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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	
	)	Supreme Court No. R-11-0033
PETITION TO AMEND ER 3.8	)	
OF THE ARIZONA RULES OF	)	**COMMENT ON PETITION**
PROFESSIONAL CONDUCT	)	
	)	

The Arizona Public Defenders Association ("APDA") submits its Comment regarding the Petition to Amend Ethical Rule 3.8 of the Arizona Rules of Professional Conduct, Rule 42 of the Arizona Rules of the Supreme Court, R-11-0033, and the corresponding "staff draft" issued by the Arizona Supreme Court on August 30, 2012. The APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of poor people who face the loss of their liberty, safeguarding the constitutional rights of indigent individuals, and resolving criminal matters effectively and fairly. Our offices defend the overwhelming majority of individuals who face criminal charges in Arizona, handling in excess of 50,000 felony cases a year.

The staff draft has listed five pertinent issues for consideration, and this Comment addresses those issues in the numerical order presented in the draft.

Question #1: What criteria should trigger the prosecutor's ethical duty to disclose exculpatory information after a conviction? Should it be "new, credible and material information," "credible and material information," or some other alternative phrasing?

Answer: The criteria should be that of "new and credible evidence," as stated in 3.8(g) of the Arizona Supreme Court staff draft. The criteria should not include "material."

Rules analogous to proposed Rule 3.8(g) do not contain a requirement of "materiality." First, the current version of Rule 15.1(b)(8), Arizona Rules of Criminal Procedure ("ARCP"), a pretrial discovery rule, requires that a prosecutor must disclose, "[a]ll existing 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 therefore." Thus, the Arizona Supreme Court has already recognized, in the context of pretrial discovery, that there is no requirement limiting disclosure in criminal cases to "material evidence." Disclosure under proposed Rule 3.8(g) should be no different in that regard.

Second, support is found in Arizona Ethics Opinion 94-07, which construed procedural and ethical rules analogous to proposed Rule 3.8(g). Opinion 94-07 was issued by the State Bar of Arizona Committee on the Rules of Professional

Conduct ("Ethics Committee"), in response to an inquiry from a prosecutor with the Maricopa County Attorney's Office regarding three factual scenarios. The scenarios all involved what were "problems of proof" for the prosecution, and whether the prosecution must disclose those "problems" to the Defense.

The Committee began its analysis by reviewing *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and its progeny. The Committee next recognized that Rule 15.1(a)(7) [now 15.1(b)(8)], ARCP, "essentially tracks the language of ER 3.8(d)[.]" The Committee then addressed the three scenarios presented by the inquiring prosecutor.

Scenario #1 involved a felony DUI case where the arresting officer testified at the preliminary hearing, and his testimony was recorded. Soon after the hearing, the officer died. Before the officer's death, the prosecutor extended a plea offer to the defendant. The defendant had not yet decided whether to take the offer. The inquiry: Must the prosecutor disclose that the officer had died, and if so, then when?

The Committee found that it was unnecessary to analyze the issue under ER 3.8(d), because disclosure of the officer's death would be required under what is now Rule 15.1(b)(1), ARCP, which Rule requires that the prosecution disclose the names and addresses of the witnesses it intends to call at trial. The prosecution's disclosure obligation under this Rule would include correcting any pleading that had already been filed and listed the officer as a witness. And the relevant ethical rules would be ER 3.4(c), which, "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,'" and Rule 8.4(c) and (d), which prohibit conduct that is deceiving, misleading, and/or prejudicial to the administration of justice. "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." *Opinion 94-07*, at 6.

Scenario #2 involved a felony drug possession case. After the prosecutor extended a plea offer, but before the defendant had made a decision, the prosecutor learned that the drugs had been destroyed. The inquiry: Must the prosecutor disclose the destruction of evidence, and if so, then when?

The Committee again found that it was unnecessary to analyze the issue under ER 3.8(d), because disclosure was required under ER 3.4, if the drugs were listed as evidence under what is now Rule 15.1(b)(5), ARCP. "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)." *Opinion 94-07*, at 7.

