SHEILA POLK (007514)
ELIZABETH ORTIZ (012838)
ARIZONA PROSECUTING ATTORNEY'S ADVISORY COUNCIL
1951 W. CAMELBACK RD. SUITE 202
PHOENIX, ARIZONA 85015
TELEPHONE: (602) 542-7222

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND ARIZONA E.R. 3.8, Rule 42, Rules of the Supreme Court	R-11-0033 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND ARIZONA E.R. 3.8, RULE 42, RULES OF THE SUPREME COURT

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) hereby submits additional comments to the current draft to amend Rule 42, E.R. 3.8 and add 3.10, Rules of the Supreme Court. Although the current draft addresses some of the concerns raised by comments filed, APAAC reasserts its position that the proposed changes to Rule 3.8 are unnecessary, confusing, impractical, and a solution in search of a problem.

Ethical Rule Is Unnecessary

As discussed in the Comment submitted by APAAC on May 21, 2013, Arizona prosecutors already have the duty to disclose "clearly exculpatory" evidence, a term well defined in both state and federal case law. In the revised draft, the term "new, credible, and material evidence" remains the proposed standard in determining what information is subject to disclosure. Adding a new term with a different standard fosters confusion as to what the prosecutor's obligations are.

Amended Rule Requires Prosecutors to Become Investigators

The new draft still requires that a prosecutor "make reasonable efforts to inquire into the

matter or to cause the appropriate law enforcement agency to undertake an investigation into the matter." APAAC renews its objection to this provision in that prosecutors cannot be ordered through an ethical rule to investigate and, when they in fact do investigations, their immunity for their actions is reduced to qualified immunity. Furthermore, although prosecutors often provide legal advice to law enforcement agencies, the agencies do not work for the prosecutors nor do the prosecutors have the authority to "cause" them to do anything.

Section 3.8(g)(2)(i)

Section 3.8(g)(2)(i) presents new issues. It requires prosecutors to promptly disclose the evidence to "the defendant's counsel or, if the defendant is not represented, to the defendant and a public defender office in the jurisdiction . . ." Many defendants fall into the latter category, as their counsel likely has withdrawn from representation after the conclusion of the case, triggering an affirmative duty on prosecutors to find a defendant who may not be readily located. The provision also requires that the prosecutor make the disclosure to a public defender's office. There are many jurisdictions in our state that **do not have a public defender's office** thus making this rule even more impractical.

Different terms are used in Ethical Rules 3.8 and 3.10

APAAC notes that the proposed amendments use inconsistent terminology.

- ER 3.8(g) charges the prosecutor with certain obligations when he/she knows of "new, credible, and material evidence creating a reasonable likelihood" that a convicted defendant did not commit the offense.
- ER 3.10 charges the lawyer who knows of "credible and material evidence that creates a reasonable likelihood" that a convicted defendant did not commit the offense. [This rule omits the word "new" from the language.]

While it is unclear whether the drafters intentionally omitted the word "new" from ER 3.10, APAAC requests that the word be inserted in the event this rule is adopted. The comment to ER 3.8

defines the term "new" and it is difficult to fathom a rule that requires attorneys to take action if the evidence they face is not new.

For these reasons, APAAC opposes the Petitioners' proposal to amend E.R. 3.8 as well as the current proposed draft

Respectfully submitted this ____ of October, 2013.

SHEILA SULLIVAN POLK
Yavapai County Attorney
Chair, ARIZONA PROSECUTING
ATTORNEYS' ADVISORY COUNCIL

ELIZABETH ORTIZ, APAAC

BY: _____
SHEILA SULLIVAN POLK
Chair, APAAC