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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN RE: PETITION TO AMEND ER 3.8 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT (RULE 42 OF THE ARIZONA RULES OF SUPREME COURT)	R-11-0033 MARICOPA COUNTY ATTORNEY'S COMMENTS TO PETITION TO AMEND ER 3.8, ARIZONA RULES OF PROFESSIONAL CONDUCT

The Maricopa County Attorney hereby responds to the Petition to Amend ER 3.8 of the Arizona Rules of Professional Conduct.

Respectfully submitted this 18th day of May, 2012.

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I. American Bar Association Model Rules of Professional Conduct 3.8(g) and (h)

In 2008, the American Bar Association House of Delegates added two paragraphs to the Model Rules of Professional Conduct, Rule 3.8, Special Responsibilities of a Prosecutor:

> (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:
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> (1) promptly disclose that evidence to an appropriate court or authority, and
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> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
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> (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 Arizona, Special Responsibilities of a Prosecutor are currently set forth in Rule 42, Rules of the Supreme Court, Arizona Rules of Professional Conduct ER 3.8, paragraphs (a) through (f). The Petition to Amend ER 3.8 seeks to add an amended version of ABA Model Rules 3.8(g) and (h), along with an amended version of the ABA's comments to those rules.

The ABA has compiled information on whether states have acted to adopt Rules 3.8(g) and (h).[1] As of January 24, 2012, Idaho has adopted the rules as is; Colorado, Delaware, North Dakota, Tennessee, Washington and Wisconsin have adopted modified versions; Michigan and North

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[1] *See*, American Bar Association, CPR Implementation Committee, Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h), January 24, 2012, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_8_g_h.authcheckdam.pdf

Carolina have rejected the rules; Maryland has deferred consideration of (g) and rejected (h); Alaska, California, the District of Columbia, Hawaii, Nebraska, New Hampshire, New York, Pennsylvania and Vermont are "studying" the rules. The remaining 32 states have taken no action. Thus, four years after the ABA approved these Model Rules, less than 15% of the states have deemed it necessary to adopt them.

II. Recommendations of State Bar of Arizona Criminal Practice & Procedure Committee Prosecution Section

On February 25, 2010, the Criminal Practice & Procedure Committee Prosecution Section submitted a Report to the State Bar Ethics Committee regarding Model Rules 3.8(g) and (h) ("CPPC Report"). The CPPC Report concluded that Model Rules 3.8(g) and (h) addressed a problem that had not been shown to exist in Arizona, *i.e.*, the suppression of post-conviction exculpatory evidence. In addition, the rule amendments imposed on prosecutors new obligations to investigate and would have drastic unanticipated consequences.

The CPPC Report stated that the Arizona ethical rules already impose duties that sufficiently govern the conduct of prosecutors in post-conviction matters. ER 3.4, Fairness to Opposing Party and Counsel, states that a lawyer shall not unlawfully conceal material having potential evidentiary value. ER 3.8(a) states that a prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. ER 8.4(d) states that it is professional misconduct to engage in conduct that is prejudicial to the administration of justice. The existing rules, along with case law, provide appropriate safeguards.

Canion v. Cole, 210 Ariz. 598, 599, 115 P.3d 1261, 1262 (2005), already requires disclosure of "clearly exculpatory" material discovered post-conviction, citing *Brady v. Maryland*, 373 U.S. 83 (1963). *Imbler v. Pachtman*, 424 U.S. 409, 427, n.25 (1976), also indicated a prosecutor's ethical duty "to inform the appropriate authority of after-acquired or other information that cast doubt upon the correctness of the conviction." The CPPC Report expressed concern that the proposed amendments to ER 3.8 would conflict with the case law and cause confusion. For example, the amendments use undefined terms such as "credible and material," rather than "clearly exculpatory."

The CPPC Report also noted that prosecutors generally have no duty to seek out evidence before trial that is helpful to the defense. However, the proposed amendments impose a duty to undertake further investigation if evidence is discovered after conviction. This imposes an impossible administrative burden on prosecutors' offices, which have limited investigative resources. Furthermore, prosecutors who engage in investigative functions may not have absolute immunity from civil liability. The burden on prosecutors is compounded by the fact that the amendments require disclosures to a court that could be in another jurisdiction.

The CPPC Report recommended that if the State Bar deems a post-conviction disclosure rule necessary, such a rule should apply to all lawyers, subject to the confidentiality requirements in ER 1.6. If the goal is to exonerate persons wrongfully convicted, any lawyer should have the duty to disclose "new, credible and material evidence." Defense lawyers as well as prosecutors would be in a position to learn of such evidence. The CPPC Report also requested clarification of several terms in the proposed amendments if the State Bar were to adopt them in whole or in part.

The Maricopa County Attorney's Office generally agrees with the arguments and recommendations in the CPPC Report. We note, however, that although the CPPC Report was submitted two years ago, neither the State Bar nor this Court has petitioned to adopt Model Rules 3.8(g) and (h). This perhaps indicates that the need for amendments perceived by Petitioners is not a widely held view in the Arizona legal community.

III. Comments on Issues Raised in Petition to Amend ER 3.8

Petitioners begin with the proposition that the rule change is needed to address "the problem of wrongful convictions." Citing the Death Penalty Information Center, the Petition states that eight death row inmates from Arizona had been "exonerated." A closer look at the information on the DPIC website[2] indicates that seven of the eight were acquitted on retrial or the charges dismissed, although not because evidence discovered after conviction proved they were innocent. The eighth case was that of Ray Krone, where DNA testing techniques not available at the time of trial later indicated that a man other than Krone murdered the victim. Upon receiving this evidence, the State moved in April 2002 to dismiss the charges with prejudice and release Krone from custody.

