

THE SUPREME COURT *of* OHIO

TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

October 1, 2021
Meeting Minutes

Task Force Members in Attendance

Hon. Gene Zmuda (Chair)
Sixth District Court of Appeals

Sara Andrews
Director, Ohio Sentencing Commission

Hon. Michael P. Donnelly
Ex-officio member
Supreme Court of Ohio

Douglas Dumolt, Esq.
Non-voting Designee of Dave Yost
Ohio Attorney General's Office

Mark Godsey, Esq.
Ohio Innocence Project

Rep. David Leland
District 22

John Martin, Esq.
Cuyahoga County Public Defender's Office

Elizabeth Miller, Esq.
Non-voting Designee of Tim Young
Office of the Ohio Public Defender

Sheriff Tom Rigenbach
Buckeye Sheriff's Association

Joanna Sanchez, Esq.
Non-voting Designee of Tim Young
Wrongful Conviction Project
Office of the Ohio Public Defender

Hon. Nick Selvaggio
Champaign County Common Pleas Court

Andy Wilson, Esq.
Senior Advisor on Criminal Justice Policy
Office of the Governor

Timothy Young, Esq.
Ohio Public Defender

Conviction Integrity in the News

Task Force Chair Judge Gene Zmuda opened the meeting by introducing Kyle Stone, the newly elected prosecutor for Stark County. In keeping with his goals to be fairness- and justice-minded in his new role as prosecutor, Stone has decided to attend Task Force meetings so that he can stay informed of conviction-integrity work in Ohio.

Judge Zmuda shared with members a story out of Stark County, in which Eric Brunner has been granted a hearing on a decades-old rape conviction after DNA testing showed he was not a match for the rape kit. Stone said he looks forward to seeing what his office can do to ensure a fair and just result in this case.

Timothy Young and Joanna Sanchez shared information about International Wrongful Conviction Day, which falls on Saturday, October 2. Young stressed the importance of remembering the impact of racial bias in wrongful convictions. Black Americans are much more likely to be wrongfully convicted of a crime and are exonerated at a slower rate on average. Sanchez encouraged members to visit wrongfulconvictionday.org for more resources and information.

Discussion of Modifications to Ohio Prof.Cond.R. 3.8

Judge Zmuda thanked Douglas Dumolt, Justice Michael Donnelly, John Martin, Judge Lindsay Navarre, and Judge Nick Selvaggio for their work in producing a new draft of modifications to Ohio Prof.Cond.R. 3.8. This version was distributed to members for their review prior to the meeting.

Martin's presentation of the draft rule included the following:

New Draft and Intentions

- Martin informed members that all previous draft versions of Ohio Prof.Cond.R. 3.8 had been scrapped and this new version was created by directly modifying the existing rule.
- Martin noted that most of the Task Force's work so far has been remedial in nature — it has focused on how to handle wrongful convictions after they happen. He and the subgroup members hoped that some of the new provisions for the Rules of Professional Conduct would be a proactive solution for wrongful convictions and help ensure that the system gets it right the first time.

Title

- This draft version of 3.8 would change the title from “Special Responsibilities of a Prosecutor” to “Special Responsibilities of a Criminal Prosecutor.” The reasoning behind this change was to acknowledge the distinction between civil and criminal roles played by prosecutors. Martin speculated that the existing rule did not make a distinction between the two because it was drawn from the American Bar Association’s (“ABA”) Model Rule 3.8 and Ohio is somewhat unique in its use of prosecutors for civil matters.

Ohio Prof.Cond.R. 3.8(a)

- In Martin’s view one of the most substantial changes to the rule is division (a). The subgroup’s proposed draft would make the following change:

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or maintain the prosecution of a charge that the prosecutor *knows* is not supported by probable cause and by the prosecutor’s good-faith belief in the defendant’s guilt for the offense charged.

