

Sup.Ct.Rules, Rule 8, RPC 3.8

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.

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.