

	<p style="text-align: center;">American Bar Association CPR Policy Implementation Committee</p> <p style="text-align: center;">Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h)</p> <p>(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:</p> <ol style="list-style-type: none"> (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor’s jurisdiction, <ol style="list-style-type: none"> (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. <p>(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.</p> <p>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/pic/</p> <p>Of the states that have adopted the Model Rule:</p> <ul style="list-style-type: none"> • Two (2) states have adopted the Model Rule as is: ID and DE. • Two (3) states have adopted modified the Model Rule: CO, TN, and WI. • In eleven (11) jurisdictions the Rules Committees are studying the Model Rule: AK, CA, DC, HI, NE, NH, NY, ND, PA, VT, and WA.
AL	No action
AK	Rules Committee studying
AZ	No action
AR	No action
CA	Rules Committee studying
CO Effective 7/1/10	<p>Adopted modified ABA Model Rule:</p> <p>(g) Changes “likelihood” to “probability;” adds to end, “within a reasonable time;”</p> <p>(g)(1) Deletes “promptly” before “disclose;” adds “prosecutorial” before “authority;”</p> <p>(g)(2) Equivalent to MR but changes language to: “if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority;”</p> <p>(g)(1)(A) is MR (g)(1)(i) but deletes “promptly;” change “that evidence” to “the</p>

	<p>evidence;” deletes clause, “unless...delay;”</p> <p>Adds (g)(1)(B):</p> <p><i>(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.</i></p> <p>(h) Deletes “in the prosecutor’s jurisdiction;” adds clause, “in a court in which the prosecutor exercises prosecutorial authority” before “of an offense;” changes language after “the prosecutor shall” with: “take steps in the appropriate court, consistent with applicable law, to set aside the conviction.”</p> <p>Comments:</p> <p>[2] Changes “accused person” and “accused” to “defendant;”</p> <p>Adds:</p> <p><i>[3A] A prosecutor’s duties following conviction are set forth in sections (g) and (h) of this rule.</i></p> <p>[7] Deletes “If the conviction...to the defendant;” replaces “would ordinarily be accompanied by” with “the prosecutor must take the affirmative step of making a;”</p> <p>Adds:</p> <p><i>[7A] What constitutes “within a reasonable time” will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.</i></p> <p>[8] Replaces “convicted of an offense...remedy the conviction” with “convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (<i>see</i> C.R.S. §18-1-601 <i>et seq.</i> and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court;”</p> <p>Adds:</p> <p><i>[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.</i></p> <p>[9] Changes “independent” to “reasonable;”</p> <p>Adds:</p>
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	<i>[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.</i>
CT	No action
DC	Rules Committee studying
DE	Adopted MR
FL	No action
GA	No action
HI	Rules Committee studying
ID	Adopted MR
IL	No action
IN	No action
IA	No action
KS	No action
KY	No action
LA	No action
ME	No action
MD	No action
MA	No action
MI	No action
MN	No action
MS	No action
MO	No action
MT	No action
NE	Rules Committee studying
NV	No action
NH	Rules Committee studying
NJ	No action
NM	No action
NY	Rules Committee studying
NC	Rejected
ND	Rules Committee studying
OH	No action
OK	No action
OR	No action
PA	Rules Committee studying
RI	No action
SC	No action
SD	No action
TN Effective	Adopted modified ABA Model Rule: (g)(1) adds at the beginning: "if the conviction was obtained outside the

1/1/2011	prosecutor’s jurisdiction,” and replaces “and” at the end of the sentence with “or;” Deletes MR (2)(i) and (ii). The second sentence of TN Rule (g)(2) is identical to MR (g)(2)(ii). (h) the words “was convicted” are moved to before “in the prosecutor’s jurisdiction”
TX	Proposed Rule 3.09
UT	No action
VT	Rules Committee studying
VA	No action
WA	Rules Committee studying
WV	No action
WI Effective 7/1/09	Adopted slightly modified ABA Model Rule: (g) WI Rule changes “shall” to “shall do all of the following:” (i) Changes “promptly disclose” to “promptly make reasonable efforts to disclose” (iii) Adds “make reasonable efforts to” before “undertake;” deletes “make reasonable efforts to” before “cause.” Comments: [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 (Supreme Court of Wisconsin Order No. 08-24, filed June 17, 2009)] “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], [8], [9]
WY	No action

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