

Proposed Rule 3.8 [RPC 5-110]

“Special Responsibilities of a Prosecutor”

(Draft # 9.1, 2/27/10)

Summary: This amended rule states the responsibilities of a prosecutor to assure that charges are supported by probable cause and addresses when and how a prosecutor must respond to new exculpatory information, including evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor’s jurisdiction.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule	RPC 5-110
Statute	
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New York

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 2

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

(See the introduction and explanation of paragraph (g) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Prosecutors have appeared at Commission meetings to address the proposed requirements for responding to new exculpatory information.

Very Controversial – Explanation:

See the introduction in the Model Rule comparison chart and Explanation of Changes for paragraph (g), below. In addition, public comments received from prosecutors included an objection to the “reasonably should know” standard in paragraph (a) of the public comment version of the Rule. In response to that input, the Commission determined to recommend that the “reasonably should know” standard be deleted and that the language in paragraph (a) should utilize the Model Rule “knows” standard.

Moderately Controversial – Explanation:

Not Controversial – Explanation

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.8* Special Responsibilities of a Prosecutor

February 2010

(Draft rule revised following consideration of public comment)

INTRODUCTION:

Proposed Rule 3.8 adopts in substance ABA Model Rule 3.8, as amended in February 2008, which imposes special obligations on prosecutors in criminal cases.

However, Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor's duties under the Model Rule to provide greater certainty to prosecutors and greater procedural protection to the criminal defendant, specifically by (1) providing that the prohibition on prosecution of a charge not supported by probable cause applies at all stages of prosecution; (2) clarifying the prosecutor's duties to disclose exculpatory information during a proceeding; (3) adding a new comment explaining the "reasonable efforts" standard used in paragraph (b); and (4) adding a new comment clarifying that paragraph (c) does not prohibit prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing.

In addition, the Commission is recommending the adoption of provisions recently added by the ABA (paragraphs (g) and (h)) to expand the scope of a prosecutor's duty of prompt disclosure of evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtain in the prosecutor's jurisdiction. This Model Rule provision is under consideration in a number of jurisdictions (e.g., Delaware and Michigan) but, to date, only Wisconsin has adopted it.

Minority. A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." See Explanation of Changes for paragraph (g), below.

* Proposed Rule 3.8, Draft 9 (2/26/10).

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>The prosecutor in a criminal case shall:</p> <p>(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;</p>	<p>TheA prosecutor in a criminal case shall:</p> <p>(a) refrain from <u>commencing or</u> prosecuting a charge that the prosecutor knows is not supported by probable cause;</p>	<p>The proposed language of paragraph (a) adopts the language of the ABA Model Rule and adds language to increase client protection. The additional language clarifies that the scope of prohibited conduct includes both prosecuting and the act of <i>commencing</i> a prosecution that a prosecutor knows is not supported by probable cause.</p>
<p>(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;</p>	<p>(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;</p>	<p>The proposed language of paragraph (b) is identical to that of the ABA Model Rule.</p>
<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;</p>	<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, <u>unless the tribunal has approved the appearance of the accused <i>in propria persona</i></u>;</p>	<p>The proposed language of paragraph (c) adopts the language of the ABA Model Rule but carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding <i>in propria persona</i> with leave of the tribunal.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>(d) make 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;</p>	<p>The proposed language of paragraph (d) generally follows the ABA Model Rule but further clarifies that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law.</p>
<p>(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:</p>	<p>(e) not subpoena a lawyer in a grand jury or other 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:</p>	<p>Paragraph (e) largely recommends the Model Rule language. Based on public comments received, the Commission also recommends the addition of a reference to civil proceedings related to a criminal matter. Explanations for any variations are provided next to the subparagraphs.</p>
<p>(1) the information sought is not protected from disclosure by any applicable privilege;</p>	<p>(1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;</p>	<p>The proposed language of paragraph (e)(1) is taken from the ABA Model Rule, but the Commission has included an additional reference to the work product doctrine because, under California law, work product protection does not constitute a privilege.</p>
<p>(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and</p>	<p>(2) the evidence sought is essential reasonably necessary to the successful completion of an ongoing investigation or prosecution; and</p>	<p>The proposed language of paragraph (e)(2) is taken from the ABA Model Rule, except that the standard for evidence to be disclosed has been changed from "essential to the successful completion etc." to "reasonably necessary to the successful completion etc."</p>

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		<p>in order to provide greater guidance to the prosecutor. It is a difficult, if not impossible, task to decide <i>ex ante</i> what evidence will be "essential" to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of "evidence reasonably necessary to the successful prosecution" is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.</p>
<p>(3) there is no other feasible alternative to obtain the information;</p>	<p>(3) there is no other feasible<u>reasonable</u> alternative to obtain the information;</p>	<p>The proposed language of paragraph (e)(3) is taken from the ABA Model Rule, except that the availability of an alternative that will preclude subpoena to a lawyer had been changed from "feasible" to "reasonable" in order to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If "feasible" means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If "feasible" means that the alternative is reasonable, the more familiar term "reasonable" should be used.</p>
<p>(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial</p>	<p>(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> investigators, law enforcement personnel, employees or other persons</p>	<p>The proposed language of paragraph (f) is taken from the ABA Model Rule, except that the reference to the prosecutor's ability to make statements that serve a legitimate law enforcement purpose, etc. subject to the duty to refrain from making extrajudicial comments with a substantial likelihood of heightening public condemnation of the accused has been deleted as an unnecessary and imprecise re-formulation of the more detailed Model Rule paragraphs 3.6(a) and (b).</p>

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<p>statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.</p>	<p>assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.</p>	
<p>(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:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(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.</p>	<p>(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:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(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.</p>	<p>Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. See also Explanation of Changes for Comments [6A] through [9].</p> <p><u>Minority.</u> A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." The minority argues that the way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was "new, credible and material information creating a reasonable doubt," the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority any information he or she receives.</p> <p>The majority, however, takes the position that rather than create a trap for unwary prosecutors, the "new, credible and material" modifier was specifically added to the proposed New York rule on</p>

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		<p>which paragraph (g) is based to create a higher standard for triggering the prosecutor's duty of disclosure. The language used encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.</p>
<p>(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.</p>	<p>(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.</p>	<p>See Explanation of Changes for paragraph (g).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.8 Special Responsibilities of a Prosecutor</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 3.8 Special Responsibilities of a Prosecutor</p> <p align="center">Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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. 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.</p>	<p>[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. 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<u>sovereign</u> 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. <u>Knowing</u> disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.</p>	<p>The deleted language is unnecessary. The final two sentences of proposed Comment [1] to the ABA Model Rule are a sufficient caution that there may be law or standards governing these obligations or imposing additional obligations upon a prosecutor, violation of which could also constitute a violation of Rule 8.4.</p>
	<p><u>[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.</u></p>	<p>This definition is intended to clarify, but not to expand, the scope of persons covered by the Rule.</p>

