APPENDIX A

CRIMINAL PRACTICE & PROCEDURE COMMITTEE, DEFENSE SUB-COMMITTEE, COMMENT IN SUPPORT OF PETITION TO AMEND ER 3.8, ARIZONA RULES OF PROFESSIONAL CONDUCT, R-11-0033

I. INTRODUCTION

The Criminal Practice & Procedure Committee, Defense Sub-Committee, unanimously supports the Petition to Amend ER 3.8, Arizona Rules of Professional Conduct, R-11-0033. The Sub-Committee's recommendation that ER 3.8 be amended to conform with ABA Model Rule 3.8 is grounded in its utter alignment with the statements, observations and analysis set forth in ABA Formal Opinion 09-454, "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense" issued July 8, 2009 by the ABA Standing Committee on Ethics and Professional Responsibility and attached as **Addendum Exhibit A** hereto. This Exhibit plainly reveals the flaws contained in the Report to the State Bar Ethics Committee submitted by the Criminal Practice & Procedure, Prosecution Sub-Committee dated February 25, 2010 (hereinafter "Prosecutor's Report" or the "Report"), as does existing Arizona authority and statistics discussed *infra.*

A. The Prosecutor's *Legal* Duty to Disclose Evidence:

The Prosecution Sub-Committee recognized its obligation to disclose material evidence favorable to the accused during the *pre-trial* phase of a criminal case pursuant to *Brady v. Maryland, 373 U.S. 83 (1963)* and Rule 15.1, Arizona Rules of Criminal Procedure. (Prosecutor's Report, p. 5) Arizona's Rule 15.1 governs a prosecutor's *pre trial* disclosure obligation. *Rivera-Longoria v. Slayton, 228 Ariz. 156, 264 P.3d 866, 868 ¶12 (2011)* (discussing prosecutor's pre-trial disclosure obligations and expressly recognizing that "... a defendant's federal rights do not delimit this Court's power to adopt procedural rules governing disclosure in criminal cases.")

Brady, on the other hand, is grounded in due process and is therefore of constitutional magnitude. *"Brady* held 'that the suppression by the prosecution of evidence favorable to *an accused* upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *373 U.S., at 87..." Kyles v. Whitley, 514 U.S. 419, 432 (1995)(emphasis* added) Twenty years after *Brady* "the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes," and held that regardless of a request by *the accused*, "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles, 514 U.S., at 432,* quoting *United States v. Bagley, 473 U.S. 667 (1985).*

Taken literally, *Brady* and its progeny concern undisclosed evidence possessed by a prosecutor and/or his agents prior to trial. The Prosecutor's Report seemingly recognized an obligation to disclose *Brady* evidence post-trial, as did the Arizona Supreme Court in *Canion v. Cole, 210 Ariz. 598, 115 P.2d 1261 (2005).* (Prosecutor's Report, p. 7) However, to the extent the Report asserts that in Arizona a convicted defendant has a procedural right to be informed of evidence discovered post-conviction, its rendition of the holding in *Canion* is misleading by omission. Not only did the Court expressly find the *pre-trial* disclosure requirements of Rule 15.1 inapplicable post-conviction (Prosecutor's Report, p. 7), it recognized that no procedural rule mandated the disclosure of discovery *post-conviction.* Rather, the Court noted only that "[d]espite the absence of explicit authority... trial judges have inherent authority to grant discovery requests in [post conviction] proceedings upon a showing of good cause." *Id. at 600, ¶10.* Therefore, in post-conviction proceedings an Arizona

prosecutor currently has no procedural disclosure obligation as to evidence discovered post trial--and any demand for such evidence made by a convicted defendant must be accompanied by a showing of good cause. A convicted defendant unaware of a prosecutor's post-trial discovery of new, credible and material evidence lacks any basis to request the discovery, much less assert "good cause" for its disclosure. The proposed modification to ER 3.8 would remedy this conundrum.

B. A Prosecutor's Ethical Obligation to Disclose Evidence Favorable to an Accused is Not Codified in Arizona:

The Prosecutor's Report deems it unnecessary to "codify[]the already existing obligation for prosecutors to disclose exculpatory evidence to a convicted defendant" because "[e]xisting law, as well as the Code of Professional Responsibility, ER 3.4, ER 3.8 and ER 8.4, already address this obligation." (Prosecutor's Report, pp. 4, 9, 13) At the outset, it is noted that neither ER 3.4 (fairness to opposing party and counsel) nor ER 8.4 (lawyer misconduct) impose any affirmative obligation upon prosecutors to disclose new, credible and material evidence discovered post-conviction. Arizona's current version of ER 3.8 similarly imposes no ethical obligation upon prosecutors to disclose the subject evidence *post-trial.* See, ER 3.8(d)(requiring prosecutorial disclosure of all "evidence or information known to the prosecutor that tends to negate the guilt *of the accused"* or which would tend to mitigate the *sentencing*). Moreover, as set forth above, there currently exists no legal, *procedural* obligation imposed upon prosecutors regarding such evidence discovered post-trial. Thus, it cannot properly be contended that the proposed ethical obligation is already codified within "existing law as well as the Code of Professional Responsibility."

In this vein, the Prosecutor's Report conflates a prosecutor's constitutional obligations pursuant to *Brady* and its progeny with its ethical obligations. A

prosecutor's *legal, constitutional* obligation to disclose evidence and information pursuant to *Brady* and its progeny is far more narrow than its existing *ethical* obligation. This reality is not novel. As the United States Supreme Court recognized in *Kyles v. Whitley* in 1995:

> **...[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.** See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3rd ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall ... 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 mitigates the offense.")

514 U.S., at 437 (**emphasis** added). Since *Kyles,* the United States Supreme Court has continued to highlight the distinction between the *Brady's constitutional* disclosure requirement and a prosecutor's *ethical* obligation, recognizing the latter to be broader in scope. *See e.g., Cone v. Bell, 556 U.S. 449, 129 S.Ct. 1769, 1783 fn. 15 (2009)*("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.") Indeed, the inaccuracy of the Report's claim that a prosecutor's ethical obligation to disclose new, credible and material evidence discovered post-conviction is already "codified" in the existing law was squarely addressed in ABA Formal Opinion 09-454, **Addendum Exhibit A,** page 1 (footnotes omitted):

> **Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, which held that criminal defendants have a due process right to receive favorable information from the prosecution. This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation.** Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. Moreover, although courts in criminal cases frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.

