

The Ethics Committee proposes to add language to N.H. RPC 3.8. The current N.H. RPC 3.8 reads:

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The Ethics Committee proposes to add the following language to N.H. RPC 3.8:

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

(1) promptly disclose that evidence to an appropriate court or prosecutorial authority in the jurisdiction where the conviction occurred, and

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

(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

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

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

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

The purpose of the rule change is explained in the Ethics Committee comment:

"Paragraphs (b) and (c) are not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. These paragraphs instead are intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. Paragraph (d) is intended to provide safe harbor to prosecutors who make judgments regarding evidence in good faith, and that even when wrong, should not be subject to discipline."

Paragraphs (b) and (c) are largely drawn from the ABA Model Rule¹ with a few minor modifications. In paragraph (b) we replaced "reasonable likelihood" with "reasonable probability." The purpose for this change was to track the language used by Courts when evaluating Brady violations. Paragraph (d) is a safe harbor to shield prosecutors who make an independent judgment in good faith which ultimately turns out to be wrong from prosecution under the rule.

¹ The analogous paragraphs are paragraph (g) and (h) from the ABA Model Rule.

Due to the introductory phrase, the Ethics Committee recommends that the rule be reformatted so that it reads naturally. The ABA did not reformat its rule when it adopted the paragraphs analogous to the proposed paragraphs (b) and (c). The reformatted rule would read:

(a) The prosecutor in a criminal case shall:

- (1) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (4) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (5) 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:
 - (i) the information sought is not protected from disclosure by any applicable privilege;
 - (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (iii) there is no other feasible alternative to obtain the information;
- (6) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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

(1) promptly disclose that evidence to an appropriate court or prosecutorial authority in the jurisdiction where the conviction occurred, and

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

(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

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

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

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

Should the rule be adopted as proposed, the Ethics Committee has drafted the following comment:

Paragraphs (b) and (c) are not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. These paragraphs instead are intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. Paragraph (d) is intended to provide safe harbor to prosecutors who make judgments regarding evidence in good faith, and that even when wrong, should not be subject to discipline. It is recommended that a prosecutor who chooses not to disclose post-conviction evidence pursuant to Paragraphs (b) or (c) record the reasons in writing.

Paragraph (b)'s "reasonable probability" standard should be interpreted consistently with how courts have applied that standard in the context of the prosecution's failure to disclose exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g., United States v. Peake*, 874 F.3d 65, 69 (1st Cir. 2017) (explaining that to get a new trial in this context, "the defendant need demonstrate only a reasonable probability that, had the evidence been disclosed to the defense in a timely manner, the result of the proceeding would have been different"); *see also State v. Shepherd*, 159 N.H. 163, 170-71 (2009) (applying the reasonable probability standard to new trial motion under state law where prosecution did not knowingly withhold *Brady* material). In that context, the United States Supreme Court has equated the reasonable probability standard with "something sufficient to 'undermine confidence in the outcome of the trial.'" *United States v. Mathur*, 624 F.3d 498, 504 (1st Cir. 2010) (quoting *Kyles v. Whitney*, 514 U.S. 419, 434 (1995)). Similarly, Paragraph (h)'s "clear and convincing evidence" standard should be interpreted consistently with how that phrase has been used in existing caselaw.

The Committee also notes that by its plain terms, Paragraph (g) may require a prosecutor to take action with respect to a conviction obtained in a jurisdiction in which the prosecutor is not admitted to the practice of law and/or has little or no knowledge regarding how the criminal justice system functions. While prosecutors should undertake reasonable efforts to fulfill their obligations under Paragraph (b), a prosecutor's inability, despite such reasonable efforts, to identify an appropriate court or authority to which to disclose post-conviction evidence should not subject the prosecutor to discipline under this Rule. Nor is there any expectation that prosecutors seek admission *pro hac vice* in another jurisdiction to fulfill their obligations.

Under paragraph (c), if 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 to remedy the conviction. Necessary steps may include 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 has knowledge that the defendant did not commit the offense of which the defendant was convicted. In situations where these steps are unlikely to redress the wrongful conviction, the prosecutor may need to take more direct steps such as seeking a Writ of Coram Nobis or a Writ of Habeas Corpus depending upon the specifics of the circumstances.