VOLUME 11

MATERIALS PROVIDED TO MEMBERS OF THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

FOR THE TWENTY-FIFTH MEETING

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

August 21, 2009, 9:00 a.m.
Supreme Court Conference Room

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1. Approval of minutes of May 8, 2009 meeting [pages 1-25]

2. Subcommittee reports:

   a. Rules 1.15(*l*)-(m), 1.16A – The Discrete Sequel –Marcus Squarrell [asterisked text on pages 27-28; *see also* pages 6-10 of attached minutes of May 8, 2009 meeting]

   b. Rule 1.5(b) – Alec Rothrock [to be distributed before meeting; *see also* pages 1-6 of attached minutes of May 8, 2009 meeting]

   c. Potential Rules 8.6 and 1.6(b)(7) – Report on status of solicitation for ABA feedback, and new Wisconsin Rule 3.8 – Judge Webb [pages 30-37; *see also* pages 14-17 of attached minutes of May 8, 2009 meeting]

3. New business

4. Administrative matters:

   a. Expired terms – Marcy Glenn [pages 38-39]

   b. Select next meeting date

5. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
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FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

PROPOSED NEW CLIENT FILE RETENTION RULE AND RELATED CHANGES TO COLO. RPC 1.15 AND COLO. RPC 1.16

MODIFICATION OF COLO. RPC 1.15

* * * *

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

* * * *

(6) Copies of all records showing payments to any person, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all cancelled checks.

~~(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.~~

(l) Dissolutions and Departures. *Upon the dissolution of a law firm, the lawyers in the law firm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.*

(m) **Availability of Records.** Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

* * * *

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. *"Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.* All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

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MODIFICATION OF COLO. RPC 1.16

* * * *

Comment

[9A] A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under paragraph (d).

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RULE 1.16A. CLIENT FILE RETENTION

Except as provided in a written agreement signed by a client, a lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of a representation in the matter, unless the lawyer has previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless (1) after such termination, the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. At any time following the expiration of a period of ten years following the termination of a representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

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Comment

[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them. Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P.(six-year retention of contingent fee agreement and proof

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of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] The two-year period under Rule 1.16A begins upon termination of a representation in a matter, even if the lawyer continues to represent the client in other matters. The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year and ten-year periods in the Rule. For example, in a matter resulting in a felony criminal conviction, a lawyer may retain a client's file for longer than the two-year and ten-year periods because of Crim.P. 35(c) considerations. The Rule does not supersede obligations imposed by other law, court order or rules of a tribunal. A lawyer may not destroy a file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year maintenance period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given. The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written

notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule 1.16A. Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, or if the lawyer has agreed otherwise. If these three preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

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July 27, 2009

George Kuhlman, Esq.
Ethics Counsel and Associate Director
Center for Professional Responsibility
American Bar Association
321 N. Clark Street
Chicago, IL 60654-7598

Re: Rule 3.8/8.6 Amendments

Dear Mr. Kuhlman:

I chair the Colorado Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct (CRPC). I write to advise you of certain changes to CRPC 3.8 that our committee recently voted to recommend to the Colorado Supreme Court, as well as other related changes we considered but have deferred recommending to the Court at this time, in part because we would appreciate input from the ABA.

Our committee's recommendations correspond in many respects to new subsections (g) and (h) in ABA Model Rule 3.8 and comments [7] and [8] to Model Rule 3.8. However, they also depart from and expand upon the Model Rule language in some respects. The recommended amendments appear as Attachment 1 to the enclosed Final Report of Rule 3.8 Subcommittee. These will be forwarded to the Colorado Supreme Court shortly, and we expect the Court to request comments and perhaps to schedule a public hearing before taking action on the recommendations.

Our committee also considered, but did not vote upon, two additional proposals to adopt several other rules that would impose upon all lawyers -- not merely prosecutors -- certain duties that are roughly analogous to those imposed on prosecutors under ABA Model Rule 3.8(g) and (h):

First, we considered a new CRPC 8.6 (Attachment 2 to the enclosed subcommittee report), which would impose certain disclosure duties on lawyers who are *not* prosecutors, and which reads as follows:

> When a lawyer who is not subject to Colo. RPC 3.8 knows of information that does not relate to the representation of a current or former client, which creates a reasonable probability that a convicted defendant did not commit a

> felony offense of which the defendant was convicted, then the lawyer shall promptly disclose such information to the appropriate prosecutorial authority in the jurisdiction where the defendant was convicted.

We also considered a lengthy comment to accompany the new rule, which also appears in Attachment 2.

Second, we considered a new exception to CRPC 1.6 (set forth at page 12 of the attached minority report of the Rule 3.8 Subcommittee), which would permit a lawyer to disclose exculpatory information related to the representation of a client, and which reads as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (7) to disclose to the appropriate prosecutorial authority information relating to the wrongful felony conviction of any person, provided that such information does not incriminate or implicate the lawyer's current or former client. If the current or former client is deceased, the lawyer may disclose such information even if it incriminates or implicates the lawyer's current or former client.

Our committee voted to table further action on proposed CRPC 8.6 and 1.6(b)(7). A number of committee members voiced serious reservations about these changes, primarily because proposed CRPC 8.6 would impose potentially watershed changes in a non-prosecutor's duty to act concerning a problem that the attorney had not in any way created (conviction of an innocent person), and because proposed CRPC 1.6(b)(7) would further chip away at a lawyer's core duty of confidentiality. To our committee's knowledge, neither the ABA nor any state has adopted comparable rules.[1]

The committee voted to provide all of these proposed rules to the ABA, so that we could share our work product and benefit from your reactions. In addition to any general comment on these proposed rules, we would appreciate information on similar action that is being considered in or has been taken by the ABA or any other state.

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[1] At the ABA CPR Conference in Chicago in May 2009, I attended the fascinating program on the Alton Logan case and I first learned of a draft recommendation from the ABA Criminal Justice Section, which would add a new subsection (c) to Model Rule 1.6, to permit a lawyer to "reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another." However, I do not know the current status of that draft recommendation.

I would be happy to provide further background and I look forward to hearing from you.

Very truly yours,

Marcy G. Glenn
of Holland & Hart LLP

MGG:lmp

cc: Honorable John R. Webb (CRPC 3.8 Subcommittee Chair)

bcc: Full Standing Committee (with August meeting materials)
Lauren Rosenello

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Letter

Marcy Glenn

From: Kuhlman, George [GKuhlman@staff.abanet.org]
Sent: Tuesday, August 11, 2009 6:53 AM
To: Marcy Glenn
Cc: Libby, Eileen; Holtaway, John
Subject: Inquiry regarding CO Rule amendments

Dear Ms. Glenn,

Thank you for your letter of July 27 and the accompanying materials describing possible amendments to the Colorado Rules of Professional Conduct. Both the Rule 3.8 Subcommittee Report and its Minority's Report are interesting and thoughtful.

