



**U.S. Department of Justice**

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February 27, 2014

The Standing Advisory Committee on the Rules of Professional Conduct  
c/o Barbara Berenson, Senior Attorney  
John Adams Courthouse  
One Pemberton Square  
Boston, MA 02108

Re: Proposed Revisions of the Rules of Professional Conduct

Dear Members of the Standing Advisory Committee:

Thank you for the opportunity to comment on the proposed revisions to the Rules of Professional Conduct. I write to express opposition to the Committee's proposed revisions to Rule 3.8, in particular the addition of subsections (h) and (i), the revision of subsection (a), and to the Committee's decision not to recommend changes to subsections (g) and (e)(2).<sup>1</sup> As you know, the U.S. Attorney's Office for the District of Massachusetts prosecutes all federal crimes in Massachusetts and therefore has a significant interest in ensuring that any obligations imposed on federal prosecutors by the Commonwealth of Massachusetts are appropriate and consistent with our obligations under federal law.

The United States Department of Justice is, of course, very supportive of the goals behind Rule 3.8, and certainly supports the apparent intent of these rules to avoid having individuals wrongfully convicted. We take to heart Justice Sutherland's admonition in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he

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<sup>1</sup> Rule 3.8(g) and (e)(2) appear in the present Rules as 3.8(j) and (f)(2). For clarity, I have referred to the proposed rule numbers throughout.

is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. 78, 88 (1935).

The Department demands that its attorneys adhere to the highest standard of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that evidence will be timely disclosed. The Department would not countenance the continued incarceration of someone who was convicted and later found factually innocent of the crime of which he or she was convicted. When confronted with credible evidence that a convicted defendant did not commit a crime, Department attorneys are expected to disclose this information to the appropriate authority whenever the information is obtained – pre-trial, during trial, or after conviction.

However, proposed Rule 3.8(a), unless clarified, may call into question a common and accepted predicate for plea negotiations. Proposed Rule 3.8(e), to the extent it conflicts with *Stern v. U.S. District Court for the District of Mass.*, 214 F.3d 4 (1st Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001), impermissibly intrudes on the grand jury function and conflicts with the standards for issuing (and quashing) subpoenas in all criminal proceedings, as set forth by Congress in Federal Rule of Criminal Procedure 17(c). Proposed Rule 3.8(g) is unnecessary and duplicative of already existing, clearer obligations, and unnecessarily invites unfounded challenges to prosecutions. Proposed Rules 3.8(h) and (i) are particularly problematic, unnecessary and ultimately ineffective to achieve the apparent desired result – freeing prisoners who did not commit the crimes of which they were convicted. We respectfully request that the Court not adopt these rules in the proposed revision of Massachusetts Rule of Professional Conduct 3.8.

### **I. Proposed Rules 3.8(h) & (i)**

#### **A. Proposed Rule 3.8(h) is unclear, impractical, and ineffective as it establishes a nebulous duty to disclose.**

First, Rule 3.8(h) as proposed requires a prosecutor to take action when she knows of “new, credible and material” evidence. The rule applies to any prosecutor, whether or not the prosecutor participated in any way in the case at hand. It is unclear how a prosecutor who receives information about a case she did not prosecute can determine whether the information is “new, credible and material.” A DNA match or confession to a recent publicized crime in her own district may be clear. But the rule, as drafted, could apply equally to a federal prosecutor in Springfield who hears from a bank robber with a history of heroin abuse whom she is preparing as a witness for trial that the bank robber previously committed a string of similar robberies with buddies in the Fort Lauderdale area. The prosecutor would not know whether his commission of

robberies in Fort Lauderdale was new information. She would not know how much to trust the robber's vague memory of particular locations he robbed, memories for which she would have no facts against which to test. And, were there some other defendant convicted of a roughly contemporaneous bank robbery in Fort Lauderdale who maintained his innocence, the prosecutor would not know whether her witness's admission bore materially on that case. Yet the rule requires the Springfield prosecutor to make these determinations even if the prosecutor was not aware of the evidence presented, the legal issues raised, or the credibility of the witnesses who testified during the trial in Fort Lauderdale – all at risk of an ethical sanction from the Massachusetts bar. Additionally, by disclosing evidence, a prosecutor who did not handle a case originally may be seen to have passed some judgment that the evidence is in fact new, credible and material, and put in doubt the actual guilt of a convicted defendant when the prosecutor is not in a position to evaluate the matter fully. This simply is an impractical and unrealistic obligation to place upon any attorney, whether a prosecutor or defense lawyer.<sup>2</sup>

