

# **Report to the State Bar Ethics Committee**

**From the Criminal Practice & Procedure Committee Prosecution  
Section**



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## Executive Summary

At its Midyear meeting in the Spring of 2007, the Criminal Justice Section of the American Bar Association (ABA) resolved to add two new provisions, paragraphs (g) and (h) to Rule 3.8, ABA Model Rules of Professional Conduct. The resolution also amended the Comment [1] to Rule 3.8 and added new Comments [7], [8], and [9]. The House of Delegates later approved the resolutions. Specifically, the resolutions stated:

(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 conviction was obtained in the prosecutor's jurisdiction,  
(A)promptly disclose that evidence to the defendant unless a court authorizes delay, and  
(B)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

## II. The Committee's Study

### A. Background

The proposed amendments to Model Rule 3.8 purport to strengthen the responsibility of prosecutors to take action when confronted with evidence of innocence. Model Rules 3.8(g) and (h) and the accompanying Comments grew out of a 2006 Report of the Association of the Bar of the City of New York which considered various aspects of prosecutor's duties, primarily focusing on the prosecutor's obligation when a convicted defendant may be innocent. The report stated in part: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post-conviction claims of innocence." The premise for the proposed rules is essentially two-fold: (1) that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent; and (2) that the current ethical rules and applicable case law are inadequate or incomplete in guiding prosecutors with respect to these responsibilities.

Adding to the backdrop for these proposed rules is the extensive history of the prosecutor's role in the criminal justice system as being a "minister of justice." The ABA references the unique role of the prosecutor in Comment 1 to Rule 3.8 when it notes that the prosecutor has the "specific obligation[s] to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." The prosecutor is a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. *See Berger v. United States*, 295 U.S. 78, 88 (1935). Coupled with this long-standing view of the prosecutor's unique role, is that as technology develops, society at large views prosecutors as having at their disposal an increasing array of tools to aid in carrying out investigatory functions. Technology such as DNA analysis has proven to be one of the most powerful tools to potentially exculpate innocent suspects as well as aiding in the conviction of suspects who are guilty. In light of these developments, issues have been raised that prosecutors receive too little ethical guidance addressing their obligation when evidence is discovered after conviction; hence the arguable need to codify their responsibilities in ethical rules that carry with them the potential for discipline.

## **B. ABA Model Rule**

Rule 3.8 of the Model Rules of Professional Conduct would include paragraphs (g) and (h) as follows:

(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 conviction was obtained in the prosecutor's jurisdiction,

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

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense than 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.

In summary, the obligations in 3.8(g) and (h) are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The Model Rules define "knows" as "actual knowledge of the fact in question"; therefore, indirect or imputed knowledge is not sufficient. When a prosecutor knows of such information, the new rules require that he or she disclose the evidence, and, if the conviction was obtained in the prosecutor's jurisdiction, conduct an appropriate investigation, and upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy the conviction.

### C. Arizona's Model

Case law from many jurisdictions hold that prosecutors are ethically bound to disclose information that casts doubt on the correctness of a conviction. The Arizona Supreme Court has stated that clearly exculpatory materials discovered post-conviction should be disclosed. *See Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005). In *Canion*, the Supreme Court reviewed a Court of Appeals decision that the defendant could compel post-conviction discovery before he had filed a post-conviction relief petition. *Id.* at 599. The Court reasoned that a defendant does not lose his right to disclosure of potentially exculpatory evidence once the jury has rendered its verdict and held that the State has an obligation to disclose “clearly exculpatory evidence.” Evidence that falls short of that definition, however, does not need to be disclosed unless and until a post-conviction petition is filed. *Id.* at 600. Thus, the Arizona Supreme Court has already made it clear that prosecutors must disclose clearly exculpatory evidence even post-conviction. The proposed model rule would confuse this standard already provided by our Supreme Court.