Notably, in addressing "the importance of prosecutors fully understanding the extent of the separate obligations imposed by [ABA Model] Rule 3.8(d)", as well as the lack of guidance "in interpreting the various state analogs to the rule," the ABA Committee on Ethics and Professional Responsibility footnoted State Bar of Arizona Ethics Opinion 01-03–an opinion subsequently withdrawn due to the fact that its conclusion rested upon the Committee's interpretation of the requirements of Rule 15.1, Ariz.R.Crim.P. (governing a prosecutor's pre-trial disclosure obligation); it similarly footnoted State Bar of Arizona Ethics Opinion 94-07 (concerning a prosecutor's request for resolution of a "heated debate" among prosecutors regarding a prosecutor's ethical obligation to disclose "exculpatory" information), attached hereto as **Addendum Exhibit B.**

In short, it is clear that a prosecutor's ethical obligation mandated by Arizona's *existing* ethical rules are *not* "codified" in *Brady,* its progeny and/or any existing post-conviction procedural rule in Arizona. Nor is such obligation derived from any other existing Rule of Professional Conduct. The modification of ER 3.8 is consequently not appropriately characterized as "redundant." Presumably, this is precisely why prosecutors oppose the proposed modification of ER 3.8.

C. "New, Credible and Material Evidence":

In addition to asserting that proposed amendment to ER 3.8 is "unnecessary", the Prosecutor's Report contends that the recommended amendment would "pose the potential for immense confusion" because the use of such terms as "credible" and "material" would create uncertainty, thereby subjecting prosecutors to disciplinary proceedings to litigate the "meaning of these terms." (Prosecutor's Report, pp. 4, 9)

The phrase "credible evidence" has been used by Arizona courts in 358 reported and unreported civil, criminal and lawyer discipline decisions to date.[1] What constitutes "material" evidence possessed by or known to a prosecutor was a topic exhaustively discussed in *Bagley* and both summarized and emphasized in *Kyles v. Whitley, 514 U.S., at 434-438; see also,* Ariz.R.Crim.P., Rule 32.1(e)(3) (describing what constitutes newly discovered material facts in post-conviction proceedings). Indeed, as far back as 1915, Arizona juries were instructed of the freedom to disregard false testimony as to any *material fact* except in so far as it may be corroborated by other *credible evidence* appearing in the case." *Faltin v. State, 17 Ariz. 278, 290, 161 P. 952 (1915)* Thus, juries were to determine both materiality and credibility of the evidence before them. Like the phrase "newly discovered evidence," the adjectives "credible" and "material" in relation to evidence discovered post-conviction should pose no real difficulty to prosecutors since each should be ascribed the meaning long existing in the law.

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[1] See e.g., *In the Matter of Tocco, 194 Ariz. 453, 455 ¶3, 984 P.2d 539 (1999)*(attorney disciplinary proceeding recognizing the hearing committee's finding of no credible evidence supporting the charge that she advised the clients to do anything that would improperly interfere with creditors' claims); *In re MH2010-002348, 2011 WL 6848440, ¶7 (App. 2011)* ("...we will only disturb a court order for involuntary treatment if it is 'clearly erroneous or unsupported by any credible evidence.'")

The prosecutor's true concern rightfully lies in the fact that he/she must unilaterally determine what evidence is new, credible and material and consequently subject to post-trial disclosure and investigation in order to avoid a violation of ER 3.8. As is true with a prosecutor's *legal* disclosure obligations, the ethical obligations imposed by the proposed amendment to ER 3.8 require a prosecutor to "make judgment calls about what would count as favorable evidence, owing to the every fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles, 514 U.S., at 439.* Resolution of this concern is easily gleaned from *Kyles*:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutor obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.
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> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See, [*United States v.*] *Agurs, 427 U.S. [97] at 108, 96 S.Ct., at 2399-2400* ('[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure'). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative ... of a sovereignty... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).* And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

514 U.S., at 439-440.

In short, "the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act." *Kyles v. Whitley, 514 U.S., at 439.*

D. The Ethical Obligation is Properly Imposed Upon Prosecutors:

The Prosecutor's Report observes: "It appears incongruent that prosecutors should be singled out as having the ethical obligation to act affirmatively when he

or she learns of 'new, credible and material' evidence that may exculpate a convicted defendant." (Prosecutor's Report, p. 12) It further posits that "no other rule within the ABA Model Rules or Arizona Rules of Professional Conduct impose such an ethical obligation on any other segment of the Bar." *Ibid.*

Imposition of an ethical obligation to disclose and investigate any new, credible and material evidence discovered post-conviction is not aimed at singling out prosecutors or imposing a burden not born by other lawyers . Obviously, such evidence discovered by a convicted defendant and/or his lawyer can and *will be* brought to the attention of the prosecutor and/or the court at the earliest possible opportunity procedurally permissible under the Rules of Criminal Procedure. See, *e.g.* Ariz.R.Crim.P., Rule 24.1(c)(5) (permitting motion for new trial on grounds that defendant was denied due process through no fault of his own); Rule 24.2(a)(2)(permitting motion to vacate judgement where newly discovered material facts exist); Rule 32.1(e)(permitting petition for post conviction relief to be filed where newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence). However, where prosecutors become aware of new, credible and material evidence post-trial--evidence unknown to the defendant--in the absence of an ethical rule requiring disclosure and investigation prosecutors are unmotivated to disclose or investigate. This point is aptly evidenced by the Prosecutor's Report which notes, "[a]n individual prosecutor would be faced with the impossible dilemma of choosing whether to devote the limited time and resources to prosecuting existing cases or investigating a previous prosecution." (Prosecutor's Report, p. 10)

In truth, the criminal justice system creates no such dilemma, much less an impossible one: It unambiguously commands that *all* who come before it receive justice; it unambiguously commands that no innocent person suffer conviction

and/or imprisonment.

In this vein, the Prosecutor's Report asserts that "it appears antithetical to believe that [a] prosecutor would be endowed with exclusive access to potentially exculpatory information while the rest of the Bar would not." *Ibid.* As stated, where the convicted defendant and/or counsel discovers the evidence, it will be exposed pursuant to the existing Arizona Rules of Criminal Procedure. But when only the prosecutor knows of the discovery of such evidence, the Rules of Professional Conduct must be modified to require him to act–particularly since no Arizona procedural rule requires it. As *Kyles* recognized, "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *514 U.S., at 437.*

The dangers inherent in omitting such an ethical requirement should be obvious to even a casual observer. In *State v. Hall, 204 Ariz. 442, 65 P.3d 90 (2003)* the defendant was convicted and sentenced to death after evidence revealed that the victim was kidnaped, robbed, beaten and killed. *204 Ariz., at 445, ¶6.* In arguing for a death sentence, the prosecutor offered evidence which indicated that the victim's skull was smashed and his arm broken. On direct appeal in 2003 the Arizona Supreme Court noted that the victim's body "*has never been recovered.*" *Ibid.*, ¶ 6.