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	<p>[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.</p>	<p>Proposed Comment [1B] is intended to clarify paragraph 3.8(b), which is adopted from the ABA Model Rule.</p>
<p>[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.</p>	<p>[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does itnot forbid the lawful questioning of an uncharged suspect who has knowingly waived the rightsright to counsel and silencethe 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.</p>	<p>Proposed Comment [2] is adopted from Comment [2] to the ABA Model Rule, except that the exception governing an accused who is appearing <i>in propria persona</i> with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c).</p>
	<p>[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</p>	<p>The first sentence of proposed Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed the law at the time the case was pending, but the law</p>

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	<p>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.</p>	<p>was subsequently changed and applied retroactively. Although the new law and court decision will apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively.</p> <p>The second sentence in proposed Comment [3] was added at the request of OCTC to clarify that a prosecutor is subject to discipline for failure to fulfill paragraph (d)'s disclosure obligations even if the non-disclosure does not result in actual prejudice to the defendant.</p>
<p>[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.</p>	<p>[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.</p>	<p>Proposed Comment [3] is adopted verbatim from Comment [3] of the ABA Model Rule.</p>
<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.</p>	<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyerclient or other privileged relationship.</p>	<p>Proposed Comment [4] is adopted from Comment [4] of the ABA Model Rule, but the requirement of "genuine need" has been expanded to include situations in which there would be an intrusion into privileged relationships other than the lawyer-client relationship.</p>
<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem</p>	<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem</p>	<p>Proposed Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2) does not provide adequate guidance to a prosecutor who</p>

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<p>of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).</p>	<p>of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this <u>Comment</u> This comment is <u>not</u> intended to restrict the statements which a prosecutor may make which<u>that</u> comply with Rule 3.6(b) or 3.6(c).</p>	<p>could be disciplined under paragraph 3.8[f] for extrajudicial statements that “have a substantial likelihood of increasing public opprobrium of the accused.” Instead, the Proposed Comment, like the Model Rule, confirms that paragraph 3.8[f] is not intended to prohibit statements by a prosecutor in compliance with paragraphs (b) or (c) of Rule 3.6, the rule governing trial publicity.</p>
<p>[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.</p>	<p>[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.</p>	<p>Proposed Comment [6] is adopted verbatim from Comment [6] of the ABA Model Rule.</p>
	<p><u>[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 the lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.</u></p>	<p>Proposed Comment [6A] has been added to clarify that prosecutors are also subject to Rule 3.3, which imposes an obligation upon a lawyer who has offered material evidence that the lawyer later comes to know is false.</p>

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<p>[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.</p>	<p>[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, <u>and the conviction was obtained outside the prosecutor's jurisdiction</u>, 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)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. <u>The scope of the inquiry 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 the inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule [1.0(i)], that the conviction should or should not be set aside. Alternatively, the prosecutor is required to</u> 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</p>	<p>Proposed Comment [7] is adopted from Comment [7] of the ABA Model Rule, except for three amendments or additions.</p> <p>First, the first sentence has been revised to clarify that a prosecutor has duties even when the wrongly-convicted person was convicted outside the prosecutor's jurisdiction.</p> <p>Second, a third sentence has been added and the fourth sentence of the Model Rule comment has been revised to provide guidance to prosecutors about the scope of the inquiry they are required to make.</p> <p>Third, the last sentence of the Comment has been added to clarify that the duties imposed on the prosecutor are not dependent upon whether the lawyer of the wrongly-convicted defendant could have discovered the evidence.</p>

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	<p>assist the defendant in taking such legal measures as may be appropriate. <u>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.</u></p>	
<p>[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.</p>	<p>[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.</p>	<p>Proposed Comment [8] is adopted verbatim from Comment [8] to ABA Model Rule.</p>
<p>[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.</p>	<p>[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 <u>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.</u></p>	<p>Proposed Comment [9] largely tracks Comment [9] to the ABA Model Rule. Additional explanatory language has been added in response to public comments expressing concerns that the Model Rule language on the "good faith" standard is inadequate.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[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]</p>	<p>For guidance, proposed Comment [10] refers to a specific California statutory prohibition applicable to both current and former prosecutors. Comment [10] also includes a cross reference to the Comment [16] of Rule 1.7 that addresses the concept that there may be conflicts of interest to which a client cannot consent because the representation is prohibited by applicable law.</p>

Rule 3.8 Special Responsibilities of a Prosecutor

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

A prosecutor in a criminal case shall:

- (a) refrain from ~~recommending,~~ commencing, or ~~continuing to prosecute~~ prosecuting a charge that the prosecutor knows ~~or reasonably should know~~ 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 ~~or other~~ 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,
 - (A)(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

~~(B)~~(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 ~~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. Competent representation of the ~~sovereignty~~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.

~~[2]~~[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.

~~[3]~~[1B] Paragraph (b) ~~is does not intended to expand upon change~~ the obligations imposed on prosecutors by applicable law. ~~It also does not prohibit a prosecutor from advising~~ "Reasonable efforts" include determining, where appropriate, whether an accused ~~or a person under investigation concerning~~ has been advised of the ~~constitutional~~

right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.

~~[2]~~ ~~[4]~~ 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 ~~rights~~right to counsel and ~~silence~~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~~.

~~[5]~~[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]~~ ~~[6]~~ 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]~~ ~~[7]~~ 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] ~~[8]~~ 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] ~~[9]~~ 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.
- ~~[40]~~ [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 ~~the~~that lawyer comes to know of its falsity. See [Rule 3.3](#), Comment [12] ~~to Rule 3.3~~.
- [7] ~~[44]~~ 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 ~~the~~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 ~~the~~ [paragraph \(g\)\(2\)](#) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule ~~[4-01.0.1(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] ~~[42]~~ 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] ~~[43]~~ 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 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.

~~[14] Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5) and Penal Code section 1424.~~

[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]

Rule 5-110 Performing the Duty3.8 Special Responsibilities of Member in Government Service a Prosecutor

(Comparison of the Current Proposed Rule to Current California Rule)

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

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]

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]

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Calhoun, Ronald District Attorney County of Kings	D	Y		I support Rod Pacheco's comments, listed below.	<u>See</u> RRC Response to comments from Rod Pacheco, District Attorney, County of Riverside, below.
2	California District Attorneys Association ("CDA") Gary Lieberstein, President	M		3.8(a)	<p>The rule starts by saying, "A prosecutor in a criminal case shall . . ." without defining exactly what constitutes a criminal case. Current Rule 5-110 refers to criminal charges, before and after the filing of an actual case. The Proposed Rule does not make this distinction, giving rise to the question of when a prosecutor's responsibility arises. If Rule 3.8(b) and (c) are meant to apply to scenarios when no case has been filed in court, it could seriously impede law enforcement investigations. However, if by inclusion of a definition or comment, the rule makes clear that "criminal case" only applies to cases that have been filed in court, there is no objection.</p> <p>CDA has significant concerns about the language "recommending, commencing or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause."</p>	<p>The use of the term "criminal case" follows the Model Rule language and the Commission believes that this term is not intended to determine the timing of compliance. Instead, it is intended to distinguish "criminal" from "civil" matters. In addition, regarding any timing issues (such as pre or post filing), a prosecutor must construe the specific provisions of the rule individually and take account of the specific criminal law context (i.e., federal or state, felony or misdemeanor, etc. . .) to determine compliance. This rule cannot address the great variety of criminal law contexts and state a universal standard for all timing issues.</p> <p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p>

