Professional Responsibility & Legal Education

The Discipline of Prosecutors: Should Intent be a Requirement?

*By Hans P. Sinha**

The American prosecutor is an amalgam in terms of historical background. The office as it appears today draws its foundation from the British Attorney General, the French *procureur publique* and the Dutch *shout*.[1] Add to this mix of common and civil law pedigree the uniqueness of the American landscape and society, and one gets a distinct and unique public servant. Paramount among the defining aspects of the American prosecutor is his immense power. He, or she,[2] simply wields an enormous amount of discretion in terms of when to prosecute, whom to prosecute, and how to prosecute. In the famous words of Justice Jackson:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[3]

This power is to a large extent unregulated. While the prosecutor works within a heavily ordered system in terms of rules, in terms of exercising his "tremendous discretion," the prosecutor is virtually ungoverned. This is how we as a nation have determined it should be. We want our prosecutors to be able to wield their power, to execute the laws of the land in an impartial manner, free from political or other interference.[4] Hence reforms seeking to rein in the prosecutor's discretionary power generally fail.

As with any power, however, there is an attendant responsibility. Recognizing that unfettered discretion may lead to abuse, or, as the Supreme Court stated, that discretion without standards "encourages an arbitrary and discriminatory enforcement of the law,"[5] rules designed to guide the prosecutor in his quest to be and act as a Minister of Justice[6] do exist. Primary among those are the various states' Rules of Professional Conduct, and primary among those is the one rule that speaks directly to prosecutors, namely Rule 3.8—the Special Responsibilities of a Prosecutor. Rule 3.8 has been referred to as the "pinnacle of the rules pyramid."[7] Not only does it speak directly to prosecutors, prosecutors are the only ones who have a rule written specifically for them.[8]

The American Bar Association's Model Rule 3.8 consists of eight sections. These parts deal with the prosecutor's duty to not charge unless probable cause exists, to assure the accused has obtained counsel, to not induce an unrepresented accused to waive certain pretrial rights, to disclose to the defense exculpatory material, to not subpoena lawyers to the grand jury unless certain pre-conditions have been met, to refrain from making extrajudicial comments, and to make reasonable efforts to investigate possible wrongful convictions and to remedy such convictions.[9] While all sections of Rule 3.8 are important, section (d) dealing with the prosecutor's duty to divulge exculpatory material, i.e. evidence that tend to negate the guilt of the defendant, may very well be the pinnacle of the pinnacle. Model Rule 3.8(d) mandates that:

> The prosecutor in a criminal case shall:
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> (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.[10]

This duty to disclose exculpatory material speaks to the very essence of the prosecutor; he simply cannot fulfill his role as a Minister of Justice if he withholds from the defense, and thus by extension from the jury, evidence that tends to negate the guilt of the defendant. By doing so, the prosecutor not only has subverted the fact-finding process of an adversary trial, but he has also succumbed to the temptation of putting his advocate role above his Minister of Justice role. This a prosecutor must never do. While he simultaneously wears two hats, that of an advocate and that of a Minister of Justice, his Minister of Justice hat is a ten-gallon Stetson, his advocate hat a small fedora; at all times the Stetson envelopes the fedora.

But, in a system composed of human beings, mistakes will happen. The question then becomes what shall happen to prosecutors who err in this regard? Should all be subject to discipline regardless of the circumstances surrounding the non-disclosure? Or should a distinction be made between those prosecutors who err in good faith and those who deliberately withhold exculpatory evidence? In other words, should intent be a pre-requisite to discipline a prosecutor under whose watch exculpatory material was not divulged?

Simple as this question may seem, there is a divergence among both state Rules of Professional Conduct and state high courts that have examined the issue, as well as between two sets of ABA rules guiding prosecutors' conduct. Subsequent to the most recent amendment of ABA Model Rule 3.8, there also

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exists an inherent contradiction with regard to this issue within the language of Model Rule 3.8 itself.