Second, both subsections (h) and (i) apply when a prosecutor “knows” of particular evidence. Proposed Rule 3.8(h) applies 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.” Similarly, Rule 3.8(i) applies 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.” Both formulations of the prosecutor’s duty are ambiguous, leaving open whether “knows of . . . new, credible and material evidence . . .” means that the prosecutor’s duty is triggered when he becomes aware of information that others later determine is new, credible, and material evidence, or whether the prosecutor’s duty is triggered only when he is both aware of the information and aware that it is new, credible and material. The term “knows” is undefined in this Rule and its comments. Its definition in Rule 9.1(f) – “actual knowledge of the fact in question” – is not helpful in distinguishing these two possible interpretations.

Third, we are concerned by the use of the term “material.” The Massachusetts Rules of Professional Conduct do not define material. (A number of Massachusetts Rules of Professional Conduct include the word “material,” but neither the Rules nor their comments attempt to define the word.) The term “material” has been construed broadly in rules of professional conduct elsewhere to mean important, relevant to establish a claim or defense, or relevant to a fact finder. *See, e.g., Cohn v. Comm’n for Lawyer Discipline*, 979 S.W. 2d 694, 698 (Tex. App. 1998) (upholding the trial court’s ruling that a false statement to the tribunal was material, stating “We believe, that in the context of Rule 3.03(a)(1), materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of

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<sup>2</sup> Indeed there is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than a defense lawyer or any other officer of the court. In other words, why should this rule not apply to any lawyer who discovers evidence relating to a defendant’s factual innocence, when a prosecutor who works in a completely different jurisdiction than the prosecuting jurisdiction will have the same level of familiarity and competence with the case as any other member of the bar?

litigation”); *Defendant v. Idaho State Bar*, 2 P.3d 147, 152 (Idaho 2000) (in context of rule of professional conduct regarding candor, defining material as “whether (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it”) (internal citations omitted); *In re Packaged Ice Antitrust Litigation*, Nos. 08–md–01952, 10–cv–11689, 2011 WL 611894, at \*5 (E.D. Mich. Feb. 11, 2011) (materiality in context of rule of professional conduct regarding conflicts defined as information sufficient to reveal the conflict’s scope and severity).

In a related context, the term “material” is usually defined in the *Brady/Giglio* jurisprudence as evidence creating “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” A “reasonable probability” is “a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). The language of proposed Rule 3.8(h) suggests that this latter interpretation may be what is intended, because it refers to evidence “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]” However, because the term “material” is subject to differing interpretations, and the rule is not at all clear, the use of the term in the proposed rule would leave a prosecutor at risk of losing his or her bar license if he or she mistakenly interprets that term.

Fourth, it is unclear what is meant or required for a prosecutor to “undertake further investigation” into the conviction of a defendant. Proposed Rule 3.8(h)(2)(ii). Prosecutors are not investigators and have neither the general investigative powers (such as the power to issue subpoenas post-trial) nor the staff or financial resources to investigate claims of “new, credible and material” evidence. Indeed, requiring prosecutors to expend their available resources in this fashion may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources.

Fifth, although proposed Comment [9] purports to protect prosecutors who have acted in “good faith” in deciding not to act under proposed Rule 3.8(h) or (i), it is unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor’s intent, or objective standard based on what a reasonable attorney would do in similar circumstances.

#### **B. Proposed Rule 3.8(i) is unclear, impractical and ineffective.**

The same concerns regarding the use of “knows” in proposed Rule 3.8(h) apply to Rule 3.8(i). Again, does “knows of clear and convincing evidence” mean that the prosecutor has heard of such evidence, knows that it actually exists, or knows that the evidence is clear and convincing? What “clear and convincing” means in this context is similarly unclear. “Clear and convincing” is usually descriptive of a burden of proof, not a piece of evidence. And, when seeking to apply this unclear standard, a prosecutor not involved in an earlier case will have no understanding of the evidentiary context of the earlier prosecution in which to assess the importance of potentially new evidence.

Perhaps more troubling is the rule's mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do. Proposed Comment [8] to Rule 3.8 attempts to clarify this mandate but falls far short by suggesting steps that "may" be necessary, but are in fact procedurally inappropriate, at least under federal law. Proposed Comment [8] states that "[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." It is not clear what legal authority relating to post-conviction motions would support a prosecutor's request for post-conviction relief from a court which has been divested of jurisdiction by the passage of time.<sup>3</sup> Nor is it clear how informing the convicting court of the prosecutor's concerns outside of a formal pleading would "remedy" the conviction. Further, the use of the word "may" implies that a prosecutor who is faced with clear and convincing evidence that a defendant did not commit the crime of which he was convicted may in some circumstances be required to do more, which could be problematic given that federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction in the context of existing federal law, as discussed below.