In addition to case law, the current ethical rules adopted in Arizona already impose duties on practitioners that sufficiently govern the conduct of prosecutors in post-conviction matters. ER 3.4 – Fairness to Opposing Counsel, states that a lawyer shall not conceal evidence. ER 3.8 – Special Responsibilities of a Prosecutor, states that a prosecutor shall not prosecute a charge not supported by probable cause. ER 8.4 – Misconduct, states that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice.” These rules coupled with applicable case law provide sufficient safeguards and guidance to attorneys. As such, the proposed additions in Model Rule 3.8 (g) and (h) are not necessary, and more importantly, pose the potential for immense confusion.

Finally, unlike perhaps New York and other jurisdictions, there is no evidence in Arizona that the current safeguards are not sufficient or that we have a large number of cases in which convicted persons serving prison sentences have been exonerated. As such, there is no justification for adopting additional rules of discipline that have possible disruptive effects.

#### D. Duty to Investigate Exculpatory Evidence

The Supreme Court of the United States and the Arizona Supreme Court have said that clearly exculpatory material discovered post-conviction should be disclosed. Existing case law, however, does not appear to impose a requirement that prosecutors undertake investigative responsibility.

##### 1. The Duty to Disclose

It is well-established that prosecutors have an obligation to disclose material evidence favorable to the accused during the pretrial phase of a criminal case. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence is “material” in this context if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

This duty to disclose has been extended to the post-trial phase of criminal proceedings. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court of the United States held that prosecutors who act within the scope of their duties in prosecuting a case are absolutely immune from civil damages under Section 1983<sup>1</sup>. The ethical guidance is included in a footnote:

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to s 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.<sup>FN25</sup>

FN25. The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the

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<sup>1</sup> 42 U.S.C. § 1983 et seq.

requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA Standards, *supra*, § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus.

424 U.S. at 427.

In *Houston v. Partee*, 978 F.2d 362 (7<sup>th</sup> Cir. 1992), prosecutors obtained post-conviction exculpatory information about defendants while investigating another case. They did not disclose the information to defendants or their attorneys. The court concluded that the prosecutors were acting solely in an investigative capacity similar to police officers and were only entitled to assert qualified immunity. However, the court mentioned that the prosecutors may have violated Illinois Rule 3.8 and forwarded the opinion to disciplinary authorities. *See also Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988) (post-conviction *Brady* violation occurred when exculpatory material was not disclosed).

In *Thomas v. Goldsmith*, 979 F.2d 746 (9<sup>th</sup> Cir. 1992), the court found that the state had a duty to produce exculpatory evidence in connection with defendant's post-conviction proceedings:

We believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding. Thomas has alleged that the state possesses evidence which would demonstrate his innocence and revive an otherwise defaulted ground for issuing a writ. Under the circumstances, fairness requires that on remand the state come forward with any exculpatory evidence it possesses. If no such evidence exists, the state need only advise the district court of that fact.

979 F.2d at 749-750 (footnotes omitted).

The Arizona Supreme Court has also recognized the duty to disclose exculpatory evidence when post-conviction review is available. In *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), the Court held that a convicted defendant has no post-trial discovery rights: “Rule 15.1 of the Arizona Rules of Criminal Procedure, which governs discovery and disclosure in criminal cases, ... applies only to the trial stage, not to PCR proceedings.” 210 Ariz. at 599, 115 P.3d at 1262. The *Canion* opinion, however, explicitly acknowledged the obligation of a prosecutor to disclose “clearly exculpatory” evidence post-trial:

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.*

It should be noted, that not all state courts recognize a post-conviction duty to disclose. In *Gibson v. Superintendent of New Jersey Department of Law and Public Safety*, 411 F.3d 427, 444 (3<sup>rd</sup> Cir. 2005), a civil rights action, the court stated:

Gibson also claims that the defendants frustrated his efforts to obtain post-conviction relief that would have ended his incarceration at an earlier date. In his brief, he relies heavily on *Brady*, seeking to imply a duty on the defendants to come forward with exculpatory evidence even after his conviction and appeal. However, Gibson has pointed to no constitutional duty to disclose potentially exculpatory evidence to a convicted criminal after the criminal proceedings have concluded and we decline to conclude that such a duty exists. We also note that the actual prosecutors in Gibson's case are not named as defendants, and would have been immune if they had been so named. *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

## 2. The Duty to Investigate

Unlike the recognized obligation to disclose “clearly exculpatory” evidence during the pretrial phase of a criminal case, there is no clear obligation under

existing law to investigate the possibility that such evidence may exist. Indeed, where the issue has been raised, courts have held that there is no general duty to seek out, obtain and disclose all evidence that might be beneficial to the defense, even during the pretrial stage. Thus, “the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.” *People v. Jordan*, 108 Cal.App.4th 349, 361, 133 Cal.Rptr.2d 434, 443 (2003).

Courts addressing prosecutors’ *Brady* obligations have uniformly phrased this requirement in terms of evidence in possession of the prosecutor, not a duty to investigate:

Implicit in the prosecutor's duty to accomplish the “dual aim of our criminal justice system[:] ‘that guilt shall not escape or innocence suffer,’ ” *U.S. v. Nobles*, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), *quoting Berger*, 295 U.S. at 88, 55 S.Ct. 629, is an ongoing obligation to disclose to the imprisoned, within a reasonable time, evidence which falls into the prosecutor's hands which compellingly and forcefully exonerates the prisoner.

*Warney v. City of Rochester*, 536 F. Supp. 2d 285, 296 (W.D.N.Y. 2008).

### III. The Committee's Recommendation

The Committee has concerns about the Proposed Amendment to Rule 3.8. These concerns, some of which are addressed in the "Other Recommendations" section in Part IV, include the following:

#### A. Inconsistency with the Recognized Obligation to Disclose Clearly Exculpatory Evidence During the Post-trial Phase.

As noted above, it is well-established under *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005) the prosecutors have an obligation to disclose "clearly exculpatory" evidence during the post-trial phase of a criminal proceeding. Existing law, as well as the Code of Professional Responsibility, ER 3.4, ER 3.8 and ER 8.4, already address this obligation.

The Proposed Amendment to Rule 3.8 would create a confusing overlay to this standard. The use of terms such as "credible" and "material" would create uncertainty. Prosecutors could be subject to disciplinary proceedings to litigate the meaning of these terms, and whether these subjective standards were met in a particular case.

Committee members have experience with post-trial proceedings involving convicted sex offenders. It is not uncommon for convicted persons who are faced with sex offender registration requirements to seek to persuade a victim (sometimes a family member) to recant the victim's testimony. The Proposed Amendment to Rule 3.8 would raise the risk that a prosecutor must deem such post-hoc recantation to be "credible" and "material" and undertake an investigation of this claim, at the risk of a disciplinary complaint. The imposition of such an obligation would not serve the interests of the criminal justice system, nor address any problem that has been documented in the record of this proposed rule amendment.

#### B. The Imposition of Investigative Duties on Prosecutors.

Proposed Rule 3.8(g)(2)(B) would require that if 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 must, among other things, "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."

This obligation to “undertake further investigation” is both contrary to existing law and imposes an impossible administrative burden on prosecutors’ offices. Prosecutors in Arizona are not, primarily, criminal investigative agencies, and lack the resources to take on this local policing role.

The State Department of Public Safety (DPS) has the primary duty for law enforcement (including investigations) on the public highways, sheriffs have the primary duty for law enforcement in unincorporated areas of the state, and municipal police have the primary duty for law enforcement in cities and towns. See Ariz. Att’y Gen. Op. I84-167; Ariz. Att’y Gen. Op. No. 66-4.

A.R.S. §§ 9-240(B)(12), provides that the town council has the power to “establish and regulate the police of the town, to appoint watchmen and policemen, and to remove them, and to prescribe their powers and duties.” See also A.R.S. §§ 9-201, -204, and -237 providing that for cities and towns, the town officers shall include a marshal or chief of police.

