

proposed ER 3.8(g)(2)(ii) and proposed Comment 7.

(3) Should the prosecutor's duty be different depending on whether the conviction was obtained in the prosecutor's jurisdiction or outside that jurisdiction? See Petitioners' proposed ER 3.8 (g) and (h) and Comment 7.

(4) Should the duty to disclose exculpatory information be extended to all lawyers, as proposed in at least one other U.S. jurisdiction? See proposed Rule 8.6, Rules of Professional Conduct of the District of Columbia.

(5) Should the Court retain or eliminate the prosecutor's duty, not only to disclose exculpatory information, but to take affirmative steps to "remedy the conviction"? See Petitioners' proposed ER 3.8(h) and Comment 8.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

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ATTACHMENT*

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change]

(g) When a prosecutor knows of new and credible evidence that the prosecutor knows creates 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 judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, promptly disclose that evidence to the defendant unless a court authorizes delay.

(h) When a prosecutor knows of clear and convincing evidence that the prosecutor knows establishes that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

(i) A prosecutor's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, ~~and~~ that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have

adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ER 8.4.

* * *

[7] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the significance of the evidence was not appreciated by the trial prosecutor or prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed that was not available at the time of trial. When a prosecutor knows of new and credible evidence that the prosecutor knows creates 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 in which the conviction occurred. If the conviction was obtained in a court in which the prosecutor exercises prosecutorial authority, paragraph (g) requires the prosecutor to promptly disclose that evidence to the defendant unless a court authorizes delay. 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 prosecutor knows establishes that a defendant was convicted in the prosecutor's jurisdiction either of an offense that the defendant

did not commit or of an offense that involves conduct of others for which the defendant was legally accountable but which those others did not commit, the prosecutor must seek to set aside 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] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include, but are not limited to, the following factors: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

. . .

ER 3.10 Disclosing New and Credible Exculpatory Information about a Convicted Person

(a) When a lawyer knows of credible evidence that the lawyer knows creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the lawyer shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

- (1) The court where the person's conviction was obtained;
- (2) The chief prosecutor in the jurisdiction where the conviction was obtained;
- (3) The person's attorney of record; and

(4) The convicted person.

If the identity and location of none of the individuals and entities listed above in subparagraphs (1) through (4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

(c) An attorney's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar other than prosecutors, whose special duties with respect to disclosure of new and credible exculpatory evidence after conviction are set forth in ER 3.8 (g), (h), and (i).