- This change would add a second requirement of a good-faith belief in the defendant’s guilt on top of the requirement of probable cause in order for a prosecutor to pursue *or maintain* charges. It acknowledges that probable cause can exist even when a prosecutor does not have a good-faith belief in a defendant’s guilt and that those circumstances can change over time.
- Martin added that, because the provisions of Ohio Prof.Cond.R. 5.1 and 5.2 regarding the respective responsibilities of supervisory and subordinate lawyers apply in these circumstances, if a subordinate attorney expresses to their superior that they do not have a good-faith belief in a defendant’s guilt but is told to pursue charges anyway, any disciplinary violation would fall on the supervisory attorney.

Ohio Prof.Cond.R. 3.8(f)–(g)

- Modifications in divisions (f) and (g) were mostly consistent with the ABA’s Model Rule 3.8 and the suggested revisions provided by the Ohio Prosecuting Attorneys Association (“OPAA”).
- The draft would add create the following divisions (f) and (g):

The prosecutor in a criminal case shall not do any of the following:

(f) [~~RESERVED~~] fail to take the following steps when a prosecutor knows of previously undisclosed, credible, and material evidence creating a reasonable likelihood that a convicted defendant is not guilty of the crime for which the defendant was convicted:

(1) if the conviction was obtained in the prosecutor’s jurisdiction,

(a) promptly disclose that evidence to an appropriate court or authority, and

(b) promptly disclose that evidence to the defendant and defendant’s attorney unless a court authorizes delay, and

(c) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

(2) if the conviction was obtained outside the prosecutor’s jurisdiction, promptly notify the prosecutor’s office in the jurisdiction that prosecuted the case, ensuring that the information is transmitted to a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

(g) fail to seek to remedy a conviction, even if all authorized appeals have concluded, when a prosecutor knows of clear and convincing evidence establishing that a defendant is innocent of the crime for which the defendant was prosecuted. If the conviction is not in the prosecutor’s jurisdiction, the prosecutor shall ensure that the matter is brought to the attention of a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

- Martin noted that the subgroup discussed the idea of clarifying that a prosecutor must disclose *Brady* materials to the court in their jurisdiction, *not* to a statewide innocence commission (should one be created). They decided not to include this in the draft rule or in the comments in order to avoid the appearance of presumption that one would be created.
 - Representative David Leland agreed that it was good to leave the issue unaddressed, as it is unknown whether the legislature would decide that a statewide commission is in fact the appropriate authority to which a prosecutor should disclose *Brady* materials.
- Tim Young asked Martin to explain the intention behind the inclusion of “unless a court authorizes delay” in 3.8(f)(1)(b). He expressed concern about allowing for further delays in innocence claims in which claimants already experience significant delays.
 - Martin responded that this language came from the ABA Model Rule 3.8, which was originally proposed for inclusion by the OPAA. By Martin’s understanding, disciplinary action could not be taken against attorney for doing something that was authorized by a court.

- Andy Wilson added that a court may authorize a delay in disclosing information to allow a prosecutor to investigate the credibility of the information.
- Judge Zmuda clarified that the delays in postconviction cases have already been addressed with the Task Force’s recommended changes to postconviction rules and statutes. He did not think a disciplinary rule would affect the procedural timeline for innocence claims.

Comment

- The following modifications were made to the comment section of Ohio Prof.Cond.R. 3.8:

[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 justice and that guilt is decided upon the basis of sufficient evidence. 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. A prosecutor also is subject to other applicable rules such as Rules 3.3 (including the responsibility to refrain from false representations and to correct false testimony of a prosecution witness), 3.6, 4.2, 4.3, 5.1, 5.2, and 5.3.

[2] ~~[RESERVED]~~ Oftentimes prosecutors, particularly in larger counties and municipalities, are subject to multiple layers of supervision. The provisions of Rules 5.1 and 5.2 regarding the respective responsibilities of supervisory and subordinate lawyers apply in these circumstances.

[3] Division (a) recognizes a continuing obligation on prosecutors not to formally initiate nor prosecute criminal charges that are not supported by probable cause and by the prosecutor’s good faith belief in the defendant’s guilt for the offense charged. This does not preclude a prosecutor from participating in an investigation in an effort to determine if charges should be brought or maintained.

