

State	Adopted ABA M. RPC 3.8 (g)	Adopted ABA M RPC 3.8(h)	Additional Comment
Alabama	No	No	
Alaska	Yes	No	
Arizona	Yes	Yes	Good faith rule
Arkansas	No	No	
California	Yes	Yes	Good faith rule
Colorado	Yes	Yes	
Connecticut	Yes	No	
Delaware	No	No	Related but diff. language in comment
District of Columbia	No	No	
Florida	No	No	
Georgia	No	No	
Guam	No	No	Guam follows the ABA Model R. of Prof. Cond. As adopted Aug. 2, 1983. GNLR 22.3
Hawaii	Yes	No	Good faith rule
Idaho	Yes	Yes	Good faith rule
Illinois	Yes	Yes	Good faith rule
Indiana	No	No	
Iowa	Yes	Yes	Good faith rule
Kansas	No	No	
Kentucky	No	No	
Louisiana	No	No	
Maine	No	No	
Maryland	No	No	
Massachusetts	Yes	Yes	Good faith rule
Michigan	Yes	Yes	Good faith rule
Minnesota	No	No	
Mississippi	No	No	
Missouri	No	No	
Montana	Yes	Yes	
Nebraska	No	No	
Nevada	No	No	
New Hampshire	No!	No!	
New Jersey	No	No	
New Mexico	Yes	No	
New York	Yes	Yes	Good faith rule
North Carolina	Yes	No	Good faith rule
North Dakota	Yes	Yes	Good faith rule
Northern Mariana Isl.			Unable to find any rules adopted locally. Fed. Ct. follows 1983 ABA Model Rules LR 1.5
Ohio	No	No	
Oklahoma	Yes	Yes	Good faith rule (rules are passed by statute? At least codified in their Oklahoma statutes rather than court rules...)
Oregon	No	No	
Pennsylvania	No	No	

State	Adopted ABA M. RPC 3.8 (g)	Adopted ABA M RPC 3.8(h)	Additional Comment
Puerto Rico			PR seems to only have the Canons of Professional Ethics adopted in 1970 PR Laws tit. 4A Appendix IX
Rhode Island	No	No	
South Carolina	No	No	
South Dakota	Yes	Yes	
Tennessee	Yes	Yes	Good faith rule
Texas	No	No	
Utah	No	No	
Vermont	No	No	
Virginia	No	No	
Washington	Yes	No	Good faith rule
West Virginia	Yes	Yes	Good faith rule
Wisconsin	Yes	Yes	Good faith rule
Wyoming	Yes	Yes	Good faith rule

Rule 3.8: Special Responsibilities of a Prosecutor

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Advocate

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (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 an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(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 seek to remedy the conviction.

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Ala. Rules of Prof. Conduct Rule 3.8

State court rules are current with amendments received through May 31, 2021. Local federal district and bankruptcy court rules are current with amendments received through May 4, 2021.

**AL - Alabama State & Federal Court Rules > ALABAMA RULES OF PROFESSIONAL CONDUCT
> ADVOCATE**

Rule 3.8. Special responsibilities of a prosecutor.

(1)The prosecutor in a criminal case shall:

- (a)**Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)**Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)**Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d)**Not willfully fail to 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;
- (e)**Exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6; and

(2)The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:

- (a)**Notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and
- (b)**To the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Annotations

Commentary

Comment

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 guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter

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of debate and varies in different jurisdictions. Although Alabama has not adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, many jurisdictions have, and the ABA Standards, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense, should be reviewed and used in interpreting the requirements of Rule 3.8, except, of course, when Rule 3.8 would obviously conflict with the ABA Standards of Criminal Justice Relating to the Prosecution Function. 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 Rule 8.4.

Paragraph (1)(c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an accused who has knowingly waived the rights to counsel and silence.

Paragraph (1)(d) imposes an ethical responsibility that ordinarily already exists. The disciplinary standard is limited to a willful failure to make the required disclosures. The exception in paragraph (1)(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 (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law.

Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.

Comparison with Former Alabama Code of Professional Responsibility

Rule 3.8 has no counterpart in the prior Alabama Code of Professional Responsibility; however, ABA Model DR 7-103(A) provided that a "public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "[a] public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

MICHIE'S ALABAMA RULES

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Alaska R. Prof. Conduct 3.8

State court rules current through updates received by the publisher as of March 5, 2021.

AK - Alaska State & Federal Court Rules > Alaska Rules of Professional Conduct > Advocate

Rule 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) [Deleted]
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information; and
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new and credible evidence creating a reasonable likelihood that a defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to the appropriate court, the defendant's lawyer, if known, and the defendant, unless a court authorizes delay or unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to the court and served on the defendant's lawyer and the defendant. For purposes of this rule:
 - (1) the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently;
 - (2) the term "credible" means evidence a reasonable person would find believable;
 - (3) the phrase "appropriate court" means the court which entered the conviction against the defendant and, in addition, if appellate proceedings related to the defendant's conviction are pending, the appellate court which is conducting those proceedings; and

(4) the phrase "defendant's lawyer" means the lawyer, law firm, agency, or organization that represented the defendant in the matter which resulted in the conviction.

Annotations

Notes

Editor's Notes

Recent Supreme Court action. — Repromulgated October 28, 2008, by SCO 1680, effective April 15, 2009; amended December 4, 2013, by SCO 1812, effective April 15, 2014.

Commentary

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, that 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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. 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 Rule 8.4.

[2] The exceptions in paragraphs (d) and (g) recognize 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] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[4] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this COMMENT is intended to restrict the statement which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] Under paragraph (g), the reasons for the evidence being unknown (and therefore "new") are varied. It may be "new" because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to

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a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed “new” evidence.

[7] A prosecutor does not violate paragraph (g) of this rule if the prosecutor makes a good faith judgment that the new evidence is not of such a nature as to trigger the obligations of paragraph (g), even though the prosecutor’s judgment is later determined to have been erroneous.

Author Comments

Alaska Rule 3.8 does not include paragraph (c) of the model rule. This paragraph would prevent a prosecutor from taking part in a legitimate interrogation of an arrested suspect. It would also prohibit a prosecutor from offering constructive pretrial resolutions of a criminal case, such as pretrial diversion or becoming a government witness. If a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available.

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Ariz. Rules of Prof'l Conduct R. 3.8

Current through changes ordered and effective as of May 17, 2021

AZ - Arizona Local, State & Federal Court Rules > Arizona Rules of Professional Conduct > Advocate

ER 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [ER 3.6](#) or this Rule.
- (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.

History

Effective December 1, 2003 by R-02-0045; amended by R-11-0033, effective January 1, 2014.

Annotations

Commentary

[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, that 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.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements [ER 3.6](#), which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with [ER 3.6 \(b\)](#) or (c).

[6] Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[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.

NOTES TO DECISIONS

Disclosure**Indictments****Preservation of Evidence****Standard of Conduct****Disclosure**

Prosecutor has an ethical duty to timely disclose to the defense all evidence or unprivileged information the prosecutor knows that tends to demonstrate the defendant is entitled to presentence incarceration credit. [*State v. Cecena*, 235 Ariz. 623, 334 P.3d 1282, 696 Ariz. Adv. Rep. 12, 2014 Ariz. App. LEXIS 188 \(Ariz. Ct. App. 2014\)](#).

Indictments

A prosecutor should not seek an indictment without probable cause. [*Shepherd v. Fahringer*, 158 Ariz. 266, 762 P.2d 553, 18 Ariz. Adv. Rep. 3, 1988 Ariz. LEXIS 154 \(Ariz. 1988\)](#).

Preservation of Evidence

Willits instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant; however, destruction or nonretention of evidence does not automatically entitle a defendant to a Willits instruction. To merit the instruction, a defendant must show: (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him; and (2) that this failure resulted in prejudice. [*State v. Davis*, 205 Ariz. 174, 68 P.3d 127, 398 Ariz. Adv. Rep. 3, 2002 Ariz. App. LEXIS 209 \(Ariz. Ct. App. 2002\)](#).

Though the state does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence, the state does have a duty, in the interest of justice, to act in a timely manner to ensure the preservation of evidence it is aware of, where that evidence is obviously material and reasonably within its grasp. [*State v. Perez*, 141 Ariz. 459, 687 P.2d 1214, 1984 Ariz. LEXIS 219 \(Ariz. 1984\)](#).

Where the state fails to act in a timely manner to ensure the preservation of evidence that is obviously material, and reasonably accessible, a defendant is entitled to a Willits instruction upon a showing that he or she was prejudiced thereby. [*State v. Perez*, 141 Ariz. 459, 687 P.2d 1214, 1984 Ariz. LEXIS 219 \(Ariz. 1984\)](#).

Standard of Conduct

A hearing panel properly found a prosecutor had violated this rule and rule 8.4(d) because she filed a criminal complaint against a judge that was not supported by probable cause in order to compel the judge's recusal from grand jury matters. [*In re Member of the State Bar of Ariz.*, 233 Ariz. 62, 309 P.3d 886, 669 Ariz. Adv. Rep. 28, 2013 Ariz. LEXIS 169 \(2013\)](#).

While a prosecutor's courtroom conduct of eye-rolling and facial expressions was inappropriate, it was confirmed only twice by the trial judge, who did not think it amounted to such pervasive misconduct as to require retrial. [*State v. Martinez*, 230 Ariz. 208, 282 P.3d 409, 641 Ariz. Adv. Rep. 27, 2012 Ariz. LEXIS 172 \(Ariz.\)](#), cert. denied, 568 U.S. 1051, 133 S. Ct. 764, 184 L. Ed. 2d 505, 2012 U.S. LEXIS 9310 (U.S. 2012).

When this rule is coupled with the requirement that a prosecutor is held to a higher standard of conduct than an ordinary attorney, and that a prosecutor's duty to seek justice and not intentionally avoid providing evidence which

might damage his case or aid the accused, it is clear that refusal to allege mitigating circumstances, which the sentencing judge might consider, meddles unduly with judicial power. [State v. Prentiss, 163 Ariz. 81, 786 P.2d 932, 48 Ariz. Adv. Rep. 17, 1989 Ariz. LEXIS 190 \(Ariz. 1989\)](#), modified, [1990 Ariz. LEXIS 34 \(Ariz. Feb. 15, 1990\)](#).

Research References & Practice Aids

Hierarchy Notes:

[ARIZONA RULES OF PROFESSIONAL CONDUCT](#)

ARIZONA COURT RULES ANNOTATED

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Ark. R. Prof. Conduct Rule 3.8

Current with rule changes received through May 20, 2021

**AR - Arkansas State & Federal Court Rules > ARKANSAS RULES OF PROFESSIONAL CONDUCT
> ADVOCATE**

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

Annotations

Commentary

COMMENT

PUBLISHER'S NOTES. The Per Curiam of the Arkansas Supreme Court dated November 19, 1990, provided, in part, that: "The canon can presently be read to provide that an appointment based on merit is proper, regardless of its nepotistic character. We do not intend for the provision to be so read. Accordingly, we amend Canon 3(B)(4) of the Arkansas Code of Judicial Conduct to provide as follows: ..."

COMMENTS.

[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 guilt is decided upon the basis of sufficient evidence. 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

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other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] The issuance of a grand jury indictment ordinarily indicates probable cause for the prosecutor to proceed. This rule covers the Attorney General and staff, Prosecuting Attorneys and staffs, City Attorneys and staffs and all others who exercise prosecutorial functions.

Case Notes

CITED:

[*Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 \(1990\)](#); [*Walker v. State*, 309 Ark. 23, 827 S.W.2d 637 \(1992\)](#).

Research References & Practice Aids

RESEARCH REFERENCES

ALR. Whether Rule of Professional Conduct Governing Prosecutor's Disclosure Obligations Is Coextensive with Brady Standard for Disclosure of Exculpatory Evidence and Factual Applications. 44 A.L.R.7th Art. 4 (2019).

ARK. L. REV. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, [47 Ark. L. Rev. 511](#).

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Cal. Rules of Prof'l Conduct, Rule 3.8

This document reflects first and last orders received through May 15, 2021. Rules are current through May 15, 2021.

CA - California Local, State & Federal Court Rules > RULES OF THE STATE BAR OF CALIFORNIA > Rules of Professional Conduct > Chapter 3. Advocate

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows (*) is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and
- (e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.
- (f) 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 an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (g) 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 seek to remedy the conviction.

History

(*) An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Cal. Rules of Prof'l Conduct, Rule 3.8

Rule 3.8 repealed and reenacted effective June 1, 2020; previously approved by order of the Supreme Court filed September 26, 2018, effective November 1, 2018.

Annotations

Commentary

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, that 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.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4. [2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation. [3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by [Brady v. Maryland \(1963\) 373 U.S. 83 \[83 S.Ct. 1194\]](#) and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions. [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. [5] Paragraph (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c). [6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals. [7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) Statutes may require a prosecutor to preserve certain types of evidence in criminal matters. (See [Pen. Code, §§ 1417.1-1417.9](#).) In addition, prosecutors must obey file preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions. (See [People v. Superior Court \(Morales\) \(2017\) 2 Cal.5th 523 \[213 Cal.Rptr.3d 581\]](#); [Shorts v. Superior Court \(2018\) 24 Cal.App.5th 709 \[234 Cal.Rptr.3d 392\]](#).) [8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the

evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted. [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Research References & Practice Aids

Collateral References:

Rutter, Cal Practice Guide, Professional Responsibility § 8:31.

Rutter, Cal Practice Guide, Professional Responsibility §§ 8:230 et seq.

Law Review Articles:

Behavior Modification: Laws Are Already in Place to Restrain Attorneys Who Engage in Uncivil and Offensive Behavior. 27 *Los Angeles Lawyer* 30.

Deering's California Codes Annotated

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Colo. RPC 3.8

This document reflects changes received through May 20, 2021

**CO - Colorado Local, State & Federal Court Rules > COLORADO RULES OF CIVIL PROCEDURE
> APPENDIX TO CHAPTERS 18 TO 20 > THE COLORADO RULES OF PROFESSIONAL
CONDUCT > ADVOCATE**

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6 (b) or 3.6 (c), and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:
 - (1) disclose that evidence to an appropriate court or prosecutorial authority, and
 - (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority
 - (A) disclose the evidence to the defendant, and
 - (B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h)When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

History

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (g) and (h) added and adopted, comment [1] amended and adopted, and comment [3A], [7], [7A], [8], [8A], [9], and [9A] added and adopted June 17, 2010, effective July 1, 2010; (f) and comment [5] amended and effective February 10, 2011.

Annotations

Notes

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, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public

Colo. RPC 3.8

condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (see C.R.S. §18-1-601 et seq. and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8A] 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. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

Case Notes

Colo. RPC 3.8

Annotator's note.

Paragraph (d)

Violation of paragraph (d) requires mens rea of intent.

Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike foul ones,

Prosecutor's zealous prosecution

A prosecutor's duty is to seek justice,

If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors,

There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt

Prosecutor should see that justice is done by seeking the truth.

No evidence proving defendant's innocence shall be withheld from him.

A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it.

The district attorney has the duty to prevent conviction on misleading or perjured evidence.

ANNOTATION

Annotator's note.

Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. [*U.S. v. Colo. Supreme Court*, 988 F. Supp. 1368 \(D. Colo. 1998\)](#), aff'd, [*189 F.3d 1281 \(10th Cir. 1999\)*](#).

Paragraph (d)

consistent with the materiality standard adopted with respect to the rules of criminal procedure. [*In re Attorney C*, 47 P.3d 1167 \(Colo. 2002\)](#).

Violation of paragraph (d) requires mens rea of intent.

[*In re Attorney C*, 47 P.3d 1167 \(Colo. 2002\)](#).

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Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike foul ones,

for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [*People v. Walker*, 180 Colo. 184, 504 P.2d 1098 \(1972\)](#).

Prosecutor's zealous prosecution

of a case is not improper. [*People v. Marin*, 686 P.2d 1351 \(Colo. App. 1983\)](#).

A prosecutor's duty is to seek justice,

not merely to convict. [*People v. Walker*, 180 Colo. 184, 504 P.2d 1098 \(1972\)](#); [*People v. Drake*, 841 P.2d 364 \(Colo. App. 1992\)](#).

If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors,

the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. [*People v. Drake*, 841 P.2d 364 \(Colo. App. 1992\)](#).

There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt

or reduce his punishment. [*People v. Wood*, 844 P.2d 1299 \(Colo. App. 1992\)](#).

Prosecutor should see that justice is done by seeking the truth.