In actuality, at the time of the direct appeal *only the prosecutor* knew the victim's skeletal remains had been discovered in March 2001–well *before* the State filed its responsive brief on appeal. The trial prosecutor had been contacted by the investigating Detective upon recovery, and had himself visited the remains site and confirmed that the remains were consistent with that of the alleged victim. The medical examiner found no broken bones, no skull fractures or fractures of

any kind, and listed the cause and manner of death as "unknown". The prosecutor then sent the skull to law enforcement for further examination and identification, and close up photographs were taken. The photographs corroborated the medical examiner's findings.

The remains were released for cremation in May 2001, but the prosecutor failed to notify defense counsel of their recovery or release until one year later. In its zeal to uphold Hall's death sentence, the State continued to argue on appeal that Hall had beaten the victim to death and had broken his arm, making no mention of the remains recovery or the medical examiner's investigation or report. Since only the prosecutor was aware of the recovery of the remains and the medical examiner's findings, the State's contentions stood unassailable on direct appeal. Fortunately, Hall's convictions and death sentence were reversed and the case remanded for retrial on other grounds.

While arguably not "clearly exculpatory" and thus not subject to mandatory disclosure pursuant to *Brady*--and since no Arizona procedural rule required disclosure of this post-conviction evidence--the prosecution was neither legally nor ethically required to disclose the recovery of the remains to defense counsel while the case pended appeal. This paved the way for the State to argue with impunity a claim on appeal which it knew was, at best, questionable in light of the evidence discovered post-conviction. Had the proposed amendment to ER 3.8 been in place the prosecutor would have had an *ethical* obligation to disclose the fact of the evidence as well as the result of its investigation to defense counsel and to the Arizona Supreme Court.

What took place in *State v. Hall* aptly demonstrates the inaccuracy of the Report's bold assertions that "there is no evidence in Arizona that the current safeguards are not sufficient or that we have a large number of cases in which

convicted persons have been exonerated", and that "[t]he Proposed Amendment to ER 3.8 ... addresses a problem that has not been shown to exist in Arizona." (Prosecutor's Report, pp. 4, 15) It similarly exposes the falsity of its contention that "[i]n those rare cases where post-trial exculpatory evidence has been provided to a prosecutor, that prosecutor has, in the past, promptly disclosed to the convicted defendant." *(Id., at* p. 15) This most certainly did not transpire in *Hall*, notwithstanding the prosecutor's personal investigation and knowledge.

What's more, there need not exist "a large number of cases in which convicted persons have been exonerated" in order to justify the amendment to ER 3.8 as recommended by Petitioner. A single wrongful conviction and/or execution is more than sufficient to justify the modification. According to Petitioner, *eight* death row inmates have been exonerated, with Arizona ranking sixth highest among the states for the number of death row exonerations. (Petition, 3:1-7) These statistics belie the contentions levied in the Prosecutor's Report.

II. CONCLUSION:

The true motive underlying opposition to the proposed amendment of ER 3.8 is unclear. What is clear is that the prosecutors' failure to recognize the problem *is the problem* which gave rise to the modification of the ABA Model Rule in the first instance. For the reasons stated, the Criminal Practice and Procedure Committee, Defense Sub-Committee urges that Arizona follow suit and amend ER 3.8 as set forth in the petition.

ADDENDUM

EXHIBIT A

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454 **July 8, 2009**

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "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 mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.[1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . 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 mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,[2] which held that criminal defendants have a due process right to receive favorable information from the prosecution.[3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.[4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.[5] Finally, although courts

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

[5] *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close

sometimes sanction prosecutors for violating disclosure obligations,[6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.[7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.[8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

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to violating [Rule 3.8]").

[6] *See, e.g., In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [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.")

[7] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.... [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); *see also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[9] Similarly, Comment [1] to Model Rule 3.8 states that: "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 procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,[10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.[11] This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.[12]

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"[13] and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."[14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

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[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id.* at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id.*

[13] Rule 3.8, cmt. [1].

[14] *Id.*

access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)[15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.[16] The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.[17]

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

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[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.*, U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.[22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."[24] Although "a lawyer cannot ignore the obvious,"[25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires

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[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], *cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

prosecutors to disclose *known* evidence and information that is favorable to the accused,[26] it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.[27]

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.[28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.[29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,[30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.[31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.[32]

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[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.[33] For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or

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[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.[38]

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.[39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,[40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.[41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.[42]

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[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g., In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

ADDENDUM

EXHIBIT B

OPINION NO. 94-07
March 18, 1994

FACTS:

The inquiring attorney is a Deputy Maricopa County Attorney who has requested that the committee resolve a "heated debate" among prosecutors within his office regarding the prosecutor's duty to disclose "exculpatory" information.

The prosecutors have grappled with the contours of their obligation, specifically whether the rule requiring disclosure is limited to evidence which clearly tends to show that the defendant is not guilty, or whether it extends to what has been characterized as mere "problems of proof".

To place the debate in perspective, the inquiring attorney requests the committee to answer the above question through three scenarios which he poses as follows:

1. The defendant is charged with aggravated Driving While Under the Influence, a class 5 felony. The arresting officer observed the defendant's driving, administered field sobriety tests, and administered the breath test. The arresting officer testified at the preliminary hearing and a record was made of his testimony. Soon thereafter, he passed away. The Deputy County Attorney offered the defendant a stipulated sentence prior to the officer's passing. The defendant is contemplating whether to take the offer or proceed to trial. Must the Deputy County Attorney disclose the fact that the officer passed away? If so, when?

2. The defendant is charged with Possession of Narcotic Drugs for Sale arising from a 1989 search warrant. The Deputy County Attorney makes an offer to a stipulated sentence then learns that the drugs were inadvertently destroyed in 1990 by the police department during relocation of its property room. The defendant is contemplating whether to take the offer or proceed to trial. The State could, if necessary, proceed to trial with only testimony and lab reports. Must the prosecutor disclose the fact that the drugs were destroyed? If so, when?

3. The defendant is charged with Driving While Under the Influence of Drugs, a class 1 misdemeanor. One key piece of evidence is a urine sample given to the police by the defendant on the night of the arrest pursuant to compliance with the Implied Consent law. The urine sample tested positive for methamphetamine. All of the sample, however, was consumed in testing leaving no portion for an independent test by defense counsel.

The State may have sufficient evidence to proceed to trial even if there were no urine sample. The defendant has made no Motion for Discovery. Must the prosecutor disclose the fact that all of the urine sample was consumed in testing? If so, when?