The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime. Revised ethical rules are not necessary to further the goal of releasing inmates who are actually innocent. As to the other seven Arizona defendants "exonerated" between 1978 and 2003, the proposed amendments would not have helped them, because no newly discovered evidence proved their innocence. Petitioners do not argue otherwise. Convicted defendants also are afforded protections under A.R.S. § 13-4240, providing for post-conviction DNA testing, and Rule 32.1, Ariz.R.Crim.P., providing for post-conviction relief on the grounds of newly discovered material facts and actual innocence.

Petitioners acknowledge that *Imbler v. Pachtman* and *Canion v. Cole* note a duty to disclose exculpatory evidence discovered post-conviction. Petitioners argue, however, that the prosecutors' obligation has not been "helpfully defined." On the contrary, the obligation seems clear--

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[2] http://www.deathpenaltyinfo.org/innocence

prosecutors must disclose "clearly exculpatory" evidence, as stated in *Canion v. Cole.* Thus, Arizona already has an established obligation. The proposed amendments to ER 3.8 are therefore not only unnecessary, but they confuse the current standard by using undefined terms and imposing disclosure and investigatory requirements not contemplated by the case law.

Petitioners mention that a "significant number" of states are studying and adopting the amendments. But as noted earlier, most states have not acted on the amendments, indicating no immediate need to implement them. Likewise, Arizona should not rush to adopt rules that only seven other states have adopted and two have rejected. This is particularly true when Petitioners have provided no examples of Arizona prosecutors withholding post-conviction exculpatory evidence or supporting the continued incarceration of defendants proven innocent. Because no problem has been identified in Arizona, this Court should wait and see how other states approach the proposed amendments and the impact on prosecutors where amendments have already been adopted.

Petitioners address what they have identified as the five "concerns" of prosecutors. "Concern 1" regards the lack of a definition of "new, credible and material evidence" and the seemingly low standard for disclosure. Petitioners counter that the standard is "very high" and suggest adopting Colorado's clarifying comments. Colorado made extensive changes to Model Rule 3.8 when amending its own rules, and clearly some time and input by a number of people was involved. Arizona should not simply adopt another state's version of the rule without a committee or task force to review the implications.

"Concern 2" regards the fact that the amendments would apply only to prosecutors. Petitioners argue that such application is appropriate, because prosecutors are ministers of justice and may have better access to information. However, defense lawyers also are officers of the court who may come across "new, credible and material evidence" about a person's innocence without breaching the duty of confidentiality to clients. If the goal of the amendments is to exonerate the innocent, the defense bar should welcome having the amendments apply to all lawyers.

"Concern 3" regards whether the duty to investigate will subject prosecutors to civil liability. Petitioners argue that the amendments require no actual investigation, although the rule specifically states, "undertake further investigation, or make reasonable efforts to cause an investigation." Petitioners also argue, without citing authority, that they believe no civil liability will arise. On the contrary, case law indicates that absolute immunity does not attach to investigative functions. "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). "[A] prosecutor's conduct while acting as an administrator or investigative officer is not 'quasi-judicial' and, therefore, does not enjoy absolute immunity." *State v. Superior Court In and For County of Maricopa*, 186 Ariz. 294, 297, 921 P.2d 697, 700 (App. 1996). Petitioners simply do not know what unintended consequences will arise from the requirement to investigate.

"Concern 4" regards whether prosecutors have refused to take action when presented with strong evidence of innocence. The Krone case is proof that prosecutors do take appropriate action. Petitioners argue that the amendments are designed to offer "much-needed guidance" but fail to offer any examples from Arizona. Likewise, the law review articles cited emphasize a few egregious examples from elsewhere and focus on analyzing what the authors believe are institutional and psychological reasons some prosecutors do not want to overturn convictions. In discussing Model Rule 3.8, one article questioned the "efficacy of ethical rules" and stated, "No number of carrots or sticks offered by statute, ethical code, or case law will overcome the deep desire of some prosecutors to believe in the prisoners' guilt despite all evidence to the contrary."[3] Thus, the proposed amendments are unlikely to change the conduct of those few rogue prosecutors. As to the majority of prosecutors who act ethically, the amendments are simply unnecessary.

"Concern 5" regards the amendments being inconsistent with existing law and confusing. Petitioners argue that there is little existing law. However, the case law and rules that do exist adequately cover disclosure of evidence, including post-conviction. The amendments add a jumble of undefined terms, an onerous new duty to investigate, and lengthy comments that provide as much confusion as clarification. As to inconsistency, one example is the difference in burden of proof between Rule 32.1, Ariz.R.Crim.P., requiring the defendant to prove grounds for post-conviction relief, and proposed ER 3.8(g)(2)(ii), requiring the prosecutor to determine whether a defendant was wrongfully convicted.

Petitioners claim to have refined the Model Rule "to eliminate any unintended ambiguities," but that refinement consists of merely adopting language from Colorado and Tennessee. The amendments remain untested, and we may not know for several years how they have affected prosecutors in the adopting states. Petitioners criticize what they call the "do-nothing approach," but a wait-and-see approach would allow Arizona to evaluate the experiences of other states before embracing a significant change in the ethical rules. Furthermore, unless comments to the Petition show otherwise, there does not appear to be widespread interest in adopting these amendments.

IV. Conclusion

The Maricopa County Attorney's Office opposes the Petition to Amend ER 3.8. Petitioners have provided no convincing evidence that there is a "problem" of wrongful convictions in Arizona,

[3] Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 San Diego L. Rev. 401, 444 (2011).

that prosecutors have failed to take corrective action when appropriate, or that the proposed amendments to ER 3.8 will solve the perceived problem. The amendments are confusing, burdensome and unnecessary. Few states have adopted them, and this Court likewise should not rush to do so.

Respectfully submitted this 18th day of May, 2012.

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