State Rule Variations

No participant or observer of the criminal justice system would argue that a prosecutor who knowingly and intentionally withholds exculpatory material from the defense should not be subject to discipline. As the Alabama 1887 Code of Ethics, the first code of ethics written for American lawyers, stated, "[t]he state's attorney is criminal, if he presses for a conviction, when upon evidence he believes the prisoner innocent."[11] There is, however, a distinction between a prosecutor who, as in the words of the Alabama Code, knowingly seeks to convict an innocent person, and a prosecutor who fails to disclose exculpatory evidence. Unlike the knowing wrongful prosecution of an innocent person, admittedly reprehensible and criminal conduct, the failure to turn over exculpatory material is not so easily categorized. Just determining what is exculpatory material can at times be open to differing interpretations, as can whether the failure to turn over such evidence had a material effect on the subsequent outcome of the proceeding. The annals are full of cases seeking to interpret and decide these questions in the context of whether a defendant's due process rights were violated as a result of the action, or, more appropriately in this context, inaction on the part of a prosecutor failing to disclose certain information to the defense.

Regardless of the subtleties involved in determining when the failure to divulge exculpatory material has violated a defendant's due process rights or not, the legal profession is unified in the belief of the importance of the prosecutor's Minister of Justice duty to divulge evidence or information that tends to negate the guilt of the defendant. Thus, while states tweak, and at times even completely omit, certain sections of Model Rule 3.8,[12] no state abandons the concepts espoused in Rule 3.8(d).[13] In fact, out of the nation's fifty-one state level jurisdictions (counting the District of Columbia), thirty-six have adopted the language of Model Rule 3.8(d) verbatim.[14] Another twelve states have made only minor changes.[15]

In the face of this uniformity, two jurisdictions, Alabama and the District of Columbia, stand apart. These two jurisdictions differ from all others, and from the Model Rules, in that they have incorporated an intent element in their Rule 3.8(d) language.

Alabama Rule 3.8(d) reads:

> The Prosecutor in a criminal case shall:
>
> (d) *not willfully* fail 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, 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.[16]

Similarly, the District of Columbia also includes an intent element in the equivalent section of the District's Rules of Professional Conduct. District of Columbia Rule 3.8(e)[17] thus reads:

> The Prosecutor in a Criminal Case Shall Not:
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> (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[.]"[18]

Both Alabama and the District of Columbia have seemingly made conscious decisions to ensure that only a prosecutor who *intentionally* violates Rule 3.8(d) will be subject to discipline in their jurisdictions. The District's language is clear; violations of Rule 3.8(d) are limited to "*intentional*[]" failures of disclosure. Although Alabama uses "willfully" as opposed to "intentionally," the effect is the same. In fact, the comments to Alabama Rule 3.8 note that the "disciplinary standard is limited to a *willful* failure to make the required disclosure."[19] Certainly both Alabama and the District of Columbia would swiftly and decisively discipline any prosecutor who willfully or intentionally decided to withhold exculpatory material from the defense. However, these jurisdictions also seem to have taken the corresponding position that a prosecutor who in *good faith* made an honest mistake in terms of what is exculpatory material and what is not, and thus inadvertently and unintentionally withheld what was later determined to be exculpatory material, should not be subject to disciplinary sanctions.

State Supreme Court Variations

Alabama and the District of Columbia are the only jurisdictions that have included an intent requirement in their respective Rule 3.8(d) language. Interestingly, however, out of the two state high courts that have examined this issue, both applying Rule 3.8(d) language that *did not* contain a specified intent requirement, one found intent was an element of a Rule 3.8(d) violation, while the second found that although intent might be taken into account for sentencing, it was not a requirement for the offense itself.

In the first case deciding whether intent is an element in a Rule 3.8(d) violation, the Colorado Supreme Court held it was. In *In the Matter of Attorney C.,* the Colorado high court was faced with a prosecutor who had twice failed to timely turn over exculpatory material. In the first incident, the prosecutor was prosecuting a domestic violence case. Prior to a preliminary hearing, the prosecutor realized she had in her file a letter from the victim wherein the victim recanted her original version of the alleged assault and instead provided a version of events that was consistent with the accused's defense.[20] Although the prosecutor recognized the letter was exculpatory, she declined to turn it over to the defense until after the hearing. The defense counsel filed a motion for sanctions referring in part to the disclosure requirement of Rule 3.8(d) of the Colorado Rules of Professional Conduct.[21] Colorado Rule 3.8(d) at the time mirrored the Model Rule language, requiring that a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused…"[22] Upon receiving the complaint, the district attorney's office entered into horse-trading with the defense counsel, agreeing to dismiss the prosecution if

the defense attorney withdrew the motion for sanctions. This ultimately was the final outcome of this incident.[23]