ETHICAL RULES INVOLVED:

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

* * * * *

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

* * * * *

ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

* * * * *

(d) 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 mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

* * * * *

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * * * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

* * * * *

OPINION:

A. General Overview

The Supreme Court of the United States has determined that the due process right to a fair trial mandates that the prosecution disclose information favorable to the defendant that is material to either guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). The Brady obligation extends not only to purely exculpatory information, but also to information that could be used to impeach government witnesses. For example, nondisclosure of a grant of immunity to a witness who testifies against a criminal defendant violates due process because witness credibility is at issue. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). Finally, because these questions can be difficult, the courts have cautioned prosecutors to resolve doubtful questions in favor of disclosure. Brady v. Maryland, supra; State v. Jones, 120 Ariz. 556, 560, 587 P.2d 742, 746 (1978).

The A.B.A. ethical codes have long recognized a similar obligation on the part of the prosecution to disclose information favorable to the defendant.[1] DR 7-103(B) of the Model Code of Professional Responsibility specifically required that prosecutors "make timely disclosure to counsel for the defendant . . . of the existence of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the

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[1] This ethical duty predates the Supreme Court's application of the due process clause to prosecutorial disclosure. See R. Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," 65 N.C.L. Rev. 693 (1987).

punishment."[2] The current provision of the Arizona Rules of Professional Conduct, ER 3.8(d), expands this requirement by mandating disclosure not only of the "existence" of favorable evidence, but of the evidence itself.[3] In addition, the current rule requires disclosure of "evidence or information that tends to negate guilt" thus making it clear that the admissibility of Brady material is irrelevant. Finally, the current rule specifically provides that the prosecution may seek a ruling from the court as to its disclosure obligations.

Brady obligations cannot be decided in a vacuum but must be considered in the context of the jurisdiction's criminal discovery rules. In Arizona, the Rules of Criminal Procedure contain

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[2] The Comment to DR 7-103(B) makes it clear that the omission of a "materiality" requirement gives it broader application than the Brady due process standard:

> . . . DR 7-103(B) does not limit the prosecutor's ethical duty to disclose to situations in which the defendant requests disclosure. Nor does it impose a restrictive view of "materiality." DR 7-103(B) states that the prosecutor has a duty to make a timely disclosure of any evidence that tends to negate guilt, mitigate the degree of the offense, or reduce the punishment. It appears possible, therefore, that a prosecutor may comply with the constitutional standards set forth in Brady and Agurs and still be in violation of DR 7-103(B) . . . .

American Bar Foundation, Annotated Code of Professional Responsibility, Comment to DR 7-103(B) at pp. 330-331(1979).

[3] The A.B.A. Comments to Rule 3.8(d) reaffirm that the ethical duty to disclose is broader than the constitutional due process obligation:

> A prosecutor's ethical obligation, though derived from constitutional mandates, seeks to preserve public confidence in the prosecution function as well as to avoid constitutionally significant harm to the defendant. Thus, Rule 3.8(d) requires disclosure of all information that may tend to negate the defendant's guilt, mitigate the offense, or reduce punishment.
>
> The ethical duty therefore, requires disclosure beyond that which may be material under the Bagley standard . . . .

A.B.A. Annotated Model Rules of Professional Conduct (2nd ed., 1992), Rule 3.8(d), Comment at p. 408.

especially broad requirements for disclosure by the prosecution. Rule 15.1(a)(7) essentially tracks the language of ER 3.8(d) by requiring that the prosecutor disclose the following no later than 10 days after arraignment in Superior Court:

> All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

Other portions of this rule require disclosure at the same time, inter alia, of the names and addresses (except victims) of all prosecution witnesses to be called in the case-in-chief, Rule 15.1(a)(1), a list of all documents or tangible evidence to be used at trial, Rule 15.1(a)(4), and the names and addresses of experts who have examined any evidence in the case, Rule 15.1(a)(3). Upon written request, the prosecutor is required to "make available to the defendant for examination, testing and reproduction any specified items contained in the list [of documents and tangible objects]." Rule 15.1(c). These broad disclosures by the State trigger equally broad disclosure requirements on the defendant. See Rule 15.2, Ariz. R. Crim. P. Both sides have a continuing duty to disclose additional information or material covered by the rules. See Rule 15.6, Ariz. R. Crim. P.

B. Discussion of the Scenarios

SCENARIO #1

> The defendant is charged with Aggravated Driving While Under the Influence, a class 5 felony. The arresting officer observed the defendant's driving, administered field sobriety tests, and administered the breath test. The arresting officer testified at the preliminary hearing and a record was made of his testimony. Soon thereafter, he passed away. The Deputy County Attorney offered the defendant a stipulated sentence prior to the officer's passing. The defendant is contemplating whether to take the offer or proceed to trial. Must the Deputy County Attorney disclose the fact that the officer passed away? If so, when?

Authorities have held that, where a witness furnished sworn testimony at a preliminary hearing and was subjected to cross examination, use of the transcript was permissible at a trial held after the witness had expired. James v. Wainwright, 680 F.2d 102 (11th Cir. 1982); Morrow v. Wyrick, 646 F.2d 1229 (8th Cir. 1981). Admission of the transcript is not allowed in every case, however, and objections can be made for a variety of reasons including that the cross examination conducted was not "the equivalent of significant cross-examination". Id. 646 F.2d at 1233.

While disclosure of the death of the officer may be required under ER 3.8(d), it is not necessary to reach that question in this scenario. Given the requirement of Rule 15.1(a)(1), Ariz. R. Crim. P., that the names of all witnesses be disclosed, the prosecutor would have an obligation to tell the defense lawyer that the officer will not be a witness or to correct any previous listing of the officer as a witness. ER 3.4(c) prohibits a lawyer from "knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." As this committee has recognized when dealing with a criminal defense attorney's duty to turn over physical evidence of the crime which comes into his possession, "If a legal obligation attaches, the attorney is ethically required to obey the law." Opinion No. 85-4 (March 14, 1985) at p. 6. See also Hitch v. Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985).

The prosecutor has a legal obligation to inform the defendant of all witnesses to be called in the case-in-chief. If the officer has been listed, then the prosecutor has an obligation to notify the defense lawyer that the officer will no longer be a witness. To do otherwise would be to deceive and mislead the defendant and be prejudicial to the administration of justice. ER 8.4(c) and (d). This disclosure should be made as soon as the prosecutor learns of the unavailability of this witness, and certainly before the defendant is asked to respond to the plea offer. See Virginia State Bar Ethics Opinion 1477, Law. Man. on Prof. Conduct (ABA/BNA) p. 1001:8713 (8/24/92) (lawyer who learns that client's answers to interrogatories were false may not attempt to effectuate settlement before answers are corrected).

