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IN SUPREME COURT  
STATE OF WISCONSIN

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OF WISCONSIN

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In the Matter of the Amendment of  
Supreme Court Rules Chapter 20  
Rules of Professional Conduct for Attorneys

PETITION

No. 08 - 24

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The Wisconsin District Attorneys Association, through its president, Ralph Uttke, District Attorney of Langlade County, respectfully petitions this court to modify Rule 20:3.8 of the Wisconsin Rules of Professional Conduct to adopt the substance of the recent changes to the American Bar Association Model Rule 3.8, accompanied by a Wisconsin comment to the rule and in support of this petition states as follows:

1. Public prosecutors, like all attorneys licensed to practice law in Wisconsin, are subject to the Wisconsin Rules of Professional Conduct approved by this court on January 5, 2007, and effective as of July 1, 2007;
2. However, as frequently recognized by this court, the role of the public prosecutor as a "minister of justice" is distinct from that of a lawyer representing an individual client, and his statutory and constitutional responsibilities to simultaneously protect the public and respect the procedural rights of the accused have no counterpart in the lawyer-client paradigm. As a consequence, much of the content of contemporary ethical codes – designed to guide lawyers who represent clients – are minimally helpful to those attorneys without actual clients such as public prosecutors;

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The court has long recognized the unique role of prosecutors as quasi-judicial officers whose duty is to seek justice rather than merely convictions. State v. Karpinski, 92 Wis. 2d 599, 285 N.W. 2d 729 (1979); Thompson v. State, 61

3. Petitioner recognizes that by nature of the position, a prosecutor has a unique role and special obligation to rectify the wrongful conviction of an innocent person. Earlier this year the American Bar Association amended Model Rule 3.8 to recognize the responsibility of a prosecutor to the wrongly convicted. (Exhibit A) We believe Wisconsin should take similar action. This petition is intended to reinforce our commitment to justice under law. We urge the court to amend SCR 20:3.8 as outlined below, a proposal similar to the new A.B.A. rule with the exception of the substitution of "request" for "undertake" in subsection (g)(2)(B) as shown below, and a revision of the language of subsection (h). The new language proposed is underscored; the language deleted from the A.B.A. rule is stricken:

#### PROPOSED AMENDMENTS TO SCR 20:3.8

(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 make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay, and

(B) Undertake Request further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of comes to know 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 a prosecutor shall . notify the court where the conviction occurred and make reasonable efforts to notify the defendant.

4. Petitioner proposes a modification of subsection (g)(2)(B) because few Wisconsin district attorney offices internal investigative resources, instead relying on other police

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Wis. 2d 325, 212 N.W. 2d 109 (1973); State v. Peterson, 195 Wis. 351, 218 N.W. 367 (1928); O'Neil v. State, 189 Wis. 259, 207 N.W. 280 (1926).

agencies. This modification reflects the reality of how investigations are conducted in most Wisconsin counties;

5. The modification of subsection (h) is intended to clarify the prosecutor's duties similar to subsection (g) instead of simply requiring that he or she "remedy" the matter;

5. To provide context for the new rule and clarify the circumstances in which it would apply, the court should include new paragraphs seven through nine of the A.B.A. Commentary to the rule (Exhibit B), as well as the following proposed Wisconsin comment:

Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20:3.8(g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new A.B.A. rule to recognize limits in the investigative resources of Wisconsin prosecutors and to clarify the prosecutor's duties when presented with "clear and convincing" evidence of innocence under subsection (h).

6. As additional support and background for this proposed the petitioner submits that in February of this year, the A.B.A. called on states to amend their legal ethical rules to require prosecutors to disclose evidence creating a reasonable likelihood that a defendant did not commit the crime for which he or she was convicted, and to take steps to remedy such convictions. Science-based exonerations of the wrongly convicted were the catalyst for the new ABA rules. Although the overwhelming majority of prosecutors across the country have acted to remedy wrongful convictions when they became known, some have not.

7. Petitioner asserts that the prosecutor's duty to seek justice not only requires the prosecutor to take precautions to avoid convicting innocent individuals but also requires action when it appears likely that an innocent person was convicted.

