



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #6(a)

**REQUESTED ACTION:** Approval of amendments to the Comments to Rule 3.8 of the Rules of Professional Conduct.

Attached is a report from the Committee on Standards of Attorney Conduct recommending amendment to the Comments to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers) to bring the Comments into conformity with amendments made to the Rule in 2012 by the Appellate Divisions. As set forth in the report, the amendments to the rule impose certain post-conviction duties on prosecutors who know of evidence that the convicted defendant did not commit the offense of which he or she was convicted. The proposed amendments to the Comments address these duties.

The Appellate Divisions adopt only the black-letter Rules of Professional Conduct; the court does not adopt the Comments, which are published by the New York State Bar Association after approval by the House of Delegates.

The report will be presented by Joseph E. Neuhaus, chair of the Committee on Standards of Attorney Conduct.

**REPORT OF THE COMMITTEE ON  
STANDARDS OF ATTORNEY CONDUCT (COSAC)**

**PROPOSED AMENDMENTS TO THE COMMENT TO RULE 3.8  
OF THE NEW YORK RULES OF PROFESSIONAL CONDUCT  
TO BRING THE COMMENT INTO CONFORMITY WITH  
THE JULY 1, 2012 AMENDMENTS TO THE TEXT OF THE RULE**

**September 20, 2013**

## **Introduction**

The Committee on Standards of Attorney Conduct (COSAC) proposes amendments to the Comment to Rule 3.8 of the New York Rules of Professional Conduct. The amendments are needed to make the Comment consistent with the black letter text of Rule 3.8 as amended by the Appellate Divisions effective July 1, 2012.

When Rule 3.8 was originally adopted by the Appellate Divisions as part of the New York Rules of Professional Conduct that took effect on April 1, 2009, the rule did not address post-conviction duties of prosecutors who know of evidence that a convicted defendant did not commit the offense of which he was convicted. The existing Comment to Rule 3.8 addresses that situation, but does so in aspirational rather than mandatory terms.

Effective July 1, 2012, however, the Appellate Divisions amended Rule 3.8 to impose certain post-conviction duties on prosecutors who know of evidence that a convicted defendant did not commit the offense of which he was convicted. The current Comment to Rule 3.8 therefore should be amended to bring it into line with the black letter text of Rule 3.8. The proposed changes would be adopted (as with all other Comments) only by the New York State Bar Association and not by the Appellate Divisions, and therefore do not require judicial approval.

The proposed amendments are based on the Comments to the parallel provisions of the ABA Model Rules. The amendments will remove inconsistencies between the present Comment and the black letter text of paragraphs (c) and (d) of Rule 3.8, and will add a new Comment paragraph to explain paragraph (e), which is not addressed at all by the present Comment. While the proposed amendments do not address every nuance of the paragraphs added by the Appellate Divisions on July 1, 2012, they align the language of the Comment with the language of the new

paragraphs, and they help to illuminate the structure, meaning, and operation of the new paragraphs.

We set forth below the text of paragraphs (c), (d), and (e) to Rule 3.8, which were added to the rule effective July 1, 2012, as well as a legislative-style version of the relevant Comments showing COSAC's proposed changes to the present Comment.

Respectfully submitted,

Joseph E. Neuhaus, Chair  
Committee on Standards of Attorney  
Conduct (COSAC)

**Rule 3.8 SPECIAL RESPONSIBILITIES OF PROSECUTORS  
AND OTHER GOVERNMENT LAWYERS**

\* \* \* \* \*

**(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:**

**(1) disclose that evidence to an appropriate court or prosecutor's office; or**

**(2) if the conviction was obtained by that prosecutor's office,**

**(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;**

**(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and**

**(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.**

**(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.**

**(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.**

***COMMENT***

[6A] Reference to a "prosecutor" in this Rule 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 Rule 3.3, Comment [6A].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (c) requires reasonably timely disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (c) requires the prosecutor to examine the evidence and undertake, or make reasonable efforts to cause to be undertaken, further inquiry or investigation to support a reasonable belief that the conviction

should or should not be set aside. Paragraph (c) also requires the prosecutor to notify the court and defendant that the prosecutor possesses such evidence, and to disclose that evidence to the defendant, absent court-authorized delay for good cause. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, may also be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (d), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek a remedy consistent with justice, applicable law, and the circumstances of the case.

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

~~[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. Accordingly, though not required by these Rules, when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted, the prosecutor should examine the evidence and undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful. 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 should be such as to provide a reasonable belief that the conviction should or should not be set aside.~~

~~[6C] Likewise, when a prosecutor comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor should 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 should disclose the new evidence to the court or other appropriate authority so that the court can determine whether to initiate its own inquiry. The evidence should be disclosed in a timely manner, depending on the particular circumstances. For example, disclosure of the evidence might be deferred where it could prejudice the prosecutor's investigation into the matter. If the convicted defendant is unrepresented and cannot afford to retain counsel, the prosecutor should request that the court appoint counsel for purposes of these post-conviction proceedings. This Comment applies to new and material evidence of innocence, regardless of whether it could previously have been discovered by the defense.~~

~~[6D] If the prosecutor comes to know of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor should seek to remedy the injustice by taking appropriate steps to remedy the wrongful conviction. These steps may include, depending on the particular circumstances, disclosure of the evidence~~

~~to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor believes that the defendant was wrongfully convicted.~~

~~[6E] Comments [6B], [6C] and [6D] 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.~~