The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000

Niki Kuckes
Roger Williams University School of Law

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The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000

BY NIKI KUCKES*

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* Associate Professor of Law, Roger Williams University. Professor Kuckes was the author of a Report 
  discussed in this Article, the Report to the ABA Commission on Evaluation of the Rules of Professional Conduct 
  Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct, Special Responsibilities of a Prosecutor 
  (December 1, 1999). This Article is written in her private capacity as a law professor and does not purport to 
  speak on behalf of the ABA or its Sections or Committees. The author thanks Bruce A. Green, Stephen A. 
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  assistance.
Recent scandals have revealed grave instances of prosecutorial misconduct on both the state and federal level. Simply looking to publicly-known cases of prosecutorial misconduct, these range from the national controversy over groundless charges filed against three Duke University lacrosse players by a North Carolina prosecutor up for re-election,¹ to the politically-motivated firings of nine federal prosecutors by the Bush Administration,² to the reversal of numerous convictions of innocent defendants based on newly-acquired DNA evidence.³ With these news stories and others, even the public at large appears attuned to the dangers of placing unchecked power in the hands of government prosecutors.


². See generally Bruce A. Green & Fred C. Zacharias, “The U.S. Attorneys Scandal” and the Allocation of Prosecutorial Power, 69 Ohio St. L.J. 187, 188 (2008) (describing the 2006 firing of nine United States Attorneys and noting that the “discharges have led to allegations that [the Department of Justice] influenced U.S. Attorneys’ Offices to pursue the President’s partisan agenda by encouraging the overzealous pursuit of voting rights cases and government corruption cases against Democrats and by discharging individual U.S. Attorneys who resisted”).

³. See generally Barry Scheck, et al., Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted 246 (2000) (analyzing sixty-two exonerations of convicted defendants obtained by the Innocence Project at Cardozo Law School using DNA evidence and concluding that prosecutorial misconduct was a factor in forty-two percent of the cases); see also, e.g., Daniel S. Medwed, Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions, 51 Vill. L. Rev. 337, 337 (2006) (reporting that between 1989 and 2006, “post-conviction DNA testing has exonerated 174 criminal defendants and at least another 300 inmates have been released on grounds consistent with innocence during that period”).
To help combat such abuses, there is a legal ethics rule devoted to the “special responsibilities” of the prosecutor, Rule 3.8.4 But this rule, which does not regulate anywhere near the full range of prosecutorial misconduct,5 has proved resistant to meaningful reform. This Article considers the dynamics at play in prosecutorial ethics reform by tracing recent modern attempts to amend Rule 3.8, beginning with the American Bar Association’s (ABA) unsuccessful review of the prosecutorial ethics rule as part of its wide-ranging “Ethics 2000” review,6 and concluding with the ABA’s recent success in amending Rule 3.8 to encompass the prosecutor’s duty to help redress wrongful convictions. Both suggest valuable lessons for reformers in prosecutorial ethics, where both process and timing can be as critical as a proposal’s content.

The Article begins with the ABA’s “Ethics 2000” review, in which the ABA undertook a much anticipated overhaul of its entire body of ethics rules, which form the basic framework for regulating lawyers’ ethics in the United States.7 A number of model rules were clarified and amended, and the Ethics 2000 process successfully sparked a nationwide movement on the state level to review and update state legal ethics rules.8 Insofar as prosecutorial ethics are concerned, however, the Ethics 2000 process was a grave disappointment to many observers.9

Although the ABA undertook to review its entire body of model ethics rules to encourage “uniformity” in state ethics rules and address “new issues and questions,”10 it chose to make no changes to Rule 3.8, the rule governing the

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5. See infra notes 13 to 16 (and accompanying text).
7. Id.
9. See, e.g., Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor at 153-54 (2007) (finding it “troubling” that the “ABA chose to pass on the opportunity to provide [guidance on prosecutorial ethics] during its last revision of the Model Rules”); Bruce A. Green, Prosecutorial Ethics As Usual, 2003 U. Ill. L. Rev. 1573, 1575 (2003) (concluding that the decision of the Ethics 2000 Commission not to supplement the prosecutorial ethics rule “could only have been motivated by political and procedural considerations . . . since its inaction cannot be explained on substantive grounds”); Ellen Yaroshefsky, It is Time to Take Prosecutorial Discipline Seriously, 8 U.D.C. L. Rev. 275, 288 (2004) (finding it “unfortunate” that the Ethics 2000 Commission declined to revise Model Rule 3.8 although it was fully aware of the criticisms of the current rules for prosecutors).
special responsibilities of a prosecutor," despite evident flaws and omissions in the rule. While the ethical challenges for prosecutors are complex and varied, the prosecutorial ethics rule touched on only a few of the prosecutor's ethical duties and had been criticized as incomplete and inadequate.12

Rule 3.8 failed, for example, to deal explicitly with any of the special ethical challenges posed by the two major arenas in which a modern prosecutor operates—investigating crime and negotiating guilty pleas—areas in which the prosecutor's ethical duties are not adequately addressed by the ethics rules applicable to lawyers more generally. Meanwhile, Rule 3.8 set a minimal standard of probable cause for prosecuting criminal charges,13 and failed to set any ethical limits other than probable cause on the exercise of the prosecutor's broad discretion to charge crimes.14 The ABA's prosecutorial ethics rule was justly criticized for being at once incomplete and vague.15

Yet the Ethics 2000 Commission decided against supplementing or clarifying the rule. In the words of one commentator, in terms of prosecutorial ethics, the Commission "decided to err on the side of conservatism rather than comprehensiveness."16 The Commission reissued the rule, with no substantive additions, and made one change to the commentary accompanying Rule 3.8 that arguably watered down its effect.17

As part of the Ethics 2000 process, shortly before the Commission was due to meet to consider Rule 3.8, I was asked if I would prepare a report for the Commission summarizing the degree to which Rule 3.8 had been implemented in

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11. MODEL RULES, R. 3.8.
12. See, e.g., Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 FORDHAM URB. L.J. 607, 616 (1999) (asserting that the disciplinary rules "barely scratch the surface" in terms of laying out the prosecutor's professional responsibilities); Ellen Yaroshefsky, It is Time to Take Prosecutorial Discipline Seriously, 8 U.D.C. L. REV. 275, 286 (2004) (noting that Model Rule 3.8 is "far from comprehensive"). See generally Monroe Freeman & Abbe Smith, UNDERSTANDING LAWYERS ETHICS, (2004).
13. See, e.g., Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR at 147-48 (2007) (arguing that if prosecutors are allowed to bring charges on the "minimal standard of probable cause," a far lower standard than the prosecutor will have to meet at trial, it increases the potential that the charging power will be used improperly).
14. Cf., e.g., D.C. R. PROF. CONDUCT R. 3.8(a) (providing that a prosecutor shall not "in exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person").
15. See, e.g., Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR at 150-51 (2007) (arguing that the inadequacy of Model Rule 3.8 "lies not only in its failure to address critical issues but also in the vagueness of its language"); Bruce A. Green, Prosecutorial Ethics As Usual, 2003 U. ILL. L. REV., 1573, 1575 (2003) ("[T]here is no principled reason for a disciplinary code to include only the particular provisions now included in Model Rule 3.8.").
the States, and the interpretive issues that had arisen. In the Report, I sought to present a “balanced view of the issues” as background for the Commission, taking into account other bodies of standards issued by the ABA and other organizations. The Report provides a comprehensive snapshot of ABA Model Rule 3.8 as it then existed in 1999 – and captures a sense as well of the combative atmosphere that then surrounded the topic of prosecutorial ethics.

My Report highlighted interpretive issues under Rule 3.8, suggesting certain limited modifications to the existing rule. Equally importantly, it laid out numerous ethical duties recognized by other bodies but not included in the ABA’s prosecutorial ethics rule, from the prosecutor’s duty not to invidiously discriminate in selecting targets for investigation, to her duty not to use criminal charges as leverage to induce defendants to settle civil claims (and many other duties as well). The Report cautioned, however, that a thoughtful and inclusive process – with input from judges, prosecutors, and defense counsel – would be needed to effectively reform the ABA’s prosecutorial ethics rule. Whether because of the Report or in spite of it, the Ethics 2000 Commission ultimately decided neither to amend the Rule nor to appoint a Task Force on prosecutorial ethics, p uniting the issue – to the disappointment of many observers.

Only six years after this disappointing conclusion to the Ethics 2000 process, the ABA recently adopted the first major amendment to Rule 3.8 in many years. In February of 2008, it amended the model rule to recognize the prosecutor’s ethical duty to help rectify wrongful convictions of innocent persons. New provisions explain the steps a prosecutor must take when faced with evidence that suggests or establishes that a convicted defendant did not commit the crime charged. These new duties are the most important additions to Rule 3.8 since

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19. Id. at 1 n.1. While I was then serving as Chair of the ABA Criminal Justice Standards Committee, the report was not a Standards Committee project (nor could it have been, given the short time available when the Report was requested).

20. Id. at 4-7 (highlighting debates over the Justice Department’s position that the ethics rules cannot be applied to federal prosecutors, and related controversies).

21. Most importantly, the Report concluded that the ethical standard for initiating and maintaining a prosecution – the probable cause standard – was unduly low. Id. at 14-15.

22. Id. at 35-42 (noting that some of the ethical duties omitted from Rule 3.8 are more significant than those included).

23. Id. at 42.

24. While some observers credit the cautionary tone of my Report with influencing the Ethics 2000 Commission not to undertake reform, I suspect that the far larger factor reflected both in my Report and the Commission’s decision was the lack of any evident base of support in the criminal justice community for undertaking major reform of the prosecutorial ethics rule as part of Ethics 2000, coupled with the certain opposition of the Justice Department.

25. See CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, REPORT 105B TO THE HOUSE OF DELEGATES 2008) [hereinafter ABA Report 105B] (proposing a resolution, approved by the ABA in February of 2008, to add
the adoption of the *Model Code* in 1969, when the ABA first laid out the two basic duties that form the backbone of the current rule – the bar on prosecuting groundless criminal charges and the prosecutor’s duty to produce exculpatory evidence.  

This amendment, moreover, was generated by a distinctly different process than either the Ethics 2000 process or the routine ethics rule amendment process. Amendments to the ethics rules usually originate from the ABA’s Standing Committee on Ethics and Professional Responsibility, which is the entity within the ABA tasked with developing model ethics rules and issuing ethics opinions. Instead, this change found its seeds in reforms initiated at the state and local level – in reforms undertaken by the New York State Bar and the Bar of the City of New York – which inspired a subcommittee within the Criminal Justice Section to propose changes to the ethics rules. In important ways, this reflects a new – and more successful – model of amending the prosecutorial ethics rules.

This Article picks up where my Report left off, tracking attempts to reform Rule 3.8 from Ethics 2000 to the present day. If the Report provided a snapshot of where prosecutorial ethics rules stood in 1999, this Article provides the frame to place that snapshot in current context. It explains how we went from the nadir for prosecutorial ethics in 1999, when the prospects for meaningful change in Rule 3.8 were slim, to the successful adoption this year of the first major change in the prosecutorial ethics rules in many years – indeed, in many decades.

*First*, the Article considers the events that led the Ethics 2000 Commission to reissue the prosecutorial ethics rule without substantive change, despite evident problems with the rule, analyzing the lessons to be drawn from the impasse. *Second*, the Article tracks subsequent developments in the States as they implemented Ethics 2000. It reaches the surprising conclusion that Ethics 2000 served to influence prosecutorial ethics rules in the field, even though the model rule itself was not improved, arguably validating the views of some who lamented the lost opportunity to reform Rule 3.8 as part of the Ethics 2000 process. *Finally*, the Article looks to the future with greater optimism. The Ethics 2000 review also served to spark State-initiated reforms that, in turn, have created a positive dialogue among local, state, and national bar authorities. Such

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Model Rule 3.8(g) and (h), setting forth new ethical duties concerning a prosecutor who becomes aware of evidence suggesting or establishing that a convicted defendant did not commit the crime charged.

26. See *MODEL CODE OF PROF’L RESPONSIBILITY*, DR 7-103(A) & 103(B) (1969). While the ethical limitation on issuing subpoenas to defense counsel, adopted in 1990, also concerns an important investigative issue, particularly on the federal level, the new ethical duty to rectify wrongful convictions has broad application nationwide and goes to the heart of the prosecutor’s basic duty to “do justice.”


28. ABA Report 105B, supra note 25 at 3 (describing the background to the amendments to Rule 3.8 concerning wrongful convictions).
“ground-up” efforts led directly to the ABA’s recent success in amending Rule 3.8 to add the prosecutor’s ethical duty to remedy wrongful convictions – and present a new model of rules reform that promises to bear more fruit.

I. LESSONS FROM THE FAILURE TO AMEND RULE 3.8 IN ETHICS 2000

While the Ethics 2000 process may have been a disappointment, given the ABA’s seeming lack of political will to tackle prosecutorial ethics, it was also a telling example of the challenges of regulating prosecutors through state legal ethics rules. Rule 3.8 is unique insofar as it singles out a group of lawyers, prosecutors, engaged in a particular type of law practice.\(^{29}\) Regulating prosecutorial ethics presents special challenges, both because the rules are targeted at and tend to antagonize a powerful lobby, and because political sensitivity inevitably accompanies any efforts to regulate law enforcement. Scholars have often noted the dynamic that makes it difficult, in American political culture, to overcome the emotional power of objections worded in terms of law enforcement imperatives.\(^{30}\) That dynamic was clearly one of the forces at play in the Ethics 2000 process.

As laid out below, the Ethics 2000 experience demonstrated starkly the difficulty of transforming critiques of the prosecutorial ethics rules into meaningful reform.

A. THE ABA’S ETHICS 2000 PROJECT

The Ethics 2000 process was the most recent major step in a long history of involvement by the ABA in formulating national standards for lawyers’ ethics. The ABA has been remarkably influential in shaping state legal ethics rules across the United States through its sets of model rules.\(^{31}\) The organization has periodically amended its rules to clarify and refine ethical doctrines and reflect changing legal practice. The “Ethics 2000” process, initiated in 1997, was one such landmark review.\(^{32}\)

\(^{29}\) See, e.g., Hans P. Sinha, Prosecutorial Ethics: The Duty to Disclose Exculpatory Material, 42 PROSECUTOR 20, 20 (2008) (“[Rule 3.8] is also the only rule drafted specifically for one segment of the profession. Significantly, there are no special rules for criminal defense lawyers, tax lawyers or corporate lawyers, or any other type of lawyers.”). While prosecutors are also subject to the ethics rules that govern all lawyers (such as the duty of candor to the court, confidentiality, conflicts of interest, and so on), Rule 3.8 concerns the “special” duties of a prosecutor that rise above those of lawyers in other types of practice.

\(^{30}\) See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 534 (2001) (emphasizing that there is a "natural alliance" between the interests of prosecutors and elected legislators that "makes prosecutors (along with police) a very powerful lobby on criminal law issues").

\(^{31}\) The first set of ABA ethics rules were the Canons of Professional Ethics, issued in 1908. See ABA CANONS OF PROF’L ETHICS (1908) [hereinafter 1908 CANONS].

\(^{32}\) Prior comprehensive reviews resulted in major revisions of the ABA’s model rules. In 1969, the ABA completed a comprehensive review of the 1908 Canons, which had come to be criticized as “generalizations designed for an earlier era,” and replaced them with an entirely new set of rules, the ABA Model Code of
Prior to Ethics 2000, the ABA's Model Rules had been amended piece-meal over the years since their adoption in 1983. By 1997, the States varied quite significantly in the degree to which they had adopted the ABA's current version of the Model Rules, were using older versions of the Model Rules, had never converted from the out-dated Model Code, or had created their own sui generis variations. A primary motivation behind the ABA's decision to initiate the project was the "growing disparity in state ethics codes," which led to an undesirable lack of uniformity. To review and update the Model Rules, and ensure that they reflected the changing ethical challenges of modern law practice, the ABA created the body popularly known as the "Ethics 2000" Commission. The Commission's task was to complete a comprehensive ethics rules review and report back to the ABA, recommending changes.

The Ethics 2000 Commission decided early on to take an approach that would be "comprehensive, but at the same time conservative, and recommend change only where necessary." Applying the motto "if it ain't broke, don't fix it," the Commission set as its goal a minimalist approach to recommending revisions. While some have questioned whether the Commission generally succeeded in this aim, with respect to Rule 3.8 – the subject of this Article – the Commission’s approach to Rule 3.8 was minimalist to a fault. Some possible explanations for the ABA's hands-off approach to the subject of prosecutorial ethics in Ethics 2000 are explored further below.

B. COMMISSIONING A BACKGROUND REPORT ON RULE 3.8

In anticipation of the Ethics 2000 Commission's review of Rule 3.8, in the Fall of 1999 the Commission decided, as noted, to solicit a report summarizing the degree to which Rule 3.8 had been implemented in the states, identifying state variations, and analyzing the issues that had arisen in interpretation of the rule. My report was completed and submitted to the Commission in early December, in anticipation of the meeting at which the Commission was scheduled to

Professional Responsibility. See Model Code, Preface (quoting Justice Harlan Fiske Stone). The Model Code, in turn, was replaced in 1983 by the ABA Model Rules of Professional Conduct, a new body of rules quite different in form and content than the Model Code. See ABA Model Rules of Prof'l Conduct, Chair's Introduction. The Ethics 2000 process, described above, undertook a comprehensive review of the Model Rules.

33. See Ethics 2000, supra note 10 (also noting that lack of uniformity was exacerbated by numerous amendments to the Rules since 1983).

34. Id.

35. To become effective, changes to the Model Rules must be approved by the ABA's House of Delegates, a representative body that governs the ABA.


37. Id. (noting that "we tried to keep our changes to a minimum").

38. See Margaret Colgate Love, The Revised Model Rules of Prof'l Conduct: Summary of the Work of Ethics 2000, 15 Geo. J. LEGAL ETHICS 441, 442-43 (2002) (noting that while the Commission's "presumptive operating principle was to make no change unless substantively necessary," as time went along it seemed that "more and more fell into this category").
consider the prosecutorial ethics rule.

The task, as I understood it, was to prepare a neutral, balanced, factual study of Rule 3.8 as it was then in place in the states, in order to provide background information for the Commission. Unlike the report of, for example, a Task Force, my role was not to initiate major changes in the Rules, or to act as an advocate for any particular group, but to provide a neutral fact-based assessment of the degree of implementation of the current rule and related interpretive issues. The limited nature of this task is reflected in the Report. At that time (and following Ethics 2000), Model Rule 3.8 established only six specific ethical principles. To paraphrase the essential elements of each, the rule established:

1. A minimum ethical standard for prosecuting criminal charges (probable cause) (Rule 3.8(a));
2. A prosecutor's duty to ensure the accused has been informed of and had the opportunity to exercise the right to counsel (Rule 3.8(b));
3. An ethical bar on seeking waivers of important pretrial rights from an accused who has not yet had counsel appointed (Rule 3.8(c));
4. A prosecutor's duty to disclose to the defense known evidence that would tend to negate guilt, reduce the offense, or mitigate the punishment of the accused (Rule 3.8(d));
5. A heightened standard for issuing subpoenas seeking testimony from lawyers about client information, (then denominated as Rule 3.8(f));
6. Ethical restrictions concerning prejudicial out-of-court statements, including a prosecutor's duty to use reasonable care to prevent investigators and police from making statements that would be ethically barred if issued by the prosecutor (then denominated as Rule 3.8(e)) and, logically related, an ethical bar on out-of-court statements by the prosecutor that tend to "heighten public condemnation" of the accused (then denominated as Rule 3.8(g)).

My Report canvassed each of these provisions, assessed the degree to which they had been implemented in the States, and discussed the interpretive issues that had arisen. I found that the original version of Rule 3.8, as adopted in 1983,

39. See Appendix A at 1 n.1 (noting that the Report "is not intended to be an advocacy piece on behalf of any particular constituency"). Indeed, because I was then in private practice at a criminal defense firm, I was particularly conscious of trying not to inject my personal views into the report, or to argue from the perspective of the defense bar.
40. The ethical restrictions on subpoenas to lawyers originally appeared as Rule 3.8(f), but in the Ethics 2000 review, this duty was renumbered Rule 3.8(e).
41. These duties were originally listed in separate sections (Rule 3.8(g) and (e), respectively), but the Ethics 2000 Commission decided to combine both duties into new subsection (f) in the current Rule, renumbering the lawyer subpoena rule as Rule 3.8(e).
had been implemented in close to two-thirds of the states, but that the later amendments to Rule 3.8 had only rarely been adopted.

Equally importantly, research for the Report revealed that the ethical duties included in Rule 3.8 were incomplete. The Report documented a wide array of additional ethical principles established in other sources but not included in the ABA's Model Rules, observing that the ethical obligations spelled out in Rule 3.8 often seem less significant than those omitted. The rule did not spell out, for example, the important question of the prosecutor's relationship with the grand jury, an issue addressed at length in the D.C. Bar's ethics rules, among other standards. Nor did it address plea bargaining practices that are ethically problematic, such as overcharging in order to increase a prosecutor's leverage in plea negotiations, or so-called "release-dismissal agreements," an ethically problematic practice in which prosecutors agree to drop (or not to file) criminal charges in exchange for the defendant's agreement not to seek civil damages. Numerous other examples abounded.

At the same time, my Report expressed serious concern as to whether the Ethics 2000 process would be a suitable forum to ensure the thorough, thoughtful review necessary to ensure successful adoption and acceptance by the interested groups. It recommended that the Commission not undertake any major reform to the rule in committee. It urged, instead, that if the Commission decided to address the fundamental problems in the ABA's prosecutorial ethics rule more broadly, it should initiate an inclusive and thoughtful process that would reach out to the leadership of the criminal justice community.

To my knowledge, the Report is the most thorough analysis available that addresses state implementation of Rule 3.8. It has been widely cited in the

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42. As issued in 1983, Rule 3.8 consisted of five provisions, which had been adopted quite widely in the States. See Appendix A at 12-27 (finding that Rule 3.8(a) had been adopted verbatim in thirty-five states, Rule 3.8(b) had been adopted verbatim in thirty-four states, Rule 3.8(c) had been adopted verbatim in thirty-one states, Rule 3.8(d) had been adopted verbatim in thirty-one states, and Rule 3.8(e) had been adopted verbatim in twenty-eight states). These figures include the states that adopted the Model Rules verbatim; a number of additional states adopted variations of these rules.

43. See id. at 29 (finding that Rule 3.8(f) (added by the ABA in 1990) had been adopted in some form in ten states); id. at 34 (finding that Rule 3.8(g) (added by the ABA in 1994) had been adopted in only three states).

44. See Appendix A at 39 (agreeing with observers who have noted that "some of the prosecutor's obligations not detailed in the rule ... are more significant than some of the obligations that are included in Rule 3.8").

