

### **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.—Amended June 17, 2009, eff. Sept. 1, 2009.

#### **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] 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:

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.

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.