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

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(b)	<p>Current Rule 5-110 is very clear on the issue, stating that charges shall not be filed “when the member knows or should know the charges are not supported by probable cause.” The addition of the “recommending” language is unnecessary, and apparently seeks to expand the group of persons that may face discipline. To attempt to throw the net around any lawyer with whom a prosecutor consults is an expansion of the rule that would be extremely unfair and unwarranted.</p> <p>CDAA is concerned about the standard “reasonably should know.” Again, current Rule 5-110 states simply, “knows or should know.” The current rule is adequate; the addition of the word “reasonably” only expands the opportunities to assail a prosecutor if, in hindsight, it could be argued that a prosecutor was negligently ignorant.</p> <p>It is CDAA’s position that Rule 3.8(b) is unnecessary and creates more ambiguity than clarity. CDAA would respectfully request that 3.8(b) be thereby deleted.</p> <p>This subsection is unclear as to whether the duty extends to overseeing law enforcement agencies. If it does, it assumes a level of control or influence that may not be available</p>	<p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;</p> <p>The Commission agrees and now recommends adoption of the Model Rule “knows” standard.</p> <p>The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have. See Comment [1B] which has been revised to state:</p> <p>“Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. ‘Reasonable efforts’ include determining where</p>

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TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

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				3.8(c)	<p>between prosecutors and law enforcement in many jurisdictions.</p> <p>We believe existing law and practice more than adequately protects the rights of the defendants and that proposed Rule 3.8(c) is thereby unnecessary.</p> <p>There are many reasons why a defendant may want to waive a preliminary hearing, and to emphasize an apparent prohibition on suggesting this course of action is an unreasonable interference in the judicial process and negotiations between the People and a defendant.</p> <p>Rule 3.8(c) is not clear on what procedure is required to “approve the appearance of the accused <i>in propria persona</i>.”</p>	<p><u>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.”</u></p> <p>Whether existing law and practice adequately protect the rights of defendants is not the principal concern of the proposed Rule. Instead, the Commission’s recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors properly should be subject to professional discipline in addition to any other consequences that might result by court sanction or otherwise. The Commission also is not concerned about why an (unrepresented) accused might want to waive a preliminary hearing or what the procedure is for doing so. The former is a matter for the accused to consider in circumstances in which his or her constitutional rights have been protected and the latter is a legal issue.</p>
				3.8(f)	<p>We have major concerns with the proposed rule that prosecutors would be expected to control what law enforcement officials might say publicly about a case.</p> <p>CDAA believe that the same standards should apply to both prosecutors and defense counsel; that is, that neither should engage in extrajudicial statements during the</p>	<p>The Commission agrees with the commenter’s concerns and has revised paragraph (f) as follows:</p> <p>(f) <u>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</u></p>

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[Sorted by Commenter]**

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				3.8(g)	<p>pendency of a filed criminal case nor should they allow anyone directly under their supervision to do so. However, once the duty of the prosecutor is extended to apply to statements by law enforcement, usually during a time when the prosecutor does not yet have jurisdiction over a case because it is still under police investigation, would be to set up an unrealistic standard of responsibility that a prosecutor in many cases would not be able to achieve. Such a proposed rule, in this light, is unwise and unfair.</p> <p>CDAA agrees wholeheartedly with the Minority Opinion explained in Rule 3.8(g). This disclosure requirement standard already exists in numerous cases following <i>Brady v. Maryland</i> and its progeny. Imposing discipline on a prosecutor who incorrectly (in hindsight) evaluates such material would also be patently unfair.</p>	<p>an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.</p> <p>The Commission's recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors is a proper subject for professional discipline in addition to any other consequences that might result by court sanction or otherwise.</p>
				Cmt. [9]	<p>CDAA believes that Comment [9] should be applied to all subsections of Proposed Rule 3.8. That is, there should be a "good faith" exception to holding a prosecutor liable for violation.</p>	<p>Comment [9] provides a good faith exception to a prosecutor's exercise of what are by their nature discretionary judgments as to what evidence is "credible and material" under proposed paragraph 3.8(g) and what evidence is "clear and convincing" under paragraph (h). This tracks the logic of Model Rule 3.8 (g) and its Comment [9]. The other Rule provisions do not call on prosecutors to make similar judgments.</p>

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Disagree = 10
Modify = 6
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3	Cardona, George Department of Justice (also	NI		3.8(c) & Cmt. [2]	<p>We seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested individuals to improve their own positions through cooperation with law enforcement investigations. We ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing:</p> <p>“Nor does paragraph (c) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”</p>	<p>The Commission agreed and adapted the suggested addition to Comment [2] which has the additional clarifying statement:</p> <p>“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</p>

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				3.8(g)	<p>Although we agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue, and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows:</p> <p>1. Few states have followed the ABA’s lead in adopting Model Rule 3.8(g), (h).</p>	<p>The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether “new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” Specifically, in such a situation, the prosecutor does not have the requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
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					<p>2. There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.</p> <p>3. Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.</p> <p>4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein: (i) the term “knows” is undefined in the proposed rule; (ii) we are concerned by the use of the term “material” without a correlating definition; (iii) 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; (iv) we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.”</p>	

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				3.8(h)	5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein: (i) similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h).; (ii) 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. Comment [8] does not sufficiently clarify what is intended.	
				Cmt. [9]	6. Proposed Comment [9]’s undefined “good faith” exception. The Comment leaves it unclear whether the standard is intended to be a subjective standard based on an analysis of the individual prosecutor’s intent, or an objective standard based on what a reasonable prosecutor would do in similar circumstances.	Comment [9] has been revised to include the following further explanation: “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.”
				3.8(g),(h)	7. Potential conflict with other Rules of Professional Conduct and other applicable laws. The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For	The Commission recognizes that there might be conflicts between this rule and other rules or duties applicable to prosecutors but the Commission observes that this is true of all of the rules and that this general concern is not unique to prosecutors. For example, conflicts between a duty of

