

RULE CHANGE 2022(06)

COLORADO RULES OF PROFESSIONAL CONDUCT

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 known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know that tends to negate the guilt of the accused or mitigates the offense, or would affect a defendant's decision about whether to accept a plea disposition, 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 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. 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;

(e) – (h) [NO CHANGE]

COMMENT

[1] – [2] [NO CHANGE]

[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. 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]. 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. 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 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.

[3A] – [9A] [NO CHANGE]

[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.

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

(e) – (h) [NO CHANGE]

COMMENT

[1] – [2] [NO CHANGE]

[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. 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]. 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. 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 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.

[3A] – [9A] [NO CHANGE]

[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.

Amended and Adopted by the Court, En Banc, February 24, 2022, effective July 1, 2022.

By the Court:

**Brian D. Boatright
Chief Justice, Colorado Supreme Court**