

Robert M. Quillian
PresidentTeresa Mathis
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April 18, 2011

VIA EMAILCamilla Faulk
Office of the Clerk
Washington Supreme Court
PO Box 40929
Olympia, Washington 98504-0929*RE: Proposed Revisions to RPC 3.8*

Dear Ms. Faulk:

We are writing on behalf of the Washington Association of Criminal Defense Lawyers ("WACDL")¹ in regards to the proposed changes to Washington Rules of Professional Conduct 3.8. WACDL takes a keen interest in the protection of persons who may be, or have been, wrongly convicted of any criminal offense. Thus, consistent with recent proposals of the American Bar Association ("ABA"), WACDL fervently supports the suggested modifications of Washington RPC 3.8.

Our criminal justice system is imperfect and persons are too often convicted of crimes when they are actually innocent. Recognizing these sad truths, the ABA's Section of Criminal Justice recommended systematic remedies to better ensure that individuals will not be convicted of crimes they did not commit and that the innocent will be exonerated. See *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of ABA Criminal Justice Section's Ad Hoc Committee to Ensure the Integrity of the Criminal Process, 2006. Subsequently, the ABA recommended the adoption of ethical provisions to clarify a prosecutor's duties when presented with evidence demonstrating the innocence of a defendant who has been convicted. The ABA has called on all States to amend their legal ethical rules to require prosecutors to disclose evidence creating a reasonable likelihood that a defendant did not commit the crime for which he or she was convicted, and to take steps necessary to remedy such convictions. In WADCL's view, even one such conviction is one too many – and must be promptly recognized.

This proposal is neither novel nor ground breaking. More than three decades ago, the United States Supreme Court recognized that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other

¹ WACDL is a statewide nonpartisan, not-for-profit, association made up of more than 1050 member-attorneys practicing criminal defense law in Washington State. The association's general objective is to improve the quality and administration of justice throughout the state and the nation.

information that casts doubt upon the correctness of the conviction.” *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).² Furthermore, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in the Rules of Professional Conduct, which identify the “Special Responsibilities of a Prosecutor.” Proposed Rules 3.8(g) and (h) and the accompanying Comments would rectify this omission.

The role of the public prosecutor as a “minister of justice” is distinct from that of a lawyer representing an individual client, and his statutory and constitutional responsibilities to simultaneously protect the public and respect procedural rights of the accused have no counterpart in the lawyer-client paradigm. As a consequence, much of the content of contemporary ethical codes – designed to guide lawyers who represent clients – are minimally helpful to those attorneys without actual clients such as public prosecutors. The new ethical rules help to clarify the prosecutor’s duties in those cases where the prosecutor knows of “clear and convincing evidence of a convicted defendant’s innocence.”

The prosecutor’s duty to seek justice not only requires the prosecutor to take precautions to avoid convicting innocent individuals, but also requires action when it appears likely that an innocent person has been convicted. These amendments protect the rights of criminal defendants who may have been wrongfully convicted and also protect the public by alerting authorities that the actual perpetrator of a crime may still be at large. The amendments also serve to increase public confidence in our criminal justice system as a whole.

We have reviewed, with interest, the January 10, 2011 letter of Thomas McBride on behalf of the Washington Association of Prosecuting Attorneys (“WAPA”). We are surprised and disappointed to see that WAPA is objecting to the proposed changes to RPC 3.8(h) – particularly so since prosecutors from other jurisdictions have endorsed these same changes. In WACDL’s view, WAPA’s objections are misguided.

Previously, WAPA has claimed that no rule changes were necessary simply because some prosecutors have been proactive in the past. Yet this would seem to argue in support of the rule, rather than against it. Moreover, suffice it to say, not all prosecutors have behaved so responsibly. See, e.g., *United States v. Price*, 586 F.3d 900 (9th Cir. 2009) (defendant received a new trial because federal prosecutors failed to turn over evidence of prime witness’s prior arrests, conduct, and convictions); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002) (noting that prosecutors had intentionally withheld exculpatory evidence thus leading to improper conviction and sentence of death). There can be no doubt that numerous innocent persons were arrested and convicted in the “Wenatchee sex ring” cases, and these tragedies were only exacerbated by the fact that the State prosecutors refused to voluntarily disclose evidence that undermined so many of these convictions. Finally, the post-trial debacle following the conviction of United States Senator Ted Stevens is an object lesson for us all. See *United States v. Stevens*, District Court Cause No. 08-231 (D. D.C.); *United States v. Kohring*, Ninth Circuit Case No. 08-30170 (March 11, 2011).

WAPA’s more-recent objections are likewise off the mark. The proposed rule does **not** require proactively seeking proof of innocence or re-investigating old cases, but only comes into play

² Other courts and commentators have echoed this understanding. See, e.g., *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F.Supp. 521 (E.D. La. 1988).

when information is brought to the prosecutor's attention and the prosecutor recognizes its potential significance. Under RPC 1.0(f), use of the term "knowledge" means "actual knowledge of the fact in question." If innocence is the "fact in question," the duty to act is triggered only when a prosecutor is made aware of the new information *and* has sufficient knowledge about the case involved to know its significance. Absent such knowledge the new rule imposes no duties at all.

The proposed subsection (h) is quite modest in its reach and hardly onerous or dangerous. The rule would not apply when new evidence is relevant but its significance is subject to reasonable disagreement. As stated in proposed RPC 3.8(i), "[a] prosecutor's independent judgment, made in good faith, that the new evidence is not of such a nature to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of the rules."

Finally, WAPA suggests that the rule might somehow lead to a parade of horrible events, in which prosecutors would need to act to overturn constitutionally valid convictions. That is hardly the case. The rule would not be applied so broadly and these complaints seem to miss the point. No matter how fair the trial court proceedings or post-conviction process, justice is never served when an innocent person is branded as guilty and condemned to prison. As stated in the commentaries:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. The responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

ABA Revised Rule 3.8 Comment [1]. Prosecutors may not sit by on the sidelines once they learn that an innocent person has been convicted of a crime. Some reasonable response is necessary and appropriate.

Thank you for your attention to these matters. We would also like to thank the Washington Board of Governors and RPC Committee for their careful and judicious review of these important matters.

Sincerely,



Todd Maybrown
Immediate Past President



Robert M. Quillian
President



Anna Tolin
President Elect

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