

SUPREME COURT OF ARIZONA

In the Matter of)
) Arizona Supreme Court
) No. R-11-0033
)
 PETITION TO AMEND ER 3.8)
)
 OF THE ARIZONA RULES OF)
)
 PROFESSIONAL CONDUCT)
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FILED 11/14/2013

**ORDER
AMENDING RULE 42, ER 3.8 AND PROMULGATING RULE 42, ER 3.10,
RULES OF THE SUPREME COURT**

A petition having been filed proposing to amend Rule 42, ER 3.8, Rules of the Supreme Court, and comments having been received, upon consideration,

IT IS ORDERED that the attached amendments to Rule 42, ER 3.8, Rules of the Supreme Court, be adopted, and the attached new Rule 42, ER 3.10, Rules of the Supreme Court, be promulgated, effective January 1, 2014.

DATED this 14th day of November, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:

Rule 28 Distribution
Lawrence A Hammond
Karen M Wilkinson
Keith A Swisher
Mark I Harrison
Terry L Goddard Jr.
J Grant Woods
Stanley G Feldman
Robert D Myers
Thomas A Zlaket
Ann Birmingham Scheel
John R Evans III
Gary M Restaino
John S Leonardo
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MaryAnn Lubas
R Thomas
Kathleen E Brody

ATTACHMENT*

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change]

(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 the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant’s counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make reasonable efforts to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.

(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 take appropriate steps, including giving notice to the victim, to set aside the conviction.

(i) A prosecutor who concludes in good faith that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections even if this conclusion is later determined to have been erroneous.

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,~~and~~ that

* Additions to text are shown by underscoring; deletions by ~~strikeouts~~.

~~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. Precisely how far the prosecutor is required to go in this direction 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 in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. 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 ER 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.

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 promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

(c) A lawyer who in good faith concludes that information is not subject to this Rule does not violate this Rule even if that conclusion is later determined to have been erroneous.

(d) This Rule does not require disclosure if the lawyer knows that appropriate governmental authorities or the convicted defendant already possess the information.

Comment

Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar except prosecutors, whose special duties with respect to disclosure of new, credible, and material exculpatory evidence after conviction are set forth in ER 3.8 (g), (h), and (i).