

Special Ethics  
for  
Prosecutors

RPC 3.8

# RPC 3.8

A 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;

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A prosecutor in a criminal case shall:

- 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 reasonably believes:
  - (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 (3) there is no other feasible way to obtain the information.

# RPC 3.8

A prosecutor in a criminal case shall:

- (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.

# RPC 3.8

A prosecutor in a criminal case shall:

- (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.]

# RPC 3.8

A prosecutor in a criminal case shall:

- (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.

# RPC 3.8

## Comments:

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”

# NDAA Standards

## 1-1.1 Primary Responsibility

“The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime are respected.”

Commentary: “A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. . . . A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole.”

# RCW 9.94A.411

## (1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

- (a) Contrary to Legislative Intent
- (b) Antiquated Statute
- (c) De Minimis Violation
- (d) Confinement on Other Charges
- (e) Pending Conviction on Another Charge
- (f) High Disproportionate Cost of Prosecution
- (g) Improper Motives of Complainant
- (h) Immunity
- (i) Victim Request

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

# RCW 9.94A.411

(2) **Decision to prosecute.**

(a) **STANDARD:**

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder. With regard to offenses prohibited by RCW [9A.44.040](#), [9A.44.050](#), [9A.44.073](#), [9A.44.076](#), [9A.44.079](#), [9A.44.083](#), [9A.44.086](#), [9A.44.089](#), and [9A.64.020](#) the prosecutor should avoid pre-filing agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW [9.94A.670](#).

Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

# RCW 9.94A.411

## **(b) GUIDELINES/COMMENTARY:**

### **(i) Police Investigation**

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following: the interviewing of all material witnesses, the completion of necessary lab tests, the obtaining, in accordance with constitutional requirements, of the suspect's version of events.

### **(ii) Exceptions**

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete if:

- (A) Probable cause exists to believe the suspect is guilty; and
- (B) The suspect presents a danger to the community or is likely to flee if not apprehended; or
- (C) The arrest of the suspect is necessary to complete the investigation of the crime.

# RCW 9.94A.411

## **(b) GUIDELINES/COMMENTARY:**

### **(iii) Investigation Techniques**

The prosecutor should be fully advised of the investigatory techniques that were used in the case investigation including:

- (A) Polygraph testing;
- (B) Hypnosis;
- (C) Electronic surveillance;
- (D) Use of informants.

### **(iv) Pre-Filing Discussions with Defendant**

Discussions with the defendant or his/her representative regarding the selection or disposition of charges may occur prior to the filing of charges, and potential agreements can be reached.

### **(v) Pre-Filing Discussions with Victim(s)**

Discussions with the victim(s) or victims' representatives regarding the selection or disposition of charges may occur before the filing of charges. The discussions may be considered by the prosecutor in charging and disposition decisions, and should be considered before reaching any agreement with the defendant regarding these decisions.

## 3.8 Generally

- A prosecutor does not represent the victims in a criminal trial. According to comment 1 of Rule of Professional Conduct (RPC 3.8) "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." Thus, **by stating that he represented law enforcement, the family and friends of the victims, and the victims themselves, the prosecutor misrepresented to the jury that he was an advocate for law enforcement and the victims and he misstated his duties under RPC 3.8.**
- Div. II Held: Prosecutors had a duty to secure a verdict free of prejudice and based on reason. A prosecutor's appeal to the jury's passion and prejudice violated that duty. The judgment was reversed and case was remanded for a new trial.

*State v. Pierce*, 169 Wn. App. 533, 558, 280 P.3d 1158 (2012)

**RPC 3.8(A)- Refrain from prosecuting a charge** that the prosecutor knows is not supported by probable cause

- 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).

- Div. Two holds that the trial court erred in refusing to accept an agreed order dismissing the State's sexually violent predator petition and granting defendant an unconditional release where the State felt it could not meet its burden and proceed with sufficient evidence.

*In re Det. of Cherry*, 166 Wn. App. 70, 77, 271 P.3d 259 (2012).

**RPC 3.8(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;

- RPC 3.8(C)- **not seek to obtain** from an unrepresented accused **a waiver** of important pretrial rights, such as the right to a preliminary hearing;
  - 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.

**RPC 3.8(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;

The Supreme Court affirmed the Disciplinary Board's finding that Deputy Prosecutor Bonet did offer to dismiss the charges against Yoder as an inducement to Yoder to not testify and that this conduct violated multiple RPCs.

*In re Discipline of Bonet*, 144 Wn.2d 502, 507, 29 P.3d 1242 (2001)

## RPC 3.8(D) (cont.)

- Washington ethics rule imposes a broader duty on prosecutors than the constitution.
- Defendant's conviction for second degree murder was proper because, although the State failed to disclose the fact that a forensic scientist who analyzed certain DNA evidence used in defendant's case had been fired for incompetence, and although the evidence was both favorable to defendant and suppressed by the State in violation of its Brady obligations, the defense failed to present any evidence in support of its claim that contamination was a real possibility; therefore the new evidence was not material.
- This does not relieve prosecutors of the **obligation to disclose impeachment evidence that might not reach "materiality" threshold under Brady**. Such suppression would not violate the constitution, but it might well violate a prosecutor's professional obligations.
- There is at least one Court of Appeals has held that the prosecution's failure to disclose potentially exculpatory evidence may violate an RPC governing disclosure obligations, **even if the evidence ultimately proves nonmaterial under a Brady analysis**. *In re Andrew J. Kline*, 113 A.3d 202 (D.C. 2015).

*State v. Davila*, 184 Wn.2d 55, 79, 357 P.3d 636 (2015).

# BRADY

Under *Brady*, the prosecution has a duty to seek out exculpatory and impeaching evidence held by other government actors. Thus, the prosecution “suppresses” evidence, for the purposes of *Brady*, even if that evidence is held by others acting on the government’s behalf. In *Davila*, the Crime Lab is an arm of the State whose knowledge is imputed to the prosecution for the purposes of *Brady*.

**RPC 3.8(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 an 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;

- RPC 3.8(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.

**RPC 3.8(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.

Questions?  
Comments?