45. See Appendix A at 35-37 (explaining the rationale on which standard-setting groups have urged that the prosecutor's ethical duties in presenting evidence to the grand jury should exceed constitutional requirements, and should include a duty to present exculpatory evidence).

46. See id. at 40.

47. Id. at 3.

48. My report recommended, in particular, that any overall review of Rule 3.8 be "undertaken over a period of time with participation from the ground up from all of the groups involved," to ensure acceptance among prosecutors, defense counsel, and the courts (and adoption by the states). Appendix A at 3.
literature on prosecutorial ethics. Until now, however, the report has not been available in print. In light of increasing interest in prosecutorial ethics, and the ongoing efforts within the ABA to amend Rule 3.8, *The Georgetown Journal of Legal Ethics* has graciously agreed to publish the Report to the Ethics 2000 Commission along with this Article.

Where my original report to the Ethics 2000 Commission left off, this Article begins below by reviewing the debates before the Commission concerning potential amendments to Rule 3.8—debates that led to the ABA's ultimate decision to leave the rule virtually intact.

C. THE ETHICS 2000 COMMISSION AND THE PROSECUTORIAL ETHICS RULE

While it is self-evident that the Ethics 2000 Commission decided not to take on prosecutorial ethics, the legislative history explaining its rationale is notably sparse. The Commission's decision not to undertake reform of the prosecutorial ethics rule—or appoint a Task Force to do so—is essentially a black box. Experts in prosecutorial ethics have expressed extreme frustration at the missed opportunity, in Ethics 2000, for a comprehensive review of prosecutorial ethics rules as part of the process of updating the *Model Rules* more broadly. In retrospect, however, it was scarcely surprising that the Commission's review came to naught. There was, to begin with, no one at the table to persuade the Commission that reform of the prosecutorial ethics rule had broad support. The Ethics 2000 Commission itself was not a body of criminal justice experts, but a group of distinguished judges and lawyers charged broadly with reviewing the entire body of ethical rules applicable to lawyers in any type of practice.

At that time, no group was actively seeking to expand upon the duties in Rule 3.8. Amazingly enough in retrospect, during Ethics 2000, no interested body of lawyers or public interest group had organized around the issue of prosecutorial

49. Given the increasing interest in prosecutorial ethics reform, the Report has been relied on by a range of groups and individuals. It has been used by the Association of the Bar of the City of New York and was extensively cited in Professor Davis's recent award-winning book, *Arbitrary Justice*, as well as in numerous law review articles. According to the ABA, it has been one of the most requested items from the Ethics 2000 archive.


51. See supra note 10.

52. The membership of the Ethics 2000 Commission included a state supreme court chief justice, a federal circuit court judge, a state court trial judge, a retired judge who is also a former dean and law professor, two professors of legal ethics (one of whom was the principal drafter of the *Model Rules*), a lawyer formerly with the Department of Justice, several private practitioners, a former in-house counsel, and a nonlawyer member (a former college president and member of many corporate boards). See Charlotte Stretch, "Overview of Ethics 2000 Commission and Report" (2002) (type of document not really clear, on ABA website). Apparently, there were no members specifically appointed because of their perspective as prosecutors or defense counsel.
ethics reform. When the Ethics 2000 Commission held eight public hearings across the United States to solicit comments about its ethics review, not a single speaker addressed Rule 3.8. No formal proposals were put on the table by any interest group or bar organization to amend the rule. Only a handful of bar associations and commentators even raised concerns about it. Despite academic critiques, dissatisfaction with Rule 3.8 clearly had not then materialized into any effective movement to seek reform in the ABA’s prosecutorial ethics rule.

At the same time – and likely related – it was evident to anyone who regularly read the legal news that the Justice Department was vociferously opposed to key aspects of the ABA’s prosecutorial ethics rules. At the time of Ethics 2000, a heated, decades-long dispute had run over the extent to which Justice Department prosecutors can be subjected to state ethical rules and disciplinary procedures. The Justice Department had taken the position that state ethics rules in general – and the “no contact” rule in particular – could not lawfully be applied to federal prosecutors who participate in questioning represented witnesses.

Only a year earlier, in October of 1998, Congress had passed the “McDade Amendment,” resolving the issue by providing explicitly that federal prosecutors must follow “State laws and rules . . . governing attorneys” in each state where prosecutors practice, but the Department was still firmly opposed to the notion that federal prosecutors, engaged in the competitive and critical enterprise of criminal law enforcement, could be regulated by state ethics rules.

Some flavor of this debate is captured in my Report, which lays out the history of the dispute (and related litigation) generated by the Justice Department’s

53. See Appendix A at 3; see also Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573, 1583 (“No ABA entity or major organization representing prosecutors or criminal defense lawyers sought changes to Rule 3.8.”).

54. Public hearings were held by the Ethics 2000 Commission as follows: February 16 and 17, 2001 (in San Diego); July 6, 2000 (in New York); June 2, 2000 (in New Orleans); February 10, 2000 (in Dallas); August 5, 1999 (in Atlanta); June 4, 1999 (in La Jolla); February 4, 1999 (in Los Angeles); and March 29, 1998 (in Montreal, in connection with the ABA’s annual National Conference on Professional Responsibility).

55. Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573, 1583 (“Only a handful of bar associations and individual attorneys, of whom I was one, raised concerns about [Rule 3.8].”).

56. See, e.g., Appendix A at 3, n. 4 (citing a sample of the academic literature on prosecutorial ethics, as of 1999, that criticized the lack of effective discipline against prosecutors).

57. See, e.g., Bruce A. Green, Prosecutorial Ethics As Usual, 2003 U. Ill. L. Rev. 1573, 1582 (2003) (noting that the Ethics 2000 Commission “waded into a roiling controversy regarding Rule 4.2,” a problem the Commission discussed “over the course of two decades”).

58. See Model Rules R. 4.2 (stating the general rule that in “representing a client, a lawyer shall not communicate about the substance of the representation with a person the lawyer knows to be represented by another lawyer in the matter,” subject to limited exceptions).


60. 28 U.S.C. § 530B.
campaign, and notes the "high degree of flux in this area caused by recent political and legal developments." As this hints, there was at the time of Ethics 2000 an unusually vitriolic relationship between Department of Justice representatives and representatives of the organized bar. The Department's combative position undoubtedly carried over to and influenced the Ethics 2000 process.

While it may seem odd that the United States Department of Justice—a federal agency that handles a small, if important, share of cases nationally—should have a significant say in formulating State ethics rules, in recent years the Department has taken a keen interest in attempts to regulate prosecutorial ethics. The Department has proved a powerful force whose opposition is not easily overcome. This dynamic was clearly at work in Ethics 2000. The Justice Department's opposition effectively doomed efforts to reform Rule 4.2, and cast a long shadow over the Commission's consideration of Rule 3.8.

At various points in the process, the Ethics 2000 Commission made tentative moves toward strengthening the prosecutor's special ethical duties under Rule 3.8. In one instance, the Commission agreed to add language to make clear that the prosecutor's duty to disclose exculpatory evidence (embodied in Rule 3.8(d)) covers not only evidence that negates guilt directly but also "evidence that tends to impeach a government witness." At another point, the Commission agreed to spell out expressly the prosecutors' duty to present exculpatory evidence to the grand jury. It voted to replace a cryptic reference in the Commentary with new text in the black-letter rule expressly stating that prosecutors have an ethical duty "in presenting a case to a grand jury, to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause."

Both decisions were promptly reversed, however, when the Commission ran into objections from federal and state prosecutors. Indeed, the net result was

61. See Appendix A at 3.
62. See generally Bruce A. Green, Prosecutorial Ethics As Usual, 2003 U. ILL. L. REV, 1573, 1582-83 (2003) (summarizing the Ethics 2000 Commission's unsuccessful attempt to work with the Justice Department to agree on reforms to Rule 4.2).
63. See Proposed Rule 3.8 – Draft No. 2 (January 26, 2000); see also COMMISSION ON EVALUATION OF RULES OF PROFESSIONAL CONDUCT, AM. BAR ASSN., MEETING MINUTES (December 10 to 12, 1999) (noting Commission consensus to add reference to impeachment evidence in Rule 3.8(d)).
64. The relevant language stated: "See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included." MODEL RULES R. 3.8, cmt. [1] (1983). This reference suggested, but did not clearly state, that in seeking an indictment the prosecutor has a duty to make a balanced presentation of the material facts to the grand jury (as in ex parte proceedings generally). See MODEL RULES R. 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").
65. See Proposed Rule 3.8 – Draft No. 2 (January 26, 2000); see also COMMISSION ON EVALUATION OF RULES OF PROFESSIONAL CONDUCT, AM. BAR ASSN., MEETING MINUTES (December 11 to 12, 1999) (noting that after some discussion, the proposal to add new (e), establishing a rule on presenting exculpatory evidence to the grand jury, was passed by a 5 to 1 vote).
66. See COMMISSION ON EVALUATION OF RULES OF PROFESSIONAL CONDUCT, AM. BAR ASSN., MEETING MINUTES (February 11 to 13, 2000) (noting comments of the National District Attorneys' Association objecting
that Rule 3.8 was actually weakened, since the Commission removed its newly-drafted section (e) (which would have expressly required a prosecutor to present exculpatory evidence to the grand jury) without reinstating the original, oblique reference to grand jury proceedings in the Commentary, which had suggested (though not spelled out) that such an ethical duty would apply.\footnote{67} Clearly, the Commission was reluctant to tinker with Rule 3.8 to improve the rule in the face of opposition from prosecutors.\footnote{68}

At the same time, the Commission did resist pressure by the Justice Department to weaken the existing duties spelled out in Rule 3.8. At Commission meetings, for example, the Department repeatedly proposed eliminating the restrictions on issuing criminal subpoenas to defense lawyers. The Commission rejected this proposal each time.\footnote{69} Despite the controversy over the requirement, it retained the lawyer subpoena provision in the rule.\footnote{70}

Similarly, a federal prosecutor initially persuaded the Ethics 2000 Commission to water down the prosecutor’s duty to take reasonable care to prevent prejudicial public statements made by law enforcement.\footnote{71} At a later meeting, however, the
Commission decided to reinstate the original language. While clearly concerned about criticism from prosecutors, the Commission was also apparently sensitive to the negative signal that would be sent by weakening the established black-letter duties in Rule 3.8.

In the end, the Commission backtracked from its limited attempt to improve Rule 3.8, and the Rule was simply reworked in format (though not in substance). In the rush of the Commission's business – and the controversy over the “no contact” rule – the path of least resistance was clearly to leave Rule 3.8 as is, rather than undertake needed reforms in prosecutorial ethics.

In short, as anticipated, the Ethics 2000 process did not prove well-suited to a comprehensive, thoughtful, successful amendment of the prosecutorial ethics rules. The factors simply did not bode well: The strong opposition of the Justice Department and state prosecutors to supplementing Rule 3.8 (and the Department’s active attempts to eliminate provisions of the rule); the Ethics 2000 Commission’s negative experience in trying to amend Rule 4.2 over the Department’s opposition; the general controversy then surrounding the prosecutorial ethics rules; the lack of any organized voice advocating to strengthen and supplement Rule 3.8; the diverse make-up of the Commission; and the Commission’s broad and ambitious project and limited time frame. Given these factors, it is perhaps no surprise that the Ethics 2000 process did not produce major change in the ABA’s prosecutorial ethics rule. Indeed, it might be considered a victory that Rule 3.8 emerged intact – including the restrictions on issuing subpoenas to defense lawyers.

At the same time, the experience suggests at least two keys to a more successful amendment process for the prosecutorial ethics rules. The Commission was handicapped in reviewing Rule 3.8 both by the lack of time for the complex issues raised by the rule (and breadth of its overall task) and by the membership’s lack of depth in criminal ethics issues. When opposition arose from the prosecutorial bar, there was a natural tendency to defer to the concerns of law enforcement. This experience highlighted two key factors: (1) the need for a working group experienced in and focused on the ethical challenges of criminal law practice; and (2) the critical need to bring into the process, and bring on board the leadership of state and federal prosecutorial groups (or at least neutralize their

72. See Commission on Evaluation of Rules of Professional Conduct, Am. Bar Assn., Meeting Minutes (July 7 to 8, 2000) (reinstating the original language concerning prosecutor’s duty to prevent unethical statements by investigators).

73. In particular, the substance of the black-letter rule was unchanged. However, the duties previously found in Rule 3.8(e) (on supervising investigators’ public statements) and Rule 3.8(g) (on the prosecutor’s duty to refrain from statements that heighten public condemnation) were combined and renumbered as new Rule 3.8(f). The duty previously contained in Rule 3.8(f) (on lawyer subpoenas) was renumbered as new Rule 3.8(e). (As noted, the reference to grand jury proceedings was also omitted from Commentary). See generally Model Rules of Prof’l Conduct as Adopted by ABA House of Delegates (Ethics 2000) (February 2002) (redlined version), available at http://www.abanet.org/cpr/c2k/c2k-redline.html.
opposition). The Ethics 2000 experience suggested, not surprisingly, that the process of amending the rules is as important as the substance to the success of the endeavor — and that the prosecutorial ethics rules in particular are highly specialized rules with sensitive political aspects, not well-suited to a routine review process.

Nonetheless, ironically perhaps, it turned out that Ethics 2000 did influence State prosecutorial ethics rules, as later developments showed. Developments in the States in the years since Ethics 2000 are reviewed below.

II. STATE REFORMS IN PROSECUTORIAL ETHICS AFTER ETHICS 2000

While the Ethics 2000 Commission did not change Rule 3.8, the Ethics 2000 process nonetheless influenced the shape of state prosecutorial ethics rules to a surprising extent. This effect took several forms.

To begin with, the very fact that the ABA undertook Ethics 2000 induced many state bodies that had not reviewed their ethics rules in a number of years to undertake a comprehensive review of their own ethics rules overall. In the wake of Ethics 2000, this national impetus led every State to update or revisit their versions of Rule 3.8 (among other rules). In this way, the ABA’s project was successful in enhancing the influence of Model Rule 3.8 — and moving toward the ABA’s stated goal of increasing uniformity with the national prosecutorial ethics standard—even if the standards themselves remained limited in scope.

Equally importantly, the Ethics 2000 review also prompted certain leadership states — most notably Wisconsin, New York, and North Carolina — to engage in thoughtful broader efforts to improve upon their own prosecutorial ethics rules, providing leadership from the bottom up that in turn served to influence the ABA. One of these efforts — the proposal of the New York State bar to articulate the prosecutor’s ethical duty when faced with evidence of a wrongful conviction — led directly to the ABA’s recent landmark decision to incorporate this ethical duty in the national model rules. This process also energized the criminal practice bar to consider and initiate member-driven reforms in the prosecutorial ethics rules, described more fully below. This positive dialogue promises to reap further benefits in coming years.

In short, even though the ABA decided itself against making any improve-

74. While the ABA did not amend Rule 3.8, it did amend many of the other Model Rules. A redlined version of the ABA rules is available at: http://www.abanet.org/cpr/e2k/e2k-report_home.html.

75. Interestingly, the District of Columbia bar, which in 1999 had been on the forefront of prosecutorial ethics with its forward-thinking version of Rule 3.8, made virtually no changes to its version of the rule. See District of Columbia Bar, Rules of Professional Conduct Review Committee, Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations at 144 (June 21, 2005, revised October 6, 2005) (noting that the existing D.C. version of Rule 3.8 “does not resemble the ABA version” and finding it unnecessary to make any substantive change in the D.C. rule). The D.C. Bar did move an obligation that had been specific to prosecutors (not to exercise peremptory strikes based on invidious discrimination) to a general duty applicable to all lawyers. Id.
ments in its own version of Model Rule 3.8, the Ethics 2000 process has served both to (1) increase uniformity across the states as a whole and (2) spark innovation in State prosecutorial ethics rules in certain leadership states. Both effects (which are, of course, to a certain degree in tension) are explored below.

A. ETHICS 2000’S EFFECT IN INCREASING STATE CONFORMITY WITH ABA RULE 3.8

The arduous process of amending the ABA’s ethics rules is, of course, only the first step toward reform. The ethical duties framed by the ABA are after all simply “model” rules. As critical, if not more critical, is the adoption of the ABA’s rules by the states as enforceable ethics rules, subject to disciplinary sanctions.

The Ethics 2000 process has been remarkably successful in persuading state bar authorities across the country to revisit and reconsider their entire bodies of ethics rules. As noted, every state and the District of Columbia undertook some review in the wake of Ethics 200076—a process that has so far been completed by about two-thirds of the States.77 The rest of the states are still in the process of reviewing their ethics rules.78 The Ethics 2000 project has also succeeded in prompting the few hold-out States that still had ethics rules based on the ABA’s Model Code (superceded by the ABA in 1983)79 to move toward Model Rules-based systems.80

In this process, the post-Ethics 2000 experience has shown that, to date, most states have been willing to follow the ABA’s leadership in the area of prosecutorial ethics. The majority of states that have completed their Ethics 2000 review have looked to the ABA for guidance on prosecutorial ethics, and have often not been inclined to second-guess the nuances of the particular language in Rule 3.8.


77. See supra note 8 (cite to ABA website tracking State implementation of Ethics 2000).

78. Id.

79. As of December 1999, a total of nine states had not yet adopted a Model Rules-based system. Eight of these states still based their system of legal ethics rules on the Model Code (Georgia, Iowa, Maine, Nebraska, New York, Ohio, Oregon, and Tennessee), while California had a sui generis system based neither on the Model Code or the Model Rules. (Two other states had only just become Model Rules jurisdictions: Vermont, which converted to a Model Rules-based system effective September of 1999; and Virginia, which had announced its intent to convert to a Model Rules-based system effective January of 2000.).

80. Since the conclusion of Ethics 2000, six of the hold-out states have converted from Model Code to Model Rules jurisdictions (Iowa, Nebraska, New York, Ohio, Oregon, and Tennessee). In addition, Georgia converted to a Model Rules jurisdiction while the Ethics 2000 process was underway. The remaining hold-out states (Maine and California) are all presently considering amendments that would transform their ethics systems to Model Rules-based systems. The ABA maintains charts tracking both the dates of adoption of the ABA’s Model Rules, see http://www.abanet.org/cpr/mrpc/chron_states.html, and the States’ response to Ethics 2000, supra note 8.
1. The Patchwork of State Prosecutorial Ethics Rules as of 1999

Going into the Ethics 2000 process, the picture of state prosecutorial ethics rules looked much like the field of legal ethics generally: A "patchwork pattern of state regulation" that yielded prosecutorial ethics rules quite different across jurisdictions.\footnote{1} My Report paints a picture of the variety of state prosecutorial ethics rules that existed as of 1999.

Every state had some ethics rules directed at the special duties of public prosecutors. But some states had in place only the two limited (though important) duties reflected in provisions of the outdated ABA Model Code.\footnote{2} Other states had adopted Rule 3.8 as issued by the ABA in 1983, but had never updated their rule to reflect the ABA's two subsequent amendments to the Rule (related to lawyer subpoenas and pretrial publicity).\footnote{3} Indeed, most states fell into this category: Only eight states, as of 1999, had prosecutorial ethics rules that reflected any of the changes made by the ABA over the preceding decade.\footnote{4} Meanwhile, a number of states had adopted their own variations of Rule 3.8 or had developed ethical rules with no counterpart in the ABA's prosecutorial ethics rule.\footnote{5}

The District of Columbia, for example, had an active bar that developed ethical

\footnote{1. See Ethics 2000, (explaining that the "patchwork pattern" of state ethics regulation was a key factor motivating the ABA leaders to undertake Ethics 2000).}

\footnote{2. The ABA Model Code had provisions analogous to two of the six duties in the Model Rules (albeit important ones): a bar on initiating criminal charges not supported by probable cause (DR 7-103(A)); and a duty to make timely disclosure of exculpatory evidence (DR 7-103(B)). See ABA Model Code of Prof'l Responsibility (1969). Similarly, California, whose system of legal ethics rules was sui generis, had a prosecutorial ethics rule comparable to one of the Model Code provisions (on prosecuting criminal charges without probable cause). See Cal. R. Prof'l Conduct R. 5-110 (1999).}

\footnote{3. As of 1999, the following thirty states had adopted prosecutorial ethics rules that were the same as or closely modeled on the 1983 version of Model Rule 3.8, but had never revisited the State's version of the rule to add either of the ABA's two post-1983 amendments: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming. In addition, by 1999, Illinois had adopted Rule 3.8, though its version more closely resembled the even older provisions of the ABA Model Code. Thus, a total of thirty-one states that could fairly be considered Model Rules jurisdictions in 1999—all of which had some variation of ABA Model Rule 3.8—had never taken the initiative to adopt the ABA's post-1983 amendments to the prosecutorial ethics rule.}

\footnote{4. The eight states whose prosecutorial ethics rules, as of 1999, reflected some or all of the ABA's post-1983 changes to Model Rule 3.8 (made by the ABA in 1990, 1994 and 1995) were: Alaska, Colorado, Louisiana, Massachusetts, North Carolina, Oklahoma, South Carolina, and Vermont. This figure, however, overstates the influence of the ABA's amendments, since some of these states had more up-to-date ethics rules not because they had diligently updated their ethics rules to reflect the ABA's amendments but because they had only recently adopted the Model Rules. Rhode Island and Tennessee, meanwhile, both had lawyer subpoena provisions in place in 1999, but had added those duties on their own initiative prior to the ABA's amendment to its rule. See R.I. R. Prof'l Conduct R. 3.8(f) (adopted in 1988); Tenn. R. Prof'l Conduct R. 7-103(C) (adopted in 1987).}

\footnote{5. See generally Appendix A at 12-37 (analyzing state variations of Rule 3.8); see also id. at 39-42 (analyzing state ethical duties of a prosecutor that do not appear in Rule 3.8).}
rules to govern not only the duties encompassed in the ABA rule but also such important issues as the prosecutor’s dealings with the grand jury, invidious discrimination in selecting prosecution targets. California, on the other hand, included only one of the two basic ethical restrictions originally included in the Model Code, the principle that prosecutors must have probable cause to prosecute. In Alaska and Rhode Island, prosecutors could not ethically issue subpoenas seeking testimony from lawyers about their clients without first obtaining a court order approving the subpoena. But in the vast majority of States, there were no ethical restrictions whatever on such investigative practices.

As these few examples suggest, going into Ethics 2000, the body of State prosecutorial ethics rules was haphazard and failed to reflect a national consensus on appropriate standards for prosecutorial conduct.

2. **The Effect of Ethics 2000 in Increasing Uniformity in State Prosecutorial Ethics Rules**

One explanation for the relative stagnation in state ethics rules on prosecutorial ethics could, of course, be that states did not support the particular provisions adopted by the ABA in the 1990’s — provisions restricting prosecutors from issuing subpoenas to lawyers seeking client information and barring prosecutors from making unnecessary public statements that “heighten public condemnation” of the defendant. Subsequent developments, however, suggest that this

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86. See D.C. R. PROF. CONDUCT R. 3.8(g) (1999) (providing that a prosecutor may not “intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause”).