County and city prosecutors offices have minimal investigative resources (if any). Existing investigative resources are devoted primarily to the preparation of cases for trial. Prosecutors rely on local police to investigate whether a crime was committed, and who is responsible.

Imposing an “investigation” requirement on prosecutor’s offices, already pared to minimal staffing by the ongoing budget constraints facing local government, would create an impossible burden. An individual prosecutor would be faced with the impossible dilemma of choosing whether to devote the limited time and resources to prosecuting existing cases or investigating a previous prosecution.

Finally, prosecutors (like judges and court employees) are entitled to absolute immunity from civil liability when performing the prosecution function. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *State v. Superior Court*, 186 Ariz. 294, 298, 921 P.2d 697, 701 (App. 1996). But prosecutors are entitled only to qualified immunity when performing investigative functions. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

Proposed Rule 3.8(g)(2)(B), then, would arguably require a prosecutor to assume a function for which no absolute immunity applies – the investigation 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.” Failing to undertake such an investigation could subject a prosecutor to the threat of disciplinary proceedings.

### C. Disclosure Requirements Regarding Other Jurisdictions.

Among the most sweeping changes invoked by the Proposed Amendment to ER 3.8 is the obligation to make disclosures regarding criminal proceedings in other states or even other countries. Proposed Rule 3.8(g) would require that if 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 must, among other things, “promptly disclose that evidence to an appropriate court or authority.”

Although this requirement appears to be aimed at a situation involving a suspect in one case confessing to a crime in another case where some other person was convicted, the proposed amendment goes much further. It would require that if a prosecutor “knows” of “credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” that prosecutor must make disclosures to “an appropriate court or authority.” Thus, in theory, a prosecutor who reads a newspaper and learns that a person convicted of some offense in California or in Papua New Guinea might have been wrongfully convicted, that prosecutor must assume a reporting responsibility to “an appropriate court or authority.”

A prosecutor facing the possible need to make such a disclosure would not know:

1. The underlying law of the other jurisdiction;
2. What evidence would be admissible under the law of that jurisdiction;
3. What post-conviction relief is available;
4. Whether the potentially exculpatory evidence has already been disclosed (or even admitted into evidence in the earlier proceeding);
5. Whether the convicted person has been pardoned; or
6. Whether the convicted person is still alive.

The wholesale expansion of recognized disclosure requirements is both unnecessary and harmful. It would distract already overworked local prosecutors

from the protecting the public through important duty of prosecuting existing cases.

#### IV. Other Recommendations

##### A. Expansion of Duty to All Attorneys

The Arizona Supreme Court has stated that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Ariz. R. Sup.Ct. 42, Preamble, Comment 1. Additionally, “[a] lawyer should seek . . . the administration of justice . . .” *Id.* at Comment 6. It appears incongruent that prosecutors should be singled-out as having the ethical obligation to act affirmatively when he or she learns of “new, credible and material” evidence that may exculpate a convicted defendant. *See* ABA Model Rule 3.8(g). To our knowledge, no other rule within the ABA Model Rules or Arizona Rules of Professional Conduct impose such an ethical obligation on any other segment of the Bar.

Further, it appears antithetical to believe that prosecutor would be endowed with exclusive access to potentially exculpatory information while the rest of the Bar would not. To better promote the laudable goal to exonerate those wrongly convicted all lawyers should have the ethical obligation to disclose “new, credible and material” evidence that may exculpate a convicted defendant, so long as it does not violate confidentiality requirements found in E.R. 1.6 (Confidentiality of Information).

If the Bar determines that all Arizona lawyers have an ethical obligation to disclose exculpatory evidence then the ABA Model Rules 3.8(g) and (h) should be placed in E.R. 3.3, which applies to all lawyers. The language for above-mentioned ABA Model Rules will have to be altered to incorporate all lawyers. The proposed amended language in E.R. 3.3 would read as follows:

(e) When an attorney 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 attorney shall, subject to the restrictions in E.R. 1.6:

(1) promptly disclose that evidence to an appropriate court or authority.