The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. [*People v. Elliston*, 181 Colo. 118, 508 P.2d 379 \(1973\)](#).

No evidence proving defendant's innocence shall be withheld from him.

It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. [*People v. Walker*, 180 Colo. 184, 504 P.2d 1098 \(1972\)](#).

A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it.

[*People v. Elliston*, 181 Colo. 118, 508 P.2d 379 \(1973\)](#).

The district attorney has the duty to prevent conviction on misleading or perjured evidence.

The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. [*DeLuzio v. People*, 177 Colo. 389, 494 P.2d 589 \(1972\)](#).

Conn. Rules of Prof'l Conduct 3.8

This document reflects all changes received as of April 30, 2021

CT - Connecticut State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (1) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (4) 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; and
- (5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (6) When a prosecutor knows of new and credible evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall, unless a court authorizes delay:
 - (A) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to a court and an appropriate authority, and
 - (B) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant, and a court and an appropriate authority.

CONNECTICUT RULES OF COURT

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Del. Rules of Prof'l Conduct 3.8

This document is current through June 1, 2021

DE - Delaware Local, State & Federal Court Rules > THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

Rule 3.8. Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

- (a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** there is no other feasible alternative to obtain the information;
- (f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

History

Amended, effective Sept. 21, 2009.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extra judicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Case Notes

HINDERING DEFENSE.
LEND-A-PROSECUTOR PROGRAM.

HINDERING DEFENSE.

Prosecutor's conduct did not comport with fundamental professional requirements because, rather than ensure that justice be done, the prosecutor: (1) appeared to prevent a self-representing defendant's proper defense; (2) mocked defendant during cross-examination; (3) attempted to prevent defendant from using standby counsel for legal research and logistical assistance; and (4) actively generated a level of cynicism that permeated the trial. [*McCoy v. State*, 112 A.3d 239 \(Del. 2015\)](#).

LEND-A-PROSECUTOR PROGRAM.

Under [*29 Del. C. § 2505*](#), the Attorney General is authorized to appoint a part-time prosecutor employed and compensated by a private law firm to prosecute criminal cases for the state. There is no bar to this Lend-A-Prosecutor Program on ethical grounds where no actual conflict between the public and private interest is presented. [*Seth v. State*, 592 A.2d 436 \(Del. 1991\)](#).

DELAWARE COURT RULES ANNOTATED

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D.C. Bar APPX. A, Rule 3.8

State court rules are current through March 10, 2021. Federal court rules are current through March 1, 2021.

DC - District of Columbia District & Federal Court Rules > District of Columbia Bar Rules > Appendix A. Rules of Professional Conduct

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall not:

- (a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;
- (b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;
- (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;
- (d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;
- (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or, in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or
- (g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

Annotations

Commentary

Comment to 2007 Revision.

[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 guilt is decided upon the basis of sufficient evidence. 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 Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended

D.C. Bar APPX. A, Rule 3.8

either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

[2] Apart from the special responsibilities of a prosecutor under this rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 3.4 prohibiting the discriminatory use of peremptory strikes, and Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

NOTES TO DECISIONS

Rule comparable to Md. R. Prof. Conduct 3.6.

Duty to disclose exculpatory evidence.

Disbarment for violation of duties.

Rule comparable to Md. R. Prof. Conduct 3.6.

Where an attorney was reprimanded in a Maryland disciplinary proceeding for making statements in his role as a prosecutor in criminal proceedings which had a substantial likelihood of depriving three criminal defendants of fair trials, in violation of Md. R. Prof. Conduct 3.6(a), and he failed to show by clear and convincing evidence that any of the exceptions under D.C. Bar R. XI, § 11(c) applied, the imposition of reciprocal discipline through a public censure was imposed; the corresponding disciplinary rule to Md. R. Prof. Conduct 3.6(a) was D.C. R. Prof. Conduct 3.8(f), and the attorney failed to show that there was an "infirmity of proof," that the misconduct in Maryland was not violative of Rule 3.8(f) within the District of Columbia. [*In re Gansler*, 889 A.2d 285, 2005 D.C. App. LEXIS 732 \(D.C. 2005\)](#).

Duty to disclose exculpatory evidence.

Defendant's convictions for assault with intent to commit murder while armed and of eight related offenses were improper because the government had an obligation under Brady to disclose testimony that the assailant fired with his left hand since that testimony was potentially exculpatory. If the defense demonstrated that defendant was right-

handed, then evidence that the shooter held the gun in his left hand would have supported the inference that defendant was not the shooter. [Miller v. United States, 14 A.3d 1094, 2011 D.C. App. LEXIS 108 \(D.C. 2011\)](#).

Former prosecutor's violation of this rule by failing to disclose potentially exculpatory information did not warrant a sanction because, inter alia, the prosecutor's understanding of his ethical obligations under this rule as being coextensive with his obligations under Brady, while wrong, was not unreasonable; the prosecutor was required to disclose all potentially exculpatory information regardless of whether the information would meet the materiality requirements of Brady. [In re Kline, 113 A.3d 202, 2015 D.C. App. LEXIS 141 \(D.C. 2015\)](#).

Disbarment for violation of duties.

Disbarment was the appropriate sanction for an attorney, who was a former prosecutor, because there was clear and convincing evidence that the attorney intentionally misused federal witness voucher funds, used fraudulent acts to conceal the misuse, intentionally failed to disclose the voucher payments to the courts and opposing counsel, violated the attorney's duties as a prosecutor, and extensively breached the public trust by wrongfully distributing witness vouchers in several felony prosecutions to individuals who were ineligible to receive them under 28 U.S.C.S. § [1821](#), as implemented by 28 C.F.R. § 21. [In re Howes, 39 A.3d 1, 2012 D.C. App. LEXIS 87 \(D.C.\)](#), sub. op., [52 A.3d 1, 2012 D.C. App. LEXIS 590 \(D.C. 2012\)](#), amended, [45 A.3d 160, 2012 D.C. App. LEXIS 286 \(D.C. 2012\)](#).

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

D.C. Law Review

For Article: Pretextual prosecution, see [92 Geo. L.J. 1135 \(2004\)](#).

For Comment: When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion, see [20 Geo. J. Legal Ethics 475 \(2007\)](#).

DISTRICT OF COLUMBIA COURT RULES ANNOTATED
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Fla. Bar Reg. R. 4-3.8

Current through changes received by May 12, 2021.

FL - Florida Local, State & Federal Court Rules > Rules Regulating The Florida Bar > Chapter 4. Rules of Professional Conduct > 4-3. ADVOCATE

Rule 4-3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing;
- (c) 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.

Annotations

Commentary

COMMENT

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations such as making a reasonable effort to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel so that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate. Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. This is the product of prolonged and careful deliberation by lawyers experienced in criminal prosecution and defense and should be consulted for further guidance. See also rule 4-3.3(d) governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of these obligations or systematic abuse of prosecutorial discretion could constitute a violation of rule 4-8.4.

Subdivision (b) does not apply to an accused appearing pro se with the approval of the tribunal, nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in subdivision (c) 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.

Research References & Practice Aids

Hierarchy Notes:

Fla. Bar Reg. R. 4-3.8

[Fla. Bar Reg](#)

LexisNexis Florida Rules of Court Annotated

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Ga. R. & Regs. St. Bar 3.8

The rules incorporate all state rule changes received by the publisher through April 30, 2021, for state and federal courts.

GA - Georgia State & Federal Court Rules > RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA > PART IV. GEORGIA RULES OF PROFESSIONAL CONDUCT > PART THREE -- ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;
- (c) Reserved.
- (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 that mitigates the offense;
- (e) exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this Rule;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information; and
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

The maximum penalty for a violation of this Rule is a public reprimand.

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4: Misconduct.

[2] Reserved.

[3] Reserved.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6: Trial Publicity, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6 (b) or 3.6 (c): Trial Publicity.

Annotations

Case Notes

JUDICIAL DECISIONS

PARTNER OR ASSOCIATE OF PART-TIME SOLICITOR OF STATE COURT. -- Until local and state governments devise means to avoid the necessity of part-time solicitors, an actual conflict of interest must be shown in order for a partner or an associate of a part-time solicitor of a state court to be disqualified from representation of a defendant in a criminal case before a superior court; this must be done on an ad hoc basis. [*Thompson v. State*, 254 Ga. 393, 330 S.E.2d 348 \(1985\).](#)

FORMER ATTORNEY GENERAL NOT DISQUALIFIED. -- A former Georgia Attorney General was not disqualified from representing challengers to statutes, (§§ 32-6-75.1 through 32-6-75.3) allowing trimming of vegetation to facilitate viewing of outdoor advertising signs, due to official opinions or prior litigation. [*Outdoor Adv. Ass'n of Ga. v. Garden Club of Ga., Inc.*, 272 Ga. 146, 527 S.E.2d 856 \(2000\).](#)

PROSECUTOR CANNOT KNOWINGLY OFFER FALSE EVIDENCE. -- Habeas court erred in granting relief to a rape defendant based on the court's erroneous finding that the prosecutor allowed the victim to testify despite knowing that the victim was lying because the prosecutor later testified the prosecutor did not know that the victim testified falsely, but only held that opinion; also, this finding was barred by collateral estoppel based on evidence offered at a hearing on the defendant's motion for a new trial. The violation of ethical rules did not constitute a due process deprivation. [*Washington v. Hopson*, 299 Ga. 358, 788 S.E.2d 362 \(2016\).](#)

BRADY VIOLATION BY PROSECUTOR. -- Attorney was not disciplined following a complaint that as a prosecutor the attorney committed a Brady violation in a criminal case involving sex abuse against a defendant because the State Bar failed to establish a clear-cut Brady violation to warrant discipline under [*Ga. St. Bar R. 4-102\(d\):3.8\(d\)*](#) as the information was disclosed at trial ultimately and the defendant was given an opportunity to cross-examine the victim. [*In the Matter of Lee*, 301 Ga. 74, 799 S.E.2d 766 \(2017\).](#)

Brady applies irrespective of the good faith or bad faith of the prosecution and intent likewise is irrelevant in considering whether [*Ga. St. Bar R. 4-102\(d\):3.8\(d\)*](#) has been violated; an unintentional violation of Brady and Rule 3.8(d) is still a violation, and any violation of Brady, intentional or unintentional, is a serious matter, not a mere technicality. [*In the Matter of Lee*, 301 Ga. 74, 799 S.E.2d 766 \(2017\).](#)

Research References & Practice Aids

LAW REVIEWS. --

For article, "'May It Please the Camera, ...I Mean the Court' -- An Intrajudicial Solution to an Extrajudicial Problem," see [39 Ga. L. Rev. 83 \(2004\)](#).

For comment, "Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials," see [68 Emory L.J. 95 \(2018\)](#).

GEORGIA RULES OF COURT ANNOTATED

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Haw. Rules of Prof'l Conduct Rule 3.8

Rules current through updates received by April 19, 2021.

HI - Hawaii State & Federal Court Rules > Hawai'i Rules of Professional Conduct

Rule 3.8. Performing the duty of public prosecutor or other government lawyer.

A public prosecutor or other government lawyer shall:

- (a) not institute or cause to be instituted criminal charges when the prosecutor or government lawyer knows or it is obvious that the charges are not supported by probable cause; and
- (b) 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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
- (c) 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 an appropriate court or authority; and
 - (2) if the conviction was obtained in the State of Hawai'i, promptly disclose that evidence to the defendant and the office of the public defender, unless a court orders otherwise.
- (d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Annotations

Commentary

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, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the convictions of innocent persons. The extent of mandated remedial action is a matter of debate. See, e.g., ABA Standards of Criminal Justice Relating to Prosecution Function. Competent representation may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. See also Rule 3.3(d) of these Rules, governing ex parte proceedings. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 of these Rules.

[2] The exception in paragraph (b) 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] "Defense" as used in paragraph (b) refers to a defense lawyer or a defendant if unrepresented.

Haw. Rules of Prof'l Conduct Rule 3.8

[4] See Rule 3.6(d) of these Rules for restrictions on extrajudicial statements by investigators and other persons employed by lawyers in criminal cases.

[5] With respect to paragraph (c), consistent with the objectives of Rules 4.2 and 4.3 of these Rules, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

Research References & Practice Aids

Hierarchy Note, Hawai'i Rules of Professional Conduct

Adopted June 25, 2013; effective January 1, 2014.

HIERARCHY NOTES:

Haw. Rules of Prof'l Conduct Note

Michie's Hawai'i Statutes Annotated

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Idaho Rules of Prof'l Conduct Rule 3.8:

State and Federal through Rules promulgated through April 22, 2021.

ID - Idaho State & Federal Court Rules > IDAHO RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8: Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) when a prosecutor knows of new, credible 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 an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Idaho Rules of Prof'l Conduct Rule 3.8:

(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 seek to remedy the conviction.

History

(Effective July 1, 2004; amended May 4, 2010.)

Annotations

Commentary

Commentary

Commentary

[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, that 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.. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard

Idaho Rules of Prof'l Conduct Rule 3.8:

will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute violation of this Rule.

III. SUP. CT. R. PROF'L CONDUCT, R 3.8

Illinois State Rules and Local Federal Rules Reflect Changes Received through May 12, 2021

**IL - Illinois Local, State & Federal Court Rules > Illinois Supreme Court Rules > Article VIII.
Illinois Rules of Professional Conduct**

Rule 3.8. Special Responsibilities of a Prosecutor

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

- (a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** there is no other feasible alternative to obtain the information;
- (f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (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 an appropriate court or authority, and
 - (2)** if the conviction was obtained in the prosecutor's jurisdiction,
 - (i)** promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii)** undertake further reasonable investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

III. SUP. CT. R. PROF'L CONDUCT, R 3.8

(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 seek to remedy the conviction.

(i) A prosecutor's judgment, made in good faith, that evidence does not rise to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

History

Adopted 7-1-09, eff. 1-1-10; amended 10-15-15, eff. 1-1-16.

Annotations

Commentary

COMMITTEE COMMENTS

[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 guilt is decided upon the basis of sufficient evidence.

[1A] The first sentence of Rule 3.8 restates an established principle. In 1924, the Illinois Supreme Court reversed a conviction for murder, noting that:

People v. Cochran, 313 Ill. 508, 526 (1924).

In 1935, the United States Supreme Court described the duty of a federal prosecutor in the following passage:

Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629, 633 (1935).

The first sentence of Rule 3.8 does not set an exact standard, but one good prosecutors will readily recognize and have always adhered to in the discharge of their duties. Specific standards, such as those in Rules 3.3, 3.4, 3.5, 3.6, the remaining paragraphs of Rule 3.8, and other applicable rules provide guidance for specific situations. Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably.

[2] In Illinois, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that pose a serious and imminent threat of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and

III. SUP. CT. R. PROF'L CONDUCT, R 3.8

have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c). [Cf. Devine v. Robinson, 131 F. Supp. 2d 963 \(N.D. Ill. 2001\).](#)

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to lawenforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further reasonable investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

Notes to Decisions

Effective Assistance of Counsel

Special Prosecutor Appointment

Effective Assistance of Counsel

Since the nature and duties of a public prosecutorial position are inherently incompatible with those of criminal defense when the employer-municipality is involved in the case in any significant way, a defendant was denied effective assistance of counsel where his defense counsel was the city prosecutor for another city whose police officers were witnesses in the case. [People v. Washington, 111 Ill. App. 3d 711, 67 Ill. Dec. 517, 444 N.E.2d 753, 1982 Ill. App. LEXIS 2639 \(Ill. App. Ct. 1st Dist. 1982\)](#), aff'd, [101 Ill. 2d 104, 77 Ill. Dec. 770, 461 N.E.2d 393, 1984 Ill. LEXIS 245 \(Ill. 1984\).](#)

Special Prosecutor Appointment

Defendant's claim had to be rejected that a special prosecutor should have been appointed pursuant to [55 ILCS 5/3-9008](#) to handle criminal sexual assault charges against defendant in a case where a candidate in an election contest made comments about the incumbent State's Attorney's alleged failure to draft a proper search warrant in

III. SUP. CT. R. PROF'L CONDUCT, R 3.8

the case and the candidate was then elected to the State's Attorney's position before defendant's trial started. Defendant did not show that a special prosecutor should have been appointed, especially since the candidate's comments centered around the State's Attorney's conduct in handling the case rather than defendant's guilt or innocence, and, thus, did not violate professional conduct rules regarding trial publicity, Ill. Sup. Ct. [*R. Prof. Conduct 3.6*](#), or observing the special responsibilities of a prosecutor under Ill. Sup. Ct. [*R. Prof. Conduct 3.8*](#). [*People v. Bickerstaff*, 403 Ill. App. 3d 347, 347 Ill. Dec. 27, 941 N.E.2d 896, 2010 Ill. App. LEXIS 771 \(Ill. App. Ct. 2d Dist. 2010\)](#), cert. denied, 563 U.S. 937, 131 S. Ct. 2112, 179 L. Ed. 2d 893, 2011 U.S. LEXIS 3026 (U.S. 2011).