The Center for Professional Responsibility's Policy Implementation Committee, chaired by Judge Barbara K. Howe, is charged with responding to requests for comment from jurisdictions that are considering the adoption or amendment of professional responsibility policies promulgated by the ABA, in this case our recently-adopted Model Rule 3.8(g) and (h). The Policy Implementation Committee's counsel is John Holtaway, with whom I will share what you sent to me. He and Judge Howe will develop a response, either by asking a subcommittee to review your proposals or by doing so on their own.

Because the Standing Committee on Ethics, which I serve as counsel, has primary jurisdiction over potential additional amendments to the ABA Model Rules of Professional Conduct, such as your tentative Rules 8.6 and 1.6(b)(7), I will be conferring with one of its members who is also the Chair-elect of the ABA Section of Criminal Law to determine what response (if any) we're positioned to make with respect to those two draft rules. Absent any official response from the Ethics Committee, I'll be glad to share with you my recollections of the recent development -- and discussion -- of the new ABA M.R. 3.8(g) and (f), and of the "non-prosecutor disclosure rule" being informally considered within the Criminal Justice Section.

You can expect our respective comments by approximately August 19th. In the meantime, please feel welcome to give me a call at the number indicated below if you'd like to discuss any matters relating to your inquiry in person.

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2009 WI 55

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 08-24

In the matter of amendment of Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys.

FILED

JUN 17, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On September 19, 2008, the Wisconsin District Attorney's Association, through its president, Ralph Uttke, District Attorney for Langlade County, filed a petition requesting this court modify Supreme Court Rule (SCR) 20:3.8 to adopt the substance of recent changes to the American Bar Association Model Rule 3.8 relating to special responsibilities of a prosecutor. A public hearing was conducted on March 9, 2009. Attorney Uttke and Attorney Pat Kenney presented the petition to the court. In addition, the court heard testimony and/or received written statements from the Office of the State Public Defender, the Wisconsin Department of Justice, the Wisconsin Association of Criminal Defense Attorneys (WACDA), the Wisconsin Criminal Justice Study Commission, Professor Ben Kempinen on behalf of the University of Wisconsin Law School's Remington Center, the State Bar of Wisconsin, and the Board of Administrative Oversight. All participants supported the petition, but several advocated adopting the language of the ABA Model Rule, rather than the modified language proposed by the

petitioner. The court discussed the petition at the ensuing open administrative conference and voted unanimously to adopt the petition with certain modifications as set forth herein. Accordingly, effective July 1, 2009, SCR 20:3.8 is amended as follows:

Section 1. 20:3.8 (g) of the Supreme Court Rules is created to read:

20:3.8 **(g)** 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 do all of the following:

(1) promptly disclose that evidence to an appropriate court or authority; and

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

(i) promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay; and

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

Section 2. 20:3.8 (h) of the Supreme Court Rules is created to read:

20:3.8 **(h)** When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Section 3. The following Comments to SCR 20:3.8(g) and (h) are not adopted, but will be published and may be consulted for

guidance in interpreting and applying the Wisconsin Rules of Professional Conduct for Attorneys:

Wisconsin Comment

Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20:3.8(g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new A.B.A. rule to recognize limits in the investigative resources of Wisconsin prosecutors.

This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

ABA Comments

[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 (g) requires prompt 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 (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. 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, would ordinarily 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 (h), 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 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.

[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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

IT IS ORDERED that notice of this amendment of SCR 20:3.8 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 17th day of June, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

37

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August 17, 2009

The Honorable Michael L. Bender
Colorado Supreme Court
2 E. 14th Avenue, 4th Floor
Denver, CO 80203

The Honorable Nathan B. Coats
Colorado Supreme Court
2 E. 14th Avenue, 4th Floor
Denver, CO 80203

Re: Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct

Dear Justices Bender and Coats:

On behalf of the Court's Standing Committee on the Rules of Professional Conduct (the Standing Committee), I respectfully request the Court to reappoint the following members for a three-year term, *nunc pro tunc* July 1, 2009:

Federico C. Alvarez
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720.254-4219

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Honorable John R. Webb
Colorado Court of Appeals
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Denver, CO 80203
303.837.3731

If it pleases the Court, I would be privileged to continue to serve as the Chair of the Standing Committee.

Ken Pennywell has advised me that he has decided not to request reappointment. I do not have a current waiting list of individuals interested in serving on the Standing Committee, but I would be pleased to meet with you to discuss candidates if you wish to appoint a new member to fill Ken's spot.

Thank you for your consideration.

Very truly yours,

Marcy G. Glenn, Chair
Standing Committee on the Colorado Rules of Professional Conduct