SCENARIO #2

> The defendant is charged with Possession of Narcotic Drugs for Sale arising from a 1989 search warrant. The Deputy County Attorney makes an offer to stipulated sentence then learns that the drugs were inadvertently destroyed in 1990 by the police department during relocation of its property room. The defendant is contemplating whether to take the offer or proceed to trial. The State could, if necessary, proceed to trial with only testimony and lab reports. Must the prosecutor disclose the fact that the drugs were destroyed? If so, when?

According to the Supreme Court of the United States in Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988), the failure of the government to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," is not a denial of due process of law "unless a criminal defendant can show bad faith on the part of" the government. Id. 488 U.S. at 57-58, 109 S. Ct. at 337. See, also, State v. Youngblood, 173 Ariz. 502, 844 P.2d 1152 (1993).

Again, it is unnecessary to decide whether disclosure is required under ER 3.8(d) because disclosure must be made under ER 3.4. The drugs in this case likely were listed as tangible evidence under Rule 15.1(a)(4). Now that the prosecutor has learned that this evidence has been destroyed, he is under an obligation to correct the Rule 15.1 disclosure. This correction must be accomplished as soon as possible after the prosecutor learns of the destruction. Certainly, it must be done before any response is made by the defendant to the plea offer, as otherwise the defendant would be misled as to the strength of the State's case. ER 8.4(c) and (d).

SCENARIO #3

> The defendant is charged with Driving While Under the Influence of Drugs, a class 1 misdemeanor. One key piece of evidence is a urine sample given to the police by the defendant on the night of the arrest pursuant to compliance with the Implied Consent law. The urine sample tested positive for methamphetamine. All of the sample, however, was consumed in testing leaving no portion for an independent test by defense counsel. The State may have sufficient evidence to proceed to trial even if there were no urine sample. The defendant has made no Motion for Discovery. Must the prosecutor disclose the fact that all of the urine sample was consumed in testing? If so, when?

In this case, the Rule 15.1(a)(4) requirement of a list of all tangible evidence may not include the urine sample. If it does, then, of course, the same analysis stated above would apply and disclosure is required. Most likely, however, the prosecution has simply disclosed a report of the urine test which apparently does not reveal the destruction of the urine sample.

The inquiring attorney reports that no "Motion for Discovery" has been made. The defendant would have a right to production of the urine for retesting under Rule 15.1(c), but must make a written request for it. Had he done so, there would be no question that disclosure is required.

Generally, the due process clause of the Federal Constitution does not require preservation of breath samples in DUI cases in order to introduce results of breath-analysis tests at trial. California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984). The Arizona Supreme Court, however, applying the due process clause of the State Constitution, has held that such preservation of breath samples is necessary. State ex rel. Dean v. City Court, 163 Ariz. 510, 789 P.2d 180 (1990); Baca v. Smith, 124 Ariz. 353, 604 P.2d 617 (1979). It has also held that due process requires that a defendant be advised of his right to an independent test because of the "inherently evanescent" quality of breath evidence. Montano v. Superior Court, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986). This rule was not extended to blood

tests because a sufficient supply of blood was available for retesting. State v. Kemp, 168 Ariz. 334, 336, 813 P.2d 315, 317 (1991). Thus, the lack of a sufficient urine sample for retesting in this case could give rise to a motion to suppress the State's test results or a motion to dismiss for a due process violation.

Moreover, the failure to preserve any urine sample for retesting would most certainly give rise to a defense request for an instruction to the jury under State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). That instruction states as follows:

> If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.[4]

Recommended Arizona Jury Instructions, Standard Criminal 11 (1989).

The Arizona Supreme Court has continually affirmed the necessity of a Willits instruction in cases of failure of the State to preserve evidence, even where due process would not itself require such preservation. See Youngblood, 173 Ariz. at 506-507, 844 P.2d at 1156-1157.

The laws governing DUI prosecutions are extremely complex and changing. See A.R.S. §§ 28-691, et seq. Whether those laws themselves may require disclosure of the unavailability of a urine sample for retesting is beyond the scope of this opinion. If they do, then ER 3.4 clearly requires that the prosecutor dis-

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[4] The Note to this instruction clearly establishes its applicability to this situation:

> A defendant is entitled to a Willits instruction upon evidence that (1) the State failed to preserve material evidence that was accessible and might have tended to exonerate him, and (2) there is resulting prejudice to defendant. Thus, where the State placed reliance on evidence such as blood, its duty of preservation becomes increasingly important, and if the State then refers to this lost evidence to support guilt, the defendant is prejudiced to the point where failure to give this instruction is reversible error. [Id. at p. 11]

close that fact. Nevertheless, it appears to the committee that the lack of such evidence is sufficiently exculpatory under the law cited above to call for disclosure under ER 3.8(d). Again, this disclosure must be made in a timely manner so that the defendant may use it in the preparation of the case and in responding to any plea offers.

DISSENT:

One member of the committee, in dissent, wrote:

I believe we have gotten off course in speculating on the law in connection with Arizona Rule of Criminal Procedure 15, but that is not what has compelled me to dissent.

The issue which is of considerable concern to me is the proposal that Ethical Rule 3.8(d) is not coextensive with the Constitution. Such an opinion would confer greater rights to defendants than the Constitution does and has the effect of creating a super-exclusionary rule. It would be elevating the opinions of this committee and the Ethical Rules above decisions of the Supreme Court of Arizona and the Supreme Court of the United States, with the power to create substantive rights for defendants not existing in the Constitution. This is not within the province of this committee; and it may well be a violation of the separation of powers doctrine of the Constitution (See, U.S. v. Simpson, 927 F.2d 1088, 1090-1091 (9th Cir. 1991)); and a violation of the Supremacy Clause of the United States Constitution if applied to federal prosecutors. See, Baylson v. Disciplinary Board of Supreme Court of Pa., 975 F.2d 102, 111-113 (3rd Cir. 1992).

Additionally, the practical realities should be considered. What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint? This weapon is certainly more effective than the existing exclusionary rule which merely excludes inadmissible evidence. One might expect that such an opinion would be used as a weapon by defense counsel to threaten that the government must now open its entire file despite the fact that the Constitution, as interpreted by the Arizona and United States Supreme Courts, does not require such a result. Prosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement.

As the Supreme Court of the United States, in establishing the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), stated in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985):

> An interpretation of Brady to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." [Citation omitted.] Furthermore, a rule that the prosecutor

> commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interests in the finality of judgments.

105 S. Ct. at 3380, n.7.

What is more, such open discovery provides the possibility of subornation of perjury, harassment and witness tampering. Many witnesses in criminal investigations involving public and organized crime figures would never cooperate if they knew their information would be prematurely disclosed.

This opinion does violence to well-established constitutional law, and creates adverse consequences to law enforcement. Therefore, I dissent.

