

WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

Special Responsibilities: Proposed Changes to Prosecutorial Ethicals

Since 1969, a New York prosecutor's ethical duties have been contained in a brief, two sentence rule in the New York Code of Professional Responsibility (the New York Code).

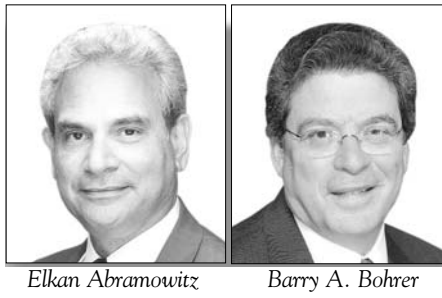
Notwithstanding reports of troubling prosecutorial conduct not addressed in ethics provisions, this rule, Disciplinary Rules (DR) 7-103, has remained virtually unchanged since its adoption.

The rule addresses only two standards:

- (i) that a prosecutor should not bring an action not supported by probable cause and
- (ii) should reveal to the defense information that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.¹

In light of literature suggesting the necessity for additional disciplinary rules for prosecutors, the adequacy of this rule has been under recent scrutiny by both the New York State Bar Association (NYSBA) and the Association of the Bar of the City of New York (City Bar). Considering a wholesale revision of New York's ethical code, the NYSBA has drafted a new rule to replace DR 7-103 and has invited public comment. In contrast, the City Bar has suggested additional rules

Elkan Abramowitz is a member of *Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer*. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. **Barry A. Bohrer** is also a member of *Morvillo, Abramowitz* and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney's Office for the Southern District of New York. **Gretchan R. Ohlig**, an attorney, assisted in the preparation of this article.



Elkan Abramowitz

Barry A. Bohrer

to supplement DR 7-103. It is widely reported that prosecutors are rarely disciplined for misconduct and that those who are rarely receive more than a "slap on the wrist."²

Updating the meager ethical guidance contained in DR 7-103 may be the first step toward remedying this problem.

Proposed Rule 3.8 From the NYSBA

The New York Code, modeled on the American Bar Association's Model Code of Professional Responsibility (Model Code), has long set the ethical standard for lawyers and the practice of law in New York. The New York Code in its current form has developed against the backdrop of the ABA's decision to adopt the Model Rules of Professional Conduct (the Model Rules), replacing the Model Code, in 1983. Although many states have since abandoned the Model Code in favor of the newer ethics system set forth in the Model Rules, the NYSBA rejected such an effort in 1985, instead modifying its version of the code in an attempt to capture significant changes set forth in the Model Rules. Accordingly, the current New York Code is an "amalgam of Model Code and Model Rules provisions, interspersed with

rules developed specifically by and for New York."³

The NYSBA's Committee on Standards of Attorney Conduct (COSAC), charged with monitoring and evaluating the New York Code and other provisions that regulate lawyers and the practice of law in New York State, began its own comprehensive evaluation of the Model Rules in January 2003. According to its final report issued earlier this year, COSAC considered "desirability of a change from the structure of the Model Code to that of the Model Rules, as well as to the substance of the provisions of the Model Rules themselves." The result was a proposed set of Rules of Professional Conduct (the proposed rules) for adoption in New York.

NYSBA House of Delegates

The proposed rules currently are under consideration by the NYSBA House of Delegates. Among the specific rules to be discussed at the November 2006 meeting of the House of Delegates is Rule 3.8 entitled "Special Responsibilities of Prosecutors." According to COSAC, Rule 3.8 substantially expands the ethical responsibilities of prosecutors and other government lawyers, which are barely addressed in the existing New York Code. The proposed rule, set forth in its entirety in the accompanying endnote,⁴ articulates standards with regard to instituting of charges; preventing the exercise of the right to counsel; seeking waiver of pretrial rights; disclosing evidence favorable to the accused; refraining from subpoenaing lawyers, except in well-defined circumstances; regulating extrajudicial comments; disclosing favorable evidence post-conviction; and taking steps to set aside wrongful convictions.

Not surprisingly, proposed Rule 3.8 has generated a great deal of commentary among federal and state prosecutors practicing in New York. COSAC has received lengthy comments from the district attorney of New York County, the United States attorneys for the districts of New York, and the District Attorneys Association of New York State. Generally, these comments object to the expansion of the prosecutorial duties set forth in DR 7-103. The District Attorneys Association of New York State expresses a “general concern...that [proposed Rule 3.8] will allow good faith prosecutorial judgments to be second guessed and where others subsequently disagree, prosecutors will find themselves accused of unethical behavior and potentially subject to serious disciplinary action.”⁵ In addition to issuing general comments regarding the undesirability of proposed Rule 3.8 as a whole, prosecutors also have raised specific objections to the proposed rule’s subsections, only some of which can be detailed in this article.