MGG:lmp

bcc: All Standing Committee Members (w/meeting materials) ✓
Kenneth B. Pennywell (via mail)
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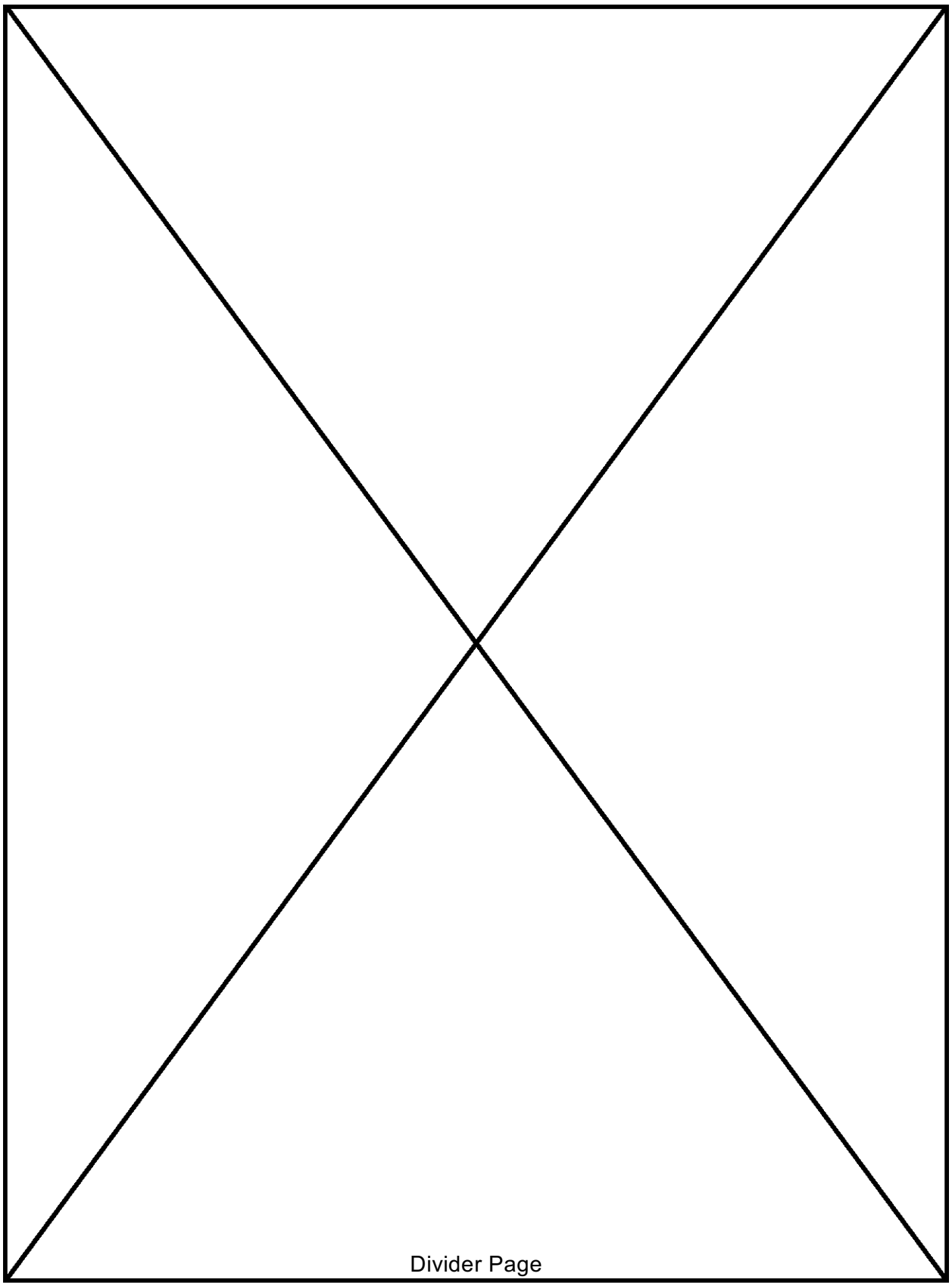

Divider Page

Subject: Additional handout #1 for Friday 8/21 meeting
From: Marcy Glenn <MGlenn@hollandhart.com>
Date: Thu, 20 Aug 2009 11:31:29 -0600
To: Alexander Rothrock <arothrock@bfw-law.com>, Anthony van Westrum <avwllc@comcast.net>, Boston Stanton <bostonhs@aol.com>, Cecil Morris <cmorris@penberg.com>, Cynthia Covell <cfc@alpersteincovell.com>, David Little <dlittle@mlmpc.com>, David Stark <dstark@faegre.com>, Eli Wald <ewald@law.du.edu>, Federico Alvarez <falvarez@4dv.net>, "Gary B. Blum" <blumg@s-d.com>, "Helen E. Raabe" <helen.raabe@diadenver.net>, Henry Reeve <hrr@denverda.org>, "Hon. John Webb" <john.webb@judicial.state.co.us>, "Hon. Michael Bender" <michael.bender@judicial.state.co.us>, "Hon. Nathan Coats" <nathan.coats@judicial.state.co.us>, John Gleason <john.gleason@csc.state.co.us>, "John M. Haried" <john.haried@usdoj.gov>, "Linda Roots (Justice Coats' assistant)" <linda.roots@judicial.state.co.us>, Lisa Wayne <lmonet20@aol.com>, "Marcus L. Squarrell" <msquarrell@duckerlaw.com>, Marcy Glenn <MGlenn@hollandhart.com>, Michael Berger <mberger@jacobschase.com>, Nancy Cohen <nancy.cohen@csc.state.co.us>, Neeti Pawar <neeti@neetilegal.com>, Ruthanne Polidori <randiepolidori@comcast.net>, "Tammy Bailey (Administrator to Judge Lucero)" <t.bailey@pdj.state.co.us>, "Thomas E. Downey, Jr." <ted@downeymurray.com>, Tuck Young <tyoung@kyklaw.com>, Valerie Dewey <valerie.dewey@judicial.state.co.us>, William Lucero <w.lucero@pdj.state.co.us>

For informational (not discussion) purposes only. *See* Agenda Item 2(c).

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]
Sent: Wednesday, August 19, 2009 8:31 AM
To: Marcy Glenn
Cc: GKuhlman@staff.abanet.org

Subject:

Dear Ms. Glenn:

George Kuhlman, the Counsel to the ABA Standing Committee on Ethics and Professional Responsibility, has asked me to respond to the portion of your inquiry that deals with proposed amendments to Colorado R Professional Conduct 3.8 (g) and (h). I am the Counsel to the Center's Policy Implementation Committee.

First, we commend the Colorado Standing Committee on the Colorado Rules of Professional Conduct ("CRPC") for proposing amendments in line with ABA Model Rule 3.8 (g) and (h). To date, Wisconsin is the on state to my knowledge to amend their Rule 3.8.

We still strongly encourage the CRPC to recommend the adoption of new subsections (g) and (h) that do not delete the word "promptly" and substitute the phrase "within a reasonable time". Subsections (g) and (h) addressing the reality that any criminal justice system may produce wrongful convictions and that prosecut ministers of justice, have a duty to remedy such convictions in the face of newly discovered evidence. The Rules of Professional Conduct prescribe a prosecutor's professional responsibilities, functioning as substantive procedural law. As your Committee's Report notes, the Rules should give a prosecutor as specific direction possible when describing a required course of conduct. We would suggest that the term "promptly" give prosecutors more direction than the term "within a reasonable time". A criminal defendant who is wron incarcerated, and possibly scheduled for execution, should be assured that a prosecutor who has discovered new, credible and material evidence will act promptly to disclose that evidence. In response to a prosecutor's concern that prompt disclosure to the defense might undermine the investigation of the exculpatory information or otherwise interfere with legitimate law enforcement interests, the disclosure requirement is qualified by the te "unless a court authorizes delay."

Additionally, prosecutors who may have violated the Rules of Professional Conduct are subject to disc proceedings. In order for disciplinary counsel to successfully prosecute lawyers for violations of the Rules, the Rules must have as clear standards of professional conduct as possible. In this context as well, "prompt" disclosure is a much clearer standard for lawyers and disciplinary counsel to understand and apply than " reasonable time."

The CRPC may want to keep its new Comment 7A in the proposed new subsections (g) and (h), but again we would suggest that you change "within a reasonable time" to "promptly."