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				3.8(g),(h)	<p>example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. In addition, there a numerous other confidentiality duties imposed on prosecutors.</p> <p>8. 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.</p>	<p>confidentiality and a duty of candor can implicate the conduct any lawyer. A one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules.</p> <p>The Commission recommends adoption of the proposed Paragraphs 3.8(g) and (h) in order to impose an affirmative duty upon a prosecutor who, in specified circumstances, may be in a position to assist in undoing a wrongful conviction. The potential misuse of the proposed Rule by prisoners who may have been properly convicted is not a consideration that outweighs the importance of the proposed duty.</p>
4	Cline, Philip District Attorney County of Tulare	D	Y	3.8(a)	The change in the language from Model Rule 3.8(a) to Proposed Rule 3.8(a) creates two significant concerns. First, by changing the language from prosecuting to recommending to prosecute, it appears that there is an attempt to include any attorney with whom a prosecutor consults in the	<p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a</p>

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				3.8(f)	<p>prosecution of the case. This would not only be extremely unfair and unwarranted, it would have an extreme chilling effect on the consultation and discussion of cases prior to filing.</p> <p>Second, by adding the language “reasonably should know is not supported by probable cause” diminishes rather than enhances the stated goal of greater certainty to prosecutors. It is unclear who defines the lowered knowledge standard. Who decides what a prosecutor should “reasonably” know? When does ignorance become negligent ignorance? The concern is that in any case in which there is an acquittal, a complaint of “negligent ignorance” could arise. The fact remains that some cases need to be tried before a jury, and some cases will be lost for any number of reasons that have nothing to do with whether the prosecutor “reasonably should” have believed the probable cause standard was met prior to filing the case.</p> <p>3.8(f) raises two concerns. First, it implies that prosecutors are able to control what law enforcement officials might say publicly about a case. Law enforcement agencies hold their own press conferences and are</p>	<p>charge that the prosecutor knows of reasonably should know is not supported by probable cause;</p> <p>The Commission agrees and now recommends adoption of the Model Rule “knows” standard.</p> <p>The Commission agrees with the commenter’s concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the</u></p>

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				3.8(g)(h)	<p>not subject to the control of the prosecutor.</p> <p>Secondly, we recognize the duty to try our cases in the courtroom rather than the media. We feel that the same obligations should be imposed upon the defense bar. Since this rule does not attempt to apply the same standards to both the prosecution and the defense, we feel that is unwise and unfair.</p> <p>I agree with the minority's position on Proposed Rule 3.8(g)(h). If the conviction did not occur in my jurisdiction, how am I to know when information is "new, credible and material creating a reasonable likelihood. . . ." This imposes an obligation on us to step outside of our role as prosecutor and conduct investigations into criminal cases outside of our jurisdiction in order to protect ourselves from accusations of misconduct.</p>	<p>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.</p> <p>Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that newly discovered, credible and material evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. In light of this comment, the Commission has concluded that Comment [7] does not adequately explain the scope of a prosecutor's duties under paragraph (g) and has edited that Comment for clarity.</p>

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5	COPRAC	M		3.8(a)	Some members of our Committee prefer the adoption of paragraph (a) of ABA Model Rule 3.8 rather than proposed Rule 3.8(a). They are concerned that it would be difficult to fairly judge whether, given all the facts and circumstances relating to the case, the prosecutor reasonably should have known about the evidence.	The Commission agrees and now recommends adoption of the Model Rule “knows” standard.
				3.8(f)	Paragraph (f) should be revised to read “not use investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.” Prosecutors often have cooperation with other agencies, but usually do not have the control implied by this proposed rule, given the law enforcement officials answer to their own chain of command.	The Commission has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators</u> , 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.
				Comment [6A]	We recommend the deletion of the last two sentences of Comment [6A] (in the clean draft) for the same reason.	The Commission notes that this objection is addressed by the recommendation re proposed paragraph 3.8(f).

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6	Lee, Bob District Attorney of Santa Cruz	D	Y	3.8(a)	The "reasonably should know" standard is vulnerable to a great deal of subjective interpretation and reasonable minds frequently differ as to what constitutes probable cause. If the "reasonably should know" standard is to be included in the Rule, the Rule must also include an express provision that a prosecutor's independent judgment, made in good faith, that probable cause exists will not violate the Rule.	The Commission agrees and now recommends adoption of the Model Rule "knows" standard.
				3.8(a)	The term "recommending" is unclear and overbroad. The word "recommending" should either be deleted from the proposed Rule or the Rule needs to be expressly limited to recommendations made to a court or grand jury.	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: 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;
				3.8(d)	The added language of the proposed rule "comply with all constitutional obligations" is important.	No response necessary.
				Cmt. [2A]	The second sentence of this comment should be deleted because it appears to go beyond the constitutional standard set by the rule and could lead to discipline for	The second sentence of proposed Comment [2A] is limited by, and does not conflict with, the black letter rule, which refers to evidence that "tends to negate the guilt of the accused or mitigates the offense" or

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				3.8(f)	nondisclosure of even the most inconsequential and immaterial items of favorable evidence. Under proposed Rule 3.6, Trial Publicity, only a lawyer's own extrajudicial statements can subject the lawyer to discipline. However, proposed Rule 3:8 (f) for prosecutors appears to subject a prosecutor to discipline for the extrajudicial statements of other government employees over whom the lawyer has no direct supervisory responsibility. As written, this is an unclear, unworkable, and unfair rule to the extent that it seeks to hold individual prosecutors responsible for the actions of other government employees who are not under the prosecutor's direct supervision.	mitigates the sentence. The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>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.</u>
				3.8(g), (h)	As the Commission's minority apparently recognizes, a prosecutor cannot be expected to know what constitutes "new, credible and material evidence" creating a reasonable likelihood that a convicted defendant did not commit a crime for purposes of proposed subdivision (g) (1) unless the crime occurred within the prosecutor's own jurisdiction. The prosecutor	The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether "new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." Specifically, in such a situation, the prosecutor does not have the

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				Cmt. [9]	<p>must be familiar with the evidence in the case in order to make such an assessment.</p> <p>In addition, Rule 3.8(g) apparently seeks to expand a court's legal authority to take action in a criminal case after conviction and judgment. The rule appears to assume that there is an appropriate court to which evidence regarding an out-of-jurisdiction conviction may be disclosed and a court which may authorize delayed disclosure for convictions within the prosecutor's own jurisdiction. However, once a defendant had been convicted and sentenced to prison, a trial court generally loses jurisdiction after 120 days to take any further action in the matter, with a few limited exceptions. (See Pen. Code, § 1170 (d).)</p> <p>If subdivisions (g) and (h) are adopted, Comment [9] must also be incorporated into the new rule because reasonable minds frequently differ as to the credibility and materiality of newly discovered evidence.</p>	<p>requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined.</p> <p>The proposed Paragraph 3.8(g) provides for disclosure to "an appropriate court or authority"; if the trial court no longer has jurisdiction, the disclosure may be made to the office of the prosecutor in the jurisdiction in which the conviction occurred.</p> <p>The Commission disagrees. As with other proposed Rules, language that clarifies the meaning or application of these rule provisions is included in the Comment to the Rule rather than in the Rule itself.</p>

