

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORDER AMENDING THE §
DELAWARE LAWYERS' RULES §
OF PROFESSIONAL CONDUCT §

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS**, and **RIDGELY**, Justices, constituting the Court *en Banc*.

ORDER

This 21st day of September 2009, it appears to the Court that it is desirable to add a new subsection 3.8(d)(2) and an additional commentary to The Delaware Lawyers' Rules of Professional Conduct.

NOW, THEREFORE, IT IS ORDERED:

1) That Rule 3.8(d) of the Delaware Lawyers' Rules of Professional Conduct shall be amended as follows:

(d)(1) 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;

(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;

- 2) That the Comment to Rule 3.8(d) of the Delaware Lawyers'

Rules of Professional Conduct shall be amended 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 to the public interest.

- 3) These amendments shall be effective immediately.

- 4) The Clerk of the Court is directed to transmit forthwith a certified copy of this Order to the Prothonotary and the Register in Chancery

in each county, the Clerk of the Court of Common Pleas and the Clerk of the Family Court in each county, and the Chief Magistrate of the Justice of the Peace Courts.

BY THE COURT:

/s/ Randy J. Holland
Justice