I have attached an article written by the Chair of the section of Criminal Justice regarding amended Model Rule 3.8.

Please let me know if you have any questions or need anything else.

John

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Visit us on the web at
for details about the 26th National Forum on Client Protection and the 36th National Conference on Professional Responsibility, June 2-5, 2010, Seattle, WA
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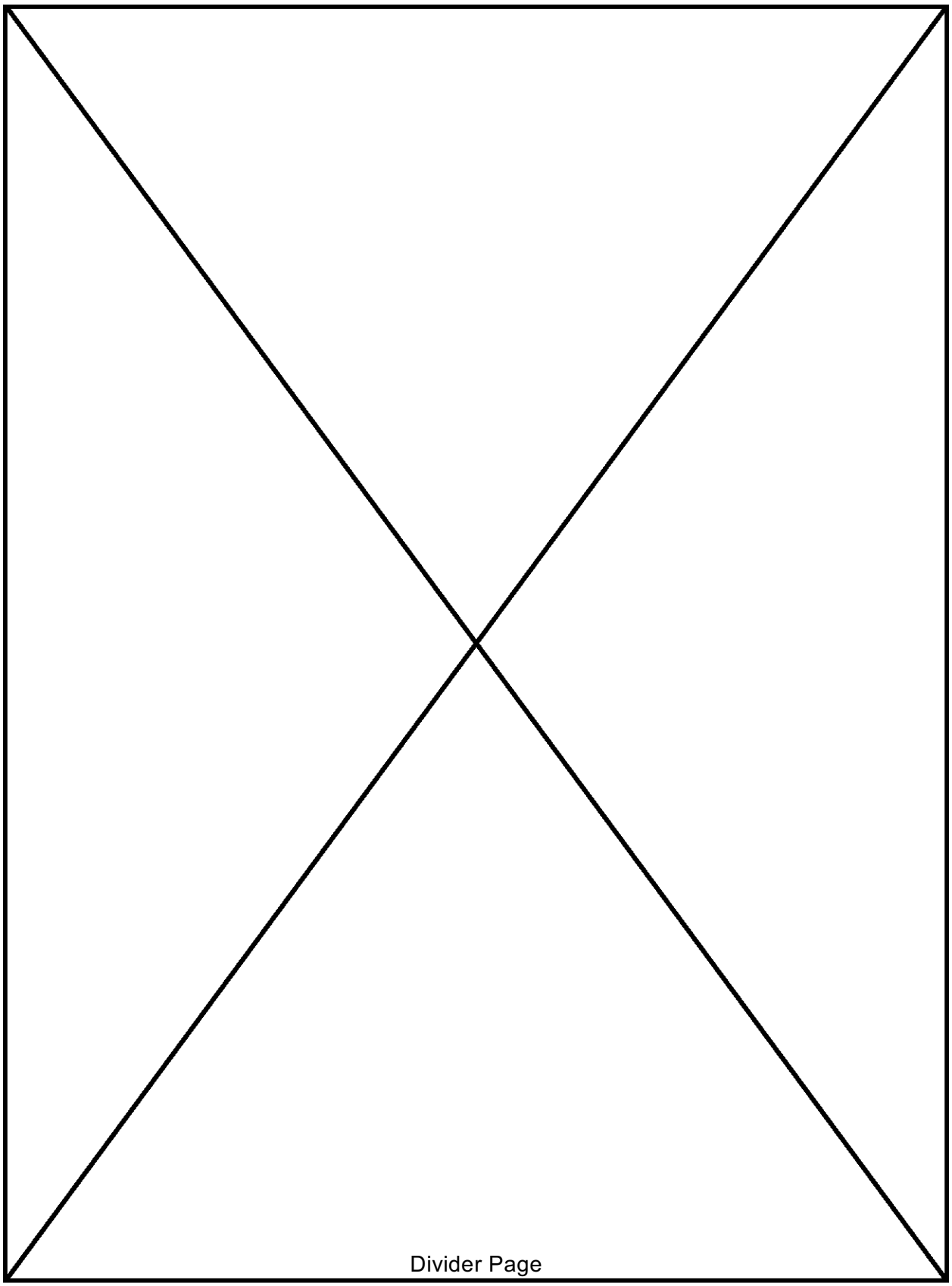

Divider Page

Subject: Additional handout #2 for Friday 8/21 meeting
From: Marcy Glenn <MGlenn@hollandhart.com>
Date: Thu, 20 Aug 2009 11:33:29 -0600
To: Alexander Rothrock <arothrock@bfw-law.com>, Anthony van Westrum <avwllc@comcast.net>, Boston Stanton <bostonhs@aol.com>, Cecil Morris <cmorris@penberg.com>, Cynthia Covell <cfc@alpersteincovell.com>, David Little <dlittle@mlmpc.com>, David Stark <dstark@faegre.com>, Eli Wald <ewald@law.du.edu>, Federico Alvarez <falvarez@4dv.net>, "Gary B. Blum" <blumg@s-d.com>, "Helen E. Raabe" <helen.raabe@diadenver.net>, Henry Reeve <hrr@denverda.org>, "Hon. John Webb" <john.webb@judicial.state.co.us>, "Hon. Michael Bender" <michael.bender@judicial.state.co.us>, "Hon. Nathan Coats" <nathan.coats@judicial.state.co.us>, John Gleason <john.gleason@csc.state.co.us>, "John M. Haried" <john.haried@usdoj.gov>, "Linda Roots (Justice Coats' assistant)" <linda.roots@judicial.state.co.us>, Lisa Wayne <lmonet20@aol.com>, "Marcus L. Squarrell" <msquarrell@duckerlaw.com>, Marcy Glenn <MGlenn@hollandhart.com>, Michael Berger <mberger@jacobschase.com>, Nancy Cohen <nancy.cohen@csc.state.co.us>, Neeti Pawar <neeti@neetilegal.com>, Ruthanne Polidori <randiepolidori@comcast.net>, "Tammy Bailey (Administrator to Judge Lucero)" <t.bailey@pdj.state.co.us>, "Thomas E. Downey, Jr." <ted@downeymurray.com>, Tuck Young <tyoung@kyklaw.com>, Valerie Dewey <valerie.dewey@judicial.state.co.us>, William Lucero <w.lucero@pdj.state.co.us>

Also for informational (not discussion) purposes only. *See* Agenda Item 2(c).

You might receive another email from Alec Rothrock, containing the current proposed draft of Rule 1.5(b). *See* Agenda Item 2(b). If not, hopefully Alec will bring that draft to the meeting. If not, it should be a very short meeting!

