

### **RULE 3.8: SPECIAL RESPONSIBILITIES OF A CRIMINAL PROSECUTOR**

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

(a) pursue or maintain the prosecution of a charge that the prosecutor *knows* is not supported by probable cause and by the prosecutor's good faith belief in the defendant's guilt for the offense charged.

(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) [ ] fail to take the following steps when a prosecutor knows of previously undisclosed, credible, and material evidence creating a reasonable likelihood that a convicted defendant is not guilty of the crime for which the defendant was convicted:

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

- (a) promptly disclose that evidence to an appropriate court or authority, and
  - (b) promptly disclose that evidence to the defendant and defendant's attorney unless a court authorizes delay, and
  - (c) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.
- (2) if the conviction was obtained outside the prosecutor's jurisdiction, promptly notify the prosecutor's office in the jurisdiction that prosecuted the case, ensuring that the information is transmitted to a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

(g) fail to seek to remedy a conviction, even if all authorized appeals have concluded, when a prosecutor knows of clear and convincing evidence establishing that a defendant is innocent of the crime for which defendant was prosecuted. If the conviction is not in the prosecutor's jurisdiction the prosecutor shall ensure that the matter is brought to the attention a prosecuting attorney who is authorized to bring the matter to the attention of the court in that jurisdiction.

### **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 3.3 (including the responsibility to refrain from false representations and to correct false testimony of a prosecution witness), 3.6, 4.2, 4.3, 5.1, 5.2 and 5.3.

[2] Oftentimes prosecutors, particularly in larger counties and municipalities, are subject to multiple layers of supervision. The provisions of Rules 5.1 and 5.2 regarding the respective responsibilities of supervisory and subordinate lawyers apply in these circumstances. [3] Division (a) recognizes a continuing obligation on prosecutors not to formally initiate nor prosecute criminal charges that are not supported by probable cause and by the prosecutor's good faith belief in the defendant's guilt for the offense charged. This does not preclude a prosecutor from participating in an investigation in an effort to determine if charges should be brought or maintained.

[4] 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.

[5] 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.

[6] [RESERVED]

### **Comparison to former Ohio Code of Professional Responsibility**

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.

### **Comparison to ABA Model Rules of Professional Conduct**

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 (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. A new division (f) regarding a prosecutor's post-conviction responsibilities to disclose newly discovered exculpatory evidence has been included.
- Division (g) has been added regarding a prosecutor's post-conviction responsibilities to remedy a conviction of an innocent person.