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OLD COLO. RPC 3.8(d)

Text and comment – same as ABA model rule:

The prosecutor in a criminal case shall:

(d) make timely disclosure 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;

Comment [3] 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 to the public interest.

IN RE ATTORNEY C, 47 P.3D 1167 (COLO. 2002)

Prosecutor twice was arguably untimely with disclosures:

- **First case:** Victim recanted certain statements to police. Prosecutor had extended plea offer for third-degree assault. Prosecutor did not withdraw or modify plea offer after finding exculpatory information in file, or disclose at preliminary hearing. Defense got the information in the mail two days later.
- **Second case:** On morning of preliminary hearing, prosecutor in presence of victim advocate interviews the victim, who denied previous information and gave a different version – exculpatory. Prosecutor did not tell defense counsel in advance of or at hearing. Prosecutor elicited victim testimony with new version – resulting in court finding probable cause to bind defendant over. Defense got in mail one day later the memo of the victim advocate.

IN RE ATTORNEY C, 47 P.3D 1167 (COLO. 2002)

Supreme Court reversed hearing panel's findings of Colo. RPC 3.8(d) violations – no rule violations found:

Relied on *Brady/Bagley* constitutional framework and Crim. P. 16

- **Materiality**: evidence tending to be outcome determinative at trial, even if it wouldn't affect the next hearing.

Question: How is a prosecutor supposed to apply this rule prospectively? Or at plea negotiations?

- **Timing**: prosecutor who is “aware” of exculpatory evidence must disclose before the next critical stage of the proceeding.

Question: What if the evidence would make a difference in the interim? Such as plea negotiations?

IN RE ATTORNEY C, 47 P.3D 1167 (COLO. 2002)

Supreme Court declined to find any rule violation, relying on the 1993 ABA Standards for Criminal Justice Prosecution Function providing for a duty to not intentionally fail to make timely disclosures.

- *The hearing board had found negligent and knowing conduct only.*
- *ABA revised those standards in 2017 (3-5.4) to eliminate that mens rea.*

Court held that “grievance proceedings should be limited to those circumstances in which a prosecutor intentionally withholds exculpatory evidence in violation of the rule.”

- *Consider that most other RPCs do not hinge on proof of intentionality just to allege a rule violation.*
- *Mens rea of intent is relevant only for sanctions analyses.*

DISCUSSIONS ABOUT A REVISED COLO. RPC 3.8(d)

- Materiality, timeliness, and intentionality
- Should there be a duty of diligence to identify exculpatory information?
 - ABA prosecutor standards now have such a duty.
- Should the prosecutor confirm that law enforcement has handed over all information?
 - Realities of workloads and relationships with law enforcement.
 - What if law enforcement hasn't turned it all over?
- If the rule is tightened, will it lead to threats of grievances that interfere with criminal proceedings?

CONSIDERATION OF OTHER COLORADO RULES OF PROFESSIONAL CONDUCT

- Colo. RPC 1.1 requires all lawyers to be competent.
- Colo. RPC 1.3 requires all lawyers to be diligent and act with promptness.
- Colo. RPC 3.8 Comment [1] provides that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”
- Compare: Colo. RPC 3.4(d) already requires diligence in producing information in civil cases: “A lawyer shall not...in pretrial procedure... fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

NEW COLO. RPC 3.8(d) (JULY 1) – PART 1

The prosecutor in a criminal case shall... (d) timely disclose to the defense all information known to the prosecutor, *regardless of admissibility*, that the prosecutor also *knows or reasonably should know* tends to negate the guilt of the accused or mitigate the offense, or *would affect a defendant's decision about whether to accept a plea disposition*, except when the prosecutor is relieved of this responsibility by statute, rule, or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor *knows or reasonably should know* could affect the sentence.

- Information favorable to the defendant, regardless of admissibility – not “outcome-determinative” or “material”
- New mens rea re: prosecutor’s view of the information
- Expressly takes into account plea negotiations
- Notice: “would affect” (plea) versus “could affect” (sentence)

NEW COLO. RPC 3.8(d) – PART 2 – ALL NEW

A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused.

NEW COLO. RPC 3.8(d) – PART 3 – ALL NEW

A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]

- New requirement for “diligent efforts” – clarified by Comment [3] – and duty to tell defense if prosecutor knows of information but cannot get it

NEW COLO. RPC 3.8(d) – COMMENT [3] (PART 1)

The disclosure obligations in paragraph (d) are not limited to information that is material as defined by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Instead, paragraph (d) imposes a duty on a prosecutor to make a disclosure irrespective of its expected effect on the outcome of the proceedings.

- *Materiality is out of the new Colo. RPC 3.8(d).*

NEW COLO. RPC 3.8(d) – COMMENT [3] (PART 2)

A finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case.

