

**TO:** Subcommittee on Model Rule 3.8 Amendments, Committee on the Rules of Professional Conduct

**FROM:** Keith Swisher and Karen Wilkinson

**DATE:** January 24, 2011

**RE:** **Amendments to ER 3.8: Special Responsibilities of Prosecutors Post-Conviction**

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Following the adoption of the Model Rules of Professional Conduct nearly thirty years ago, Arizona ER 3.8 has remained virtually identical to the corresponding Model Rule 3.8. In 2008, the ABA adopted significant amendments to Model Rule 3.8, and our Subcommittee was formed to assess whether the Ethics Committee should recommend these or similar amendments to ER 3.8. These amendments, in short, give guidance to prosecutors in discharging their ethical responsibilities when they learn of new and probative evidence that an innocent person has likely been wrongfully convicted. While caselaw recognizes a general ethical duty to disclose exculpatory evidence acquired after a conviction, the contours of that duty are not clearly defined in either caselaw or ethical rules. With certain clarifications discussed below, Arizona should maintain consistency and incorporate the ABA's recent amendments. This Memorandum explains why and how through the following four parts: (1) the reason for the amendments; (2) a survey of other states' adoption of the amendments; (3) a response to prosecutorial concerns with the amendments; and (4) a proposed rule, which is substantially similar to the ABA's amendments, but which clarifies a few ambiguities.

#### I. THE REASONS FOR A RULE

We now know, for certain, that innocent people are sometimes sent to prison, even death row. If we look only at DNA-testing cases, there have been 265 exonerations to date, and the vast majority of those wrongfully convicted are minorities.<sup>1</sup> With the famous cases of Ray Krone and Larry Youngblood, Arizona is the home of perhaps the two highest-profile exonerations in the nation. Unfortunately, these are not the only exonerations in Arizona. The Death Penalty Information Center reports that as of October 27, 2010, there had been 138 exonerations of death row inmates. Eight of those inmates were from Arizona, with Arizona ranking sixth highest among the states for the number of death row exonerations.<sup>2</sup> Since these

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<sup>1</sup> See, e.g., Innocence Project, <http://www.innocenceproject.org/know/>. These numbers grow each year. See *id.* (listing DNA exonerations by year).

<sup>2</sup> See Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

cases were exposed, the problem of wrongful convictions has not been miraculously cured.<sup>3</sup> Perhaps obviously, there is universal agreement that such travesties of justice are just that—travesties—and any means to mitigate such travesties should be taken seriously.

In *Imbler v. Pachtman*, the Supreme Court noted that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”<sup>4</sup> Similarly, our own Supreme Court has agreed, in passing dictum, that prosecutors have an “ethical and constitutional obligation to disclose clearly exculpatory material that comes to [their] attention after the sentencing has occurred . . . .”<sup>5</sup> Furthermore, as the ABA noted when promulgating the amendments, “when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice.”<sup>6</sup> Thus, prosecutors have post-conviction obligations (i) to disclose “clearly” exculpatory evidence and (ii) if that evidence shows that a person has been wrongfully convicted, to do something about it. Neither obligation, however, has been helpfully defined for prosecutors. Adopting Model Rule 3.8(g) and (h) would remedy that void in Arizona. Indeed, Arizona would not be the first state to accept this much-needed guidance, as the following Part describes.

## II. OTHER STATES’ REACTIONS TO THE AMENDMENTS TO MODEL RULE 3.8

As of this writing, at least five states have adopted the ABA’s 2008 amendments in full or in substantial part. Those states are Colorado, Delaware, Idaho, Tennessee, and Wisconsin. Moreover, California’s State Bar Board of Governors has incorporated the amendments verbatim in the new California Rules of Professional Conduct and submitted the proposed rules to the Supreme Court of California for approval, and New York State Bar Association previously amended the comments to its rules to include language substantially similar to the Model Rule

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<sup>3</sup> For example, Arizona had another DNA exoneration just last month. *See also generally* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (estimating a 3–5% wrongful conviction rate for capital rape-murders). It should go without saying, however, that prosecutors are often not the chief cause of wrongful convictions in the first instance, but prosecutors always play a consequential role—whether positive or negative—in post-conviction exonerations.

<sup>4</sup> 424 U.S. 409, 427 n.25 (1976) (citing the ABA Standards for Criminal Justice and former Code of Professional Responsibility).

<sup>5</sup> *Canion v. Cole*, 115 P.3d 1261, 1262 (Ariz. 2005). The entire discussion consists of the following sentence: “The Court of Appeals found, and the State acknowledges, an ethical and constitutional obligation to disclose clearly exculpatory material that comes to its attention after the sentencing has occurred, *see Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (setting forth requirement to disclose clearly exculpatory material), and we affirm that the State does bear such a duty.” *Id.* The Court then went on to distinguish the issue. *See id.* at 1262–63.

