

**Prosecution Resolution: Amendments to Mass. R. Prof. C. 3.8
on Special Responsibilities of Prosecutors**

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When the Supreme Judicial Court announced in October 2014 that it would be implementing comprehensive changes to the Massachusetts Rules of Professional Conduct, the court also stated that it was deferring action on Rule. 3.8. The revisions to the other rules took effect on July 1, 2015.

After further review, Rule 3.8, entitled “Special Responsibilities of Prosecutors,” has now also been amended effective April 1, 2016. The revisions bring Rule 3.8 current in some particulars with changes to ABA Model Rule 3.8 since 1998, when the rules of professional conduct were first adopted in Massachusetts, and address additional issues raised by prosecutors, defense counsel, and other members of the bar during the review process. Among other matters of interest, and as discussed in more detail later in this article, the amended rule includes new comment 3A, addressing the interaction of a prosecutor’s obligations of disclosure under Rule 3.8 with a prosecutor’s disclosure obligations under substantive law.

What’s New

The following are the principal changes to the rule and comments:

- **Rule 3.8(a)**: This section previously required prosecutors only to refrain from prosecuting a charge not supported by probable cause. As amended, it requires prosecutors to refrain from prosecuting where the prosecutor “lacks a good faith belief” that probable cause to support the charge exists. It further requires a prosecutor to refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause exists or can be developed through investigation.
Comment 1 has been expanded to note that prosecutors have a responsibility to take special precautions to prevent and rectify the conviction of innocent persons and also that competent representation of the government may obligate the prosecutor to take some procedural and remedial measures in such cases.
Comment 1A to this rule is new and clarifies that paragraph (a) does not prohibit a prosecutor from “declaring the intention” to prosecute for as yet uncharged

criminal conduct if the prosecutor in good faith believes that probable cause to support the charge can be developed through investigation.

- Rule 3.8(d): Section (d) itself is unchanged and still requires a prosecutor to make timely disclosure to the defense of all evidence or information known to the prosecutor that “tends to negate the guilt of the accused or mitigates the offense” and, in connection with sentencing, to disclose to the defense and the tribunal all unprivileged mitigating information that the prosecutor knows, unless a relevant protective order exists.

Comment 3A to this section, as previously mentioned, is a new comment that deals with the relationship between the prosecutor’s ethical obligations under this rule and obligations imposed by substantive law. The comment clarifies that the two sets of obligations are not coextensive and that disclosure as specified in section (d) is required regardless of its anticipated impact and exists independently of a request for information. A prosecutor violates this section, however, only if the prosecutor knows that the information required to be disclosed tends to be exculpatory or mitigating.

- Rule 3.8(f): Former Rules 3.8(e) and (g) have now been combined into new Rule 3.8(f). This rule requires that a prosecutor refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. It also prohibits prosecutors from making extrajudicial statements prohibited under either Rule 3.6 (“Trial Publicity”) or Rule 3.8 and, in addition, requires prosecutors to take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting a prosecutor from making such statements.

Comment 6, also new, notes that prosecutors are subject to the supervisory responsibilities imposed on lawyers by Mass. R. Prof. C. 5.1 and 5.3 as to both other lawyers and nonlawyers who “work for or are associated with” the office. The comment further indicates that “issuing the appropriate cautions” to such persons will ordinarily satisfy the prosecutor’s obligations under this section.

- Rule 3.8(i): This rule, formerly (g), still prohibits a prosecutor from avoiding pursuit of evidence that may hurt the prosecutor’s case, but the previous requirement that the prosecutor’s actions in so doing must be “intentional” in order to violate the rule has been deleted.
- Rule 3.8(h): This new paragraph prohibits prosecutors from seeking, as a condition of a disposition in a criminal matter, the defendant’s waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.
- Rule 3.8(i): This paragraph, also new, describes a prosecutor’s obligations of disclosure when, because of “new, credible, and material evidence,” the prosecutor knows that there is a reasonable likelihood that a defendant did not commit the offense of which the defendant was convicted. The obligations differ depending on whether the conviction was or was not obtained by the prosecutor’s own office.

