

Joint Committee on Attorney Standards

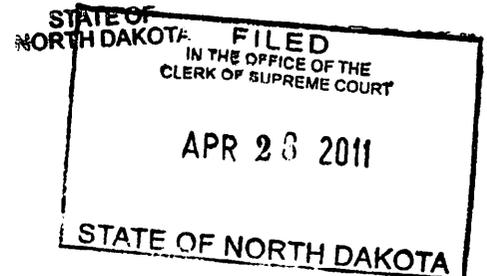
North Dakota Supreme Court
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Hon. Michael G. Sturdevant, Chair
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Chief Justice
Supreme Court

APR 23 2011

April 26, 2011



Honorable Gerald W. Vandewalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard Ave
Bismarck, ND 58505-0530

Re: Proposed Amendments to Rule 3.8, Rules of Professional Conduct - Special Responsibilities of a Prosecutor

Dear Chief Justice Vandewalle:

The Joint Committee on Attorney Standards recently completed work on amendments to Rule 3.8 of the Rules of Professional Conduct which govern the special ethical obligations of prosecutors. The Committee's initial consideration of rule amendments was in response to amendments made to the ABA Model Rule. The ABA amendments created new subparagraphs (g) and (h), and related comments, to describe a prosecutor's ethical obligations upon learning of evidence indicating a defendant had been convicted of an offense the defendant did not commit.

Following the Joint Committee's initial discussion of the ABA amendments, the ND State's Attorneys Association submitted proposed changes to the ABA amendments and suggested additional changes to our current rule, particularly with regard to paragraph (c). The Committee rejected some of the Association's proposed changes to the ABA language but tentatively approved amendments based on the ABA language and some revisions suggested by the Association. The Committee then sought comments on the amendments from ND Association of Criminal Defense Lawyers, the Commission on Legal Counsel for Indigents, and Legal Services of North Dakota. NDACDL and Legal Services submitted comments and suggested changes to the amendments to address specific concerns. Following review of the suggested changes, the Committee ultimately approved amendments to paragraph (c) that indicate permissible kinds of communications when a person is charged with a misdemeanor, infraction, or traffic offense and that also describe the kinds of contacts that are prohibited if the person is charged with a felony.

I would note that during the Joint Committee's consideration of the proposed amendments to create new subparagraphs (g) and (h), state's attorney representatives raised a specific concern regarding N.D.C.C. Section 27-13-12. The statute imposes a criminal penalty and license forfeiture in circumstances in which an attorney who served as a prosecutor in a case subsequently indirectly or directly advises, represents, or receives compensation from the defendant in the same case. There was concern that this statute may conflict in some manner with the ethical obligation imposed under new subparagraphs (g) and (h) that a prosecutor take certain actions upon learning of evidence that a defendant was wrongly convicted. The Joint Committee noted the concern but generally concluded that subparagraphs (g) and (h) do not require a prosecutor to advise, represent, or receive compensation from a defendant and, therefore, likely do not implicate Section 27-13-12.

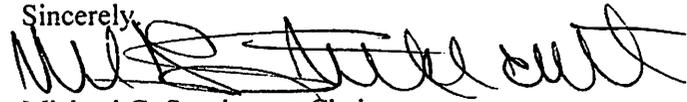
The Joint Committee approved the amendments for submission to the Supreme Court pending review and comment

by the Board of Governors. Under Administrative Rule 38, Section 3B, the Committee is required to submit its recommendations to the Board for review and comment. At its recent April 16 meeting, the Board reviewed the proposed amendments and voted to take no position with respect to the amendments.

On behalf of the Joint Committee, I am pleased to submit the proposed amendments to Rule 3.8 regarding paragraph (c) and new paragraphs (g) and (h) and related comment changes to the Supreme Court for its consideration.

If you should have any questions concerning the Joint Committee's recommendation, please contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Sturdevant", written over a horizontal line.

Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

MGS/

cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje

JOINT COMMITTEE ON ATTORNEY STANDARDS - PROPOSED AMENDMENTS

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

1 The prosecutor in a criminal case shall:

2 (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable
3 cause;

4 (b) make reasonable efforts to assure that the accused has been advised of the right to, and
5 the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

6 (c) ~~not seek to obtain from an unrepresented accused a waiver of important pretrial rights,~~
7 ~~such as the right to a preliminary hearing; when communicating with an unrepresented person:~~

8 (1) charged with a misdemeanor, infraction, or traffic offense be permitted to discuss the
9 matter, provide information regarding settlement, and negotiate a resolution that may
10 include a waiver of constitutional and statutory rights;

11 (2) charged with a felony, unless the defendant has been permitted by the court to
12 represent him or herself without benefit of counsel;

13 (i) avoid any discussions with the defendant regarding decisions, including
14 advising the defendant not to obtain counsel, whether to accept or reject a
15 settlement offer, whether to waive important procedural rights, or how the
16 tribunal is likely to rule in the case; and

17 (ii) refrain from assisting the defendant in the completion of forms for the waiver
18 of a preliminary hearing or jury trial; and

19 (iii) make any settlement offer in writing.