##### B. Other Recommendations

If the Bar believes that there is a need for codifying the already existing obligation for prosecutors to disclose exculpatory evidence to a convicted defendant then changes to the ABA Model Rules 3.8(g) and (h) would be required. Specifically, these language changes would be required to provide more clarity and certainty as to when a prosecutor would be required to disclose exculpatory evidence:

▶ The definition of “prosecutor” must be defined. Does “prosecutor” include the state’s appellate counsel or post-conviction counsel? Does this term also include a government attorney who pursues civil remedies? *See* ABA Model Rules 3.8(g), (h).

▶ The evidentiary standard “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense” is very ambiguous and open to multiple interpretations. A possible solution is that the term “knows” is applied to each of the conditions necessary to require action by the prosecutor. Such a standard would indicate to the prosecutor when his or her duty to disclose is triggered. *See* ABA Model Rule 3.8(g).

▶ The definitions “undertake further investigation” or “make reasonable efforts to cause an investigation” are ambiguous. The definition “undertake further investigation” fails to provide any concise information as what is an appropriate or adequate investigation. The definition “make reasonable efforts to cause an investigation” does not explain to a prosecutor what lengths are required to cause an investigation. *See* ABA Model Rule 3.8(g)(B).

▶ The evidentiary standard “clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense” needs further clarification. Whether a particular body of evidence satisfies the “clear and convincing” standard is a question over which reasonable minds can differ and often do disagree. Because reasonable minds can disagree on what is “clear and convincing evidence” it is not appropriate for a prosecutor to have others second-guess the prosecutor’s belief of what is or is not “clear and convincing evidence.” *See* ABA Model Rule 3.8(h).

▶ The definition “knows” in ABA Model Rule 3.8(h) needs to be clarified. Because “knows” is not defined it appears to invite complaints against prosecutors based solely on evidence that was “known to exist” at the time of the trial. Such an invitation to convicted defendants would embolden them to file frivolous bar complaints against prosecutors. And this would impose unjustified burden on prosecutors, the Bar’s disciplinary personnel and the process.

For the Bar's convenience in determine whether ABA Model Rules 3.8(g), (h) should be amended, the Delaware State Bar has suggested the following language to amend these rules:

Amend Rule 3.8(d) of the Delaware Lawyers' Rules of Professional Conduct as follows:

(d)(1) make timely disclosures to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal:

(2) when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred:

Amend the Comment to Rule 3.8 (d) of the Delaware Lawyers' Rules of Professional Conduct as follows:

[3] The duty of disclosure described in paragraph (d) does not end with the conviction of the criminal defendant. The prosecutor also is bound to disclose after-acquired evidence that casts doubt upon the correctness of the conviction. If a prosecutor becomes aware of new, 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 such evidence to the appropriate court and, unless the court authorizes a delay, to the defense attorney, or, if the defendant is not represented by counsel, to the defendant. If the conviction was obtained outside the prosecutor's jurisdiction, disclosure should be made to the chief prosecutor of the jurisdiction where the conviction occurred. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligation of paragraph (d), even if subsequently determined to have been erroneous, does not constitute a violation of this Rule. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or the public interest.

## V. Conclusion

Prosecutors are held to a high standard by existing law. The Committee acknowledges the need for such high standards. The Proposed Amendment to ER 3.8, however, addresses a problem that has not been shown to exist in Arizona. In those rare cases where post-trial exculpatory evidence has been provided to a prosecutor, that prosecutor has, in the past, promptly disclosed to the convicted defendant. There has been no showing of widespread suppression of exculpatory evidence.

In seeking to address this issue, the Proposed Amendment to ER 3.8 would impose on prosecutors an investigation obligation that never previously existed in Arizona, and would have drastic unanticipated consequences. The Committee strongly urges that the alternatives recommended herein be adopted in lieu of the draft Proposed Amendment.