Research References & Practice Aids

Research References and Practice Aids

LEGAL PERIODICALS

For article, "In Prosecutors We Trust: UK Lessons for Illinois Disclosure," see [*38 Loy. U. Chi. L.J. 695 \(2007\)*](#).

For comment, "Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?," see [*26 S. Ill. U. L.J. 317 \(2002\)*](#).

Silence is Golden: "The New Illinois Rules on Attorney Extrajudicial Speech," see *33 Loy. U. Chil. L.J. 323 (2002)*

For Symposium, "Ethics 2000 and Beyond Reform Or Professional Responsibility As Usual?: Prosecutorial Ethics as Usual," see [*2003 U. Ill. L. Rev. 1573*](#).

Illinois State Rules and Local Federal Rules
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Ind. Rules of Prof'l Conduct 3.8

State court rules current through May 25, 2021. Federal court rules current through April 1, 2021

IN - Indiana Local, State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

History

Amended September 30, 2004, effective January 1, 2005.

Annotations

Notes

AMENDMENTS.

The 2004 amendment, effective January 1, 2005, added subsection (e); redesignated former subsection (e) as subsection (f); and in subsection (f) added the language "except for statements ...of the accused and" preceding "exercise reasonable care" at the beginning, and added "or this Rule" at the end.

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b), 3.6(c) or 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Case Notes

IN GENERAL.

ADVOCATING PLEA BARGAINING.

DUTY TO DISCLOSE EXCULPATORY OR MITIGATING EVIDENCE.

INFLAMMATORY ARGUMENT.

--PROBABLE CAUSE.

PROOF OF PROSECUTORIAL MISCONDUCT.

PROSECUTOR'S RESPONSIBILITY TO DEFENDANT.

PUBLIC DISCLOSURES BY PROSECUTORS.

Ind. Rules of Prof'l Conduct 3.8

UNFAIRLY EMPHASIZING ROLE AS PUBLIC SERVANT.
 URGING NOT GUILTY PLEA.

IN GENERAL.

R. P.C. 3.6 and R.P.C. 3.8 do not require a finding that an otherwise improper statement cause actual prejudice to a criminal defendant or to an adjudicative proceeding; rather, both rules use the "substantial likelihood" standard. [*In re Brizzi*, 962 N.E.2d 1240 \(Ind. 2012\)](#).

ADVOCATING PLEA BARGAINING.

Vigorous advocacy of plea bargaining by the prosecutor was not a violation of former DR 6-101 (now see this rule). [*Rose v. State*, 488 N.E.2d 1141 \(Ind. App. 1986\)](#).

DUTY TO DISCLOSE EXCULPATORY OR MITIGATING EVIDENCE.

Members of the bar and trial bench are obliged to report to the appropriate authorities incidents of failure to timely disclose evidence or information known to a prosecutor that tends to negate the guilt of the accused or mitigate the offense. [*Goodner v. State*, 714 N.E.2d 638 \(Ind. 1999\)](#).

Prosecutor was suspended for a period of at least 18 months and was required to go through the reinstatement process before resuming practice because she violated R.P.C. 3.8(a) by prosecuting a charge of child molestation after the victim recanted and failing to disclose the recantation to the defense. [*In re Hudson*, 105 N.E.3d 1089 \(Ind. Aug. 29, 2018\)](#).

INFLAMMATORY ARGUMENT.

Prosecutors bear a special responsibility to adhere to the rule that it is not proper to phrase final arguments in a manner calculated to inflame the passions or prejudices of the jury. [*Remsen v. State*, 428 N.E.2d 241 \(Ind. 1981\)](#).

--PROBABLE CAUSE.

Court abused its discretion by granting defendant's motion to dismiss the charges related to his alleged molestation of his second child, because defendant should not have been charged with the offenses against the second child at the same time as he was charged with the sexual offenses against the first child and neglect against the three children, when the State did not have probable cause that defendant molested the second child until July 2010; in July 2010, the second child was reinterviewed, and he was able to speak clearly and in full sentences, and made accusations that defendant had molested him. [*State v. McDonald*, 954 N.E.2d 1031 \(Ind. App. 2011\)](#).

PROOF OF PROSECUTORIAL MISCONDUCT.

To prove prosecutorial misconduct, a defendant must show that the prosecutor actually engaged in misconduct and that said misconduct actually placed the defendant in grave peril to which he should not have been subjected. [*Roose v. State*, 449 N.E.2d 594 \(Ind. 1983\)](#).

Prosecutor did not violate R.P.C. 3.8 or 8.4(d) by listening to recorded telephone calls between defendant prisoner and counsel given that the information the state learned from the telephone calls was only put to extremely

Ind. Rules of Prof'l Conduct 3.8

limited use in discrediting a defense witness and that the witness was also discredited by the separate testimony of another witness; neither the information that the state had nor the way it used it harmed defendant or put him in grave peril because it did not have any probable persuasive effect on the jury's decision. [*Bassett v. State*, 895 N.E.2d 1201 \(Ind. 2008\)](#), cert. denied, 129 S. Ct. 1920, 2009 U.S. LEXIS 2690, 173 L. Ed. 2d 1068 (U.S. 2009).

PROSECUTOR'S RESPONSIBILITY TO DEFENDANT.

It is not the duty of a prosecutor to present the case of the defense. [*Tope v. State*, 266 Ind. 239, 57 Ind. Dec. 313, 362 N.E.2d 137](#), writ of cert. denied 434 U.S. 869, 98 S. Ct. 209 (1977); [*Craig v. State*, 267 Ind. 359, 60 Ind. Dec. 214, 370 N.E.2d 880 \(1977\)](#).

PUBLIC DISCLOSURES BY PROSECUTORS.

Prosecutor's public disclosure of defendant's DNA test results did not violate R.P.C. 3.6 or 3.8 since test results were public record, having been included in affidavit of probable cause, and disclosure was therefore not extrajudicial, nor did it place defendant in grave peril. [*Muex v. State*, 800 N.E.2d 249 \(Ind. App. 2003\)](#).

Attorney was given a public reprimand because public statements he made regarding murder cases in his role as a prosecutor violated R.P.C. 3.6(a) and R.P.C. 3.8(f). It was unclear where the content of a probable cause affidavit ended and the attorney's own assessment of the matters began, and the statements were not meant to serve a law enforcement purpose under R.P.C. 3.8(f). [*In re Brizzi*, 962 N.E.2d 1240 \(Ind. 2012\)](#).

UNFAIRLY EMPHASIZING ROLE AS PUBLIC SERVANT.

Although the duty of the prosecutor is to the whole of society, including the accused, it is improper for the prosecutor to play upon his position as a public servant to obtain unfair advantage in a criminal trial. [*Craig v. State*, 267 Ind. 359, 60 Ind. Dec. 214, 370 N.E.2d 880 \(1977\)](#).

URGING NOT GUILTY PLEA.

Vigorous promotion by the prosecuting attorney that the defendant give up his right to plead not guilty is not a violation of this disciplinary rule. [*Rose v. State*, 488 N.E.2d 1141 \(Ind. App. 1986\)](#).

Research References & Practice Aids

INDIANA LAW JOURNAL.

The Right to Counsel in Prosecutorial Interrogations, 57 Ind. L.J. 499.

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Ind. Rules of Prof'l Conduct 3.8

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RES GESTAE.

The amended Indiana Rules of Professional Conduct: duties to tribunals and non-clients, 48 (No. 7) Res Gestae 16 (2005).

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Ethics Curbstone: Ministering justice: the prosecutor's special role, 50 (No. 10) Res Gestae 27 (2007).

Burns Indiana Statutes Annotated Court Rules Edition.

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Iowa R. of Prof'l Conduct 32:3.8

Current through the May 2021 Supplement

IA - Iowa Local, State & Federal Court Rules > CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT > ADVOCATE

RULE 32:3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;
- (b) make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 32:3.6 or this rule;
- (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,
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(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, seek to remedy the conviction.

History

[Court Order April 20, 2005, effective July 1, 2005; August 28, 2020, effective January 1, 2021]

Annotations

Commentary

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, that 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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. *See generally* ABA Standards of Criminal Justice Relating to the Prosecution Function. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 rule 32:8.4.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence. In addition, paragraph (c) does not apply to a defendant charged with a simple misdemeanor for which the prosecutor reasonably believes the defendant will not be incarcerated.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements rule 32:3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments December 2020 RULES OF PROFESSIONAL CONDUCT Ch 32, p.61 which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with rule 32:3.6(b) or 32:3.6(c) and with rule 32:3.6(e).

[6] Like other lawyers, prosecutors are subject to rules 32:5.1 and 32:5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to

Iowa R. of Prof'l Conduct 32:3.8

prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of rules 32:4.2 and 32:4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

IOWA COURT RULES

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KRPC 3.8

This document reflects changes received through May 1, 2021

KS - Kansas State & Federal Court Rules > KANSAS SUPREME COURT RULES > RULES RELATING TO DISCIPLINE OF ATTORNEYS > RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT

RULE 3.8 ADVOCATE: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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 guilt is decided upon the basis of sufficient evidence. 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 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 Rule 8.4.

KRPC 3.8

[2]In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph

(c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4]Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5]Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6]Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History

[History: Am. (e) and (f) effective July 1, 2007.]

KANSAS COURT RULES

End of Document

Ky. SCR Rule 3.8

Current through amendments received through April 20, 2021

KY - Kentucky Local, State & Federal Court Rules > RULES OF THE SUPREME COURT > III. PRACTICE OF LAW > Rule 3.130. Kentucky Rules of Professional Conduct. > ADVOCATE

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) 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;
- (d) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (e) refrain, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons under the supervision of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

History

(Amended April 16, 2009, effective July 15, 2009.)

Annotations

Notes

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 guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter

Ky. SCR Rule 3.8

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 Rule 8.4.

[2] The exception in paragraph (c) 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] Paragraph (d) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons under the supervision of the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Case Notes

1. Introduction of Exculpatory Evidence.
2. Motion to Disqualify.

NOTES TO DECISIONS

1. Introduction of Exculpatory Evidence.

A prosecutor has no duty to introduce exculpatory evidence favorable to the accused as part of the Commonwealth's evidence in chief at trial. This rule only requires the prosecutor to timely disclose exculpatory information to the accused. [*Donta v. Commonwealth*, 858 S.W.2d 719, 1993 Ky. App. LEXIS 95 \(Ky. Ct. App. 1993\)](#).

2. Motion to Disqualify.

Where defendant alleged that the prosecutor was biased against defendant as a result of the prosecutor's work with a detective and defendant's claim to have slept with the detective's wife, the district court did not err when it denied defendant's motion to disqualify the prosecutor, because the record was incomplete and the alleged conflict of interests did not rise to the level of demonstrating actual prejudice. [*2017 U.S. App. LEXIS 4311 \(6th Cir. 2017\)*](#).

Research References & Practice Aids

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] The exception in paragraph (c) 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] Paragraph (d) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

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[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons under the supervision of the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

HIERARCHY NOTES:

III, Rule 3.130 Note

KENTUCKY RULES ANNOTATED

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La. St. Bar Ass'n. Art. XVI § 3.8

This document reflects amendments received through June 7, 2021.

**LA - Louisiana State & Federal Court Rules > ARTICLES OF INCORPORATION OF THE
LOUISIANA STATE BAR ASSOCIATION > RULES OF PROFESSIONAL CONDUCT > ADVOCATE**

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- a.refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- b.make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- c.not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing;
- d.make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either 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;
- e.Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - 1.the information sought is not protected from disclosure by any applicable privilege;
 - 2.the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - 3.there is no other feasible alternative to obtain the information;
- f.except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Annotations

Case Notes

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : General Overview

Legal Ethics : Prosecutorial Conduct

Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

LexisNexis (R) Notes

LexisNexis (R) Notes**Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview**

1. Prosecutor received a three-month suspension from the practice of law, which was suspended in its entirety, for violating La. St. Bar Ass'n Art. XVI, RPC 3.8 by failing to disclose an exculpatory statement of the only eyewitness in a murder case; the only aggravating circumstance was the prosecutor's considerable experience, but there were many mitigating circumstances. [*In re Jordan*, La. 04-2397, 913 So. 2d 775, 2005 La. LEXIS 2104 \(La. June 29 2005\)](#).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

2. Defendants' motion for new trial was granted because (1) misconduct was not confined to single low-level government employee who committed such acts infrequently and over short period of time; to contrary, they were committed by those with significant authority who act in the name of "United States of America"; and (2) Fact that government's actions were conducted in anonymity made it all more egregious. [*United States v. Bowen*, 969 F. Supp. 2d 546, 2013 U.S. Dist. LEXIS 134434 \(E.D. La. 2013\)](#), affirmed by [*799 F.3d 336, 2015 U.S. App. LEXIS 14498 \(5th Cir. La. 2015\)*](#).

Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : General Overview

3. Defendants' motion for new trial was granted because (1) misconduct was not confined to single low-level government employee who committed such acts infrequently and over short period of time; to contrary, they were committed by those with significant authority who act in the name of "United States of America"; and (2) Fact that government's actions were conducted in anonymity made it all more egregious. [*United States v. Bowen*, 969 F. Supp. 2d 546, 2013 U.S. Dist. LEXIS 134434 \(E.D. La. 2013\)](#), affirmed by [*799 F.3d 336, 2015 U.S. App. LEXIS 14498 \(5th Cir. La. 2015\)*](#).

Legal Ethics : Prosecutorial Conduct

4. Prosecutor received a three-month suspension from the practice of law, which was suspended in its entirety, for violating La. St. Bar Ass'n Art. XVI, RPC 3.8 by failing to disclose an exculpatory statement of the only eyewitness in a murder case; the only aggravating circumstance was the prosecutor's considerable experience, but there were many mitigating circumstances. [*In re Jordan*, La. 04-2397, 913 So. 2d 775, 2005 La. LEXIS 2104 \(La. June 29 2005\)](#).

Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

5. Prosecutor received a three-month suspension from the practice of law, which was suspended in its entirety, for violating La. St. Bar Ass'n Art. XVI, RPC 3.8 by failing to disclose an exculpatory statement of the only eyewitness in a murder case; the only aggravating circumstance was the prosecutor's considerable experience, but there were many mitigating circumstances. [*In re Jordan*, La. 04-2397, 913 So. 2d 775, 2005 La. LEXIS 2104 \(La. June 29 2005\)](#).

End of Document

Me. Rules of Prof'l Conduct 3.8

Local Federal District & Bankruptcy Court Rules & ECF documents are current with amendments received through March 1, 2021. All other Local and Federal District & Bankruptcy Court materials are current with amendments received through July 1, 2020. State Court Rules current with amendments April 1, 2021

ME - Maine State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > ADVOCATE

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor shall:

- (a)** refrain from prosecuting a criminal or juvenile charge that the prosecutor knows is not supported by probable cause;
- (b)** make timely disclosure in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of evidence or information known to the prosecutor after diligent inquiry and within the prosecutor's possession or control, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment;
- (c)** refrain from conducting a civil, juvenile, or criminal case against any person whom the prosecutor knows that the prosecutor represents or has represented as a client;
- (d)** refrain from conducting a civil, juvenile, or criminal case against any person relative to a matter in which the prosecutor knows that the prosecutor represents or has represented a complaining witness.

MAINE RULES OF COURT

End of Document

Md. Rule 19-303.8

Rules current through May 7, 2021

MD - Maryland State & Federal Court Rules > MARYLAND RULES > TITLE 19. ATTORNEYS > CHAPTER 300. MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 19-303.8. Special Responsibilities Of A Prosecutor (3.8)

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, an attorney and has been given reasonable opportunity to obtain an attorney;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 19-303.6 (3.6) or this Rule.

History

(Added June 6, 2016, effective July 1, 2016.)

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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 Prosecution Function, which in turn are the product of prolonged and careful deliberation by attorneys experienced in both criminal prosecution and defense. See also Rule 19-303.3 (d) (3.3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures

Md. Rule 19-303.8

by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 19-308.4 (8.4).

[2] Section (c) of this Rule does not apply to an accused appearing self-represented with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to an attorney and silence.

[3] The exception in section (d) of this Rule 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.

