

# Rule 3.8. Special Responsibilities of a Prosecutor.

## Colorado Court Rules

### Colorado Rules of Professional Conduct

#### Advocate

As amended through Rule Change 2022(06), February 24, 2022, effective July 1, 2022

### Colo. R. Prof'l. Cond. 3.8

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) 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) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by statute, rule, or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it;
- (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 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, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c) or other law, 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.

**(g)** When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

- (1) disclose that evidence to an appropriate court or prosecutorial authority, and
- (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority
  - (A) disclose the evidence to the defendant, and
  - (B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

*RPC 3.8*

(f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (g) and (h) added and adopted, comment [1] amended and adopted, and comment [3A], [7], [7A], [8], [8A], [9], and [9A] added and adopted June 17, 2010, effective July 1, 2010; (f) and comment [5] amended and effective February 10, 2011; amended and adopted by the Court, En Banc, 10/14/2021, effective immediately; amended and adopted by the Court, En Banc, February 24, 2022, effective 7/1/2022.

**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, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action 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 are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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.*

[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 seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant 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 disclosure obligations in paragraph (d) are not limited to information that is material as defined by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Instead, paragraph (d) imposes a duty on a prosecutor to make a disclosure irrespective of its expected effect on the outcome of the proceedings. A finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. See Preamble and Scope [20]. Paragraph (d) requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information in light of case-specific factors such as the status of plea negotiations, the imminence of a critical stage in the proceedings, whether the information relates to a prosecution witness who will be called to testify at the next hearing, and whether the*

*information pertains only to credibility or negates the guilt of the accused. 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 and that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. The prosecutor's duty to disclose information pursuant to paragraph (d) continues throughout the prosecution of a criminal case and the prosecutor should notify agencies known to be involved in the case of this continuing obligation. The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.*

*[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.*

*[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 the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). 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 condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).*

*[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.*

*[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 (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. 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, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.*

*[7A] What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.*

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable ( see C.R.S. §18-1-601 et seq. and 18 U.S.C. §2 ), but which those others did not commit, then the prosecutor must take steps in the appropriate court. 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.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

[10] The special responsibilities set forth in Rule 3.8 are in addition to a prosecutor's ethical obligations contained in the other provisions of these Rules of Professional Conduct.

*ANNOTATION* Annotator's note. Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. *U.S. v. Colo. Supreme Court*, 988 F. Supp. 1368 (D. Colo. 1998), *aff'd*, 189 F.3d 1281 (10th Cir. 1999). Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. *In re Attorney C*, 47 P.3d 1167 (Colo. 2002). Violation of paragraph (d) requires *mens rea* of intent. *In re Attorney C*, 47 P.3d 1167 (Colo. 2002). *Cases Decided Under Former DR 7-103*. While the prosecutor may strike hard blows, he is not at liberty to strike foul ones, for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *People v. Walker*, 180 Colo. 184, 504 P.2d 1098 (1972). Prosecutor's zealous prosecution of a case is not improper. *People v. Marin*, 686 P.2d 1351 (Colo. App. 1983). A prosecutor's duty is to seek justice, not merely to convict. *People v. Walker*, 180 Colo. 184, 504 P.2d 1098 (1972); *People v. Drake*, 841 P.2d 364 (Colo. App. 1992). If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and

*opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992). There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt or reduce his punishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992). Prosecutor should see that justice is done by seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973). No evidence proving defendant's innocence shall be withheld from him. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972). A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973). The district attorney has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).*

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