Commentary

The prosecutors do not object to this proposed rule, which they say follows established prosecutorial practice. The U.S. Attorney's Offices do not propose any changes. The Manhattan D.A., however, wants to make sure that the proposed rule does not prevent prosecutors from taking a statement from the defendant prior to arraignment. The state prosecutors do not object to the substance of the proposed rule, but state a general concern that the U.S. and New York constitutions and case law -- not ethical rules -- should define the rights of defendants.

B. City Bar Recommendation

We approve of the proposed rule, but suggest that the commentary to 3.8(b) make clear, as does the commentary to 3.8(c), that the rule does not prevent the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

III. Proposed Rule 3.8(c) and Comment [2]

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

[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 pro se 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.

COSAC states that this provision has no counterpart in the DR 7-103 and is identical to its ABA counterpart.

A. Prosecutor Commentary

The prosecutors have no objection to the substance of the proposed rule, so long as it is clear that it only applies to individuals that have been formally charged. In other words: so long as an "accused" means a "defendant." The prosecutors want it to be clear that the rule would not prevent lawful questioning of uncharged suspects or the practice of allowing uncharged suspects to assist in investigations.

B. City Bar Recommendation

We approve of the substance of the proposed rules but recommend that the word "*defendant*" be used instead of "*accused*" in order to make clear that the rule applies when a person has been formally charged with a crime. We believe that this is the intent of the rule.

In addition, we note that although seemingly unaddressed by COSAC or any of the prosecutors, the spirit of this Rule should likewise apply to material witnesses, detained pursuant to 18 U.S.C. § 3144 or any analogous state rule. Pursuant to that statute, such persons are afforded all of the rights due to defendants under 18 U.S.C. § 3142 and, given the significant liberty interest at stake, it seems to us that prosecutors should be required to treat detained material witnesses in the same fashion as defendants, under Rule 3.8(c). Accordingly, we recommend adding the phrase "*or detained material witness*" to the provision, as follows: "*[a prosecutor shall] not seek to obtain from an unrepresented defendant or detained material witness a waiver of important pretrial rights, such as the right to a preliminary hearing*."

IV. Proposed Rule 3.8(d) and Comment [3]

(d) [A prosecutor shall,] 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 negate the guilt of the accused, mitigate the offense or reduce the sentence;

[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.

Proposed Rule 3.8 (d) is the ethical codification of a prosecutor's responsibility under *Brady v. Maryland,* 373 U.S. 83 (1963), requiring timely disclosure to the defense of all evidence and information that tends to negate guilt or mitigate an offense, and, in connection with sentencing, with disclosure to the tribunal and the defense of all unprivileged information that tends to negate guilt, mitigate the offense or reduce the sentence. The tribunal has the authority to relieve the prosecutor of this responsibility by

protective order, a provision that does not appear in the current DR 7-103(B), to which this rule corresponds. DR 7-103(B) provides as follows: " 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."

A. Prosecutor Commentary

The U.S. Attorneys have no objection to the protective order proviso, but urge that DR 7-103 (B) should be retained. Their objections to 3.8(d) appear to be twofold: they see the change in the model rules as directed at distinguishing between privileged and unprivileged information, a distinction to 3.8(d) they seem to believe is unnecessary; additionally, they object to the obligation to disclose to the tribunal, contending that it is defense counsel's job to explain the significance of the evidence to the tribunal.

The state prosecutors and the Manhattan D.A. likewise object to disclosure to the tribunal, and the latter also questions the need to distinguish between privileged and unprivileged information. The Manhattan D.A. has proposed that separate reference to post-conviction obligations be deleted from Rule 3.8(d).

B. City Bar Recommendation

We agree with the modifications suggested by the Manhattan D.A. We note that neither the comments to the ABA Rule nor the COSAC comments explain the need to distinguish between pre-conviction and post-conviction obligations. Further, we do not believe that sentencing tribunals would view their decision-making ability as improved by the receipt of raw *Brady* materials from a prosecutor in connection with sentencing. Finally, on those rare occasions when *Brady* information may be privileged and not subject to disclosure, a responsible prosecutor will want the tribunal to endorse that conclusion. We propose the following language:

> *(d) [A prosecutor shall,] except when he or she is relieved of this responsibility by a protective order of the tribunal, make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, mitigate the offense or reduce the sentence.*

V. Proposed Rule 3.8(e) and Comment [4]

(e) [A prosecutor shall] 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;

[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.

