

## MEMORANDUM

**TO:** Supreme Court Advisory Committee  
**FROM:** Advertising Subcommittee  
**DATE:** May 12, 2008  
**SUBJECT:** Preliminary Recommendation

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The Advertising Rules Subcommittee, consisting of Leslie Van Frank, Paul Veasy, Bob Burton, and Stuart Schultz held a conference call on May 9, 2008. We discussed possible revisions that would primarily affect existing Rule 7.1 (Communications Concerning a Lawyer's Services) and Rule 7.2 (Advertising).

We discussed some of the changes that have been made in the Florida and Texas rules, as well as the existing advertising rule in California, all of which provide more specific definitions of prohibited conduct than do Utah's present rules.

We also discussed issues related to that part Florida's rules which requires advertisements to be submitted to the Bar for review before they are disseminated in the electronic media, including questions of how such a pre-screening program could be administered.

We decided that we need to determine whether advertising is an issue of sufficient concern to members of the Bar to warrant the preparation of any proposed rule changes. We therefore recommend that a survey be circulated to members of the Bar, consisting of a short set of questions presented in a neutral fashion to determine the level of concern, if any, Bar members may have regarding advertising. If there is little interest or concern among members of the Bar regarding this issue, then the subcommittee would

decide whether there was any point in pursuing the matter any further.

We also decided as a preliminary step to discuss the matter more specifically with John Baldwin and Nate Alder to determine if they would support such a survey being distributed to members of the Bar. Stuart Schultz was assigned to talk to John and Nate, which is still pending.

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A PROPOSAL TO PERMIT RESPONDENT TO APPEAL  
A FINAL DETERMINATION OF PRIVATE ADMONITION OR  
PUBLIC REPRIMAND BY THE ETHICS & DISCIPLINE COMMITTEE  
[DRAFT MAY 14, 2008]

**Rule 14-510. Prosecution and Appeals**

(a) *Informal complaint of unprofessional conduct. . . .*

(b) *Proceedings before Committee and screening panels. . . .*

(c) *Exceptions to admonitions and public reprimands.* Within ten days after notice of the recommendation of an admonition or public reprimand to the Committee chair, the respondent may file with the Committee chair an exception to the recommendation and may ~~[also, if desired, ]~~request a hearing. If a request for a hearing is made, the Committee chair, or a screening panel chair designated by the Committee chair, shall ~~[proceed to ]~~hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present.<sup>1</sup> The complainant's testimony may be read into the record. The complainant need not appear personally unless called by the respondent as an adverse witness for purposes of cross-examination.<sup>2</sup> The respondent shall have the burden of proof of showing that the recommendation is ~~[unreasonable, ]~~<sup>3</sup> unsupported by substantial evidence, arbitrary, capricious ~~[and otherwise]~~<sup>4</sup> or clearly erroneous. On behalf of the Committee, the Committee chair shall issue a final determination that either sustains, dismisses or modifies the recommendation of the screening panel.<sup>5</sup> Any modification of

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<sup>1</sup>There is no indication in the current rule of what procedure is to be followed when an exception is filed and no hearing is requested. One possibility is to insert the following just before the sentence that begins "On behalf of the Committee": "If no hearing is requested, the Committee chair will review the record compiled by the screening panel."

<sup>2</sup>This is an odd provision. The rules in subsection (b) governing the procedure before a panel of the Committee do not provide a right for the respondent to call and examine (or cross-examine) the complainant. It appears only in the exception process.

<sup>3</sup>"Unreasonable" is omitted; the Subcommittee suggests that "unreasonable" is not one of the usual standards of review (although, in connection with "unjust," it is used in determining the legality of utility rates under the Public Utility Code).

<sup>4</sup>The use of "and" appears to be a mistake, as it would require respondent to sustain a burden of proof on all four separate standards (five if "unreasonable" is included). "Otherwise" is confusing surplusage.

<sup>5</sup>Although it may be implicit, the existing rule does not directly state what the outcome of

(continued...)

a recommendation of discipline may be no more severe than the original recommendation of the screening panel.

(d) Appeal of a final Committee determination of admonition or public reprimand.

(1) Within 30 days after the Committee chair issues a final determination of a private admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file an appeal in the district court, seeking reversal or modification of the final determination by the Committee chair.