Comment 7 is a new comment specifying that disclosures as to a represented defendant must be made through counsel and that disclosures to an unrepresented defendant “would ordinarily be accompanied by a request to the court for appointment of counsel...” The comment also states that section (i) applies to new, credible and material evidence regardless of whether it could previously have been discovered by the defense and that required disclosures should ordinarily be made promptly.

- Rule 3.8(j): This new section requires that a prosecutor “seek to remedy the injustice” when the prosecutor knows that clear and convincing evidence establishes that the defendant was convicted of an offense that the defendant did not commit in a case prosecuted by the prosecutor’s office.
Comment 8, also new, lists steps that the prosecutor may be required to take to remedy an injustice, including disclosure of the evidence to the defendant, notifying the court, and requesting that the court appoint counsel for an unrepresented indigent defendant.
- Rule 3.8(k): This new safe-harbor provision provides that a prosecutor’s independent, good faith judgment that the new evidence does not trigger the obligations of sections (i) and (j), even if subsequently found to be erroneous, is not a violation of Rule 3.8

New comment 3A should be of special interest to lawyers on both sides of criminal cases. The comment originates from the debate over whether a prosecutor’s obligations of disclosure under Rule 3.8(d) are coextensive with the prosecutor’s obligation to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Specifically, the issue has been whether the disciplinary standard is or should be the same as the retrospective “material-to-outcome” standard recognized by the U.S. Supreme Court in cases that followed *Brady*, i.e., that the conviction will not be overturned if the information withheld did not make a difference to the outcome of the trial—or whether the disciplinary rule views prosecutors’ disclosure requirements more broadly.

In a recent disciplinary decision by the D.C. Court of Appeals, *In re Kline*, 113 A.3d 202 (DC 2015), the court there undertook an extensive review of the issue, citing to U.S. Supreme Court decisions that suggested a more expansive ethical obligation, as well as to disciplinary decisions from other jurisdictions that have come

out on both sides of the question. The court ultimately concluded that the ethics rule “requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements” of the U.S. Supreme Court decisions decided after *Brady*.

The American Bar Association reached a similar conclusion in a 2009 ethics opinion, Formal Opinion 09-454, July 8, 2009, “Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense.” This opinion described as “inaccurate” the “assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure...” and determined that Rule 3.8(d) “does not implicitly include the materiality limitation recognized in constitutional case law.” The ABA went on to state that:

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

And that:

Further, this ethical duty of disclosure is not limited to admissible “evidence,” such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable “information.” Though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations.... Nothing in the rule suggests a de minimis exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or that the favorable evidence is highly unreliable.

The adoption by the Supreme Judicial Court of new comment 3A makes clear that, in Massachusetts, the retrospective materiality of the evidence or information is not the dispositive factor in determining whether it has to be disclosed to the defense.

What’s Not New

Rules 3.8(b),(c) and (d) retain their original numbering and have not been revised. Paragraph (b) still requires prosecutors to make reasonable efforts to assure

that the accused is advised of the right to counsel and has the opportunity to obtain counsel; paragraph (c) prohibits prosecutors from seeking to obtain waivers of certain pretrial rights from an unrepresented accused, unless the court has obtained an acceptable waiver of counsel; and paragraph (d) still requires the disclosures to the defense described above. And former paragraph (f), limiting prosecutors' ability to subpoena lawyers to grand jury or other criminal proceedings, has been renumbered as Rule 3.8(e) but is otherwise unchanged.

Comment 2 to paragraph (c) and comment 3 to paragraph (d) contain minor stylistic revisions but are otherwise unchanged. Similarly comment 4 to what is now paragraph (e) and comment 5 to what is now paragraph (f) are also unchanged in substance.

The Takeaway

The amendments to Rule 3.8 serve to underline the first sentence of comment 1 to this rule—“[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” The changes emphasize a criminal prosecutor's ongoing obligation to see that defendants are accorded procedural justice and that mistakes are rectified. The additional details spelled out in the amendments should provide guidance to assist prosecutors in navigating their responsibilities in what is often a thorny area of law.