WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

January 10, 2011

Camilla Faulk, Supreme Court Clerk
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dear Camilla,

Proposed additions to Rule of Professional Conduct 3.8 have been published for comment by the Supreme Court. Washington's Prosecuting Attorneys operate daily under the provisions of this ethics rule - directed specifically at our practice - and its interaction with the handling of criminal cases. Attached to this letter is the proposal advanced by Washington's Prosecuting Attorneys and the original proposal by the WSBA Rules of Professional Conduct Committee. Neither of these proposals were submitted to you by the WSBA Board of Governors.

We are relieved to have this issue considered by the Supreme Court, as we trust that you are experienced with, and will better understand, the difficulty in evaluating evidence years after conviction in criminal cases. In July of 2010, the WSBA Board of Governors (BOG) rejected separate proposals from the WSBA Rules of Professional Conduct Committee and the Washington Association of Prosecuting Attorneys. Instead the BOG directed the drafting of a third proposal, now submitted to this court. New language, proposed by the BOG in subsection (g) that addresses a prosecuting attorney's existing responsibility to disclose new evidence of innocence is not controversial. The most significant issue of dispute is a proposed duty to "remedy the conviction" included within subsection (h) of the BOG proposal.

Prosecuting Attorneys believe that a duty to disclose new evidence of innocence to the sentencing court and the defendant included within subsection (g) is desirable. Our concern is that the duty to remedy a prior conviction based solely upon the existence of new evidence under subsection (h) is an ambiguous obligation to impose. Failure to pursue a "remedy" with sufficient vigor or success to satisfy a complainant will subject a deputy prosecutor or his or her supervisors to bar complaints and potential disciplinary action.

The record of a case, the availability of evidence collected during the investigation, and the memories of the witnesses, jurors, judge and attorneys may have diminished five, ten or twenty years after the trial or plea. This creates problems in evaluating the meaning of newly discovered evidence or new interpretations of existing evidence. For example, self-serving statements by a defendant or witness may not have been admitted because they would have opened the door to more inculpatory evidence from other witnesses; evidence that otherwise is excluded except for rebuttal purposes. Years later, there may be no record of why evidence was not offered and more importantly no record as to what evidence would have been offered in rebuttal.

206 10th Avenue S.E. Olympia, WA 98501 (360)753-2175 Fax (360)753-3943

This is not to deny the need to disclose evidence of innocence or to evaluate it – but it clearly calls for the need to use just as much care in its evaluation, as we used in the original conviction. Advocacy by the Prosecuting Attorney on behalf of the State's conviction betters the process, it does not thwart it. This is why we oppose the BOG proposed subsection (h) to RPC 3.8.

The original WSBA Rules of Professional Conduct Committee proposal also included a duty to remedy within subsection (h), but at least recognized that a duty to remedy a conviction should not be triggered solely by some objective existence of exculpatory evidence. That Committee included that "the prosecutor believes that the evidence clearly and convincingly establishes the defendant's innocence" The WSBA Rules of Professional Conduct Committee, perhaps better than everyone else involved in this process, realizes that we are amending ethical rules for prosecuting attorneys and not procedural rules for the courts.

The BOG proposal creates a duty to remedy a conviction based upon evidence supporting innocence, but the trigger of this duty expressly does not require the Prosecuting Attorney to believe that the defendant is innocent. So, a Prosecuting Attorney could be deemed unethical for not working to overturn a conviction which she or he believes is valid, which has been found to be constitutionally obtained by prior appellate court decision, and which is being evaluated so long after the fact that all evidence seems suspect. This cannot be a just result. It is not an appropriate ethical stricture. It will lead to absurd results and subject ethical deputy prosecutors around the state to multiple bar complaints from criminal defendants – requiring significant efforts to be spent defending their license in formal disciplinary action.

We would like to thank the WSBA Rules of Professional Conduct Committee for engaging Prosecutors in the consideration of these proposed changes. While we did not agree to a final draft, there was active discussion and either of the original proposals is far superior to the current BOG submission.

We object to the ethics rules being used to implement a new requirement to actively work against a conviction in BOG proposed subsection (h). The Supreme Court should take note of the vote opposing new subsection (h) by the WSBA Criminal Law Section Executive Board (made up equally of prosecutors and defense attorneys).

Our alternative proposal codifies within the ethics rules, the required notice to the sentencing court and defendant upon the discovery of evidence that creates a reasonable likelihood that the convicted defendant is innocent. The major change from the BOG recommendation is that once notice is made to the court and the defendant - it does not create a mandatory duty upon the prosecutor to act to overturn his or her office's prior obtained conviction. It leaves open the possible defense of the conviction by a prosecutor, who believes the new evidence is not dispositive and trusts to the greater truth-seeking available in our adversarial justice system.

Sincerely,

Thomas A. McBride
Executive Secretary

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(g) When a prosecutor knows of new, credible and material evidence relevant to a conviction occurring in the prosecutor's jurisdiction, which when considered with the evidence available at trial, creates a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted, the prosecutors shall disclose that evidence to the sentencing court and to the defendant.

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

PROSECUTING ATTORNEYS PROPOSAL

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the 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) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter, to determine whether the defendant is innocent of the offense of which the defendant was convicted.

(h) When a prosecutor 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 prosecutor shall seek to remedy the conviction.

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

WSBA ETHICS COMMITTEE