



# Va. R. Sup. Ct. 3.8

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As amended through August 18, 2022

Rule 3.8 - Additional Responsibilities Of A Prosecutor

**A lawyer engaged in a prosecutorial function shall:**

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;**
- (b) not knowingly take advantage of an unrepresented defendant;**
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;**
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and**
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial**

[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.

[1a] Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.

[1b] Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court's usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of *Code of Virginia* Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.

[2] At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing *pro se* with the ultimate approval of the tribunal. Where an accused does appear *pro se* before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the

nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are knowingly made and voluntary.

[3] The qualifying language in paragraph (c), i.e., "... after a party has been charged with an offense," is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term "encourage" in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a 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] Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.

### Virginia Code Comparison

With respect to paragraphs (a), DR 8-102(A)(1) provided that a "public prosecutor or other government lawyer shall ... refrain from prosecuting a charge that [he] ... knows is not supported by probable cause."

Paragraph (b) is derived from DR 8-102(A)(2) which prohibited prosecutors from inducing an unrepresented defendant to

to the defendants.

Paragraph (d) is similar to DR 8-102(A)(4), but requires actual knowledge on the part of prosecuting lawyers that they are in possession of exculpatory evidence as opposed to simply being in knowing possession of evidence that may be determined to be of such a nature, although acknowledging that such disclosure may be affected by court orders.

Paragraph (e) has no direct counterpart in *Virginia Code*, but it generally parallels DR 7-106 (B), now Rule 3.6(b), which directed that a lawyer "exercise reasonable care to prevent his employees and associates from making a [prohibited] extrajudicial statement."

Paragraph DR 8-102(A)(5), which prohibited the subpoena of an attorney as a witness in a criminal prosecution regarding a present or past client without prior judicial approval, has been deleted in light of prevailing case law.

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#### ***Committee Commentary***

*The Committee retitled this Rule "Additional Responsibilities of a Prosecutor," rather than "Special Responsibilities of a Prosecutor," as in the ABA Model Rule, to make it clear that the Rule's provisions are in addition to the obligations of the attorney acting in a prosecutorial role as set forth in the remaining Rules. The Committee also thought it appropriate to address the proscriptions of the Rule to any "lawyer engaged in a prosecutorial function" as opposed to just a "prosecutor in a criminal case" so as to eliminate any confusion on the part of any lawyer (such as a County Attorney or assistant Attorney General) who may be acting in the role of a prosecutor without being a member of a Commonwealth's Attorney's office.*

*proscription set forth in the Virginia Code ("shall refrain") so as to make clear that the prosecutor should not even file a charge if it is not supported by "probable cause" and should certainly not pursue a charge to trial, even if initially supported by the minimum standard of "probable cause," if it cannot reasonably be expected to survive a motion to strike the evidence or motion for judgment of acquittal. The original ABA Model Rule language only proscribed "prosecuting a charge that... is not supported by probable cause."*

*The Committee did not include the language of ABA Model Rule 3.8(b) in which the prosecutor is required to "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" because the Committee did not believe that such an obligation should formally be placed on the lawyer-prosecutor.*

*The Committee concluded that the language of proposed paragraph (b) more accurately focuses on the type of prosecutorial conduct that is prohibited, rather than the provision of the existing DR and ABA Model Rule 3.8(c) which address the waiver of important procedural rights which, in fact, can be knowingly waived as the Comment attempts to explain. In addition, the Committee felt that the example of the waiver of such a procedural right as that of a preliminary hearing as set forth in the existing DR and ABA Model Rule is misleading at best, since it is exceedingly rare that a defendant charged with a felony would insist on proceeding pro se and then agree to waive the hearing.*

*The Committee felt that it was appropriate to strengthen the provisions of DR 8-102(A)(3) to provide that the lawyer acting in a prosecutorial function shall not "instruct or encourage a person to withhold information from the defense" as opposed to the more subjective and less enforceable "shall not discourage." In addition, in recognition of the reality of the*

*"party."*

*The Committee felt a change from existing DR 8-102(A)(4) concerning the disclosure of exculpatory evidence to the defense was appropriate by clarifying that it would apply only to that evidence which the prosecutor knows is exculpatory as opposed to a more subjective analysis of evidence which may be in the knowing possession of the prosecutor but which he does not have reason to believe would be exculpatory.*

*The Committee felt that the language of the ABA Model Rule which speaks in terms of "exercising reasonable care" to prevent others involved in a prosecution from making prohibited extrajudicial statements placed an unreasonable affirmative duty on the attorney acting in a prosecutorial role whereby the attorney would be held responsible for attempting to control the conduct of others.*

*Finally, the Committee decided to recommend deletion of DR 8-102(5) prohibiting the subpoena of an attorney as a witness in a criminal matter involving a present or former client without prior judicial approval because of prevailing case law and judicial fiat (the United States District Court for the Eastern District of Virginia) which does not require same.*

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