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					<p>meaning in our profession. We suggest removing the word "recommending."</p> <p>"Reasonably should know" causes us some concern because it could include facts that had not been uncovered or investigated if the State Bar determines the prosecutor <i>should have</i> found them. Opens the door to second guessing or "Monday morning quarterbacking." We prefer "should know."</p>	<p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;</p> <p>The Commission agrees and now recommends adoption of the Model Rule "knows" standard.</p>
				3.8(b)	We are concerned about 3.8(b) in that it seems to put a duty on the prosecution that we have an obligation to ensure that the police are making sure that they have advised of the right to counsel. We have no control over this aspect of law enforcement behavior.	The language of proposed paragraph 3.8(b) is identical to the language of the ABA Model Rule. Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of police conduct. The Commission believes this places the correct burden on prosecutors.
				3.8(f)	We are concerned with 3.8(f) in that the rule subjects a prosecutor to discipline, including potential disbarment, for statements made by independent police departments. This is very troubling and prosecutors should not be accountable for statements made by individuals over whom they have no	<p>The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other</u></p>

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				3.8(g)	<p>supervision.</p> <p>Our concern with 3.8(g) is how is a prosecutor from one county/jurisdiction supposed to know if discovered information is material or credible evidence that would lead toward exoneration in another county/jurisdiction in another part of the state?</p>	<p>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.</p> <p>Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that discovered evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. A prosecutor who discovers evidence related to a case but who does not have any basis to believe that it creates such a reasonable likelihood has no duty to act under the rule.</p>

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8	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M	Y	3.8(d)	Section (d) pertains to prosecutors' disclosure obligations. PREC recommends that the Section include both statutory and constitutional obligations. For this reason, the words "statutory and" should be inserted before the word "constitutional" in line one.	The Commission did not make the requested change, in part, due to concerns expressed by prosecutors about the scope of the rule.
				3.8(e)	Section (e) implicates prosecutors' use of lawyers as witnesses against their current or former clients. This issue implicates prosecutors' ethical obligations in criminal cases as well as related civil matters, such as <i>habeas corpus</i> cases and extradition proceedings, which also are handled by prosecutors. PREC recommends that the Section explicitly encompass civil proceedings that are related to criminal matters.	The Commission agreed and modified paragraph (e) to encompass a "civil proceeding related to a criminal matter."
				3.8(g)	With regard to Section (g), PREC recommends that no geographic limitation be placed on prosecutors' obligation to "promptly disclose that evidence to the defendant unless a court authorizes delay" (presently in (g)(2)(A)). Accordingly, PREC recommends that the Rule read: "(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted	The Commission determined that when the conviction at issue was obtained outside the prosecutor's jurisdiction, the prosecutor's duties should not be as rigorous as when the conviction was obtained in the prosecutor's jurisdiction. A prosecutor in one jurisdiction often will have no practical way of locating a convict in another jurisdiction. Where the conviction was not obtained in the prosecutor's jurisdiction, it should be sufficient for the prosecutor to notify the relevant court or authority.

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					<p>defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority;</p> <p>(2) promptly disclose that evidence to the defendant unless a court authorizes delay; and</p> <p>(3) if the conviction was obtained in the prosecutor's jurisdiction, 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."</p>	

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9	Los Angeles County District Attorney's Office	D	Y		We urge the Commission not to adopt, as presently drafted, proposed Rule 3.8. While this Department supports many of the requirements contained in the proposed rule, there are provisions which are unclear and may inhibit prosecutors' obligations to enforce the law.	The Commission has provided the public and interested stakeholders opportunity to provide input on the proposed rule, and many stakeholders have in fact attended RRC meetings to address their concerns and suggestions regarding the rule. The Commission decided to recommend adoption of proposed Rule 3.8 only after considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected the final form of the RRC's recommendation.