A number of the prosecutors’ complaints center around subsection (a) of the proposed rule, which expands on DR 7-103(A) in two ways. First, it increases the scope of DR 7-103(A), which speaks only to when a prosecutor should institute a charge, by setting forth the standard pursuant to which prosecutors should (i) institute a charge or (ii) prosecute to trial or continue to prosecute a charge. Second, it adds an objective state of mind element to the subjective language in DR 7-103(A), providing that a prosecutor shall not bring a charge or continue to prosecute a charge that the prosecutor “knows or reasonably should know” is not supported by the evidence. According to the proposed rule, in instituting a charge, the evidence should be supported by probable cause; in continuing to prosecute a charge, the evidence should be sufficient to establish a prima facie showing of guilt.

Objective State of Mind?

With respect to these changes, prosecutors object to the inclusion of an objective state of mind element, arguing that only the subjective standard of “knows” as set forth

in DR 7-103 should be used. To support their position, prosecutors posit that in cases where there had been a judicial finding of insufficiency of proof, a rule including the objective standard of “reasonably should know” may result in “prima facie evidence of misconduct in that the prosecutor ‘reasonably should have known’ that the evidence was insufficient, yet ‘continued to prosecute.’”⁶ In addition, prosecutors argue that the rule as drafted would require them to “throw in the towel” in cases involving reluctant or unexpectedly unavailable witnesses. To seek plea negotiations or continue to prosecute such cases may subject prosecutors to discipline pursuant to that part of the rule barring continued pretrial discussions where the prosecutor knows there may be insufficient evidence due to missing witnesses. The New York District Attorneys Association argues that this result is unfair to victims and the public at large.⁷

Furthermore, prosecutors believe that portions of proposed Rule 3.8 may lead to conclusions contrary to New York law, such as the rule set forth in subsection (e), which prohibits a prosecutor from issuing a subpoena to a lawyer to testify about a present or former client unless the information sought is not privileged. Prosecutors argue that this requirement is contrary to existing law because it shifts the burden of determining whether information is privileged to the prosecutor rather than the individual who holds the privilege. Prosecutors suggest that the remainder of subsection (e) requiring that the information be essential and not feasibly obtained in any other way be eliminated altogether. In his comments, New York County District Attorney Robert Morgenthau said that these subsections “provide protection even for information that is not privileged and place unreasonable limitations on both prosecutorial discretion in the conduct of investigations and the grand jury’s traditional right to have every man’s ...evidence.”⁸

Proposals From the City Bar

Independent of the efforts undertaken by COSAC, but concurrent in time, the Committee on Professional Responsibility

of the City Bar (the committee) also examined the ethics provisions governing prosecutors to “determine whether the current disciplinary rules adequately reflect the unique role and responsibilities of these government lawyers.” The results of these efforts recently were reported by the City Bar. Recognizing the work done by COSAC on proposed Rule 3.8, the committee declined to undertake “a comprehensive review of all aspects of prosecutorial action” or “enter into the longstanding controversies about certain prosecutorial obligations.” Instead, the committee identified three specific areas of prosecutorial work that were of greatest concern to the prosecutor’s duty to justice, and drafted proposed standards related to these areas to “augment the existing rules governing prosecutors.”⁹

The areas identified by the committee were:

- 1) a prosecutor’s obligation to the factually innocent;
- 2) the standard required to take a case beyond the charging stage; and
- 3) a prosecutor’s duty of candor.

With respect to the first of these areas, the committee proposed a rule that states:

A prosecutorial office shall:

- (a) investigate the merits of a convicted person’s innocence claim submitted to the prosecutorial office where the assertions made by the person, if true, would raise a reasonable probability that he did not commit the offense for which he was convicted, and he identifies new material evidence, whether or not defense counsel could have found it by the exercise of due diligence that supports his assertion;
- (b) disclose to the convicted person any *Brady* material that comes to the prosecution’s attention that was available prior to the defendant’s conviction but not previously disclosed; and
- (c) where there is clear and convincing evidence that the person did not commit the offense, join in a motion to set aside the prior judgment.

The committee found that in light of the large number of cases in which convicted defendants are exonerated, it is appropriate that prosecutorial resources

be used to consider credible post-conviction claims of innocence. The commentary notes that these obligations are not only upon the individual prosecutor, but upon the office as a whole.¹⁰

The second rule proposed by the committee is identical to COSAC's proposed Rule 3.8(a) regarding the standards by which a prosecutor must determine whether a case can be charged or taken beyond the charging stage. The committee is in agreement that an objective state of mind element be added to the subjective element currently contained in DR 7-103 and that a standard higher than probable cause—"evidence to support a prima facie showing of guilt"—is required to carry a case beyond the charging stage.¹¹

Finally, with respect to a prosecutor's obligation to reveal information helpful to the defense to the court, the committee proposed the following rule:

Prosecutor's Duty of Candor

The prosecutor has a duty of candor to the Court:

(a) *Duty to correct false testimony*: The prosecutor has the duty to correct the testimony of his witness that he knows or reasonably should know is false, by asking questions designed to elicit corrections and truthful testimony. If the prosecutor has reason to believe that his witness has committed perjury, the prosecutor must immediately bring that fact to the court's attention.