(2) The district court shall conduct a trial *de novo* of the matter and shall either sustain, reverse or modify the final determination of the Committee chair. As used in this section, "trial *de novo*" means an original, independent proceeding and does not mean a trial *de novo* on the record.<sup>6</sup>

(3) (i) *The district court shall receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded. The district court shall decide the case and direct the entry of judgment.*<sup>7</sup>

(ii) Except as otherwise provided in subsection (d)(3)(i), an appeal brought under this Rule shall be subject to the procedures in Rules 14-511(b) through -(e).<sup>8</sup>

(4) Any modification by the district court of the final determination of discipline rendered by the Committee may be no more severe than the Committee's determination.

(5) The decision of the district court after a trial *de novo* may not be appealed unless the court rules on the constitutionality of a statute or other law.<sup>9</sup>

<sup>5</sup>(...continued)

the Committee chair's consideration of a respondent's exceptions shall be.

<sup>6</sup>This is the language used in Utah Code Ann. § 59-1-601, which gives a taxpayer an option of a trial *de novo* before the district court on an appeal from a decision of the Utah State Tax Commission.

<sup>7</sup>This language is derived from Rule 7(d) of the Rules of Small Claims Procedures. It is rendered in italics to indicate that the Subcommittee thought it prudent to initiate a discussion in the full Committee on the relative formality or informality of the proceedings before the district court.

<sup>8</sup>Rule 14-511 gives the general procedure for a formal complaint filed by OPC after a finding of probable cause by the Ethics and Discipline Committee. Rule 14-511 is reprinted below for reference purposes; no changes are being proposed to 14-511.

<sup>9</sup>This mirrors the language of Utah Code Ann. § 78-6-10(2), which governs the finality of appeals of small claims judgments to the district court..

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from tax code

**Rule 14-511. Proceedings subsequent to finding of probable cause.**

(a) *Commencement of action.* If the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, OPC counsel shall prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the Rules of Professional Conduct. The formal complaint shall be signed by the Committee chair or, in the chair's absence, by the Committee vice chair or a screening panel chair designated by the Committee chair.

(b) *Venue.* The action shall be brought and the trial shall be held in the county in which an alleged offense occurred or in the county where the respondent resides or practices law or last practiced law in Utah; provided, however, that if the respondent is not a resident of Utah and the alleged offense is not committed in Utah, the trial shall be held in a county designated by the Chief Justice of the Supreme Court. The parties may stipulate to a change of venue in accordance with applicable law (currently Utah Code section 78-13-9).

(c) *Style of proceedings.* All proceedings instituted by the OPC shall be styled "In the Matter of the Discipline of (name of respondent and respondent's Bar number), Respondent."

(d) *Change of judge as a matter of right.*

(1) *Notice of change.* The respondent or OPC counsel may, by filing a notice indicating the name of the assigned judge, the date on which the formal complaint was filed, and that a good faith effort has been made to serve all parties, change the judge assigned to the case. The notice shall not specify any reason for the change of judge. The party filing the notice shall send a copy of the notice to the assigned judge and to the presiding judge. The party filing the notice may request reassignment to another district court judge from the same district, which request shall be granted. Under no circumstances shall more than one change of judge be allowed to each party under this rule.

(2) *Time.* Unless extended by the court upon a showing of good cause, the notice must be filed within 30 days after commencement of the action or prior to the notice of trial setting, whichever occurs first. Failure to file a timely notice precludes any change of judge under this rule.

(3) *Assignment of action.* Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice of the Supreme Court, who shall determine whether the notice is proper and, if so, shall reassign the action.

(4) *Rule 63 and Rule 63A unaffected.* This rule does not affect any rights a party

may have pursuant to Rule 63 or Rule 63A of the Utah Rules of Civil Procedure.

(e) *Actions tried to the bench; findings and conclusions.* All actions tried according to this article shall be tried to the bench, and the district court shall enter findings of fact and conclusions of law. Neither masters nor commissioners shall be utilized.

(f) *Sanctions hearing.*<sup>10</sup> Upon a finding of misconduct and as soon as reasonably practicable, within a target date of not more than 30 days after the district court enters its findings of fact and conclusions of law, it shall hold a hearing to receive relevant evidence in aggravation and mitigation, and shall within five days thereafter, enter an order sanctioning the respondent. Upon reasonable notice to the parties, the court, at its discretion, may hold the sanctions hearing immediately after the misconduct proceeding.

