SCHOOL OF LAW
UNIVERSITY of WASHINGTON

April 27, 2011.

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

Re: Proposed WRPC 3.8(g)-(i)

Dear Ms. Faulk:

We are writing to comment on the proposed amendment of Washington Rule of Professional Conduct 3.8. As faculty members at the University of Washington School of Law, we have a wide variety of specialties and professional backgrounds. One of the things we share, however, is a deep and abiding interest in problems of professional responsibility.

With regard to proposed Rule 3.8(g)-(i), we have all had occasion to study and reflect on the special ethical responsibilities of prosecutors. We are in agreement that conviction of the innocent is a serious problem for our criminal justice system and that the existing systems for preventing such convictions – provision of counsel to the indigent; remedies for ineffective assistance of counsel; and the existing ethical rules governing criminal defense counsel and prosecutors – have been inadequate.

We have followed with interest the amendment of ABA Model Rule 3.8 to deal specifically with evidence of innocence that develops after conviction. We support the changes made to the Model Rules and the proposal made by the WSBA to bring the Washington Rules into basic agreement with the Model Rules.

It is clear that this matter has been carefully studied by the Rules of Professional Conduct Committee and the Board of Governors, with thoughtful input from both the Washington Association of Criminal Defense Lawyers and the Washington Association of Prosecuting Attorneys. It is also clear and impressive to us that the criminal defense bar and the prosecuting attorneys agree that a change to the Washington Rule 3.8 to deal with this problem will be valuable.

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So far as we can tell, the only material difference of opinion is over whether prosecutors should have a duty to "remedy the conviction" if they come to "know" (i.e., have "actual knowledge" (WRPC 1.0(f))) of "clear and convincing evidence establishing that a defendant convicted in the prosecutor's jurisdiction was innocent of the offense." Comment of Thomas McBride on behalf of the Washington Association of Prosecuting Attorneys (WAPA).

It is possible to read WAPA's comment opposing this duty to mean that the prosecutors are worried that such a duty might be triggered even though the prosecutor does not believe the defendant is innocent. With all respect, if this is WAPA's meaning, we do not think that such a scenario is realistic. If the prosecutor "knows" of such evidence "clearly and convincingly" establishing innocence, we do not think a rational prosecutor could continue to believe in guilt. Moreover, if the juxtaposition of such knowledge and such an irrational belief are psychologically possible, we do not think such continued belief in guilt should be countenanced by the court.

In fairness, however, we do not really think this is the possible scenario which worries the prosecutors. They seem to be worried that post-conviction evidence of innocence will surface but that it will not be enough, under all the facts and circumstances, to convince the prosecutors "clearly and convincingly" that the defendant was wrongly convicted. This is a perfectly understandable scenario and the prosecutors are quite correct to be worried about it. But in such a circumstance, the prosecutors will not have knowledge of evidence that "clearly and convincingly" establishes innocence and so the duty will not be triggered.

There is, of course, the danger that regulators might conclude, after the fact, that prosecutors actually knew something that they claim not to have known. But this is nothing new: knowledge can be inferred from the circumstances and it has always been so, perhaps particularly in the criminal law. Regulators might also conclude, after the fact, that the evidence known to the prosecutors was clear and convincing, despite the prosecutors' conclusion to the contrary. As countless cases attest, reasonable persons can disagree about whether something meets the "clear and convincing" evidentiary standard. But again, the rule provides protection to the prosecutors. This is precisely the reason that subsection 3.8(i) has been proposed, protecting a prosecutor in his or her "independent judgment, made in good faith, that evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h)...though subsequently determined to have been erroneous."

Lastly, WAPA argues that the duty to remedy a conviction will somehow interfere with the prosecutors' right and ability to defend a conviction in which they still reasonably believe by utilizing the "greater truth-seeking available in our adversarial justice system." We fail to see how the rule in any way precludes them from such a defense if the belief in the defendant's guilt remains reasonable. What it precludes them from doing is defending a conviction against clear and convincing evidence known to them that the conviction was mistaken. And it needs to be borne in mind that the "adversarial justice system" on which they wish to rely –in lieu of a duty to take remedial action -- is the same system which has led to the wrongful conviction of many innocent defendants.

Even if that system is "truth-seeking" as WAPA suggests, we think we are entitled to question whether it is as successful at "truth-discovery" as they imply.

We do not mean to impugn the professionalism and honesty of Washington's prosecutors present or past. However, the oft-cited words of the Supreme Court in *Berger v. United States,* 195 U.S. 78, 88 (1935), bear repeating:

> The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

The fact remains that there have been wrongful convictions in Washington, just as in other jurisdictions. The time is long since past that our rules should be amended to try to remedy such wrongful convictions when clear and convincing evidence of innocence surfaces. We think that proposed Rule 3.8(g)-(i) will help to do just that. Prosecutors, no less than other participants in the criminal justice system, should support correction of a clear injustice. We urge the Court to adopt the Rule as proposed.

As legal educators, we communicate to our students that the Rules of Professional Conduct contain not only disciplinary rules but also aspirational guidelines that give attorneys a framework for practicing at the highest level of ethics and professionalism. We have great respect for lawyers in all practice areas and try to convey that respect to our students, while of necessity dealing mostly with cases in which attorneys have fallen below required standards. When we discuss the conduct of prosecuting attorneys, we hope, in discussing the crucial role of prosecutors in exercising their great power and discretion, to be able to point to the adoption of Rule 3.8(g)-(i) with pride, rather than discussing it as an ABA Model Rule that Washington failed to adopt.

Very truly yours,

Helen Anderson

Tom Andrews

Rob Aronson

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