

Alabama Rules of Professional Conduct

Advocate

Rule 3.8.

Special Responsibilities of a Prosecutor.

(1) 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 from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Not willfully 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, 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) Exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6; and

(2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:

(a) Notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and

(b) To the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Comment

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. Although Alabama has not adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, many jurisdictions have, and the ABA Standards, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense, should be reviewed and used in interpreting the requirements of Rule 3.8, except, of course, when Rule 3.8 would obviously conflict with the ABA Standards of Criminal Justice Relating to the Prosecution Function. 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.

Paragraph (1)(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 accused who has knowingly waived the rights to counsel and silence.

Paragraph (1)(d) imposes an ethical responsibility that ordinarily already exists. The disciplinary standard is limited to a willful failure to make the required disclosures. The exception in paragraph (1)(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.

Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law.

Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.

Comparison with Former Alabama Code of Professional Responsibility

Rule 3.8 has no counterpart in the prior Alabama Code of Professional Responsibility; however, ABA Model DR 7-103(A) provided that a “public prosecutor... shall not institute... criminal charges when he knows or it is obvious that the charges are not supported by probable cause.” DR 7-103(B) provides that “[a] public prosecutor... shall make timely disclosure... of the existence of evidence, known to the prosecutor... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”