

SARAH DUNNE  
LEGAL DIRECTOR

ROSE SPIDELL  
NANCY TALNER  
STAFF ATTORNEYS

LINDSEY SOFFES  
FLOYD AND DELORES JONES  
FAMILY FELLOW



April 27, 2011

Camilla Faulk  
Office of the Clerk  
Washington Supreme Court  
PO Box 40929  
Olympia, Washington 98504-0929

RE: Support for Proposed Revisions to RPC 3.8

AMERICAN CIVIL  
LIBERTIES UNION  
OF WASHINGTON  
FOUNDATION  
901 FIFTH AVENUE #630  
SEATTLE, WA 98164  
T/206.624.2184  
F/206.624.2190  
WWW.ACLU-WA.ORG

JESSE WING  
BOARD PRESIDENT

KATHLEEN TAYLOR  
EXECUTIVE DIRECTOR

Dear Ms. Faulk:

We are writing on behalf of the American Civil Liberties Union of Washington Foundation (ACLU) in support of the proposed changes to Washington Rules of Professional Conduct 3.8. There have been news reports all over the country, including in Washington, regarding people convicted of crimes and exonerated years later by new evidence. Many people in these cases were imprisoned for a long time, and in some cases were even on death row awaiting execution, when evidence surfaced that showed they were innocent. These incidents establish a clear need for the proposed rule revision. We fully support the detailed comments of the Washington Association of Criminal Defense Lawyers (WACDL) but write separately to emphasize the important constitutional principles which support adoption of the proposed revisions.

Washington has had an ethics rule for a long time specifying the "special responsibilities of a prosecutor." RPC 3.8. The proposed revisions merely supplement that rule with provisions clarifying the duties of a prosecutor when evidence of a defendant's innocence comes to light after a conviction has occurred. The proposed rules clarify that the required steps are different depending on whether the conviction occurred in the prosecutor's jurisdiction or outside it. There have been no comments submitted opposing a prosecutor's ethical duty to notify the court when such evidence comes to light; the comments of the prosecutors' association supports such a duty. Nor does there appear to be opposition to proposed RPC 3.8(g) from anyone else. The strong consensus in support of paragraph (g) should lead the Court to approve proposed RPC 3.8(g).

Similarly, the prosecutors' association supports the "safe harbor" provision, proposed RPC 3.8(i), and there is no apparent opposition to it. This proposed section of the rule is a necessary companion to proposed paragraphs (g) and (h). It shields prosecutors from Bar discipline when they make an independent judgment, in good

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faith, that evidence does not trigger the obligations of paragraphs (g) or (h), even if the prosecutor's judgment later turns out to be erroneous. We urge the Court to approve proposed RPC 3.8(i) along with paragraphs (g) and (h).

The prosecutors' association opposes proposed RPC 3.8(h), claiming that it will force them to argue against a conviction they believe is proper. But that is not what proposed paragraph (h) says. Instead, it requires very strong evidence of innocence before a prosecutor has a duty to act to remedy the conviction. The comments to the proposed rule explain that the extent of the prosecutor's duty will depend on the circumstances. That provides a reasonable amount of flexibility instead of forcing unreasonable action. Paragraph (h) takes a balanced approach and should be approved by the Court.

The well established constitutional obligations of prosecutors also support the need for adoption of paragraph (h). A prosecutor's duty to disclose exonerating evidence has long been recognized as required by due process. *Brady v. Maryland*, 373 U.S. 83 (1963). The harm of prolonging the incarceration of an innocent person is even greater than harms flowing from ordinary pre-trial discovery violations. There are few greater deprivations of liberty than continuing to incarcerate an innocent person. The significance of these interests justifies the proposed rules requiring the prosecutor to act to remedy a conviction upon actual knowledge of evidence of innocence. Mere notice of the exonerating evidence is not sufficient.

Sincerely,

A handwritten signature in cursive script that reads "Nancy L. Talner".

NANCY L. TALNER  
Staff Attorney