See Preamble and Scope **[20]**:

- **[20]** says: “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.”
- *This comment clarifies that a trial judge’s finding of a Colo. RPC 3.8(d) violation (or finding facts suggesting a violation) does not entitle a criminal defendant to any particular relief.*

NEW COLO. RPC 3.8(d) – COMMENT [3] (PART 3)

Paragraph (d) requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information in light of case-specific factors such as the status of plea negotiations, the imminence of a critical stage in the proceedings, whether the information relates to a prosecution witness who will be called to testify at the next hearing, and whether the information pertains only to credibility or negates the guilt of the accused.

- *No longer simply “before the next critical stage.”*
- *Non-exhaustive list of four independent considerations.*
- *Credibility information vs. negates guilt is just one of the four – not a hard line.*

NEW COLO. RPC 3.8(d) – COMMENT [3] (PART 4)

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 to the public interest and that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects.

- *The reference to protective orders is in the current rule.*
- *The reference to procedural rules is new.*

NEW COLO. RPC 3.8(d) – COMMENT [3] (PART 5)

The prosecutor's duty to disclose information pursuant to paragraph (d) continues throughout the prosecution of a criminal case and the prosecutor should notify agencies known to be involved in the case of this continuing obligation.

- *Safe harbor for the duty to make diligent efforts to obtain exculpatory information.*
- *Duty to notify vs. duty to investigate further.*
- *Duty ends when prosecution ends.*

NEW COLO. RPC 3.8(d) – COMMENT [3] PART 5 CONT'D

The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.

“A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]”

- *New duty to “alert,” not a duty to investigate further.*
- *Duty does not extend to things a prosecutor doesn’t know and couldn’t have easily known – such as agencies not involved in the case that may have credibility information on prosecution witnesses.*

NEW COMMENT [10] TO COLO. RPC 3.8

[10] The special responsibilities set forth in Rule 3.8 are in addition to a prosecutor's ethical obligations contained in the other provisions of these Rules of Professional Conduct.

- *Other rules apply.*
- *Our office interprets the prosecution's representation of The People as representation of a client.*

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

How do prosecutors get the information from law enforcement?

Colo. RPC 3.8(d) says: “A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]”

Comment [3] says: The prosecutor’s duty to disclose information pursuant to paragraph (d) continues throughout the prosecution of a criminal case and the prosecutor should notify agencies known to be involved in the case of this continuing obligation. The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.”

- *Prosecutors may consider a standard letter at beginning of case requesting disclosure on ongoing basis.*

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

What if prosecutors can't get the information from law enforcement?

Colo. RPC 3.8(d) says: “A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]”

- Review the file – is there a reference to information law enforcement has not turned over? Ask for it.
- A prosecutor should request the information from law enforcement far enough in advance to facilitate timely disclosure, and let the defense know if law enforcement is unresponsive.

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does this rule require prosecutors to find and disclose all potential credibility-related information about prosecution witnesses?

- The rule says: “A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]”
- **Comment [3]** says: “The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.”

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does this rule require prosecutors to disclose information from victim advocates about a victim’s willingness to testify at trial?

- What about a prosecutor’s mental impressions (work product) about the current mental state of the victim? Crim. P. 16(l)(e)(1)
 - Compare to: physical availability under subpoena power
 - Or statement from victim that they refuse to show up for trial
- Is this information that “tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant’s decision about whether to accept a plea disposition,” or “could affect the sentence”?
 - “Courts scare me.” Might not be information covered by Colo. RPC 3.8(d)
 - Also compare to: extrinsic information that could affect any case’s jury trial

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does this rule require prosecutors to disclose problems in locating a witness? When would they need to disclose that?

- Is this information that “tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant’s decision about whether to accept a plea disposition,” or “could affect the sentence”?
 - *How important is this witness? What would they say at trial? Would the defense objectively conclude that the absence of this witness weakens the prosecution’s case?*
- Timeliness – are there current active efforts to locate the witness? Is there a reasonable basis for believing the witness will be available/under subpoena? Has a plea offer already been extended?

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does this rule require prosecutors to disclose that federal charges are possible?

- Hypothetical/speculative compared to federal contact with prosecutor
- Is this information that “would affect a defendant’s decision about whether to accept a plea disposition?” E.g., would federal charges likely result in longer sentence.
- Timeliness – What does the prosecutor actually know? Has a plea offer already been extended?

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

What about the identities of confidential informants?

- **Comment [3]** states: “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 to the public interest and that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects.”
- So Colo. RPC 3.8(d) does not require disclosure of information that Crim. P. 16 allows a prosecutor to withhold.

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does this rule apply when a prosecutor learns a defendant plans to plead guilty as charged?

