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11 **IN THE SUPREME COURT**
12 **STATE OF ARIZONA**

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

Supreme Court No. R-11-0033

**Comment of the State Bar of Arizona
in Response to Court's August 28,
2013, Order Re-Opening Comments**

17 The State Bar of Arizona respectfully requests that the Court reinstate in the
18 proposed amended ER 3.8(g)(1) and new ER 3.10(a) directions that qualifying
19 information be disclosed to the defense as well as the court and the prosecutorial
20 authority.

21 Proposed amended ER 3.8(g) requires that in appropriate cases, prosecutors who
22 know of "new, credible, and material evidence" must disclose that evidence to the court
23 and the corresponding prosecutorial authority. The defense -- counsel, defendant and
24 public defender office -- are included only if the conviction occurred in a court where the
25 prosecutor has prosecutorial authority.

26 Proposed new ER 3.10(a) requires that a non-prosecutor faced with disclosing
qualifying information only needs to disclose the information to the court in which the
defendant was convicted and the corresponding prosecutorial authority.

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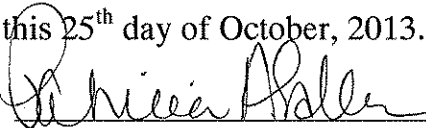
In both situations, notice should be given to defense counsel or, if the defendant is not represented, then to the indigent defense appointing authority in the jurisdiction. With the amount of court-related information available on the Internet, lawyers faced with disclosing qualifying information should be able to readily find out a defendant's counsel or record or the appropriate public-defender entity.

If the Court is inclined to adopt the ER 3.8 amendments and the new ER 3.10, then directions for sending exculpatory information to the defense should be included. The defense is most able and apt to put the information to its optimal use.

The State Bar also suggests using the phrase "indigent defense appointing authority" instead of "public defender office" because the former is more descriptive and encompasses the myriad of forms public defense may take.

The State Bar's proposed revisions to the August 28, 2013, re-circulated proposals are attached in the appendix.

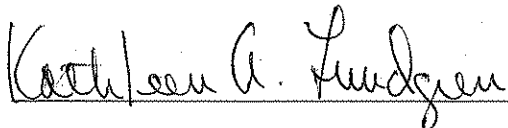
RESPECTFULLY SUBMITTED this 25th day of October, 2013.



Patricia A. Sallen
Deputy General Counsel

John A. Furlong
General Counsel

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 25th day of October, 2013,

by: 

1 State Bar of Arizona proposed revisions
2 to parts of the August 28, 2013, re-circulated proposals

3 [Additions shown by **double underlining and bold**;
4 deletions shown by ~~striking through~~]

5 ER 3.8 Special Responsibilities of a Prosecutor

6
7 The prosecutor in a criminal case shall:

8 (a)-(f) [No change from current rule]

9 (g) When a prosecutor knows of new, credible, and material evidence creating
10 a reasonable likelihood that a convicted defendant did not commit an offense
11 of which the defendant was convicted, the prosecutor shall:

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13 (1) promptly disclose that evidence to the court in which the defendant
14 was convicted and to the corresponding prosecutorial authority, **and to**
15 **defendant's counsel or, if defendant is not represented, the defendant**
16 **and the indigent defense appointing authority in the jurisdiction, and**

17
18 (2) if the judgment of conviction was entered by a court in which the
19 prosecutor exercises prosecutorial authority,

20 ~~(i) promptly disclose that evidence to the defendant's counsel or, if the~~
21 ~~defendant is not represented, to the defendant and a public defender~~
22 ~~office in the jurisdiction, and (ii) make reasonable efforts to inquire into~~
23 ~~the matter or to cause the appropriate law enforcement agency to~~
~~undertake an investigation into the matter.~~

24 (h)-(i) [No changes to proposed amended rule]

25 Comment [No changes to proposed amended comments]

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ER 3.10 Credible and Material Exculpatory Information about a Convicted Person

(a) When a lawyer knows of credible and material evidence that 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 court in which the defendant was convicted, **the defendant's counsel of record** and the corresponding prosecutorial authority.

(b)-(d) [No changes to proposed new rule]

Comment [No changes to proposed comment to new rule]