87. Id. Rule 3.8(a) (providing that in exercising the discretion to investigate or prosecute, a prosecutor shall not “improperly favor or invidiously discriminate against any person”).

88. See CA. R. PROF. CONDUCT R. 5-110 (1999) (providing that a member of the bar in government service shall not prosecute criminal charges when the “member knows or should know that the charges are not supported by probable cause”).

89. See ALASKA R. PROF. CONDUCT R. 3.8(f) (1999) (requiring that the prosecutor “obtain prior judicial approval” to issue a criminal subpoena to a lawyer seeking client information); R.I. R. PROF. CONDUCT R. 3.8(f) (to same effect).


91. The ABA’s ethical restriction on issuing criminal subpoenas to lawyers was adopted in February 1990. This amendment brought Rule 3.8 into conformity with the ABA’s earlier public resolution on the issuance of subpoenas to lawyers, adopted in February of 1988. See ABA MIDYEAR MEETING, AM. BAR ASS’N, REPORT 118 (Feb. 1990). As originally adopted in 1990, ABA Model Rule 3.8(f) included a requirement of prior judicial approval for a subpoena to a lawyer. That part of the rule was deleted by the ABA in August 1995. See AM. BAR ASS’N, CENTER FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 510-12 (2006). This 1995 deletion responded to litigation challenging this part of the rule as outside of the authority of the ethical rules. Id. at 512.

92. The restriction on out-of-court statements by a prosecutor that tend to heighten public condemnation of the accused was adopted in August 1994. See ABA ANNUAL MEETING, AM. BAR ASS’N, REPORT 100 (Aug. 1994).
was not the predominant reason. Following Ethics 2000, state ethics rules were brought into much closer conformity with the ABA's prosecutorial ethics rule — including the provisions on both lawyer subpoenas and pretrial publicity.

The Ethics 2000 process was surprisingly successful in prompting states to move much closer to a model of national conformity with ABA ethical standards, as expressed in Rule 3.8. Because many States had not considered the ABA's interim amendments to Rule 3.8 (adopted in 1990, 1994, and 1995), or had not adopted Rule 3.8 at all, the Ethics 2000 process significantly increased interstate conformity in prosecutorial ethics, even without substantive change in the rule.93

The figures are quite striking, and suggest the influence of Ethics 2000 more generally: Before Ethics 2000, as noted, almost two-thirds of the States followed the old, outdated version of Rule 3.8 from 1983, but had never revisited the rule despite the ABA's subsequent amendments.94 In contrast, by July of 2008, the numbers had completely reversed. Almost two-thirds of the States had put in place up-to-date versions of Rule 3.8 identical to or closely based on the ABA's prosecutorial ethics rule as issued by the Ethics 2000 Commission.95 These figures, moreover, simply reflect changes adopted through July of 2008. The final figures on interstate conformity in prosecutorial ethics rules in the wake of Ethics 2000 will likely be higher, since proposals to update prosecutorial ethics rules are still pending in other States.96

The most significant trend in this regard is the dramatic increase in the number of states that have adopted the ABA's restriction on criminal subpoenas issued to lawyers — the most controversial aspect of the ABA model rule.97 Imposing ethical restrictions on issuing subpoenas to defense counsel reflects valid concerns about the increasing tendency of some prosecutors, particularly at the

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93. The statistics that follow reflect states that have adopted the ABA's version of Model Rule 3.8 as it emerged from the Ethics 2000 process in 2002. The very recent ABA amendments to Model Rule 3.8 (from February of 2008) are not reflected in these figures, and have yet to work their way through the system.

94. See supra note 76 (noting that thirty-one States had a version of Model Rule 3.8 in 1999 but had not updated that rule to reflect subsequent amendments).

95. By July of 2008, fourteen states had in place prosecutorial ethics rules that conformed exactly to the Ethics 2000 version of Model Rule 3.8 (or with such minor differences as to be de minimis). These states included: Arizona, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, and South Carolina. By the same date, seventeen other states had in place prosecutorial ethics rules closely modeled on the Ethics 2000 version of Model Rule 3.8. These states included: Arkansas, Maryland, Minnesota, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, Wisconsin, and Wyoming. Of the remaining states that had completed their Ethics 2000 review and implemented rules changes by July of 2008, only four states chose to leave in place versions of Rule 3.8 that depart substantially from the ABA's Ethics 2000 version of the rule (these states are Alabama, Connecticut, Florida and Mississippi). Most recently, in December of 2008, New York similarly announced its intent to retain a version of Rule 3.8 limited to the two duties encompassed in the old Model Code provision.

96. This year's amendments to ABA Model Rule 3.8, of course, threaten to reverse this trend.

97. In describing the lawyer subpoena rule as "controversial," the Article uses this term in the sense that this ethical duty has been the subject of controversy, rather than to question the validity of the rule.
federal level, to seek evidence directly from criminal defense counsel. Such practices drive a wedge between clients and their lawyers, can compromise client confidentiality, and threaten to create conflicts of interest. Although the Justice Department has an internal rule restricting such subpoenas, it has been adamantly opposed to imposing such restrictions on prosecutors as an ethical matter. Litigation initiated by Department to challenge the lawyer subpoena rule led the ABA in 1995 to amend Model Rule 3.8 to tone down the restriction.

As this history suggests, as an ethical rule, this duty has been controversial. The rule was largely absent from state ethics rules in 1999, when Ethics 2000 began. At that time, only ten states had adopted any ethical rule restricting lawyer subpoenas, while most states had no ethical provision at all limiting such investigative practices. Thus, Ethics 2000 had a significant impact in shaping state ethics rules in the area of lawyer subpoenas, even though the ABA simply preserved its rule intact. Indeed, perhaps the most important influence of Ethics 2000, in the area of prosecutorial ethics, was to induce many more states to adopt a lawyer subpoena rule. The implementation process made clear that although federal prosecutors were still actively working to eliminate the ethical rule limiting lawyer subpoenas, their concerns were apparently not widely shared by prosecutors and judges in the bar leadership on the state level.

Following Ethics 2000, sixteen new states adopted verbatim the ABA’s lawyer subpoena rule, while three new states adopted rules closely modeled on the ABA’s lawyer subpoena rule. At the same time, all ten states that had a lawyer

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98. See, e.g., Whitehouse v. U.S. District Court, 53 F.3d 1349, 1352 (1st Cir. 1995) (“Until recently, federal prosecutors rarely subpoenaed attorneys to compel testimony relating to their clients. This practice changed in the 1980s as the federal government stepped up its fight against organized crime and narcotics trafficking.”).

99. See generally Fred Zacharias, A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys, 76 MINN. L. REV. 917, 921-24 (1992) (discussing issues raised when prosecutors subpoena lawyers to give testimony about their clients, including problems of trust, loyalty, confidentiality, conflicts of interest, and prosecutorial abuse).

100. See generally AM. BAR. ASS’N, supra note 84, at 509-12 (describing the history of the ABA’s lawyer subpoena rule, including federal prosecutors’ legal challenges to the rule). The ABA’s 1995 amendment eliminated a provision in the original rule that had also barred a prosecutor from issuing a subpoena to a lawyer unless “the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.” Id. at 511.

101. These states were: Alaska, Colorado, Louisiana, Massachusetts, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, and Vermont. See Appendix A at 29. A number of these states had adopted their own variations of the model rule, rather than following the ABA’s exact language.

102. Following Ethics 2000, the lawyer subpoena rule was renumbered Model Rule 3.8(e), but it remained the same in substance. See ARIZ., RULES OF PROF’L CONDUCT ER 3.8(e); DEL. RULES OF PROF’L CONDUCT R. 3.8(e); GA. RULES OF PROF’L CONDUCT R. 3.8(f); IDAHO RULES OF PROF’L CONDUCT R. 3.8(e); IND. RULES OF PROF’L CONDUCT R. 3.8(e); IOWA RULES OF PROF’L CONDUCT R. 32:3.8(e); KAN. RULES OF PROF’L CONDUCT R. Rule 226, Rule 3.8(e); MO. RULES OF PROF’L CONDUCT R. 3.8(e); MONT. RULES OF PROF’L CONDUCT R. 3.8(e); N. M. RULES OF PROF’L CONDUCT R. 3.8(e); NEB. RULES OF PROF’L CONDUCT R. 3.8(e); NEV. RULES OF PROF’L CONDUCT R. 3.8(e); N.H. RULES OF PROF’L CONDUCT R. 3.8(e); N.D. RULES OF PROF’L CONDUCT R. 3.8(e); OHIO RULES OF PROF’L CONDUCT R. 3.8(e); WASH. RULES OF PROF’L CONDUCT R. 3.8(e); WIS. RULES OF PROF’L CONDUCT R. SCR 20:3.8(e).

103. See MINN. RULES OF PROF’L CONDUCT R. 3.8(f) (adopting a variation of the ABA’s Model Rule 3.8(e) test that eliminates the requirement that the evidence be unavailable through other sources); N.J. RULES OF
subpoena rule in 1999 retained some variation of the rule, including four states that moved closer to the ABA’s language following Ethics 2000. Thus, by July of 2008, twenty-nine states had in place some rule modeled on the ABA’s lawyer subpoena rule. In North Carolina, in the wake of Ethics 2000, the State expanded its lawyer subpoena rule to also cover search warrants directed at a lawyer seeking client information, a logical extension of the ABA rule.

While the widespread adoption of the lawyer subpoena rule in the states might be explained away on the ground that this practice is simply not a concern of state prosecutors, it is also telling, in this regard, that as part of their Ethics 2000 review many states also adopted the ABA’s provision barring pretrial publicity that tends to “heighten public condemnation” of the accused (a restriction that is, if anything, more likely to come into play at the state level, where prosecutors tend to be elected rather than appointed and are presumably more likely to make public statements about pending cases). This aspect of the Model Rule imposes a higher duty on prosecutors than on lawyers generally, who are ethically barred from making public statements outside of court that threaten to “materially prejudice[ ] an adjudicative proceeding” in which the lawyer is participating. A prosecutor must also refrain from unnecessary out-of-court statements that tend to increase the public opprobrium already attendant to becoming the target of a

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PROF’L CONDUCT R. 3.8(e) (adopting a variation of the ABA’s Model Rule 3.8(e) test that makes steps one and two alternative, rather than cumulative, requirements); S.D. RULES OF PROF’L CONDUCT R. 3.8(e) (adopting a variation of the ABA’s Model Rule 3.8(e) test that defines the coverage in terms of subpoenas that seek information “relating to the lawyer’s representation” of a client, rather than simply “evidence about” a client).

104. Following Ethics 2000, Louisiana, Oklahoma, South Carolina, and Tennessee adopted the ABA’s version of Model Rule 3.8(e) in lieu of the State’s prior rule. See LA. RULES OF PROF’L CONDUCT R. 3.8(e); OKLA. RULES OF PROF’L CONDUCT R. 3.8(e); S.C. RULES OF PROF’L CONDUCT R. 3.8(e); TENN. RULES OF PROF’L CONDUCT R. 3.8(e). It should be noted that Tennessee’s 2002 adoption of the lawyer subpoena rule came as part of the State’s conversion to the Model Rules, rather than its Ethics 2000 review (which is still open). As of July 2008, Colorado, Massachusetts, and Vermont continued to follow the ABA’s 1995 version of Model Rule 3.8(e), while Alaska continued to follow the 1990 version of the ABA rule that included a judicial approval requirement (it should be noted, however, that Alaska, Massachusetts, and Vermont have not completed their Ethics 2000 review). See ALASKA RULES OF PROF’L CONDUCT R. 3.8(f); COLO. RULES OF PROF’L CONDUCT R. 3.8(e); MASS. RULES OF PROF’L CONDUCT R. 3.8(f); VT. RULES OF PROF’L CONDUCT R. 3.8(f). North Carolina retained and expanded the ethical duty concerning lawyer subpoenas. See N.C. RULES OF PROF’L CONDUCT R. 3.8(e) (covering subpoenas and search warrants). Rhode Island continues to follow its own sui generis lawyer subpoena provision. See R.I. RULES OF PROF’L CONDUCT R. 3.8(f).

105. Similar proposals have been made in other States. See, e.g., NEW YORK STATE BAR ASSOCIATION, PROPOSED RULES OF PROFESSIONAL CONDUCT at 153 (February 1, 2008) (proposing that New York adopt an ethical restriction on lawyers subpoenas closely modeled on the ABA’s ethical duty); Memorandum from Randall Difunatorium to Angela Chang, “FW::RRC – 5-110[3.8] – Post 6/13/08 Meeting Materials” (July 11, 2008) (attaching discussion draft of California Rule 3.8 that would add to the California ethics rules a lawyer subpoena rule closely modeled on the ABA’s ethical duty). The New York courts recently rejected this proposed change without comment, while the California proposal is still pending. See infra note 138.

106. See N.C. RULES OF PROF’L CONDUCT R. 3.8(e).

107. It may be that State prosecutors did not oppose adding this requirement. At the State level, prosecutors are less likely to issue subpoenas to defend lawyers because of the different nature of their case load, which tends to be focused on street crime rather than white collar crime.

108. MODEL RULES R. 3.6(a).
criminal charge.\textsuperscript{109} Here, too, the opposition of federal prosecutors to this ethical rule apparently did not significantly deter implementation on the state level.

As of 1999, only three states had adopted the ABA's ethical bar on unnecessary public statements that serve to heighten public condemnation of a defendant.\textsuperscript{110} Following Ethics 2000, twenty-three additional states have so far adopted this duty verbatim as part of their state prosecutorial ethics rule.\textsuperscript{111} This number will likely rise as more states complete Ethics 2000 reviews. These data too clearly suggest that Ethics 2000 had a cognizable influence in prompting states to move toward more standardized ethics rules – even though the ABA did not reform or improve upon that standard. Ironically, the states were successfully induced to move closer together in their prosecutorial ethics standards, even though this success arguably simply perpetuated the inadequacy of the system.

National uniformity in legal ethics is not, of course, an absolute goal. Still, differences in ethical standards between states should ideally be based on conscious decisions, whether based on differences in local practice or on considered disagreements with the ABA's approach, rather than lack of attention to updating a jurisdiction's ethical standards.\textsuperscript{112} In the words of one scholar, while complete uniformity in prosecutorial ethics is neither possible nor desirable, "vast disparities in how prosecutors perform fundamental duties and

\textsuperscript{109} See Model Rules R. 3.8(f) cmt. 6.

\textsuperscript{110} These states were Massachusetts, North Carolina, and Oklahoma. The District of Columbia also followed a variation of the rule. See D.C. Rules of Prof'l Conduct R. 3.8(f) (1999) (adopting an ethical bar on extrajudicial comments by a prosecutor that "serve to heighten condemnation of the accused") and do not serve a legitimate law enforcement purpose).

\textsuperscript{111} As of July 2008, twenty-three additional states had adopted verbatim the portion of Model Rule 3.8(f) that established the prosecutor's duty concerning unnecessary condemnationary public statements. See Ariz. Rules of Prof'l Conduct ER 3.8(f); Ark. Rules of Prof'l Conduct R. 3.8(e); Colo. Rules of Prof'l Conduct R. 3.8(g); Del. Rules of Prof'l Conduct R. 3.8(f); Idaho Rules of Prof'l Conduct R. 3.8(f); Ind. Rules of Prof'l Conduct R. 3.8(f); Iowa Rules of Prof'l Conduct R. 32:3.8(f); Kan. Rules of Prof'l Conduct 226, Rule 3.8(f); La. Rules of Prof'l Conduct R. 3.8(f); Md. Rules of Prof'l Conduct R. 3.8(e); Mo. Rules of Prof'l Conduct R. 3.8(f); Mont. Rules of Prof'l Conduct R. 3.8(f); Nev. Rules of Prof'l Conduct R. 3.8(f); N.H. Rules of Prof'l Conduct R. 3.8(f); N.D. Rules of Prof'l Conduct R. 3.8(g); Okla. Rules of Prof'l Conduct R. 3.8(f); Pa. Rules of Prof'l Conduct R. 3.8(e); R.I. Rules of Prof'l Conduct R. 3.8(e); S.C. Rules of Prof'l Conduct R. 3.8(f); S.D. Rules of Prof'l Conduct R. 3.8(f); Va. Rules of Prof'l Conduct R. 3.8(f); Wyo. Rules of Prof'l Conduct R. 3.8(e); see also N.C. Rules of Prof'l Conduct R. 3.8(g) (preserving the duty); Okla. Rules of Prof'l Conduct R. 3.8(f) (same); Mass. Rules of Prof'l Conduct R. 3.8(g) (same). In addition, by 2008, Illinois had adopted a variation of the ABA provision as well, though not as part of its Ethics 2000 review (which is still open). See Ill. Rules of Prof'l Conduct R. 3.8(e) (2008) (barring unnecessary public statements that "pose a serious and imminent threat of heightening public condemnation of the accused"). This brings to twenty-six the total number of states with such a provision as of July 2008.

\textsuperscript{112} In Illinois, for example, after noting that many lawyers practice in more than one state, that legal transactions are often interstate in nature, and that clients and lawyers will benefit from using consistent ethics terminology, the Committee reviewing the Illinois ethics rules urged that the ABA Model Rules be adopted absent a "compelling reason" for rejecting a particular provision. See ISBA/CBA [Illinois State Bar Association/Chicago Bar Association] Joint Committee on Ethics 2000, Revised Final Report at 6 (Jan. 8, 2004, as revised April 1, 2004); see also id. at 8 ("The value of national uniformity and consistency in ethics rules is clear. The practice of law is no longer a purely local matter.").
responsibilities suggest a need for guidance.113 In this sense, Ethics 2000 was successful in its goal of increasing uniformity, even if the process proved disappointing in the degree to which the prosecutorial ethics rules so implemented remained incomplete.

Some conclusions can be drawn from this information. The fact that most states have proved willing to closely follow Model Rule 3.8 in the wake of Ethics 2000 (including its lawyer subpoena rule) suggests that the earlier lack of conformity in state prosecutorial ethics rules was more likely a function of inattention to updating state ethics rules than disagreement with the ABA’s approach. While this bodes well for the ABA’s leadership in ethics—including in the sometimes sensitive area of prosecutorial ethics—it also suggests that proceeding by way of a series of piece-meal amendments to the Rules is likely to lead to the very problems with inconsistency that led the ABA to initiate Ethics 2000. For whatever reason, it clearly is not easy to induce state bars to undertake the rules amendment process on a rolling basis.114 This suggests that in terms of maximizing the likelihood of state implementation of reforms, appointing a Task Force to review Model Rule 3.8 as a whole is preferable to a series of individual amendments to portions of the rule.

Beyond this, the lessons to be drawn from these figures are ambiguous. With twenty-twenty hindsight, it is possible, as some commentators have implied, that the ABA missed a significant opportunity in Ethics 2000 to make meaningful changes to Rule 3.8, and that the states would have been willing to follow suit.115 On the other hand, within a few short years, the political climate has become so much more receptive to the problem of prosecutorial misconduct that it is hard to recall how poor the prospects seemed for reforming the prosecutorial ethics rules in 1999.116 It may be that a more ambitious Ethics 2000 review would have backfired, for precisely the same reasons that the ABA exercised forbearance.117

114. This evidence of state inertia points to one clear conclusion: Given the hurdles to opening the state amendment process, it is critical to take advantage of the open, but narrow, window in the states still considering their rules in light of Ethics 2000 to add the new ABA duty on wrongful convictions to the mix (new Model Rules 3.8(g) and (h)).
115. See Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor at 151 (2007) (suggesting that the Ethics 2000 process was a “lost opportunity”).
116. See, e.g., Green, Prosecutorial Ethics As Usual, supra note 9, at 1575 (noting that the Ethics 2000 Commission “had good reason to conclude that strengthening the [prosecutorial ethics] rule would be an unprofitable expenditure of time, energy, and good will because the Commission’s personnel and process made it unlikely that prosecutors and defense counsel would accept its proposed additions, and because the inevitable firestorm would potentially eclipse its other work”).
117. The degree to which the states are willing to reopen or expand their rules amendment process to add new ABA Model Rules (g) and (h) (concerning wrongful convictions) will be a telling sign of whether the climate for reform of the prosecutorial ethics rules has meaningfully changed.
B. ETHICS 2000'S EFFECT IN INSPIRING STATE-SPECIFIC REFORMS OF RULE 3.8

The other notable effect of Ethics 2000 – and an even more intriguing development – has been thoughtful innovations the process it has sparked in certain leadership states. In the wake of Ethics 2000, bar leaders in states like Wisconsin, New York, and North Carolina have shown the political will not simply to adopt the ABA Model Rules, where appropriate, but also to supplement, clarify and strengthen Rule 3.8 with new ethical duties and refinements. State prosecutors may well be more amenable to participation in constructive ethics reform than the Justice Department's highly public opposition might suggest.

Some of the more notable recent state-led innovations in prosecutorial ethics are described briefly below, organized by topic area.

1. A PROSECUTOR’S ETHICAL DUTIES IN NEGOTIATING GUILTY PLEAS

The prosecutor’s special ethical responsibility in connection with negotiating guilty pleas is, as noted at the outset of this Article, one of the main omissions from the ABA Model Rule 3.8.118 In negotiating plea agreements with criminal defendants, it is generally understood that a prosecutor does not stand on the same ethical footing as a lawyer for an ordinary party, who is subject to very limited ethical duties (essentially, the duty not to make deliberate misrepresentations).119 A prosecutor has some greater ethical obligations in terms of the conduct and candor we expect. Yet the specific duties the prosecutor has in plea negotiations are not spelled out in the rule.

As part of its Ethics 2000 review, Wisconsin adopted a thoughtful supplemental ethics provision that sheds light on one aspect of the prosecutor’s ethical duties in plea negotiations – the problem of reaching plea agreements with unrepresented defendants. The state’s provision was apparently inspired by its incisive review of ABA Model Rule 3.8(c), one of the most confusing provisions in the ABA rule, which concerns a prosecutor’s duty not to seek waivers of important pretrial rights from an accused who is not represented.120

Strictly read, the black letter rule seems to prohibit prosecutors from dealing directly with pro se defendants121 – a conclusion that would pose a significant

118. See, e.g., Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor at 149 (2007) (noting that the prosecutor who withholds exculpatory information from the defendant while negotiating a plea to the offense “arguably is engaging in unethical conduct”).
119. See MODEL RULES R. 4.1(a) (providing that in the course of representing a client a lawyer shall not “knowingly . . . make a false statement of material fact or law to a third person”).
120. See MODEL RULES R. 3.8(c) (providing that a prosecutor shall “not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing”).
121. See, e.g., Ben Kempinen, An Unrepresented Person, WISCONSIN LAWYER, Vol. 78, No. 10 (October 2005) (observing that “if the rule is read to prohibit seeking waivers of any procedural right - however important - the rule appears to flatly prohibit plea negotiations with unrepresented defendants. By definition, seeking a
problem for prosecutors dealing with misdemeanor cases—though the commentary disavows any such intent. More broadly, Model Rule 3.8(c) fails to comprehensively address the role a prosecutor may ethically play in dealing with unrepresented defendants. This presents not only the narrow question of waiving preliminary hearings, but the much broader problem of negotiating case resolutions with defendants who lack counsel (including those who have waived rights to counsel or cannot afford to retain a lawyer).