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NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
10	Orange County Bar Association	M	Y	3.8(a)	<p>The language of the ABA Model Rule is clear and ensures client protection. The Commission’s proposal to include “recommending, commencing, or continuing to prosecute a charge” could have a chilling effect upon discussions preceding the actual filing of a charge. Moreover, the Commission’s language is internally inconsistent, in that the introductory phrase that a “prosecutor in a criminal case shall . . .” connotes that a criminal lawsuit has been initiated, and would therefore exclude the “recommending” phase of the litigation.</p> <p>The OCBA opposes the inclusion of the phrase “or reasonably should know” on the grounds it (1) is vague as to whether an objective or subjective test would be applied, (2) would impose disciplinary consequences for potential negligence, and (3) would be impractical as applied, since it would require review of a prosecutor’s work product at each stage of the prosecution to determine what the prosecutor should have known regarding whether the charges are supportable.</p> <p>Comment [4]</p> <p>In Comment [4], the OCBA suggests that the Commission delete the word “genuine” as unnecessary.</p>	<p>The Commission agrees and has deleted the words “recommending” and “or continuing” from paragraph (a). That paragraph now provides:</p> <p style="padding-left: 40px;">A prosecutor in a criminal case shall:</p> <p style="padding-left: 40px;">(a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;</p> <p>The Commission agrees and now recommends adoption of the Model Rule “knows” standard.</p> <p>The Commission disagrees with the commenter’s suggestion. The phrase “genuine need” appears in the corresponding Model Rule Comment, and there</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>does not appear to be any materially better alternative. Simply removing the word “genuine” would suggest that prosecutors may subpoena lawyers when there any need to do so. That change would make the Comment inconsistent with paragraph (e), which limits prosecutors to situations of genuine need and which describes when there is a genuine need for a lawyer’s testimony.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
11	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	M		3.8(a)	OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by "recommending" for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences of opinion? What if the opinion is based on differences about what is admissible evidence?	The Commission agrees that the term "recommending" is problematical and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: 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;
				3.8(b)	OCTC is also concerned about paragraph (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 reasonable opportunity to obtain counsel. In most situations, police, not the prosecutor, are involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them?	Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of police conduct. The Commission believes this places the correct burden on prosecutors.
				3.8(c)	The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pre-trial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused	The Commission's recommendation of the proposed paragraph 3.8(c) is based on its agreement with the Model Rule concept that the proposed Rule will prevent prosecutors from overreaching with respect to unrepresented defendants that may result in waiver of important pre-trial rights.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	in propria persona. Likewise, OCTC is concerned with paragraph (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 (paragraph) seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement official is an elected position.	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators</u> , 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.
				3.8(e)	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.	The Commission is uncertain what point the commenter is making. Paragraph (e) is not intended to address waivers of either the lawyer-client privilege or lawyer work product. That is more properly addressed in evidence rules and the law of evidence.
				3.8(g)	OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.	No response necessary.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt.	OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under B&P Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.	The Commission agrees and has added a comment concerning this Code section. The Code section is also referenced in the Comment to proposed Rule 1.7.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
12	Pacheco, Rod District Attorney, County of Riverside	D		3.8(b)	Proposed Rule 3.8(b) creates an affirmative duty upon prosecutors to ensure that an “accused” is advised of and given the opportunity to obtain counsel. I strongly oppose this rule as vague, unnecessary, and unfair.	The proposed language of paragraph (b) is identical to that of the ABA Model Rule and does not affirmatively require the prosecutor to advise the defendant of the right to counsel.
				Cmt. [1B]	Proposed Comment 1B states that Proposed Rule 3.8(b) is not intended to expand the obligations imposed on prosecutors by applicable law, but neither federal nor California law imposes the affirmative duties outlined by the Proposed Rule.	Comment [1B] refers only to paragraph (b) of the proposed Rule. After reviewing paragraph (b), the Commission concludes that it does not create any expansion of prosecutors’ obligations. The only expansion is that prosecutors act under the risk of professional discipline for certain conduct that otherwise would be improper.
				3.8(d)	Proposed Rule 3.8(d) sets forth the <i>Brady</i> obligation and expands upon it by requiring a prosecutor to disclose to the defense <i>and the tribunal</i> all unprivileged mitigating <i>sentencing</i> information. While I concur in the adoption of the rule as it comports with <i>Brady</i> and limits discipline to information <i>knowingly</i> suppressed by the prosecutor, and while I applaud the clarifying language added by the Comment (i.e., “comply with all constitutional obligations, as defined by relevant case law”), I am concerned about	The Commission disagreed with the recommended deletion, in part, because the requirement for disclosure to the tribunal is limited to the context of a “sentencing” proceeding.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(e)	<p>the rule's apparent requirement that the prosecution <i>affirmatively advocate</i> mitigating evidence on behalf of the defense. As such, I recommend removing the language "and to the tribunal" from Proposed Rule 3.8(d).</p> <p>I object to requirements (2) and (3) as being unnecessary and unfairly exposing prosecutors to discipline. If the prosecution has determined that the information sought is not privileged or work product (and thus there would be no infringement upon the attorney-client privilege), the prosecutor's presentation of evidence and duty to advocate on behalf of the People should not be limited by such artificial constraints. There is no meaningful public policy or rationale to support requirements (2) and (3) other than a desire to shield defense attorneys. In sum, this rule would hamper the ascertainment of truth which is essential to the fair administration of justice. Accordingly, I propose deleting requirements (2) and (3).</p>	<p>The language of proposed paragraph 3.8(e) substantially follows that of the ABA Model Rule. Requirements (2) and (3) are intended to protect the attorney-client relationship from compromise or undue interference from subpoenas issued by a prosecutor in a grand jury or other criminal proceeding.</p>
				3.8(f)	<p>I strongly oppose this rule as it is overbroad, ambiguous, and unfairly subjects prosecutors to discipline for statements of others, even individuals over which the prosecutor has no direct supervision. The Proposed Rule appears to have no outer</p>	<p>The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law</u></p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(h)	<p>limits regarding over whom the prosecutor must exercise control and the steps the prosecutor must take to avoid discipline. Accordingly, I recommend deletion of this Proposed Rule.</p> <p>Proposed Rule 3.8(h) sets forth a heightened degree of responsibility for prosecutors when they know of “clear and convincing evidence” of a defendant’s innocence. While the Proposed Comment cites examples of steps a prosecutor may take to “remedy” a conviction, the outer limits of this proposed affirmative obligation remain ambiguous and the Proposed Rule leaves prosecutors with little guidance as to the specific actions they must take in order to avoid discipline under this section. I recommend the Commission clarify the obligations proposed by this rule.</p>	<p>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.</p> <p>Proposed paragraph (h) is framed in terms of a prosecutor “taking steps to remedy the conviction” in order to capture the wide range of possible actions that may be appropriate in various circumstances. The illustrations provided in proposed Comment [12] provide guidance regarding what might constitute appropriate steps to remedy in particular situations.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
13	Paulson, David W. District Attorney of Solano County	D	Y	3.8(a)	<p>Proposed rule 3.8 (a) changes the existing rule from: "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause..." to "<u>A</u> prosecutor in a criminal case shall (a) refrain from <u>recommending, commencing, or continuing to prosecute</u> a charge the prosecutor <u>knows or reasonably should know</u> is not supported by probable cause."</p> <p>Magistrates often disagree with the prosecutor's assessment of probable cause. A magistrate's discharge of the defendant "would become almost a prima facie case for an action against that prosecutor with the State Bar. A challenge them under Penal C. 995. However, a prosecutor is less likely to proceed with dismissed charges in an information given the possibility a lost Penal C. 995 motion would be used against him or her in a bar complaint. The "knew or should have known" standard will likely have a significant impact on the way domestic violence cases are prosecuted. Currently, many domestic violence cases are prosecuted notwithstanding the fact the victims recant or are uncooperative. The standard will inhibit prosecutors from aggressively pursuing these cases when it</p>	<p>The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;</p> <p>The Commission agrees and now recommends adoption of the Model Rule "knows" standard.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>can be easily argued the, prosecutor "should have known" there was no "probable cause" since the victim was uncooperative. Likewise, cases involving criminal street gangs often have proof problems due to uncooperative witnesses. Changes to Rule 3.8 will likely curtail the number of gang prosecutions because, prosecutors again will fear being reported to the State Bar if these cases are dismissed.</p> <p>The change from "the prosecutor" to "a prosecutor who recommends" will affect interactions among lawyers within prosecutors' offices. Experienced lawyers will refrain from advising new prosecutors. This likely will have the unintended consequence of increasing the number of bad prosecutions by decreasing the amount of advice new lawyers will receive.</p>	<p>The commenter's concerns should be addressed by the deletion of "recommending" from paragraph (a).</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