[4] Section (e) of this Rule supplements Rule 19-303.6 (3.6), which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 19-303.6 (b) (3.6) or 19-303.6 (c) (3.6).

[5] Like other attorneys, prosecutors are subject to Rules 19-305.1 (5.1) and 19-305.3 (5.3), which relate to responsibilities regarding attorneys and non-attorneys who work for or are associated with the attorney's office. Section (e) of this Rule reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, section (e) of this Rule requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Model Rules Comparison -- Rule 19-303.8 (3.8) has been rewritten to retain elements of existing Maryland language and to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules. ABA Model Rule 3.8 (e) has not been adopted.

Case Notes

Prosecutorial vouching and advocate-witness. -- Mistrial should have been declared when the prosecutor impeached a witness with questions about a prior conversation between the witness and the prosecutor; the prosecutor was in effect testifying, but could not be cross-examined by defendant. [*Walker v. State*, 373 Md. 360, 818 A.2d 1078 \(2003\)](#).

Prosecutor's promise to prosecute bomb threat cases against juveniles. -- Prosecutor did not commit a violation of prior, similar Rule 3.1 by commenting on future prosecutions of juveniles who phoned bomb threats, despite the lack of clear evidence against the juveniles, because by making the comments about prosecuting bomb threats, the prosecutor intended to communicate that his office must try hard cases. [*Att'y Griev. Comm'n v. Gansler*, 377 Md. 656, 835 A.2d 548 \(2003\)](#).

Michies Annotated Code of Maryland, Maryland Rules

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ALM Sup. Jud. Ct. Rule 3:07, R.P.C. Advocate, Rule 3.8

This document reflects rules changes received as of May 18th, 2021.

MA - Massachusetts Court Rules > Supreme Judicial Court > A. Rules of the Supreme Judicial Court > Chapter Three. Ethical Requirements and Rules concerning the Practice of Law > Rule 3:07. Massachusetts Rules of Professional Conduct

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;

(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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

(1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

(2) take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;

(g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

(2) if the conviction was obtained by that prosecutor's office,

(i) disclose that evidence to the appropriate court;

(ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

(iv) undertake or assist in any further investigation as the court may direct.

(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

(k) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

History

Amended eff January 1, 1999; Amended effective April 1, 2016.

Annotations

Notes

Editorial Note—

The 1998 court order substituted paragraphs (h) and (i) for ones which read: "(h) not assert personal knowledge of the facts in issue, except when testifying as a witness; and (i) not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein." and added paragraph (j).

The 2016 court order rewrote this rule.

Commentary

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, that 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. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[1A] While a prosecutor may not threaten to prosecute a charge that the prosecutor knows is not supported by probable cause, this rule does not prohibit a prosecutor from declaring the intention to prosecute an individual for as yet uncharged criminal conduct if the prosecutor has a good faith belief that probable cause to support the charge can be developed through subsequent investigation.

[2] Paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term “accused” means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[3A] The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless of an individual's right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to take reasonable steps to prevent all those assisting or associated with the prosecution team, but not under the direct supervision or control of the prosecutor, including law enforcement personnel, from making improper extrajudicial statements. A prosecutor's issuing the appropriate cautions to such persons will ordinarily satisfy the obligations of paragraph (f).

[7] Consistent with the objectives of Rules 4.2 and 4.3, disclosure under paragraph (i) to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly.

[8] Under paragraph (j), once the prosecutor knows that clear and convincing evidence establishes that the defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not

commit, the prosecutor must seek to remedy the injustice. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

Massachusetts Court Rules Annotated
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MRPC 3.8

State rules current with changes received through June 1, 2021.

MI - Michigan Court Rules > Michigan Rules of Professional Conduct > Advocate

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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 degree of 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; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.
- (g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction.
- (h) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

History

Rule 3.8 adopted by order of the Michigan Supreme Court eff October 1, 1988; Rule 3.8 amended September 24, 2018, eff January 1, 2019.

Annotations

Notes

NOTES

COMMENT:

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 guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate. Cf. Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. 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 Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

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 paragraphs (b) and (e), this rule imposes on a prosecutor an obligation to make reasonable efforts and to take reasonable care to assure that a defendant's rights are protected. Of course, not all of the individuals who might encroach upon those rights are under the control of the prosecutor. The prosecutor cannot be held responsible for the actions of persons over whom the prosecutor does not exercise authority. The prosecutor's obligation is discharged if the prosecutor has taken reasonable and appropriate steps to assure that the defendant's rights are protected.

Commentary

Staff Comment:

order issued September 24, 2018:

The amendments make several substantive changes in [MCR 6.502](#) regarding postjudgment relief from judgment motions. First, the new language in [MCR 6.502\(G\)\(2\)](#) inserts a discretionary “actual innocence” waiver provision similar to that in [MCR 6.508\(D\)\(3\)](#). Further, [MCR 6.502\(G\)\(3\)](#) is added to clarify that shifts in science are included in the definition of “new evidence” for purposes of the exemption from the successive motion limitation. Finally, new language is added to MRPC 3.8 to require certain actions by a prosecutor who knows of new, credible, and material evidence creating a reasonable likelihood that defendant is innocent of the crime for which defendant was convicted, or who knows of clear and convincing evidence that shows defendant is innocent of the crime. The additional language of MRPC 3.8 is taken largely from the ABA Model Rules of Professional Conduct 3.8, and includes the “safe harbor” provision as a separate provision of the rule (as opposed to being part of the comments as in the model rule).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

End of Document

Minn. Rules of Prof'l Conduct 3.8

This document reflects changes received through June 8, 2021

MN - Minnesota State & Federal Court Rules > MINNESOTA RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
- (f) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

History

Amended effective October 1, 2005.

Annotations

Commentary

COMMENT

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 guilt is decided upon the basis of sufficient evidence. 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

Minn. Rules of Prof'l Conduct 3.8

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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case.

Case Notes

Criminal Law & Procedure : Counsel : Right to Counsel : General Overview
 Legal Ethics : Prosecutorial Conduct

LexisNexis (R) Notes

Criminal Law & Procedure : Counsel : Right to Counsel : General Overview

[State v. Colby, 2004 Minn. App. LEXIS 1420 \(Minn. Ct. App. Dec. 21 2004\).](#)

Overview: (Unpublished Opinion) Evidence was sufficient to sustain a theft conviction; defendant was working alone where the theft occurred, defendant asked an employee for the key, and the next morning, money and items were missing from the premises.

- Minn. R. Prof. Conduct 3.8(b) states that in criminal cases, a prosecutor shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel. [Go To Headnote](#)

Legal Ethics : Prosecutorial Conduct

[State v. Colby, 2004 Minn. App. LEXIS 1420 \(Minn. Ct. App. Dec. 21 2004\).](#)

Minn. Rules of Prof'l Conduct 3.8

Overview: *(Unpublished Opinion) Evidence was sufficient to sustain a theft conviction; defendant was working alone where the theft occurred, defendant asked an employee for the key, and the next morning, money and items were missing from the premises.*

- Minn. R. Prof. Conduct 3.8(b) states that in criminal cases, a prosecutor shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel. [Go To Headnote](#)

[Neuman v. State, 1999 Minn. App. LEXIS 410 \(Minn. Ct. App. Apr. 20 1999\)](#), review denied by [1999 Minn. LEXIS 366 \(Minn. June 16, 1999\)](#).

Overview: *The appellate court affirmed appellant's convictions of driving after cancellation, and held that, in the trial court, the marital status of the prosecutor and court reporter, on its face, did not suggest any impropriety.*

- The Minnesota Rules of Professional Conduct set forth special responsibilities of a prosecutor, which include assuring that a defendant's guilt is determined on the basis of sufficient evidence. See Minn. Rules of Prof'l Conduct, 3.8 cmt. [Go To Headnote](#)

MINNESOTA COURT RULES ANNOTATED

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Miss. RPC. Rule 3.8

Current with changes received by the publisher through March 25, 2021.

MS - Mississippi State & Federal Court Rules > MISSISSIPPI RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Annotations

Commentary

COMMENT

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 guilt is decided upon the basis of sufficient evidence. 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 Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. 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 Rule 8.4.

With reference to paragraphs (b) and (d), see Mississippi Uniform Criminal Rules of Circuit Court Practice, 1.04 and 4.06.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

Miss. RPC. Rule 3.8

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.

CODE COMPARISON.-- DR 7-103(A) provides that "A public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Case Notes

VIOLATION.

Prosecutor's failure to disclose the contents of ATF reports was in error and in bad faith, because the fact that the records contained nothing incriminating demonstrated evidence in favor of defendant and the prosecutor's statement he engaged in a practice of disposing of exculpatory evidence demonstrated bad faith. [*Blakeney v. State*, 236 So. 3d 11, 2017 Miss. LEXIS 434 \(Miss. 2017\)](#).

Research References & Practice Aids

RESEARCH REFERENCES

Practice References. Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedure, Forms*, Fourth Edition (Michie).

MISSISSIPPI COURT RULES ANNOTATED

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Mo. Sup. Ct. R. 4-3.8

RULES CURRENT THROUGH May 24, 2021.

MO - Missouri State & Federal Court Rules > SUPREME COURT RULES > RULES GOVERNING THE MISSOURI BAR AND THE JUDICIARY > RULE 4. RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 4-3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 4-3.6 or this Rule 4-3.8.

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 4-8.4.

Mo. Sup. Ct. R. 4-3.8

[2]In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Rule 4-3.8 (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3]The exception in Rule 4-3.8 (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.

[4]Rule 4-3.8 (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5]Rule 4-3.8 (f) supplements Rule 4-3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 4-3.6 (b) or (c).

[6]Like other lawyers, prosecutors are subject to Rules 4-5.1 and 4-5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Rule 4-3.8 (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, Rule 4-3.8 (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History

Adopted September 28, 1993, eff. July 1, 1995; Rev. July 1, 2007.

MISSOURI COURT RULES

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MT Prof. Conduct R. 3.8

This document reflects changes current through May 1, 2021

MT - Montana State & Federal Court Rules > MONTANA RULES OF PROFESSIONAL CONDUCT > ADVOCATE

RULE 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** there is no other feasible alternative to obtain the information;
- (f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule consistent with the Confidential Criminal Justice Information Act.
- (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 an appropriate court or authority; and
 - (2)** if the conviction was obtained in the prosecutor's jurisdiction:
 - (i)** promptly disclose that evidence to the defendant unless a court authorizes delay; and
 - (ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

MT Prof. Conduct R. 3.8

(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 seek to remedy the conviction.

MONTANA RULES OF COURT

End of Document

Neb. Ct. R. of Prof. Cond. § 3-503.8

Court Rules current through April 27, 2021.

**NE - Nebraska Local, State & Federal Court Rules > Chapter 3 Attorneys and the Practice of Law
> Article 5 Nebraska Rules of Professional Conduct > (3) Advocate**

§ 3-503.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Research References & Practice Aids

Hierarchy Notes:

[Neb. Ct. R. Ch. 3, Art. 5](#)

Nebraska Local, State & Federal Court Rules

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Nev. Rules of Prof'l Conduct 3.8

Current through rules promulgated and effective as of May 1, 2021

NV - Nevada Local, State & Federal Court Rules > NEVADA RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a)** Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e)** Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** The information sought is not protected from disclosure by any applicable privilege;
 - (2)** The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** There is no other feasible alternative to obtain the information;
- (f)** Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

History

Added eff. 5-1-06

Annotations

Commentary

COMMENT

Nev. Rules of Prof'l Conduct 3.8

MODEL RULE COMPARISON--2006 --Rule 3.8 (formerly Supreme Court Rule 179) is the same as ABA Model Rule 3.8.

Case Notes

EDITOR'S NOTE. --Some of the cases in the following annotations were decided under former similar rules.

PROSECUTOR'S PRIMARY DUTY is not to convict, but to see that justice is done. [*Williams v. State*, 103 Nev. 106, 734 P.2d 700 \(1987\)](#).

MICHIE'S NEVADA COURT RULES ANNOTATED

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N.H. Rules of Prof'l Conduct Rule 3.8

Rules current with amendments received through May 26, 2021

NH - New Hampshire State & Federal Court Rules > NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) **except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.**--Adopted July 25, 2007, eff. January 1, 2008.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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

N.H. Rules of Prof'l Conduct Rule 3.8

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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Case Notes

Annotations
Indictments

Annotations

Indictments

An indictment is not proof of guilt, but is evidence that the county attorney believes an individual is probably guilty of committing the acts charged. [*State v. Yates*, 137 N.H. 495, 629 A.2d 807, 1993 N.H. LEXIS 109 \(1993\)](#).

Research References & Practice Aids

2004 ABA Model Code Comment RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

N.H. Rules of Prof'l Conduct Rule 3.8

[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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

HIERARCHY NOTES:

N.H. Rules of Prof'l Conduct Note

NEW HAMPSHIRE COURT RULES ANNOTATED

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N.J. Court Rules, RPC 3.8

Current with all changes received through May 17, 2021

NJ - New Jersey State & Federal Court Rules > RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY > PART I. RULES OF GENERAL APPLICATION > APPENDIX TO PART I RULES OF PROFESSIONAL CONDUCT > RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

RPC 3.8. Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence 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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and
 - (2) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [RPC 3.6](#) or this Rule.

History

Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

Annotations

Case Notes

Criminal Law & Procedure : Grand Juries : Evidence Before the Grand Jury : Exculpatory Evidence
 Criminal Law & Procedure : Counsel : Prosecutors
 Criminal Law & Procedure : Counsel : Right to Counsel : Trials
 Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Constitutional Right
 Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : General Overview
 Legal Ethics : Professional Conduct : Tribunals
 Legal Ethics : Prosecutorial Conduct

LexisNexis (R) Notes:

Criminal Law & Procedure : Grand Juries : Evidence Before the Grand Jury : Exculpatory Evidence

1. In grand jury proceeding resulting in an armed robbery indictment, the prosecutor did not have an obligation to present the statements of three witnesses that tended to place defendant in an intoxicated state and at a location other than that of the crime because none of the statements related to the time of the robbery and thus did not negate defendant's guilt. [State v. Smith, 269 N.J. Super. 86, 634 A.2d 576, 1993 N.J. Super. LEXIS 872 \(App.Div. 1993\)](#), limited by [State v. Hogan, 144 N.J. 216, 676 A.2d 533, 1996 N.J. LEXIS 616, 49 A.L.R.5th 863 \(1996\)](#).

Criminal Law & Procedure : Counsel : Prosecutors

2. Prosecutor who misstated to an attorney retained to represent a client in police custody that the client was a witness rather than a criminal suspect, and who refused to allow that attorney access to the client, violated N.J. [R. Prof. Conduct 3.8\(b\)](#). [State v. Reed, 133 N.J. 237, 627 A.2d 630, 1993 N.J. LEXIS 726 \(1993\)](#).

Criminal Law & Procedure : Counsel : Right to Counsel : Trials

3. In effect, the New Jersey Rules of Professional Conduct are designed to make it a professional obligation on the part of assistant prosecutors to assure that a key Miranda right is honored; such misconduct on the part of the assistant prosecutors by itself renders defendant's statement unuseable even for impeachment purposes on cross-examination of defendant. [State v. Sosinski, 331 N.J. Super. 11, 750 A.2d 779, 2000 N.J. Super. LEXIS 192 \(App.Div. 2000\)](#).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Constitutional Right

4. In effect, the New Jersey Rules of Professional Conduct are designed to make it a professional obligation on the part of assistant prosecutors to assure that a key Miranda right is honored; such misconduct on the part of the assistant prosecutors by itself renders defendant's statement unuseable even for impeachment purposes on cross-examination of defendant. [State v. Sosinski, 331 N.J. Super. 11, 750 A.2d 779, 2000 N.J. Super. LEXIS 192 \(App.Div. 2000\)](#).

Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : General Overview

5. In effect, the New Jersey Rules of Professional Conduct are designed to make it a professional obligation on the part of assistant prosecutors to assure that a key Miranda right is honored; such misconduct on the part of the assistant prosecutors by itself renders defendant's statement unuseable even for impeachment purposes on cross-examination of defendant. [State v. Sosinski, 331 N.J. Super. 11, 750 A.2d 779, 2000 N.J. Super. LEXIS 192 \(App.Div. 2000\)](#).

Legal Ethics : Professional Conduct : Tribunals

6. In grand jury proceeding resulting in an armed robbery indictment, the prosecutor did not have an obligation to present the statements of three witnesses that tended to place defendant in an intoxicated state and at a location other than that of the crime because none of the statements related to the time of the robbery and thus did not negate defendant's guilt. [*State v. Smith*, 269 N.J. Super. 86, 634 A.2d 576, 1993 N.J. Super. LEXIS 872 \(App.Div. 1993\)](#), limited by [*State v. Hogan*, 144 N.J. 216, 676 A.2d 533, 1996 N.J. LEXIS 616, 49 A.L.R.5th 863 \(1996\)](#).