Scenario #3 involved a misdemeanor driving while under the influence of drugs case. A key piece of evidence was a urine sample given by the defendant that tested positive for methamphetamine, although the State might have sufficient

evidence to proceed to trial without the sample. All of the sample was consumed in testing, thereby precluding independent testing by the Defense. The Defense had not made a motion for discovery. The inquiry: Must the prosecution disclose that all of the sample was consumed in testing, and if so, then when?

The Committee concluded that if the prosecutor had filed Rule 15.1 discovery listing the urine sample as potential evidence, then the same type of analysis for the preceding scenarios would apply. But if the prosecutor had simply disclosed a report of the urine test that did not reveal the destruction of the sample, the analysis would be somewhat different. After reviewing relevant caselaw, including DUI caselaw, the Committee recognized that the, "laws governing DUI prosecutions are extremely complex and changing. … 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 disclose that fact. Nevertheless, it appears to the committee that the lack of such evidence is sufficiently exculpatory … to call for disclosure under ER 3.8(d). Again, 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." *Opinion 94-07*, at 8-9.

A review of Opinion 94-07 shows that the prosecutor's ethical duties regarding the production of evidence and compliance with Arizona's discovery and ethical rules arise without any requirement of "materiality." The same should

be true regarding Ethical Rule 3.8(g), and the standard there should be "new and credible" evidence.

And third, within the last few years the United States Supreme Court took note of ABA Model Rule 3.8(d), recognizing that: "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. … As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (including citation to ABA Model Rule 3.8(d)).

Consideration of these analogous authorities all support the "new and credible" evidence standard as set forth in the Arizona Supreme Court's staff draft. APDA urges the adoption of that standard by the Arizona Supreme Court in new Rule 3.8(g).

Question #2: Should this Court retain or delete the prosecutor's ethical duty, upon receipt of exculpatory information after conviction, to "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"?

Answer: The Court should delete the prosecutor's ethical duty to undertake further investigation.

The prosecutor's primary duty under E.R. 3.8, should be to promptly disclose the evidence to the appropriate court, defendant and indigent representation appointing authority. Once the information has been disclosed to the defendant and defense counsel, it will be the responsibility of the defense to ensure the information is properly investigated and necessary motions filed.

The defendant and thus defense counsel are in the best position to ensure the investigation moves forward in a timely manner. The defendant whose life and or liberty are at stake will ensure that the investigation is expeditiously completed. Although well meaning, a prosecutor may not have the time or resources to dedicate towards investigating a past conviction when faced with current cases. Likewise, police agencies are often overwhelmed with current cases and may not have the capacity to dedicate resources to investigating new information on matters deemed resolved. Further, cases arising out of smaller jurisdictions with minimal prosecutors and law enforcement may face significant delays. Thus, to ensure the matter receives appropriate timely attention the defense should be tasked with the responsibility of investigating and litigating the matter.

Also, an investigation of the matter may require communication with the defendant. The defendant may be unwilling to communicate with the prosecutor or police agencies since the communications are not privileged. However, the

defendant is able to freely communicate with defense counsel, eliminating barriers to the investigation.

Although the prosecutor should not be required to shoulder the investigation, the agency must provide all information and evidence in a timely manner and encourage the police agencies to cooperate in the investigation. The prosecutors will possess the ability to conduct their own investigation and commence hearings, but the mandatory obligation will reside with the defense.

Question #3: Should the prosecutor's duty be different depending on whether the conviction was obtained in the prosecutor's jurisdiction or outside of that jurisdiction?

Answer: The duty of the prosecutor should not be dependent upon whether the prosecutor practices in the jurisdiction of conviction.

The duty of the prosecutor is to inform the appropriate court, defendant and indigent representation appointing authority in the jurisdiction of conviction. Once the prosecutor has informed the appropriate parties it will be the duty of the parties to investigate and litigate the matter. Thus, the prosecution is relieved from the responsibility of coordinating operations across counties.

The contact information for the appropriate court, defendant and indigent representation appointing authority is easily discoverable. Prosecutors will be able to contact the required parties with very little effort or delay, facilitating the defendants need to have the matter expeditiously resolved.

The defendant must always be notified of the evidence regardless of whether the prosecutor who discovered the evidence practices in the convicting county. The defendant will require the assistance of counsel to litigate exoneration. Based upon the defendant's financial status, counsel may be appointed or retained. Without notification from the prosecutor, the defendant will not be aware he needs to seek counsel.

