

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]						
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	County of Ventura, Office of the District Attorney	D	No	3.8(b)	<p>This rule is unnecessary. The court has the duty to advise the defendant of the right to counsel. There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty.</p> <p>Comment [1B] states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e. to make efforts to assure that the accused is advised of the right to, and procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. 3.8(b) should be deleted.</p>	
				3.8(c)	<p>This rule prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused <i>in propria persona</i>. California law</p>	

TOTAL =_6_ Agree = _1_
 Disagree = _1_
 Modify = _3_
 NI = _1_

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>already prohibits an unrepresented defendant from waiving preliminary hearing. (Pen. Code section 860; <i>In re Van Brunt</i> (1966) 24 Cal.App.2d 96, 104, overruled on other grounds in <i>In re Smiley</i> (1967).) If a case is going to be resolved by way of guilty plea rather than by trial, the defendant must waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. (<i>Boykin v. Alabama</i> (1969) 395 U.S. 238; <i>In re Tahl</i> (1969) 1 Cal.3d 122.) The standard guilty plea forms include these waivers, and the court must satisfy itself that the waivers are free and voluntary before they are accepted.</p> <p>A defendant has the constitutional right to self-representation. This is a choice by the defendant, not by the prosecution, and not by the court. The court does not really “approve” a defendant’s exercise of this right.</p> <p>The application of the Proposed Rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The Proposed Rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling “approving”</p>	

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				3.8(f)	<p>self-representation.</p> <p>We appreciate the concern in protecting the rights of unrepresented defendants, however, the Proposed Rule is overbroad and unnecessary.</p> <p>This rule should not be adopted because it could be read as requiring the prosecutor, in every case, to issue directives to police, victims, witnesses, and other persons over which prosecutors have no supervisory authority. This would include statements by independent elected officials such as police chiefs.</p> <p>Comment [6] explains that this duty applies “even when such persons are not under the direct supervision of the prosecutor.” Proposed Rule 5.1 and 5.3, which are cited in Comment [6], make attorneys responsible only for persons over whom they have managerial authority or direct supervisory authority. The State Bar should not mandate prosecutors to issue directives to persons in other agencies over whom they have no supervisory or managerial authority.</p>	
3	Public Defender of Los Angeles County	M	Yes	3.8(e) and Comment	Rule 3.8(e) concerning the special rules for prosecutors, states that a prosecutor shall	

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				[4]	<p>not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the Proposed Rule, saying it is intended to limit the issuances of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.</p> <p>There is no “genuine need” exception written into the Proposed Rule and it should not swallow up the Proposed Rule’s protections.</p>	
4	Office of Chief Trial Counsel	M	Yes	3.8(a)	OCTC thanks the Commission for its changes in subparagraph (a), which is preferable to the original proposal, and its inclusion of a reference to section 6131 in Comment [10].	No response required.
				3.8(b)	OCTC is, however, concerned about subparagraph (b)’s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel. This section fails to address that in most situations the	

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				3.8(c)	<p>police, not the prosecutor, control this. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. <i>People v. Jacinto</i> (2010) _ Cal.App.4th __, WL 2105069 [finding that the Sheriff's deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them?</p> <p>The same concern seems to apply to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.</p>	
				3.8(f)	<p>Likewise, OCTC is concerned with subparagraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under Proposed Rule 3.6. While in principle laudable, this requirement seems to have the same problem of not addressing the thorny</p>	

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				3.8(e)	issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.	
				3.8(g)	OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.	
				Comment [1A]	There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment [1A] defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should be in the Proposed Rule itself, not a Comment.	
5	San Diego County Bar Association Legal Ethics Committee		Yes		The Proposed Rule is acceptable except (1) the omission of the ABA language on pretrial publicity (review SDCBA's letter for an example) and (2) objection was voiced with respect to subparagraphs (d) and (f).	

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				3.8(d)	Proposed subsection (d) adds the requirement that a prosecutor “comply with all constitutional obligations as defined by relevant case law regarding the” timely disclosure of [discovery]. I believe that a requirement that a prosecutor have knowledge of “all relevant case law” regarding discovery would be unduly burdensome; I am not sure any lawyer could ever find enough hours in the day to comply with that additional requirement, particularly given on how quickly the law changes in this area.	
				3.8(f)	Subsection (f) is another section that could be hard to enforce. While working with law enforcement agencies often involved cooperation, different agencies handle cases very differently. Prosecutors do not have supervisory responsibilities over the employees of other agencies, and it may be unfair to require prosecutors to exercise control they don't have. While prosecutors can provide training regarding the law, ultimately the employees of other agencies will answer to their own chain of command.	
6	US Attorney 's Office for Central, Southern, Northern, and Eastern District of California	M		3.8(g) & (h)	Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h). Based on the information we have, it appears that since the ABA promulgated Model Rule	

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				3.8(g)	<p>3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.</p> <p>There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger. There is no reason why the Rules of Professional Conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently addresses this issue. We respectfully disagree. If a prosecutor in Jurisdiction A learns of evidence tending to</p>	

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				3.8(g)	<p>show the innocence of a defendant previously convicted by a prosecutor's office in Jurisdiction B, in which the prosecutor in Jurisdiction A has never served, then the prosecutor in Jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in Jurisdiction A will not know what evidence was presented at the trial in Jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in Jurisdiction B. The prosecutor in Jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in Jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.</p> <p>Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. Because</p>	

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					<p>prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose.</p> <p>Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein. First, the term “knows” is undefined in the Proposed Rule.</p> <p>Second, we are concerned by the use of the term “material” without a correlating definition.</p> <p>Third, we believe the Proposed Rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation.</p> <p>Fourth, we are concerned with the mandate that a prosecutor “undertake further</p>	

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				3.8(h)	<p>investigation” or “make reasonable efforts to cause an investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence.</p> <p>Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein. First, similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h).</p> <p>Second, and perhaps most troubling, is Proposed Rule 3.8(h)’s mandate that a prosecutor “shall seek to remedy the conviction.” This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment [8] attempts to clarify this mandate but falls short. The use of the phrase “may include” render the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant’s innocence will in some circumstances be required to do more, with no guidance as to what this more is.</p>	

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				Comment [9]	<p>Proposed Comment [9]’s “good faith” exception is troublesome. We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. But, we believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to “know” of evidence triggering obligations under the Proposed Rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not “know” of such evidence.</p> <p>The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws.</p> <p>Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law</p>	

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					enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.	

Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Following Review of Public Comments)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law, regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (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.

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, 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. Competent representation of the sovereign 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. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor’s office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. “Reasonable efforts” include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.
- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused’s voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor’s failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable

care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].
- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) 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)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to 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. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

- [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, or 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), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.
- [10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]