<sup>6</sup> AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION ET AL., REPORT TO HOUSE OF DELEGATES (Feb. 2008), [http://www.abanet.org/leadership/2008/midyear/sum\\_of\\_rec\\_docs/hundredfiveb\\_105B\\_FINAL.doc](http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc).

amendments. Finally, at least nine additional states are studying the amendments and assessing whether to recommend their adoption.

In sum, a significant number of other states are studying these amendments, concluding that they constitute much-needed guidance, and adopting them accordingly.

### III. PROSECUTORS' CONCERNS

The concern that our justice system is compromised by the conviction and imprisonment of innocent persons is shared by all, including prosecutors. Indeed, in Wisconsin—which became the first state to adopt the Rule 3.8 amendments—the petition to amend the state's ethics rules was filed by the Wisconsin District Attorney's Association.<sup>7</sup> Similarly, the National District Attorneys Association, the largest and oldest organization representing criminal prosecutors in the world, recently adopted a similar standard outlining prosecutorial notification, disclosure, and remedial responsibilities in post-conviction innocence cases.<sup>8</sup>

Nevertheless, not all agree on the best way to address the problem. The Prosecution Section of the Criminal Practice and Procedure Committee of the State Bar of Arizona voiced concerns about the changes recommended by the ABA.<sup>9</sup> Prosecutors have expressed the following five initial concerns with the amendments. Each concern is explained and addressed below.

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<sup>7</sup> See, e.g., <http://www.legalethicsforum.com/files/rule-3.8-as-adopted-by-wisconsin-effective-july-1-2009.pdf> (providing a copy of the July 17, 2009 order of the Supreme Court of Wisconsin adopting amendments).

<sup>8</sup> The full text of the rule follows:

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court and unless the court authorizes a delay, the defense attorney, or the defendant, if the defendant is not represented by counsel, and seek the release of the defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court and unless the court authorizes a delay, to the defense attorney, or to the defendant, if the defendant is not represented by counsel.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 8-1.8 (3d ed. 2009) (“Duty of Prosecutor in Cases of Actual Innocence”); *cf. also id.* Standard 8-1.6 (“The prosecutor shall not assert or contest an issue on collateral review unless there is a basis in law and fact for doing so. The basis should not be frivolous. . . .”); ABA STANDARDS FOR CRIMINAL JUSTICE: Prosecution Function Standard 3-3.11(c) (3d ed. 1999) (“A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.”).

<sup>9</sup> See Criminal Practice & Procedure Committee Prosecution Section, State Bar of Arizona, Report to the State Bar Ethics Committee (Feb. 25, 2010) (previously circulated to committee members).

*Concern 1:* What does “new, credible and material evidence” mean? And why should prosecutors have to disclose such evidence on such a seemingly low standard?

*Answer:* The amendments’ standard for action is actually very high. The standard not only requires “knowledge”<sup>10</sup> of “new, credible and material evidence,” but also requires that such evidence create a reasonable “likelihood” that the person was actually innocent of the offense.<sup>11</sup> But to alleviate any remaining concerns, in our proposed rule in Part IV below, we have inserted additional commentary (borrowed from the fine state of Colorado) further clarifying both (1) what is “new” evidence and (2) some of the factors that a prosecutor might consider in determining whether that new evidence is “credible and material.” We have also inserted language that more carefully identifies the prosecutor on whom the obligations are imposed.

*Concern 2:* Why should the disclosure portion of the rule in subsection (g) apply only to prosecutors and not every attorney who comes in contact with such exculpatory evidence?

*Answer:* First and foremost, the prosecutor is a “minister of justice,” whose duty is not merely to convict people.<sup>12</sup> Second, the prosecutor often has access to information that is not available to the public. Third, in some cases, at least inadvertently, the prosecutor may have been partially responsible for the wrongful conviction in the first place. Fourth, and finally, unlike defense counsel, the prosecutor does not have countervailing confidentiality duties in this context.

*Concern 3:* Will the duty to “investigate” subject prosecutors to civil liability?

*Answer:* There is no precedent that this, or any other, ethics rule will subject prosecutors to civil liability. In fact, the Supreme Court partially justified the grant of broad civil immunity to prosecutors on the very basis that prosecutors were subject to professional disciplinary rules. Thus, because “a prosecutor stands . . . amen[able] to professional discipline by an association of his peers,” this fact “undermine[s] the argument that the

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<sup>10</sup> ER 1.0(f) of the Arizona Rules of Professional Conduct and Model Rule 1.0(f) both define “knows” as “actual knowledge of the fact in question.” As noted in the ABA recommendation, “indirect or imputed knowledge will not suffice.” *See supra* note 6. Moreover, ER 3.8 has long used “knows” as the applicable standard (along with many other ethics rules).

<sup>11</sup> *See generally* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 471–72 (2009) (noting that this high standard for action sets only a “bare minimum” and suggesting that prosecutors should go above and beyond it). We thank Bruce Green, who was one of the chief architects of these amendments in both the ABA and New York, for his input, from which we have borrowed liberally in this Memorandum.