(g) *Review.* Any discipline order by the district court may be reviewed by the Supreme Court through a petition for review pursuant to the Utah Rules of Appellate Procedure. *except as provided, L 14-510*

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<sup>10</sup>This section of the district court procedures does not seem appropriate for an appeal from a Committee final determination.



AMERICAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION  
DEATH PENALTY REPRESENTATION PROJECT  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF LITIGATION  
SECTION OF STATE AND LOCAL GOVERNMENT LAW  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL  
RESPONSIBILITY  
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION  
COMMISSION ON DOMESTIC VIOLENCE  
NEW YORK STATE BAR ASSOCIATION  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct be amended to add new  
2 paragraphs (g) and (h) as follows:

3 ....

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

7  
8 (1) promptly disclose that evidence to an appropriate court or authority, and

9  
10 (2) if the conviction was obtained in the prosecutor's jurisdiction,

11  
12 (A) promptly disclose that evidence to the defendant unless a court authorizes  
13 delay, and

14  
15 (B) undertake further investigation, or make reasonable efforts to cause an  
16 investigation, to determine whether the defendant was convicted of an offense that the defendant  
17 did not commit.

18  
19 (h) When a prosecutor knows of clear and convincing evidence establishing that a  
20 defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not  
21 commit, the prosecutor shall seek to remedy the conviction.

22  
23 FURTHER RESOLVED, That the Comment [1] to 3.8 of the Model Rules of Professional  
24 Conduct be amended as follows:

# 105B

25 [1] A prosecutor has the responsibility of a minister of justice and not simply that of  
26 an advocate. This responsibility carries with it specific obligations to see that the defendant is  
27 accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that  
28 special precautions are taken to prevent and to rectify the conviction of innocent persons. The  
29 extent of mandated remedial action is a matter of debate and varies in different jurisdictions.  
30 Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the  
31 Prosecution Function, which are the product of prolonged and careful deliberation by lawyers  
32 experienced in both criminal prosecution and defense. Competent representation of the  
33 sovereignty may require a prosecutor to undertake some procedural and remedial measures as a  
34 matter of obligation. Applicable law may require other measures by the prosecutor and knowing  
35 disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a  
36 violation of Rule 8.4.

37  
38 FURTHER RESOLVED, that the Comment to 3.8 of the Model Rules of Professional Conduct  
39 be amended by adding the following new paragraphs:  
40

41 [7] When a prosecutor knows of new, credible and material evidence creating a  
42 reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime  
43 that the person did not commit, paragraph (g) requires prompt disclosure to the court or other  
44 appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction  
45 occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires  
46 the prosecutor to examine the evidence and undertake further investigation to determine whether  
47 the defendant is in fact innocent or make reasonable efforts to cause another appropriate  
48 authority to undertake the necessary investigation, and to promptly disclose the evidence to the  
49 court and, absent court-authorized delay, to the defendant. Consistent with the objectives of  
50 Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's  
51 counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a  
52 request to a court for the appointment of counsel to assist the defendant in taking such legal  
53 measures as may be appropriate.  
54

55 [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence  
56 that the defendant was convicted of an offense that the defendant did not commit, the prosecutor  
57 must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to  
58 the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant  
59 and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant  
60 did not commit the offense of which the defendant was convicted.  
61

62 [9] A prosecutor's independent judgment, made in good faith, that the new evidence  
63 is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently  
64 determined to have been erroneous, does not constitute a violation of this Rule.

## REPORT

In *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, the ABA's Section of Criminal Justice explored the systemic causes for wrongful convictions in our criminal justice system. Its report made numerous recommendations for systemic remedies to better ensure that individuals will not be convicted of crimes that they did not commit and that the innocent will be exonerated.<sup>1</sup> That report did not address the well established ethical obligations of a prosecutor toward innocent persons.

The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."<sup>2</sup> Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in Rule 3.8 of the ABA Model Rules of Professional Conduct, which identifies the "Special Responsibilities of a Prosecutor." Proposed Rules 3.8(g) and (h), and the accompanying Comments would rectify this omission.

