

1 John A. Furlong, Bar No. 018356
2 General Counsel
3 STATE BAR OF ARIZONA
4 4201 N. 24th Street, Suite 100
5 Phoenix, Arizona 85016-6266
6 Telephone: (602) 252-4804
7 John.Furlong@staff.azbar.org

8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO AMEND ER 3.8,
11 ARIZONA RULES OF
12 PROFESSIONAL CONDUCT (RULE
13 42, ARIZONA RULES OF THE
14 SUPREME COURT)

Supreme Court No. R-11-0033

**Comment of the State Bar of
Arizona in Response to Court's
August 30, 2012, Order**

15 On August 30, 2012, the Supreme Court ordered that Petition R-11-0033 be
16 reopened for comment on five questions related to a Proposed Staff Draft on
17 changes to Ethical Rule (ER) 3.8 and proposed ER 3.10, Rule 42, Ariz. R. Sup. Ct.
18 The State Bar of Arizona addresses those five questions in this comment and
19 recommends changes to the Proposed Staff Draft, if the Court is inclined to adopt it.

20 **DISCUSSION**

21 **Court question 1: What criteria should trigger the
22 prosecutor's ethical duty to disclose exculpatory
23 information after a conviction? Should it be "new,
24 credible and material information," "credible and
25 material information," or some alternative phrasing of
the criteria?**

1 Proposed Staff Draft Rule 3.8(g) provides:

2 (g) When a prosecutor knows of new and credible evidence that
3 the prosecutor knows creates a reasonable likelihood that a
4 convicted defendant did not commit an offense of which the
5 defendant was convicted, the prosecutor shall:

6 (1) promptly disclose that evidence to an appropriate
7 court or authority,

8 and

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

13 The Supreme Court proposals are not workable due to the difficulty a
14 prosecutor will have to determine what is “credible and material” or “new, credible
15 and material” information in a case. Although Petitioners disagree with this
16 reasoning, they agree with the suggested revision below.

17 The institutional memory of a criminal case often fades very quickly, usually
18 due to factors such as the large volume of cases and the high personnel turnover in a
19 prosecutorial agency. Consequently, a prosecutor who receives potentially
20 exculpatory material is unlikely to be the same prosecutor who presented the case at
21 trial and may not be able to find sufficient information within the agency to
22 determine its credibility or materiality. The case file itself may offer only marginal
23 guidance about the newness, credibility, or materiality of the information. The State
24 Bar recognizes that such information should not simply be ignored. Instead, the best
25 way to deal with these situations is to modify the Proposed Staff Draft Rule 3.8(g) as
follows:

(g) When a prosecutor is in receipt of information ~~knows of~~
~~new and credible evidence that the prosecutor knows creates a~~
~~reasonable likelihood~~ a convicted defendant did not commit an

1 offense of which the defendant was convicted, the prosecutor
2 shall:

- 3 (1) promptly disclose that evidence to an appropriate
4 court or authority, and
5 (2) if the judgment of conviction was entered by a court
6 in which the prosecutor exercises prosecutorial
7 authority, promptly disclose that evidence: (i) to an
8 appropriate court with a request to appoint an attorney
9 for the defendant and (ii) to the defendant unless a
10 court authorizes delay; and
11 (3) if applicable, follow the requirements of ER 3.8(h).

12 With this amendment, the defendant and his or her attorney will be able to
13 develop the claim of wrongful conviction without the prosecuting agency guessing
14 whether the information is new, credible, or material. This process would be
15 acceptable regardless of the jurisdiction in which the claim arises. If the information
16 raises the substantial question of guilt as addressed in ER 3.8(h), then the prosecutor
17 should follow 3.8(h) to address the situation.

