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Joint Committee on Attorney Standards

North Dakota Supreme Court
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STATE OF NORTH DAKOTA

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STATE OF
NORTH DAKOTA

Hon. Michael G. Sturdevant, Chair
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October 3, 2012

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 previously recommended to the Supreme Court proposed amendments to paragraph (c) of Rule 3.8 of the Rules of Professional Conduct which would have identified permissible kinds of communications when a person is charged with a misdemeanor, infraction, or traffic offense and that also described the kinds of contacts that are prohibited if the person is charged with a felony. Following a comment period and hearing on the proposed amendments, the Supreme Court referred the proposed amendments back to the Committee for further consideration in light of concerns expressed by state's attorney representatives at the hearing. At its June and September meetings, the Committee solicited additional discussion regarding the amendments and possible revisions.

Following discussion and comments concerning the amendments, the Committee approved changes in essentially three parts of the proposed amendments. Paragraph (c) (2) is revised to clarify that certain communications with an unrepresented person are prohibited unless the defendant has on the record waived the right to counsel. The previous iteration of the amendments referred to the defendant as having been permitted by the court to self-represent, which is an inapposite condition in light of the defendant's constitutionally recognized right to self-represent. Additionally, paragraph (c)(2)(i) is revised to more precisely require that a prosecutor avoid "providing advice" to the defendant. The amendments previously referred more generally to avoiding discussions with the defendant about decisions. Finally, the Committee has on several occasions discussed how an unrepresented person could be informed of collateral consequences associated with agreeing to a guilty plea. There was general agreement that prosecutors ought not be required to inform the person of the litany of possible collateral consequences. However, there was also general agreement that some indication of possible consequences would be appropriate in light of the latitude afforded prosecutors in communicating with an unrepresented person. The previous amendments required that a prosecutor, when communicating with an unrepresented person charged with a felony, must make any settlement offer in writing. This proposed provision is revised to require that the written settlement offer must include at least a general notice to the person that there may be significant consequences other than any the court may impose following a guilty plea.

At its September meeting, the Joint Committee voted to submit the revised proposed amendments to paragraph (c) of Rule 3.8, and the associated comment language, to the Supreme Court for consideration. I should note that some state's attorney representatives again expressed misgivings about the writing requirement and perceived obstacles the proposed amendments may place in the way of communicating with unrepresented defendants.

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

Sincerely,

Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

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

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;~~ when communicating with an unrepresented person:

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

(2) charged with a felony, unless the defendant has on the record waived the right to counsel:

(i) avoid providing advice to the defendant, including advising the defendant not to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights, or how the tribunal is likely to rule in the case; and

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

(3) charged with a felony, make any settlement offer in writing, which must include at least a general notice to the unrepresented person that significant consequences other than any consequences the court imposes may follow from a guilty plea.

(d) disclose to the defense at the earliest practical time 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) 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

(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 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 likelihood that a convicted defendant did not commit an offense of which the defendant was convicted:

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

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

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

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

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

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. This responsibility also obligates the prosecutor to promptly make available to the defense information which is known, material and favorable to the defendant's position. Discovery of such information by the prosecutor confers no property right in the same upon the prosecutor; rather, in the interest of seeing that the truth is ascertained and all proceedings justly determined, the defense should be accorded ready access to any such information. 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] ~~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 representing himself 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~~ Paragraph (c) allows the prosecutor of a misdemeanor or lesser offense to supply to the defendant a prepared form for a waiver of appearance and plea of guilty if the defendant desires to plead guilty and does not want to appear in court to do it. A prosecutor does not act as the defendant's legal advisor when responding to a defendant's request for a sentence or other disposition proposal or paperwork that will facilitate entry of a guilty plea without appearing.

[3] 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.

[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 lawyer-client relationship.

[5] Paragraph (f) supplements Rule 3.6, 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 that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Rule is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(b) or 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 prompt disclosure to the appropriate tribunal and prosecuting authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or cause another appropriate authority to undertake the necessary investigation, and to promptly, absent court-authorized delay, disclose existence of the evidence 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 (h), 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 undo 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 paragraphs (g) and (h), though subsequently determined to be erroneous, does not constitute a violation of this Rule.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 09/20/85 and 11/08/85; Minutes of the Joint Committee on Attorney 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~~ 03/04/11, 06/13/12, and 09/14/12.