<sup>12</sup> *See, e.g.*, ARIZ. RULES OF PROF’L CONDUCT ER 3.8 cmt. 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.”); *In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (“The prosecutor’s interest in a criminal prosecution ‘is not that it shall win a case, but that justice shall be done.’ In addition, courts generally recognize that the ethical rules impose high ethical standards on prosecutors.”) (internal citations omitted).

imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.”<sup>13</sup> Finally, the ABA recommendation includes new comment [9], which provides that a prosecutor’s erroneous but good faith judgment that new evidence does not trigger these new obligations does not constitute a violation of the rule.

*Concern 4:* Are there any prosecutors who have refused to take action (or have frustrated others’ action) when presented with strong evidence of innocence?

*Answer:* The amendments are primarily designed to offer guidance, and ideally, no prosecutor will ever violate the new rules. But the answer is yes: some (but by no means all) prosecutors have sat on their hands—or outright resisted—in the face of rock-solid evidence that they had inadvertently convicted the innocent.<sup>14</sup>

*Concern 5:* The proposed obligations seem inconsistent with existing law, which would be confusing.

*Answer:* In fact, there is little existing law—and certainly none that affirmatively conflicts with the proposed rule. The current state of the law offers almost no rule-based guidance, and the case law—which mentions in passing only the “ethics of office” and “clearly” exculpatory evidence—is of little practical assistance to prosecutors in determining their precise ethical duties in these situations. These amendments would finally provide some clear guidance, which thus would be the opposite of “confusing” to prosecutors.<sup>15</sup>

In sum, the concerns do not justify a do-nothing approach. At best, they suggest that the language of the ABA’s amendments should be refined to eliminate any unintended ambiguities, which is a task that we have attempted below.

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<sup>13</sup> *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); see also ARIZ. RULES OF PROF’L CONDUCT Scope (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.”). It is also noteworthy that the National District Attorneys Association has promulgated a similar ethics rule (as noted above). Because that organization’s official policy is that prosecutors should be afforded full protection from civil liability, it is highly unlikely that it would have promulgated such a rule if, in doing so, it would open up the litigation floodgates.

<sup>14</sup> See, e.g., Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, \_\_ SAN DIEGO L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1682076>; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

<sup>15</sup> It also bears noting that ethics rules in general, and ER 3.8 in particular, impose additional requirements on lawyers. See, e.g., ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-454 (2009) (noting that Model Rule 3.8(d) imposes more stringent disclosure obligations than those of the Constitution); see generally *In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (“[C]ourts generally recognize that the ethical rules impose high ethical standards on prosecutors.”).

#### IV. PROPOSED AMENDMENT

Using the amendments to the Model Rule as the foundation, the following proposed language clarifies the amendments in light of the concerns expressed above. All modifications to the Model Rule are noted in track changes; and as further noted, most of these modifications were adapted from sister states that have already adopted the amendments.

### 3.8. Special Responsibilities of a Prosecutor

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(g) When a prosecutor knows of new, credible and material evidence creating 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 or authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority~~if the conviction was obtained in the prosecutor's jurisdiction,~~<sup>16</sup>

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) 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.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

#### 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, 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. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a

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<sup>16</sup> These changes were inspired by the new Colorado and Tennessee rules. See COLO. RULES OF PROF'L CONDUCT R. 3.8(g)(2) (2010); TENN. RULES OF PROF'L CONDUCT R. 3.8(g)(1) (2011).

matter of obligation. 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 Rule 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.<sup>17</sup> When a prosecutor knows of new, credible and material evidence creating 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, such as the chief prosecutor of the jurisdiction ~~in which~~ where the conviction occurred. If the conviction was obtained in a court in which the prosecutor exercises prosecutorial authority~~the prosecutor's jurisdiction~~, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. 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 defendant was convicted 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,<sup>18</sup> the prosecutor must seek to remedy 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] A prosecutor's reasonable~~independent~~<sup>19</sup> judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. 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

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<sup>17</sup> See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 8A (2010).

<sup>18</sup> See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 8 (2010).

<sup>19</sup> See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 9 (2010).

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.<sup>20</sup>

## CONCLUSION

In light of the foregoing discussion, the ABA's recent amendments to Model Rule 3.8 should be incorporated into ER 3.8, along with the minor modifications (or rough equivalents) suggested above, without further delay. Wrongful convictions happen, and Arizona's ethics rules currently provide next-to-no guidance to prosecutors in the face of such travesties of justice. This current inattention is puzzling and has placed Arizona behind the ethics curve on this issue. To remedy this fact, these amendments pay overdue attention to the second half of the prosecutor's "twofold aim"—"that guilt shall not escape *or innocence suffer*."<sup>21</sup>

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<sup>20</sup> See COLO. RULES OF PROF'L CONDUCT R. 3.8 cmt. 9A (2010).

<sup>21</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). As our Supreme Court has noted, the "prosecutor's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (internal quotation omitted).