Proposed Rules 3.8(g) and (h) and the accompanying Comments are based on provisions adopted by the House of Delegates of the New York State Bar Association on November 4, 2006 in the course of its comprehensive review of the state's disciplinary code.<sup>3</sup> The rules had their genesis in a 2006 Report of the Association of the Bar of the City of New York ("ABCNY"),<sup>4</sup> which considered various aspects of prosecutors' duties. Among other provisions, against the background of recent knowledge about the fallibility of the criminal justice process, the Report proposed a rule regarding the prosecutor's obligation when a convicted defendant may be innocent. The report stated: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post - conviction claims of innocence."<sup>5</sup> The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent. These responsibilities include a duty to disclose the evidence, to

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<sup>1</sup> *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

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

<sup>3</sup> The proposed provisions are expected to be presented to the judiciary in 2008 as part of proposed comprehensive amendments to the New York Code of Professional Responsibility. The proposed Rules were adopted with the support of local bar associations and with virtually no opposition in the state bar's House of Delegates after a drafting process that involved significant input from state and federal prosecutors and representatives of the criminal defense bar.

<sup>4</sup> Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York 69 (2006).

<sup>5</sup> *Id.* at 73.

# 105B

conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.

The ABCNY proposal was presented to the state bar's Committee on Standards of Attorney Conduct ("COSAC"),<sup>6</sup> which agreed with the premise of the ABCNY proposal and drafted provisions that captured the substance of the proposal, and circulated them for a lengthy period of public comment. COSAC's original proposed Rules 3.8(g) and (h) received comment from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations and bar associations, and revised its proposals in light of suggestions received from around the state.<sup>7</sup>

The version adopted by the New York State Bar Association was closely examined and refined by the ABA Section of Criminal Justice, which drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership, including those who serve as representatives of other national organizations such as the National District Attorneys Association. It was then further refined in collaboration with the ABA Standing Committee on Ethics and Professional Responsibility, to ensure its general consistency with the philosophy, purposes, structure and style of the ABA Model Rules of Professional Conduct.

As the proposed provisions reflect, it is important to codify prosecutorial duties upon learning of possible false convictions. The obligations in the proposed rule are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The ABA Model Rules define "knows" to "denote[] actual knowledge of the fact in question"; therefore, indirect or imputed knowledge will not suffice.

The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct, rather than only in the provisions of the ABA Standards Relating to the Administration of Justice, which are not intended to be enforced, will express the vital importance that the profession places on this

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<sup>6</sup> COSAC is chaired by a former state bar president, Steven Krane, who now also chairs the ABA Standing Committee on Ethics and Professional Responsibility, and includes in its membership a diverse group of practitioners and academics from around the state with expertise in legal ethics. It was appointed to review the existing New York Code of Professional Responsibility in light of the 2002 amendments to the ABA Model Rules of Professional Conduct and to propose comprehensive revisions.

<sup>7</sup> ABCNY and the New York County Lawyers Association supported the rule as did many prosecutorial and defense organizations, albeit with various suggested drafting changes. No one took issue with the underlying premise that prosecutors have professional duties upon learning that a wrongful conviction may have occurred. The comments were duly considered by COSAC, which then conducted a day-long meeting attended by representatives of more than thirty prosecutor, defender and bar association representatives. Extensive discussion during that meeting resulted in revisions to Rules 3.8(g) and (h) and the accompanying Comments.

obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices have institutional disincentives to comport with these obligations<sup>8</sup> and, as courts have recognized, their failures are not self-correcting by the criminal justice process.<sup>9</sup> Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The proposed Rules 3.8(g) and (h) and Comments in the proposal would be additions to current Rule 3.8 with the exception of Comment [1]. Comment [1] is currently included in Rule 3.8 but would be amended to add two sentences and to delete one sentence as reflected in the following redlined version:

[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, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which ~~in turn~~ are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable 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.

The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities,<sup>10</sup> with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless

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

<sup>9</sup> See, e.g., *Houston v. Partee*, 978 F.2d 362 (7<sup>th</sup> Cir. 1992).

