

Disciplinary Rules and Procedures Committee
Meeting of February 24, 2021
Via Zoom

MINUTES

Chair Harold Michael Bagley called the meeting to order at 11:04 a.m.

Attendance:

Committee members: Harold Michael Bagley, R. Gary Spencer, Erin H. Gerstenzang, Patrick H. Head, R. Javoyné Hicks, William D. James, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, Patrick E. Longan, Jabu Sengova, and William Thomas, Jr.

Staff: Damon Elmore, Paula J. Frederick, Jenny K. Mittelman, William D. NeSmith, III, and Kathya S. Jackson.

Guests: Supreme Court Justice Peterson, Supreme Court Deputy Clerk Tia Milton, Acting United States Attorneys, Peter Leary, Stacy Ludwig, and Kirk Erskine, United States Senior Litigation Counsel Charysse Alexander, District Attorney Sherry Boston and Robert W. Smith, Jr., General Counsel for Prosecuting Attorneys' Council of Georgia.

Approval of Minutes:

The Committee approved the Minutes from the January 8, 2021 meeting.

Action Item:

Rule 3.8

Sherry Boston presented the Georgia District Attorneys' version of Rule 3.8. Charysse Alexander presented the Georgia United States Attorneys' Office's version of Rule 3.8. The Committee thoroughly discussed the differences between the two versions. By unanimous vote, the Committee adopted the Georgia District Attorneys' version of Rule 3.8. Rule 3.8 as approved is attached.

The meeting adjourned at 12:10 p.m.

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~~ comply with Rule 4.2.
- 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.
- h. promptly disclose new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted to an appropriate court or authority. If the conviction was obtained in the prosecutor's jurisdiction, the prosecutor shall promptly disclose that evidence to the defendant unless a court authorizes delay and 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.

- i. seek to remedy a conviction obtained in the prosecutor's jurisdiction when the prosecutor knows of clear and convincing evidence establishing that a defendant did not commit the offense.

The maximum penalty for a violation of this rule is a ~~public reprimand~~ disbarment.

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.

[6] Reserved

[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 (h) 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 (h) 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 (i), 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 (h) and

(i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.