Legal Ethics : Prosecutorial Conduct

7. In grand jury proceeding resulting in an armed robbery indictment, the prosecutor did not have an obligation to present the statements of three witnesses that tended to place defendant in an intoxicated state and at a location other than that of the crime because none of the statements related to the time of the robbery and thus did not negate defendant's guilt. [*State v. Smith*, 269 N.J. Super. 86, 634 A.2d 576, 1993 N.J. Super. LEXIS 872 \(App.Div. 1993\)](#), limited by [*State v. Hogan*, 144 N.J. 216, 676 A.2d 533, 1996 N.J. LEXIS 616, 49 A.L.R.5th 863 \(1996\)](#).

8. Prosecutor who misstated to an attorney retained to represent a client in police custody that the client was a witness rather than a criminal suspect, and who refused to allow that attorney access to the client, violated N.J. [*R. Prof. Conduct 3.8\(b\)*](#). [*State v. Reed*, 133 N.J. 237, 627 A.2d 630, 1993 N.J. LEXIS 726 \(1993\)](#).

9. Prosecutor had an interest in the proceedings against a city, which prejudiced the clerk as a matter of law, and violated his duty under former [*R.R. 1:25*](#). [*State v. Rosengard*, 89 N.J. Super. 28, 213 A.2d 262, 1965 N.J. Super. LEXIS 272 \(Law Div. 1965\)](#), reversed by [*47 N.J. 180, 219 A.2d 857, 1966 N.J. LEXIS 201 \(1966\)*](#).

NEW JERSEY COURT RULES ANNOTATED

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NY CLS Rules Prof Conduct R 3.8

This document reflects all changes received as of June 1, 2021

NY - New York Court Rules > Selected Chapters from the Codes, Rules and Regulations (NYCRR) of the State of New York Relating to Judges and Attorneys > Rules of Professional Conduct > Advocate

Rule 3.8. Special Responsibilities of Prosecutors and Other Government Lawyers

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) 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 within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office; or

(2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

History

Add, eff April 1, 2009; amend, eff July 1, 2012.

Annotations

Notes

NOTES:

Editor's Notes:

Provisions analogous to this Rule were found in former Code of Professional Responsibility § 1200.34.

Notes to Decisions

I. UNDER CURRENT RULE

1. Generally

II. UNDER FORMER RULES AND ETHICAL CANONS

2. Generally

I. UNDER CURRENT RULE

1. Generally

Former district attorney (DA) was suspended for 2 years for violating N.Y. R. Prof. Conduct 3.3, 3.4, 3.8, 5.3, 5.5 and 8.4 ([22 NYCRR § 1200.0](#)) in her position as DA as she: (1) engaged in prosecutorial misconduct that deprived a defendant of a fair trial; (2) improperly served grand jury subpoenas with no intention of presenting the information obtained to a grand jury; (3) violated a court order and allowed an intern who had failed the bar to conduct a felony trial and suppression hearing; (4) disregarded the attorney-client relationship of a witness; and (5) disregarded her obligation to disclose exculpatory evidence in a homicide case and attempted to mislead the court as to her knowledge of the exculpatory material. [Matter of Rain, 162 A.D.3d 1458, 79 N.Y.S.3d 387, 2018 N.Y. App. Div. LEXIS 4750 \(N.Y. App. Div. 3d Dep't 2018\)](#).

Prosecutor was suspended for two years because the prosecutor admitted violating his prosecutorial obligations by failing to disclose 48 items that should have been disclosed under Brady, including materials that implicated an alternative suspect and undermined the credibility of the People's main trial witnesses. [Matter of Kurtzrock, 192 A.D.3d 197, 138 N.Y.S.3d 649, 2020 N.Y. App. Div. LEXIS 8291 \(N.Y. App. Div. 2d Dep't 2020\)](#).

While dismissal based on the prosecutor's inexcusable failure to disclose that the People's main witness had changed his story was not an appropriate sanction under Brady or N.Y. R. Prof. Conduct 3.8(b) ([N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0](#)), the People were directed to obtain and turn over to defendant the witness's prior convictions and pretrial depositions. [People v Waters, 941 N.Y.S.2d 482, 35 Misc. 3d 855, 2012 N.Y. Misc. LEXIS 1532 \(N.Y. Sup. Ct. 2012\)](#).

II. UNDER FORMER RULES AND ETHICAL CANONS

2. Generally

NY CLS Rules Prof Conduct R 3.8

Mere fact that same attorney acts as prosecutor in prosecution for crime of assault and as plaintiff's attorney in a civil action for personal injuries suffered as result of such assault does not defeat the prosecution or prevent the use of an assault conviction as a foundation for collateral estoppel in the civil suit; the query in such a situation must be whether the same rules of fairness and of law which would bind a public law officer if he were present were observed by the private attorney during the criminal trial. [*Read v Sacco*, 49 A.D.2d 471, 375 N.Y.S.2d 371, 1975 N.Y. App. Div. LEXIS 11427 \(N.Y. App. Div. 2d Dep't 1975\)](#).

Preferable and approved practice is that attorney representing a litigant in a civil action should not be the prosecutor of the opposing party in a criminal proceeding arising out of the same subject matter. [*Read v Sacco*, 49 A.D.2d 471, 375 N.Y.S.2d 371, 1975 N.Y. App. Div. LEXIS 11427 \(N.Y. App. Div. 2d Dep't 1975\)](#).

People must be charged with knowledge of defective grand jury proceedings since only they had knowledge of what had occurred before grand jury, and being officers of court, they had responsibility of insuring that valid indictment was obtained in accordance with applicable law, such that all delays while People had knowledge of lack of sufficient quorum for indictment are chargeable to People for purposes of determining whether criminal defendant was afforded speedy trial. [*People v Gelfand*, 131 Misc. 2d 268, 499 N.Y.S.2d 573, 1986 N.Y. Misc. LEXIS 2495 \(N.Y. Sup. Ct. 1986\)](#).

Prosecutor who suggests civil resolution in lieu of criminal prosecution must have probable cause to support criminal charge. NYSBA, Comm on Prof Ethics Op. No. 821, 2/11/08 (27-07).

If donation by defendant to not-for-profit organization may ethically be required under terms of plea bargain for reduction of charges, then same donation may ethically be required in exchange for dismissal or, or agreement not to bring, those charges; there is no ethical principle that guilty plea to some offense is required condition to resolution of potential criminal action. NYSBA Comm on Prof Ethics Op. No. 770, 11/12/03 (2-03).

In plea bargain requiring defendant to make donation to not-for-profit organization, it is ethical to require that donation be made before plea is entered, to ensure that defendant will live up to that part of bargain, assuming that such bargain is otherwise lawful. NYSBA Comm on Prof Ethics Op. No. 770, 11/12/03 (2-03).

There is no ethical objection to plea bargain in which, as part of sentence to lesser charge, defendant agrees to make payment that would have been authorized by law as penalty for original charge, as long as payment is legally permissible term of sentence to lesser charge and original charge was supported by probable cause; thus, donation to county's STOP-DWI program would be permitted. NYSBA Comm on Prof Ethics Op. No. 770, 11/12/03 (2-03).

Research References & Practice Aids

Hierarchy Notes:

[NY CLS Rules Prof Conduct](#)

New York Court Rules Annotated
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16-308 NMRA

Court rules current with changes received by the publisher as of May 10, 2021.

NM - Michie's Annotated Local, State & Federal Court Rules Of New Mexico > RULES OF PROFESSIONAL CONDUCT > ARTICLE 3. ADVOCATE

16-308 Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

- A.** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- B.** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;
- C.** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- 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;
- E.** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** there is no other feasible alternative to obtain the information; and
- F.** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that are false or create a clear and present danger of prejudicing a criminal proceeding, and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 16-306 of the Rules of Professional Conduct.
- G.** promptly disclose new, credible and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted. Such evidence shall be disclosed in writing when it becomes known to the prosecutor, absent court authorization otherwise. If the defendant is unrepresented, the prosecutor shall inform a person reasonably certain to inform the defendant or take appropriate action.

[As amended, effective November 3, 2008; as amended by Supreme Court Order No. 15-8300-007, effective December 31, 2015.]

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 16-804 of the Rules of Professional Conduct.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph C does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph E is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph F supplements Rule 16-306 of the Rules of Professional Conduct, which prohibits extrajudicial statements that are false or create a clear and present danger of prejudicing a criminal proceeding. Nothing in this commentary is intended to restrict the statements that a prosecutor may make that comply with Paragraph B or C of Rule 16-306 of the Rules of Professional Conduct.

[6] Like other lawyers, prosecutors are subject to Rules 16-501 and 16-503 of the Rules of Professional Conduct, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer's office. Paragraph F reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, Paragraph F requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, Paragraph G requires prompt written disclosure to defense counsel or, if defendant is unrepresented, to a person reasonably certain to inform defendant or take appropriate action on defendant's behalf. Examples of persons reasonably certain to inform defendant or take appropriate action are the chief prosecutor and/or chief public defender of the jurisdiction where the conviction occurred. Other examples are the appropriate court or tribunal in the jurisdiction where the conviction occurred.

[8] For purposes of Paragraph G of this rule, the term "prosecutor" includes any current prosecutor as well as any former prosecutor who was involved in the prosecution of the defendant. The duty of a former prosecutor under this rule, however, may be limited when that duty conflicts with duties to current clients. The term "material" as used in this subsection has the same meaning as construed under *Brady v. Maryland*, 373 U.S. 83 (1963), its progeny, and Rule 16-308(D). The term "promptly" in this subsection is intended to require disclosure when it becomes evident to the prosecutor that the information is new, credible, and material. "Promptly" does not bar appropriate inquiry and investigation to determine whether disclosure must be made.

16-308 NMRA

[9] A prosecutor who makes a good faith judgment complies with the prosecutor's obligation under this rule even if, after the fact, others believe that the judgment was not only erroneous, but negligent. It is preferred that a prosecutor who chooses not to disclose evidence, record the reasons in writing.

[10] The Committee considered the full text of ABA Model Rules 3.8(g) and (h) but rejected those rules as too procedural. The Committee's view is that the Rules of Professional Conduct should define ethical duties rather than establish rules of procedure, particularly when ethical rules of procedure may conflict with established rules of criminal procedure or other laws. Thus, this rule focuses on a prosecutor's ethical duty to disclose evidence of a defendant's innocence to a person reasonably certain to relay the information to a defendant and/or act on a defendant's behalf. The rule does not mandate a prosecutor to take any particular action beyond the appropriate disclosure of exculpatory information.

STATUTORY NOTES

THE 2015 AMENDMENT, effective December 31, 2015, added G and [7] through [10] of committee commentary.

Case Notes

CLOSING ARGUMENT
DUTY OF PROSECUTOR
INTERPRETATION

JUDICIAL DECISIONS

ANALYSIS

CLOSING ARGUMENT

Prosecutor's comments during rebuttal closing argument in a driving while intoxicated case created an unnecessary risk to defendant's right to the fair and impartial administration of justice. By informing the jury that defense counsel had lied regarding a seat belt citation and waving a copy of the seat belt violation that was not admitted into evidence, the prosecutor violated this rule and [Rules 5-115\(A\), 16-804\(D\), 16-304\(E\), and 16-305\(D\) NMRA. State v. Torres, 2012-NMSC-016, N.M. , 279 P.3d 740.](#)

DUTY OF PROSECUTOR

Where, after seizing a letter and audio tapes that were potentially exculpatory, police then lost the letter and ruined the tapes, in reversing the conviction of defendant minister for the murder of one of his parishioners, the Supreme Court of New Mexico commented that, while intending to cast no aspersions, the Court thought it in order to direct attention to Canon 5 of the Canons of Professional Ethics applicable in New Mexico, former 21-2-1(3)(2.04) (now Rule 16-308 NMRA), which stated that the primary duty of a lawyer engaged in public prosecution was not to convict, but to see that justice was done and that the suppression of facts or the secreting of witnesses capable of establishing the innocence of an accused was highly reprehensible. [Trimble v. State, 75 N.M. 183, 402 P.2d 162 \(1965\).](#)

INTERPRETATION

District court correctly concluded that the challenged provisions of Rule 16-308(E) were not preempted outside of the grand-jury context, but were preempted in the grand-jury setting because they conflicted with the federal-law principles, embodied in the Grand Jury Clause of the Constitution, as interpreted by the United States Supreme

16-308 NMRA

Court, that governed federal prosecutors' attorney-subpoena practices before grand juries, and thereby stood as an obstacle to the effectuation of the grand jury's constitutionally authorized investigative functions. [*United States v. Supreme Court of N.M.*, 824 F.3d 1263 \(10th Cir. June 7, 2016\)](#).

In a lawsuit brought by the United States against the New Mexico Supreme Court, and the state's Disciplinary Board and Office of Disciplinary Counsel, claiming that the enforcement of this Rule against federal prosecutors licensed in New Mexico violated the Supremacy Clause, the district court had subject-matter jurisdiction because the United States had standing and the claim was ripe for review. [*United States v. Supreme Court of N.M.*, 824 F.3d 1263 \(10th Cir. June 7, 2016\)](#).

District court's injunction appropriately prohibited the enforcement of Rule 16-308(E)(2) and (3) against federal prosecutors practicing before grand juries, while permitting the enforcement of Rule 16-308(E)(1). [*United States v. Supreme Court of N.M.*, 824 F.3d 1263 \(10th Cir. June 7, 2016\)](#).

Other attorneys who may be subpoenaed under Subsection (E) of this rule or the applicable federal standards were not necessary and indispensable parties under *Fed. R. Civ. P. 19* as their interests were adequately represented by New Mexico, who's interests were identical to theirs. *United States v. Supreme Court of N.M.*, F. Supp. 2d (D.N.M. Nov. 1, 2013).

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this part, article, or chapter.

Michie's Annotated Rules of New Mexico

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N.C. R. Prof. Cond. Rule 3.8

Current through May 27, 2021

NC - North Carolina State & Federal Court Rules > THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR > ADVOCATE

Rule 3.8. Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

- (a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d)** after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including 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;
- (e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3)** there is no other feasible alternative to obtain the information.
- (f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g)** When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:
 - (1)** if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or
 - (2)** if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or

defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

Annotations

Commentary

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. See, e.g., [G.S. 15A-903](#) et. seq., [Brady v. Maryland](#), 373 U.S. 83 (1963); [Giglio v. U.S.](#), 405 U.S. 150 (1972); [Kyles v. Whitley](#), 514 U.S. 419 (1995). 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 hardship to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial

N.C. R. Prof. Cond. Rule 3.8

statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[8] When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender, under all circumstances regard less of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. Statutory Authority G.S. 84-23, Adopted July 24, 1997; Amended October 17, 2001; Amended effective February 27, 2003; Amended effective November 16, 2006; Amended effective March 16, 2017. Rule 3.8 is substantially similar to Model Rule 3.8. Rule 3.8 is similar to Rule 7.3 of the superseded (1985) Rules of Professional Conduct, except that Rule 3.8 restricts the circumstances in which a prosecutor may subpoena a lawyer. For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For article, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," see [65 N.C.L. Rev. 693 \(1987\)](#).

Case Notes

APPELLATE ADVOCACY. --Supreme Court of North Carolina admonished the State for its conflicting arguments in at least two different cases regarding appeals from probation revocations. [State v. Hooper, 358 N.C. 122, 591 S.E.2d 514 \(2004\)](#).

N. C. R. Prof. Conduct 3.8(e) does not require judicial pre-screening, and, in any event, a violation of N.C. R. Prof. Conduct 3.8(e) cannot be a basis to quash a grand jury subpoena. Furthermore, N.C. R. Prof. Conduct 3.8(e) is appropriately construed as a limited cautionary instruction (admonishing prosecutors to take pause before causing a subpoena to be issued so as to ensure that there is a genuine need to intrude into the client-lawyer

N.C. R. Prof. Cond. Rule 3.8

relationship) and not intended to create any substantive rights or procedural hurdles that would thwart the subpoena process or fetter the grand jury's investigatory function. [*In re Grand Jury Subpoena*, 533 F. Supp. 2d 602 \(W.D.N.C. May 4, 2007\)](#).