APPENDIX B

Report to the State Bar Ethics Committee

From the Criminal Practice & Procedure Committee Prosecution Section

February 25, 2010

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Executive Summary

At its Midyear meeting in the Spring of 2007, the Criminal Justice Section of the American Bar Association (ABA) resolved to add two new provisions, paragraphs (g) and (h) to Rule 3.8, ABA Model Rules of Professional Conduct. The resolution also amended the Comment [1] to Rule 3.8 and added new Comments [7], [8], and [9]. The House of Delegates later approved the resolutions. Specifically, the resolutions stated:

> (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:
>
> (1)promptly disclose that evidence to an appropriate court or authority,and
>
> (2)if the conviction was obtained in the prosecutor's jurisdiction,
> (A)promptly disclose that evidence to the defendant unless a court authorizes delay, and
> (B)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.
>
> (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

II. The Committee's Study

A. Background

The proposed amendments to Model Rule 3.8 purport to strengthen the responsibility of prosecutors to take action when confronted with evidence of innocence. Model Rules 3.8(g) and (h) and the accompanying Comments grew out of a 2006 Report of the Association of the Bar of the City of New York which considered various aspects of prosecutor's duties, primarily focusing on the prosecutor's obligation when a convicted defendant may be innocent. The report stated in part: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post-conviction claims of innocence." The premise for the proposed rules is essentially two-fold: (1) that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent; and (2) that the current ethical rules and applicable case law are inadequate or incomplete in guiding prosecutors with respect to these responsibilities.

Adding to the backdrop for these proposed rules is the extensive history of the prosecutor's role in the criminal justice system as being a "minister of justice." The ABA references the unique role of the prosecutor in Comment 1 to Rule 3.8 when it notes that the prosecutor has the "specific obligation[s] to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." The prosecutor is a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. *See Berger v. United States*, 295 U.S. 78, 88 (1935). Coupled with this long-standing view of the prosecutor's unique role, is that as technology develops, society at large views prosecutors as having at their disposal an increasing array of tools to aid in carrying out investigatory functions. Technology such as DNA analysis has proven to be one of the most powerful tools to potentially exculpate innocent suspects as well as aiding in the conviction of suspects who are guilty. In light of these developments, issues have been raised that prosecutors receive too little ethical guidance addressing their obligation when evidence is discovered after conviction; hence the arguable need to codify their responsibilities in ethical rules that carry with them the potential for discipline.

B. ABA Model Rule

Rule 3.8 of the Model Rules of Professional Conduct would include paragraphs (g) and (h) as follows:

> (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:
>
> > (1) promptly disclose that evidence to an appropriate court or authority; and
> >
> > 2) if the conviction was obtained in the prosecutor's jurisdiction,
> >
> > > (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
> > >
> > > (B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense than the defendant did not commit.
>
> (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.

In summary, the obligations in 3.8(g) and (h) are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The Model Rules define "knows" as "actual knowledge of the fact in question"; therefore, indirect or imputed knowledge is not sufficient. When a prosecutor knows of such information, the new rules require that he or she disclose the evidence, and, if the conviction was obtained in the prosecutor's jurisdiction, conduct an appropriate investigation, and upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy the conviction.

C. Arizona's Model

Case law from many jurisdictions hold that prosecutors are ethically bound to disclose information that casts doubt on the correctness of a conviction. The Arizona Supreme Court has stated that clearly exculpatory materials discovered post-conviction should be disclosed. *See Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005). In *Canion,* the Supreme Court reviewed a Court of Appeals decision that the defendant could compel post-conviction discovery before he had filed a post-conviction relief petition. *Id.* at 599. The Court reasoned that a defendant does not lose his right to disclosure of potentially exculpatory evidence once the jury has rendered its verdict and held that the State has an obligation to disclose "clearly exculpatory evidence." Evidence that falls short of that definition, however, does not need to be disclosed unless and until a post-conviction petition is filed. *Id.* at 600. Thus, the Arizona Supreme Court has already made it clear that prosecutors must disclose clearly exculpatory evidence even post-conviction. The proposed model rule would confuse this standard already provided by our Supreme Court.

In addition to case law, the current ethical rules adopted in Arizona already impose duties on practitioners that sufficiently govern the conduct of prosecutors in post-conviction matters. ER 3.4 – Fairness to Opposing Counsel, states that a lawyer shall not conceal evidence. ER 3.8 – Special Responsibilities of a Prosecutor, states that a prosecutor shall not prosecute a charge no supported by probable cause. ER 8.4 – Misconduct, states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." These rules coupled with applicable case law provide sufficient safeguards and guidance to attorneys. As such, the proposed additions in Model Rule 3.8 (g) and (h) are not necessary, and more importantly, pose the potential for immense confusion.

Finally, unlike perhaps New York and other jurisdictions, there is no evidence in Arizona that the current safeguards are not sufficient or that we have a large number of cases in which convicted persons serving prison sentences have been exonerated. As such, there is no justification for adopting additional rules of discipline that have possible disruptive effects.

D. Duty to Investigate Exculpatory Evidence

The Supreme Court of the United States and the Arizona Supreme Court have said that clearly exculpatory material discovered post-conviction should be disclosed. Existing case law, however, does not appear to impose a requirement that prosecutors undertake investigative responsibility.

1. The Duty to Disclose

It is well-established that prosecutors have an obligation to disclose material evidence favorable to the accused during the pretrial phase of a criminal case. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence is "material" in this context if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

This duty to disclose has been extended to the post-trial phase of criminal proceedings. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court of the United States held that prosecutors who act within the scope of their duties in prosecuting a case are absolutely immune from civil damages under Section 1983[1]. The ethical guidance is included in a footnote:

> The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to s 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.[FN25]
>
> FN25. The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the

[1] 42 U.S.C. § 1983 et seq.

> requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA Standards, supra, § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus.

424 U.S. at 427.

In *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992), prosecutors obtained post-conviction exculpatory information about defendants while investigating another case. They did not disclose the information to defendants or their attorneys. The court concluded that the prosecutors were acting solely in an investigative capacity similar to police officers and were only entitled to assert qualified immunity. However, the court mentioned that the prosecutors may have violated Illinois Rule 3.8 and forwarded the opinion to disciplinary authorities. *See also Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988) (post-conviction *Brady* violation occurred when exculpatory material was not disclosed).

In *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992), the court found that the state had a duty to produce exculpatory evidence in connection with defendant's post-conviction proceedings:

> We believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding. Thomas has alleged that the state possesses evidence which would demonstrate his innocence and revive an otherwise defaulted ground for issuing a writ. Under the circumstances, fairness requires that on remand the state come forward with any exculpatory evidence it possesses. If no such evidence exists, the state need only advise the district court of that fact.

