

### Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) - (c) [NO CHANGE]

(d) ~~make timely disclosure to the defense of all evidence or information, regardless of admissibility, that the known to the prosecutor~~ knows or reasonably should know could that tends to negate the guilt of the accused, or mitigates the offense, or and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, affect a defendant's critical decisions in the case, except when the prosecutor is relieved of this responsibility by statute, rule, or a 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. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. The prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists, including by making disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecution is unable to obtain it;

(e) – (h) [NO CHANGE]

#### COMMENT

[1] – [2] [NO CHANGE]

[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.~~ Paragraph (d) has been revised considerably from the language interpreted by *In re Attorney C*, 47 P. 3d 1167 (Colo. 2002) (adopting the materiality standard and disclosure requirements from *Brady v. Maryland*, 373 U.S. 83 (1963)). The current language departs from this materiality standard because *Brady* employs a retrospective view of whether the outcome of the proceedings would have been different had the disclosure been made. Instead, paragraph (d) now imposes a duty on a prosecutor to make the disclosure irrespective of its expected effect on the outcome of the proceedings. However, a finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. See Scope [20]. Paragraph (d) also requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information at issue 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's 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. The phrase could "affect a defendant's critical decisions in the case" includes the decision whether to accept a plea disposition. This rule also recognizes that

procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. Whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances of the case, including whether anyone has alerted the prosecutor to the likely existence of information that has not yet been discovered. 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.

[3A] – [9A] [NO CHANGE]

### **Rule 3.8. Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

(a) - (c) [NO CHANGE]

(d) timely disclose to the defense all information, regardless of admissibility, that the prosecutor knows or reasonably should know could negate the guilt of the accused, mitigate the offense, or affect a defendant's critical decisions in the case, 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. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. The prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists, including by making disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecution is unable to obtain it;

(e) – (h) [NO CHANGE]

#### **COMMENT**

[1] – [2] [NO CHANGE]

[3] Paragraph (d) has been revised considerably from the language interpreted by *In re Attorney C*, 47 P. 3d 1167 (Colo. 2002) (adopting the materiality standard and disclosure requirements from *Brady v. Maryland*, 373 U.S. 83 (1963)). The current language departs from this materiality standard because *Brady* employs a retrospective view of whether the outcome of the proceedings would have been different had the disclosure been made. Instead, paragraph (d) now imposes a duty on a prosecutor to make the disclosure irrespective of its expected effect on the outcome of the proceedings. However, a finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. *See* Scope [20]. Paragraph (d) also requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information at issue 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's 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. The phrase could "affect a defendant's critical decisions in the case" includes the decision whether to accept a plea disposition. This rule also recognizes that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. Whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances of the case, including whether anyone has alerted the prosecutor to the likely existence of information

that has not yet been discovered. 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.

[3A] – [9A] [NO CHANGE]