North Carolina Court Rules Annotated

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N.D.R. Prof. Conduct Rule 3.8

Current through amendments received as of May 26, 2021

ND - North Dakota Local, State & Federal Court Rules > North Dakota Rules of Professional Conduct > ADVOCATE.

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)** Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)** when communicating with an unrepresented person:
 - (1)** charged with a misdemeanor, infraction, or traffic offense, be permitted to discuss the matter, provide information regarding settlement, and negotiate a resolution that may include a waiver of constitutional and statutory rights;
 - (2)** charged with a felony:
 - (i)** avoid providing advice to the defendant, including advising the defendant not to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights, or how the tribunal is likely to rule in the case; and
 - (ii)** refrain from assisting the defendant in the completion of forms for the waiver of a preliminary hearing or jury trial;
 - (3)** charged with a felony, when the defendant has on the record waived the right to counsel, be permitted to:
 - (i)** discuss the matter with the defendant, including whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights, or how the tribunal is likely to rule in the case; and
 - (ii)** assist the defendant in the completion of forms for the waiver of a preliminary hearing or jury trial;
 - (4)** charged with a felony, make any settlement offer in writing, which must include at least a general notice to the unrepresented person that significant consequences other than any consequences the court imposes may follow from a guilty plea.
- (d)** Disclose to the defense at the earliest practical time 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;
- (e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1)** the information sought is not protected from disclosure by any applicable privilege;
 - (2)** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

N.D.R. Prof. Conduct Rule 3.8

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under N.D.R. Prof. Conduct 3.6 or this Rule.

(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:

(1) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose notice of the existence of that evidence to an appropriate tribunal and prosecuting authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction

(i) promptly disclose the existence of that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation or cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) when a prosecutor knows of or receives clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, seek to undo the conviction.

History

Source:

Amended effective August 1, 2006; amended effective March 1, 2012; amended effective March 1, 2013.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. This responsibility also obligates the prosecutor to promptly make available to the defense information which is known, material and favorable to the defendant's position. Discovery of such information by the prosecutor confers no property right in the same upon the prosecutor; rather, in the interest of seeing that the truth is ascertained and all proceedings justly determined, the defense should be accorded ready access to any such information. 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 Rule 8.4.

[2] Paragraph (c) allows the prosecutor of a misdemeanor or lesser offense to supply to the defendant a prepared form for a waiver of appearance and plea of guilty if the defendant desires to plead guilty and does not want to appear in court to do it. A prosecutor does not act as the defendant's legal advisor when responding to a defendant's request for a sentence or other disposition proposal or paperwork that will facilitate entry of a guilty plea without appearing.

N.D.R. Prof. Conduct Rule 3.8

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Rule is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the appropriate tribunal and prosecuting authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or cause another appropriate authority to undertake the necessary investigation, and to promptly, absent court-authorized delay, disclose existence of the evidence to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to undo the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to be erroneous, does not constitute a violation of this Rule.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 09/20/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on 06/08/04; 03/18/05, 06/14/05, 12/11/09, 03/19/10, 06/15/10, 09/10/10, 12/10/10, 03/04/11, 06/13/12, and 09/14/12.

Case Notes

Duty to Disclose.
Failure to Disclose.
Right to Fair Trial.

Duty to Disclose.

Prosecutor's ethical obligation to disclose evidence under N.D.R.Prof. Conduct 3.8(d) is broader than the duty under [*Brady or N.D.R.Crim.P. 16. Feland v. Feland, 2012 ND 174, 820 N.W.2d 672, 2012 N.D. LEXIS 177 \(Aug. 20, 2012\).*](#)

Failure to Disclose.

Assistant state's attorney violated N.D.R.Prof. Conduct 3.8(d) by negligently failing to disclose a state auditor's memo to defense counsel; however, as the attorney's conduct constituted an isolated instance of negligence that caused little or no actual injury to any party, admonition was the appropriate sanction under [*N.D. Stand. Imposing Law. Sanctions 5.24, 6.24. Feland v. Feland, 2012 ND 174, 820 N.W.2d 672, 2012 N.D. LEXIS 177 \(Aug. 20, 2012\).*](#)

N. D.R.Prof. Conduct 3.8(d) is not limited to a prosecutor's intentional failure to disclose exculpatory evidence, but also applies to a knowing or negligent failure to disclose. [*Feland v. Feland, 2012 ND 174, 820 N.W.2d 672, 2012 N.D. LEXIS 177 \(Aug. 20, 2012\).*](#)

Disciplinary counsel showed that the assistant state's attorney negligently failed to disclose a memo from a state auditor to defense counsel in violation of N.D.R.Prof. Conduct 3.8(d) because the memo was not listed on any of the discovery checklists created by the state's attorney's office, which enumerated items that had been provided to the defense in discovery; defense counsel testified he did not receive the memo in discovery before trial; and the attorney explicitly assured the district court that the files had been reviewed and all relevant documents had been provided, when the memo had not been provided. [*Feland v. Feland, 2012 ND 174, 820 N.W.2d 672, 2012 N.D. LEXIS 177 \(Aug. 20, 2012\).*](#)

Right to Fair Trial.

Defendant was not denied fair trial by state's charging him with street-gang crime and moving to have that charge dismissed at the end of its case-in-chief, where defendant did not show street-gang charge was a bad faith contrivance by state's attorney. [*State v. Garcia, 1997 ND 60, 561 N.W.2d 599 \(1997\).*](#)

Ohio Prof. Cond. Rule 3.8

Rules current through rule amendments received through May 24, 2021

OH - Ohio Local, State & Federal Court Rules > Ohio Rules of Professional Conduct > III. Advocate

Rule 3.8. Special responsibilities of a prosecutor

The prosecutor in a criminal case shall not do any of the following:

- (a) pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause;
- (b) [RESERVED]
- (c) [RESERVED]
- (d) fail to 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, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;
- (e) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor *reasonably believes* all of the following apply:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
 - (3) there is no other feasible alternative to obtain the information.
- (f) [RESERVED]

Annotations

Commentary

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 justice and that guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

[2] [RESERVED]

[3] The exception in division (d) recognizes that a prosecutor may seek an appropriate order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Division (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] [RESERVED]

[6] [RESERVED]

Rule 3.8(a) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment).

EC 7-13 recognizes the distinctive role of prosecutors:

The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

Rule 3.8 modifies Model Rule 3.8 as follows: -

The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;

Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;

Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;

Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;

Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;

Division (d) is modified to comport with Ohio law;

Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6.

Case Notes

Generally

Authority of prosecutor

Generally

Prosecutor did not engage in prosecutorial misconduct where he cross-examined defendant as to the contradictory testimony of several witnesses who had testified earlier in the trial; the questions were posed to impeach defendant's credibility, did not express the prosecutor's personal belief or opinion as to the credibility of a witness or as to the guilt of the accused, and were not calculated to confuse the jury. [*State v. Hemphill, 2005 Ohio 3726, 2005 Ohio App. LEXIS 3429 \(2005\)*](#).

Defendant received a fair trial where a reasonable jury could have found him guilty absent the prosecutor's statements during his closing argument, and no prosecutorial misconduct occurred; because defendant chose to proceed pro se, he was held to the same standard as the prosecutor with respect to procedural matters. [*State v. Richards, 2003 Ohio 5235, 2003 Ohio App. LEXIS 4741 \(2003\)*](#).

A prosecutor in an aggravated murder case violates the defendant's right to due process by graphically describing the victim's lingering, horrid death where there is no evidence to support such argument: [*State v. Hart, 94 Ohio App. 3d 665, 641 N.E.2d 755, 1994 Ohio App. LEXIS 1820 \(1994\)*](#).

Ohio Prof. Cond. Rule 3.8

It is a violation of the disciplinary rules for a city director of law to threaten and bring criminal charges in order to accomplish a personal purpose: [*Stark Cty. Bar Assn. v. Russell*, 25 Ohio St. 3d 124, 495 N.E.2d 430, 25 Ohio B. 170, 1986 Ohio LEXIS 706 \(1986\)](#).

It is reversible error for a prosecutor to imply in closing argument that defense counsel did not believe in his own case, but that the prosecutor did believe in hers: [*State v. Banks*, 31 Ohio App. 3d 57, 508 N.E.2d 986, 31 Ohio B. 97, 1986 Ohio App. LEXIS 10112 \(1986\)](#).

Prosecutorial misconduct existed where the assistant prosecutor referred to defense evidence as "lies", "garbage", "garbage lies", "[a] smoke screen", and a "well conceived and well rehearsed lie" and intimated that defense counsel had suborned perjury by manufacturing, conceiving and fashioning lies to be presented in court: [*State v. Smith*, 14 Ohio St. 3d 13, 470 N.E.2d 883, 14 Ohio B. 317, 1984 Ohio LEXIS 1228 \(1984\)](#).

Authority of prosecutor

Even if the prosecutor did publically suggest the defendants were guilty, that statement would not cause actual prejudice because all criminal prosecutions carried the implied understanding that the state believed that a defendant was guilty; all of the defendants who were a party to this appeal pleaded guilty, so as a matter of law they waived the right to complain of the prosecutor's conduct and there was no prejudice. *State v. Cornick*, -- Ohio App. 3d --, 2014- Ohio 2049, -- N.E.2d --, [*2014 Ohio App. LEXIS 1987 \(May 15, 2014\)*](#).

A prosecutor can, in good faith, certify that the chances of effective prosecution have been destroyed, then, so long as the case is supported by probable cause, proceed to prosecute the case to conclusion, even while recognizing the likelihood of an acquittal: [*State v. Comstock*, 79 Ohio App. 3d 414, 607 N.E.2d 520, 1992 Ohio App. LEXIS 2084 \(1992\)](#).

OHIO RULES OF COURT SERVICE

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5 Okl. St. Chap. 1, Appx. 3-A, Rule 3.8

This document is current with laws from the 2021 First Regular Session of the 58th Legislature, approved by the Governor through April 21, 2021, including up to Chapter 80 (with the exception of Chapter 51) and emergency effective legislation through Chapter 515 (with the exception of Chapter 488).

Oklahoma Statutes, Annotated by LexisNexis® > Title 5. Attorneys and State Bar (Chs. 1 — 2) > Chapter 1. Appendix 3-A. Rules of Professional Conduct > Advocate (§§ 3.1 — 3.9)

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;
- (g) The lawyer upon whom a subpoena is served shall be afforded a reasonable time to file a motion to quash compulsory process of his/her attendance. Whenever a subpoena is issued for a lawyer who then moves to quash it by invoking attorney/client privilege, the prosecutor may not press further in any proceeding for the subpoenaed lawyer's appearance as a witness until an adversary in camera hearing has resulted in a judicial ruling which resolves all the challenges advanced in the lawyer's motion to quash.
- (h) 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 within a reasonable time:

5 Okl. St. Chap. 1, Appx. 3-A, Rule 3.8

(1) disclose that evidence to an appropriate court and prosecutorial authority in the jurisdiction where the conviction occurred, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,

(i) unless a court authorizes delay, make reasonable efforts to disclose that evidence to the defendant's attorney or if the defendant is not represented by counsel to the defendant, and

(ii) if the defendant is not represented by counsel, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence, and

(iii) request an appropriate authority to investigate whether the defendant was convicted of an offense that the defendant did not commit.

(i) When a prosecutor learns of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority of an offense that the defendant did not commit, the prosecutor shall promptly notify the appropriate court and make reasonable efforts to notify the defendant's counsel and the defendant.

(j) A prosecutor's judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (h) and (i) of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Adopted March 10, 1988

As amended

ORPC 3.8

This document is current through changes received April 1, 2021

OR - Oregon Local, State & Federal Court Rules > OREGON STATE BAR RULES > OREGON RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and
- (b) 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.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Known"

"Knows"

"Tribunal"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 7-103 (A).

Paragraph (d) is essentially the same as DR 7-103 (B), with the addition of an exception for protective orders.

OREGON COURT RULES

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User Name: Geoffrey Gallagher

Date and Time: Friday, June 11, 2021 12:00:00 PM EDT

Job Number: 145950719

Document (1)

1. [Pa. RPC 3.8](#)

Client/Matter: -None-

Pa. RPC 3.8

State Court Rules current with amendments April 1, 2021. Local federal district and bankruptcy court rules and ECF documents are current with amendments received through December 1, 2020. All other local federal district and bankruptcy court materials are current with amendments received through December 1, 2020. Local Court Rules are current with amendments received through December 1, 2020

PA - Pennsylvania Local, State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

EXPLANATORY 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 guilt is decided upon the basis of sufficient evidence. 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 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 Rule 8.4.

2§ In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

Pa. RPC 3.8

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.

4§ Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

CODE OF PROF. RESP. COMPARISON

DR 7-103(A) provides that "A public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

PENNSYLVANIA RULES OF COURT

End of Document

R.I. Sup. Ct. Art. V, Rule 3.8

Current with rule changes received through May 24, 2021.

RI - Rhode Island State & Federal Court Rules > STATE RULES > SUPREME COURT RULES > ARTICLE V. RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a)**refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)**make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)**not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e)**except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;
- (f)**not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

History

As adopted by the court on February 16, 2007, eff. April 15, 2007

Annotations

Commentary

COMMENTARY

[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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[6] The prohibition in paragraph (f) was added because of the increasing incidence of grand jury and trial subpoenas directed toward attorneys. A court called upon for prior judicial approval should be guided by appropriate standards. See e.g., [*Whitehouse v. U.S. District Court*, 53 F.3d 1349 \(1st Cir. 1995\)](#); [*U.S. v. Klubock*, 832 F.2d 664 \(1st Cir. 1987\)](#) (en banc). Accordingly, prior judicial approval should be withheld unless (1) the information sought is not protected from disclosure by an applicable privilege, (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative, (3) the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter in a reasonably limited period of time, and gives reasonable and timely notice, (4) the purpose of the subpoena is not to harass the attorney or his or her client, and (5) the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.

Case Notes

1. ATTORNEY-CLIENT RELATIONSHIP.
2. DUTY OF PROSECUTOR.
3. PRESENTMENT OF EVIDENCE.
4. PROSECUTORIAL MISCONDUCT.

Analysis

1. ATTORNEY-CLIENT RELATIONSHIP.

R.I. Sup. Ct. Art. V, Rule 3.8

The United States Attorney's petition to amend subdivision (f) was denied, where the federal district court in Rhode Island had adopted this rule and there was, therefore, no state interference because the state and federal courts were in harmony as to the proper ethical conduct of attorneys practicing in their respective courts. [*In re Almond*, 603 A.2d 1087 \(R.I. 1992\)](#).

Subdivision (f) strikes an even balance between the competing interests of criminal prosecution and protection of the attorney-client privilege. [*In re Almond*, 603 A.2d 1087 \(R.I. 1992\)](#).

A federal district court's adoption of a local rule similar to subdivision (f) does not impermissibly interfere with *Fed. R. Crim. P. 17*. [*In re Almond*, 603 A.2d 1087 \(R.I. 1992\)](#).

2. DUTY OF PROSECUTOR.

A prosecutor has not only the right, but also the obligation, to present the strongest possible case against any defendant who is being tried. [*State v. Gasparico*, 694 A.2d 1204 \(R.I. 1997\)](#).

3. PRESENTMENT OF EVIDENCE.

The prosecution does not have an obligation to present the exact same evidence at two trials arising out of the same occurrence. Additionally, the prosecutor need not introduce exculpatory evidence as long as he or she does not conceal that evidence from a defendant. [*State v. Gasparico*, 694 A.2d 1204 \(R.I. 1997\)](#).

4. PROSECUTORIAL MISCONDUCT.

Where the prosecutor had no pretrial knowledge of certain testimony, nor was his opening statement at trial and his dismissal of a co-defendant's arson count a precursor to this allegedly "wholly unanticipated" testimony, and where the defendant further failed to make the least minimal showing that any evidence favorable to his case was suppressed or withheld by the state, there was no prosecutorial misconduct. [*State v. Binns*, 732 A.2d 114 \(R.I. 1999\)](#).

RHODE ISLAND COURT RULES ANNOTATED

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Rule 3.8, RPC, Rule 407, SCACR

This document reflects changes received through April 1, 2021

SC - South Carolina State & Federal Court Rules > SOUTH CAROLINA APPELLATE COURT RULES > IV. RULES GOVERNING THE PRACTICE OF LAW > RULE 407. RULES OF PROFESSIONAL CONDUCT > ADVOCATE

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

History

[Adopted effective September 1, 1990. Amended effective May 8, 1996; October 1, 2005; December 1, 2005.]