8. Both the A.B.A. changes and the instant proposal define two situations when action is required – when there is a "reasonable likelihood" or "clear and convincing evidence" that a person was wrongly convicted.

9. In the first instance, addressed by subsection (g), when a prosecutor comes to know of new and material evidence creating a "reasonable likelihood" that a person was wrongly convicted, the prosecutor must examine the evidence and undertake whatever further inquiry or investigation is necessary to determine whether the conviction was wrongful. It would impose no new responsibilities for the mass of requests for post-conviction relief which lack merit and do not raise claims of innocence. Stated otherwise, the rule would not apply when new evidence is relevant but its significance is subject to reasonable disagreement. Petitioner agrees with the view expressed in paragraph 9 of the A.B.A. commentary, "(a) prosecutor's independent judgment, made in good faith, that the new evidence is not of such a nature to trigger the obligation of §(g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of the rules." (Exhibit B) Faced with proof of a "reasonable likelihood" of innocence, the A.B.A. rule would require a prosecutor to: (1) notify an "appropriate court or authority," (2) tell the offender or his lawyer, and (3) either investigate further or make "reasonable efforts to cause an investigation" that could resolve the factual questions presented. Our proposed subsection (g) is identical to A.B.A. Rule 3.8(g).

10. Subsection (h) of the new A.B.A. Rule concerns the situation where the prosecutor is confronted with "clear and convincing evidence" of innocence. It provides that the prosecutor "shall seek to remedy the conviction." Here it is assumed that further investigation is not needed. Our proposed subsection (h) would replace the general requirement that a prosecutor "seek to remedy the conviction" with a more specific articulation of duties, requiring the

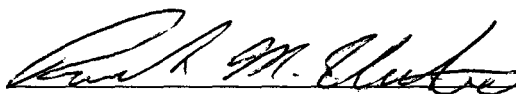
prosecutor to notify the court of record and make reasonable efforts to notify the convicted person. In this respect it parallels the requirements of subsection (g). Wisconsin case law recognizes judicial authority over the decision to dismiss a pending case.<sup>2</sup> The language proposed in subsection (h) acknowledges this authority and provides clarity in articulating a prosecutor's responsibilities under the rule.

11. These amendments protect the rights of criminal defendants who may have been wrongfully convicted and also protect the public by alerting authorities that the actual perpetrator of a crime may still be at large. The amendments also serve to increase public confidence in state and our criminal justice system as a whole. Petitioner also believes, based upon consultation with prosecutors throughout the state of Wisconsin, that the proposed Rule is consistent with prevailing policies and practices.

#### CONCLUSION

For these reasons, petitioner respectfully requests that SCR 20:3.8 be amended as described herein.

Respectfully submitted,



Ralph Uttke

District Attorney  
Langlade County  
President, Wisconsin District Attorney's Association  
State Bar No. 1012940

Langlade County District Attorney  
800 Clermont St.  
Antigo, WI 54409-1985  
(715) 627-6224

<sup>2</sup> *State v. Kenyon*, 85 Wis. 2d 36, 270 N.W. 2d 160 (1978)

## EXHIBIT A

### Model Rules of Professional Conduct

#### Revised Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) 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 and 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 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,

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

- (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

## EXHIBIT B

### A.B.A. Model Rules of Professional Conduct

#### Revised Rule 3.8 Special Responsibilities Of A Prosecutor - Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

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

[4] Paragraph (e) 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 client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a 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. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).



[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent 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.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary 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.

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

## **EXHIBIT C**

### **Current Rule 20:3.8 with proposed changes underscored:**

#### **SCR 20:3.8 Special responsibilities of a prosecutor**

(a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

(b) When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter.

(c) When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

(d) When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:

(1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or

(2) assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.

(e) A prosecutor shall not subpoena a lawyer in a grand jury or other 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.

(f) A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:

(1) 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; and

(2) 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 SCR 20:3.6.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) In the conviction was obtained in the prosecutor's jurisdiction,

(A) Promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay, and

(B) Request further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor comes to know 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, a prosecutor shall notify the court where the conviction occurred and make reasonable efforts to notify the defendant.