

**Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
(Commission's Revised Proposed Rule Adopted on
March 31 – April 1, 2016 – Clean Version)**

[Note: This rule is being recommended for expedited processing to the Board.]

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (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.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This 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.* This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this Rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this Rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[4] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[6] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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. (See Rule 4.2.)

[7] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could 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.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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Synopsis of Public Comments

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-12	Loyola Law School Innocence Project (7-22-16)	Y	A	3.8	<p>California is last jurisdiction to adopt such a rule. The rule will help reduce wrongful convictions. It is a fair rule that only requires prosecutors to disclose information known or reasonably should be known to them.</p> <p>The rule will prevent injustice and will actually make prosecutors jobs easier for them.</p>	No response necessary.
X-2016-16	Santiago, David (8-1-2016)	No	M	3.8	<p>Rule should be expanded to include non-criminal cases. DAs will often prolong cases in search of experts who agree with them.</p> <p>Duty to disclose should also include materials used to impeach DA witnesses or that may undermine the legality of the charge/civil petition being filed.</p>	The rule addresses criminal cases only because of the unique nature of prosecutor's role in such cases. There are other rules that address some of the concerns in civil cases, such as Rules 1.3, 3.2 and 3.4.
X-2016-32j	Law Professors (Zitrin) (07-25-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that	No response necessary.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					"tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	
X-2016-43aa	COPRAC (Baldwin) (8-12-16)	Y	A	3.8	Supports the rule.	No response necessary.
X-2016-49	Domenic Lombardo (8-19-16)	N	A	3.8	Rule will do a better job of making sure prosecutors adhere to their Brady duties especially in light of Penal Code section 1424.5.	No response necessary.
X-2016-52j	Law Professors (Zitrin) (08-24-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that "tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	No response necessary.

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Synopsis of Public Comments

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-54	Paul Cadman (8-30-16)	N	D	3.8	<p>The last thing we need are more rules. Saddling honest, hard-working lawyers with more rules is a waste of time.</p> <p>Recounts example of honest prosecutor he knows and claims that rule creates a de facto presumption of dishonesty among prosecutors.</p> <p>Dishonest lawyers on both sides of criminal cases will be exposed. Don't need new rules.</p>	The Commission was presented with substantial evidence that the issues addressed by proposed Rule 3.8 are necessary to assure a fair trial to defendants. In addition, this Rule will bring California into alignment with the majority of states, one of the charges of the Commission.
Public Hearing	Ogul, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 58-59 of the public hearing transcript.)	N	A	3.8	Prosecutor's concerns regarding discipline for not disclosing impeachment materials are unfounded because impeachment evidence doesn't meet the definition of exculpatory.	No response required.