20 (d) disclose to the defense at the earliest practical time all evidence or information known
21 to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
22 connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating
23 information known to the prosecutor, except when the prosecutor is relieved of this responsibility
24 by a protective order of the tribunal;

25 (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence

1 about a past or present client unless the prosecutor reasonably believes:

2 (1) the information sought is not protected from disclosure by any applicable
3 privilege;

4 (2) the evidence sought is essential to the successful completion of an ongoing
5 investigation or prosecution; and

6 (3) there is no other feasible alternative to obtain the information;

7 (f) except for statements that are necessary to inform the public of the nature and extent of
8 the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making
9 extrajudicial comments that have a substantial likelihood of heightening public condemnation of the
10 accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees
11 or other persons assisting or associated with the prosecutor in a criminal case from making an
12 extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this
13 Rule.

14 (g) when a prosecutor knows of new, credible, and material evidence creating a reasonable
15 likelihood that a convicted defendant did not commit an offense of which the defendant was
16 convicted:

17 (1) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose
18 notice of the existence of that evidence to an appropriate tribunal and prosecuting authority,
19 and

20 (2) if the conviction was obtained in the prosecutor's jurisdiction

21 (i) promptly disclose the existence of that evidence to the defendant unless a court
22 authorizes delay, and

23 (ii) undertake further investigation or cause an investigation to determine whether
24 the defendant was convicted of an offense that the defendant did not commit.

25 (h) when a prosecutor knows of or receives clear and convincing evidence establishing that
26 a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not
27 commit, seek to undo the conviction.

28 **Comment**

1 [1] A prosecutor has the responsibility of a minister of justice and not simply that of an
2 advocate. This responsibility carries with it specific obligations to see that the defendant is accorded
3 procedural justice ~~and~~, that guilt is decided upon the basis of sufficient evidence, and that special
4 precautions are taken to prevent and to rectify the conviction of innocent persons. This responsibility
5 also obligates the prosecutor to promptly make available to the defense information which is known,
6 material and favorable to the defendant's position. Discovery of such information by the prosecutor
7 confers no property right in the same upon the prosecutor; rather, in the interest of seeing that the
8 truth is ascertained and all proceedings justly determined, the defense should be accorded ready
9 access to any such information. Applicable law may require other measures by the prosecutor and
10 knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could
11 constitute a violation of Rule 8.4.

12 ~~[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to~~
13 ~~challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary~~
14 ~~hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does~~
15 ~~not apply however to an accused representing himself with the approval of the tribunal. Nor does~~
16 ~~it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to~~
17 ~~counsel and silence. Paragraph (c) allows the prosecutor of a misdemeanor or lesser offense to~~
18 supply to the defendant a prepared form for a waiver of appearance and plea of guilty if the
19 defendant desires to plead guilty and does not want to appear in court to do it. A prosecutor does
20 not act as the defendant's legal advisor when responding to a defendant's request for a sentence or
21 other disposition proposal or paperwork that will facilitate entry of a guilty plea without appearing.

22 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate
23 protective order from the tribunal if disclosure of information to the defense could result in
24 substantial harm to an individual or to the public interest.

25 [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other
26 criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-
27 client relationship.

1 [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have
2 a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal
3 prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing
4 public condemnation of the accused. Although the announcement of an indictment, for example,
5 will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid
6 comments that have no legitimate law enforcement purpose and have a substantial likelihood of
7 increasing public opprobrium of the accused. Nothing in this Rule is intended to restrict the
8 statements that a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

9 [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to
10 responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's
11 office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection
12 with the unique dangers of improper extrajudicial statements in a criminal case. In addition,
13 paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or
14 associated with the prosecutor from making improper extrajudicial statements, even when such
15 persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care
16 standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement
17 personnel and other relevant individuals.

18 [7] When a prosecutor knows of new, credible and material evidence creating a reasonable
19 likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person
20 did not commit, paragraph (g) requires prompt disclosure to the appropriate tribunal and prosecuting
21 authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the
22 conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to
23 examine the evidence and undertake further investigation to determine whether the defendant is in
24 fact innocent or cause another appropriate authority to undertake the necessary investigation, and to
25 promptly, absent court-authorized delay, disclose existence of the evidence to the defendant.
26 Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be
27 made through the defendant's counsel, and, in the case of an unrepresented defendant, would
28 ordinarily be accompanied by a request to a court for the appointment of counsel to assist the

1 defendant in taking such legal measures as may be appropriate.

2 [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that
3 the defendant was convicted of an offense that the defendant did not commit, the prosecutor must
4 seek to undo the conviction. Necessary steps may include disclosure of the evidence to the defendant,
5 requesting that the court appoint counsel for an unrepresented indigent defendant and, where
6 appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit
7 the offense of which the defendant was convicted.

8 [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not
9 of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined
10 to have been erroneous, does not constitute a violation of this Rule.

11 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney
12 Standards Committee on 09/20/85 and 11/08/85; Minutes of the Joint Committee on Attorney
13 Standards on 06/08/04, 03/18/05, 06/14/05, 12/11/09, 03/19/10, 06/15/10, 09/10/10, 12/10/10; and
14 03/04/11; _____.