A. Prosecutor Commentary

The U.S. Attorneys recognize that the decision to subpoena attorneys must be made with care and they do not object to 3.8(e)(1), except insofar as it shifts the burden of proving that information is not privileged onto the prosecutor. They argue against the adoption of parts (2) and (3) of the rule for several reasons.

First, they contend that there are legitimate reasons for seeking non-privileged material from a defense lawyer. For instance, a prosecutor might seek information from a defense lawyer if a client is using an unwitting lawyer's services to commit a crime or fraud. The rule would insulate the information in this instance for the sake of protecting the lawyer-client relationship. The policy goals for protecting the attorney-client relationship are certainly absent in this case. In addition, prosecutors may seek information related to the payment of fees, which may be crucial for an investigation.

Second, the U.S. Attorneys argue that this issue does not come up solely in the context of prosecutors. Defense attorneys and civil litigators also may subpoena each other, but the rule is directed to prosecutors alone.

The Manhattan D.A. similarly objects to the rule. First, he argues that (e)(1) shifts the burden, which is traditionally placed on the person asserting privilege, to the prosecutor. Second he suggests that parts (2) and (3) place unreasonable burdens on the ability of the prosecutor (and the grand jury) to obtain evidence.

The state prosecutors cite several cases in arguing that the rule is contrary to New York law. One court upheld a subpoena of attorney fees, holding that to subpoena non-privileged information from a defense attorney, a lawyer must show (a) reasonable grounds to believe the material is relevant, (b) no reasonable, legally sufficient alternative

source, and (c) good faith. Matter of Grand Jury Subpoena of Lynne Stewart, 144 Misc.2d 1012 (Sup Ct N.Y. Co. 1987) (Snyder, J.). The Appellate Division affirmed but stayed the subpoena until the representation concluded in order to avoid the inevitable "chilling effect" of such a request. In re Stewart, 156 A.D.2d 294 (1st Dept. 1989). The appellate division did not directly address the standard established by Judge Snyder. Id.

B. City Bar Recommendation

We agree with the U.S. Attorneys that part (1) of the rule is acceptable. A prosecutor should not subpoena information unless he believes that the information is subject to disclosure. We do not see how this rule shifts the burden of proof established by case law, but it would be easy to address the concerns of the Manhattan D.A. and the U.S. Attorneys by simply adding a comment stating that the rule in no way shifts the burden of proof under law.

We also agree with the prosecutors that part (2) of this rule should not be adopted. By insisting that prosecutors abstain from requesting information unless it is "essential" to the successful completion of an investigation or prosecution, the rule will create a good deal of litigation and a very high hurdle for prosecutors. Since there are occasions when it would be appropriate to subpoena non-privileged information, we believe that this subsection of the rule is inadvisable. While we do not think it is contrary to New York law, it does add burdens on prosecutors to those already imposed by New York law, and thus agree with the prosecutors that proposed subsection (2) of the rule should be omitted.

We disagree, however, with the prosecutors' critique of subsection (3), and recommend that that provision be adopted, with one edit. We propose changing the word "*feasible*" to "*reasonable*" so that the provision reads: "*there is no other reasonable alternative to obtain the information*." We agree with the drafters of the rule that the client-lawyer relationship is deserving of protection, and believe that the concerns of the prosecutors would be met with the adoption of subsection (3), as amended. That is, where a prosecutor is able to obtain the same information through some other reasonable channel, we believe that policy dictates she should do so.

VI. Proposed Rule 3.8(f) and Comments [5 and 6]

(f) [A prosecutor shall,] 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, (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and (2) 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;

[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.

Proposed Rule 3.8(f) regulates extrajudicial statements by prosecutors, directing that they refrain from comments having a substantial likelihood of heightening public condemnation of the accused, and imposes an obligation to exercise reasonable care to prevent persons associated with the prosecution from making extrajudicial statements which the prosecutor would be prohibited from making under Rule 3.6. There is no counterpart to this rule in DR 7-103.

A. Prosecutor Commentary

All prosecutors object to the prosecution statements portion of this Rule. The state prosecutors argue that the Rule should be eliminated entirely. The U.S. Attorneys have no objection to the portion of the Rule that imposes an obligation of reasonable care with respect to non-prosecution statements; they contend that a cross-reference to Rule 3.6 would be sufficient to deal with the first portion of Rule 3.8(f). They explain that nothing in the ABA's Comment 5 to Rule 3.8 helps identify the types of prosecutors' statements Rule 3.8(f) was intended to prohibit. Since the "safe harbor" of Rule 3.6(b) is available to prosecutors, as is the "right to respond" of Rule 3.8(d), it is difficult to conceive of a statement prohibited by Rule 3.8(f) which is not already prohibited by Rule 3.6.

