U.S. Department of Justice

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Clerk of the Supreme Court
of the State of Washington
P.O. Box 40929
Olympia, Washington 98504-0929

Re: Public Comment of the United States Department of Justice to Proposed Amendments to Rule 3.8 of the Washington Rules of Professional Conduct

Dear Sir or Madam:

The United States Department of Justice (hereafter "The Department") hereby submits this public comment to the proposed addition of subsections (g), (h) and (i) to Rule 3.8 of the Washington Rules of Professional Conduct.

The Department is supportive of the goals behind this proposed rule. The United States Supreme Court recognized in Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." The Department demands that its attorneys adhere to the highest standard of professional conduct and expects, when exculpatory evidence is obtained by its prosecutors, that evidence will be disclosed as soon as possible. The Department would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, therefore, the Departmental attorneys are expected to disclose this information to the appropriate authority whenever the information is obtained – pre-trial, during trial, or after conviction. Indeed, the prosecutor's disclosure obligation is set forth in the United States Attorneys' Manual.

Nevertheless, because proposed Washington Rules 3.8(g) and (h) are both unnecessary and problematic, The Department respectfully opposes their adoption and inclusion in the Washington Rules of Professional Conduct.

DISCUSSION

1. There is No Demonstrated Need for the Proposed New Subsections.

The Department of Justice is not aware of any case in the State of Washington which demonstrates that an innocent prisoner was kept in prison because a prosecutor knew of and suppressed post-conviction evidence of innocence. Washington Rules of Professional Conduct 3.8(d) already requires prosecutors 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 mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]" A prosecutor who is aware that a convicted defendant is actually innocent and suppresses such information could be found to be in violation of Rule 8.4(d). Therefore, proposed Washington Rule 3.8(g) and (h) are unnecessary.

2. Few States Have Followed the ABA's Lead with Respect to This Proposal.

Insofar as The Department is aware, it appears that since the American Bar Association ("ABA") promulgated Model Rule 3.8(g) and (h), only four states have adopted new rules based on it: Colorado, Idaho, Tennessee and Wisconsin. The New York Court of Appeals conclusively rejected a proposal to adopt Rule 3.8(g) and (h). A similar proposed amendment was pending in Louisiana, but the Louisiana Bar Association decided, based upon the negative comments received, to defer consideration of the proposal. On October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Bar Committee that its proposed version of Rule 3.8(g) be rejected entirely. In our view, proposed amendments based on Model Rule 3.8(g) and (h) are likely meeting with a lack of acceptance because state bar disciplinary authorities deem it unnecessary and because they regard it as something more appropriately addressed by state legislatures.

3. There Should Not Be a Special Rule for Prosecutors That Applies in Cases to Which the Prosecutor is a Complete Stranger.

There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to the case any differently than any other member of the bar. If a prosecutor learns of evidence tending to show the innocence of a defendant previously convicted in a prosecution by an office in which the prosecutor has never served, then he is in the same position as any other

lawyer who learns such information, with respect to weighing whether the evidence is new, credible, material, and creates a reasonable likelihood that a convicted defendant did not commit an offense.

4. Proposed Rule 3.8(g) is Unclear in Many Respects.

First, Rule 3.8(g) as drafted requires a prosecutor to take action when he knows of "new, credible and material" evidence. The rule applies to any prosecutor, whether or not the prosecutor participated in any way in the particular case. It is unclear how a prosecutor who receives information about a case he did not prosecute can determine whether the information is "new, credible and material." Yet the Rule requires the prosecutor to make this determination even if he or she is not aware of the evidence presented, the legal issues raised, or the credibility of the witnesses who testified during the trial. Additionally, by disclosing the evidence, a prosecutor who did not handle the original case also may be considered to have passed some judgment that the evidence is in fact credible and material, and that it puts in doubt the actual guilt of the convicted defendant.

Second, both subsections (g) and (h) apply when a prosecutor "knows" of particular evidence. Rule 3.8(g) applies 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." Rule 3.8(h) applies when a prosecutor "knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was innocent of the offense [.]" The term "knows" is undefined in the proposed Rules and their comments. "Knows" is defined elsewhere in the Rules to mean "actual knowledge of the fact in question." Washington Rule 1.0(f). But this formulation raises the question of whether "knows of . . . new, credible and material evidence . . ." means that the prosecutor's duty is triggered when he becomes aware of information that others later determine is new, credible, and material evidence, or whether the prosecutor's duty is only triggered when he is both aware of the information and aware that it is new, credible and material.

Third, The Department is concerned by the use of the term "material." Washington Rule 1.0 does not define material. (Washington Rules 1.7, 3.3 and 4.1 include the word "material" but neither the Rules nor their comments attempt to define the word.) While not defined in proposed Washington Rule 3.8 or its comments, the term "material" or materiality" is used elsewhere in the Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. *See e.g.*, Washington Rules 1.7(a)(2), 3.3(a)(1), 4.1(a), and Cohn v. Comm'n for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (upholding the trial court's ruling that a false statement to the tribunal was material, the court stated, "We believe, that in the context of Rule 3.03(a)(1), materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a

ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation.")

In a related context, the term "material" is usually only defined in the Brady/Giglio jurisprudence as evidence creating "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). The language of Rule 3.8(g) suggests that this latter interpretation may be what is intended, since it refers to evidence "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" Nevertheless, the term "material" may be subject to differing interpretations, and the use of the term in the proposed rule would leave a prosecutor uncertain about when disclosure would be required.