979 F.2d at 749-750 (footnotes omitted).

The Arizona Supreme Court has also recognized the duty to disclose exculpatory evidence when post-conviction review is available. In *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), the Court held that a convicted defendant has no post-trial discovery rights: "Rule 15.1 of the Arizona Rules of Criminal Procedure, which governs discovery and disclosure in criminal cases, ... applies only to the trial stage, not to PCR proceedings." 210 Ariz. at 599, 115 P.3d at 1262. The *Canion* opinion, however, explicitly acknowledged the obligation of a prosecutor to disclose "clearly exculpatory" evidence post-trial:

> The Court of Appeals found, and the State acknowledges, an ethical and constitutional obligation to disclose clearly exculpatory material that comes to its attention after the sentencing has occurred, *see Brady,* 373 U.S. at 87, 83 S.Ct. 1194 (setting forth requirement to disclose clearly exculpatory material), and we affirm that the State does bear such a duty.

Id.

It should be noted, that not all state courts recognize a post-conviction duty to disclose. In *Gibson v. Superintendent of New Jersey Department of Law and Public Safety*, 411 F.3d 427, 444 (3rd Cir. 2005), a civil rights action, the court stated:

> Gibson also claims that the defendants frustrated his efforts to obtain post-conviction relief that would have ended his incarceration at an earlier date. In his brief, he relies heavily on *Brady,* seeking to imply a duty on the defendants to come forward with exculpatory evidence even after his conviction and appeal. However, Gibson has pointed to no constitutional duty to disclose potentially exculpatory evidence to a convicted criminal after the criminal proceedings have concluded and we decline to conclude that such a duty exists. We also note that the actual prosecutors in Gibson's case are not named as defendants, and would have been immune if they had been so named. *Imbler v. Pachtman,* 424 U.S. 409, 427, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

2. The Duty to Investigate

Unlike the recognized obligation to disclose "clearly exculpatory" evidence during the pretrial phase of a criminal case, there is no clear obligation under

existing law to investigate the possibility that such evidence may exist. Indeed, where the issue has been raised, courts have held that there is no general duty to seek out, obtain and disclose all evidence that might be beneficial to the defense, even during the pretrial stage. Thus, "the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." *People v. Jordan,* 108 Cal.App.4th 349, 361, 133 Cal.Rptr.2d 434, 443 (2003).

Courts addressing prosecutors' *Brady* obligations have uniformly phrased this requirement in terms of evidence in possession of the prosecutor, not a duty to investigate:

> Implicit in the prosecutor's duty to accomplish the "dual aim of our criminal justice system[:] 'that guilt shall not escape or innocence suffer,' " *U.S. v. Nobles,* 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), *quoting Berger,* 295 U.S. at 88, 55 S.Ct. 629, is an ongoing obligation to disclose to the imprisoned, within a reasonable time, evidence which falls into the prosecutor's hands which compellingly and forcefully exonerates the prisoner.

Warney v. City of Rochester, 536 F. Supp. 2d 285, 296 (W.D.N.Y. 2008).

III. The Committee's Recommendation

The Committee has concerns about the Proposed Amendment to Rule 3.8. These concerns, some of which are addressed in the "Other Recommendations" section in Part IV, include the following:

A. Inconsistency with the Recognized Obligation to Disclose Clearly Exculpatory Evidence During the Post-trial Phase.

As noted above, it is well-established under *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005) the prosecutors have an obligation to disclose "clearly exculpatory" evidence during the post-trial phase of a criminal proceeding. Existing law, as well as the Code of Professional Responsibility, ER 3.4, ER 3.8 and ER 8.4, already address this obligation.

The Proposed Amendment to Rule 3.8 would create a confusing overlay to this standard. The use of terms such as "credible" and "material" would create uncertainty. Prosecutors could be subject to disciplinary proceedings to litigate the meaning of these terms, and whether these subjective standards were met in a particular case.

Committee members have experience with post-trial proceedings involving convicted sex offenders. It is not uncommon for convicted persons who are faced with sex offender registration requirements to seek to persuade a victim (sometimes a family member) to recant the victim's testimony. The Proposed Amendment to Rule 3.8 would raise the risk that a prosecutor must deem such post-hoc recantation to be "credible" and "material" and undertake an investigation of this claim, at the risk of a disciplinary complaint. The imposition of such an obligation would not serve the interests of the criminal justice system, nor address any problem that has been documented in the record of this proposed rule amendment.

B. The Imposition of Investigative Duties on Prosecutors.

Proposed Rule 3.8(g)(2)(B) would require that if 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 must, among other things, "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."

This obligation to "undertake further investigation" is both contrary to existing law and imposes an impossible administrative burden on prosecutors' offices. Prosecutors in Arizona are not, primarily, criminal investigative agencies, and lack the resources to take on this local policing role.

The State Department of Public Safety (DPS) has the primary duty for law enforcement (including investigations) on the public highways, sheriffs have the primary duty for law enforcement in unincorporated areas of the state, and municipal police have the primary duty for law enforcement in cities and towns. See Ariz. Att'y Gen. Op. I84-167; Ariz. Att'y Gen. Op. No. 66-4.

A.R.S. §§ 9-240(B)(12), provides that the town council has the power to "establish and regulate the police of the town, to appoint watchmen and policemen, and to remove them, and to prescribe their powers and duties." See also A.R.S. §§ 9-201, -204, and -237 providing that for cities and towns, the town officers shall include a marshal or chief of police.

County and city prosecutors offices have minimal investigative resources (if any). Existing investigative resources are devoted primarily to the preparation of cases for trial. Prosecutors rely on local police to investigate whether a crime was committed, and who is responsible.

Imposing an "investigation" requirement on prosecutor's offices, already pared to minimal staffing by the ongoing budget constraints facing local government, would create an impossible burden. An individual prosecutor would be faced with the impossible dilemma of choosing whether to devote the limited time and resources to prosecuting existing cases or investigating a previous prosecution.

Finally, prosecutors (like judges and court employees) are entitled to absolute immunity from civil liability when performing the prosecution function. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *State v. Superior Court,* 186 Ariz. 294, 298, 921 P.2d 697, 701 (App. 1996). But prosecutors are entitled only to qualified immunity when performing investigative functions. *Buckley v. Fitzsimmons,* 509 U.S. 259, 274 (1993).

Proposed Rule 3.8(g)(2)(B), then, would arguably require a prosecutor to assume a function for which no absolute immunity applies – the investigation 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." Failing to undertake such an investigation could subject a prosecutor to the threat of disciplinary proceedings.