### **C. Proposed Rules 3.8(h) and (i) may be incompatible with applicable federal laws and other Rules of Professional Conduct.**

The duties imposed by these proposed rules may conflict with prosecutors' obligations under other rules and, for federal prosecutors, under federal law.

Proposed Rules 3.8(h) and (i) are simply not designed to be compatible with existing federal laws and procedures. They alter the balance already struck in existing law without being subjected to the rigors of or accountability to a formal legislative process. Federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly-discovered evidence. Under federal law, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Federal Rule of Criminal Procedure 33(a), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There is a three-year time limit on such a motion based on newly-discovered evidence. Under 28 U.S.C. § 2255, a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the date on which the judgment of conviction becomes final, an impediment to making the motion is removed if the movant is prevented from making the motion by government action, the right asserted was recognized by the Supreme Court, or facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Thus, the ability of a federal prosecutor to "remedy the conviction" may be limited by applicable law and procedure.

In addition, Mass. R. Prof. Conduct 1.6 is implicated. Prosecutors have a client just as other attorneys do and are obligated to preserve their client's confidences. Federal prosecutors

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<sup>3</sup> There also may be no authority for the appointment of counsel in federal court at this point. See Order 13-02 Plan for Implementing the Criminal Justice Act of 1964 As Amended 18 U.S.C. § 3006A (D. Mass. November 14, 2013) (listing persons for whom counsel can be appointed).

are also governed by a host of other confidentiality requirements, *e.g.*, the Privacy Act of 1974 (5 U.S.C. § 552); Fed. R. Crim. P. 6(e) (grand jury secrecy); and 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure under proposed Rules 3.8(h) and (i) could subject the Assistant United States Attorney to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Additionally, proposed Rules 3.8(h) and (i) place an ethical duty on a federal prosecutor that potentially conflicts with 5 U.S.C. § 301, which provides that agency records are owned by the federal agency and cannot be disclosed without agency approval. *See Touhy v. Ragan*, 340 U.S. 462 (1951); *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982) (finding Touhy regulations constitutional); *see also United States v. Williams*, 170 F.3d 431 (4th Cir. 1999) (holding that defendant in state murder prosecution was required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Ethical rules such as Model Rules 3.8(h) and (i) should not attempt to trump these federal laws.

I am further troubled by proposed Comment [7] to Model Rule 3.8, which states, “[c]onsistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.” The comment suggests that Department attorneys have no ability to talk to a defendant. In fact, Rule 4.2 allows *ex parte* contact with a represented defendant under certain circumstances, such as when it is “authorized by law,” and the rule’s prohibition only applies when the person in question is actually represented by counsel on the matter to be discussed. In many situations where a disclosure appears to be required under proposed Rule 3.8(h), there may be a question of whether the person in question is still represented by counsel. Experience teaches that it is sometimes very difficult to determine whether an already convicted and sentenced defendant is still represented by his trial or appellate counsel, has new counsel, or no longer has counsel.

**D. The commentary to proposed Rule 3.8 should state that a prosecutor has satisfied such obligations as he may have under subsection (h) or (i) if he has reported the evidence to the prosecutor who obtained the conviction or an appropriate supervisory attorney in the jurisdiction in which the conviction was obtained.**

For all of the reasons described above, it will rarely be possible for a prosecutor to meaningfully assess evidence potentially material to obtaining a conviction in an unfamiliar case. Absent special circumstances, the prosecutor also will not have the evidentiary background necessary to undertake a considered follow-up investigation if he previously has had no role in the case. The people in a position to make the assessment and investigate effectively are the prosecutor(s) who obtained the original conviction and their supervisors. Accordingly, if subsections (h) and (i) are adopted in any form, the commentary to Rule 3.8 should explicitly state that a prosecutor’s obligations under these subsections are satisfied if he brings evidence which he learns to the attention of one of these people.

## **II. Massachusetts Proposed Rule 3.8(g)**

Proposed Massachusetts Rule 3.8(g), presently Rule 3.8(j), provides that the “prosecutor in a criminal case shall. . . (g) not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused.” While I am again supportive of the goal behind this proposed rule, the rule does not provide clear direction to a prosecutor. Rather, it risks subjecting a prosecutor and her cases to amorphous claims – ones which would be both difficult to verify or investigate – that the prosecutor improperly failed to pursue a particular avenue of investigation or some particular legal theory advocated by a defendant. Moreover, proposed Massachusetts Rule 3.8(g) improperly assumes that prosecutors have complete control over all investigative functions conducted by independent law enforcement agencies. I ask the Committee to reconsider whether subsection (g) should remain in Rule 3.8 when revised. If the Committee determines it should remain, I propose adding a comment clarifying its scope.