18 **Court question 2: Should this Court retain or delete the**
19 **prosecutor's duty, upon receipt of exculpatory**
20 **information after a conviction, to "undertake further**
21 **investigation, or make reasonable efforts to cause an**
22 **investigation, to determine whether the defendant was**
23 **convicted of an offense that the defendant did not**
24 **commit"? See Petitioners' proposed ER 3.8(g)(2)(ii)**
25 **and proposed Comment 7.**

21 Under the State Bar's suggested revisions to the proposed ethical rule,
22 investigation of the defendant's actual innocence claim would occur only after the
23 defendant, through his or her attorney, presented evidence to the court and the
24 prosecuting agency that warranted further investigation or in circumstances set forth
25 in 3.8(h).

1 Comment 7 thus should be amended to read as follows:

2 [7] For the purposes of paragraph (g), the information requiring
3 the prosecutor to act is any claim of actual innocence. Evidence
4 is considered new when it was unknown to a trial prosecutor at
5 the time the conviction was entered or, if known to a trial
6 prosecutor, was not disclosed to the defense, either deliberately
7 or inadvertently. The reasons for the evidence being unknown
8 (and therefore new) are varied. It may be new because: the
9 information was not available to a trial prosecutor or the
10 prosecution team at the time of trial; the significance of the
11 evidence was not appreciated by the trial prosecutor or
12 prosecution team at the time of trial; the police department
13 investigating the case or other agency involved in the
14 prosecution did not provide the evidence to a trial prosecutor;
15 or recent testing was performed that was not available at the
16 time of trial. When a prosecutor knows of new and credible
17 evidence that the prosecutor knows creates a reasonable
18 likelihood that a person If the conviction was obtained in a
19 court in which the prosecutor exercises prosecutorial authority,
20 paragraph (g) requires the prosecutor to promptly disclose that
21 evidence to the defendant unless a court authorizes delay. If the
22 information raises a substantial question about the defendant's
23 guilt with the prosecutor, the procedure set forth in ER 3.8(h)
24 should be followed. Consistent with the objectives of Rules 4.2
25 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.
If the conviction was obtained 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, e.g. the chief prosecutor of the
jurisdiction in which the conviction occurred.

23 Comment 7, as currently proposed, may lead to unexplored areas of the law.
24 Rather than have the prosecutor act as a gatekeeper, these claims should be passed
25 along to the parties with the greatest interest in proving actual innocence -- the

1 defense. Only when the prosecutor is presented with information that raises a
2 substantial question about the defendant's guilt, as defined by ER 3.8, would ER
3 3.8(h) apply. With the suggested revisions, assessment of the quality of the
4 information supporting a claim of innocence will be easier for all parties.

5
6 **Court question 3: Should the prosecutor's duty be**
7 **different depending on whether the conviction was**
8 **obtained in the prosecutor's jurisdiction or outside that**
9 **jurisdiction? See Petitioners' proposed ER 3.8 (g) and**
10 **(h) and Comment 7.**

11 Within the prosecutor's jurisdiction, the prosecutor may give the information
12 to the defendant in addition to the appropriate court, unless the court authorizes a
13 delay. When the information involves a matter outside the prosecutor's jurisdiction,
14 the information must be forwarded to the appropriate court or prosecuting agency.
15 Under the State Bar's proposal, the prosecutor in receipt of the information will not
16 make a judgment whether the evidence is new, credible or material, unless it raises a
17 substantial question of the defendant's guilt.

18 **Court question 4: Should the duty to disclose**
19 **exculpatory information be extended to all lawyers, as**
20 **proposed in at least one other U.S. jurisdiction? See**
21 **proposed Rule 8.6, Rules of Professional Conduct of the**
22 **District of Columbia.**

23 The State Bar recognizes the special duty prosecutors have as ministers of
24 justice to rectify a miscarriage of justice. Rectifying this type of wrong, however, is
25 a duty that should extend to all attorneys who obtain potentially exculpatory
evidence. For that reason, the State Bar recommends extending this obligation to all
attorneys. See Report to the State Bar Ethics Committee, Appendix B at 12, State

1 Bar Comments to Petition R-11-0033. Preventing the conviction of an innocent
2 person is a core value of the judicial system and should be an interest for all
3 attorneys. Our ethical rules already obligate all State Bar members to report the
4 serious ethical violations of any other State Bar member. Similarly, under proposed
5 ER 3.10, any State Bar member who possesses non-confidential information that
6 indicates the innocence of a convicted person should be obligated to disclose it.