14	Rackauckas, Tony District Attorney County of Orange	D	Y		<p>I am in complete agreement with the arguments advanced by Rod Pacheco, above. I therefore respectfully urge, as he did, the deletions of the following proposed rules: Rule 3.8(b), Rule 3.8(e)(2), Rule 3.8(e)(3) and Rule 3.8(f).</p> <p>I also respectfully urge that the language “and to the tribunal,” be deleted from Rule 3.8(d) and clarify a prosecutor’s affirmative obligations under Rule 3.8(h).</p>	<p>See Response to comments from Rod Pacheco, District Attorney, County of Riverside, above.</p> <p>The Commission disagreed with the recommended deletion, in part, because the requirement for disclosure to the tribunal is limited to the context of a “sentencing” proceeding.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
15	Santa Clara County Bar Association	M	Y		The SCCBA strongly recommends that the RRC pull proposed Rule 3.8 from Batch 5 to take further time and public input from the appropriate criminal justice participants to draft a rule that makes more sense for this jurisdiction. The Model Rule is much too broad and undefined in major respects to be of benefit in its current form.	The Commission is recommending adoption of proposed Rule 3.8 only after considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected the final form of the RRC's recommendation.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
16	Sylva, Julianne	D	N		<p>I disagree with proposed rule 3.8 because the substitution of the “ordinary negligence standard” in this rule is a completely subjective standard and would subject prosecutors to years of litigation anytime that they make a disputable decision.</p> <p>Furthermore, it is of great concern to me that the Commission is promoting this rule to “increase client protection” without considering the need to promote public safety or even due process as defined in the Fifth and Fourteenth Amendments of the U.S. Constitution. Please do not adopt this rule as it stands.</p>	<p>The Commission agrees and now recommends adoption of the Model Rule “knows” standard.</p> <p>The proposed Rule does not alter a prosecutor's duties when seeking a conviction but does subject a prosecutor to professional discipline for certain conduct that already is improper. The commenter does not suggest how the imposition of such discipline might decrease public safety or interfere with due process.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
17	Totten, Gregory D. District Attorney of Ventura County	D (in part)	Y	3.8(a)	Proposed rule 3.8(a) broadens the liability of prosecutors in several ways that go beyond both rule 5-110 and ABA Model Rule 3.8. First, it extends the “reasonably should know” standard to the case after filing. Prosecutors often have large caseloads and have to prioritize when they will work on each case. Prosecutors also often receive “hand-off” cases that have previously been assigned to another prosecutor. If a prosecutor has received reports that arguably negate probable cause but has not yet read them because he or she was working on other cases, the State Bar could argue that the prosecutor has acted unethically in failing to act on information he “should have known.” The current requirement that an attorney act competently (Rule 3-110; Model Rule 1.1) is an adequate standard to address this concern. If rule 3.8(a) is enacted as proposed, it will further empower the State Bar Court to discipline prosecutors for whatever it deems the prosecutor <i>should have known</i> . This would conceivably include facts that had not even been uncovered or investigated by police if the State Bar determines that the prosecutor, or police agency members of the ‘prosecution team,’ <i>should have</i> found them out.	Paragraph (a) has been revised to delete the “should have known” standard.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>The proposed language regarding “commencing or continuing to prosecute a charge” is acceptable, but the application of the rule to “recommending” a charge is problematic and should be deleted. The rule is not clear as to what sort of recommendation is prohibited.</p> <p>Even if the language regarding “recommending” a charge is deleted, the rule should be amended to add language similar to the following: “This rule shall not prohibit good faith advocacy on the issue of guilt or probable cause.” This is necessary to allow prosecutors to exercise the vigorous advocacy expected of all attorneys. ABA Model Rule 3.1 requires attorneys to assert positions only if they are “not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” But, Rule 3.1 provides an exception for criminal defense attorneys. They “may nevertheless so defend the proceeding as to require that every element of the case be satisfied.” Clearly, a defense attorney is not prohibited from defending a</p>	<p>The Commission agrees and has deleted the words “recommending” and “or continuing” from paragraph (a). That paragraph now provides:</p> <p>A prosecutor in a criminal case shall:</p> <p>(a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;</p> <p>The Commission did not make the requested change. The Commission believes that a prosecutor role’s is different from other attorney advocates because a prosecutor’s duty is to seek justice rather than to advocate vigorously on an issue of guilt or probable caused.</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(b)	client even if the attorney knows or should know that the defendant is guilty. We do not argue that the law should be otherwise. But, a problem arises when there is legitimate issue as to whether probable cause exists. The defense can make whatever arguments it wants with impunity. Prosecutors should be able to make good faith arguments without fear that if the court disagrees, the State Bar will discipline the prosecutor. The rule is unnecessary. The court has the duty to advise the defendant of the right to counsel (Pen. Code Sections 860, 987.) 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. Proposed paragraph 3.8(b) could improperly expose prosecutors to discipline for <i>Miranda</i> violations by police.	The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have. See Comment [1B] which has been revised to state: "Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. 'Reasonable efforts' include determining where <u>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.</u> " See above. Comment [1B] has been revised to state: "Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. 'Reasonable efforts' include determining where
				Cmt. [1B]	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	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	<p>accused is advised of the right to, and procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel. The Comment in effect cancels out the rule for California prosecutors. I recommend that 3.8(b) be deleted.</p> <p>The proposed rule allows the prosecutor to seek a waiver of constitutional rights from an unrepresented defendant if the court has approved the appearance of the defendant in propria persona. But in Comment [2], the Commission has deleted the language about court approval. As a result, Comment [2] appears to impose an absolute prohibition of seeking the waiver of pretrial rights from an unrepresented defendant, and is inconsistent with the language of Rule 3.8(c). Comment [2] should be amended to put back the language, "Paragraph (c) does not apply, however, to an accused appearing pre se with the approval of the tribunal."</p> <p>I question the need for this rule. The rule is apparently designed to prevent the prosecution from attempting to take unfair advantage of an unrepresented defendant. But if the case is going to be resolved by way of guilty plea, rather than by trial, the defendant <i>must</i> waive the rights to jury trial,</p>	<p><u>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."</u></p> <p>Because the reference to a tribunal's having approved a defendant's appearance <i>in propria persona</i> has been added to the black letter rule in paragraph (c), it has been removed from Comment [2].</p> <p>The Commission agrees that the purpose of the proposed Rule is to prohibit a prosecutor from taking unfair advantage of an unrepresented defendant and also agrees that whether a defendant is represented by counsel is the defendant's choice. The intended effect of the rule is precisely to prevent the prosecutor from engaging in plea discussion with an</p>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	to confront and cross-examine witnesses, and the privilege against self-incrimination. The standard guilty plea forms include these waivers. Whether a defendant is represented by counsel or appears without counsel is the choice of the defendant, not of the prosecution. The only practical effect I can see from the proposed rule is that it may prohibit plea discussions with an unrepresented defendant, or presenting an unrepresented defendant with a guilty plea form, until after a court appearance at which the court approves (or acknowledges) that the defendant is representing himself.	unrepresented defendant until the court has approved the defendant's request to appear <i>in propria persona</i> .
					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" self-representation.	This comment expresses concern about the application of paragraph (c) to 'infractions' but does not identify any 'important pretrial rights' that apply when an infraction is charged
				Cmt. [2A]	The language added by the Commission, "comply with all constitutional obligations, as defined by relevant case law regarding," is important. Without this language, the rule would overstate the prosecution's disclosure obligations, and would improperly subject a	No response necessary.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	<p>prosecutor to discipline for failure to disclose even <i>immaterial</i> evidence that conceivably might be favorable.</p> <p>Comment [2A] is helpful in clarifying that a prosecutor should not be disciplined for conduct that was lawful at the time it occurred.</p> <p>The rule would create an imbalance between prosecutors and defense attorneys. Prosecutors would be expected to take reasonable care to prevent “investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution” from making certain extrajudicial statements. But under Model Rule 5.3, a defense attorney would have a comparable responsibility only as to persons over which the attorney has “direct supervisory authority.” Public release of inflammatory or inadmissible information from the defense can be just as damaging to the cause of justice as such statements from the prosecution. The rule should be modified to impose comparable responsibilities on defense attorneys.</p>	<p>No response necessary.</p> <p>The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows:</p> <p>(f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.</p>