In place of ABA Model Rule 3.8(c), and to supplement that rule, Wisconsin drafted a thoughtful and comprehensive rule on the general question of the ethical limits of a prosecutor's conduct when negotiating with unrepresented persons. Under the Wisconsin rule, a prosecutor may discuss a matter with an unrepresented defendant, provide information about settlement, and negotiate a resolution that may include a waiver of constitutional and statutory rights, but the prosecutor may not provide "legal advice" to the person or assist the person in the completion of court forms such as guilty plea forms. Wisconsin also added an ethical rule expressly providing that a prosecutor, whether during an investigation or a court proceeding, must inform an unrepresented person of the prosecutor's role and interest in the matter.

By taking on an important and nuanced issue not addressed in Model Rule 3.8, the Wisconsin bar authorities used the Ethics 2000 review process to read the model rule carefully and improve upon it. The Wisconsin amendment is a positive contribution to prosecutorial ethics and serves as an excellent example of the value of ground-up reform. Many additional ethical questions about plea bargaining remain.

2. A PROSECUTOR'S ETHICAL DUTY IN INVESTIGATING CRIMES

In the same period that the ABA's Ethics 2000 review was ongoing, Massachusetts adopted an important ethical rule that belongs in this list because it addresses another critical area missing from ABA Model Rule 3.8: The prosecutor's duty in investigating crime. In particular, the Massachusetts rule

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122. See MODEL RULES R. 3.8 cmt. 2 (noting that the bar on seeking waivers of important pretrial rights "does not apply . . . to an accused appearing pro se with the approval of the tribunal").
123. See WIS. R. PROF. CONDUCT SCR 20:3.8(d).
124. Id., SCR 20:3.8(c).
125. See, e.g., NDAA, NATIONAL PROSECUTION STANDARDS, § 43.4 (2d ed. 1991) (a prosecutor “should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges”); id., §43.5 (a prosecutor “should not file charges for the purpose of obtaining from a defendant a release of potential civil claims” against the prosecutor, police or others); cf. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION STANDARDS, Standard 3-3.9(g) (3d ed. 1993) (a prosecutor “should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress” absent court approval).
expresses the important principle that a prosecutor should not “intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused.”\textsuperscript{126} This key principle was reflected in the ethical considerations that formed part of the \textit{Model Code},\textsuperscript{127} but was not included in the ABA’s \textit{Model Rule}.

This duty reflects an important concrete expression of the prosecutor’s duty not simply to seek convictions but to seek justice. The prosecutor’s duty in investigating crime goes beyond that of an ordinary advocate. As a general matter, a lawyer is not ethically required to uncover evidence to help the opposing party, merely to refrain from unlawfully obstructing the other side’s access to evidence or unlawfully destroying evidence.\textsuperscript{128} She has no obligation to follow investigative leads that will generate evidence to help her trial adversary. The prosecutor’s role is quite different. Her obligation to investigate fairly and impartially is an important aspect of a prosecutor’s role-specific ethics.

In generating this ground-up improvement to the prosecutorial ethics rules, Massachusetts insightfully concluded that it is important to spell out this principle in the black-letter of Rule 3.8 (particularly given the evident relationship between this duty and the prosecutor’s central duty to produce exculpatory evidence). Undoubtedly, there are other important ethical limitations on the prosecutor’s investigative conduct that are likewise missing from the ABA Model Rule, and would benefit from similar study.\textsuperscript{129}

\textbf{3. A PROSECUTOR’S ETHICAL DUTIES WITH RESPECT TO EXCULPATORY EVIDENCE}

The post-Ethics 2000 period also generated a notable state-initiated improvement to one of the most established aspects of Model Rule 3.8 – the duty to provide exculpatory evidence under Rule 3.8(d) – through a similarly thoughtful state review process. One problem with the ABA rule is that although it requires a prosecutor to produce to the defendant any evidence or information that tends to negate guilt, by its terms, the rule limits the ethical duty to information “known” to the prosecutor.\textsuperscript{130} Exculpatory evidence existing in the case file may not be personally known to the individual prosecutor responsible for handling the case at trial. Yet the rule fails to expressly require the prosecutor to make a diligent 

\textsuperscript{126} See MA. RULES OF PROF’L CONDUCT R. 3.8(j); see also D.C. RULES OF PROF’L CONDUCT R. 3.8(d) (to same effect).

\textsuperscript{127} See ABA MODEL CODE OF PROF’L RESPONSIBILITY, EC 7-13 (1969) (providing that “a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor’s case or aid the accused”).

\textsuperscript{128} See MODEL RULES R. 3.4(a).

\textsuperscript{129} See, e.g., D.C. RULES OF PROF’L CONDUCT R. 3.8(a) (providing that in exercising discretion to investigate or prosecute, a prosecutor shall not “improperly favor or invidiously discriminate against any person”); \textit{id.}, R. 3.8(g) (laying out the ethical principles that govern a prosecutor’s relationship with the grand jury).

\textsuperscript{130} MODEL RULES R. 3.8(d) (2008).
search for such material in the hands of the prosecution and the police.\textsuperscript{131}

In the wake of the state’s recent experience with some notorious cases of prosecutorial misconduct, North Carolina concluded that the ABA’s current rule does not sufficiently express the prosecutor’s ethical obligations with respect to exculpatory evidence.\textsuperscript{132} The state chose to rethink and substantively improve its version of Model Rule 3.8(d) by requiring not simply disclosure of known exculpatory evidence but also a “reasonably diligent inquiry” by the prosecutor to locate such evidence.\textsuperscript{133}

This addition to Rule 3.8 by North Carolina, too, reflects a beneficial, ground-up state reform that promises to improve the prosecutorial ethics rules. The same process could fruitfully be brought to other key questions that remain unanswered in Rule 3.8(d) – such as the critical question what it means to “timely” disclose exculpatory information in connection with plea negotiations\textsuperscript{134}

4. A PROSECUTOR’S ETHICAL DUTY IN EXERCISING CHARGING DISCRETION

Finally, another important state reform effort took on an issue highlighted in my 1999 Report – the degree of evidence that should ethically be required to file and pursue criminal charges.\textsuperscript{135} Though the Ethics 2000 Commission was not convinced to change the ABA’s rule, the state review process that followed in its wake convinced an important body of bar leaders that the ABA’s “probable cause” standard for prosecuting criminal offenses, embodied in Model Rule 3.8(a), sets too low an ethical floor.\textsuperscript{136} While these New York bar leaders were

\begin{itemize}
\item \textsuperscript{131} See, e.g., Angela J. Davis, \textit{Arbitrary Justice: The Power of the American Prosecutor} at 150 (2007) (noting that Model Rule 3.8(d), concerning exculpatory evidence, “does not require prosecutors to make efforts to discover such information from anyone”).
\item \textsuperscript{133} Id. At the same time it made this amendment, North Carolina expanded the scope of its version of Rule 3.8 to create an ethical duty to timely disclose to the defense “all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions.” Compare Model Rules R. 3.4(c) and (d) (noting the general obligation of every lawyer, in adversary proceedings, not to “knowingly disobey an obligation under the rules of a tribunal” and to “make reasonably diligent effort to comply with a lawful discovery request by an opposing party”).
\item \textsuperscript{134} See, e.g., Peter A. Joy, Kevin C. McNunigal, \textit{Disclosing Exculpatory Material in Plea Negotiations}, 16 Crim. Just. 41, 42 (Fall 2001) ("The ethics rule makes no specific mention of plea negotiations or guilty pleas. The language of the rule, especially its requirement of 'timely disclosure,' certainly mandates that prosecutors disclose exculpatory material during plea negotiations if not sooner. Yet, secondary sources, such as treatises, do not typically discuss the rule in the context of plea negotiations, and we can find no authority that applies the rule in that context.").
\item \textsuperscript{135} See Appendix A at 15 (noting that probable cause is a very minimal requirement”).
\item \textsuperscript{136} See NEW YORK STATE BAR ASSOCIATION, PROPOSED RULES OF PROFESSIONAL CONDUCT at 153 (February 1, 2008); compare D.C. RULES OF PROF’L CONDUCT R. 3.8(c) (providing that a prosecutor shall not “prosecute to
ultimately not successful in convincing the New York courts to change that State’s ethics rule, the New York bar’s consensus on the importance of clarifying the charging standard is a notable development.\textsuperscript{137}

As adopted by the ABA, Model Rule 3.8(a) builds an important ethical principle – the minimum ethical threshold for a prosecutor to charge a defendant criminally – around the concept of “probable cause.” This legal concept, frequently used in constitutional law,\textsuperscript{138} is generally understood to mean a relatively limited and informal requirement of evidentiary proof, well below the proof required to support conviction at trial.\textsuperscript{139} Other bodies of standards reflect the conclusion that the probable cause rule fails to express the appropriate ethical standard.

The ABA’s Criminal Justice Standards, for example, set a higher bar than probable cause, providing that a prosecutor should not initiate, cause to be initiated, or permit the continued pendency of criminal charges “in the absence of sufficient admissible evidence to support a conviction.”\textsuperscript{140} This standard, the commentary emphasizes, is substantially higher than probable cause.\textsuperscript{141} The United States Attorneys Manual, similarly, views probable cause as a minimal requirement that is simply a “threshold consideration,” the absence of which absolutely bars prosecution.\textsuperscript{142} Federal prosecutors are cautioned that to initiate prosecution, the prosecutor should be convinced not simply that probable cause exists but that the “admissible evidence will probably be sufficient to obtain and sustain a conviction.”\textsuperscript{143} State prosecutors, similarly, are guided by a standard

\textsuperscript{137} The New York courts recently chose, without comment, to retain the language of the State’s prior version of Rule 3.8, simply changing the numbering of the rule. See www.nycourts.gov/press/pr2008_7.shtml (press release and link to revised New York ethics rules). The court system did not explain why it chose to make no substantive changes in the prosecutorial ethics rule, as the bar leadership had recommended.

\textsuperscript{138} Probable cause is the constitutional standard under the Fourth Amendment for obtaining a search warrant and for detaining a defendant prior to trial. See U.S. CONST. amend. IV. The same standard is applied by the federal courts at a preliminary hearing to decide whether to allow charges to proceed to trial. See FED. R. CRIM. P. 5.1(a).

\textsuperscript{139} See, e.g., Brinegar v. United States, 338 U.S. 160, 175 (1949) (noting that the substance of the varied definitions of probable cause as articulated by the Supreme Court is simply “a reasonable ground for belief of guilt”). Probable cause is understood to be somewhere above “bare suspicion” but below the evidence that would justify conviction. \textit{Id.; see also}, e.g., Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (noting that probable cause is a “practical, nontechnical” conception); Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973) (emphasizing the “broad” gap between the concepts of probable cause and proof beyond a reasonable doubt).

\textsuperscript{140} ABA \textsc{Standards for Criminal Justice, Prosecution Function and Defense Function Standards}, Standard 3-3.9(a) (3d ed. 1993).

\textsuperscript{141} See \textit{id.}, Commentary at 73 (noting that a probable cause standard is “substantially less than sufficient admissible evidence to sustain a conviction”).

\textsuperscript{142} \textsc{United States Attorneys’ Manual}, Section 9-27.200 (B).

\textsuperscript{143} \textit{id.}, Section 9-27.220(A); \textit{see also id.} at 9-27.220(B) (emphasizing that in addition to the existence of admissible evidence sufficient to sustain a conviction, “no prosecution should be initiated unless the government believes that the person probably will be found guilty by an unbiased trier of fact”).
issued by the National District Attorneys Association that a prosecutor should file “only those charges which he reasonably believes can be substantiated by admissible evidence at trial.”

These standards suggest a consensus view about the ethics of criminal charging that is not reflected in current Model Rule 3.8. Had it been accepted, for example, the proposal in New York would have allowed the filing of criminal charges based on probable cause but made it unethical to prosecute at trial criminal charges not supported by “evidence sufficient to establish a prima facie showing of guilt.” This pair of standards is incorporated in the District of Columbia ethical rules. This example provides yet more evidence that leadership states are beginning to engage in thoughtful reform efforts directed at the prosecutorial ethics rules, reforms which may in turn influence other states and national bar authorities.

While each of the amendments discussed above reflects a valuable reform, a final innovation arising out of the Ethics 2000 implementation process deserves separate consideration: The proposal of the New York State bar to add a provision spelling out the prosecutor’s ethical duty to help rectify wrongful convictions of innocent defendants. It was this inspired and ambitious reform—which originated in an idea generated by New York City’s local bar association—that ultimately led to the ABA’s recent successful action to amend Model Rule 3.8. This reflects the paradigmatic “ground-up” innovation in prosecutorial ethics, and suggests a new model for rules reform discussed below.

III. A NEW MODEL OF RULES REFORM: ADDING THE PROSECUTOR’S ETHICAL DUTY TO RECTIFY WRONGFUL CONVICTIONS

In February of 2008, when the ABA adopted black-letter rules that elucidate the prosecutor’s ethical duties when faced with evidence that a defendant was wrongly convicted, this effort arose directly out of the New York Bar Association’s thoughtful review of its own ethics rules in the wake of Ethics 2000

144. NDAA, NATIONAL PROSECUTION STANDARDS, Standard 43.3 (2d ed. 1991X).

145. The New York proposal would provide that a prosecutor shall not: (1) institute or maintain a charge when the prosecutor knows or it is obvious that the charge is not supported by probable cause; or (2) prosecute a charge at trial when the prosecutor knows or it is obvious that the charge cannot be supported by evidence sufficient to establish a prima facie showing of guilt. See NEW YORK STATE BAR ASSOCIATION, PROPOSED RULES OF PROFESSIONAL CONDUCT at 153 (February 1, 2008).

146. See D.C. RULES OF PROF’L CONDUCT R. 3.8(b) (making it unethical to file in court or maintain a charge the prosecutor knows is not supported by probable cause); id. R. 3.8(c) (making it unethical to prosecute to trial a charge the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt).

147. Ironically, as noted above, the New York courts recently issued a new rule, effective April of 2009, which simply repeats (and renumbers) the prosecutor’s ethical duties expressed in the old version of New York’s ethics rules. The new version of New York Rule 3.8 does not include the prosecutor’s duty with respect to wrongful convictions, nor does it reflect any of the ethical duties added to the Model Rules by the ABA since 1969. See supra note 137.
and the initiative taken by bar leaders and academics to expand these reforms to the national level. This amendment is notable, not only because it reflects the first step taken by the ABA in many years to add a meaningful, timely, and useful duty to Rule 3.8, but also because it suggests a new model of rules reform. While the New York courts chose not to undertake any substantive reform of its version of the prosecutorial ethics rule, the New York State Bar’s proposal proved influential on a national level.

As noted, this was a ground-up reform that began at the state and local level and influenced the ABA—the opposite course from the top-down process of general ethics reform. Within the ABA, as well, the new rule took a notably different course than most ethics rules. The change was proposed by the Criminal Justice Section, rather than the ABA’s dedicated ethics committee, reflecting a new and positive approach to amending prosecutorial ethics. By allowing the proposal to percolate through the ranks of the criminal justice system, it gave supporters time to build consensus, refine the rules based on a breadth of experience among state and federal prosecutors, defense counsel and judges, and develop a solid ground of support for the proposed change.

Both the substance and process of this amendment—a striking departure from the Ethics 2000 experience—are worth exploring.

A. ADDING A NEW DUTY TO REMEDY WRONGFUL CONVICTIONS

The new duties recently added to ABA Model Rule 3.8 concern the prosecutor’s duty when faced with evidence that a criminal defendant has been wrongfully convicted. To the extent evidence suggesting a defendant’s lack of guilt surfaces during a case, this circumstance was addressed by the existing rule: A prosecutor has an ethical duty, under Rule 3.8(d), to “timely” disclose to the defense evidence and information that “tends to negate the guilt” of the defendant. The problem not addressed, until the recent amendment, was the prosecutor’s ethical duty when she discovers exculpatory evidence after a defendant’s conviction—whether the evidence concerns a case prosecuted by the prosecutor herself, by someone in her office, or by a prosecutor in another jurisdiction.

148. Proposed changes to the ABA’s model ethics rules are generally within the ambit of the ABA’s Standing Committee on Ethics and Professional Responsibility, which is the body within the ABA tasked with responsibility to develop model national ethics standards. See http://www.abanet.org/cpr/committees/scepr.html.

149. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, Report 105B to the House of Delegates (February 2008) (proposing a resolution, approved by the ABA in February of 2008, to adopt as amendments Model Rule 3.8(g) and (h), addressing a prosecutor’s ethical duties when faced with evidence that either suggests or establishes that a convicted defendant did not commit the crime charged).

150. See MODEL RULES R. 3.8(d).

151. To the extent this ethical dilemma fell within the general rubric of a lawyer’s duties when she comes to learn that she has presented false evidence to a tribunal, this duty by its terms continues only to the “conclusion
The Supreme Court had suggested that it is a prosecutor’s ethical duty “to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” However, this duty was not embodied in the ethics rules. The ethical obligation to “timely” disclose exculpatory evidence failed to clearly address the matter. (Indeed, the prosecutor’s duty to “timely” disclose exculpatory evidence is ambiguous more generally). Nor did commentary to Rule 3.8(d) address the situation in which a prosecutor later acquires evidence suggesting a convicted defendant’s innocence. At the same time, contemporaneous news coverage highlighted for the bar leadership the very real problem of wrongful convictions of innocent defendants.

A host of recent cases initiated by Innocence Projects involving exonerations based on DNA evidence demonstrated the fallibility of the system, and the very real possibility that innocent defendants had been wrongfully convicted. Several influential newspaper exposes, based on studies of thousands of criminal cases, similarly highlighted the problem of prosecutorial misconduct, including a number of cases in which innocent defendants were later found to have been wrongfully convicted. A comprehensive study by the Center for Public Integrity in 2003 revealed, similarly, that prosecutorial misconduct was endemic, and that the most common form of prosecutorial misconduct was the failure to disclose exculpatory evidence. These studies made clear that the problem of wrongful convictions of innocent persons was very real, and highlighted the of the proceeding.” Model Rules R. 3.3(a), (c) and Comment [13] (noting that the rule sets a “practical time limit on the obligation to rectify false evidence”). Moreover, this duty seems to contemplate simply a duty to correct false evidence the lawyer herself has sponsored, and by its terms only concerns offering evidence before a tribunal. See id. cmt. 1 (“This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.”).

152. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976). In Imbler, the prosecutor had written to the governor while the convicted defendant was on death row awaiting execution, disclosing additional evidence discovered after trial. This evidence later formed the basis for a federal court’s reversal of the defendant’s conviction on habeas based on prosecutorial misconduct. Id. at 411-16. Nonetheless, the Supreme Court found the prosecutor immune from liability in civil damages, reasoning that permitting a damages claim in these circumstances would discourage prosecutors from exercising their ethical duty to inform the appropriate authorities following a conviction of evidence that casts doubt on a defendant’s guilt. Id. at 427 n.25; see also, e.g., Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992) (noting that prosecutors’ failure to disclose exculpatory evidence discovered after the defendants’ conviction but while their appeal was pending “raises very serious questions” under the ethics rules).

153. See generally Barry Scheck, et al., Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted 246 (2000) (discussing numerous cases in which convicted defendants were proved by DNA evidence to have been innocent). The efforts of Innocence Projects to reverse wrongful convictions of innocent defendants are ongoing.

154. See generally Angela J. Davis, The Legal Profession’s Failure to Discipline Unethical Prosecutors, 36 Hofstra L. Rev. 275, 280 (2007) (describing two major newspaper studies by reporters at the Chicago Tribune and the Pittsburgh Post-Gazette, based on analysis of thousands of criminal cases, revealing numerous instances of prosecutorial misconduct).

155. See, e.g., Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 123-41 (2007) (summarizing study results, which revealed that courts took action to remedy convictions based on prosecutorial misconduct in 2,000 of the 11,452 criminal cases studied by the Center for Public Integrity in
responsibility of prosecutors, as "ministers of justice," to help remedy such miscarriages of justice.156

The ABA responded by adopting amendments to Rule 3.8 to add two new provisions concerning a prosecutor's ethical duties, depending on the strength of the after-acquired evidence and the jurisdiction of conviction: The first provision imposes disclosure and/or investigative duties when a prosecutor is faced with "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted;"157 the second imposes a higher ethical duty to "seek to remedy" a conviction when a prosecutor "knows of clear and convincing evidence establishing" that a defendant prosecuted in her jurisdiction was convicted of an offense the defendant did not commit.158 Extensive commentary explains and elaborates upon these duties.159

The prosecutor's ethical duty to remedy wrongful convictions — the first substantive change to the ABA's prosecutorial ethics rule in many years — promises to become one of the most important provisions in the current rule.160

which claims of prosecutorial misconduct were raised). See generally Center for Public Integrity, http://www.publicintegrity.org/default.aspx.

156. AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, Report 105B to the House of Delegates at 5 (February 2008) ("The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the 'duty of prosecutors to seek justice, not merely to convict.'").

157. See MODEL RULES R. 3.8(g) (added February 2008). This provision provides in full:

(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,

(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) 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.

158. See MODEL RULES R. 3.8(h) (added February 2008). This provision provides in full:

(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.

159. See MODEL RULES R. 3.8 cmt. 7-9. The ABA also amended the introductory commentary to Rule 3.8 to make clear that the prosecutor's duty as a minister of justice includes the duty to see "that special precautions are taken to prevent and to rectify the conviction of innocent persons"). Id. cmt. 1 (amended February 2008).

160. See, e.g., AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, Report 105B to the House of Delegates at 4 (February 2008) ("The obligation to avoid and rectify convictions of innocent persons, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors.").
B. CHANGING THE PROCESS OF PROSECUTORIAL ETHICS REFORM

Turning from the substance of this new ethical duty to the secret of the ABA’s success in achieving this reform, the process is notable in two respects: First, these changes were proposed not by the Ethics Committee, the entity within the ABA responsible for developing model ethics rules and issuing ethics opinions, but by the Criminal Justice Section, which represents lawyers and judges working in criminal justice. The Criminal Justice Section has been highly successful in developing an influential body of Criminal Justice Standards that provide guidance in various areas of criminal practice, such as the prosecution and defense function, post-conviction relief, criminal discovery, sentencing, guilty pleas, and a wide range of other criminal justice topics. Through this process, the Section has successfully brought together different segments of the criminal bar, including judges, prosecutors, defense counsel, and academics, in positive and constructive discussions to agree on standards of conduct to govern criminal practice, in a thoughtful setting outside the charged environment of particular criminal litigation. In 2008, for example, the Section issued a brand new set of Standards, addressing Prosecutorial Investigations.