Fourth, The Department does not understand what it means to require the prosecutor to "make reasonable efforts to inquire into the matter[.]" Prosecutors are not investigators and do not have general investigative powers (such as the power to issue subpoenas post-trial), nor the staff or monetary resources to investigate claims of "new, credible and material" evidence. Indeed, requiring prosecutors to expend their available resources in this fashion may violate separation of powers principles by permitting the judicial branch to direct the executive branch about how to allocate and expend its resources.

Fifth, The Department does not understand what is meant by requiring the prosecutor to "make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter[.]" Federal prosecutors do not have direct control over law enforcement agencies. The Department does not establish their priorities, nor does it direct their manpower. The Department is not in their chain of command, nor does it decide how law enforcement agencies spend their budgets. Placing this burden on the federal prosecutors is unfair and unworkable.

5. Proposed Rule 3.8(h) and (i) are Unclear in Many Respects.

The most troubling language here, is the rule's mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment [8] to Washington Rule 3.8 attempts to clarify this mandate but falls short. Proposed Comment [8] states that "[n]ecessary steps will depend on the circumstances and may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented defendant, and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant is innocent of the offense of which the defendant was convicted." It is not clear what authority

would support a prosecutor's request for post-conviction relief, and it is not clear how informing the convicting court of the prosecutor's concerns would "remedy" the conviction. In any event, the use of the word "may" implies that a prosecutor who is faced with clear and convincing evidence of a defendant's innocence may, in some circumstances, be required to do more, which could be problematic given that federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction in the context of existing federal law as discussed below.

Although the proposed new section (i) purports to protect prosecutors who have acted in "good faith" in deciding not to act under Rule 3.8(g) or (h), it is unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor's intent, or objective standard based on what a reasonable attorney would do in similar circumstances.

6. Impact on Other Rules of Professional Conduct and Applicable Laws.

The duties imposed by this proposed rule may conflict with the prosecutors' obligations under other rules and, for federal prosecutors, under federal law.

For instance, Washington Rule 1.6 is implicated. Prosecutors have a client just as other attorneys do, and are obligated to preserve their client's confidences. Federal prosecutors are also governed by a host of other confidentiality requirements, e.g., the Privacy Act of 1974 (5 U.S.C. § 552); Fed. R. Crim. P. 6(e) (grand jury secrecy); and 26 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure would subject the Assistant United States Attorney to criminal penalties, 5 U.S.C. § 552a(i)(l), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Additionally, Rule 3.8(g) and (h) place an ethical duty on a federal prosecutor that potentially conflicts with 5 U.S.C. § 301, which provides that agency records are owned by the federal agency and cannot be disclosed without agency approval. See Touhy v. Ragen, 340 U.S. 462 (1951); see also United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (holding that defendant in state murder prosecution was required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Rule 3.8(g) and (h) should not attempt to trump these federal laws.

The Department is further troubled by proposed Comment [7] to Washington Rule 3.8, which states, "[c]onsistent with the objectives of Rules 4.2 and 4.3, disclosure to a defendant who the prosecutor knows is represented by counsel in the matter must be made through the defendant's counsel, and, in the case of an unrepresented defendant, may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate." The comment suggests that The Department has no ability to talk to a defendant. In fact, Rule 4.2 allows ex parte contact with a represented defendant under certain circumstances, such as when it is "authorized by law," and the Rule's prohibition only

applies when the person in question is actually represented by counsel on the matter to be discussed. In many situations where a disclosure appears to be required under Rule 3.8(g), there may be a question of whether the person in question is still represented by counsel – experience teaches that it is very difficult to determine whether an already convicted and sentenced defendant is still represented by his trial or appellate counsel, has new counsel, or does not have counsel.

Finally, Rules 3.8(g) and (h) are simply not designed to be compatible with existing laws and procedures. They alter the balance already struck in existing law without being subjected to the rigors of, or accountability to, a formal legislative process. Both state and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence. Under federal law, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Federal Rule of Criminal Procedure 33(a), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There is a three-year time limit on such a motion based on newly discovered evidence. Under 22 U.S.C. § 2255, a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right, or the date that new facts were discoverable. Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying criminal proceeding. Herrera v. Collins, 506 U.S. 390 (1993). Thus, the ability of a federal prosecutor to "remedy the conviction" may be limited by law.

7. Adopting Rule 3.8(g) and (h) Will Likely Cause a Flood of Complaints From Prisoners.

One likely consequence of adoption of these new Rules would be that prosecutors, and their resources, will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to defend their law licenses. As the Supreme Court may know, there is a substantial cottage industry within the prisons generating all manner of post-conviction claims of innocence, "new" evidence claims, claims of perjured testimony, etc. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, some defense attorneys, and judges and their staffs see this cottage industry in action. Despite good intentions, the drafters of the proposed rule unfortunately may be handing prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Supreme Court should carefully consider whether it wants to create a mechanism for disgruntled prisoners to vent their frustrations through the attorney disciplinary process.

CONCLUSION

For the foregoing reasons, The Department respectfully opposes the incorporation of proposed new subsections (g), (h) and (i) to Rule 3.8 into the Washington Rules of Professional Conduct.

Respectfully submitted,

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