Rule 3.8: Special Responsibilities of a Prosecutor

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 5-110 provides as follows:

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

In addition, Rule 5-220 provides that a lawyer “shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.”

Connecticut and Michigan omit paragraphs (e) and (f) of ABA Model Rule 3.8.

District of Columbia: Every paragraph of Rule 3.8 differs from the Model Rule. The D.C. version of Rule 3.8 provides that the prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments

which serve to heighten condemnation of the accused;
or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

Florida omits paragraphs (b), (e), and (f) of ABA Model Rule 3.8.

Georgia: In place of Rule 3.8(b) and (c), Georgia substitutes the simple caution that a prosecutor shall “refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel.” Georgia also shortens Rule 3.8(d) by eliminating the part that begins “in connection with sentencing.” Georgia also limits the application of Rule 3.8(e) to statements the prosecutor would be prohibited from making only under Rule 3.6(g) (as opposed to the entire rule).

Illinois: At the beginning of Rule 3.8, Illinois adds a new paragraph (a) stating: “The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.”

Maryland omits Rule 3.8(e), and Rule 3.8(f) extends only to an “employee or other person under the control of a prosecutor.”

Massachusetts: Rule 3.8(c) prohibits prosecutors from seeking waivers of important pretrial rights from unrepresented defendants unless “a court has first obtained from the accused a knowing and intelligent written waiver of counsel.” Massachusetts Rule 3.8(f) tracks ABA Model Rule 3.8(e), but

adds that the prosecutor must obtain “prior judicial approval after an opportunity for an adversarial proceeding.”

Massachusetts also adds paragraphs (h) and (i), which track DR 7-106(C)(3) and (4), and adds a new paragraph (j) providing that a prosecutor in a criminal case shall “not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused.”

The Massachusetts federal court version of Rule 3.8(e) - Local Rule 3.8(f) was declared invalid in *Stern v. United States District Court for the District of Massachusetts*, 16 F. Supp. 2d 88 (1st Cir. 2000), reh’g and reh’g en banc denied, 214 F.3d 4 (1st Cir. 2000) (concluding that “the adoption of Local Rule 3.8(f) exceeded the district court’s lawful authority to regulate both grand jury and trial subpoenas” in federal courts).

New Jersey: Rule 3.8(c) prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver only of important “post-indictment” pretrial rights, and New Jersey Rule 3.8(d) requires timely disclosure to the defense only of all “evidence,” not “information.”

New York: Regarding ABA Model Rule 3.8(a), New York’s DR 7-103(A) provides that a “public prosecutor or other government lawyer” shall not “institute or cause to be instituted” criminal charges when he or she knows “or it is obvious” that the charges are not supported by probable cause. Regarding ABA Model Rule 3.8(b) and (c), New York has no counterparts. Regarding Rule 3.8(d), DR 7-103(B) provides that a “public prosecutor or other government lawyer” in criminal litigation shall make timely disclosure to counsel for the defendant, “or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer,” that tends to negate the guilt of the

accused, mitigate “the degree of” the offense or “reduce the punishment.” Regarding Rule 3.8(e), New York has no counterpart. Regarding Rule 3.8(f), New York has no counterpart except the general supervisory obligation in DR 1-104(C) which provides that a “law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm.” Regarding Rules 3.8(g) and (h), New York has no counterpart.

North Carolina: Rule 3.8(e) adds that the prosecutor shall not “participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer,” unless the conditions stated in ABA Model Rule 3.8(e) are satisfied.

Ohio: Rule 3.8(a) provides that a prosecutor shall not “pursue or” prosecute a charge that the prosecutor knows is not supported by probable cause. (A note by the drafters says the rule is thus expanded to prohibit either the pursuit or prosecution of unsupported charges and thus is broad enough to include grand jury proceedings.) Ohio omits Rule 3.8(b) because (according to a Model Rules Comparison) ensuring that the defendant is advised about the right to counsel is a police and judicial function, and because Rule 4.3 already sets forth duties applicable to all lawyers in dealing with unrepresented persons. Ohio also omits Rule 3.8(c) because that rule has a potential adverse impact on defendants who seek continuances or seek to participate in diversion programs. Rule 3.8(d) deletes the words “and to the tribunal” in connection with sentencing disclosures. Ohio omits Rule 3.8(f) because prosecutors, like all lawyers, are already subject to Rule 3.6.

Pennsylvania deletes Rule 3.8(e) (governing subpoenas to lawyers) and instead adopts a separate rule, Pennsylvania

Rule 3.10, which forbids a prosecutor or other governmental lawyer, absent judicial approval, to subpoena a lawyer before a grand jury or other tribunal investigating criminal conduct if the prosecutor seeks to compel evidence concerning a current or former client of the lawyer.

Rhode Island switches the order of paragraphs (e) and (f) and substitutes the following for ABA Model Rule 3.8(e):

The prosecutor in a criminal case shall . . . (f) not without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

Texas: Rule 3.09(a) provides that a prosecutor shall refrain from prosecuting “or threatening to prosecute” a charge that the prosecutor knows is not supported by probable cause. Texas Rule 3.09(b) and (c) provides that a prosecutor shall:

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights.

Texas omits paragraph (e) and the first half of ABA Model Rule 3.8(f) but retains in Rule 3.07 the obligation to exercise reasonable care to prevent “persons employed or controlled by the prosecutor” in a criminal case from making an extrajudicial

statement that the prosecutor would be prohibited from making.

Utah: Rule 3.8(d) eliminates the obligation to disclose unprivileged mitigating information “to the tribunal” in connection with sentencing; Utah omits ABA Model Rule 3.8(e) (regarding subpoenas to lawyers); and Utah’s equivalent to ABA Model Rule 3.8(f) deletes everything up to the phrase “exercise reasonable care.”

Virginia: Rule 3.8, which Virginia calls “Additional Responsibilities of a Prosecutor,” states that a prosecutor shall:

(b) not knowingly take advantage of an unrepresented defendant.

(c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense.

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . .

Virginia omits paragraph (e) and the first half of paragraph (f) of ABA Model Rule 3.8 and replaces the duty to “exercise reasonable care to prevent” in the second half of Rule 3.8(f) with a mandate that a prosecutor not “direct or encourage” others to make statements that Rule 3.6 would prohibit the prosecutor from making.

Wisconsin: Rule 3.8(b) requires a prosecutor who is “communicating with an unrepresented person in the context of an investigation or proceedings” to “inform the person of the prosecutor’s role and interest in the matter.”

Wyoming: Rule 3.8(b) begins with the words “prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused.” Wyoming omits Rule 3.8(e) (regarding subpoenas to lawyers).