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[Back to Article](#)

State Adopts Wrongful Conviction Protocol for Prosecutors

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New York state has established rules for prosecutors if they discover that a defendant has been convicted of a crime he did not commit.

[The rules](#) were added to the Rules of Professional Conduct by the presiding justices of the four Appellate Division departments in July. They stipulate that when a prosecutor knows of "clear and convincing evidence" that a defendant did not commit the crime for which he was convicted, "the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case."

Prosecutors must act within a "reasonable time" to notify the court and the defense that they have come into the possession of significant new evidence. Those materials are to be turned over to the defense unless doing so would interfere with an ongoing investigation or endanger the safety of a witness or another person involved in the case, according to the rules.

District Attorney William Fitzpatrick of Onondaga County, who worked on the new rules on behalf of the District Attorneys Association of the State of New York, said the rules are due to the "tremendous attention given to wrongful convictions" over the past several years.

"It is not a case where someone was saying, 'Oh, my god, we have a rash of D.A.s covering up wrongful convictions,'" said Fitzpatrick, a former president of the district attorneys group. "But it was something that the defense bar was working on and it seemed like an eminently reasonable thing to do."

Violations would subject prosecutors to the same penalties faced by all lawyers who run afoul of the rules of professional conduct.

A prosecutor who decides in "good faith" that an inquiry into a conviction based on new evidence is not warranted, even if that decision is "subsequently determined to have been erroneous," is not in violation of the rules.

The changes stem from a study of wrongful convictions by the New York City Bar in 2006, and over the years there has been input from the state bar and the New York County Lawyers' Association as well as federal and state prosecutors and others ([See ABA Report](#)).

Before the alterations were made, Rule 3.8 of Part 1200 of Title 22 of the Official Compilations of Codes, Rules and Regulations, also known as the "Special Responsibilities of Prosecutors and other Government Lawyers," was silent about the duties of prosecutors in the situation of uncovering evidence of wrongful convictions.

John McEneny, assistant U.S. attorney for the Southern District, helped formulate changes to Rule 3.8 on behalf of federal prosecutors.

He said that despite bickering over the wording, most prosecutors accepted the concept of the rules from the beginning.

"The prosecutors had no conceptual objection to it," McEneny said yesterday. "Look, this is what we do instinctively without a lot of thought about it and, in fact, the rules sort of reflect actual practices."

McEneny said there was no one "gotcha" moment that prompted formulation and adoption of the rules, but that there was a consensus that "it would be good to articulate this so everybody knows what prosecutors do."

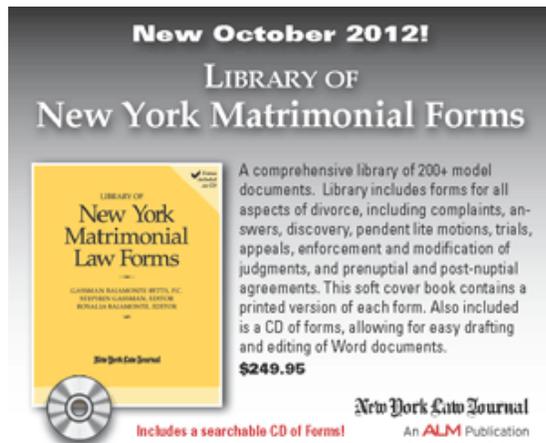
He said the rules embody the concept of a prosecutor's obligations to defendants when they discover a wrongful conviction that were first enumerated in [Imbler v. Fachtman](#), 424 U.S. 409 (1976).

New York became the eighth state to adopt some form of the rules for prosecutors who encounter wrongful convictions.

Professor Bruce Green of Fordham University School of Law said that putting the rules in writing will enhance the teaching function of district attorneys' offices throughout the state.

"Before this, there was no rule that they should disclose [new exculpatory material] to a court, no rule they should disclose it to a defendant, that they should investigate it," Green said. "There was no rule that they should try to remedy that. It is not now that we think that prosecutors are generally misbehaving, but it stresses the importance of prosecutors' function to make sure they get it right."

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