The break-through reflected in the recent Rule 3.8 amendments – the “aha” moment – occurred when the leadership of the Section realized that it could use the same collaborative process to seek reform of the ABA’s prosecutorial ethics rule. While the ABA’s Criminal Justice Standards are often cited in court decisions, they are not part of the ethics rules. As such, the standards of conduct they propose are influential but are not enforceable. Disciplinary proceedings against individuals cannot be instituted for violating a standard of conduct set forth in the Criminal Justice Standards. In proposing to add Model Rules 3.8(g) and (h) to the ABA’s ethics rules, the Section consciously decided to proceed by seeking an amendment to the ethics rules rather than simply issuing a new standard. This represents an insightful new process, one which brings the Section’s success in generating consensus on the Criminal Justice Standards to

161. The full name of this body is the Standing Committee on Ethics and Professional Responsibility.
162. See generally http://www.abanet.org/crimjust/standards/home.html (listing and providing tables of contents for the different sets of ABA Criminal Justice Standards) In the interest of full disclosure, the author of this Article previously served as the Chair of the ABA Criminal Justice Standards Committee, and was a reporter for both the Discovery and Guilty Plea Standards. I am also currently one of many members of the Criminal Justice Section’s Ethics, Gideon and Professionalism Committee, the work of which is discussed infra.
163. See ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS ON PROSECUTORIAL INVESTIGATIONS, Preamble (February 2008) (“These Standards are intended as a guide to conduct for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility.”).
164. See, e.g., AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, Report 105B to the House of Delegates at 4 (February 2008) (noting the importance of including the prosecutor’s duty concerning wrongful convictions in the Model Rules, since the ABA Standards Relating to the Administration of Justice “are not intended to be enforced”).
165. Id.
the process of reforming the prosecutorial ethics rules.

The important difference – critical to Rule 3.8 in particular – is that unlike the general membership of the Ethics 2000 Commission, or the ABA’s Ethics Committee, which is focused on lawyers’ ethics, the Criminal Justice Section is a dedicated group of lawyers who practice in criminal law and are committed to improving the process of criminal justice in the United States.166 By bringing this prosecutorial ethics proposal up through the Criminal Justice Section’s committee process,167 it ensured that the details of the proposed amendment would be thoroughly vetted by numerous prosecutorial and defense groups, both to refine the rule and build support among diverse constituencies (including the prosecutors who will be regulated by the new duty).168 In another development critical to the successful adoption of the Rule 3.8 amendments – in direct contrast to the Ethics 2000 experience – the leadership of the Criminal Justice Section built on its existing relationship with federal prosecutors to convince Department of Justice representatives not to oppose the amendments they sought.169

Second, another striking fact about the successful amendments to add Model Rules 3.8(g) and (h) is that they found their roots in state and local reform initiatives, rather than descending from above in a national initiative originated by the ABA. The proposal originated in a thoughtful report issued by members of the New York City bar association,170 which was in turn adopted as part of the Ethics 2000 review process within the New York State bar.171 This “ground-up” reform process from within the criminal justice community reflected a positive dialogue between State and national bar authorities that proved far more successful than past efforts in amending the prosecutorial ethics rules. State and local judges, prosecutors, defense lawyers, and academics have shown the will

166. In making its proposal, the Section also drew upon the Ethics Committee’s advice, and the Ethics Committee was a co-sponsor of the proposed amendments.

167. See Stephen A. Saltzburg, Changes to Model Rules Impact Prosecutors, 23 CRM. JUST. 1, 13 (Spring 2008) (“Both the black letter of the rule and the additions to the comments were the work of the Ethics, Gideon and Professionalism Committee, cochaired by Bruce Green and Ellen Yaroshefsky.”).

168. See id. at 4 (noting that the Criminal Justice Section “drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership” to refine the language of the rule).

169. Id. at 13 (noting that the Department of Justice considered asking the ABA House of Delegates to postpone a vote on the proposed amendments to add Model Rules 3.8(g) and (h), but were convinced not to fight the recommendation after long talks between Department representatives, ABA Criminal Justice Section Chair Stephen Saltzburg, and Professor Bruce Green to explain the language of the rule). Professor Saltzburg has noted that the “spirit of cooperation” reflected in these talks gave him hope “that the ABA and the DOJ might be moving forward together in a joint effort to improve our criminal justice system.” Id.

170. See id. at 13 (describing the origin of proposed Rules 3.8(g) and (h), which “had their genesis in a 2006 Report” issued by the New York City bar association); see also Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York 69 (2006).

171. See New York State Bar Association, Proposed Rules of Professional Conduct at 154 (February 1, 2008) (proposing to add to the New York ethics rules new Rules 3.8(h) and (g), concerning the prosecutor’s duty to help remedy wrongful convictions).
and risen to the challenge of reforming prosecutorial ethics rules, where the Ethics 2000 Commission could not.

In short, while the timing of these proposed changes – in the wake of scandals over the conviction of innocent defendants – obviously created a powerful impetus for reform, the process of reforming Rule 3.8 was also important to the success of the recent prosecutorial ethics amendments at the ABA level. These efforts are ongoing, and promise to bear further fruit in the near future.

IV. CONCLUSION

Clearly, the broad support needed to amend the prosecutorial ethics rule had not sufficiently materialized in 1999 to lend the Ethics 2000 Commission the confidence to undertake reform of Model Rule 3.8. But circumstances are now different. Given the widespread publicity over some recent and notorious cases of prosecutorial misconduct, there is now a window in which the public and the legal community appear open to meaningful change. The public is more aware than ever of the fallibility of prosecutors. Meaningful reform in the prosecutorial ethics rule may finally be within reach, if ethics regulators can learn the lessons from Ethics 2000 – that there is the political will among many leaders within the criminal justice community to tackle the rules governing prosecutorial ethics, but a patient, persistent, and inclusive process is critical.

172. See supra notes 1 to 3 (and accompanying text).

NIKI KUCKES, ESQ.
MILLER, CASSIDY, LARROCA, & LEWIN, L.L.P.

December 1, 1999

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† Eds. Note: The font styles, heading styles, and citation formatting of this document have been updated to conform with the Journal’s standards. In all other respects, this document is identical to the report as it was presented to the ABA Ethics 2000 Commission.

1. This report is submitted at the request of the Commission, and is not intended to be an advocacy piece on behalf of any particular constituency. Rather, the report seeks to present a balanced analysis of the issues, taking into account bodies of standards issued by other organizations, as well as by the ABA. The author is currently serving as the Chair of the Criminal Justice Standards Committee of the ABA Criminal Justice Section.
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INTRODUCTION

Rule 3.8 of the ABA Model Rules of Professional Conduct (hereinafter Model Rules) sets forth specific ethical restrictions which apply to a “prosecutor in a criminal case.” Like any lawyer, a prosecutor is subject to general ethical rules such as Rule 3.3 on candor to the tribunal, Rule 3.4 on fairness to opposing party, Rule 3.5 on trial decorum, and so on. In addition, Rule 3.8 contains a number of restrictions that reflect the “special responsibilities” the prosecutor has because of the unique role that he or she plays in the justice system as the representative of the people in a criminal prosecution.

The need for special ethical rules governing the conduct of prosecutors is based on the principle that it is the prosecution’s role to represent a sovereign whose goal is “not that it shall win a case, but that justice shall be done.” Most, if not all, state jurisdictions have an ethics rule specific to the responsibilities of a prosecutor. Many of these are modeled on ABA Rule 3.8. Some have adopted Rule 3.8 with modifications, some notable examples of which are discussed below. Others are based on the comparable provisions that were contained in the ABA’s Model Code of Professional Responsibility (hereinafter Model Code).

More generally, the subject of prosecutorial misconduct has received great attention in academic writing over the last fifteen years. While some commentators have questioned whether specific obligations should be removed from (or added to) Rule 3.8, the concept of ethical rules governing the conduct of prosecutors in criminal cases is accepted as one of a number of important tools to

2. Berger v. United States, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2003) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”) (hereinafter MODEL RULES); see generally Bruce A. Green, Why Should Prosecutors ‘Seek Justice’?, 26 FORDHAM URB. L.J. 607 (1999) (emphasizing the special role and power of the prosecutor, and corresponding duty to “seek justice”).
discourage and punish prosecutorial misconduct. Indeed, a principal criticism of such ethics rules is not that they exist, but that they are too rarely applied in practice to discipline prosecutors who have committed unethical conduct.

Two recent developments are likely to focus increased attention on Rule 3.8. First, Congress recently adopted a statute making federal prosecutors subject to the state ethical rules in the states where they practice (the "McDade Amendment"). This has already focused the attention and considerable resources of the Department of Justice on the development, amendment, and application of state ethics rules governing prosecutors. Second, in recent years, Supreme Court decisions and other developments have placed increasing restrictions on courts' ability to use other sanctions to deter and punish prosecutorial misbehavior. This puts more pressure on the use of ethics rules to bring prosecutors' behavior into line with ethical expectations. While both of these developments principally affect federal prosecutors, who are in the minority of prosecutors nationwide, ethical rules affecting federal prosecutions have frequently become a significant focus of the debate over ethical rules, both because of the prominence and multi-state nature of federal prosecutions, and the voice of the Justice Department as an advocate. Thus, it is likely that these developments will increase attention to and reliance on Rule 3.8 (as well as the other ethical Rules applicable to criminal prosecutions).

This Report is divided into three parts. Part I explains the current context of Rule 3.8. It briefly explains the history of the Rule, then details recent developments which affect the Rule as a whole, including the recent passage of the McDade Amendment, as well as developments affecting application of alternative sanctions. Part II analyzes the extent to which each of the seven specific provisions of Rule 3.8 have been adopted by the states, describes alternative versions some states have adopted, and details criticisms of each provision (and recommendations concerning possible solutions thereto). Part III discusses potential additions to Rule 3.8, including additional provisions adopted by some states or contained in model codes or other bodies of standards.

Notably, while some commentators have suggested that ethical rules such as Rule 3.8 be broadened to address a fuller range of prosecutorial misconduct, the

4. See, e.g., BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14.1 at 13-1 (West 1998) (the existing sanctions are either too frequently employed or ineffective to punish or prevent misconduct" by prosecutors); Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 94 (1995) ("[C]ommentators have uniformly lamented the lack of effective discipline of prosecutors who violate standards of professional conduct."); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 693 (1987) (disciplinary charges against prosecutors have been "brought infrequently under the applicable rules" and "meaningful sanctions have been applied only rarely").
5. See, e.g., Rory K. Little, Who Should Regulate the Ethics of Federal Prosecutors, 65 Fordham L. Rev. 355, 358 n. 8 (1996) (noting that federal prosecutors comprise a "group whose significance is perhaps belied by their relatively small numbers").
author is not aware of any formal proposal to this effect that has been put on the table by any of the major groups representing interests in the criminal justice system. The Justice Department, which has in past years sought amendments to Rule 3.8, has not submitted formal comments to the Commission seeking or proposing any changes to this Rule. Nor have any recent proposals been put forward by the ABA's Criminal Justice Section, the ABA's Litigation Section, or organized groups such as the National District Attorneys Association (NDAA), the National Association of Criminal Defense Lawyers (NACDL), and the National Legal Aid and Defenders Association (NLADA).

Given the high degree of flux in this area caused by recent political and legal developments, and the lack of formal proposals for change from those affected, this Report suggests that the Commission should not lightly undertake significant changes to Rule 3.8 at this time. While the Rule may benefit from an overall review, such a review would be best undertaken over a period of time with participation from the ground up from all of the groups involved. This will best ensure acceptance among prosecutors, defense counsel and the courts of any resulting amendments (and adoption in the states of any new Rules that may result).

PART I: CONTEXT OF THE DEBATE OVER ETHICAL RESTRICTIONS ON PROSECUTORS

A. HISTORY OF RULE 3.8

A version of ethical Rule 3.8 has been in existence, in some form, for many years now. It was part of the ABA's original Model Code of Professional Responsibility, and in 1983, when the Model Code was replaced by the ABA Model Rules of Professional Conduct, Rule 3.8 was expanded. Over the years since that time, several provisions have been added, and some amendments made, but the Rule has remained largely intact. Now, as a result of a number of developments, detailed below, Rule 3.8 has become the subject of increased scrutiny in the criminal justice community, as well as of particular interest in academic writings.

B. MOST RECENT DEVELOPMENTS: THE MCDADE AMENDMENT

The congressional passage, in October of 1998, of the McDade Amendment was a critical development related to Rule 3.8. This Amendment ended a
decade-long dispute between the Justice Department and ethics authorities over the extent to which federal prosecutors are subject to state ethical rules and disciplinary procedures. This Amendment resolves this question by providing explicitly that federal prosecutors must follow "State laws and rules... governing attorneys" in each state where such prosecutors practice. However, the McDade Amendment leaves open a number of questions as to how this principle should be implemented, and promises to spark additional debates about the content of specific state ethical rules such as Rule 3.8.

THE DECADE-LONG DEBATE: For the last ten years, the Justice Department has taken the position that "state bar associations may not... impose sanctions on a government attorney who has acted within the scope of his federal responsibilities." The Department has also instituted a number of court cases seeking declarations to this effect. ABA and states ethics authorities (and a number of courts) have taken the position, on the contrary, that the same standards of professional conduct have governed, and should govern, federal prosecutors as govern other lawyers.

THE "NO-CONTACT" RULE: As the Commission is aware, this debate became focused in recent years around the "no-contact" rule contained in ABA Model Rule 4.2, which bars an attorney from communicating with a person known to be represented by counsel without that counsel's consent. This rule has been widely adopted in the States. The Department of Justice has taken the position that Rule 4.2 (and state rules modeled thereon) do not apply to federal prosecutors because it would unduly interfere with their federal law enforcement function.

Consistent with this position, following the 1989 issuance of a memorandum (the "Thornburgh Memorandum") espousing this position, in 1994 the Department adopted regulations expressly exempting federal prosecutors from the application of such state "no-contact" rules. These regulations, however, were declared invalid in United States ex rel. O'Keefe v. McDonnell Douglas Corp., on

8. 28 U.S.C. § 530B.
10. See, e.g., United States v. Colorado Supreme Court, 871 F. Supp. 1328 (D. Colo. 1994) at 1328 (suit by U.S. Attorney seeking declaration that Colorado Rules 3.3(d) and 3.8(f) may not be applied to federal prosecutors); Stern v. Supreme Judicial Court for Mass., 184 F.R.D. 10, 11 (D. Me. 1999) (suit by U.S. Attorney seeking declaration that Massachusetts Rule 3.8(f) may not be applied to federal prosecutors).
11. See, e.g., In re Doe, 801 F. Supp. 478, 488 (D.N.M. 1992) ("It is difficult to accept that today... federal prosecutors can no longer function, as they have until now, if required to adhere to the same ethical standards as other attorneys.").
12. See, e.g., United States v. Ferrara, 54 F.3d 825, 827 (D.C. Cir. 1995) (government argued that Supremacy Clause precludes state authorities from taking disciplinary action against Department of Justice prosecutor under state ethics rules modeled on Rule 4.2); In re Doe, 801 F. Supp. at 484-86 (D.N.M. 1992) (same).
13. 28 C.F.R. § 77.1 et seq. (1997). These regulations established a federal "no-contacts" rule applicable to "attorneys for the government" (defined to include federal prosecutors) and stated that this rule was intended to "preempt and supercede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government". 28 C.F.R. § 77.12 (1997).
the ground that they had been issued “without valid statutory authority.”\textsuperscript{14} The Thornburgh Memorandum had been the subject of similar criticism.\textsuperscript{15}

THE ATTORNEY SUBPOENA ISSUE: Meanwhile, a similar dispute between Justice Department representatives and state ethics authorities emerged in connection with the application of another ABA ethics rule, Rule 3.8(f), which places ethical restrictions on a prosecutor’s issuance of subpoenas to attorneys.\textsuperscript{16} As under Rule 4.2, the Department of Justice took the position, based on various legal doctrines, that state ethics rules based on Rule 3.8(f) (and federal court rules based on such state ethics rules) may not properly be applied to federal prosecutors. This issue was litigated in a number of cases, with mixed results.\textsuperscript{17}

PASSAGE OF THE McDADE AMENDMENT: Thus, in 1998, when the McDade Amendment was being considered, the issue whether federal prosecutors could be disciplined under state ethical rules was very much in dispute. The McDade Amendment resolved this debate by specifying that attorneys for the federal government must follow state ethical rules. It added a new provision to Title 28 concerning “ethical standards for attorneys for the Government,” applicable to Justice Department attorneys who conduct criminal or civil enforcement proceedings and to Independent Counsels and their employees. This new law, which went into effect April 19, 1999, provides that:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.\textsuperscript{18}

Consistent with this provision, the few court decisions that have been issued since the enactment of Section 530B have upheld the application of rules based on state ethics rules to federal prosecutors.\textsuperscript{19}

JUSTICE DEPARTMENT REGULATIONS: As further directed by the McDade Amendment, the Justice Department issued a set of interim regulations to

\begin{itemize}
  \item \textsuperscript{14} 132 F.3d 1252, 1257 (8th Cir. 1998).
  \item \textsuperscript{15} See, e.g., In the Matter of Doe, 801 F. Supp. 478 (D.N.M. 1992).
  \item \textsuperscript{16} MODEL RULES R. 3.8(f).
  \item \textsuperscript{17} Cases that ruled against the Department’s position included: Whitehouse v. U.S. District Court for the District of Rhode Island, 53 F.3d 1349, 1351-52 (1st Cir. 1995) (federal court rule based on state ethics rule 3.8(f) may be validly applied to federal prosecutor’s issuance of both grand jury and trial subpoenas); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (federal court rule based on predecessor to state ethics Rule 3.8(f) may properly be applied to federal prosecutor).
  \item Cases that upheld the Department’s position included: Baylson v. Disciplinary Bd. of Supreme Court of Pa., 975 F.2d 102, 104 (3d Cir. 1992) (neither state ethics rule modeled on Rule 3.8(f) nor federal court rule based on that state rule may be applied to federal prosecutors).
  \item \textsuperscript{18} 28 U.S.C. § 530B.
  \item \textsuperscript{19} See United States v. Colorado Supreme Court, 189 F.3d 1281, 1283 (10th Cir. 1999) (federal court rule based on state ethics rule 3.8(f) may be enforced against federal prosecutors); Stern v. Supreme Judicial Court for Mass., 184 F.R.D. 10, 19 (D. Mass. 1999) (same).
\end{itemize}
implement Section 530B. These regulations have gone into immediate effect pending the process of notice and comment. These regulations seek to resolve a number of questions not directly addressed by the Amendment itself. Because the regulations have been in effect for only six months, it is too early to know now these rules will work in effect, or to predict all of the issues that may be raised.

**Subsequent Congressional Efforts:** Moreover, since the passage of the McDade Amendment, there have been other congressional efforts to repeal or amend the law. Almost immediately upon passage of the law, Senator Hatch introduced a bill (S. 250) that would have overturned the McDade Amendment and delineated, as a matter of federal law, certain categories of punishable conduct for federal prosecutors, to be enforced by the Attorney General. In March of this year, as the McDade Amendment was about to become effective, Senator Hatch introduced another bill (S. 755) that would have delayed its effective date by another six months. Neither of these have been enacted.

In the same month, March 1999, the Senate Judiciary Committee sponsored a hearing on “The Effect of State Ethics Rules on Federal Law Enforcement,” at which Deputy Attorney General Eric Holder gave testimony predicting that the McDade Amendment would impede law enforcement. Mr. Holder raised, in particular, the potential effects of state ethics rules such as Rule 4.2 (on contacts with represented witnesses), Rule 3.3(d) (on ex parte communications with the court), and Rule 3.8(f) (on issuing subpoenas to attorneys). Meanwhile, in April of this year, Senator Leahy introduced his own bill (S. 855) to replace the McDade Amendment with yet another provision. In more recent months, however, none of these proposed measures have seen action in Congress.

**Effect on the Model Rules:** Finally, the effect of the McDade Amendments on the ABA’s *Model Rules* has not yet fully emerged. On the discrete issue of Rule 4.2, a compromise was reached following the adoption of that Amendment, which among other things, had the practical effect of disapproving the substantive “no contacts” rule contained in the Justice Department’s regulations in favor of state “no contact” rules. In July of this year, this Commission reached agreement with the ABA Standing Committee on Ethics and Professional Responsibility to recommend changes to Rule 4.2 to address the Department’s concerns. At the same time, the basic stand-off between the Justice Department and ethics authorities continued, as the Department would not agree to sign off on the proposed changes to Rule 4.2.21

While the Department has raised a spectre of issues for federal law enforcement stemming from the application of state ethical rules to federal

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21. The proposed amendments to Rule 4.2 were drafted so as to meet the Department’s concerns while preserving the principle that Rule 4.2 (and other state ethical rules) should apply to federal prosecutors.
prosecutors,\textsuperscript{22} the Department has not at this point sought to achieve change through proposing specific changes to the ABA's \textit{Model Rules}. The effects that all of the above developments may have for Rule 3.8 (as adopted by the ABA and implemented in the states) are not yet clear.

\textbf{CONCLUSION:} In sum, while there has been a great deal of recent legislative, regulatory and judicial activity in the area of state ethical supervision of federal prosecutors, the complex issues surrounding these matters are still in flux. While, as noted, federal prosecutors are in the minority of prosecutors nationwide, the application of state ethics rules to federal prosecutors is of critical importance because it promises to shift an increasing national focus to the content of state ethics rules such as Rule 3.8 that apply to prosecutors. The Department of Justice has already sought, in connection with the passage of the McDade Amendment, to highlight certain state ethical rules which it believes unduly impede federal law enforcement.\textsuperscript{23} The next phase of this debate may well focus on amending these state ethical rules, as well as the \textit{Model Rules} themselves. It is too early to predict exactly how these developments will unfold.\textsuperscript{24}

\section*{C. OTHER DEVELOPMENTS: ALTERNATIVE SANCTIONS}

In other developments, Model Rule 3.8 is also increasing in importance because of the growing restrictions on other means of ensuring ethical conduct by prosecutors in connection with criminal prosecutions. While there are a number of mechanisms, other than state ethical rules, that address prosecutorial misconduct, many of these are increasingly limited in application because of legal or practical limitations. This makes the use of such alternative sanctions ineffective (and often inappropriate) as a comprehensive means of deterring and punishing unethical conduct. For example:

\textbf{REVERSAL OF CONVICTION:} Courts have, in some cases, reversed convictions in criminal cases because the prosecutor engaged in misconduct in connection with the trial. The Supreme Court has made clear, however, that reversal may not be used primarily or simply to "discipline the prosecutor—and warn other prosecu-
tors" that they must cease engaging in such misconduct. Rather, even if a prosecutor has engaged in clear misconduct, the Court has held that reversal of a conviction is not appropriate if the misconduct created error harmless to the outcome of the trial.25

DISMISSAL OF INDICTMENT: Similarly, while the courts in some cases, have dismissed indictments for prosecutorial misconduct occurring before the grand jury, the Supreme Court has made clear the very high standard for such dismissals, at least in the federal courts. A federal district court "exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant." This requires a showing that the misconduct "substantially influenced the grand jury's decision to indict" or at least caused "grave doubt" as to whether the grand jury's decision was free from the influence of the misconduct.26

EXCLUSION OF EVIDENCE: Exclusion of evidence at a criminal trial has also been used by some courts as a sanction to punish prosecutorial misconduct in connection with obtaining evidence against the defendant. Again, however, commentators have noted that "the case law in many jurisdictions favors the admission of the evidence obtained in violation of ethical rules, regardless of the nature or severity of the ethical breach."27 As with other sanctions related to the criminal conviction itself, courts are reluctant to reward the defendant, who may be guilty of the charged offense, on the basis of the prosecutor's misconduct—unless that misconduct clearly went directly to the prosecutor's ability to obtain that conviction.