Five months later, the same prosecutor and the same defense counsel again met in court, this time in a sexual assault cases involving a child victim. As in the prior incident, the prosecutor learned of exculpatory material prior to a preliminary hearing. The nature of the material again was in the form of a changed version of events by the victim. Although the prosecutor recognized the material was exculpatory, she declined to turn it over to the defense until after the hearing. Once she did divulge the information, the defense counsel filed a motion for sanctions (which was dismissed by the trial court), and the district attorney's office again eventually dismissed the charges.[24] Ultimately a disciplinary charge was also filed against the prosecutor.

In examining the case, the Colorado Supreme Court agreed with the disciplinary board's conclusion that the prosecutor in both instances had failed to disclose exculpatory material.[25] However, the court also noted that the board had found the prosecutor's failure to disclose such exculpatory evidence to be negligent for the first instance and knowing for the second instance. Concluding that in Colorado, "a prosecutor violates Rule 3.8(d) *only* if he or she acts *intentionally*,"[26] the Colorado high court declined to find a violation of the rule and reversed the disciplinary board's imposition of a public censure of the prosecutor.[27]

Two years after the Colorado case, the Louisiana Supreme Court had an opportunity to examine the same issue. In a case involving a prosecutor failing to turn over a witness statement, disciplinary proceedings were brought against the prosecutor.[28] The Louisiana Disciplinary Hearing Committee, after conducting a formal hearing, concluded that the prosecutor reasonably believed the statement was inculpatory instead of exculpatory and recommended that the disciplinary charges against the prosecutor be dismissed.[29] Upon reviewing the hearing committee's recommendation, the disciplinary board found a "technical" violation of Louisiana Rule 3.8(d)[30], but, considering mitigating factors, and in particular the prosecutor's "good faith and *lack of intent*," the board found that no formal discipline was warranted.[31] The Louisiana Supreme Court, in a decision subsequent to the Colorado decision, yet without mentioning or acknowledging the Colorado opinion or its rationale, agreed with the board that a violation of Rule 3.8(d) had occurred.[32] The Louisiana Supreme Court, however, unlike the Colorado Supreme Court, found that a mental element is not incorporated in Rule 3.8.[33] Thus, in terms of a Rule 3.8(d) violation in Louisiana, the prosecutor's intent, or lack thereof, is irrelevant. A good faith prosecutor who makes an honest mistake in failing to disclose exculpatory material is as susceptible to a disciplinary sanction as is the prosecutor who intentionally withholds exculpatory material. A Louisiana prosecutor's mental element only comes into play in terms of the *sanction*, not in terms of whether a violation occurred. Accordingly, the Louisiana Supreme Court, rejecting the hearing committee's and the disciplinary board's findings and recommendations, concluded that the prosecutor had knowingly violated Rule 3.8(d), and imposed a sanction of a three-month suspension, such suspension being fully deferred upon the condition of no additional misconduct for a one year period.[34]

Based upon these two cases, as it stands now, prosecutors in all but four jurisdictions do not know under what standards they are operating in terms of potential discipline when exculpatory material is not divulged to the defense. Alabama, District of Columbia and Colorado attorneys all know that only a willful or intentional violation will subject them to discipline. Louisiana attorneys know that intent is not a requirement for discipline, and that at the very minimum a knowing violation will subject them to discipline. Attorneys in the remaining jurisdictions are left to wonder how their high courts may rule on this issue. Unfortunately, if they turn to the ABA Model Rules, they are not provided much more definite guidance either.