<sup>10</sup> Prosecutors and their representative organizations involved in the drafting process generally agreed on the need to identify specific measures to be taken upon learning of new evidence of a convicted defendant's innocence. Accordingly, the proposed provisions specifically identify when a prosecutor's disciplinary obligations are implicated regarding disclosure, investigation, and remedial measures. Recognizing, however, that individual cases and jurisdictions differ, the rule does not prescribe particular investigative steps and remedial measures that must be pursued. Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate step may be to make, or join in, an application for executive clemency.

# 105B

sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant.

With the understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Comment specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions. A convicted defendant might easily complain that a prosecutor “knows” that the defendant is innocent. Indeed, the defendant may support a complaint by relying on much the same evidence that might have been presented at trial. We are confident, however, that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.

The provisions build upon the ABA’s historic commitment to developing policies and standards designed to give concrete meaning to the “duty of prosecutors to seek justice, not merely to convict,”<sup>11</sup> and, in particular, to prevent and rectify the conviction of innocent defendants.<sup>12</sup> For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review,<sup>13</sup> and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence.<sup>14</sup> These prior resolutions implicitly recognized the need to reexamine convictions in light of newly discovered, material exculpatory evidence. The proposed additions to the ABA Model Rules will codify public prosecutors’ obligations to conduct such reexaminations.

Respectfully submitted,

Stephen J. Saltzburg  
Chair, Section of Criminal Justice  
February 2008

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<sup>11</sup> ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c); accord *Berger v. United States*, 295 U.S. 78 (1935).

<sup>12</sup> See generally *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

<sup>13</sup> Resolution 111F, approved August 2004.

<sup>14</sup> ABA Standards on DNA Evidence, Standard 2.6(b).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations  
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Stephen Saltzburg, Chair Section of Criminal Justice

1. Summary of Recommendation(s).  
The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.
2. Approval by Submitting Entity. The recommendation was approved by the Criminal Justice Section Council at its May 12, 2007 meeting.
3. Has this or a similar recommendation been submitted to the House or Board previously?  
This is an addition to Model Rule 3.8 (titled "Special Responsibilities of a Prosecutor") previously passed by the ABA.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? Model Rule 3.8 already exists. This recommendation will add two provisions in order to strengthen the responsibility of prosecutors to take action when confronted with evidence of innocence. The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict" (ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c)); and, in particular, to prevent and rectify the conviction of innocent defendants. For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review (Resolution 111F, approved August 2004), and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence (ABA Standards on DNA Evidence, Standard 2.6(b)).

# 105B

5. What urgency exists which requires action at this meeting of the House?  
The number of wrongly convicted persons for various reasons is alarming. Every step must be taken to free the innocent and thereby preserve respect for the rule of law and the legal system.
  
6. Status of Legislation. (If applicable.) N. A.
  
7. Cost to the Association. (Both direct and indirect costs.) No Costs  
The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at all levels of government. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.
  
8. Disclosure of Interest. (If applicable.)  
  
No known conflict of interest exists.
  
9. Referrals.  
Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2008 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

The Recommendation is co-sponsored by the ABA Standing Committee on Ethics and Professional Responsibility, The ABA Section of Individual Rights and Responsibilities, The ABA Section of Litigation, The ABA Section of State and Local Government Law, The ABA Commission on Domestic Violence, The ABA Government and Public Sector Lawyers Division, The ABA Death Penalty Representation Project, The Association of the Bar of the City of New York, The New York State Bar Association, and the National Organization of Bar Counsel.



10. Contact Person. (Prior to the meeting.)

**Bruce A. Green**

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Email: [bgreen@law.fordham.edu](mailto:bgreen@law.fordham.edu)

11. Contact Person. (Who will present the report to the House.)

**Stephen Saltzburg**

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# 105B

## EXECUTIVE SUMMARY

### **A. Summary of Recommendation.**

The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.

### **B. Issue Recommendation Addresses.**

The Recommendation addresses prosecutors' disciplinary obligations when they know that an innocent person has been, or may have been, convicted. This is an issue of tremendous significance in the criminal justice system, given that evidence of innocence sometimes is not known until after a conviction is obtained.