Annotations

Case Notes

Comment

Rule 3.8, RPC, Rule 407, SCACR

[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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

South Carolina Court Rules

End of Document

S.D. Codified Laws § 16-18-Appx., Rule 3.8

Current through acts received as of May 31st of the 2021 General Session of the 96th South Dakota Legislative Assembly, Supreme Court Rule 21-06 and Executive Order 21-05.

LexisNexis® South Dakota Codified Laws Annotated > Title 16 Courts and Judiciary (Chs. 16-1 — 16-23) > Chapter 16-18 Powers and Duties of Attorneys (§ 16-18-1) > APPENDIX TO SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to exculpate the guilt of the accused, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged exculpatory information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence relating to the lawyer's representation of a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees of other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (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 an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(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 seek to remedy the conviction.

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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History

SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004; SL 2018, ch 297 (SCR 18-06), eff. July 1, 2018.

S.D. Codified Laws § 16-18-Appx., Rule 3.8

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Tenn. Sup. Ct. R. 8, Rule 3.8

Current with amendments received through May 25, 2021

TN - Tennessee Local, State & Federal Court Rules > RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE [EFFECTIVE JANUARY 28, 1981] > Rule 8. Rules of Professional Conduct. > Chapter 3 Advocate

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case:

- (a) shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) shall not advise an unrepresented accused to waive important pretrial rights;
- (d) shall 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;
- (e) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule; and discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.
- (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) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to an appropriate authority, or
 - (2) if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Annotations

Commentary

COMMENT

[1] A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost. See *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994). For example, prosecutors are expected "to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals. Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct." *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000). A knowing disregard of obligations or a systematic abuse of prosecutorial discretion could constitute a violation of RPC 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not advise an unrepresented accused to waive the right to a preliminary hearing or other important pretrial rights. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements RPC 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with RPC 3.6(b) or 3.6(c). Paragraph (f) is only intended to apply prior to the conclusion of a proceeding. A proceeding has concluded when a final judgment in the proceeding has been affirmed on appeal or the time for appeal has passed.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted outside the prosecutor's jurisdiction of a crime that the person did not commit, paragraph (g) requires prompt disclosure to an appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation.

[7] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Case Notes

1. Prosecutor's Duty to Disclose.

Because Tenn. Sup. Ct. R. Prof. Conduct 8, 3.8(d), was already interpreted as coextensive in scope with the Brady rule and its progeny, the Supreme Court of Tennessee declined to interpret timely as any other definition than what was required constitutionally as a timely disclosure. [*In re Petition to Stay the Effectiveness of Ethics Opinion 2017-F-163*, 582 S.W.3d 200, 2019 Tenn. LEXIS 372 \(Tenn. Aug. 23, 2019\)](#).

Supreme Court of Tennessee declines to interpret a prosecutor's ethical duty under Tenn. Sup. Ct. R. Prof. Conduct 8, 3.8(d), as being more expansive than one's legal obligations under [*Brady v. Maryland*, 10 L. Ed. 2d 215, 83 S. Ct. 1194, 373 U.S. 83, 1963 U.S. LEXIS 1615 \(1963\)](#), and its progeny, or that timely disclosure of the material should be interpreted as soon as reasonably practicable. [*In re Petition to Stay the Effectiveness of Ethics Opinion 2017-F-163*, 582 S.W.3d 200, 2019 Tenn. LEXIS 372 \(Tenn. Aug. 23, 2019\)](#).

Opinion Notes

Definitional Cross-References

"Known" and "knows" See RPC 1.0(f)

"Material" See RPC 1.0(o)

"Reasonable" See RPC 1.0(h)

"Reasonably believes" See RPC 1.0(i)

"Substantial" See RPC 1.0(j)

"Tribunal" See RPC 1.0(m)

Disciplinary Board Opinions.

The propriety of representing a will beneficiary to uphold the validity of the will on the issue of testamentary capacity after having witnessed the execution of the will. Formal Ethics Opinion 83-F-54 (8/29/83).

A county attorney may represent a defendant when a law enforcement officer of the county is the prosecutor, only if the attorney is precluded from representing law enforcement officers. Formal Ethics Opinion 84-F-60 (1/18/84).

Potential ethical conflicts and ethical responsibilities of attorneys employed in programs administered by Department of Human Services pursuant to Title IV-D of the Federal Social Security Act. Formal Ethics Opinion 90-F-123 (9/14/90).

Research References & Practice Aids

Law Reviews.

Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework For Analysis, 34 Vand. L. Rev. 431.

HIERARCHY NOTES:

Rule 8 Note

TENNESSEE COURT RULES ANNOTATED

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Tex. R. Prof Conduct 3.09

THIS DOCUMENT IS CURRENT THROUGH May 12, 2021

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT > III. ADVOCATE

Rule 3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
- (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; and
- (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Annotations

Commentary

Comment:

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pre-trial, trial, or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. 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 Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. 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.

6. Sub-paragraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

Case Notes

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Prosecutorial Misconduct
 Legal Ethics : Sanctions : General Overview
 Legal Ethics : Sanctions : Disciplinary Proceedings : General Overview

LexisNexis (R) Notes

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Prosecutorial Misconduct

1. Defendant had not established that the prosecutors' comments at closing, which allegedly violated the rules of professional conduct because they related to conduct arising from a count in the indictment that had been dismissed, were so prejudicial to defendant that a new trial was required; although the count had been dismissed, the trial court had allowed, without objection, evidence related to the first count to be admitted to prove the conduct alleged in the second and third counts, and reference to the evidence by the prosecutors at closing was not prejudicial. [*Gallegos v. State*, 2006 Tex. App. LEXIS 9988 \(Tex. App. El Paso Nov. 16 2006\)](#).

Legal Ethics : Sanctions : General Overview

2. Trial court did not abuse its discretion in awarding sanctions against the attorney, in part because her history of violating disciplinary rules by settling a case on behalf of a client without the client's consent, and thus making decisions that are beyond the scope of her authority, illustrated a pattern of disregarding professional

responsibilities to her clients. [*Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, 2012 Tex. App. LEXIS 4741, 2012 WL 2150144 \(Tex. App. Houston 14th Dist. June 14 2012\)](#).

Legal Ethics : Sanctions : Disciplinary Proceedings : General Overview

3. Trial court did not abuse its discretion in awarding sanctions against the attorney, in part because her history of violating disciplinary rules by settling a case on behalf of a client without the client's consent, and thus making decisions that are beyond the scope of her authority, illustrated a pattern of disregarding professional responsibilities to her clients. [*Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, 2012 Tex. App. LEXIS 4741, 2012 WL 2150144 \(Tex. App. Houston 14th Dist. June 14 2012\)](#).

Texas Rules

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Utah Rules of Prof'l Conduct Rule 3.8

Current with rules effective through February 15, 2021.

UT - Utah State & Federal Court Rules > Utah Code of Judicial Administration > Part II. Supreme Court Rules of Professional Practice > Chapter 13. Rules of Professional Conduct > Advocate

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

History

Amended effective November 1, 2005.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

Utah Rules of Prof'l Conduct Rule 3.8

[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.

[3a] Utah has not adopted the ABA version of Rule 3.8. ABA Model Rule 3.8(d), requiring the prosecution to inform the tribunal of mitigating information related to sentencing, creates an unreasonable burden and is not deemed workable where the same information is required to be disclosed to the defense counsel who should be in the best position to decide what to present to the tribunal. The ABA's paragraph (e) regarding limitations on subpoenaing lawyers to grand juries or other legal proceedings is viewed as unnecessary, as there are adequate safeguards in place for federal prosecutors, and the Utah criminal justice system does not typically use the grand jury procedure. Utah has not adopted the ABA's proposed paragraph (f), because the changes are either unnecessary because of, or are potentially inconsistent with, the provisions of Rule 3.6.

NOTES TO DECISIONS

Prosecutorial misconduct.

Mistrial was properly denied notwithstanding the prosecution's failure to offer directly to the defense a knife that could have corroborated defendant's claim of self-defense, since the trial court admitted the evidence despite its late discovery, and the jury was then allowed to consider fully its evidentiary value, thus eliminating any substantial prejudice that might have occurred due to the prosecution's misconduct. [*State v. Hay*, 221 Utah Adv. 3, 859 P.2d 1, 1993 Utah LEXIS 118 \(Utah 1993\)](#).

Cited in

[*Bullock v. Carver*, 910 F. Supp. 551, 1995 U.S. Dist. LEXIS 19281 \(D. Utah 1995\)](#).

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

A.L.R.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Hierarchy Notes:

[*UTAH CODE OF JUDICIAL ADMINISTRATION, Pt. II, Ch. 13*](#)

UTAH COURT RULES ANNOTATED

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Va. Sup. Ct. R. pt. 6, sec. II, 3.8

Including changes received by the publisher through May 5, 2021.

VA - Virginia State & Federal Court Rules > RULES OF SUPREME COURT OF VIRGINIA > PART SIX INTEGRATION OF THE STATE BAR > SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT > ADVOCATE

Rule 3.8. Additional Responsibilities of a Prosecutor

A lawyer engaged in a prosecutorial function shall:

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Annotations

Commentary

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 guilt is decided upon the basis of sufficient evidence.

[1a] Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.

[1b] Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court's usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of [Code of Virginia Section 18.2-251](#) when, in fact, the court has a standard policy of not utilizing such an option.

[2] At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing pro se with the ultimate approval of the tribunal. Where an accused does appear pro se before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are knowingly made and voluntary.

[3] The qualifying language in paragraph (c), i.e., ". . . after a party has been charged with an offense," is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term "encourage" in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a 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.

[4] Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the ultra vires actions of law enforcement personnel who may be only minimally involved in a case.

Virginia Code Comparison

With respect to paragraphs (a), DR 8-102(A)(1) provided that a "public prosecutor or other government lawyer shall . . . refrain from prosecuting a charge that [he] . . . knows is not supported by probable cause."

Paragraph (b) is derived from DR 8-102(A)(2) which prohibited prosecutors from inducing an unrepresented defendant to "surrender important procedural rights."

The counterpart to paragraph (c) is DR 8-102(A)(3) which proscribed "discouraging" a person from giving relevant information to the defendants.

Paragraph (d) is similar to DR 8-102(A)(4), but requires actual knowledge on the part of prosecuting lawyers that they are in possession of exculpatory evidence as opposed to simply being in knowing possession of evidence that may be determined to be of such a nature, although acknowledging that such disclosure may be affected by court orders.

Paragraph (e) has no direct counterpart in Virginia Code, but it generally parallels DR 7-106 (B), now Rule 3.6(b), which directed that a lawyer "exercise reasonable care to prevent his employees and associates from making a [prohibited] extrajudicial statement."

Paragraph DR 8-102(A)(5), which prohibited the subpoena of an attorney as a witness in a criminal prosecution regarding a present or past client without prior judicial approval, has been deleted in light of prevailing case law.

Committee Commentary

The Committee retitled this Rule "Additional Responsibilities of a Prosecutor," rather than "Special Responsibilities of a Prosecutor," as in the ABA Model Rule, to make it clear that the Rule's provisions are in addition to the obligations of the attorney acting in a prosecutorial role as set forth in the remaining Rules. The Committee also thought it appropriate to address the proscriptions of the Rule to any "lawyer engaged in a prosecutorial function" as opposed to just a "prosecutor in a criminal case" so as to eliminate any confusion on the part of any lawyer (such as a County Attorney or assistant Attorney General) who may be acting in the role of a prosecutor without being a member of a Commonwealth's Attorney's office.

The Committee believed that paragraph (a) in which actual knowledge is required is more understandable and more susceptible to ready enforcement where any more subjective standard (such as "or it is obvious") is too vague. At the same time, the Committee wanted to strengthen the proscription set forth in the Virginia Code ("shall refrain") so as to make clear that the prosecutor should not even file a charge if it is not supported by "probable cause" and should certainly not pursue a charge to trial, even if initially supported by the minimum standard of

"probable cause," if it cannot reasonably be expected to survive a motion to strike the evidence or motion for judgment of acquittal. The original ABA Model Rule language only proscribed "prosecuting a charge that... is not supported by probable cause."

The Committee did not include the language of ABA Model Rule 3.8(b) in which the prosecutor is required to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel" because the Committee did not believe that such an obligation should formally be placed on the lawyer-prosecutor.

The Committee concluded that the language of proposed paragraph (b) more accurately focuses on the type of prosecutorial conduct that is prohibited, rather than the provision of the existing DR and ABA Model Rule 3.8(c) which address the waiver of important procedural rights which, in fact, can be knowingly waived as the Comment attempts to explain. In addition, the Committee felt that the example of the waiver of such a procedural right as that of a preliminary hearing as set forth in the existing DR and ABA Model Rule is misleading at best, since it is exceedingly rare that a defendant charged with a felony would insist on proceeding pro se and then agree to waive the hearing.

The Committee felt that it was appropriate to strengthen the provisions of DR 8-102(A)(3) to provide that the lawyer acting in a prosecutorial function shall not "instruct or encourage a person to withhold information from the defense" as opposed to the more subjective and less enforceable "shall not discourage". In addition, in recognition of the reality of the investigative stage of a matter in which a witness may be asked to "keep quiet" in order to protect the witness and the integrity of the investigation, the Committee felt it appropriate to restrict application of the prohibition to that point in the process after formal charge when the "person" becomes a "party."

The Committee felt a change from existing DR 8-102(A)(4) concerning the disclosure of exculpatory evidence to the defense was appropriate by clarifying that it would apply only to that evidence which the prosecutor knows is exculpatory as opposed to a more subjective analysis of evidence which may be in the knowing possession of the prosecutor but which he does not have reason to believe would be exculpatory.

The Committee felt that the language of the ABA Model Rule which speaks in terms of "exercising reasonable care" to prevent others involved in a prosecution from making prohibited extrajudicial statements placed an unreasonable affirmative duty on the attorney acting in a prosecutorial role whereby the attorney would be held responsible for attempting to control the conduct of others.

Finally, the Committee decided to recommend deletion of DR 8-102(5) prohibiting the subpoena of an attorney as a witness in a criminal matter involving a present or former client without prior judicial approval because of prevailing case law and judicial fiat (the United States District Court for the Eastern District of Virginia) which does not require same.

Case Notes

Failure of Commonwealth to comply with discovery order. -- When it is brought to the attention of a court that the Commonwealth has failed to comply with a discovery order, the court may prohibit the Commonwealth from introducing the evidence or enter such other order as it deems just under the circumstances. Certain circumstances may dictate a citation for contempt and/or require referral of the matter to the appropriate ethics committee of the bar. [*Stotler v. Commonwealth*, 2 Va. App. 481, 346 S.E.2d 39 \(1986\)](#) (decided under former DR 8-102).

Sanctions, etc., for deliberate attempt to introduce inadmissible evidence. -- When it appears to a trial court that a party has deliberately attempted to introduce evidence which it knows is improper or inadmissible, either because it was not disclosed during discovery or because it otherwise is inadmissible under rules of evidence, it is the duty and responsibility of the court to deter such inappropriate tactics by taking such action, imposing such sanctions, or granting such relief as it deems appropriate. [*Stotler v. Commonwealth*, 2 Va. App. 481, 346 S.E.2d 39 \(1986\)](#) (decided under former DR 8-102).

Court order that Commonwealth refrain from interfering with attempts to interview witnesses. -- [*Article I, Section 8 of the Virginia Constitution*](#) protects "the right to prepare for trial which, in turn, includes the right to interview

material witnesses and to ascertain the truth," and is reinforced by the Virginia Code of Professional Responsibility. "The prosecutor in a criminal case ... shall ... [n]ot discourage a person from giving relevant information to the defendants." DR 8-102 (A)(3) (1987). As qualified by writ of prohibition, the trial judge's order that the Commonwealth refrain from any interference with attempts by defense counsel to interview witnesses is fully consistent with those principles. [*Epperly v. Booker*, 235 Va. 35, 366 S.E.2d 62 \(1988\)](#) (decided under former DR 8-102).

Rule not violated. -- Finding that the attorney violated Va. Sup. Ct. R. pt. 6, § II, R. 3.8(a) was improper because it could not be inferred from the circumstances that the attorney had actual knowledge that the third indictment lacked probable cause to support it. [*Livingston v. Va. State Bar*, 286 Va. 1, 744 S.E.2d 220, 2013 Va. LEXIS 75 \(2013\)](#).

Prosecutor may not deny intention to call witness to avoid discovery. -- Where the Commonwealth's attorney knows that an informant's appearance as a witness is impending, or intends in all likelihood to call the witness, the prosecutor may not deny his or her intention to call the witness as a pretext to avoid discovery. Courts have the responsibility to monitor the conduct of those attorneys who appear before them and assure adherence to professional standards. [*Moreno v. Commonwealth*, 10 Va. App. 408, 392 S.E.2d 836 \(1990\)](#) (decided under former DR 8-102).

