

Adopted by voice vote

AMERICAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION  
DEATH PENALTY REPRESENTATION PROJECT  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF LITIGATION  
SECTION OF STATE AND LOCAL GOVERNMENT LAW  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL  
RESPONSIBILITY  
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION  
COMMISSION ON DOMESTIC VIOLENCE  
NEW YORK STATE BAR ASSOCIATION  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct be amended to add new  
2 paragraphs (g) and (h) as follows:  
3 ....  
4 (g) When a prosecutor knows of new, credible and material evidence creating a  
5 reasonable likelihood that a convicted defendant did not commit an offense of which the  
6 defendant was convicted, the prosecutor shall:  
7  
8 (1) promptly disclose that evidence to an appropriate court or authority, and  
9  
10 (2) if the conviction was obtained in the prosecutor’s jurisdiction,  
11  
12 (A) promptly disclose that evidence to the defendant unless a court authorizes  
13 delay, and  
14  
15 (B) undertake further investigation, or make reasonable efforts to cause an  
16 investigation, to determine whether the defendant was convicted of an offense that the defendant  
17 did not commit.  
18  
19 (h) When a prosecutor knows of clear and convincing evidence establishing that a  
20 defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not  
21 commit, the prosecutor shall seek to remedy the conviction.

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23 FURTHER RESOLVED, That the Comment [1] to 3.8 of the Model Rules of Professional  
24 Conduct be amended as follows:

25 [1] A prosecutor has the responsibility of a minister of justice and not simply that of  
26 an advocate. This responsibility carries with it specific obligations to see that the defendant is  
27 accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that  
28 special precautions are taken to prevent and to rectify the conviction of innocent persons. The  
29 extent of mandated remedial action is a matter of debate and varies in different jurisdictions.  
30 Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the  
31 Prosecution Function, which are the product of prolonged and careful deliberation by lawyers  
32 experienced in both criminal prosecution and defense. Competent representation of the  
33 sovereignty may require a prosecutor to undertake some procedural and remedial measures as a  
34 matter of obligation. Applicable law may require other measures by the prosecutor and knowing  
35 disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a  
36 violation of Rule 8.4.

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38 FURTHER RESOLVED, that the Comment to 3.8 of the Model Rules of Professional Conduct  
39 be amended by adding the following new paragraphs:

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41 [7] When a prosecutor knows of new, credible and material evidence creating a  
42 reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime  
43 that the person did not commit, paragraph (g) requires prompt disclosure to the court or other  
44 appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction  
45 occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires  
46 the prosecutor to examine the evidence and undertake further investigation to determine whether  
47 the defendant is in fact innocent or make reasonable efforts to cause another appropriate  
48 authority to undertake the necessary investigation, and to promptly disclose the evidence to the  
49 court and, absent court-authorized delay, to the defendant. Consistent with the objectives of  
50 Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's  
51 counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a  
52 request to a court for the appointment of counsel to assist the defendant in taking such legal  
53 measures as may be appropriate.

54  
55 [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence  
56 that the defendant was convicted of an offense that the defendant did not commit, the prosecutor  
57 must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to  
58 the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant  
59 and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant  
60 did not commit the offense of which the defendant was convicted.

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62            [9]     A prosecutor's independent judgment, made in good faith, that the new evidence  
63 is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently  
64 determined to have been erroneous, does not constitute a violation of this Rule.