### **A. Rule 3.8(g) remains more appropriately an ABA standard for criminal justice.**

Proposed Rule 3.8 (g), which is drawn directly from the ABA Standards for Criminal Justice, the Prosecution Function 3-3.11(c), properly remains a part of the Standards. The ABA Standards for Criminal Justice are a “guide to professional conduct and performance.” ABA Standards for Crim. J., Pros. Function 3-1.1. In contrast to rules of professional conduct, the standards “are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction.” *Id.*; *see also State v. Colton*, No. CR6289646, 1998 WL 420705, at \*9 (Conn. Super. Ct. July 17, 1998) (citing Standard 3-3.11(c) in assessing a claim of prosecutorial misconduct underlying a motion to dismiss for double jeopardy and observing that prosecutor is not required to “check out every single word a witness says” because “the legal and ethical obligation does not go that far and the standard required only that the prosecutor acquire ‘all *relevant* evidence’”) (emphasis in original). The relative ambiguity of the rule and the fact that it establishes aspirational standards rather than clear requirements make it appropriate as guidance and not as the basis for which an attorney could be disciplined.

Prosecutors’ obligations under already existing Rules provide adequate protection against the risks that proposed Massachusetts Rule 3.8(g) seeks to address. In particular, Rule 3.8(a) already requires that a prosecutor “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]” Moreover, Comment [1] to Massachusetts Rule 3.8 already reminds prosecutors of their special responsibilities:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

Mass. R. 3.8 cmt. [1]. Taken together, Rule 3.8(a) and Comment [1] already require attorneys to have a factual basis to support a charge and not to ignore evidence undermining either probable

cause or evidentiary sufficiency of guilt.

**B. Prosecutors have limited capacity to investigate independently.**

Federal prosecutors are not investigators and have neither the general investigative powers nor the staff or financial resources to investigate every possible legal theory or claim of additional evidence. Federal investigations are conducted mainly by independent law enforcement agencies. To the extent their actions or functions can be imputed to prosecutors through Rule 5.3, proposed Rule 3.8(g) puts the prosecutor at risk for actions and inactions by others over which he or she may have no or inadequate knowledge or control.

To the extent the Court nevertheless retains proposed Massachusetts Rule 3.8(g), we recommend including clarifying language, such as that adopted in a similar rule in the District of Columbia. In particular, while District of Columbia Rule of Professional Conduct 3.8(d) tracks proposed Massachusetts Rule 3.8(g), it provides guiding language that clarifies the rule's scope: "This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure." D.C. Rules of Professional Conduct R. 3.8(d) cmt. [1] (2007). Comment [1] to D.C. Rule 3.8(d) makes clear that the government's obligation to investigate under the rule is no greater than its obligation under substantive law, and we recommend that similar clarification be included should the Court decide to retain proposed Massachusetts Rule 3.8(g).

**III. Massachusetts Proposed Rule 3.8(e)**

Proposed Rule 3.8(e)(2), presently Rule 3.8(f)(2), requires that a prosecutor not subpoena a lawyer to present evidence about a past or present client unless "the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding[.]" We recommend eliminating Rule 3.8(e)(2) to conform the proposed rule to the ABA Model Rules or, in the alternative, including a comment that makes clear that Rule 3.8(e)(2) is not applicable to federal prosecutors.

As set out in greater detail in the dissent from the Report of the Standing Advisory Committee on the Rules of Professional Conduct A-45-A-48 (July 7, 2013) *available at* <http://www.mass.gov/courts/sjc/docs/rules-professional-conduct-report.pdf> ("the Report"), the controversial requirement that prosecutors obtain judicial approval for attorney subpoenas—which has been deleted from the ABA Model Rules and has similarly either been rejected or not adopted in almost every other state—is unnecessary and, at least as applied to federal prosecutors, has been preempted by federal case law.

