

2022-06 Rule of Professional Conduct 3.8

Subcommittee Report

Date: May 22, 2023

Subcommittee Members: Justice N. William Delker, Sean P. Gill, Sara S. Greene, Jeanne Herrick, Charles Keefe

The NHBA Ethics Committee submitted a proposal to add language to NH Rules of Professional Conduct 3.8 Special Responsibilities of a Prosecutor. See [#2022-006 New Hampshire Rule of Professional Conduct 3.8](#). The proposed language is intended to “proactively provide guidance to prosecutors regarding their obligations” upon the discovery 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 proposal is largely based on the ABA Model Rule.

The Advisory Committee on Rules held a public hearing on the proposal on December 9, 2022. In addition to the oral presentations, the committee received written letter submissions from criminal practice professionals. The committee also received a survey of states and territories that was submitted by the Ethics Committee, which indicates whether, and the extent to which, the ABA Model Rule has been adopted by other jurisdictions. The survey shows that 23 states have adopted Model Rule 3.8 (g) and of those 23, 17 have also adopted Model Rule 3.8 (h). To date, all states that have adopted 3.8(h) have also adopted 3.8(g).

The Rules of Professional Conduct Statement of Purpose, provides that “The Rules of Professional Conduct constitute the disciplinary standard for New Hampshire lawyers. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct.” Rule 3.8 additionally sets out special responsibilities of a prosecutor due to the responsibility that a prosecutor has as a minister of justice and not simply that of an advocate.

At the public hearing and in the written submissions issues were raised regarding the language of the proposed rule. Members of the criminal defense bar expressed concern that the proposed rule is contrary to established law regarding exculpatory evidence and offered revisions to the proposed rule that include replacing “new, credible, and material evidence” with “previously undisclosed exculpatory evidence.” For the most part, however, their revised language includes the procedural aspects of the proposed rule.

Prosecutors expressed concern regarding the scope of the rule (to which prosecutors does it apply) and the triggering mechanism for the obligation. Prosecutors also expressed concern that the rule is contrary to established law regarding a party’s right to seek a new trial and suggested that the rule may be more appropriately codified in the Rules of Criminal Procedure. Prosecutors suggested that, if adopted, the rule should only apply to convictions occurring

within the prosecutor's jurisdiction and in cases where the new, credible and material evidence creates a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted. Prosecutors suggested that their revised language is consistent with the proposed rule's stated goal, codifying "a requirement that a prosecutor provide both the sentencing court and the defendant with notice of new, credible, and material evidence that undermines the integrity of a conviction."

As noted above, 23 states have adopted Rule 3.8(g). The State of New Mexico, however, considered the full text of ABA Model Rules 3.8(g) and (h) and rejected those rules as too procedural, opting instead for the following language.

[The prosecutor in a criminal case shall] promptly disclose new, credible and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted. Such evidence shall be disclosed in writing when it becomes known to the prosecutor, absent court authorization otherwise. If the defendant is unrepresented, the prosecutor shall inform a person reasonably certain to inform the defendant or take appropriate action.

16-308(G) NMRA.

The committee comments to the New Mexico Rules of Professional Conduct further explain:

The Committee's view is that the Rules of Professional Conduct should define ethical duties rather than establish rules of procedure, particularly when ethical rules of procedure may conflict with established rules of criminal procedure or other laws. Thus, this rule focuses on a prosecutor's ethical duty to disclose evidence of a defendant's innocence to a person reasonably certain to relate the information to a defendant and/or act on a defendant's behalf. The rule does not mandate a prosecutor to take any particular action beyond the appropriate disclosure of exculpatory information.

16-308 NMRA.

The State of Delaware also opted for a different approach, adopting the following language:

[W]hen the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred.

Delaware Rules of Professional Conduct 3.8(d)(2).

In making the following recommendation, the subcommittee considered the comments offered by the defense bar and prosecutors as well as the representative of the Ethics Committee. Three of four members of the subcommittee concluded that the proposed Rule 3.8(g) and the various alternatives include language that may have unintended consequences of impacting criminal procedure, which are better addressed through Rules of Criminal Procedure or decided through case law. The proposed language for Rule 3.8(h), however, is straight forward and consistent with the purpose of the Rules of Professional Conduct and the special responsibilities of a prosecutor due to the responsibility that a prosecutor has as a minister of justice. Finally, the subcommittee considered including the safe harbor in either the rule or the comments. To maintain consistency in the manner that the Rule of Professional Conduct are applied, the subcommittee recommends omitting the safe harbor language altogether.

The majority of the subcommittee recommends amending Rule 3.8 as follows in bold and in brackets.

Rule 3.8. Special Responsibilities of a Prosecutor

(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:

a. the information sought is not protected from disclosure by any applicable privilege;

b. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

c. 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 clear and convincing evidence establishing that a defendant was convicted of an offense that the defendant did not commit, the prosecutor shall unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant, and where the conviction was obtained within the prosecutor's jurisdiction, the prosecutor shall request that the court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, or where the conviction was obtained outside the prosecutor's jurisdiction, the prosecutor shall make timely disclosure of that evidence to the chief prosecutor of the jurisdiction where the conviction occurred.]

2004 ABA Model Rule Comment

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[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. 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. 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.

[2] In some jurisdictions, 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.

[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.

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

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

[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.

The dissenting member of the subcommittee proposed alternative language based on the following concerns.

The language in the first line of the first sentence, “clear and convincing evidence” should be amended to “new, credible, and material evidence” to be more in accordance with other states that have enacted similar rules. He further suggested that this language gives better guidance to prosecutors based upon their role in the criminal justice system, and it better addresses the spirit and purpose of the rule.

It was also recommended changing the language going from the end of the first line to the second line, “a defendant was convicted of an offense that the defendant did not commit” to “creates a reasonable likelihood that a convicted defendant did not commit an offense.”

As such, the first sentence would read, “When a prosecutor knows of new, credible, and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense...” This recommendation is intended to better address the purpose of the rule and allow a defendant (and counsel) to address new evidence that calls a conviction into question. It relieves the prosecutor, who may not be neutral, from determining whether it was “clear and convincing” evidence, and determining whether the new evidence shows the defendant did not commit the offense. This change is based on the belief that of the spirit of the rule is to allow new evidence that calls a conviction into question to be turned over to the defendant so that the defendant and counsel can do whatever they wish with the new evidence. They may also have a different view on whether it is “clear and convincing” or shows whether the defendant did not commit the offense.

The dissenting subcommittee member’s recommendation is to replace the language proposed by the majority in section 3.8(b) to read as follows.

[(b) When a prosecutor knows of new, credible, and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense, the prosecutor shall unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant, and where the conviction was obtained within the prosecutor’s jurisdiction, the prosecutor shall request that the court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, or where the conviction was obtained outside the prosecutor’s jurisdiction, the prosecutor shall make timely disclosure of that evidence to the chief prosecutor of the jurisdiction where the conviction occurred.]