Private prosecutor. -- Because an attorney simultaneously represented the victim in a civil action against defendant and sought to prosecute her, and because the procedural safeguards were not followed that would have ensured the publicly-elected prosecutor remained in control of the case, the trial court erred in failing to disqualify the attorney as a private prosecutor. [*Price v. Commonwealth*, 72 Va. App. 474, 849 S.E.2d 140, 2020 Va. App. LEXIS 269 \(2020\)](#).

VIRGINIA COURT RULES ANNOTATED

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Vt. Prof. Cond. Rule 3.8

State court rules are current with amendments received through May 17, 2021. Local Federal Bankruptcy and District Court rules are current with amendments received through April 14, 2021.

VT - Vermont State & Federal Court Rules > VERMONT RULES OF PROFESSIONAL CONDUCT > RULES > ADVOCATE

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain unfairly from an unrepresented accused a waiver of important pretrial rights;
- (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;
- (e) not subpoena a lawyer in a grand jury, inquest, or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
 - (3) there is no other feasible alternative to obtain the information.
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case who are in the employment or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

History

Amended June 17, 2009, eff. Sept. 1, 2009.

Annotations

Notes

TEXT:

1. Paragraph (f): Relocate [former] paragraph (e)

The text of [former] paragraph (e) has not been modified but has been moved here to consolidate in a single paragraph the prosecutor's obligations regarding extrajudicial publicity.

Commentary

Comment.

Reporter's Notes[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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence. Nor does it forbid appropriate plea negotiations with an unrepresented accused.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Reporter's Notes --2009 Amendment.

V.R.P.C. 3.8 is amended to conform to the changes in the Model Rule while retaining certain variations in the Vermont rule as originally adopted. V.R.P.C. 3.8(c) adds "unfairly" to modify the nature of the prosecutor's obligation and deletes "such as the right to a preliminary hearing" at the end of the paragraph as inapplicable in Vermont. Language is added in former V.R.P.C. 3.8(e) [now (f)] concerning the prosecutor's employment of nonlawyer assistants for consistency with Rule 5.3. Former Model Rule 3.8(g) [now (f)], forbidding unnecessary statements that would heighten public condemnation of the accused, was omitted as superfluous. See Reporter's Notes to V.R.P.C. 3.8 (1999). These variations are carried forward, except that former Model Rule 3.8(g) has been incorporated in V.R.P.C. 3.8(f) both for uniformity with the Model Rules and because it is a salutary provision.

The ABA Reporter's Explanation of other changes in the rule is as follows:

COMMENT:

[1] The Commission recommends deleting the cross-reference to Rule 3.3(d) in the context of grand jury proceedings, on the ground that grand jury proceedings are not ex parte adjudicatory proceedings.

[2] The proposed modifications provide a rationale for the Rule and clarify the distinctions between an unrepresented accused, an accused who is appearing pro se with the approval of the tribunal and an uncharged suspect. No change in substance is intended.

[6] This is a new Comment explaining the material relocated from [former] paragraph (e). It provides that the reasonable-care standard will be satisfied if the prosecutor issues appropriate cautions to law-enforcement personnel and other individuals assisting or associated with the prosecutor but not under the prosecutor's direct supervision. No change in substance is intended.

Reporter's Notes

This rule carries forward related Vermont Code provisions, but makes certain changes reflecting developments in constitutional law. The prosecutor is now obligated to make reasonable efforts to assure that the accused is given the opportunity to exercise the right to counsel. The prosecutor must also refrain from seeking to obtain a waiver of important pretrial rights from an unrepresented accused. The rule limits the prosecutor's discretion in subpoenaing lawyers to a grand jury to testify regarding past or present clients, a rule which has no counterpart in the Vermont Code. Finally, the rule adds a provision requiring the prosecutor to exercise reasonable supervision over lawyer and nonlawyer personnel who are within the prosecutor's control to prevent them from making prohibited extrajudicial statements.

The study committee departed somewhat from the ABA model version of this rule.

To reach a consensus on subsection (c), it was decided to include "unfairly " after the word "obtain" in that subsection and to delete the phrase "such as the right to a preliminary hearing," which has no applicability to Vermont practice. The comment was adjusted accordingly.

The changes in subsection (e) were made to make it consistent with Rule 5.3.

Subsection (f) was so modified by the ABA in August of 1995. The change was made because of a concern that this was a rule of procedure, not one of ethics. The study committee included the reference to inquests to make this rule consistent with Vermont practice.

Subsection (g), and its corresponding comment, was deleted as superfluous.

VERMONT COURT RULES ANNOTATED

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Wash. RPC 3.8

Current with rules effective through May 1, 2021

WA - Washington Local, State & Federal Court Rules > STATE RULES > PART I. RULES OF GENERAL APPLICATION > RULES OF PROFESSIONAL CONDUCT (RPC) > TITLE 3. ADVOCATE

Rule 3.8. Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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 mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (B) make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.
- (h) [Reserved.]

(i) A prosecutor's independent judgment, made in good faith, that the evidence is not of such nature as to trigger the obligations of paragraph (g) of this Rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

History

Adopted June 25, 1985, effective Sept. 1, 1985; amended, effective September 1, 2006; adopted November 3, 2011, effective December 13, 2011.

Annotations

Commentary

COMMENT

[1] [Washington Revision.] 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 guilt is decided upon the basis of sufficient evidence. The extent of mandated remedial action 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. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard

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will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Additional Washington Comments (7-10)

[7] [Washington Revision.] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person is innocent of committing, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to make reasonable efforts to inquire into the matter to determine whether the defendant is in fact innocent, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

[8] [Reserved.]

[9] [Reserved.] Comment [9] to Model Rule 3.8 is codified, with minor revisions, as paragraph (i).]

[10] In many of the Lawyer RPC, the term "counsel" has been changed to "lawyer" to avoid ambiguity between a lawyer and an LLLT. The term "counsel" has been retained in this Rule, however, because this term in a criminal matter may implicate statutory and constitutional responsibilities that are not intended to be modified. The term "counsel" in this Rule nevertheless denotes a lawyer.

Case Notes

EXCULPATORY STATEMENTS.
FILING OF CHARGES.
GUIDELINES.

EXCULPATORY STATEMENTS.

Exculpatory statement made by defendant should have been disclosed to defense counsel by prosecutor; however, since defense counsel was able to elicit it during cross-examination of prosecution witness, defendant was not prejudiced. [State v. Hall, 22 Wn. App. 862, 593 P.2d 554](#), review denied, 92 Wn.2d 1021 (1979).

FILING OF CHARGES.

The filing of a completely unfounded information may subject the prosecution to court sanctions and disciplinary proceedings. [State v. Cameron, 30 Wn. App. 229, 633 P.2d 901](#), review denied, 96 Wn.2d 1023 (1981).

GUIDELINES.

A county prosecutor is not required to publish any guidelines regarding when aggravated murder will be charged. [State v. Martin, 41 Wn. App. 133, 703 P.2d 309](#), review denied, 104 Wn.2d 1016 (1985).

Research References & Practice Aids

Textbooks and Treatises.

Washington Criminal Practice in Courts of Limited Jurisdiction (Michie).

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W. Va. Prof. Cond., Rule 3.8

Rules current through June 2, 2021

WV - West Virginia State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > Advocate

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege; and
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (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 an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(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 seek to remedy the conviction.

History

Amended by order entered September 29, 2014, effective January 1, 2015.

Annotations

Commentary

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, that 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. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard

W. Va. Prof. Cond., Rule 3.8

will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief-prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

A.L.R. reference.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

Case Notes

Duty of prosecutor.

Concomitant with the duty of a prosecutor to seek justice, rather than merely to convict, is a duty to disclose evidence that is known to the prosecutor tending to exculpate the accused in a criminal proceeding. [*Lawyer Disciplinary Bd. v. Hatcher*, 199 W. Va. 227, 483 S.E.2d 810, 1997 W. Va. LEXIS 6 \(1997\).](#)

[*Lawyer Disciplinary Bd. v. Jarrell*, 206 W. Va. 236, 523 S.E.2d 552, 1999 W. Va. LEXIS 133 \(1999\).](#)

Attorney's conduct in two cases violated the Rules of Professional Conduct because he made false statements to the circuit court, he ignored discovery requests and disobeyed court orders, he failed to comply with the special duties as a prosecuting attorney, and he made false representations of fact to the circuit court and opposing counsel and in court documents; a three-year suspension was an appropriate sanction because the attorney's misconduct violated his duties, his actions were intentional, the amount of real or potential harm was significant, and the balance of mitigating and aggravating factors weighed in favor suspension. [*Lawyer Disciplinary Bd. v. Busch*, -- W. Va. --, 754 S.E.2d 729, 2014 W. Va. LEXIS 107 \(2014\).](#)

Sanctions.

Prosecutor who violated W. Va. R. Prof. Conduct 3.6, 3.8 and 8.4 by making extrajudicial statements about an active investigation was removed from office, publicly reprimanded and ordered to pay hearing costs. [*Lawyer Disciplinary Bd. v. Sims*, 212 W. Va. 463, 574 S.E.2d 795, 2002 W. Va. LEXIS 179 \(2002\).](#)

Research References & Practice Aids

2014 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, that 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. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief-prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be

W. Va. Prof. Cond., Rule 3.8

made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

HIERARCHY NOTES:

W. Va. Prof. Cond., Note

Michie's West Virginia Code Annotated Court Rules

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Wis. SCR 20:3.8

This document is current through May 1, 2021

WI - Wisconsin State & Federal Court Rules > WISCONSIN SUPREME COURT RULES > CHAPTER 20 RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS > ADVOCATE

SCR 20:3.8. Special responsibilities of a prosecutor

(a)A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

(b)When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter.

(c)When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

(d)When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:

(1)otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or

(2)assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.

(e)A prosecutor shall not subpoena a lawyer in a grand jury or other proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1)the information sought is not protected from disclosure by any applicable privilege;

(2)the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3)there is no other feasible alternative to obtain the information.

(f)A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:

(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; and

(2)exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under SCR 20:3.6.

(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 do all of the following:

- (1) promptly disclose that evidence to an appropriate court or authority; and
- (2) if the conviction was obtained in the prosecutor's jurisdiction:
 - (i) promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay; and
 - (ii) make reasonable efforts to undertake an investigation or cause an investigation to be undertaken, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (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 seek to remedy the conviction.

WISCONSIN COMMENT

The Wisconsin Supreme Court Rule differs from the Model Rule in several respects: (1) paragraph (b) adds the reference to "in the context of an investigation or proceeding"; (2) paragraphs (c) and (d) expand the rule by deleting a reference to communications occurring only "after the commencement of litigation"; (3) paragraphs (d) and (f) exempt municipal prosecutors from certain requirements of the rule. Care should be used in consulting the ABA Comment.

Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20:3.8 (g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new A.B.A. rule to recognize limits in the investigative resources of Wisconsin prosecutors.

This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

Annotations

Commentary

COMMENT

ABA

[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 guilt is decided upon the basis of sufficient evidence. 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 Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

WISCONSIN COURT RULES

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WY Prof. Conduct Rule 3.8

This document reflects changes through rules received by the publisher on or before May 16, 2021.

WY - Wyoming State & Federal Court Rules > Rules of Professional Conduct for Attorneys at Law > Advocate

Rule 3.8. Special Responsibilities of Prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (f) When a prosecutor knows of new, credible and material evidence that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate authority or court, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the court and the defendant unless a court authorizes a delay
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit, and
- (g) 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 seek to remedy the conviction.

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 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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards for Criminal Justice Relating to the Prosecution Function, which are the product of*

WY Prof. Conduct Rule 3.8

prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 Rule 8.4.

[2] Rule 3.8(b) is not intended to prohibit prosecutors from participating directly or indirectly in constitutionally permissible investigative actions. Therefore, for purposes of the Rule, “the accused” means a person who has been arrested and brought before a magistrate, or a person against whom adversarial judicial criminal proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. In addition, a prosecutor may ethically advise law enforcement officers regarding the full range of constitutionally permissible investigative actions, including lawful contacts with a suspect, target, or defendant.

[3] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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.

[5] Section (e) does not create an affirmative duty on the part of the prosecutor to exercise supervisory control over other agencies.

[6] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[8] When a prosecutor knows of new, credible and material evidence a person outside the prosecutor’s jurisdiction was convicted of a crime that the person did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[9] Under paragraph (g), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[10] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

History

Amended April 11, 2006, effective July 1, 2006; amended August 5, 2014, effective October 6, 2014.

Annotations

Prosecutorial misconduct. —

Special responsibilities of prosecutors. —

Prosecutorial ethics. —

Counseling law enforcement personnel. —

Sanctions. —

Prosecutorial misconduct. —A prosecutor acted in a manner inconsistent with his ethical obligation to further the ends of justice where, although the prosecutor provided the notice of other bad acts evidence requested by the defense, and the defense filed a pretrial motion in limine, the district court did not consider the admissibility of evidence concerning the incident at issue until after the jury had been impaneled and the parties had given their opening statements and, as a consequence, the prosecutor was able to preview that evidence for the jury before the court made a detailed determination of admissibility. [Capshaw v. State, 11 P.3d 905, 2000 Wyo. LEXIS 197 \(Wyo. 2000\).](#)

Special responsibilities of prosecutors. —In an action in which a defendant appealed from his convictions of two counts of felony conversion of grain in violation of Wyo. Stat. Ann. § [11-11-117\(b\)](#) (2003) and one count of felony check fraud in violation of Wyo. Stat. Ann. § [6-3-702\(a\)\(b\)\(iii\)](#) (2003), defendant failed to meet his burden of showing the district court abused its discretion when it denied his motion to withdraw his guilty plea on the basis that the judge and prosecutor were biased and prejudiced where (1) no manifest injustice resulted from the prosecutor's representation of the State despite his familial relationship with three of the victims because the prosecutor promptly and fully disclosed the relationship; (2) a judge may not be removed for cause simply on the basis that his brother was, at one time, a customer of the defendant. [Reichert v. State, 2006 WY 62, 134 P.3d 268, 2006 Wyo. LEXIS 66 \(Wyo. 2006\).](#)

Prosecutorial ethics. —Prosecutor must explicitly stand by the terms agreed upon in the guilty plea and may not play "fast and loose" with the established terms reached between the parties in a plea agreement. [Herrera v. State, 2003 WY 25, 64 P.3d 724, 2003 Wyo. LEXIS 27 \(Wyo. 2003\).](#) Prosecutors must comply with specifically enumerated ethical requirements in properly fulfilling their role as prosecutors. [Herrera v. State, 2003 WY 25, 64 P.3d 724, 2003 Wyo. LEXIS 27 \(Wyo. 2003\).](#)

WY Prof. Conduct Rule 3.8

Counseling law enforcement personnel. —Given a deputy sheriff’s testimony that the prosecutor’s office helped plan daily investigations, the court reasonably inferred, for purposes of Wyo. R. Prof. Conduct 3.8(b), that the planning included plans for the anticipated interview of the accused in the case at hand. [Harlow v. State, 2003 WY 47, 70 P.3d 179, 2003 Wyo. LEXIS 58 \(Wyo. 2003\)](#), reh’g denied, [2003 Wyo. LEXIS 85 \(Wyo. May 20, 2003\)](#), cert. denied, 540 U.S. 970, 124 S. Ct. 438, 157 L. Ed. 2d 317, 2003 U.S. LEXIS 7776 (U.S. 2003).

Sanctions. —A violation of Wyo. R. Prof. Conduct 3.8(b), concerning interviews with accused persons, does not require a holding that a defendant’s statement is inadmissible. [Harlow v. State, 2003 WY 47, 70 P.3d 179, 2003 Wyo. LEXIS 58 \(Wyo. 2003\)](#), reh’g denied, [2003 Wyo. LEXIS 85 \(Wyo. May 20, 2003\)](#), cert. denied, 540 U.S. 970, 124 S. Ct. 438, 157 L. Ed. 2d 317, 2003 U.S. LEXIS 7776 (U.S. 2003).

Research References & Practice Aids

Law reviews. —For case note, “The Mirage of Brady in Wyoming: How Far Will the Wyoming Supreme Court Allow a Prosecutor to Go?,” see XXXV Land & Water L. Rev. 609 (2000).

Hierarchy Notes:

[WY Prof. Conduct](#)

Wyoming State & Federal Court Rules
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