CONTEMPT OF COURT AND OTHER JUDICIAL SANCTIONS: A court may also cite a prosecutor for contempt of court as a punishment for unethical conduct. The Supreme Court has suggested that such an alternative might be used, for example, instead of dismissal of an indictment.28 In practice, however, contempt reportedly is "rarely invoked as a sanction for prosecutorial misconduct."29 Similarly, while the Supreme Court has also suggested such other judicial sanctions as "chastising the prosecutor in a published opinion,"30 in practice, even when such opinions are issued by the courts, "only rarely does the court identify the offending prosecutor by name."31 This significantly reduces the effectiveness of

25. United States v. Hasting, 461 U.S. 499, 504 (1983); see also United States v. Young, 470 U.S. 1, 14 (1985) (where timely objection is not made, prosecutorial misconduct during trial provides grounds for reversal of conviction only where misconduct creates "plain error").
28. See Bank of N.S., 487 U.S. at 263.
29. See GERSHMAN, PROSECUTORIAL MISCONDUCT, supra note 4, at 13-13.
30. Bank of N.S., 487 U.S. at 263.
31. GERSHMAN, PROSECUTORIAL MISCONDUCT, supra note 4, at 13-15.
such sanctions.

**Civil Lawsuits:** While a defendant may bring suit against a prosecutor seeking damages for prosecutorial misconduct under the federal civil rights laws, 28 U.S.C. § 1983, such suits are unlikely to prevail in most cases because, under Supreme Court decisions in this area, a prosecutor has absolute immunity from civil suit in the exercise of his or her duties as an advocate, and qualified immunity in connection with the exercise of his or her other official duties.

**Self-Regulation:** There are also internal rules and mechanisms in place by which prosecutors' offices regulate the conduct of their own attorneys. For example, the Justice Department has established the Office of Professional Responsibility, an independent office set up to investigate and impose appropriate discipline on federal prosecutors in response to complaints of prosecutorial misconduct. While such self-regulation is a critical element and should be encouraged, courts have not accepted the argument that such mechanisms are sufficient, standing alone, as a means of ensuring ethical conduct by prosecutors.

**Hyde Amendment.** Finally, with respect to federal prosecutors, the congressional passage in 1997 of the Hyde Amendment, which allows defendants who are acquitted at trial to recover their attorney's fees in limited circumstances, was also intended as a means of deterring prosecutorial abuses. To prevail, a defendant must show, among other things, that the prosecution was "vexatious, frivolous or in bad faith," a high standard for recovery. A recent report indicates that only seventy-six petitions have been filed in the last two years, and that criminal defendants have so far prevailed seven times.

In sum, while prosecutors are subject to a variety of other disciplinary mechanisms that seek to deter unethical conduct, there are many limitations on these alternative sanctions. This makes state ethical rules—and the Model Rules providing guidance for such state rules—an increasingly important means of ensuring ethical conduct by this part of the bar. Indeed, the Supreme Court has expressly justified placing restrictions on other remedies, such as civil suits against prosecutors seeking damages, by citing the existence of state ethical rules that punish prosecutorial misconduct. These trends focus increasing attention on Rule 3.8 and related ABA ethical rules.

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34. See, e.g., Stern v. Supreme Judicial Court for Mass., 184 F.R.D. 10, 19 (D. Mass. 1999) (rejecting argument that attorney-client relationship is "adequately protected by the Department of Justice guidelines for attorney subpoenas," and noting that passage of McDade Amendment "signals Congress' belief that the [DOJ] guidelines are insufficient").
36. See Sam Skolnik, Little to Hyde After 2 Years, LEGAL TIMES, at 1 (Nov. 29, 1999).
37. See Imbler, 424 U.S. at 429.
PART II: ANALYSIS OF EXISTING PROVISIONS OF RULE 3.8

RULE 3.8(A) - PROBABLE CAUSE REQUIREMENT

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; ... 

ABA Model Rule 3.8(a) concerns the prosecutor’s basic obligation not to pursue unfounded charges. It is one of two requirements that were originally contained in the Model Code of Professional Responsibility. A number of other states have variations of this Rule that are similar, but not identical. A number of states, and other model rules, have adopted comparable ethical rules that address certain issues not explicitly addressed in Model Rule 3.8(a), which the Commission may want to consider adding to the Rule or its Commentary. These include:

1. DUTY NOT TO CONTINUE PROSECUTION OF UNFOUNDED CHARGES

Certain states’ rules spell out, in express terms, that the obligation not to “prosecute” charges not supported by probable cause encompasses not only the obligation not to initiate such charges but also the obligation not to continue to prosecute such charges if the evidence should change.

California, for example, provides that where a prosecutor who is responsible for prosecuting criminal charges “becomes aware that those charges are not supported by probable cause,” the prosecutor must “promptly so advise the court.

38. MODEL CODE DR 7-103(A), provided that:

A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

39. See ALA. RULES OF PROF'L CONDUCT R. 3.8(a); ALASKA RULES OF PROF'L CONDUCT R. 3.8(a); AZ. RULES OF PROF'L CONDUCT R. 42, ER 3.8(a); ARK. RULES OF PROF'L CONDUCT R. 3.8(a); Colo. RULES OF PROF'L CONDUCT R. 3.8(a); CT. RULES OF PROF'L CONDUCT R. 3.8(a); DEL. RULES OF PROF'L CONDUCT R. 3.8(a); Fla. RULES OF PROF'L CONDUCT R. 4-3.8(a); IDAHO RULES OF PROF'L CONDUCT R. 3.8(a); Ind. RULES OF PROF'L CONDUCT R. 3.8(a); Kan. MODEL RULES OF PROF'L CONDUCT R. 226, R. 3.8(a); La. RULES OF PROF'L CONDUCT R. 3.8(A)(a); Md. RULES OF PROF'L CONDUCT R. 16-812, R. 3.8(a); Mass. RULES OF PROF'L CONDUCT R. 3.8(a); Mich. RULES OF PROF'L CONDUCT R. 3.8(a); Min. RULES OF PROF'L CONDUCT R. 3.8(a); Miss. RULES OF PROF'L CONDUCT R. 3.8(a); Mo. RULES OF PROF'L CONDUCT R. 3.8(a); Mt. RULES OF PROF'L CONDUCT R. 3.8(a); Nev. RULES OF PROF'L CONDUCT R. 3.8; N.H. RULES OF PROF'L CONDUCT R. 3.8(a); N.J. RULES OF PROF'L CONDUCT R. 3.8(a); N.M. RULES OF PROF'L CONDUCT R. 16-308(A); N.C. R. BAR R. 3.8(a); 5 OKLA. ST. Cm'. 1, APPX 3-A, R. 3.8 (hereinafter Okla. R. 3.8(a)); Pa. R.P.C. R. 3.8(a); R. I. RULES OF PROF'L CONDUCT R. 3.8(a); S.C. RULES OF PROF'L CONDUCT R. 3.8(a); S. D. RULES OF PROF'L CONDUCT R. 3.8(a); UTAH RULES OF PROF'L CONDUCT R. 3.8(a); Vt. RULES OF PROF'L CONDUCT R. 3.8(a); Wa. RULES OF PROF'L CONDUCT R. 3.8(a); W. Va. RULES OF PROF'L CONDUCT R. 3.8(a); Wis. RULES OF PROF'L CONDUCT, SCR 20: R. 3.8(a); Wyo. RULES OF PROF'L CONDUCT R. 3.8(a).
in which the criminal matter is pending." The D.C. Rules also address this circumstance, providing that a prosecutor may not "file in court or maintain" a charge that the prosecutor knows is not supported by probable cause. The Kentucky rules address this situation by providing that a prosecutor "at all stages of a proceeding" shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

The ABA's Prosecution Function Standards, similarly, spell this out expressly, providing that:

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.

RECOMMENDATION: The principle that the prosecutor should neither institute nor permit the continued pendency of charges that are not supported by probable cause is an important one that should be spelled out in the Rule or its Commentary. This clarification could be accomplished by a minor amendment in the language of Rule 3.8(a) to delete the word "prosecuting" and substitute language similar to that in the D.C. rules, to the effect that a prosecutor shall refrain from "filing in court or maintaining" a charge that the prosecutor knows is not supported by probable cause. Alternatively, the Commentary could be amended to make clear that the Rule's reference to refraining from "prosecuting" is intended to encompass all of these concepts.

2. KNOWLEDGE OR "REASON TO KNOW"

Some states extend Model Rule 3.8 to go beyond the prosecutor's actual "knowledge" that probable cause does not exist to cover, more broadly, situations in which the prosecutor "should have known" or where it "was obvious" that probable cause did not exist.

California, for example, prohibits prosecuting criminal charges that the prosecutor "knows or should know" are not supported by probable cause. Illinois similarly prohibits a prosecutor from instituting charges where the lawyer knows "or reasonably should know" that the charges are not supported by probable cause. Hawaii, Maine and New York bar a prosecutor from instituting criminal charges where the lawyer knows "or it is obvious" that the charges are

40. CAL. RULES OF PROF'L CONDUCT R. 5-110.
41. D.C. RULES OF PROF'L CONDUCT R. 3.8(b).
42. KY. RULES OF PROF'L CONDUCT SCR 3.130(3.8(a)).
43. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, STANDARD 3-3.9(a) (3d ed. 1993).
44. CAL. RULES OF PROF'L CONDUCT R. 5-220.
45. ILL. RULES OF PROF'L CONDUCT R. 3.8(a), direct quote.
not supported by probable cause.46

RECOMMENDATION: An amendment to broaden the "knowledge" requirement of Rule 3.8(a) is not advisable. Were the Rule to be changed to add a "reason to know" provision, it would be inconsistent with the general approach of the Model Rules, which use "knowledge" to mean "actual knowledge of the fact in question."47 It is notable that similar language included in the ABA Model Code of Professional Responsibility (which also covered the filing of charges where "it is obvious" that probable cause does not exist) was deleted by the ABA in adopting the Model Rules.48 While some states have carried over such provisions into their current ethical rules, such an amendment would inject an undesirable degree of uncertainty into the Rule.

3. HIGHER STANDARD THAN PROBABLE CAUSE

The ABA's Prosecution Function Standards both adopt the "probable cause" standard for initiating criminal charges and also contain a higher standard than mere "probable cause" for maintaining such charges. After citing the "probable cause" standard, noted above, they go on to provide further that:

A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.49

Similarly, the National Prosecution Standards, issued by the National District Attorneys Association, a major prosecutor's organization, also set a higher bar than the "probable cause" standard espoused by Model Rule 3.8(a). These prosecutorial standards call upon a prosecutor to file "only those charges which he reasonably believes can be substantiated by admissible evidence at trial."50

A similar rule has been adopted in at least one state. The District of Columbia rules provide, in addition to the "probable cause" standard, that a prosecutor also may not "Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt."51

RECOMMENDATION: The Commission should consider adopting an additional subsection to Rule 3.8, comparable to the above rules, that would bar a prosecutor from instituting or maintaining criminal charges when he or she does not believe that they can be substantiated by admissible evidence at trial.

46. HAWAII RULES OF PROF'L CONDUCT R. 3.8(a); ME. CODE PROF. RESPONSIBILITY R. 3.7(i)(1); N.Y CODE PROF. RESPONSIBILITY DR 7-103(A) (same).
47. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, at xviii (3d ed. 1995).
48. See MODEL CODE DR 7-103(A).
50. NDAA, NATIONAL PROSECUTION STANDARDS, § 43.3 (2d ed. 1991).
51. D.C. RULES OF PROF'L CONDUCT R. 3.8(c).
The "probable cause" standard is a very minimal requirement. In certain circumstances, it would allow a prosecutor to pursue charges, for example, even if he or she knew that the existing evidence—and, more importantly, the evidence that could be admitted at trial—would not be sufficient to sustain a conviction. For these reasons, a broader rule has been endorsed by the ABA and by a major prosecutors' association.

If the Commission were to adopt such a rule, it would require a change to the black letter Rule. One option would be to adopt a new subsection, to be inserted after subsection (a), that would add language (combining the D.C. rule and the ABA Prosecution Function Standards) to the effect that a prosecutor should "refrain from prosecuting to trial a charge that the prosecutor knows is not supported by admissible evidence sufficient to support a conviction." This would allow a slightly lower standard for the filing of initial charges (based on probable cause only), but would make clear a prosecutor's obligation to dismiss charges as soon as it becomes clear to him or her that the admissible evidence will be insufficient to sustain the defendant's conviction.

4. Application to Unfounded Grand Jury Indictments

An unusual variation on Rule 3.8 is contained in a comment to the Texas version of this rule, which provides that it does not apply:

to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, so long as he believes the grand jury could reasonably conclude that some charge is proper.52

To the extent that this may suggest that Texas would allow a prosecutor to present to the grand jury an indictment that a prosecutor did not know to be supported by probable cause, most rules do not contain any such limitation.

Indeed, a number of states have specifically addressed this issue by specifying, in contrast to the Model Rule language, that a prosecutor is barred from "instituting or causing to be instituted" charges not supported by probable cause (as opposed to "refrain from prosecuting," the phrase used in the Model Rule).53

The ABA Prosecution Function Standards, similarly, cover not only instituting but also "causing to be instituted" criminal charges that lack probable cause.54 Such language clearly covers the situation where a prosecutor has "caused" the grand jury to issue the charges.

52. TX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09(a), cmt. (2).
53. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 5-110; HAWAII RULES OF PROF'L CONDUCT R. 3.8; ILL. RULES OF PROF'L CONDUCT R. 3.8(b); ME. RULES OF PROF'L CONDUCT R. 3.7(i)(1).
54. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 3-3.9(a) (3d ed. 1993).
RECOMMENDATION: Only one state has raised this issue as a question in controversy, which suggests that the existing Rule is clear enough on this point. However, the concept that Model Rule 3.8 covers not only the institution of criminal charges through the filing of an information, which is within the prosecutor’s control, but also through a grand jury indictment, which is not directly issued by the prosecutor, is an important one. If the Commission feels that the existing language ("prosecuting") or the proposed modification thereto ("filing in court or maintaining") are not clear enough to cover charges issued by the grand jury, this point could be clarified in Commentary.

5. THREATENING UNSUPPORTED CRIMINAL CHARGES

At least one state, Texas, has a version of Rule 3.8 that covers not only prosecuting but also "threatening to prosecute" a charge that the prosecutor knows is not supported by probable cause. The ABA Guilty Plea standards take a similar position in the context of plea negotiations, providing that:

In connection with plea negotiations, the prosecuting attorney should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges or the prosecuting attorney has no good faith intention of pursuing those charges.

The American Law Institute’s Model Code of Pre-Arraignment Procedure, section 350.3(3)(a) similarly bars a prosecutor from "charging or threatening to charge the defendant with a crime not supported by facts believed to be provable."

RECOMMENDATION: The issue of "threatening" unsupported charges should not be dealt with in the context of amending Rule 3.8(a), which simply addresses the more limited issue of the evidentiary basis for filing and prosecuting charges. Rather, such an issue is distinct enough that, if the Commission were to consider it, it would be preferable to do so in the context of a new proposed subsection of the Rule. This issue should therefore be considered, if at all, as part of an overall review and expansion of Model Rule 3.8, a subject addressed in Section III, infra.

RULE 3.8(B) - DEFENDANT'S RIGHT TO COUNSEL

The prosecutor in a criminal case shall: . . .

55. Tx. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09(a).
56. ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, STANDARD 14-3.1(h) (3d ed. 1999) (emphasis added).
(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;...

Like the above rule, ABA Model Rule 3.8(b) has been widely adopted in the states, and is an ethical rule in at least thirty-four jurisdictions.\textsuperscript{57} The ABA Prosecution Function Standards also contain a similar rule.\textsuperscript{58}

This rule has largely gone without remark, and only one issue of any note appears in variations of this provision contained in the state ethical rules:

1. LIMITATION TO CUSTODIAL INTERROGATION

Two states, Texas and Wyoming, would not generally require the prosecutor to undertake efforts to ensure the defendant has been advised of the right to counsel, but would impose such a duty in connection with questioning an unrepresented person who is accused of a criminal offense.

Texas requires only that the prosecutor “refrain from conducting or assisting in a custodial interrogation of an accused unless” the prosecutor has made reasonable efforts “to be assured” that the accused has been advised of “any” right to counsel.\textsuperscript{59} Commentary to the Texas rule states that this does not forbid the “lawful questioning” of any person who has “knowingly, intelligently and voluntarily waived the rights to counsel and to silence,” nor would it apply with respect to questioning a defendant who is not entitled to appointed counsel and has not expressed a desire to retain counsel.\textsuperscript{60}

Wyoming provides, similarly, that “prior to interviewing an accused or prior to counselling a law enforcement officer with respect to interviewing an accused,” the prosecutor must make reasonable efforts to assure that the accused has been

\textsuperscript{57} ALA. RULES OF PROF'L CONDUCT R. 3.8(1)(b); ALASKA RULES OF PROF'L CONDUCT R. 3.8(b); ARIZ. RULES OF PROF'L CONDUCT ER 3.8(b); ARK. RULES OF PROF'L CONDUCT R. 3.8(b); Colo. RULES OF PROF'L CONDUCT R. 3.8(b); CONN. RULES OF PROF'L CONDUCT R.3.8(b); DEL. RULES OF PROF'L CONDUCT R. 3.8(b); IDAHO RULES OF PROF'L CONDUCT R. 3.8(b); IND. RULES OF PROF'L CONDUCT R. 3.8(b); KAN. RULES OF PROF'L CONDUCT R. 3.8(b); KY. RULES OF PROF'L CONDUCT, SCR 3.130(3.8(b); LA. RULES OF PROF'L CONDUCT R. 3.8(A)(b); MD. RULES OF PROF'L CONDUCT R. 3.8(b); Mass. RULES OF PROF'L CONDUCT R. 3.8(b); Mich. RULES OF PROF'L CONDUCT R. 3.8(b); Miss. RULES OF PROF'L CONDUCT R. 3.8(b); Minn. RULES OF PROF'L CONDUCT R. 3.8(b); Miss. RULES OF PROF'L CONDUCT R. 3.8(b); MO. RULES OF PROF'L CONDUCT 3.8(b); MONT. RULES OF PROF'L CONDUCT 3.8(b); NEV. RULES OF PROF'L CONDUCT, R. 3.8(a); N.H. RULES OF PROF'L CONDUCT R. 3.8(b); N.J. RULES OF PROF'L CONDUCT, RCP 3.8(b); N.C. RULES OF PROF'L CONDUCT R. 3.8(b); N.D. RULES OF PROF'L CONDUCT R. 3.8(b); OKLA. RULES OF PROF'L CONDUCT R. 3.8(b); PA. RULES OF PROF'L CONDUCT R. 3.8(b); R.I. RULES OF PROF'L CONDUCT R. 3.8(b); S.C. RULES OF PROF'L CONDUCT R. 3.8(b); S. D. RULES OF PROF'L CONDUCT R. 3.8(b); UTAH RULES OF PROF'L CONDUCT R. 3.8(b); UT RULES OF PROF'L CONDUCT R. 3.8(b); VT. RULES OF PROF'L CONDUCT R. 3.8(b); WASH. RULES OF PROF'L CONDUCT R. 3.8(b); W.VA. RULES OF PROF'L CONDUCT R. 3.8(b); WIS. RULES OF PROF'L CONDUCT, SCR 20:3.8(c).

\textsuperscript{58} See, STANDARDS FOR CRIMINAL JUSTICE, § 3-3.10(a) (1993) ("A prosecutor should not fail to 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.").

\textsuperscript{59} TEX. RULES OF PROF'L CONDUCT R. 3.09(b)

\textsuperscript{60} TEX. RULES OF PROF'L CONDUCT R. 3.09 cmt 3.
advised of the right to counsel. These rules appear to be addressed at the realistic fact that, in many instances, the prosecutor will have no contact with the defendant before the first court appearance, and thus may not have any opportunity before that time to make "reasonable efforts" to ensure that he or she has been advised of the right to counsel.

RECOMMENDATION: Existing Rule 3.8(b) appears to be adequate and noncontroversial, and should not require either amendment or clarification. In most circumstances, the prosecutor's duty to ensure that the defendant is aware of the right to counsel, and is given the opportunity to obtain counsel, should be fulfilled by the judge's advisement to the defendant at his or her first appearance. If this does not happen, it is appropriate, and in the interests of justice, to call upon the prosecutor to take other steps to ensure that the defendant is not required to engage in any substantive proceedings without knowingly, voluntarily and intelligently waiving any right to counsel. Obviously, if no right to counsel attaches in a particular case, Rule 3.8(b) will have no applicability.

RULE 3.8(C) - WAIVER OF RIGHTS OF UNREPRESENTED DEFENDANT

The prosecutor in a criminal case shall:...

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;...

ABA Model Rule 3.8(c) has been adopted verbatim in at least thirty-one states. The ABA Prosecution Function Standards contain an identical stan-

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61. Wyo. Rules of Prof'L ConduCt R. 3.8(b)

62. The same issue appears to have prompted the variation on Rule 3.8(b) in New Mexico, which provides that "prior to appearing in a court proceeding where a defendant appears without counsel," the prosecutor shall make reasonable efforts to ensure that the defendant is advised of the right to counsel. N.M. Rules of Prof'L ConduCt R. 16-308(B)

63. See Standards For Criminal Justice, § 3-3.10(a), Commentary at 79 (1993) ("With respect to the right to counsel, a prosecutor has acted reasonably and properly under this Standard if her or she simply lets the judge raise this subject with the accused.").