- The text of the rule does not differentiate between a plea “deal” and pleading guilty as charged.
- The prosecutor in a criminal case shall...(d) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know ... would affect a defendant’s decision about whether to accept a plea disposition...
 - *So the requirements of disclosure apply regardless of whether the defendant is getting a “deal”*

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

How does this rule apply when a prosecutor plans to offer a plea deal at arraignment/first appearance and the prosecutor does not have the discovery from law enforcement?

- The rule says: “The prosecutor in a criminal case shall...(d) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know ... would affect a defendant’s decision about whether to accept a plea disposition... A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it[.]”
- The prosecutor should disclose what is known, and make clear that not all discovery is available yet.

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

How does this rule apply to pro se defendants?

- The rule still applies.
- Consider alternative ways to deliver discovery and impact on timing:
 - Thumb-drive prosecutor brings to court?
 - Time for defendant to review before accepting plea deal/going to trial?
 - Arrange for defendant to get ongoing discovery?

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

What if information is misplaced in the office, and a prosecutor doesn’t find it until the eve of trial?

- Did the prosecutor ever know about the information, or is this more akin to supervisory neglect? See Colo. RPC 1.0 Terminology (“know” denotes actual knowledge)
- Does Colo. RPC 3.3(a) impose a duty to correct anything said to the Court?
- A lawyer’s conduct will be reviewed based on the facts and circumstances as they existed at the time; lawyers often have to act on uncertain or incomplete information (see Scope [19])
- Alternatives to public discipline typically used for one-time instances of negligent conduct for other types of rule violations.
 - *Trial court in best position to provide a trial-related remedy.*

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Will a prosecutor have to address a grievance while the criminal case at issue is ongoing?

- The trial court is still the venue for a trial-related remedy.
- OARC prefers to review a trial court’s disposition of a discovery issue first, even though it isn’t binding on OARC.
- Five-year rule of limitations for most type of conduct.
C.R.C.P. 242.12.
- Abeyance of a disciplinary matter is an option.

RULE 16 – PARTIAL LIST OF REQUIREMENTS

(a)(3) “The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.”

(b)(1)-(3) – Specific deadlines for disclosure.

(b)(4) “The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.”

(c)(2) – under Material Held by Other Government Personnel: “The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.”

RULE 216 – PARTIAL LIST OF REQUIREMENTS

- Court orders discovery (not automatic) – and still requires a showing “that the items sought may be material to the preparation of the defense”
- Court orders production of witness statements
 - Court can excise irrelevant portions prior to production to defense
- Municipal courts can impose additional rules
- Also see Rule 202: Rules are intended to provide for “the just determination” of municipal ordinance violations and “shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.”
- Rule changes coming? New Supreme Court Committee on Municipal Rules
 - CMCR 216 Subcommittee – Judge Billy Stiggers

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

Does a violation of 3.8(d) mean that Rule 16 or *Brady* has been violated?

- Colo. RPC 3.8(d) has requirements that Rule 16 does not have.
- Colo. RPC 3.8(d) requires more disclosure than *Brady* and thus does not by itself establish a constitutional violation. But *Brady* can apply to law enforcement when RPC 3.8(d) does not.
 - **Comment [3]:** “The disclosure obligations in paragraph (d) are not limited to information that is material as defined by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Instead, paragraph (d) imposes a duty on a prosecutor to make a disclosure irrespective of its expected effect on the outcome of the proceedings.”
- There could be overlapping facts between an alleged 3.8(d) violation and an alleged Rule 16 or *Brady* violation.

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

What are the remedies in a criminal case if a court makes findings that suggest a violation of Colo. RPC 3.8(d)?

- **Comment [3]:** “A finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case.”
- There could be overlapping facts between an alleged 3.8(d) violation and an alleged Rule 16, Rule 216 or *Brady* violation.
- While not bound by a court’s findings, OARC always reviews a court’s factual findings and the evidence supporting those findings – so a court’s articulation of both is very helpful.
 - OARC has to prove its own cases by clear and convincing evidence, but a court’s factual findings provide a roadmap for an OARC case.
 - Sometimes OARC comes to a different conclusion based on additional information.

“FREQUENTLY ASKED QUESTIONS” (SO FAR)

What should defense counsel do if they believe Colo. RPC 3.8(d) has been violated?

- Defense counsel can notify a prosecutor of the concern that the prosecutor might not be in compliance with the rule.
 - Consider a writing.
 - Consider a detailed explanation of why defense counsel believes there may be a violation.
- Defense counsel is not required by OARC to make a record in court.
- Many courts will not make an express finding of an ethical rule violation.
- OARC complaints can be initiated by phone, an online form, or through the mail.



**THANK
YOU**