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July 2, 2010

Via Facsimile & First Class Mail

Elaine M. Bixler, Secretary
Office of the Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania
601 Commonwealth Avenue, Suite 5600
P.O. Box 62625
Harrisburg, PA 17106-2625

Re: Proposed Amendments to Model Rule of Professional
Conduct 3.8 and to Pa. RPC 3.8

Dear Ms. Bixler:

A. **An exemplary tale**

Patrick Brown, who had no prior record, has spent the past nine years in a Pennsylvania prison serving a sentence of 22 to 70 years for a burglary/robbery he did not commit. He was convicted in 2001 by a jury on the basis of a victim eyewitness identification even though a second eyewitness did not identify him and even though the blue bandana worn by the robber and left at the scene bore the DNA of another. In 2006, five years into Patrick's sentence, the assistant district attorney who tried Patrick came into possession of DNA evidence that matched the DNA on the blue bandana. The DNA belonged to a male in custody in Pennsylvania who closely resembled Patrick. Perhaps because the statute of limitations now barred the prosecution of the actual perpetrator, the assistant district attorney took no steps to remedy Patrick's wrongful conviction. Without doubting the accuracy of the DNA evidence that established Patrick's innocence, the prosecutor did not contact Patrick's trial counsel, he did not inform the Court of the new, exculpatory evidence, he did not forbear from opposing Patrick's 2006 PCRA petition, he did not seek to remedy the conviction by any means. If he communicated the finding to Patrick in a 2006 letter as he claims to have done, the letter never reached Patrick and no copy has ever been produced.

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Seven months ago, through a fortuitous chain of events, and without any awareness that the Commonwealth possessed the exculpatory DNA evidence, Patrick's new lawyer learned the identity of the actual assailant. She asked the trial prosecutor to have that person's DNA compared to the DNA on the blue bandana. At that point, the assistant district attorney said that testing would not be necessary since he already knew from the 2006 sample that the lawyer had correctly identified the real perpetrator.

On June 17, 2010, Patrick Brown was granted a new trial based on stipulated facts known to the assistant district attorney since 2006. The charges against Patrick have since been nolle prossed. The assistant district attorney maintains that he has acted as a "minister of justice."

B. The interest of the Pennsylvania Innocence Project

The Pennsylvania Innocence Project submits these comments in support of the adoption of the amendments to Model Rule of Professional Conduct 3.8 that were approved by the American Bar Association in February 2008 and the correlative amendment of Pennsylvania Rule of Professional Conduct 3.8 as set forth in Annex A to the Board's May 15, 2010 Pennsylvania Bulletin Notice. The adoption of the amendments would give needed guidance to Pennsylvania's prosecutors as to their duties as ministers of justice regarding post-conviction innocence claims. As explicit statements of professional norms, the amendments would help prosecutors overcome any tendency or pressure to subordinate the interests of justice to the interests in preserving a conviction when confronted by substantial evidence of innocence post-conviction. Compliance with these norms will help eradicate the blight of wrongful convictions and lead to the apprehension of actual wrongdoers who remain at large to prey on others.

The Pennsylvania Innocence Project is a Pennsylvania not-for-profit corporation. Organized in 2008, it began operating in 2009 with the fourfold mission of (1) securing the exoneration, release from imprisonment, and restoration to society of persons who are actually innocent of the crimes for which they have been convicted and imprisoned; (2) providing clinical training and experience to students in the fields of law, journalism, criminal justice, and forensic science; (3) working in concert with law enforcement agencies and the courts to improve the accuracy and reliability of verdicts in criminal cases by eliminating the systemic causes of wrongful convictions; and (4) enhancing the effectiveness of, and public respect for, the criminal justice system in Pennsylvania through public education and advocacy of best practices in law enforcement and prosecution. Its board of directors includes former state and federal prosecutors, defense attorneys, civil rights lawyers, and law professors. Its Advisory Board numbers two former United States Attorneys, a former Acting Attorney-General of the Commonwealth of Pennsylvania, the deans of the law schools of Temple University, Villanova University, Drexel University, Rutgers University-Camden, and the University of Pennsylvania,

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and many other individuals with deep experience in criminal justice as prosecutors and/or defense lawyers, all of whom share a keen and abiding interest in the quality of criminal justice.