(b) *Duty as to the presentence report*: The prosecutor has the obligation of correcting any errors in the pre-sentence report that work to the detriment of the defendant, regardless of whether they are noticed by defense counsel.

(c) *Duty to disclose material facts to the court*: A prosecutor shall not knowingly fail to disclose to the tribunal a material fact with the knowledge that the tribunal may tend to be misled by such failure.

The committee observed that neither the New York Code nor the Model Rules address the areas covered by this rule, but that such a rule was necessary to ensure full candor by prosecutors.¹²

Review and comment of both proposed

Rule 3.8 and the City Bar's recommendations is in its early stages. The response of prosecutors and their professional organizations makes clear that there are many differing opinions on the substance and scope of ethical rules governing prosecutors and other government lawyers. An increasing focus on the paucity of disciplinary sanctions imposed against prosecutors may result in definitive action with respect to the revision of New York Code's DR 7-103. Notably, a Report to the American Bar Association Commission on Evaluation of the Rules of Professional Conduct observed that "a principal criticism of [ethics rules governing the conduct of prosecutors] is not that they exist, but that they are too rarely applied in practice to discipline prosecutors who have committed unethical conduct."¹³

Ultimately, the question will be whether alteration of the New York Code as it pertains to the ethical obligations of prosecutors will really make any difference. It is open season for public comment, which should include contributions from all participants in the criminal justice system on this important subject.

1. New York Code of Professional Responsibility, DR 7-103: Performing the Duty of Public Prosecutor or Other Government Lawyer.

2. See e.g., Bennett L. Gershman, Prosecutorial Misconduct §14.1 (West 2d ed. 2001); Fred C. Zacharias, "The Professional Discipline of Prosecutors," 79 N.C. L. Rev. 721 (2001); Joseph R. Weeks, "No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence," 22 Okla. City U. L. Rev. 833 (1997); Bruce A. Green, "Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?," 8 St. Thomas L. Rev. 69 (1995); Richard A. Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," 65 N.C. Law Rev. 693 (1987).

3. See New York State Bar Association, Committee on Standards of Attorney Conduct Report on Proposed New York Rules of Professional Conduct at i (setting forth history of New York's ethics code for attorneys) (available at http://www.onbar.org/news/COSAC_Rules/COSAC093005REPORTINTRODUCTION.pdf#search=new%20york%20rules%20of%20professional%20conduct).

4. A prosecutor or other government lawyer in a criminal case shall:

(a) not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trail or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt;

(b) not seek to prevent a person under investigation or the accused from exercising the right to counsel;

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

(d) except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, (i) 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 to mitigate the

offense and (ii) in connection with sentencing, disclose to the defense and to the tribunal all unprivileged information known to the prosecutor that tends to negate the guilt of the accused, mitigate the offense or reduce the sentence;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine; (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, (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused 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 rule 3.6 or this Rule;

(g) when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, (1) make timely disclosure to the convicted defendant and any appropriate court or authority of any material evidence known to the prosecutor and not previously disclosed; and (2) investigate the guilt or innocence of the convicted defendant;

(h) when a prosecutor knows of clear and convincing evidence establishing that an innocent person has been convicted, take appropriate steps to set aside the prior conviction.*

*Proposed New York Rules of Professional Conduct, Rule 3.8 (available at www.nysba.org/Content/ConentGroups/COSAC_Report/Rule3.8.pdf).

5. Letter to Steven C. Krane, Chair of COSAC, from Hon. Frank J. Clark, President of District Attorneys Association of New York State (May 24, 2006) ("Clark Letter"); see also Letter to Steven C. Krane, Chair of COSAC, from Robert M. Morgenthau, District Attorney of New York County, "Commentary on the New York State Bar Association's Proposed New York Rules of Professional Conduct" (May 25, 2006) ("Morgenthau Letter"); Letter to Steven C. Crane [sic], Chair of COSAC, from the United States Attorneys for the Districts of New York, "Comments on Proposed Rule 3.8, Special Responsibilities of Prosecutors" (May 26, 2006) ("United States Attorneys Letter").

6. Clark Letter at p. 2; see also United States Attorneys Letter at p. 2.

7. Clark Letter at pp. 2-3; see also Morgenthau Letter at p. 1.

8. Morgenthau Letter at p. 3. See also Clark Letter at pp. 3-4; United States Attorneys Letter at pp. 5-6 (noting that these subsections would make attorneys especially attractive for "shady" clients who seek a repository for records of a questionable enterprise).

9. The Committee on Professional Responsibility, The Association of the Bar of the City of New York, "Proposed Prosecutorial Ethics Rules" The Record, Vol. 61, No. 1 (2006) (available at http://www.nycbar.org/Publications/record/vol_61_no_1.pdf).

10. Id. at pp. 75.

11. Id. at pp. 79-81.

12. Id. at pp. 81-83.

13. Niki Kuckes, "Special Responsibilities of a Prosecutor," Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Responsibility (Dec. 1, 1999).