### **C. How Proposed Policy Will Address the Issue.**

The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the duty of prosecutors to "seek justice," not merely to convict, and, in particular, to prevent and rectify the conviction of innocent defendants. The amendments will establish a prosecutor's obligation, in specified circumstances, to disclose new evidence of innocence after a conviction is obtained, to investigate the new evidence, and, if there is clear and convincing evidence of the defendant's innocence, to take remedial measures. The provisions will educate prosecutors about their obligations and serve as a basis of discipline when prosecutors act in bad faith in violation of the provisions.

### **D. Minority Views or Opposition.**

No opposition to this recommendation is known to exist at this time.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION  
DEATH PENALTY REPRESENTATION PROJECT  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF LITIGATION  
SECTION OF STATE AND LOCAL GOVERNMENT LAW  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL  
RESPONSIBILITY  
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION  
COMMISSION ON DOMESTIC VIOLENCE  
NEW YORK STATE BAR ASSOCIATION  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct be amended to add new  
2 paragraphs (g) and (h) as follows:

3 ....

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

7  
8 (1) promptly disclose that evidence to an appropriate court or authority, and

9  
10 (2) if the conviction was obtained in the prosecutor’s jurisdiction,

11  
12 (A) promptly disclose that evidence to the defendant unless a court authorizes  
13 delay, and

14  
15 (B) undertake further investigation, or make reasonable efforts to cause an  
16 investigation, to determine whether the defendant was convicted of an offense that the defendant  
17 did not commit.

18  
19 (h) When a prosecutor knows of clear and convincing evidence establishing that a  
20 defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not  
21 commit, the prosecutor shall seek to remedy the conviction.

22  
23 FURTHER RESOLVED, That the Comment [1] to 3.8 of the Model Rules of Professional  
24 Conduct be amended as follows:

# 105B

25 [1] A prosecutor has the responsibility of a minister of justice and not simply that of  
26 an advocate. This responsibility carries with it specific obligations to see that the defendant is  
27 accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that  
28 special precautions are taken to prevent and to rectify the conviction of innocent persons. The  
29 extent of mandated remedial action is a matter of debate and varies in different jurisdictions.  
30 Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the  
31 Prosecution Function, which are the product of prolonged and careful deliberation by lawyers  
32 experienced in both criminal prosecution and defense. Competent representation of the  
33 sovereignty may require a prosecutor to undertake some procedural and remedial measures as a  
34 matter of obligation. Applicable law may require other measures by the prosecutor and knowing  
35 disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a  
36 violation of Rule 8.4.

37  
38 FURTHER RESOLVED, that the Comment to 3.8 of the Model Rules of Professional Conduct  
39 be amended by adding the following new paragraphs:  
40

41 [7] When a prosecutor knows of new, credible and material evidence creating a  
42 reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime  
43 that the person did not commit, paragraph (g) requires prompt disclosure to the court or other  
44 appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction  
45 occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires  
46 the prosecutor to examine the evidence and undertake further investigation to determine whether  
47 the defendant is in fact innocent or make reasonable efforts to cause another appropriate  
48 authority to undertake the necessary investigation, and to promptly disclose the evidence to the  
49 court and, absent court-authorized delay, to the defendant. Consistent with the objectives of  
50 Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's  
51 counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a  
52 request to a court for the appointment of counsel to assist the defendant in taking such legal  
53 measures as may be appropriate.  
54

55 [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence  
56 that the defendant was convicted of an offense that the defendant did not commit, the prosecutor  
57 must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to  
58 the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant  
59 and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant  
60 did not commit the offense of which the defendant was convicted.  
61

62 [9] A prosecutor's independent judgment, made in good faith, that the new evidence  
63 is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently  
64 determined to have been erroneous, does not constitute a violation of this Rule.

## REPORT

In *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, the ABA's Section of Criminal Justice explored the systemic causes for wrongful convictions in our criminal justice system. Its report made numerous recommendations for systemic remedies to better ensure that individuals will not be convicted of crimes that they did not commit and that the innocent will be exonerated.<sup>1</sup> That report did not address the well established ethical obligations of a prosecutor toward innocent persons.

The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."<sup>2</sup> Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in Rule 3.8 of the ABA Model Rules of Professional Conduct, which identifies the "Special Responsibilities of a Prosecutor." Proposed Rules 3.8(g) and (h), and the accompanying Comments would rectify this omission.