The Pennsylvania Innocence Project came into being well into the life of the national innocence movement. Since the original Innocence Project was founded in 1992 at Cardozo School of Law, more than 50 independent innocence projects have been established in the United States. The Pennsylvania Innocence Project was preceded in Pennsylvania by the Innocence Institute of Point Park University, a program for journalism students. Due to the efforts of lawyers and journalists who make up the innocence movement, 256 individuals have been exonerated in the United States over the past twenty years on the strength of DNA evidence.¹ Before their release, they had served, on average, twelve years in prison for crimes they did not commit.² Twelve of those documented DNA exonerations involved Pennsylvania inmates. At least another 250 individuals have been exonerated in the United States over the same span of time based on non-DNA evidence.

As a society, we do not countenance the punishment of the actually innocent. But by revealing certain systemic causes of wrongful convictions—eyewitness misidentifications, false confessions to police, jailhouse informant testimony, fraudulent or simply flawed forensic science, and police or prosecutorial misconduct—the body of exonerations has demonstrated that, notwithstanding our abhorrence of the wrongful conviction of an innocent person, wrongful convictions are not mere aberrations, rare and isolated events. They occur with some frequency and for known reasons. Many can be prevented, and the Pennsylvania Innocence Project is invested in that effort.

When justice has seemingly miscarried, and evidence of an apparent miscarriage comes to light only after the conviction is final, the prosecutor has the power either to pursue the interests of justice—wherever they lead—or to defend the conviction at all costs. In a very real way, the prosecutor is the gatekeeper to the portals of justice for post-conviction innocence claimants. Recognizing the prosecutor's immense power over the post-conviction fate of innocence claims, the Pennsylvania Innocence Project views the proposed amendments to Rule 3.8 as of surpassing importance to its mission and, more importantly, to the integrity and effectiveness of Pennsylvania's criminal justice system.

¹ See The Innocence Project, at <http://www.innocenceproject.org/know> (last visited July 2, 2010). Adding the recent exoneration of Patrick Brown raises the Innocence Project's count from 255 to 256.

² *Id.*

C. The Proposed Amendments

Proposed paragraphs (f) and (g) set forth the duties of the prosecutor after conviction when he or she: (1) learns of new, credible evidence that makes it reasonably likely that a convicted defendant was not, in fact, guilty of the crime; or (2) knows from clear and convincing evidence that the convicted defendant was innocent. In the first circumstance, the prosecutor has disclosure and investigation obligations. He or she is bound, with certain exceptions, to both disclose the “new, credible, and material” evidence to an appropriate court or other authority and to the defendant, and to cause an investigation to be made into whether the defendant was convicted of a crime the defendant did not commit. In the second circumstance, the prosecutor has but one charge: to “seek to remedy the conviction.” Proposed comment 6 suggests that necessary steps to remedying the conviction may include “disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.”

The proposed amendments amplify the responsibilities already assigned to prosecutors under existing Pa. RPC 3.8. Comment 1 to Rule 3.8 recognizes that “a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Comment 1 thus embodies the long-standing Pennsylvania law that “[a]s an officer of the court and an instrument of the criminal justice system, the prosecutor’s duty is to seek justice, not simply convictions.”³ . The United States Supreme Court has long viewed the prosecutor’s role in the same light. The interest of the prosecutor “is not that [he] shall win a case, but that justice shall be done....He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”⁴

The Special Responsibilities of Prosecutors detailed in Pa. RPC 3.8 already include a duty to disclose exculpatory evidence. Paragraph (d) specifically prescribes the duty 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.” Proposed paragraphs (f) and (g) would essentially extend a narrower version of the existing disclosure obligation to the

³ *Commonwealth v. D’Amato*, 514 Pa. 471, 500, 526 A.2d 300, 314 (1987). In this respect, Pennsylvania echoes the Bar’s conception that it is the prosecutor’s duty “to seek justice, not merely to convict.” *ABA Standards of Criminal Justice Prosecution Function and Defense Function*, Standard No. 3-1.2(c) (3d ed. 1993).

⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935). *Accord, Brady v. Maryland*, 373 U.S. 83, 87n. 2 (1963) (“[t]he Government wins its point when justice is done in its courts.”)

post-conviction stage. As opposed to requiring disclosure of “all evidence or information...that tends to negate the guilt of the accused or mitigates the offense,” a test which sweeps in exculpatory evidence of every kind or quality, paragraphs (f) and (g) are not triggered without evidence that satisfies a qualitative standard: it must be credible and material or clear and convincing, and the prosecutor who believes in good faith that the evidence known to him meets neither standard is not subject to sanction under the amendments.

If it is correct that the duties spelled out in proposed paragraphs (f) and (g) are implicit in the more general formulations of Pa. RPC 3.8, then the amendments do not impose any new requirements on prosecutors so much as they dispel vagueness and uncertainty. Until the proliferation of exonerations in recent years, there has not been the occasion to consider the special responsibilities of prosecutors who come to know of credible or compelling evidence of innocence after conviction. Now that valid, unarguable innocence claims are a recurring phenomenon, the profession owes it to prosecutors and to society to map the prosecutor’s duties in this vexing and heretofore uncharted landscape.

While defining the prosecutor’s obligations in relation to post-conviction innocence claims is of the utmost importance, the amendments’ reach is modest. They do not, for example, impose any affirmative duty upon prosecutors to seek out evidence of innocence or initiate a re-investigation of old cases in the absence of evidence of the requisite quality. The amendments essentially codify what principled prosecutors do when presented with credible evidence that the wrong person has been convicted: they disclose, they investigate, and, when the evidence requires, they take remedial action.

Nor do the amendments place prosecutors in peril for the good faith performance of their duties as ministers of justice at the post-conviction stage. A prosecutor will not be subject to sanctions merely for deciding that the evidence does not warrant disclosure, an investigation, or remedial action in the case of a defendant who is later determined to have been wrongfully convicted. As made clear by Proposed Comment 7, “A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.”

The proposed amendments enjoy broad support in the legal profession. They have been endorsed by the House of Delegates of the Pennsylvania Bar Association on the recommendation of PBA’s Legal Ethics and Professional Responsibility Committee. They were approved by overwhelming voice vote by the ABA House of Delegates in February 2008, and

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the adoption process was spearheaded by a multiplicity of ABA committees and sections.⁵ Since February 2008, they have been adopted by Delaware and, with certain modifications, by Wisconsin and Colorado. A number of states in addition to Pennsylvania are actively considering adoption.⁶

D. Why the amendments are needed

If the amendments do no more than spell out what is implicit in the existing rule, are they needed? The answer is an unequivocal “Yes” for several reasons. Prosecutors will benefit from having both clear rules to guide their conduct and the bulwark of authority in the form of mandatory Rules of Professional Conduct to shield them against pressures to reject innocence claims in favor of the interest in finality. A prosecutor who both knows the rule and knows that the rule has bite can be expected to conform his or her conduct to the stated norm. Cases such as *Commonwealth v. Brown*,⁷ which introduced these comments, are much less likely to occur if the prosecutor’s duty is clear—not merely implicit—and if there is a realistic threat of sanctions for violations of that duty. A prosecutor who would allow a defendant to languish in prison in knowing and willful disregard of clear and convincing evidence of the defendant’s actual innocence invites professional sanctions at a minimum for ruining the life of another, disgracing the office of prosecutor, and bringing the entire criminal justice system into disrepute.

Without a clear rule and the threat of sanctions, the risk exists that the prosecutor will rationalize ignoring credible evidence of innocence. All lawyers are beset by conflicting interests.⁸ A prosecutor is subject to considerable pressures, internal and external, to defend

⁵These sections and committees include the ABA Criminal Justice Section; the ABA Death Penalty Representation Project; the ABA Section of Individual Rights and Responsibilities; the ABA Section of Litigation; the ABA Section of State and Local Government Law; the ABA Standing Committee on Ethics and Professional Responsibility; the ABA Government and Public Sector Lawyers Division; the ABA Commission on Domestic Violence; as well as the New York State Bar Association; the Association of the Bar of the City of New York; and the National Organization of Bar Counsel.