64. Ala. Rules of Prof'L ConduCt R. 3.8(1)(c); Ariz. Rules of Prof'L ConduCt ER 3.8(c); Ark. Rules of Prof'L ConduCt R. 3.8(c); Conn. Rules of Prof'L ConduCt R. 3.8(c); Del. Rules of Prof'L ConduCt R. 3.8(c); Fla. Rules of Prof'L ConduCt R. 4-3.8(b); Idaho Rules of Prof'L ConduCt R. 3.8(c); Ind. Rules of Prof'L ConduCt R. 3.8(c); Kan. Rules of Prof'L ConduCt R. 3.8(c); La. Rules of Prof'L ConduCt R. 3.8(1)(c); Md. Rules of Prof'L ConduCt R. 3.8(c); Mich. Rules of Prof'L ConduCt R. 3.8(c); Minn. Rules of Prof'L ConduCt R. 3.8(c); Miss. Rules of Prof'L ConduCt R. 3.8(c); Mo. Rules of Prof'L ConduCt R. 3.8(c); Mont. Rules of Prof'L ConduCt R. 3.8(c); Nev. Rules of Prof'L ConduCt, R. 3.8(c); N.H. Rules of Prof'L ConduCt R. 3.8(c); N.D. Rules of Prof'L ConduCt R. 3.8(c); Okla. Rules of Prof'L ConduCt R. 3.8(c); Pa. Rules of Prof'L ConduCt R. 3.8(c); R.I. Rules of Prof'L ConduCt R. 3.8(c); S.C. Rules of Prof'L ConduCt R. 3.8(c); S.D. Rules of Prof'L ConduCt R. 3.8(c); Utah Rules of Prof'L ConduCt R. 3.8(c); Wash. Rules of Prof'L ConduCt R. 3.8(c); W.Va. Rules of Prof'L ConduCt R. 3.8(c); Wis. Rules of Prof'L ConduCt, SCR 20:3.8(d); Wyo. Rules of Prof'L ConduCt R. 3.8(c).
While this rule appears to have been largely uncontroversial in practice, several issues have been noted by commentators:

1. **Black Letter vs. Commentary**

   In several states, concepts included in the ABA's Commentary to Model Rule 3.8 have been incorporated in the black letter. In Colorado, for example, the black letter rule provides that Rule 3.8(c) does not apply "to an accused appearing pro se with the approval of the tribunal," and that it does not "forbid the lawful questioning of a suspect who has waived the rights to counsel and silence." In Massachusetts, similarly, the rule has been amended to provide that a prosecutor shall not seek waiver of important pretrial rights from unrepresented defendant "unless a court has first obtained from the accused a knowing and intelligent written waiver of counsel."

   **RECOMMENDATION:** The Model Rule's inclusion of the above concepts in Commentary, rather than black letter, appears appropriate. These amendments are not substantive in nature, and should not require any amendment to Rule 3.8(c).

2. **Broader Rule**

   The comparable rule in Texas extends not only to the waiver of "pretrial" rights but more broadly provides that a prosecutor should "not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pretrial, trial, or post-trial rights" (additional language underlined).

   **RECOMMENDATION:** It should not be necessary to expand Rule 3.8(c) to cover rights other than pretrial rights. The Rule focuses on pretrial rights because it is during this period—especially in connection with a preliminary hearing—that the defendant is least likely to have either been appointed counsel, notified by the court of his or her right to counsel, or been permitted by the court to enter a knowing and intelligent waiver of counsel. Because a court may not allow trial to proceed without a defendant who is entitled to counsel either having obtained counsel or properly waived that right, the prosecutor’s dealings with the defendant after that point should be of less concern. Thus, the additional language included in the Texas rule should not be necessary.

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65. See ABA CRIMINAL JUSTICE SECTION STANDARDS, PROSECUTION FUNCTION, Part 1, Standard 3-3.10(c) (3d ed. 1993).
66. That Comment (Comment 2 to Model Rule 3.8) provides that: "Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence."
67. Compare COLO. RULES OF PROF'L CONDUCT R. 3.8(c) with MODEL RULE 3.8(c), cmt 2.
68. MASS. RULES OF PROF'L CONDUCT R. 3.8(c).
69. TEX. RULES OF PROF'L CONDUCT R. 3.09(c).
In a letter to the Commission, it is the position of Department of Justice attorney Stephen J. Csontos that Rule 3.8(c) is unnecessary. He argues that “a complete prohibition on all waivers [of pretrial rights] is not needed to deter abuse,” since a conviction will not be sustained if the prosecutor cannot “bear the heavy burden of proving a knowing, voluntary and intelligent waiver on the part of an accused.” He argues, further, that it makes no sense not to allow a defendant to waive pretrial rights, which are not constitutionally conferred, when constitutional rights may “freely be waived.”

With all due respect, this argument appears to be based on a misreading of the rule. Rule 3.8(c) does not forbid the defendant’s waiver of any rights (including pretrial rights). Rather, it simply controls the timing of such waivers. The Rule simply seeks to ensure that a prosecutor will not induce an unrepresented defendant to waive such rights at a time before he or she has had the right to counsel explained, and has knowingly and voluntarily waived that right. This is a sound rule which has not generally been subject to criticism and, as noted, is also recognized in other ABA standards.

Mr. Csontos has also suggested that certain clarifications be made in the Rule: First, he has suggested that the reference in the black letter rule to an “accused” and in the Commentary to a “suspect” is confusing, and that “consistent terminology should be used.” However, the distinction in terminology is deliberate. It is intended to distinguish between a prosecutor’s dealings with an “accused,” who has been charged with an offense, and the questioning of a “suspect,” who has not been charged. It would therefore not be advisable to eliminate this distinction.

Second, he suggests that the reference to “important” pretrial rights is unduly vague, and that additional examples of such rights be included. This suggestion is addressed below.

Finally, he suggests including an exception in the rule for “situations in which an individual has made a knowing and intelligent waiver of the right to counsel.” With respect to this issue, the Commentary already addresses this issue by


71. A similar point is reflected in an amendment, in one state, to the effect that the prosecutor may not seek to obtain from an unrepresented defendant a waiver of important “post-indictment” pretrial rights. N.J. RULES OF PROF’L CONDUCT, RCP 3.8(c). The state’s Commentary explains that this change was made “to conform more closely to decisional law” holding that “[p]reindictment consent to search or interrogation does not invoke the same Sixth Amendment concerns” regarding the right to counsel. However, for the same reasons noted above, such a change is unnecessary in light of the limitation of Model Rule 3.8(c), on its face, to an “accused” (as opposed to a “suspect”), which necessarily implies that charges have already been brought.

explaining that Rule 3.8(c) "does not apply to an accused appearing pro se with the approval of the tribunal." Such approval is only granted by the court after ensuring that the defendant has entered a knowing, voluntary and intelligent waiver of the right to counsel. Thus, this Comment already recognizes the exception Mr. Csontos is proposing.

RECOMMENDATION: For the reasons stated above, Rule 3.8(c) has been widely adopted, without notable controversy, and there is no compelling reason to make changes in the black letter at this time. While this obligation is not one of the most important duties set forth in the Rule, it would send an undesirable signal to eliminate it outright.

With respect to Mr. Csontos' suggestion that additional examples of "important" pretrial rights be provided, this could be done in Commentary, if the Commission desires to do so. However, a preliminary hearing is the primary example of a pretrial right for which the prosecutor may seek a waiver before the court has advised the defendant of the right to counsel (and entered any proper waiver of this right), and inclusion of additional examples would not add significantly to this standard.

RULE 3.8(D) - DISCLOSURE OF EXCULPATORY EVIDENCE

The prosecutor in a criminal case shall:...

(d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;...

ABA Model Rule 3.8(d) is an important provision that sets out the prosecutor's ethical obligation to furnish exculpatory evidence to the defense. It is one of the two provisions that were originally contained in the ABA Code of Professional Responsibility, and was adopted in substance virtually unchanged from that rule.74

Model Rule 3.8(d) has been adopted verbatim in at least thirty-one states.75

73. See ABA CRIMINAL JUSTICE SECTION STANDARDS, PROSECUTION FUNCTION, Part 1, Standard 3-3.10(c), commentary at 80 (3d ed. 1993).

74. MODEL CODE DR 7-103(B) (1980), provided that:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

75. ALASKA RULES OF PROF'L CONDUCT R. 3.8(d); ARIZ. RULES OF PROF'L CONDUCT, ER 3.8(d); ARK. RULES OF PROF'L CONDUCT R. 3.8(d); COLO. RULES OF PROF'L CONDUCT 3.8(d); CONN. RULES OF PROF'L CONDUCT R.
Several other states have adopted the rule with minor variations. The more substantive issues include the following.

1. **Prosecutor's State of Mind**

A few states have variations on this rule that contain additional restrictions on the prosecutor's state of mind. For example, the comparable Alabama rule adds language requiring that the prosecutor have "willfully fail[ed]" to make timely disclosure to the defense of the material called for by the rule. The District of Columbia rules, similarly, emphasize that a prosecutor may not "intentionally fail to disclose to the defense" the evidence covered by the rule. The ABA's Prosecution Function Standards also specify that a prosecutor should not "intentionally fail" to make timely disclosure of exculpatory evidence. The California rules, more narrowly, do not address a disclosure obligation at all, but simply provide that a prosecutor may not "suppress any evidence" that the prosecution "has a legal obligation to reveal or to produce."

**Recommendation:** Existing Rule 3.8(d) already contains an intent requirement in that it only requires the disclosure of exculpatory evidence or information "known to the prosecutor." Thus, even under the existing Rule, a prosecutor's inadvertent failure to disclose evidence or information that is in his or her

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3.8(4); DEL. RULES OF PROF'L CONDUCT R. 3.8(d); FLA. RULES OF PROF'L CONDUCT, R. 4-3.8(c); IDAHO RULES OF PROF'L CONDUCT R. 3.8(d); IND. RULES OF PROF'L CONDUCT R. 3.8(d); KAN. RULES OF PROF'L CONDUCT R. 3.8(d); KY. RULES OF PROF'L CONDUCT, SCR 3.130(3.8)(c); LA. RULES OF PROF'L CONDUCT R. 3.8(d); MD. RULES OF PROF'L CONDUCT R. 3.8(d); MASS. RULES OF PROF'L CONDUCT R. 3.8(d); MONT. RULES OF PROF'L CONDUCT R. 3.8(d); MISS. RULES OF PROF'L CONDUCT R. 3.8(d); MO. RULES OF PROF'L CONDUCT R. 3.8(d); NEV. RULES OF PROF'L CONDUCT R. 3.8(d); N.J. RULES OF PROF'L CONDUCT R. 3.8(d); N.M. RULES OF PROF'L CONDUCT 16-308(D). See also, e.g., ILL. RULES OF PROF'L CONDUCT R. 3.8(b) (adopting similar language from DR 7-103(B)); ME. RULES OF PROF'L CONDUCT R. 3.8(d) (minor variation in language).
possession, but that he or she does not know about (or understand to be exculpatory), would not be penalized. While adding a "willful" requirement would further strengthen this intent requirement, most jurisdictions have not seen fit to do so. The Rule appears to have been largely uncontroversial in practice, and such an amendment should not be necessary.

2. TIMING OF DISCLOSURES

Several states have strengthened the rule by adding requirements concerning the specific timing with which the disclosures must be made. The District of Columbia rules, for example, provide that the disclosure must be made "at a time when use by the defense is reasonably feasible." The North Dakota rules require that the disclosures be made "at the earliest practical time."

RECOMMENDATION: The existing rule addresses the timeliness issue by requiring that the disclosure of exculpatory evidence be "timely." This language should suffice to ensure that the disclosures are made at a time when they can reasonably be used by the defense.

3. NEED FOR A DEFENSE REQUEST

Justice Department attorney Csontos states that "under federal law, a prosecutor's obligation to disclose exculpatory evidence is triggered by a request from the defense." He argues, on this basis, that this Rule could penalize a prosecutor who had complied with federal requirements, and suggests amending the language of this Rule to proscribe, instead, only the "intentional failure to disclose exculpatory information when requested by the defense."

There are several reasons why Model Rule 3.8(d) does not include a requirement that the defendant must request exculpatory material to trigger a prosecutor's disclosure obligation.

First, it is not true that there is no federal obligation to produce exculpatory evidence absent a request by the defense. Mr. Csontos appears to be referring to the requirements of Federal Rule of Criminal Procedure Rule 16, which require a defense "request" before the prosecutor is required to disclose certain types of pretrial discovery (principally, statements of the defendant, the defendant's prior record, material documents and test reports, and expert testimony). As the Commentary to Rule 16 explains, however, with respect to exculpatory evidence:

[T]here are situations in which due process will require the prosecution, on its own, to disclose evidence 'helpful' to the defense. Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 386 U.S. 66 (1967).

82. D.C. RULES OF PROF'L CONDUCT R. 3.8(e).
83. N.D. RULES OF PROF'L CONDUCT R. 3.8(d).
The Supreme Court made clear, in *Kyles v. Whitley*, that "a defendant's failure to request favorable evidence [does] not leave the Government free of all obligation." Rather, "regardless of request," as a matter of constitutional law, the prosecutor must disclose to the defense favorable evidence that is "material" to the case.

The same distinction between exculpatory evidence and other types of discovery is reflected in the NDAA's National Prosecution Standards, which contain no requirement for a defense request to trigger the prosecutor's obligations to disclose helpful evidence.

Second, the ABA has consciously rejected including a requirement that a defendant have requested the material in order to trigger a prosecutor's obligation to disclose exculpatory evidence. The ABA Discovery Standards, for example, require the prosecutor to disclose—with or without a request by defense counsel—"any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant." As the Commentary to this provision explains, the Standards deliberately omit any requirement for a defense request, not only because such a request is not constitutionally required, but also because:

A requirement that a request be made to obtain such discovery can become a trap for unknowledgeable defense counsel, and is contrary to the discovery standards' objective to eliminate game-playing.

**RECOMMENDATION:** For the reasons stated above, it is appropriate that Rule 3.8(d) not be limited to a situation where a defendant has requested the disclosure of helpful information, but rather impose a broader obligation on the prosecutor.

4. **ETHICAL OBLIGATION BEYOND CONSTITUTIONAL MINIMUM**

While not raised by Mr. Csontos, it should be noted that Rule 3.8(d) imposes an ethical obligation that goes beyond the prosecutor's constitutional obligation in certain other respects.

As the Supreme Court has observed, Rule 3.8(d) is broader than the constitutional requirement set forth in cases like *Brady, Kyles, Agurs*, and

85. Id. at 434. In this context, "materiality" means that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).
88. Id., Commentary at 32-33.
Bagley. While due process calls for the disclosure of “material” exculpatory evidence, this constitutional standard “requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.”

This choice, however, was made deliberately. In adopting the same principle in the Prosecution Function Standards, the ABA consciously recognized that the requirement so adopted “goes beyond the corollary duty imposed upon prosecutors by constitutional law.” Such a rule helps to implement the Supreme Court’s observation that, even if not constitutionally required, a prosecutor should “resolve doubtful questions in favor of disclosure.” This is in keeping with the prosecutor’s role as the representative of a sovereignty whose interest in a criminal prosecution is “not that it shall win a case, but that justice shall be done.”

Finally, it is also noteworthy that the same disclosure rule is endorsed by a major prosecutors’ organization, the NDAA, as well as by the Uniform Rules of Criminal Procedure, without any limitation to “material” evidence. In essence, this reflects a judgment that the prosecutor should turn over all potentially exculpatory evidence to the defense, and let defense counsel determine whether or not that evidence is material to his or her case.

RECOMMENDATION: The ABA’s decision to impose an ethical disclosure obligation concerning exculpatory evidence that goes beyond the constitutional minimum is an appropriate judgment that has been widely accepted in the states, and should not be upset.

RULE 3.8(E) - EXTRAJUDICIAL STATEMENTS BY STAFF

The prosecutor in a criminal case shall:

(e) exercise reasonable care to prevent 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;
ABA Model Rule 3.8(e) was added in 1983. It is intended to require a prosecutor to exercise reasonable care to prevent other law enforcement personnel from making an extrajudicial statement that the prosecutor himself or herself would be prohibited from making under Rule 3.6.

Model Rule 3.8(e) has been adopted verbatim in twenty-eight states. It has also been adopted, with minor variations, in an additional six states. It does not appear that any significant issues have been raised concerning the application of this rule.

RECOMMENDATION: There is no need to consider any changes to Model Rule 3.8(e).

RULE 3.8(F) - SUBPOENAS ISSUED TO LAWYERS

The prosecutor in a criminal case shall: . . .

(f) 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;
(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; . . .

ABA Model Rule 3.8(f) concerns a prosecutor's ethical duties when he or she causes a subpoena to be issued to another lawyer. This provision has been the subject of significant debate and litigation, principally as concerns the application of the rule to federal prosecutors.

HISTORY OF PROVISION: This provision has its origin in a resolution passed by

95. ALASKA RULES OF PROF'L CONDUCT R. 3.8(e); ARIZ. RULES OF PROF'L CONDUCT, ER 3.8(e); ARK. RULES OF PROF'L CONDUCT R. 3.8(e); Colo. RULES OF PROF'L CONDUCT R. 3.8(e); Conn. RULES OF PROF'L CONDUCT R. 3.8(5); Del. RULES OF PROF'L CONDUCT R. 3.8(f); IDAHO RULES OF PROF'L CONDUCT R. 3.8(f); Ind. RULES OF PROF'L CONDUCT R. 3.8(f); Kan. RULES OF PROF'L CONDUCT R. 3.8(f); La. RULES OF PROF'L CONDUCT R. 3.8(e); Mass. RULES OF PROF'L CONDUCT R. 3.8(e); Mich. RULES OF PROF'L CONDUCT R. 3.8(e); Miss. RULES OF PROF'L CONDUCT R. 3.8(e); Mo. RULES OF PROF'L CONDUCT R. 3.8(e); Mont. RULES OF PROF'L CONDUCT R. 3.8(e); Nev. RULES OF PROF'L CONDUCT, R. 3.8(f); N.H. RULES OF PROF'L CONDUCT R. 3.8(f); N.M. RULES OF PROF'L CONDUCT, R. 16-308(E); N.C. RULES OF PROF'L CONDUCT R. 3.8(f); Pa. RULES OF PROF'L CONDUCT R. 3.8(e); R.I. RULES OF PROF'L CONDUCT R. 3.8(e); S.C. RULES OF PROF'L CONDUCT R. 3.8(f); S.D. RULES OF PROF'L CONDUCT R. 3.8(f); UTAH RULES OF PROF'L CONDUCT R. 3.8(e); Wash. RULES OF PROF'L CONDUCT R. 3.8(f); W. Va. RULES OF PROF'L CONDUCT R. 3.8(e); Wis. RULES OF PROF'L CONDUCT, SCR 20: 3.8(f)(2); Wyo. RULES OF PROF'L CONDUCT R. 3.8(e) (not verbatim).

96. In most of these, the rule was changed to clarify that the prosecutor's obligation is limited to those employees under his or her control, as opposed to all persons "assisting or associated with" the prosecutor. See Ala. RULES OF PROF'L CONDUCT R. 3.8(e); Md. RULES OF PROF'L CONDUCT R. 3.8(e); Minn. RULES OF PROF'L CONDUCT 3.8(e); Tex. RULES OF PROF'L CONDUCT, Rule 3.09(e). In several other states, the rule was amended to change the prosecutor's duty to take "reasonable care" to a duty to make "reasonable efforts." N.D. RULES OF PROF'L CONDUCT R. 3.8(e); Okla. RULES OF PROF'L CONDUCT R. 3.8(e). None of these changes is substantive.
the ABA in 1988 that limited the issuance of lawyer subpoenas in grand jury and other criminal proceedings. In 1990, this restriction was added as part of the ethical rules. As the comment to the rule explains, Model Rule 3.8(f) is “intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client relationship.”

As originally adopted, the rule contained an additional limitation that barred a prosecutor from issuing a subpoena to a lawyer without “obtain[ing] prior judicial approval after an opportunity for an adversarial proceeding.” This requirement was intended to ensure “an independent determination that the applicable standards are met.” In 1995, however, following a federal court ruling invalidating such a rule, this procedural requirement for prior judicial approval was deleted. The rest of the rule was left intact.

**Adoption of Rule:** Rule 3.8(f) has been adopted, in some form, in the following ten states: Alaska; Colorado; Louisiana; Massachusetts; North Carolina; Oklahoma; Rhode Island; South Carolina; Tennessee; and Vermont. While Virginia currently has such a provision in effect, it is destined to be eliminated as of January 1, 2000, under revisions made this year to the Virginia ethical rules.

**Litigation over Rule:** While there has been considerable litigation over rules based on Model Rule 3.8(f) (or state-law precursors), it is important to emphasize that the litigation has centered on the application of such rules to federal prosecutors, rather than on the merits of such rules per se.

For at least a decade, the U.S. Department of Justice has actively sought to challenge the application of rules containing attorney subpoena restrictions as applied to federal prosecutors. This issue has primarily arisen when federal trial courts have adopted, as their own rules of practice, state ethical rules containing such restrictions. The results (and reasoning) have been mixed. The more recent

97. See Model Rules R. 3.8(e) cmt. 4.
99. See Alaska Rules of Prof’l Conduct R. 3.8(f) (including requirement for judicial approval); Colo. Rules of Prof’l Conduct R. 3.8(f) (requirement for judicial approval later omitted); La. Rules of Prof’l Conduct R. 3.8(f) (including requirement for judicial approval); Mass. Rules of Prof’l Conduct R. 3.8(f) (including requirement for judicial approval); N.C. Rules of Prof’l Conduct R. 3.8(e) (without requirement for judicial approval); Okla. Rules of Prof’l Conduct R. 3.8(f) (variation on judicial approval requirement); R.I. Rules of Prof’l Conduct R. 3.8(f) (without judicial approval requirement); S.C. Rules of Prof’l Conduct R. 3.8(e) (without judicial approval requirement); Tenn. Code of Prof’l Resp., DR 7-103(C) (including judicial approval requirement); Vt. Rules of Prof’l Conduct R. 3.8(f) (without requirement for judicial approval).
100. See Va. Rules of Prof’l Conduct 3.8 and Commentary (adopted January 25, 1999, to become effective January 1, 2000). The Commentary explains that the prior requirement contained in Virginia Disciplinary Rule 8-102(A)(5), which prohibited the issuance of a subpoena to an attorney as a witness in a criminal matter involving a present or former client without prior judicial approval, was deleted “because of prevailing case law and judicial fiat (the United States District Court for the Eastern District of Virginia) which does not require same.”
trend, however, suggests that the courts will uphold the application of revised Model Rule 3.8(f) to federal prosecutors (particularly given the passage of the McDade Amendment).

In Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania, for example, the Third Circuit struck down a federal court rule requiring judicial approval before a grand jury subpoena may be issued to an attorney because its adoption “falls outside the local rule-making authority of the district court” and is inconsistent with Federal Rule of Criminal Procedure 17.101 The Court focused, in particular, on the “broad mechanism for pre-service judicial review of attorney subpoenas” contained in the rule.102

The Third Circuit’s decision in Baylson decision, however, was in direct conflict with the decision of the First Circuit addressing another, virtually identical federal court rule. In United States v. Klubock, an equally divided court sitting en banc affirmed the judgment of the district court upholding a federal court rule requiring judicial approval before a grand jury subpoena may be issued to an attorney.103 That Court reasoned, in direct contrast, that the rule was “within the rule-making power of the district court” and did not implicate any Supremacy Clause concerns.104

The First Circuit affirmed the Klubock rule in subsequent cases, including Whitehouse v. United States District Court for the District of Rhode Island, another case involving a federal court rule requiring judicial approval for the issuance of an attorney subpoena.105 In Whitehouse, as in Klubock, the Court held that federal court adoption of Rule 3.8(f) is “a legitimate exercise of the rule-making authority of the United States District Court.”106 A district court in the First Circuit, similarly, recently upheld a federal court rule based on Model Rule 3.8(f) (including the judicial approval requirement).107

The most recent precedent in this area was issued within the last two months by the Tenth Circuit. That decision, in United States v. Colorado Supreme Court,108 is notable for two reasons. First, unlike the above decisions, it concerns a federal court rule based on the amended version of Rule 3.8(f) (without the judicial approval requirement). This is significant because this amendment makes more clear that Rule 3.8(f) is intended to be an ethical rule, rather than a rule of procedure. And second, the decision expressly applies the McDade Amendment.

Under these circumstances, the Tenth Circuit ruled that a federal court rule

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101. 975 F.2d 102, 112 (3rd Cir. 1992). The Court also held, for similar reasons, that the Supremacy Clause barred state ethics authorities from disciplining a federal prosecutor for violating such a rule. Id. at 113.
102. Id. at 108-09.
103. 832 F.2d 664 (1st Cir. 1987).
104. Id. at 666-67.
105. 53 F.3d 1349 (1st Cir. 1995).
106. Id. at 1365.
based on Colorado ethics Rule 3.8(f) is an ethical rule that properly “may be enforced against federal prosecutors in Colorado.”

The Court emphasized, in particular, that Rule 3.8(f) “in its current incarnation is a rule of ethics applicable to federal prosecutors by the McDade Act,” rather than a “substantive or procedural rule that is inconsistent with federal law.”

While this decision does not entirely clarify matters, since it concerns solely the prosecutor’s power to issue a trial subpoena to an attorney, rather than a grand jury subpoena, it does suggest that, given the changes in Rule 3.8(f), and equally important, in federal law, the courts are likely to look more favorably than does the Baylson decision on the propriety of ethical rules placing limits on a prosecutor’s power to issue subpoenas to attorneys.

RATIONALE FOR THE RULE: The rationale for Rule 3.8(f) is amply described in many of the litigated precedents.

This Rule arose out of observations, in the late 1980’s, concerning the “government’s apparently increasing use of grand jury subpoenas on a target’s counsel, both pre- and post-indictment.” Despite the promulgation of Model Rule 3.8(f), and despite the adoption by the U.S. Department of Justice of internal restrictions on such subpoenas, by the mid-1990’s, courts observed that “the instances of federal prosecutors subpoenaing attorneys to compel evidence regarding their clients have, nevertheless, continued to increase.”

The Ninth Circuit observed, in a passage quoted by other courts, that this practice is roundly condemned:

The practice has been almost universally criticized by courts, commentators, and the defense bar because it is viewed as a tool of prosecutorial abuse and as an unethical tactical device US Attorneys employ to go on a ‘fishing expedition’ with legal counsel without first pursing alternative avenues to get the information.

In particular, the practice has been condemned because any benefit derived from such subpoenas “comes at the direct expense of the attorney-client relationship.” Among other things, attorney subpoenas “chill the relationship between the lawyer and client,” create an “immediate conflict of interest for the
attorney/witness,” divert the attorney’s “time and resources away from his
client,” discourage attorneys “from providing representation in controversial
criminal cases,” and “force attorneys to withdraw as counsel because of ethical
rules prohibiting an attorney from testifying against his client.”

The Justice Department itself, as noted, has internal rules placing similar
restrictions on the issuance of grand jury subpoenas by federal prosecutors—
although as a voluntary measure, not an enforceable ethical restriction. Similar
to Model Rule 3.8(f), these Guidelines require that

first, “the information sought shall not be protected by a valid claim of
privilege,”

second, “[a]ll reasonable attempts to obtain the information from alternative
sources shall have proved to be unsuccessful,”

third, “the information sought is reasonably needed for the successful
completion of the investigation or prosecution,” and is not being “used to
obtain peripheral or speculative information,”

fourth, the “need for the information must outweigh the potential adverse
effects upon the attorney-client relationship,” and

fifth, the “subpoena shall be narrowly drawn and directed at material
information regarding a limited subject matter and shall cover a reasonable,
limited period of time.”

CURRENT CRITICISMS: Justice Department attorney Csontos, in his comments to
the Commission, urges that “there are strong policy reasons for reconsidering
Rule 3.8(f).” Among other things, he argues that Rule 3.8(f) affords protection
even to “non-confidential communications,” shifts the burden from the party
claiming the privilege to the prosecutor, allows blanket invocation of a privilege,
and creates a “need” standard that goes beyond mere relevance. He also argues
that “similar limitations do not apply across the board to subpoenas issued by all
lawyers, including defense counsel and lawyers representing parties in civil
cases.”

Mr. Csontos also cites a 1992 law review article critical of Rule 3.8(f) by

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118. Whitehouse, 53 F.3d at 1354; see also, e.g., Colorado Supreme Court, 1999 U.S. App. LEXIS 20903 at
1358 (an attorney subpoena “undermines the trust and openness so important to the attorney-client relationship”
and “opens a second front which counsel must defend with her time and resources”); GERSHMAN,
PROSECUTORIAL MISCONDUCT, § 3.2(h) (1998) (“One of the most controversial issues today is the use of
subpoenas directed at criminal defense attorneys to produce documents or testify in matters related to their
clients.”).

119. See U.S. Attorneys’ Manual, Title 9, § 9-13.410 (Guidelines for Issuing Grand Jury or Trial Subpoena
To Attorneys For Information Relating to the Representation of Clients).

120. Id. at 9-166.

121. Csontos Letter at 5.

122. Id. at 4 n. 4.

123. Id. at 5.
Professor Fred Zacharias. In the article, Professor Zacharias notes the increasing trend toward attorney subpoenas, the "uniformly negative" response by the bar and scholarly commentators, the "significant costs" to defense attorneys, the "potential for prosecutorial abuse," and the "rampant" calls for reform. Professor Zacharias takes the position, however, that these evils can be better addressed than through an ethical rule that mandates "pre-issuance judicial review" of such subpoenas (for example, through a rule entitling a client to a copy of the attorney's grand jury transcript).

Of these criticisms, perhaps the most compelling is that a similar rule does not govern the issuance of subpoenas by defense counsel and in civil cases. On the other hand, the prosecutor alone has the power to obtain the issuance of grand jury subpoenas, which presents a particularly grave potential for abuses in this area.

RECOMMENDATION: While Model Rule 3.8(f) has drawn heated and consistent criticism from the Justice Department insofar as it applies to federal prosecutors, the rationale for the rule has been strongly supported by the courts, the bar and commentators. The amendment by the ABA, in 1995, to remove the requirement for prior judicial approval for the issuance of an attorney subpoena removes from the Rule the provision that arguably was more in the nature of a procedural rule than an ethical restriction. As revised, Rule 3.8(f) is limited to addressing the conduct of the prosecutor, and to ensuring that the prosecutor meet a certain standard of belief before seeking to issue a subpoena for an attorney's testimony. While the rule has not been widely adopted in the states, it has been recently upheld, in its amended version, by a federal appeals court. All of these considerations, taken together, suggest that there is no compelling reason for the ABA now to reverse course and delete the provision from its Model Rules.

RULE 3.8(G) - COMMENTS HEIGHTENING PUBLIC CONDEMNATION OF ACCUSED

The prosecutor in a criminal case shall: . . .

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Model Rule 3.8(g) concerns the prosecutor’s duty to avoid making unnecessary out-of-court statements that tend to heighten public condemnation of the

124. Id. at 5 (citing Zacharias, A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys, 76 Mlnn. L. Rev. 917 (1992)).
125. 79 Mlnn. L. Rev. 917, 921-24.
126. Id. at 943.
accused. This provision was added to the Rule in 1994.

Commentary explains that the Rule was adopted in recognition that, "in the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused." Thus, the prosecutor “can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.” Model Rule 3.8(g) has been so far been adopted in only a few states.

RECOMMENDATION: While Justice Department Attorney Csontos notes that this provision is “superfluous,” it has not drawn a great deal of criticism or comment. There does not appear to be any compelling reason to revisit Rule 3.8(g) at this time.

COMMENT [1] TO RULE 3.8 - APPLICATION OF RULE 3.3 TO GRAND JURY

Another current issue under ABA Model Rule 3.8 concerns the reference, in Comment [1] to that Rule, to another rule, Rule 3.3, which concerns a lawyer’s obligation in ex parte proceedings. Specifically, in discussing the prosecutor’s obligation under rules other than Rule 3.8, the Comment states that grand jury proceedings are included in the ex parte proceedings governed by Rule 3.3.

This is significant because Rule 3.3 provides that in an ex parte proceeding, unlike a normal adversary proceeding, the lawyer has an obligation to “inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Thus, this reference in the Comment has been interpreted to mean that the prosecutor is required to disclose to the grand jury, in seeking an indictment, all material facts supportive of the defendant’s innocence, as well as of the defendant’s guilt.

In most of the states that have adopted Rule 3.8, the reference in Comment [1] to Rule 3.3, and its application to grand jury proceedings, has also been adopted. However, six states that have otherwise adopted Comment [1] have

127. MODEL RULES R. 3.8 cmt. 5.
128. MASS. RULES OF PROF’L CONDUCT R. 3.8(g); N.C. RULES OF PROF’L CONDUCT R. 3.8(f); OKLA. RULES OF PROF’L CONDUCT R. 3.8(f).
129. Csontos Letter at 5.
130. Specifically, the portion of the Comment at issue states: “See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.”
131. MODEL RULES R. 3.3(d).
deleted this reference to grand jury proceedings. In the District of Columbia, Rule 3.8 itself has been amended to require expressly that "in presenting a case to a grand jury," a prosecutor may not "fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause." \(^{134}\)

Other states expressly address this issue in Rule 3.3(d) or the commentary thereto. For example, in adopting recent changes to the Virginia ethical rules, effective January 1, 2000, that state has added a Comment to Rule 3.3(d) stating that ex parte proceedings "do not include grand jury proceedings." \(^{135}\)

In some states, the ex parte rule of Rule 3.3(d) is not included at all, and thus the issue is simply not germane.

As a constitutional matter, it is clear that a prosecutorial practice to disclose exculpatory evidence to the grand jury is not legally required. In *United States v. Williams*, the Supreme Court held that a prosecutor does not have a "binding obligation" to present even "substantial" exculpatory evidence to a grand jury, and refused to dismiss an indictment on this basis. \(^{136}\) The Court also went on to emphasize its view that there is no reason that a prosecutor should be required to present such evidence, since this would transform the function of the grand jury from an accusatory to an adjudicatory body.

Notwithstanding the *Williams* decision, however, a number of ethical standards impose such a requirement. The NDAA's National Prosecution Standards, for example, provide that the prosecutor "should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude an indictment." \(^{137}\) The ABA's Prosecution Function Standards provide, similarly, that "no prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense." \(^{138}\)

Commentary to the ABA Standards explains the rationale for adopting a rule in this area that consciously "goes beyond the minimum requirements of constitutional law" set out by the Supreme Court in *Williams*:

[This Standard] follow[s] the general approach of the ABA Model Rules of Professional Conduct by requiring prosecutors to make timely disclosure to the


\(^{134}\) D.C. Rules of Prof'L Conduct R. 3.8(g).

\(^{135}\) Va. Rules of Prof'L Conduct 3.3(d) cmt. 14.

\(^{136}\) 504 U.S. 36 (1992)

\(^{137}\) NDAA, NATIONAL PROSECUTION STANDARDS, § 58.4 (2d ed. 1991).

\(^{138}\) ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.6(b) (3d ed. 1993).
grand jurors of the same evidence that must be disclosed to the defense, namely, all evidence known to the prosecutor tending to negate the guilt of the accused or to mitigate the offense. For example, when a police officer has seriously injured or killed a person in the line of duty, prosecutors often present all available information and witnesses to the grand jury so that an evaluation of probable cause can be made by an entity independent of the prosecutor. Such a procedure enhances public confidence in the ultimate decision on whether to prosecute. The obligation to present evidence that tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice.\textsuperscript{139}

Similarly, the Justice Department itself, notwithstanding the Williams decision, has adopted a policy that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person."\textsuperscript{140}

Justice Department attorney Csontos states that since evidence negating guilt is not required to be brought to the attention of grand juries, "prosecutors should not be threatened with discipline for failing to investigate further or to present all theories advanced by the defense." He recommends that consideration be given to one of the following: (1) amending Rule 3.3(d) to exclude grand jury proceedings; (2) modifying the Comment to Rule 3.3(d) to say that the presentation of evidence in grand jury proceedings is not affected by the rule; or (3) removing the reference to Rule 3.3(d) in the Comment to Rule 3.8.\textsuperscript{141}

**Recommendation:** A clearer statement of the ABA Rules' position on the issue of presenting exculpatory evidence to the grand jury is desirable, but should only be done with input from all affected groups.

At present, the application of Rule 3.3 to grand jury proceedings is not addressed in that Rule at all, but only in a fairly minimal reference in a Comment to Rule 3.8. While most of the states include the reference to Rule 3.3 in their Comment to Rule 3.8, it is not clear that this was done with a great deal of thought to the issue. On the other hand, both the ABA and the NDAA have consciously adopted the position that a prosecutor should present to the grand jury in seeking an indictment evidence that is exculpatory to the defendant, given the prosecu-

\textsuperscript{139} Id., Commentary at 66-67.

\textsuperscript{140} UNITED STATES ATTORNEYS' MANUAL, § 9-11.233 (noting that violations of this policy may be referred "to the Office of Professional Responsibility for review"). Notwithstanding the imposition of this requirement on its attorneys as a matter of policy, the Justice Department has vigorously pressed in court to bar the application of Rule 3.3(d) to federal prosecutors conducting grand jury proceedings. In United States v. Colorado Supreme Court, 871 F. Supp. 1328 (D. Colo. 1994), the Department sought a declaration that Rule 3.3(d) was "null and void as [it] pertain[s] to federal prosecutors in the performance of their federal duties." Id. at 1328. That issue became moot, however, when in the middle of the litigation Colorado deleted the Comment to Rule 3.8 that made Rule 3.3 applicable to grand jury proceedings. See United States v. Colorado Supreme Court, 988 F. Supp. 1368, 1369 (D. Colo. 1998).

\textsuperscript{141} Csontos Letter at 8.
tor's sole access to this body and his or her duty to "do justice" rather than win a case.

The fundamental question for the Commission is whether there is sufficient reason, as Mr. Csontos has suggested, to revisit the existing ethical obligation, and/or whether the obligation, even if retained, should be spelled out more clearly (and more consistently between Rule 3.3 and Rule 3.8). The fact that the Williams case holds that the failure to present the grand jury with exculpatory evidence is not a basis for dismissal of an indictment cuts both ways. While Mr. Csontos argues that this means that the requirement should be eliminated outright as an ethical obligation, it could be argued equally that this demonstrates the need for an ethical rule to provide the only meaningful sanction in this area (particularly given the difficulty for anyone but the prosecutor of detecting when such a violation has occurred).

The consistency of the position taken by standards in the area (including those issued by a major prosecutors' organization) tends to suggest that this is an important obligation which should continue to be included in the Rule—and if so, spelled out explicitly, either in the Rule or in commentary. Given the controversial nature of any amendment in this regard, however, it is an issue on which the Commission should seek broader comment before making any proposal.

One potential compromise would be to take the position taken by the District of Columbia rules, which recognize an obligation, but limit it to the obligation to present to the grand jury "material facts tending substantially to negate the existence of probable cause." Such a standard would be more limited than a requirement to present "all" material facts, and would be more closely tied to Rule 3.8(a), which prohibits the prosecutor from seeking the issuance of an indictment absent probable cause. Such a change would require an amendment to the black letter, however. On balance, the author believes that such an amendment would be the best course.

Other alternatives would be: (a) To eliminate any reference to the grand jury issue in either Rule. This would have the effect of leaving open the issue whether a grand jury is an ex parte proceeding under Rule 3.3(d). (b) To clarify in the commentary to Rule 3.3(d), as under current Rule 3.8, that ex parte proceedings include grand jury proceedings. This would ensure consistency between the two rules without changing the Rules' current position. (c) To clarify in the commentary to Rule 3.3(d) that ex parte proceedings do not include grand jury proceedings. This would require eliminating the reference outright in the commentary to Rule 3.8, and would reverse the Rules' current position on this issue. All three of these alternatives would affect the commentary only.

Finally, were the Commission to simply leave the commentary as is, it would leave the issue to the states for development.
PART III: POTENTIAL AREAS OF CHANGE TO RULE 3.8

As noted, one criticism of Rule 3.8 is that it is incomplete in the obligations it imposes. It has been pointed out, rightly, that some of the prosecutor’s obligations not detailed in the rule (such as the obligation not to deliberately avoid obtaining evidence helpful to the defendant, recognized in many standards) are more significant than some of the obligations that are included in Rule 3.8 (such as the duty not to seek waiver of pretrial rights from an unrepresented defendant, which will rarely come into play). The commentary to Rule 3.8 addresses this to some extent, noting that “applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4,” the catch-all provision which makes it unethical, among other things, to engage in conduct that is “prejudicial to the administration of justice.”

It is unquestionable that there are many important obligations unique to the prosecutor’s role that are not included in the rule as a specific ethical obligation.

Some of the additional areas of prosecutorial misconduct that have been recognized in the case law or in state ethical rules, but are not included in the Model Rule are listed below. This list is not provided to suggest that any or all of these restrictions or limitations be added to Rule 3.8, but to indicate the range of issues presented in this area. Some additional ethical restrictions on prosecutors reflected in state rules include:

- A prosecutor shall not “intentionally avoid the pursuit of evidence or information because it may damage the prosecution’s case or aid the defense.”
- A prosecutor shall not, “in exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person.”
- A prosecutor shall not “peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex.”
- A prosecutor shall not “conduct a civil or criminal case against any person whom the lawyer represents or has represented as a client.”

142. See, e.g., Bruce A. Green, Why Should Prosecutors ‘Seek Justice’?, 26 FORDHAM URB. L. J. 607, 616 (1999) (the disciplinary rules “do not address many areas of prosecutorial conduct”).
143. MODEL RULES R. 8.4(d).
144. D.C. RULES OF PROF’L CONDUCT R. 3.8(e); see also, e.g., VT. CODE PROF. RESP. EC 7-13; TENN. CODE OF PROF. RESP. EC 7-13; ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993).
145. D.C. RULES OF PROF’L CONDUCT R. 3.8(a); see also ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.1(3b) (3d ed. 1993).
146. D.C. RULES OF PROF’L CONDUCT R. 3.8(h).
147. ME. RULES OF PROF’L CONDUCT R. 3.7(j)(3).
A prosecutor “shall not conduct a civil or criminal case against any person relative to a matter in which the lawyer represents or has represented the complaining witness.” 148

A prosecutor shall “not assert personal knowledge of the facts at issue, except when testifying as a witness.” 149

A prosecutor shall “not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein.” 150

A prosecutor shall “not knowingly take advantage of an unrepresented defendant.” 151

Similarly, there are a number of additional prosecutorial obligations not contained in Rule 3.8, but recognized in the case law, in standards, or other sources. These include, for example:

- A prosecutor “should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.” 152

- A prosecutor “should not file charges for the purpose of obtaining from a defendant a release of potential civil claims against victims, witnesses, law enforcement agencies, and their personnel, or the prosecutor and his personnel.” 153

- A prosecutor “should not knowingly use illegal means to obtain evidence or employ or instruct or encourage others to use such means.” 154

- A prosecutor “should not discourage or obstruct communication between prospective witnesses and defense counsel.” 155

- A prosecutor “should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.” 156

- A prosecutor “should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.” 157

148. ME. RULES OF PROF’L CONDUCT R. 3.7(i)(4).
149. MASS. RULES OF PROF’L CONDUCT R. 3.8(h).
150. ME. RULES OF PROF’L CONDUCT R. 3.8(i).
151. VA. RULES OF PROF’L CONDUCT R. 3.8(b) (to take effect January 1, 2000).
152. NDAA, NATIONAL PROSECUTION STANDARDS, § 43.4 (2d ed. 1991).
153. NDAA, NATIONAL PROSECUTION STANDARDS, § 43.5 (2d ed. 1991).
154. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.1(c) (3d ed. 1993).
155. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.1(d) (3d ed. 1993).
156. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.1(d) (3d ed. 1993).
157. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.5(b) (3d ed. 1993); see also NDAA, NATIONAL PROSECUTION STANDARDS, § 60.3 (2d ed. 1991).
If a prosecutor "believes that a witness is a potential defendant, the prosecutor should not seek to compel the witness's testimony before the grand jury without informing the witness that he or she maybe charged." 158

A prosecutor "should not condition a dismissal of charges, nolle prosequei, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court." 159

Finally, in the academic literature, additional potential amendments to Rule 3.8 have been proposed and debated. These include, for example, proposals to include in the Rule a provision requiring that prosecutors avoid not only impropriety but also conduct that has the "appearance of impropriety." 160 Similarly, while not directed at revisions to Rule 3.8, Senator Hatch's proposed legislation (discussed above in connection with attempts to overturn the McDaniel Amendment) would have added ethical limitations on the conduct of federal prosecutors not contained in Rule 3.8, including, for example, rules that a prosecutor may neither "attempt to corruptly influence or color a witness's testimony with the intent to encourage untruthful testimony" nor "offer or provide sexual activities to any government witness or potential witness in exchange for or on account of his or her testimony," as well as a rule that a prosecutor may not "violate a defendant's right to discovery." 161

Again, these descriptions are not provided to suggest that all of these obligations should be ethical restrictions in Rule 3.8, but simply to indicate the wide range of recognized prosecutorial obligations that are not contained in the Rule. As this demonstrates, a full-scale review of Rule 3.8 would require considerable thought, research, and solicitation of comments from a broad range of interests.

RECOMMENDATION: Any significant change in Rule 3.8 is certain to provoke substantial debate and controversy. Equally important, to be effective, any changes that are made will require the participation and support of many different constituencies in the criminal justice community. Therefore, before the Commission undertakes any major revision of Rule 3.8, if it is inclined to do so, it should initiate a process that will include, at a minimum, participation and input from those groups within the ABA with expertise in criminal justice, federal and state prosecuting authorities and public defenders, defenders' and prosecutors' associations on the federal and state level, standard-setting bodies, and trial and appellate

158. ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.6(d) (3d ed. 1993).
159. ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.9(g) (3d ed. 1993).
161. See S. 250.
judges in courts handling criminal matters. It may be that such a project is beyond the scope, or timing, for the Commission given its already ambitious goals and agenda.