Proposed Rules 3.8(g) and (h) and the accompanying Comments are based on provisions adopted by the House of Delegates of the New York State Bar Association on November 4, 2006 in the course of its comprehensive review of the state's disciplinary code.<sup>3</sup> The rules had their genesis in a 2006 Report of the Association of the Bar of the City of New York ("ABCNY"),<sup>4</sup> which considered various aspects of prosecutors' duties. Among other provisions, against the background of recent knowledge about the fallibility of the criminal justice process, the Report proposed a rule regarding the prosecutor's obligation when a convicted defendant may be innocent. The report stated: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post-conviction claims of innocence."<sup>5</sup> The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent. These responsibilities include a duty to disclose the evidence, to

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<sup>1</sup> *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

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

<sup>3</sup> The proposed provisions are expected to be presented to the judiciary in 2008 as part of proposed comprehensive amendments to the New York Code of Professional Responsibility. The proposed Rules were adopted with the support of local bar associations and with virtually no opposition in the state bar's House of Delegates after a drafting process that involved significant input from state and federal prosecutors and representatives of the criminal defense bar.

<sup>4</sup> Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York 69 (2006).

<sup>5</sup> *Id.* at 73.

# 105B

conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.

The ABCNY proposal was presented to the state bar's Committee on Standards of Attorney Conduct ("COSAC"),<sup>6</sup> which agreed with the premise of the ABCNY proposal and drafted provisions that captured the substance of the proposal, and circulated them for a lengthy period of public comment. COSAC's original proposed Rules 3.8(g) and (h) received comment from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations and bar associations, and revised its proposals in light of suggestions received from around the state.<sup>7</sup>

The version adopted by the New York State Bar Association was closely examined and refined by the ABA Section of Criminal Justice, which drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership, including those who serve as representatives of other national organizations such as the National District Attorneys Association. It was then further refined in collaboration with the ABA Standing Committee on Ethics and Professional Responsibility, to ensure its general consistency with the philosophy, purposes, structure and style of the ABA Model Rules of Professional Conduct.

As the proposed provisions reflect, it is important to codify prosecutorial duties upon learning of possible false convictions. The obligations in the proposed rule are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The ABA Model Rules define "knows" to "denote[] actual knowledge of the fact in question"; therefore, indirect or imputed knowledge will not suffice.

The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct, rather than only in the provisions of the ABA Standards Relating to the Administration of Justice, which are not intended to be enforced, will express the vital importance that the profession places on this

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<sup>6</sup> COSAC is chaired by a former state bar president, Steven Krane, who now also chairs the ABA Standing Committee on Ethics and Professional Responsibility, and includes in its membership a diverse group of practitioners and academics from around the state with expertise in legal ethics. It was appointed to review the existing New York Code of Professional Responsibility in light of the 2002 amendments to the ABA Model Rules of Professional Conduct and to propose comprehensive revisions.

<sup>7</sup> ABCNY and the New York County Lawyers Association supported the rule as did many prosecutorial and defense organizations, albeit with various suggested drafting changes. No one took issue with the underlying premise that prosecutors have professional duties upon learning that a wrongful conviction may have occurred. The comments were duly considered by COSAC, which then conducted a day-long meeting attended by representatives of more than thirty prosecutor, defender and bar association representatives. Extensive discussion during that meeting resulted in revisions to Rules 3.8(g) and (h) and the accompanying Comments.

obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices have institutional disincentives to comport with these obligations<sup>8</sup> and, as courts have recognized, their failures are not self-correcting by the criminal justice process.<sup>9</sup> Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The proposed Rules 3.8(g) and (h) and Comments in the proposal would be additions to current Rule 3.8 with the exception of Comment [1]. Comment [1] is currently included in Rule 3.8 but would be amended to add two sentences and to delete one sentence as reflected in the following redlined version:

[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, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which ~~in turn~~ are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable 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.

The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities,<sup>10</sup> with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless

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

<sup>9</sup> See, e.g., *Houston v. Partee*, 978 F.2d 362 (7<sup>th</sup> Cir. 1992).

<sup>10</sup> Prosecutors and their representative organizations involved in the drafting process generally agreed on the need to identify specific measures to be taken upon learning of new evidence of a convicted defendant's innocence. Accordingly, the proposed provisions specifically identify when a prosecutor's disciplinary obligations are implicated regarding disclosure, investigation, and remedial measures. Recognizing, however, that individual cases and jurisdictions differ, the rule does not prescribe particular investigative steps and remedial measures that must be pursued. Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate step may be to make, or join in, an application for executive clemency.