Model Rule Variations

One would think that the American Bar Association, nominally the organization that speaks for the American legal profession as a whole, composed of the most learned and articulate of our society, would speak with one voice on this issue. Such is not the case. The ABA has promulgated two sets of rules that address a prosecutor's duty to disclose exculpatory material. One is the "Model Rules of Professional Conduct," the other is the "Prosecution Function Standards." These two sets of rules take different approaches in terms of whether discipline of prosecutors who fail to disclose exculpatory material should be limited to intentional violations or not. And, as if this disparity is not enough, Model Rule 3.8, since its most recent amendment in 2008, also contain an inherent contradiction in this regard.

ABA Model Rule and ABA Prosecution Standard Contradition

The Colorado Supreme Court, as part of its rationale for finding that intent is an element of a Rule 3.8(d) violation, cited to the fact that while the Model Rule 3.8(d) language might be silent as to an intent requirement, the American Bar Association Prosecution Function Standard 3-3.11, *Disclosure of Evidence by the Prosecutor*, specifically incorporates an intent element.[35] In fact, as the Colorado Supreme Court observed, "the ABA specifically added 'intentionally' to the standard subsequent to its original enactment."[36] As such, the ABA's own Prosecution Standard addressing the duty of the prosecutor to disclose exculpatory material, holds that "[a] prosecutor should not *intentionally* fail to make timely disclosure to the defense…" of exculpatory material.[37] This stands in sharp contrast with the ABA's Model Rules of Professional Conduct. As noted above, the language of Model Rule 3.8(d), does *not* include an intent requirement. Considering that the Prosecution Standards are generally viewed as being aspirational, the highest ethical and professional conduct prosecutors should aspire to maintain and fulfill, and the Model Rules outline the bare minimum ethical conduct that a prosecutor should not fall below,[38] this disparity and contradiction is especially troubling. No wonder that two sister-states, Colorado and Louisiana, both with languages tracking Model Rule 3.8, could come to such inapposite conclusions.

This contradiction is not limited to the Rules and the Standards. A similar contradiction also exits within Model Rule 3.8 itself. By not including an intent requirement in section

(d) of Rule 3.8, and considering that the ABA did include such a requirement in the equivalent section of its Prosecution Standard, i.e. Standard 3-3.11(a), one can safely surmise that this omission was by design, and not by happenstance. This conclusion is strengthened by the fact that the comment pertaining to section (d) of Rule 3.8, does not address intent in any way.

Up to this point, while there was a conflict between the pertinent ABA Model Rule and ABA Prosecution Standard, at least Model Rule 3.8 was not internally inconsistent. This changed in February of 2008, however, when the ABA House of Delegates added sections (g) and (h) to Rule 3.8. These new sections, adopted by voice vote and without debate, no less,[39] pertain to the prosecutor's duties when faced with evidence of wrongful convictions. Section (g) requires a prosecutor who "knows of new, credible and material evidence creating a reasonable likelihood" that a person was wrongfully convicted, to make prompt disclosure to an appropriate authority, or if the conviction was obtained in the prosecutor's jurisdiction, examine the evidence and undertake further investigation.[40] Section (h) outlines the next logical step of the prosecutor's duty in this regard, mandating that once the prosecutor "knows of clear and convincing evidence" establishing a convicted person's innocence, he "shall seek to remedy the conviction."[41]

These duties are in no way new. The obligation of the prosecutor to ensure that wrongful convictions do not occur, and the corresponding duty to do everything in his power to remedy a wrongful conviction, were always part of a prosecutor's Minister of Justice role. However, this is an area where prosecutors admittedly in the past have forced their advocate Fedora hats over their Minister of Justice of Stetsons, and turned blind eyes to their over-reaching duty to remedy wrongful convictions with the same force and dedication as they seek convictions. As such, articulating these duties in separate sections of Rule 3.8 can only do good, and should be welcomed by all.

What is interesting, however, is that a newly added comment of Rule 3.8 seems to validate good faith mistakes by a prosecutor pertaining to his post-conviction duties. Comment [9] of Rule 3.8 explains that:

> 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.[42]

In other words, a prosecutor who makes a good faith decision *pre-conviction* that a piece of evidence is not exculpatory *is* subject to discipline if that decision is subsequently determined to have been erroneous, while a prosecutor who makes a good faith decision *post-conviction* that a piece of evidence does not establish a defendant was wrongfully convicted, even if that decision was later determined to have been equally erroneous, *is not* subject to discipline. Making such a distinction is simply nonsensical. Remedying a wrongful conviction on the tail end is just as much a part of a prosecutor's Minister of Justice duties, as is ensuring a fair trial and preventing a wrongful conviction on the front end. Either no honest, hard-working prosecutor who happens to make a good faith mistake should be subject to a Rule 3.8 violation, or all should be.