See you tomorrow,
Marcy

From: Kuhlman, George [mailto:GKuhlman@staff.abanet.org]
Sent: Wednesday, August 19, 2009 8:44 AM

To: Marcy Glenn; Holtaway, John
Subject: RE:

Dear Marcy,

I will be sending you brief comments on your committee's "additional" proposals for a new 1.6(a)(7) and a new Rule 8.6, but with the caveat that I've actually no authority to present an ABA response.
Our Policy Implementation Committee is charged with encouraging the jurisdictions to consider, and hopefully adopt, existing ABA policy, but it customarily doesn't comment on other policies, except perhaps to observe that "we're not there, yet."

In that connection, I'd recommend that you stay in touch with folks in the ABA Criminal Justice Section, who, as you've noted, have "your" issues on their radar at the moment. They too, however, will not be able to speak officially on behalf of the Criminal Justice Section, but they'll know the best of the arguments for what you've got under consideration.

George Kuhlman
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From: Marcy Glenn [mailto:MGlenn@hollandhart.com]
Sent: Wednesday, August 19, 2009 9:34 AM
To: Holtaway, John
Cc: Kuhlman, George
Subject: RE:

Dear John, thank you for your prompt comments and attached article. I will

share them with the full Committee at our meeting on Friday.

Sincerely,
Marcy Glenn
Holland & Hart, LLP
Denver, CO
303-295-8320
mglenn@hollandhart.com

From: Holtaway, John [JHoltaway@staff.abanet.org]
Sent: Wednesday, August 19, 2009 8:30 AM
To: Marcy Glenn
Cc: GKuhlman@staff.abanet.org
Subject:

Dear Ms. Glenn:

George Kuhlman, the Counsel to the ABA Standing Committee on Ethics and Professional Responsibility, has asked me to respond to the portion of your inquiry that deals with proposed amendments to Colorado Ru Professional Conduct 3.8 (g) and (h). I am the Counsel to the Center's Policy Implementation Committee.

First, we commend the Colorado Standing Committee on the Colorado Rules of Professional Conduct ("CRPC") for proposing amendments in line with ABA Model Rule 3.8 (g) and (h). To date, Wisconsin is the onl state to my knowledge to amend their Rule 3.8.

We still strongly encourage the CRPC to recommend the adoption of new subsections (g) and (h) that do not delete the word "promptly" and substitute the phrase "within a reasonable time". Subsections (g) and (h) addressing the reality that any criminal justice system may produce wrongful convictions and that prosecuto ministers of justice, have a duty to remedy such convictions in the face of newly discovered evidence. The Rules of Professional Conduct prescribe a prosecutor's professional responsibilities, functioning as substantive ar procedural law. As your Committee's Report notes, the Rules should give a prosecutor as specific direction possible when describing a required course of conduct. We would suggest that the term "promptly" give prosecutors more direction than the term "within a reasonable time". A criminal defendant who is wrong incarcerated, and possibly scheduled for execution, should be assured that a prosecutor who has discovered credible and material evidence will act promptly to disclose that evidence. In response to a prosecutor's concern that prompt disclosure to the defense might undermine the investigation of the exculpatory information or otherwise interfere with legitimate law enforcement interests, the disclosure requirement is qualified by the term, "unless a court authorizes delay."

Additionally, prosecutors who may have violated the Rules of Professional Conduct are subject to disci proceedings. In order for disciplinary counsel to successfully prosecute lawyers for violations of the Rules, the Rules must have as clear standards of professional conduct as possible. In this context as well, "prompt" disclosure is a much clearer standard for lawyers and disciplinary counsel to understand and apply than " reasonable time."

The CRPC may want to keep its new Comment 7A in the proposed new subsections (g) and (h), but again we would suggest that you change "within a reasonable time" to "promptly."

I have attached an article written by the Chair of the section of Criminal Justice regarding amended Model Rule 3.8.

Please let me know if you have any questions or need anything else.

John

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for details about the 26th National Forum on Client Protection and the 36th National Conference on Professional Responsibility, June 2-5, 2010, Seattle, WA
http://www.abanet.org/cpr/events/home.html

Changes to Model Rules Impact Prosecutors

BY STEPHEN A. SALTZBURG

At the ABA Midyear Meeting, one resolution of the Criminal Justice Section that was approved by the House of Delegates (105 B) added two provisions to Rule 3.8 of the Model Rules of Professional Conduct. The two additions are the following:

(g) 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:

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

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

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

(B) 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.

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

Prosecutors are obligated to rectify wrongful convictions.

The House also approved the Criminal Justice Section's recommendation of the following amendment to the Comment to Rule 3.8. (New material is highlighted in italics and bold and deleted material has been struck through.):

[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, 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.*** ~~Precisely how far the prosecutor is required to go in this direction~~ ***The extent of mandated remedial action*** 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 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.

STEPHEN A. SALTZBURG *is the 2007-08 chair of the Criminal Justice Section and the Wallace and Beverley Woodbury University Professor at George Washington University School of Law in Washington, D.C. Contact him at ssaltz@law.gwu.edu.*

The House approved adding the following new paragraphs to the Comment to Rule 3.8:

> [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 (g) requires prompt 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 (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. 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, would ordinarily 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 (h), 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 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.
>
> [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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

The additions to Rule 3.8 reflect the long-standing concern among prosecutors, defense counsel, judges, and academics about the risk that any criminal justice system, even working at its best, may produce wrongful convictions, and the importance of remedying such convictions in the face of important newly discovered evidence. Both the black letter of the rule and the additions to the comment were the work of the Ethics, Gideon, and Professionalism Committee, cochaired by Bruce Green and Ellen Yaroshefsky. The Criminal Justice Section Council carefully considered the proposals and benefited greatly from suggestions made by several of the elected prosecutors who serve on the Council and from work previously done by the New York State Bar as it adopted a rule similar to the one ultimately approved by the Council and the House of Delegates.

Our Section had some impressive cosponsors on our recommendation. These included the ABA Death Penalty Representation Project, the Section of Individual Rights and Responsibility, the Section of Litigation, the Section of State and Local Government Law, the Standing Committee on Ethics and Professional Responsibility, the Government and Public Sector Lawyers Division, the ABA Commission on Domestic Violence, the New York State Bar Association, the Association of the Bar of the City of New York, and the National Organization of Bar Counsel.