A prosecutor's ethical obligation to ensure justice is meted out will always require them to file appropriate motions when they are aware their office convicted an innocent person. If the agency that discovers the exonerating information was the prosecuting agency, the prosecutor must rectify the situation.

Question #4: Should the duty to disclose exculpatory information be extended to all lawyers, as proposed in at least one other U.S. jurisdiction?

Answer: All lawyers should have an ethical duty to disclose exculpatory information.

The staff draft's proposal regarding ER 3.10 is well founded. The changes proposed are implicit in all attorneys' current ethical responsibilities. The Arizona Oath of Admission provides "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." Further, *all* attorneys should "be mindful of deficiencies in the administration of justice" and it is misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." Rule 42, Ariz.R.S.Ct., Preamble and ER 8.4(d). In

addition, as recognized in the Court's Order, proposed ER 3.10 is based on Washington DC's proposed ER 8.6. (*See* the District of Columbia Board on Professional Responsibility Report ("BPR Report"), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/index.cfm). As discussed in the BPR Report, the District of Columbia Rules Review Committee received extensive comments from interested parties, some of whom expressed concern at what they saw as an expansion of lawyers' responsibilities. While the members of the subcommittee recognized these concerns, they ultimately found that "[P]reventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to all attorneys, not just prosecutors." BPR Report at page 46.

Question #5: Should the Court retain or eliminate the prosecutor's duty, not only to disclose exculpatory information, but to take affirmative steps to "remedy the conviction."

Answer: The Court should retain the prosecutor's ethical duty to take affirmative steps to "remedy the conviction."

The prosecutor has an ethical duty to ensure that the innocent are not imprisoned, as previously discussed in sections 2 and 3. A prosecutor who is aware that his jurisdiction wrongful convicted an individual must file the appropriate motions to secure his release. A prosecutor is not obligated to conduct an independent investigation to determine whether an individual has been

wrongfully convicted but if the prosecutor is aware of the person's innocences, steps must be taken to ensure justice for all.

Respectfully submitted this 20th day of May, 2013.

/s/_____
Christina M. Phillis
President
APDA

ATTACHMENT*

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change]

(g) When a prosecutor knows of new and credible evidence that the prosecutor knows creates 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, defendant ~~or~~ and indigent representation appointing authority~~, and~~

(2) ~~if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, promptly disclose that evidence to the defendant unless a court authorizes delay.~~

(h) When a prosecutor knows of clear and convincing evidence that the prosecutor knows establishes that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

(i) A prosecutor's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, ~~and~~ 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. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers

experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ER 8.4.

* * *

[7] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the significance of the evidence was not appreciated by the trial prosecutor or prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed that was not available at the time of trial. When a prosecutor knows of new and credible evidence that the prosecutor knows creates a reasonable likelihood that a person ~~outside the prosecutor's jurisdiction~~ was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court ~~or other appropriate authority~~, defendant ~~and~~ indigent representation appointing authority ~~such as the chief prosecutor~~ of the jurisdiction in which the conviction occurred. If the conviction was obtained in a court in which the prosecutor exercises prosecutorial authority, paragraph (g) requires the prosecutor to promptly disclose that evidence to the court, defendant and indigent representation appointing authority unless a court authorizes delay. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the prosecutor knows establishes that a defendant was convicted in the prosecutor's jurisdiction either of an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant was legally accountable but which those others did not commit,

the prosecutor must seek to set aside the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include, but are not limited to, the following factors: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

. . .

ER 3.10 Disclosing New and Credible Exculpatory Information about a Convicted Person

(a) When a lawyer knows of credible evidence that the lawyer knows creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the lawyer shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

(1) The court where the person's conviction was obtained;

(2) The chief prosecutor in the jurisdiction where the conviction was obtained;

(3) The person's attorney of recordor indigent representation appointing authority; and

4) The convicted person.

If the identity and location of none of the individuals and entities listed above in subparagraphs (1) through (4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

(c) An attorney's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation

of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar other than prosecutors, whose special duties with respect to disclosure of new and credible exculpatory evidence after conviction are set forth in ER 3.8 (g), (h), and (i).