B. City Bar Recommendation

The state prosecutors contend that they do not and cannot control the statements made by the police and others, arguing that any prejudice can be dealt with in voir dire. Putting aside the troubling assertion that local prosecutors cannot control non-lawyers while federal prosecutors can, we see no problem in encouraging prosecutors to moderate the statements made by others. Certainly, prosecutors have control over their own employees and may have control over "others assisting or associated with the prosecutor," such as police officers assigned to a prosecutor's office. While there may be little that a prosecutor can do with respect to statements made by police following a street arrest, the ability to influence law enforcement conduct is much greater when an arrest is made pursuant to an arrest warrant obtained by the prosecutor.

The complaint of the Manhattan D.A. that the Rule is "one-sided" in imposing obligations on prosecutors and not on defense lawyers ignores the differences in access to the press and the disproportionate damage that can be done when a prosecutor, as opposed to a defense lawyer, releases unnecessary, extraneous and damaging information about a defendant. The complaint also overlooks the right to respond granted all lawyers in Rule 3.6(d). As a "minister of justice," however, a prosecutor has a responsibility unmatched by that of a defense attorney, and should understand that prosecutions are better tried in the courtroom than in the press.

In sum, however, because we cannot describe a statement prohibited by Rule 3.8(f), that is not already prohibited by Rule 3.6, we have no objection to the reformulation proposed by the U.S. Attorneys. Nor do we object to the reformulation of Comments 5 and 6, as proposed by them, with one edit, discussed below. We propose that Rule 3.8(f) read as follows:

> *(f) [A prosecutor shall] comply with the provisions of Rule 3.6, 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;*

Comment 5, which deals with statements by the prosecutor himself or herself, should be stricken and Comment 6, which deals with the statements of others, should be enlarged to deal with the entirety of the Rule. We do not recommend inclusion of a sentence, proposed by the U.S. Attorneys, that would essentially provide a safe harbor under the rule for "general training or guidelines" given to law enforcement agencies. We believe that inclusion of such a sentence would go too far in undercutting the reach of the rule. Any prosecutor, then, would be able to demonstrate compliance by simply referring back to some general training that all officers presumably receive, but about which the prosecutor played no role nor had any knowledge. Thus, we propose that Comment 6 should read as follows:

[6] Paragraph (f) reminds the prosecutor of Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. 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.

VII. Proposed Rules 3.8(g) and 3.8(h) and Comments [6A and 6B]

(g) [A prosecutor shall,] when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted,

(1) make timely disclosure to the convicted defendant and any appropriate court or authority of any material evidence known to the prosecutor and not previously disclosed; and

(2) investigate the guilt or innocence of the convicted defendant;

(h) [A prosecutor shall,] when a prosecutor knows of clear and convincing evidence establishing that an innocent person has been convicted, take appropriate steps to set aside the prior conviction.

[6A] Reference to "a prosecutor" includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment [6A] to Rule 3.3.

[6B] The prosecutor's duty to seek justice has traditionally been understood not only to require the prosecutor to take precautions to avoid convicting innocent individuals, but also to require the prosecutor to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted. Rules 3.8(g) and (h) express this traditional understanding. Accordingly, when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a convicted defendant was innocent, Rule 3.8(g) requires the prosecutor either to personally conduct an investigation or to ensure that another

appropriate investigatory or prosecutorial authority conducts an investigation to determine whether, in fact, the defendant was innocent of the offenses for which he was convicted. Additionally, Rule 3.8(g) requires the prosecutor to disclose the new evidence to the defendant so that defense counsel may conduct any necessary investigation and make any appropriate motions directed at setting aside the verdict and requires the prosecutor to disclose the new evidence to the court or other appropriate authority so that the court can determine whether to initiate its own inquiry. If' the convicted defendant is unrepresented and cannot afford to retain counsel, the court will ordinarily appoint counsel for purposes of' these post conviction proceedings. The post conviction disclosure duty applies to new and material evidence of innocence regardless of whether it could previously have been discovered by the defense. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that he did not commit, the prosecutor must seek to remedy the injustice by taking appropriate steps to set aside the prior conviction. The duties in paragraphs (g) and (h) apply whether the new evidence comes to the attention of the prosecutor who obtained the defendant's conviction or to a different prosecutor. If the evidence comes to the attention of a prosecutor in a different prosecutor's office, the prosecutor should notify the office of the prosecutor who obtained the conviction.