Despite the wide support for the Criminal Justice Section recommendation, not everyone was persuaded that sections (g) and (h) provided clear enough guidance to prosecutors. The U.S. Department of Justice (DOJ) considered asking the House of Delegates to delay a vote on 105 B because it had a number of questions about how Rules 3.8(g) and (h) would work in practice. Bruce Green and I each spent a good deal of time in telephone conversations explaining why the Council had chosen the language that it did. David Margolis, associate deputy attorney general, sent an eight-page letter to Laurel G. Bellows, chair of the House of Delegates, setting forth comments on Rules 3.8(g) and (h). Hank White, the executive director of the ABA, and I met separately with Paul A. Hayden, deputy director of the Office of Intergovernmental and Public Liaison of the Department of Justice to talk about 105 (B). Ultimately, the Department of Justice chose not to fight the recommendation before the House of Delegates, and I committed the Criminal Justice Section to working with the DOJ, the National District Attorneys Association, and other interested persons and groups to ensure that the additions to Rule 3.8 did not operate as a kind of unfair "gotcha" that would place prosecutors in jeopardy of having meritless ethics claims filed against them. The spirit of cooperation apparent in Paul Hayden's efforts gave me hope that the ABA and the DOJ might be moving forward together in a joint effort to improve our criminal justice system.

As part of my commitment to ensuring that Rules 3.8(g) and (h) operate as the Criminal Justice Section anticipated they would, I address some of the DOJ's concerns here. My comments, of course, reflect only my own understanding of the rule, but I have asked Bruce Green to review them and happily state that he concurs.

Q: How can a prosecutor who did not prosecute a case know that evidence is "new, credible, and material"?

A: At times, a prosecutor will know that evidence the pros-

ecutor has received exculpates someone who was convicted in another jurisdiction. This may occur, for example, when an arrested individual confesses to a crime for which the prosecutor knows that someone in another jurisdiction was convicted. But unless a prosecutor actually does *know* of the conviction in another jurisdiction, *knows* the evidence is relevant to that conviction, and *knows* that the evidence is "new, credible, and material," the rule imposes no obligation. Even so, as a matter of prudence, a prosecutor who receives evidence that appears to support a claim of innocence in another jurisdiction ought to refer that evidence to the prosecutor in the other jurisdiction for evaluation. The burden of action would be minimal and would place in appropriate hands the determination of whether the evidence satisfies the standard.

Q: Is "material" the same as under *Maryland v. Brady*?

A: The ABA Model Rules use the term "material" in various places. For example, lawyers must correct false statements of "material fact" made to the tribunal (Rule 3.3(a)(1)) and may not make a false statement of "material fact" to a third person (Rule 4.1(a)(1)). In these contexts, the term "material" means that the information might have significance for how the recipient makes decisions. In Rule 3.8(g), however, the term must be understood in the context of the purpose of the rule and in light of prosecutors' ordinary disclosure obligations both under *Brady* and its progeny and under Rule 3.8(d), which requires timely disclosure of information that "tends to negate the guilt of the accused." Like the *Brady* standard, Rule 3.8(g) is directed at evidence that, in the context of all the evidence, raises significant doubts about the defendant's guilt—e.g., a confession by a newly discovered suspect; a prosecution witness's recantation or evidence that raise significant doubts about a prosecution witness's credibility; a newly discovered witness who exonerates the defendant, etc. If, given everything that the prosecutor now knows, the evidence would not have to be disclosed under *Brady* and Rule 3.8(d) if a trial were to be held tomorrow, then it obviously is not "material" under Rule 3.8(g). Conversely, if a conscientious prosecutor or defense lawyer, knowing of the information, would investigate to determine whether an innocent defendant was wrongly convicted, the evidence is surely "material."

Q: How quickly must a prosecutor act in order to act "promptly"?

A: The word "promptly" is used in other places in the Model Rules. I have always taken it to mean with reasonable speed, and reasonableness depends upon a variety of circumstances. Exculpatory evidence would have to be disclosed more swiftly to a defendant scheduled for execution than to one who had served time and been released. But disclosure is not required until it becomes evident to the prosecutor that the information is new, credible, and material. A prosecutor might well have to review a record that might not be readily available before deciding this. The prosecutor might have to go over old notes of interviews that might be in police custody. "Promptly" does not bar appropriate inquiry and investigation to determine whether disclosure must be made.

Q: How does a prosecutor remedy a conviction?

A: The black letter provides no answer, but the additions to the Comment provide that "[n]ecessary 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." When there is no judicial means of correcting the injustice, supporting a motion for executive clemency may be the necessary step. The Department of Justice expressed concern that not all jurisdictions may adopt the Comment, or that some jurisdictions may not be satisfied by the steps identified in the Comment. The reality is that any state may change the black letter, reject it, change the Comment, or reject it, in light of the particular state's law and processes. But the ABA is on record as approving the Comment, which was given considerable thought by the Criminal Justice Section. Prosecutors may not be able to do more than the actions indicated, and they should not be faulted for not doing what is beyond their power. But, as Comment paragraph [1] states at the outset, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." I have little doubt that a prosecutor who is convinced of a convicted person's innocence will do what he or she can to see that justice is done. Unfortunately, the reality is that under federal law and in some states, there may be little that a prosecutor can do once the time for post-trial motions has expired, other than to appeal to the executive's pardon or clemency power. I should also note that the intent of Rule 3.8(h) is not to suggest that defense counsel and courts have no role to play when it comes to undoing a wrongful conviction. Defense motions and judicial discretion may be critical to remedy an injustice.

Q: What is good faith?

A: The Criminal Justice Section fought hard to have included in the Comment this language: "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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule." To me this is a clear statement to disciplinary agencies and courts that well-intentioned prosecutors who make considered judgments under the rule should not be sanctioned or even investigated. A prosecutor who makes a good faith judgment is protected even if, after the fact, others believe that the judgment was not only erroneous, but negligent.