C. Disclosure Requirements Regarding Other Jurisdictions.

Among the most sweeping changes invoked by the Proposed Amendment to ER 3.8 is the obligation to make disclosures regarding criminal proceedings in other states or even other countries. Proposed Rule 3.8(g) would require that if 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 must, among other things, "promptly disclose that evidence to an appropriate court or authority."

Although this requirement appears to be aimed at a situation involving a suspect in one case confessing to a crime in another case where some other person was convicted, the proposed amendment goes much further. It would require that if a prosecutor "knows" of "credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," that prosecutor must make disclosures to "an appropriate court or authority." Thus, in theory, a prosecutor who reads a newspaper and learns that a person convicted of some offense in California or in Papua New Guinea might have been wrongfully convicted, that prosecutor must assume a reporting responsibility to "an appropriate court or authority."

A prosecutor facing the possible need to make such a disclosure would not know:

1. The underlying law of the other jurisdiction;
2. What evidence would be admissible under the law of that jurisdiction;
3. What post-conviction relief is available;
4. Whether the potentially exculpatory evidence has already been disclosed (or even admitted into evidence in the earlier proceeding);
5. Whether the convicted person has been pardoned; or
6. Whether the convicted person is still alive.

The wholesale expansion of recognized disclosure requirements is both unnecessary and harmful. It would distract already overworked local prosecutors

from the protecting the public through important duty of prosecuting existing cases.

IV. Other Recommendations

A. Expansion of Duty to All Attorneys

The Arizona Supreme Court has stated that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Ariz. R. Sup.Ct. 42, Preamble, Comment 1. Additionally, "[a] lawyer should seek . . . the administration of justice . . ." *Id.* at Comment 6. It appears incongruent that prosecutors should be singled-out as having the ethical obligation to act affirmatively when he or she learns of "new, credible and material" evidence that may exculpate a convicted defendant. *See* ABA Model Rule 3.8(g). To our knowledge, no other rule within the ABA Model Rules or Arizona Rules of Professional Conduct impose such an ethical obligation on any other segment of the Bar.

Further, it appears antithetical to believe that prosecutor would be endowed with exclusive access to potentially exculpatory information while the rest of the Bar would not. To better promote the laudable goal to exonerate those wrongly convicted all lawyers should have the ethical obligation to disclose "new, credible and material" evidence that may exculpate a convicted defendant, so long as it does not violate confidentiality requirements found in E.R. 1.6 (Confidentiality of Information).

If the Bar determines that all Arizona lawyers have an ethical obligation to disclose exculpatory evidence then the ABA Model Rules 3.8(g) and (h) should be placed in E.R. 3.3, which applies to all lawyers. The language for above-mentioned ABA Model Rules will have to be altered to incorporate all lawyers. The proposed amended language in E.R. 3.3 would read as follows:

> (e) When an attorney 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 attorney shall, subject to the restrictions in E.R. 1.6:
>
> (1) promptly disclose that evidence to an appropriate court or authority.

B. Other Recommendations

If the Bar believes that there is a need for codifying the already existing obligation for prosecutors to disclose exculpatory evidence to a convicted defendant then changes to the ABA Model Rules 3.8(g) and (h) would be required. Specifically, these language changes would be required to provide more clarity and certainty as to when a prosecutor would be required to disclose exculpatory evidence:

► The definition of "prosecutor" must be defined. Does "prosecutor" include the state's appellate counsel or post-conviction counsel? Does this term also include a government attorney who pursues civil remedies? *See* ABA Model Rules 3.8(g), (h).

► The evidentiary standard "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense" is very ambiguous and open to multiple interpretations. A possible solution is that the term "knows" is applied to each of the conditions necessary to require action by the prosecutor. Such a standard would indicate to the prosecutor when his or her duty to disclose is triggered. *See* ABA Model Rule 3.8(g).

► The definitions "undertake further investigation" or "make reasonable efforts to cause an investigation" are ambiguous. The definition "undertake further investigation" fails to provide any concise information as what is an appropriate or adequate investigation. The definition "make reasonable efforts to cause an investigation" does not explain to a prosecutor what lengths are required to cause an investigation. *See* ABA Model Rule 3.8(g)(B).

► The evidentiary standard "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense" needs further clarification. Whether a particular body of evidence satisfies the "clear and convincing" standard is a question over which reasonable minds can differ and often do disagree. Because reasonable minds can disagree on what is "clear and convincing evidence" it is not appropriate for a prosecutor to have others second-guess the prosecutor's belief of what is or is not "clear and convincing evidence." *See* ABA Model Rule 3.8(h).

► The definition "knows" in ABA Model Rule 3.8(h) needs to be clarified. Because "knows" is not defined it appears to invite complaints against prosecutors based solely on evidence that was "known to exist" at the time of the trial. Such an invitation to convicted defendants would embolden them to file frivolous bar complaints against prosecutors. And this would impose unjustified burden on prosecutors, the Bar's disciplinary personnel and the process.

For the Bar's convenience in determine whether ABA Model Rules 3.8(g), (h) should be amended, the Delaware State Bar has suggested the following language to amend these rules:

Amend Rule 3.8(d) of the Delaware Lawyers' Rules of Professional Conduct as follows:

(d)(1) make timely disclosures to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal:

(2) when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred:

Amend the Comment to Rule 3.8 (d) of the Delaware Lawyers' Rules of Professional Conduct as follows:

[3] The duty of disclosure described in paragraph (d) does not end with the conviction of the criminal defendant. The prosecutor also is bound to disclose after-acquired evidence that casts doubt upon the correctness of the conviction. If a prosecutor becomes aware of new, material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose such evidence to the appropriate court and, unless the court authorizes a delay, to the defense attorney, or, if the defendant is not represented by counsel, to the defendant. If the conviction was obtained outside the prosecutor's jurisdiction, disclosure should be made to the chief prosecutor of the jurisdiction where the conviction occurred. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligation of paragraph (d), even if subsequently determined to have been erroneous, does not constitute a violation of this Rule. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or the public interest.

V. Conclusion

Prosecutors are held to a high standard by existing law. The Committee acknowledges the need for such high standards. The Proposed Amendment to ER 3.8, however, addresses a problem that has not been shown to exist in Arizona. In those rare cases where post-trial exculpatory evidence has been provided to a prosecutor, that prosecutor has, in the past, promptly disclosed to the convicted defendant. There has been no showing of widespread suppression of exculpatory evidence.

In seeking to address this issue, the Proposed Amendment to ER 3.8 would impose on prosecutors an investigation obligation that never previously existed in Arizona, and would have drastic unanticipated consequences. The Committee strongly urges that the alternatives recommended herein by adopted in lieu of the draft Proposed Amendment.