7 The Proposed Staff Draft, however, ignores the standards already established
8 under ER 8.3 as well as the ethics opinions and court decisions interpreting that
9 ethical rule. The State Bar recommends that this proposal be modified to take
10 advantage of the already established disclosure standard of ER 8.3.

11 In addition, the State Bar recommends that lawyers be advised that they do
12 not need to disclose under new ER 3.10 if they know that the relevant governmental
13 authority itself already knows of the relevant information.

14 Therefore, the State Bar recommends the following modification to Proposed
15 Staff Draft ER 3.10:

16
17 ER 3.10 Disclosing ~~New and Credible Exculpatory~~ Information
18 about a Convicted Person

19 (a) When a lawyer knows of information credible evidence that
20 ~~the lawyer knows creates a reasonable likelihood~~ raises a substantial
21 question whether that a convicted defendant ~~did not committed~~ an
22 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:

- 23 (1) The court where the person's conviction was obtained;
24 (2) The chief prosecutor in the jurisdiction where the
conviction was obtained;
25 (3) The person's attorney of record; and
(4) The convicted person.

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

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

7 (c) An attorney's independent judgment, made in good faith,
8 that the information is not of such a nature as to trigger the
9 obligation of this rule, though subsequently determined to
10 have been erroneous, does not constitute a violation of this
11 Rule.

12 Comment

13 [1] Rectifying the conviction and preventing the incarceration
14 of an innocent person are core values of the judicial system and
15 matters of vital concern to the legal profession. Because of the
16 importance of these principles, this Rule applies to all members
17 of the Bar other than prosecutors, whose special duties with
18 respect to disclosure of new and credible exculpatory evidence
19 after conviction are set forth in ER 3.8 (g), (h), and (i).

20 [2] The standards already established under ER 8.3 for
21 determining whether information raises a substantial question
22 as well as the ethics opinions and court decisions interpreting
23 that ethical rule are to be applied to this rule.

24 [3] A lawyer need not disclose as directed above if the lawyer knows
25 that appropriate government authorities are already aware of the
information.

**Court 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"? See Petitioners' proposed ER 3.8(h)
and Comment 8."**

1 The petition proposed that ER 3.8(h) state “When a prosecutor knows of clear
2 and convincing evidence establishing that a defendant in the prosecutor’s
3 jurisdiction was convicted of an offense that the defendant did not commit, the
4 prosecutor shall seek to remedy the conviction.”

5 A prosecutor’s duty as a minister of justice requires him or her to take action
6 to remedy the conviction of an innocent person when the evidence of innocence is
7 the result of all parties developing the information that will satisfy a court of the
8 defendant’s innocence. There might be circumstances when the prosecution receives
9 information that raises a substantial question as defined by ER 3.8 as to the guilt of a
10 convicted person. The evidence to support this substantial question would
11 necessarily fall into the category of newly discovered evidence. *See* Rule 32.1(e),
12 Ariz. R. Crim. P. In those rare instances, the prosecutor has an affirmative duty. The
13 State Bar’s proposal, however, puts the information regarding claims of actual
14 innocence in the hands of the people who have the greatest stake in the use and
15 development of the information, the defendant and his or her attorney.

16 The State Bar thus recommends that Proposed Staff Draft ER 3.8(h) be
17 modified as follows:

18
19 (h) When a prosecutor knows, based upon newly discovered
20 evidence raising a substantial question about a defendant’s
21 guilt, knows of clear and convincing evidence establishing that
22 the defendant in the prosecutor’s jurisdiction was convicted of
23 an offense that the defendant did not commit the prosecutor
24 shall take steps in the appropriate court, consistent with
25 applicable law, to set aside the conviction.