CONCLUSION

A layperson may say so what? What difference does it make what the threshold standard for imposing discipline on prosecutors for violating Rule 3.8(d) is? Should we not simply make sure that all prosecutors play by the rules and that no person is wrongfully convicted? The answer to that is a resounding yes. However, in a system devised and run by human beings, such will not always be the case. The question then becomes what should happen to prosecutors who err? Should jurisdictions follow the path blazed by Colorado, Alabama, and the District of Columbia, and by the ABA in Prosecution Standard 3-3.11(a), or should jurisdictions follow the road chosen by Louisiana, and (presumably) ABA Model Rule 3.8(d)? The answer to this question may lie in how one views prosecutors in general: whether one believes that prosecutors as a whole are good and take their dual roles as advocates and Ministers of Justice seriously, that either all prosecutors are bad, or that the system granting them such enormous discretionary power by definition overwhelms even the most moral and just person, thus leading prosecutors to over-emphasize their advocacy role as opposed to their Minister of Justice role. But while consistency among state rules may be desirable, and consistency among different rules and standards promulgated by the same organization expected, at the very minimum the one Model Rule of Professional Conduct specifically drafted for prosecutors should be internally consistent. Absent such consistency, we are likely to find high courts of different jurisdictions again coming to as different conclusions as did the Colorado and the Louisiana Supreme Courts. No one in or out of the criminal justice system would be served by such an outcome.

Endnotes

1 Joan E. Jacoby, *The American Prosecutor in Historical Context*, 31 Prosecutor, Jun. 1997, at 33.

2 The author out of readability will use the male pronoun throughout this article, as opposed to the more obtuse "he or she" or "s/he" versions. The male pronoun was selected by a flip of the coin.

3 Robert H. Jackson, "*The Federal Prosecutor*," 24 J. Am. Jud. Soc. 18 (1940).

4 With the exception of the disturbing and utterly flagrant politicization of the United States Department of Justice, the flagship of the American Prosecutor institution, during the presidency of George W. Bush, American prosecutors as a whole have remained remarkably devoid of politics.

5 Papachristou v. City of Jacksonville, 92 S.Ct. 839, 847 (1972).

6 The comment to the American Bar Association's Model Rules of Professional Conduct, Rule 3.8 – the Special Responsibilities of a Prosecutor, holds that "[a] prosecutor has the responsibilities of a minister of justice and not simply that of an advocate." Model Rules of Professional Conduct: 1908 Centennial Edition 2008, Center for Professional Responsibility, American Bar Association 88 (2008), [hereinafter Model Rules].

7 Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 42 Prosecutor, March 2008, at 20-21, noting that in terms of relevance to prosecutors, the Rules of Professional Conduct can be viewed as a pyramid, with the most relevant rules on top, followed by rules of less relevance on the subsequent tiers.

8 Part of the reason a specific rule has been promulgated for prosecutors ties in with prosecutorial immunity. As the Supreme Court has noted, in lieu of society granting prosecutors the vast shield of immunity, the "prosecutor

stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Imbler v. Pachtman, 96 S.Ct. 984, 994 (1976). It is also interesting to note that no other attorneys have a rule written specifically for them.

9 The American Bar Association Model Rule 3.8 reads in its entirety: Rule 3.8 Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: (a) refrain from 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; (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; (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: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (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 statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (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. Rule 3.8, Model Rules, *supra* note 6, at 87-88.

10 Model Rule 3.8(d), Model Rules, *supra* note 6, at 88.

11 Rule 12, 1887 Code of Ethics of the Alabama State Bar Association, *reprinted in* Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code 50 (Occasional Publications of the Bounds Law Library, University of Alabama School of Law 2003).