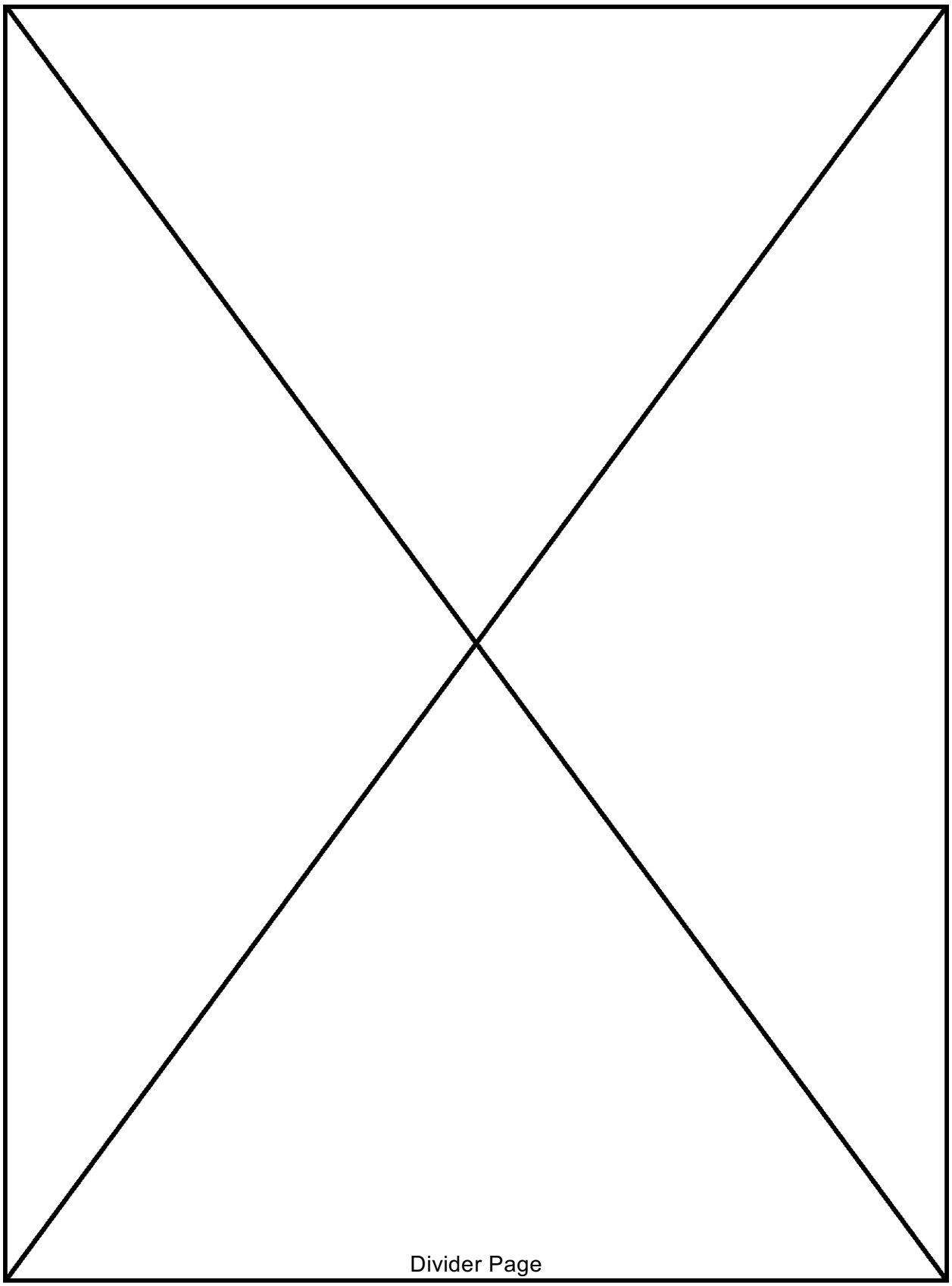
Q: Is the Rule at odds with finality?

A: Congress has demonstrated in enacting 28 U.S.C. § 2255 and Fed. R. Crim. P. 33 a desire to impose time limits on judicial challenges to a conviction. Finality is a legitimate goal of a criminal justice system, and legislatures may legitimately impose substantial proof requirements on defendants who, after being convicted, claim innocence. But Rules 3.8(g) and (h) focus on the ethical obligations of prosecutors and their role as ministers of justice. Prosecutors who conclude that there is new, credible and material evidence of innocence ought not ignore it. And prosecutors who learn of clear and convincing evidence that a person was wrongly convicted should seek to remedy the conviction. If the prosecutor takes available measures but the jurisdiction makes it impossible to correct the injustice, the prosecutor nonetheless has satisfied all moral and ethical obligations.

Q: What about defense counsel?

A: The Council of the Criminal Justice Section asked the Ethics, Gideon, and Professionalism Committee to consider another rule that would be directed at all lawyers who come upon evidence that is credible and material and indicates that a person has been wrongly convicted. Any such rule requires a careful balancing of attorney-client privilege and confidentiality concerns as well as concern about the innocent. The committee has circulated its first draft in an effort to promote discussion. We shall proceed to consider and debate the issue, and almost certainly will find that consensus on the right balance will be difficult to obtain. But, for those who believe that wrongful convictions call into question public confidence in our criminal justice system and cry out for a remedy, Rules 3.8(g) and (h) may be only a down payment toward acceptance of broader responsibility. Only time will tell.

For now, I want to thank David Margolis and Paul Hayden for working with the Criminal Justice Section and the American Bar Association, and also to thank Mat Heck, immediate past president of NDAA, who helped to facilitate a dialogue between DOJ and the Section. The good news is that the Department of Justice, in David Margolis's words, is "very supportive of the goals behind this proposed Rule [3.8(g) and (h)]," and the Criminal Justice Section is equally supportive of the notion that no prosecutor, federal or state, should be in limbo as to what is required by the rule. This is progress and illustrates why we so proudly claim that the Criminal Justice Section is a proper home for all those who participate in seeking justice in America. ■



Divider Page

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To: Alexander Rothrock <arothrock@bfw-law.com>, Anthony van Westrum <avwllc@comcast.net>, Boston Stanton <bostonhs@aol.com>, Cecil Morris <cmorris@penberg.com>, Cynthia Covell <cfc@alpersteincovell.com>, David Little <dlittle@mlmpc.com>, David Stark <dstark@faegre.com>, Eli Wald <ewald@law.du.edu>, Federico Alvarez <falvarez@4dv.net>, "Gary B. Blum" <blumg@s-d.com>, "Helen E. Raabe" <helen.raabe@diadenver.net>, Henry Reeve <hrr@denverda.org>, "Hon. John Webb" <john.webb@judicial.state.co.us>, "Hon. Michael Bender" <michael.bender@judicial.state.co.us>, "Hon. Nathan Coats" <nathan.coats@judicial.state.co.us>, John Gleason <john.gleason@csc.state.co.us>, "John M. Haried" <john.haried@usdoj.gov>, "Linda Roots (Justice Coats' assistant)" <linda.roots@judicial.state.co.us>, Lisa Wayne <lmonet20@aol.com>, "Marcus L. Squarrell" <msquarrell@duckerlaw.com>, Marcy Glenn <MGlenn@hollandhart.com>, Michael Berger <mberger@jacobschase.com>, Nancy Cohen <nancy.cohen@csc.state.co.us>, Neeti Pawar <neeti@neetilegal.com>, Ruthanne Polidori <randiepolidori@comcast.net>, "Tammy Bailey (Administrator to Judge Lucero)" <t.bailey@pdj.state.co.us>, "Thomas E. Downey, Jr." <ted@downeymurray.com>, Tuck Young <tyoung@kyklaw.com>, Valerie Dewey <valerie.dewey@judicial.state.co.us>, William Lucero <w.lucero@pdj.state.co.us>
Date: Thu, 20 Aug 2009 11:44:23 -0600
Subject: Additional handout #3 for Friday 8/21 meeting

With apologies for the multiple emails, Cecil forwarded the attached new ABA ethics opinion to me yesterday, and it looks like it will be worth reading. It addresses pre-conviction prosecutorial disclosure issues, and might include some useful analysis as we continue to grapple with post-conviction disclosure issues. This, too, is for informational, not discussion, purposes, at least for now.

