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VIA E-MAIL

March 11, 2011

Camilla Faulk
Office of the Clerk
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Proposed Revisions to RPC 3.8

Dear Ms. Faulk:

I am a Seattle lawyer who previously served as Chair of the WSBA Rules of Professional Conduct Committee. I am writing regarding the proposed revisions to RPC 3.8, and specifically to respond to a letter dated January 10, 2011 from Thomas A. McBride, Executive Secretary of the Washington Association of Prosecuting Attorneys, commenting on the proposed rule. I am writing in my personal capacity only; I am not purporting to speak on behalf of the WSBA, the WSBA Board of Governors, or the WSBA Rules of Professional Conduct Committee.

I was actively involved in the development of the proposed rule revision while serving as Chair of the RPC Committee. At the July 2010 meeting of the WSBA Board of Governors, where I made a presentation regarding the RPC Committee's proposal, concern was expressed by some Governors that proposed subparagraph (h) of RPC 3.8 was confusing and internally inconsistent as to the required mental state to impose disciplinary liability. That draft of the provision provided that a prosecutor would be required to seek to remedy a conviction when he or she "knows of evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant is innocent of committing and the prosecutor believes that the evidence clearly and convincingly establishes the defendant's innocence." The concern being raised at the BOG meeting was that if a prosecutor *knows* of evidence establishing a defendant's innocence, that prosecutor would also necessarily *believe* that the evidence establishes the defendant's innocence.

Based on this input, the RPC Committee reviewed the proposal and modified the proposed subsection (h) language at its August 2010 meeting. This change was then presented to the WSBA Board of Governors, which unanimously adopted the revised version as proposed at its September 2010 meeting. Under the revised version of subsection (h), which is now more in line with, but not identical to, the language of Model Rule 3.8(h), a prosecutor must seek to remedy a conviction when he or she "knows of clear and convincing evidence establishing that a defendant convicted in the prosecutor's jurisdiction was innocent of the offense." This language focuses the mental state requirement in the rule on a prosecutor's *knowledge* that there is *clear and convincing evidence* of a convicted defendant's innocence.

Mr. McBride says in his letter that this revised language in proposed subsection (h) imposes an ethical duty on a prosecutor to seek to remedy a conviction based "solely" on "some objective existence of exculpatory evidence," but that is not what the proposed rule says. The rule would impose this duty on prosecutors *only* upon knowledge (defined in RPC 1.0(f) as "actual knowledge of the fact in question") of clear and convincing evidence of innocence. While Mr. McBride is correct that a subjective *belief* of the prosecutor is no longer contained in subsection (h) as a required mental state to impose the ethical duty, the RPC Committee concluded, and the WSBA Board of Governors apparently agreed, that the knowledge standard requiring the existence of clear and convincing evidence of innocence, combined with the safe harbor from disciplinary liability contained in the text of the rule at RPC 3.8(i) for a prosecutor's good faith exercise of independent judgment, provided more than sufficient protection to prosecutors from arbitrary action by disciplinary counsel while using a mental state standard that is consistent and reasonable. And, as noted in the WSBA's report of the proposed rule, imposing a duty on prosecutors in subparagraph (h) to take action to remedy a wrongful conviction in narrowly defined circumstances in which the prosecutor knows of clear and convincing evidence establishing a convicted defendant's innocence is entirely consistent with the prosecutor's role as a minister of justice. The proposal recognizes that taking affirmative action in these situations is an ethical prerogative of prosecuting attorneys. It is not a change in substantive criminal law or the procedural rules governing criminal practice.

I hope this clarifies why changes were made to proposed subparagraph (h) after the proposal was originally presented to the WSBA Board of Governors in July 2010. Mr. McBride was not actively involved in the redrafting of subsection (h) last summer, and I believe he is simply mistaken in his January 10, 2011 letter as to what occurred regarding the proposal. I have found Mr. McBride to be extremely responsive and helpful in the process of developing the rule, and I know the other RPC Committee members truly valued his expertise and his input.

Please feel free to call or write if you have any questions regarding the proposal.

Sincerely,

Arthur J. Lachman

cc Thomas A. McBride, WAPA (via e-mail)
Paula Littlewood, WSBA Executive Director (via e-mail)
J. Donald Curran, Chair, RPC Committee (via e-mail)