A. Prosecutor Commentary

The Manhattan D.A. recommends a minor stylistic change in (g)(1) and would change (g)(2) to require the prosecutor to "undertake such further investigation as may be necessary to determine whether the new evidence requires that the conviction be set aside" (rather than "investigate the guilt or innocence of the convicted defendant"). The Manhattan D.A. would eliminate 3.8(h) altogether on the ground that only a court may set aside a conviction on motion of the defense, and it is enough, ethically, if the prosecutor discloses new exculpatory evidence to defense counsel.

The state prosecutors take the position that (g) and (h) go too far in establishing prosecutorial responsibilities in the area of wrongful convictions. Rather, they suggest that New York Disciplinary Rule 7-103, which requires disclosure of exculpatory material to the defense, "would seem to provide adequate protection to the defendant against a wrongful conviction." They further take the position that prosecutors should not be mandated to conduct an investigation of a potentially innocent convicted person, but that disclosure of exculpatory information to the defendant should operate "as the optimal safeguard against a wrongful conviction continuing."

The U.S. Attorneys on the whole are supportive of the proposed rules, and, rather than argue that 3.8(g) or (h) should be eliminated, suggest amendments that would likely meet the concerns of the state prosecutors -- *i.e.*, recognizing that prosecutors can not "set aside" convictions, but rather may take steps to have a court do so.

B. City Bar Recommendation

A prosecutor's central and most important duty is to seek justice. The wrongful conviction of an innocent person is not only a fundamentally unfair "private wrong" suffered by that person, but also a very "public wrong" that undermines the confidence of the public in our justice system. One need only look at the recent spate of convictions that have been overturned on the basis of subsequent DNA testing to conclude that we must impose some obligation on prosecutors, as the PRC's Report in *The Record* noted, "to give serious consideration and devote office resources to the consideration of credible post-conviction claims of innocence." (Report at 73). Subsections 3.8(g) and (h) were added to COSAC's proposed Rule 3.8 largely as the result of the City Bar's suggestion, and we strongly support adoption of these important rules, with the modifications discussed below.

We do not believe that the criticism of the state prosecutors is well founded. We agree, for the most part, with the suggestions of the U.S. Attorneys, which we feel are consistent with the intent of the Rules as well as the prior positions of the City Bar. Accordingly, set forth below are our recommended changes to proposed subsections (g) and (h) and their commentary, with the changes in bold.

*(g) [A prosecutor shall,] when **he or she** comes to know of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted,*

*(1) make timely disclosure **of that evidence** to the convicted defendant and any appropriate court or authority; and*

*(2) **undertake such further inquiry or investigation as necessary to form a reasonable belief as to the** guilt or innocence of the convicted defendant;*

*(h) [A prosecutor shall,] when **he or she** knows of clear and convincing evidence establishing that an innocent person has been convicted, take appropriate steps to **have** the prior conviction **set aside**.*

[6A] Reference to "a prosecutor" includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment[6A] to Rule 3.3.

*[6B] The prosecutor's duty to seek justice has traditionally been understood not only to require the prosecutor to take precautions to avoid convicting innocent individuals, but also to require the prosecutor to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted. Rules 3.8(g) and (h) express this traditional understanding. **Rule 3.8(g) focuses***

on the prosecutor's own professional evaluation of the evidence. Accordingly, when a prosecutor comes to know of new and material evidence that he or she believes creates a reasonable likelihood that a convicted defendant was innocent, Rule 3.8(g) affirmatively requires the prosecutor to examine the evidence and to undertake such further inquiry or investigation as necessary for the prosecutor reasonably to determine what his or her position should be on an anticipated motion to vacate. The scope of the inquiry will depend on the circumstances; in some cases the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation must be such as to provide a reasonable basis, in the sense of Rule 1.0(m), for the prosecutor's position. *Additionally, Rule 3.8(g) requires the prosecutor to disclose the new evidence to the defendant so that defense counsel may conduct any necessary investigation arid make any appropriate motions directed at setting aside the verdict.* ***The Rule also requires the prosecutor to disclose the new evidence to the court or other appropriate authority for any action the court may deem appropriate, such as scheduling an initial conference and appointing counsel for an unrepresented defendant.*** *The post conviction disclosure duty applies to new and material evidence of innocence regardless of whether it could previously have been discovered by the defense. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that he did not commit, the prosecutor must seek to remedy the injustice by taking appropriate steps to* ***have*** *the prior conviction set aside. If the evidence comes to the attention of a prosecutor in a different prosecutor's office, the prosecutor should notify the office of the prosecutor who obtained the conviction.*