⁶ See ABA Rule 3.8 Status of State Adoption, annexed hereto (showing which states have adopted amendments to ABA Rule 3.8, which have adopted with modification, and which are studying the amendments).

⁷ Court of Common Pleas of Dauphin County, No. CP-22-CR-2113-2001.

⁸ Pa. RPC Preamble, Comment 9 (“In the nature of law practice, . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”).

hard-won convictions. The prosecutor is personally convinced that the defendant committed the crime; a renunciation of the conviction is bound to create friction with the police and civilian witnesses who collaborated on “making” the case; an exoneration of a convicted defendant will detract from the trial prosecutor’s “batting average;” the District Attorney may suffer embarrassment and political damage from the revelation that the office convicted an innocent person; and, if reopening the case may reveal one form or another of police or prosecutorial misconduct, there is even more incentive to insist that the conviction not be disturbed.

Studies of the behavior of prosecutors in cases that have led to DNA-based exonerations tend to validate the concern that without clear guidance and the potential for sanctions, prosecutors will be unreceptive and resistant to substantial claims of innocence. For example, of the cases (as of 2004) in which DNA testing ultimately exonerated the convicted defendant, prosecutors opposed testing in more than half.⁹ Insofar as it is reasonably inferable that prosecutors are more likely to oppose DNA testing, despite credible evidence of innocence, in cases involving police or prosecutorial misconduct, it is noteworthy that of the first 70 persons exonerated by DNA evidence, prosecutorial misconduct was evident in 34 of them.¹⁰

E. Conclusion

That defendants can be convicted of and punished for crimes they did not commit is not a criticism of prosecutors, judges, or the criminal justice system; human systems are inherently fallible. But precisely because mistakes are inevitable, the criminal justice system must strive constantly to minimize the risk of error by devising and implementing more reliable procedures for accurately determining guilt. And precisely because mistakes are inevitable and the consequences grave, both the criminal justice system and the legal profession must have mechanisms for detecting and correcting errors when substantial evidence of innocence comes to light.¹¹ The proposed amendments to Pa. RPC 3.8 constitute one such mechanism. If nothing

⁹ See Daniel S. Medwed, “The Zeal Deal: Prosecutorial Resistance to Post Conviction Claims of Innocence,” 84 B.U.L. Rev. 125, 129 (2004).

¹⁰ See The Innocence Project, at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited June 30, 2010).

¹¹ As expressed by the New Jersey Superior Court in ordering post-conviction DNA testing, ““Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentenced to a prison term....We regard it as ...important to rectify that failure....We would rather [permit the testing] than sit by while a [possibly] innocent man...languishes in prison while the true offender stalks his next victim.”” *State v. Thomas*, 586 (continued...)

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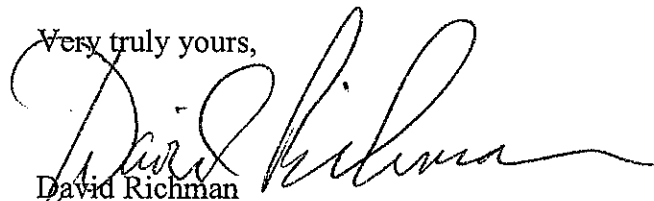
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else, their adoption will imbue with meaning and force the precept that the prosecutor has a duty to do justice that transcends the duty to be a zealous advocate for conviction. Any question as to whether a prosecutor has a post-conviction duty "to seek justice, not simply [preserve] convictions," will be answered definitively.

Lawyers in general have a need to know their professional duties, prosecutors, their special responsibilities. The adoption of the proposed amendments will serve the purpose of informing prosecutors of their responsibilities for justice in the post-conviction context, a realm not clearly charted under existing Rule 3.8. Prosecutors will be well-served by having clearer guideposts, society will benefit from the likelier detection and correction of wrongful convictions that the amendments ensure, and the legal system will gain from a rule that promotes public trust in attorneys as representatives of a fair and just legal system.