The judicial approval requirement was and remains controversial for good reason. As an initial matter, the Committee itself was closely divided on whether to retain this requirement. *See Report at 29, A-45-A-48.*

While Massachusetts had a judicial approval requirement for attorney subpoenas as far back as 1986, the current version of the requirement was first adopted in the 1990 amendments to the ABA Model Rules of Professional Conduct, and it was controversial at the time. *See* Ellen J. Bennett, *et al.*, Am. Bar Ass'n Center for Prof'l Responsibility, *Ann. Model R. of Prof'l Conduct* 390 (7th ed. 2011). Just five years later, in 1995, the requirement was eliminated by the ABA because it determined that the requirement belonged in a rule of criminal procedure, not in an ethics code. *Id.* (citing ABA Report to the House of Delegates, No. 101 (Aug. 1995) (citing *Baylson v. Disciplinary Bd.*, 764 F. Supp. 328 (E.D. Pa. 1991), and *Stern v. U.S. Dist. Court*, *supra*)).

Since then, virtually every state has either adopted the current version of the ABA Model Rules 3.8(e), which does not include the requirement of judicial approval, or, if they previously had a judicial approval requirement, they have eliminated it. Indeed, only Rhode Island and Pennsylvania have retained the judicial approval requirement. *See* Pa. Rules of Prof'l Conduct R. 3.10;<sup>4</sup> R.I. Rules of Prof'l Conduct R. 3.8(f)(2). Thus, rejection of proposed Massachusetts Rule 3.8(e)(2) would comport with one of the Committee's stated goals of consistency with the ABA Model Rules, and eliminating Rule 3.8(e)(2) would ensure consistency with virtually every other state, which is a salutary goal in the increasingly national and international practice of law.

Notwithstanding the Committee's argument that the Massachusetts Supreme Judicial Court has the *authority* to promulgate both ethical and procedural rules (in contrast to the separation of authority in the federal system), inclusion of the requirement of judicial approval unnecessarily confounds ethical and procedural rules. Proposed Massachusetts Rule 3.8(e)(2) goes beyond establishing an ethical precept to establishing rules of criminal procedure and court supervision that have no analogue elsewhere in the rules.

To the extent the Court retains proposed Massachusetts Rule 3.8(e)(2), the United States Attorney's Office requests the inclusion of the following comment that makes clear that it is inapplicable to federal prosecutors and that federal prosecutors would not be subject to discipline for acting in compliance with federal precedents:

Paragraph (e)(2) does not apply to federal prosecutors appearing in federal matters. *See Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

While Massachusetts Bar Counsel submitted an affidavit in *Stern* "vouchsaf[ing] that he would not wield State Rule 3.8(f) against federal prosecutors" (*see Stern*, 214 F.3d at 9), the addition of this comment would make clear the limitation in the rule itself without having to rely on outside authority.

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<sup>4</sup> Note that, while Pennsylvania also has included a judicial approval requirement in its rules of professional conduct, as in Massachusetts, the federal courts have rejected the application of that rule to federal prosecutors. *See Baylson v. v. Disciplinary Bd.*, 975 F.2d 102, 108 (3d Cir. 1992).

#### **IV. Massachusetts Proposed Rule 3.8(a)**

The proposed revisions to Rule 3.8(a) would require a prosecutor to refrain from “threatening to prosecute a charge that the prosecutor knows is not supported by probable cause.” Absent clarification in the commentary, I am concerned that this revision may inadvertently restrict a common predicate for plea negotiations.

Often, and wholly properly, a prosecutor may offer to end an investigation into a defendant’s course of criminal conduct if he will plead guilty to those representative offenses already known to the prosecutor. Sometimes formulating this differently, the prosecutor may state that he will continue his investigation into the defendant’s criminal conduct absent an agreement, and pursue such other charges as he may uncover. In either case, at the time the prosecutor makes this statement, the prosecutor knows that he does not then have probable cause to establish the additional offenses which he may later uncover.

The commentary to Rule 3.8(a) should make clear that the rule prohibits a prosecutor who has investigated a specific crime and determined there not to be probable cause to believe in a person’s involvement from nonetheless threatening to prosecute the person for that crime. The rule, by contrast, does not prohibit a prosecutor from declaring he will prosecute an individual for as yet uncharged criminal conduct if he develops sufficient evidence through subsequent investigation to support charges.

#### **Conclusion**

For the foregoing reasons, the United States opposes the adoption of proposed Rule 3.8, in particular Model Rules 3.8(a), (e)(2), (g), (h), and (i), into the Massachusetts Rules of Professional Conduct. If the Committee ultimately concludes that adoption of some variation of these provisions is warranted, we believe that these provisions and their accompanying comments should be substantially redrafted and would welcome the opportunity to participate in that process.

Thank you for this opportunity to comment.

Respectfully,

  
CARMEN M. ORTIZ  
United States Attorney