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

[5] Division (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.

[6] ~~[RESERVED]~~

[7] ~~[RESERVED]~~

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6. A new division (f) regarding a prosecutor's post-conviction responsibilities to disclose newly discovered exculpatory evidence has been included.

Division (g) has been added regarding a prosecutor's post-conviction responsibilities to remedy a conviction of an innocent person.

Comparison to Other Jurisdictions

- Dumolt informed members that he had done some research into similar professional-conduct rules in other jurisdictions. He found that the good-faith requirement in division (a) did exist in other jurisdictions, although not in the majority of the jurisdictions he researched. The postconviction *Brady* responsibilities can be found in a large number of states, as they are consistent with the ABA Model Rules. Most other jurisdictions had not divided those responsibilities into two categories of inside and outside jurisdiction, as this draft has.

Vote on Draft of Modifications to Ohio Prof.Cond.R. 3.8

Judge Selvaggio moved to approve the draft modifications to Ohio Prof.Cond.R. 3.8 for inclusion in the final report and recommendations. Mark Godsey seconded the motion. Staff Liaison Bryan Smeenk held a roll call and the present members voted unanimously to approve the recommendation. The votes were as follows:

Sara Andrews: Yes

Mark Godsey: Yes

Representative David Leland: Yes

John Martin: Yes

Meredith O'Brien: Yes

Sheriff Tom Riegenbach: Yes

Judge Nick Selvaggio: Yes

Andy Wilson: Yes

Tim Young: Yes

Judge Gene Zmuda: Yes

Vote on Proposed Footnote on Civil Prosecutors

Because the recommended modifications to Ohio Prof.Cond.R. 3.8 limit the scope of the rule to criminal prosecutors, the working group drafted the following footnote to address the possible need for a parallel rule for government attorneys in civil matters:

The Task Force notes that Rule 3.8 as presently constituted focuses on the responsibilities of the prosecutor in criminal cases; to that end, our proposed changes to Rule 3.8 include amending the title of the section to reflect its more limited scope. The Task Force believes that the power and resources of all government attorneys is such that, even in civil matters, the government lawyer, as a representative of the sovereign, has ethical considerations unique to their office due to the responsibility not to use the position or the economic power of the government to harass parties or bring about unjust settlements or results. While the conduct of government in civil lawsuits involving allegations of wrongful convictions is relevant to the work of the Task Force, the Task Force believes that any disciplinary rules involving the role of the government attorney in the civil context is best left to the Ohio Supreme Court and the Commission on Professionalism (whose membership is more representative of the relevant stakeholders in this regard than is that of this Task Force). Accordingly, we recommend that the Court, through the Commission, consider whether a rule parallel to 3.8 be promulgated for government attorneys in civil matters.

Judge Nick Selvaggio moved to recommend the footnote for inclusion in the final report and recommendations under the condition that the exact language can continue to be revised as needed during the drafting of the final report. Sara Andrews seconded the motion. Smeenck held a roll call and the present members voted 9-1 to approve the recommendation. The votes were as follows:

Sara Andrews: Yes
Mark Godsey: Yes
Representative David Leland: Yes
John Martin: Yes
Meredith O'Brien: Yes
Sheriff Tom Riggerbach: Yes
Judge Nick Selvaggio: Yes
Andy Wilson: No
Tim Young: Yes
Judge Gene Zmuda: Yes

Next Meeting Date — Friday, October 22, 2021, from 10:00 a.m. to 12:00 p.m.

Judge Zmuda informed members that a working group has met to work on potential language to recommend a statewide innocence commission in Ohio. The next meeting will focus on vetting the language. Once a recommendation is made related to an innocence commission, the Task Force will have finished its study and begin to put together the final report and recommendations.

The next meeting of this Task Force is scheduled for October 22, 2021, from 10:00 a.m. to 12:00 p.m.