

1 Christina M. Phillis,  
2 Arizona Bar Membership No. 014871  
3 Arizona Public Defender Association  
4 777 W. Southern Ave., Ste. 101  
5 Mesa, Arizona 85210  
6 Telephone (602) 372-2815  
7 Fax (602) 372-8919  
8 Email Juv-SE@mail.maricopa.gov

6 **IN THE SUPREME COURT**  
7 **STATE OF ARIZONA**

8  
9 PETITION TO AMEND ER 3.8, ARIZONA  
10 RULES OF PROFESSIONAL CONDUCT  
11 (RULE 42, ARIZONA RULES OF THE  
12 SUPREME COURT)

Supreme Court No. R-11-0033

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

12 Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Arizona Public Defender  
13 Association ("APDA") supports the Court's current proposal, with minor modifications clarifying  
14 the notice provisions of amended ER 3.8(g)(1) and new ER 3.10(a). These proposed changes  
15 were approved by the State Bar's Rules Committee on October 10, 2013, and are currently being  
16 considered by the State Bar Board of Governors.

17  
18 Proposed amended ER 3.8(g) appropriately provides that prosecutors must disclose  
19 information within the scope of the proposed rule to the court and the corresponding prosecutorial  
20 authority and "to defendant's counsel or, if the defendant is not represented, the defendant and a  
21 public defender office in the jurisdiction" if the conviction occurred in a court where the  
22 prosecutor has prosecutorial authority. For purposes of consistency and fairness, the same type  
23 of notice to defense should apply to prosecutors if they become aware of information within the  
24 rule's scope pertaining to a criminal case outside of the prosecutor's jurisdiction. In fact, there  
25 may be a more compelling need to provide defense counsel in another jurisdiction such notice,  
26 since the other jurisdiction may not have the same type of 3.8 obligations as those provided by the

1 Arizona rule. Alerting defense counsel to the information will better ensure that follow-up action  
2 is taken. For purposes of clarity, we also suggest that the phrase “indigent defense appointing  
3 authority” be substituted for “public defender office” -- many jurisdictions have different names for  
4 the agencies responsible for court appointed counsel.

5  
6 Proposed new ER 3.10(a) is modeled after the District of Columbia’s Proposed Rule 8.6.  
7 Unlike the D.C. proposal, however, it does not require any disclosure to the defendant or  
8 defendant’s counsel of record. Accordingly, we suggest that “the defendant’s counsel of record”  
9 be added to the Court’s proposal.

10 In addition to promoting fairness, adding notice to the defense for all disclosures under 3.8  
11 and 3.10 should address concerns raised by the prosecution regarding the additional workload  
12 their offices could encounter if they are required to engage in follow-up investigation on  
13 disclosures made pursuant to these proposed rules. As stated by the APDA at page 6 of our May  
14 20, 2013 Comment, “The defendant and thus defense counsel are in the best position to ensure the  
15 investigation moves forward in a timely manner. The defendant whose life and or liberty are at  
16 stake will ensure that the investigation is expeditiously completed.”

17  
18 RESPECTFULLY SUBMITTED this 25th day of October, 2013.

19 \_\_\_\_\_  
20 Christina Phillis  
21 Secretary, Arizona Public Defender Association

21 Electronic copy filed with the Clerk of the  
22 Supreme Court of Arizona this \_\_\_\_\_ day of  
23 October, 2013,

24 by: \_\_\_\_\_  
25  
26

1 Arizona Public Defender Association 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  
10 creating a reasonable likelihood that a convicted defendant did not  
11 commit an offense of which the defendant was convicted, the prosecutor  
12 shall:

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

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

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

Comment [No changes to proposed amended comments]

\* \* \*

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]