Very truly yours,



David Richman

President, Pennsylvania Innocence Project

Richard C. Glazer
Executive Director

Marissa Boyers Bluestine
Legal Director

(continued...)

A.2d 250, 252-53 (N.J. Super. App. Div. 1991), as quoted in *Commonwealth v. Brisson*, 421 Pa. Super. 442, 450-51, 618 A.2d 420, 424 (1992).

**American Bar Association
CPR Policy Implementation Committee**

**Variations of the ABA Model Rules of Professional Conduct
Rule 3.8(g) and (h)**

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an 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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see <http://www.abanet.org/cpr/jclr/home.html>.

Of the states that have adopted the Model Rule:

- One (1) state has adopted Model Rule as is: DE.
- Two (2) states have adopted modified Model Rule: CO and WI.

Six (6) state Rules Committees are studying the Model Rule: CA, D.C., LA, PA, TN and WA.

AL	No action
AK	No action
AZ	No action
AR	No action
CA	Rules Committee studying
CO Effective 7/1/10	Adopted modified ABA Model Rule: (g) Changes "likelihood" to "probability;" adds to end, "within a reasonable time;" (g)(1) Deletes "promptly" before "promptly;" (g)(2) Equivalent to MR but changes language to: "if the judgement of conviction was entered by a court in which the prosecutor exercises prosecutorial authority;" (g)(1)(A) is MR (g)(1)(i) but deletes "promptly;" change "that evidence" to "the evidence;" deletes clause, "unless...delay;"

Adds (g)(1)(B):

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) Deletes “in the prosecutor’s jurisdiction;” adds clause, “in a court in which the prosecutor exercises prosecutorial authority” before “of an offense;” changes language after “the prosecutor shall” with: “take steps in the appropriate court, consistent with applicable law, to set aside the conviction.”

Comments:

[2] Changes “accused person” and “accused” to “defendant;”

Adds:

[3A] A prosecutor’s duties following conviction are set forth in sections (g) and (h) of this rule.

[7] Deletes “If the conviction...to the defendant;” replaces “would ordinarily be accompanied by” with “the prosecutor must take the affirmative step of making a;”

Adds:

[7A] What constitutes “within a reasonable time” will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Replaces “convicted of an offense...remedy the conviction” with “convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (see C.R.S. §18-1-601 *et seq.* and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court;”

Adds:

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] Changes “independent” to “reasonable;”

Adds:

[9A] Factors probative of the prosecutor’s reasonable judgment that the

	<i>evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.</i>
CT	No action
DC	Rules Committee studying
DE	Adopted MR
FL	No action
GA	No action
HI	No action
ID	No action
IL	No action
IN	No action
IA	No action
KS	No action
KY	No action
LA	Rules Committee studying
ME	No action
MD	No action
MI	No action
MN	No action
MS	No action
MO	No action
MT	No action
NE	No action
NV	No action
NH	No action
NJ	No action
NM	No action
NY	No action
NC	No action
ND	No action
OH	No action
OK	No action
OR	No action
PA	Rules Committee studying
RI	No action
SC	No action
SD	No action
TN	Rules Committee studying
TX	No action
UT	No action
VT	No action

VA	No action
WA	Rules Committee studying
WV	No action
WI Effective 7/1/09	<p>Adopted slightly modified ABA Model Rule:</p> <p>(g) WI Rule changes “shall” to “shall do all of the following:”</p> <p>(i) Changes “promptly disclose” to “promptly make reasonable efforts to disclose”</p> <p>(iii) Adds “make reasonable efforts to” before “undertake;” deletes “make reasonable efforts to” before “cause.”</p> <p>Comments: [The following Comments to SCR 20:3.8(g) and (h) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct for Attorneys (Supreme Court of Wisconsin Order No. 08-24, filed June 17, 2009)]</p> <p>“Wisconsin Comment</p> <p>Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20: 3.8 (g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new A.B.A. rule to recognize limits in the investigative resources of Wisconsin prosecutors.</p> <p>This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.”</p> <p>ABA Comments [7], [8], [9]</p>
WY	No action

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