12 Sinha, *supra* note 7, at 21, noting that a majority of states modify section (f) dealing with extra-judicial statements, and that some even entirely omit section (b) dealing with the duty to advice defendant of his right to counsel.

13 *Id.*

14 *Id.* n.7, listing the thirty-six jurisdictions that have adopted Model Rule 3.8(d) verbatim as being AK, AR, AZ, CO, CN, DE, FL, HI, ID, IN, IO, KS, KY, MA, MD, MI, MN, MS, MO, MT, NC, NE, NH, NV, OK, OR, PA, RI, SC, SD, TX, VT, WA, WI, WV and WY.

15 *Id.* n.8 listing those states with minor edits to the Model Rule 3. 8 language as being GE, IL, ME, ND, NJ, NY, OH, TN, UT, VA, NM and LA. Note that while New York remains a Model Code jurisdiction, its DR 7-103(B) language is similar to the Model Rule's 3.8 language. *Id.* California has not adopted either the Model Code or the Model Rules. *Id.* n9.

16 Alabama Rules of Prof'l Conduct, Rule 3.8(d) (emphasis supplied).

17 The Model Rule 3.8(*d*) equivalent language appears in section (*e*) of the District of Columbia's Rule 3.8.

18 District of Columbia Rules of Prof'l Conduct, Rule 3.8(e) (emphasis supplied).

19 Alabama Rules of Prof'l Condcut, Rule 3.8, cmt. (emphasis supplied).

20 *In the Matter of Attorney C*, 47 P.3d 1167, 1169 (Colo. 2002).

21 *Id.* The motion was also based upon a failure to adhere to Rule 16 of the Colorado Rules of Criminal Procedure. *Id.*

22 *Id.* at 1169. Note that the language of Colorado Rule 3.8(d) actually contained a drafting error, substituting "of" for "or," thus reading "…make timely disclosure of all evidence *of* information…" The Colorado Supreme Court noted this was a mere typographical error. *Id.* n3.

23 *Id.* at 1168.

24 *Id.* at 1169.

25 *Id.* at 1172.

26 *Id.* at 1168 (emphasis supplied).

27 *Id.*

28 *See In re Roger Jordan, Jr.*, 913 So.2d 775 (La. 2004).

29 *Id.* at 780.

30 At the time, Louisiana Rule 3.8(d) tracked the Model Rule language, reading in pertinent part that the prosecutor must "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused…" *Id.* at 777, n2.

31 *Id.* (emphasis supplied).

32 *Id.* at 782.

33 *Id.* at 783.

34 *Id.* at 784.

35 Prosecution Standard 3-3.11 – *Disclosure of Evidence by the Prosecutor,* American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., American Bar Association (1993). Prosecution Standard 3-3.11, section (a), reads in full: "A Prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would reduce the punishment of the accused." *Id.*

36 *Attorney C*, 47 P.3d at 1174.

37 Prosecution Standard 3-3.11(a), *supra* note 36 (emphasis supplied).

38 Indeed, the Honorable E. Norman Vassey, Chair of the ABA Commission on Evaluation of the Rules of Professional Conduct (1997-2002) ("Ethics 2000"), in his introduction to the Centennial edition of the Model Rules, noted that the Commission "retained the primary *disciplinary function* of the Rules, resisting the temptation to preach aspirationally about 'best practices' or professionalism concepts." *Chair's Introduction*, Model rules, *supra* note 6, at xvi (emphasis supplied).

39 See 24 Law. Man. Prof. Conduct 92 (2008), noting that not only were the motions to amend Rule 3.8 by adding sections (g) and (h) "approved by voice vote, and with no debate," they were also approved despite the Department of Justice having "asked that consideration of the motion be postponed." *Id.*

40 Section (g) of Model Rule 3.8 reads in full: "When a prosecutor knows of new, credible and material evidence creating a reasonably 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. *See* Model rules, *supra* note 6, at 88.

41 Section (h) of Model Rule 3.8 reads in full: "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." *See* Model Rules, *supra* note 6, at 88.

42 Comment [9], Rule 3.8, Model Rules of Professional Conduct, Model Rules, *supra* note 6, at 90 (emphasis supplied).