# 105B

sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant.

With the understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Comment specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions. A convicted defendant might easily complain that a prosecutor “knows” that the defendant is innocent. Indeed, the defendant may support a complaint by relying on much the same evidence that might have been presented at trial. We are confident, however, that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.

The provisions build upon the ABA’s historic commitment to developing policies and standards designed to give concrete meaning to the “duty of prosecutors to seek justice, not merely to convict,”<sup>11</sup> and, in particular, to prevent and rectify the conviction of innocent defendants.<sup>12</sup> For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review,<sup>13</sup> and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence.<sup>14</sup> These prior resolutions implicitly recognized the need to reexamine convictions in light of newly discovered, material exculpatory evidence. The proposed additions to the ABA Model Rules will codify public prosecutors’ obligations to conduct such reexaminations.

Respectfully submitted,

Stephen J. Saltzburg  
Chair, Section of Criminal Justice  
February 2008

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<sup>11</sup> ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c); accord *Berger v. United States*, 295 U.S. 78 (1935).

<sup>12</sup> See generally *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

<sup>13</sup> Resolution 111F, approved August 2004.

<sup>14</sup> ABA Standards on DNA Evidence, Standard 2.6(b).



GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations  
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Stephen Saltzburg, Chair Section of Criminal Justice

1. Summary of Recommendation(s).  
The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.
2. Approval by Submitting Entity. The recommendation was approved by the Criminal Justice Section Council at its May 12, 2007 meeting.
3. Has this or a similar recommendation been submitted to the House or Board previously?  
This is an addition to Model Rule 3.8 (titled "Special Responsibilities of a Prosecutor") previously passed by the ABA.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? Model Rule 3.8 already exists. This recommendation will add two provisions in order to strengthen the responsibility of prosecutors to take action when confronted with evidence of innocence. The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict" (ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c)); and, in particular, to prevent and rectify the conviction of innocent defendants. For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review (Resolution 111F, approved August 2004), and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence (ABA Standards on DNA Evidence, Standard 2.6(b)).

# 105B

5. What urgency exists which requires action at this meeting of the House?  
The number of wrongly convicted persons for various reasons is alarming. Every step must be taken to free the innocent and thereby preserve respect for the rule of law and the legal system.
  
6. Status of Legislation. (If applicable.) N. A.
  
7. Cost to the Association. (Both direct and indirect costs.) No Costs  
The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at all levels of government. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.
  
8. Disclosure of Interest. (If applicable.)  
  
No known conflict of interest exists.
  
9. Referrals.  
Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2008 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

The Recommendation is co-sponsored by the ABA Standing Committee on Ethics and Professional Responsibility, The ABA Section of Individual Rights and Responsibilities, The ABA Section of Litigation, The ABA Section of State and Local Government Law, The ABA Commission on Domestic Violence, The ABA Government and Public Sector Lawyers Division, The ABA Death Penalty Representation Project, The Association of the Bar of the City of New York, The New York State Bar Association, and the National Organization of Bar Counsel.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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# 105B

## EXECUTIVE SUMMARY

### **A. Summary of Recommendation.**

The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.

### **B. Issue Recommendation Addresses.**

The Recommendation addresses prosecutors' disciplinary obligations when they know that an innocent person has been, or may have been, convicted. This is an issue of tremendous significance in the criminal justice system, given that evidence of innocence sometimes is not known until after a conviction is obtained.

### **C. How Proposed Policy Will Address the Issue.**

The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the duty of prosecutors to "seek justice," not merely to convict, and, in particular, to prevent and rectify the conviction of innocent defendants. The amendments will establish a prosecutor's obligation, in specified circumstances, to disclose new evidence of innocence after a conviction is obtained, to investigate the new evidence, and, if there is clear and convincing evidence of the defendant's innocence, to take remedial measures. The provisions will educate prosecutors about their obligations and serve as a basis of discipline when prosecutors act in bad faith in violation of the provisions.

### **D. Minority Views or Opposition.**

No opposition to this recommendation is known to exist at this time.