

**SUPREME COURT OF WISCONSIN**

## NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 08-24

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In the matter of amendment of Supreme Court  
Rules Chapter 20, Rules of Professional Conduct  
for Attorneys.

**FILED****JUN 17, 2009**

David R. Schanker  
Clerk of Supreme Court  
Madison, WI

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On September 19, 2008, the Wisconsin District Attorney's Association, through its president, Ralph Uttke, District Attorney for Langlade County, filed a petition requesting this court modify Supreme Court Rule (SCR) 20:3.8 to adopt the substance of recent changes to the American Bar Association Model Rule 3.8 relating to special responsibilities of a prosecutor. A public hearing was conducted on March 9, 2009. Attorney Uttke and Attorney Pat Kenney presented the petition to the court. In addition, the court heard testimony and/or received written statements from the Office of the State Public Defender, the Wisconsin Department of Justice, the Wisconsin Association of Criminal Defense Attorneys (WACDA), the Wisconsin Criminal Justice Study Commission, Professor Ben Kempinen on behalf of the University of Wisconsin Law School's Remington Center, the State Bar of Wisconsin, and the Board of Administrative Oversight. All participants supported the

petition, but several advocated adopting the language of the ABA Model Rule, rather than the modified language proposed by the petitioner. The court discussed the petition at the ensuing open administrative conference and voted unanimously to adopt the petition with certain modifications as set forth herein. Accordingly, effective July 1, 2009, SCR 20:3.8 is amended as follows:

**Section 1.** 20:3.8 (g) of the Supreme Court Rules is created to read:

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 do all of the following:

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

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

**Section 2.** 20:3.8 (h) of the Supreme Court Rules is created to read:

20:3.8 (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.

**Section 3.** The following Comments to SCR 20:3.8(g) and (h) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct for Attorneys:

#### **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.

This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

#### **ABA Comments**

[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.

IT IS ORDERED that notice of this amendment of SCR 20:3.8 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 17th day of June, 2009.

BY THE COURT:

David R. Schanker  
Clerk of Supreme Court