From: ABA Center for Professional Responsibility [mailto:cpr@abanet.org]
Sent: Wednesday, August 19, 2009 9:51 AM
To: Cecil E Morris
Subject: Formal Ethics Opinion 09-454 Recently Released

Dear Center for Professional Responsibility Members:

Attached is Formal Ethics Opinion 09-454 "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense"<http://maestro.abanet.org/trk/click?ref=3Dzpqri74vj_3-a74dx3d467x11042& from the ABA Standing Committee on Ethics and Professional Responsibility.

ABA formal ethics opinions issued since 1984 are also available online in the Center "members only" ethics opinion library<http://maestro.abanet.org/trk/click?ref=3Dzpqri74vj_3-a74dx35c38x11042&.

On behalf of the leadership and staff of the Center, we thank you for your ongoing support and invite you to contact us<mailto:cpr@abanet.orgif we can be of assistance.

ABA Center for Professional Responsibility

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454 **July 8, 2009**

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "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, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.[1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . 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." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,[2] which held that criminal defendants have a due process right to receive favorable information from the prosecution.[3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.[4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.[5] Finally, although courts

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

[5] *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close

sometimes sanction prosecutors for violating disclosure obligations,[6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.[7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.[8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

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to violating [Rule 3.8]").

[6] *See, e.g*., *In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

[7] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.. . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); s*ee also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[9] Similarly, Comment [1] to Model Rule 3.8 states that: "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, 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."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,[10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.[11] This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.[12]

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"[13] and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."[14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

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[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id*. at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id*.

[13] Rule 3.8, cmt. [1].

[14] *Id.*

access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)[15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.[16] The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.[17]

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

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[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id*. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.,* U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.[22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."[24] Although "a lawyer cannot ignore the obvious,"[25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires

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[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], *Cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

prosecutors to disclose *known* evidence and information that is favorable to the accused,[26] it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.[27]

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.[28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.[29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,[30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.[31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.[32]

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[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.[33] For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or

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[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.[38]

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.[39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,[40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.[41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.[42]

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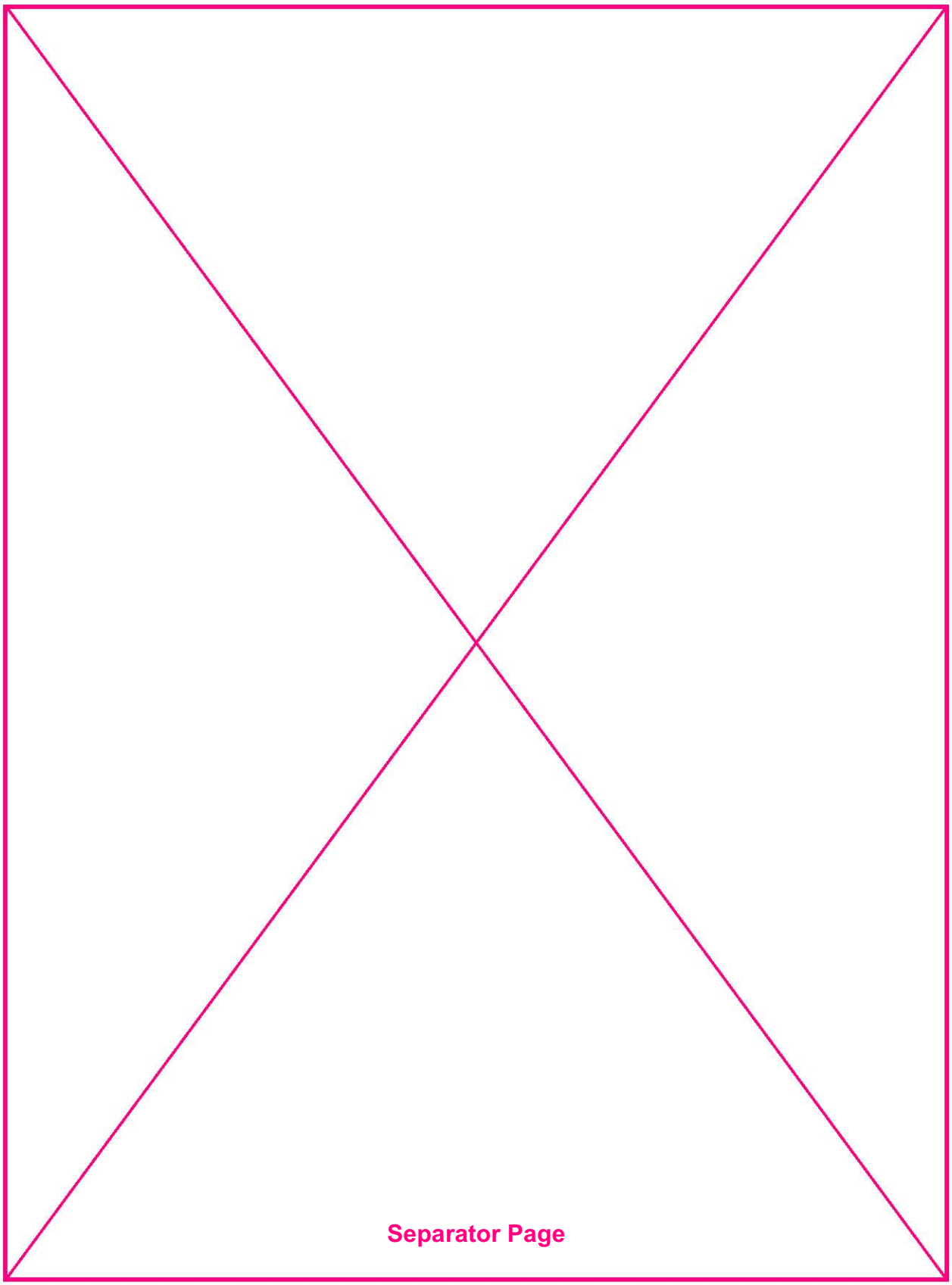
[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g.*, *In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).



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