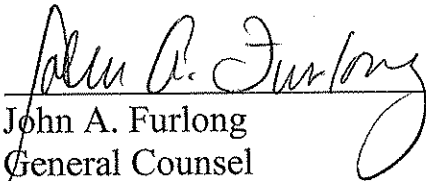
1 The State Bar further recommends changing Proposed Staff Draft comment 8
2 as follows:

3 [8] Under paragraph (h), when a prosecutor, based upon newly
4 discovered evidence, once the prosecutor knows of clear and
5 convincing evidence that the prosecutor knows establishes
6 believes there is a substantial question that a defendant was
7 convicted in the prosecutor's jurisdiction either of an offense
8 that the defendant did not commit or of an offense that involves
9 conduct of others for which the defendant was legally
10 accountable but which those others did not commit, the
11 prosecutor must seek to set aside the conviction. See Ariz. R.
12 Crim. P. 32.1(e) (defining newly discovered evidence).
13 Necessary steps may include making reasonable efforts to
14 inquire into the matter, making reasonable efforts to cause an
15 appropriate law enforcement agency to undertake an
16 investigation into the matter, disclosing the evidence to the
17 defendant, requesting that the court appoint counsel for an
18 unrepresented indigent defendant and, where appropriate,
19 notifying the court that the prosecutor has knowledge that the
20 defendant did not commit the offense of which the defendant
21 was convicted.

22 **CONCLUSION**

23 For the above reasons, the State Bar requests that if the Court is inclined to
24 adopt a version of the Proposed Staff Draft, that language be amended as described
25 above and as amended in Appendix A.

RESPECTFULLY SUBMITTED this 20th day of May, 2013.

By 
John A. Furlong
General Counsel

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Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
20th day of May, 2013.

By: Kathleen A. Lundgren

Appendix A

State Bar proposed revisions to Supreme Court Proposed Staff Draft of ER 3.8(g), (h) and (i) and ER 3.10

[Additions shown by underlining; deletions shown by ~~strike-through~~]

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change to existing rule]

(g) When a prosecutor is in receipt of information ~~knows of new and credible evidence that the prosecutor knows creates a reasonable likelihood~~ 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;
- (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, promptly disclose that evidence: (i) to an appropriate court with a request to appoint an attorney for the defendant and (ii) to the defendant unless a court authorizes delay; and
- (3) if applicable, follow the requirements of ER 3.8(h).

(h) When a prosecutor knows, based upon newly discovered evidence raising a substantial question about a defendant's guilt, ~~knows of clear and convincing evidence establishing that the~~ 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) [No change to Proposed Staff Draft]

Comment

[1] [No change to Proposed Staff Draft amendments]

* * *

[7] For the purposes of paragraph (g), the information requiring the prosecutor to act is any claim of actual innocence. 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 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 defendant unless a court authorizes delay. If the information raises a substantial question about the defendant's guilt with the prosecutor, the procedure set forth in ER 3.8(h) should be followed. 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. If the conviction was obtained 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, e.g. the chief prosecutor of the jurisdiction in which the conviction occurred.

[8] Under paragraph (h), when a prosecutor, based upon newly discovered evidence, once the prosecutor knows of clear and convincing evidence that the prosecutor knows establishes believes there is a substantial question 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. See Ariz. R. Crim. P. 32.1(e) (defining newly discovered evidence). Necessary

steps may include making reasonable efforts to inquire into the matter, making reasonable efforts to cause an appropriate law enforcement agency to undertake an investigation into the matter, disclosing 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] [No change to Proposed Staff Draft]

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

(d) When a lawyer knows of information credible evidence that the lawyer knows creates a reasonable likelihood raises a substantial question whether that a convicted defendant did not committed 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 record; 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.

(e) [No change to Proposed Staff Draft]

(f) [No change to Proposed Staff Draft]

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).

[2] The standards already established under ER 8.3 for determining whether information raises a substantial question as well as the ethics opinions and court decisions interpreting that ethical rule are to be applied to this rule.

[3] A lawyer need not to disclose as directed above if the lawyer knows that appropriate government authorities are already aware of the information.