The Prosecutor

# The Special Responsibilities of the Prosecutor: *Protecting the Accused's Right to Counsel, Interaction with the Unrepresented Defendant, and Subpoenaing the Defense Counsel*

By Hans P. Sinha and Devon Dennis

**This is the third of a series** of articles discussing the special ethical and professional rules that govern the role of the prosecutor. In particular, this series of articles has focused upon the eight paragraphs of Rule 3.8—*The Special Responsibilities of a Prosecutor* of the Model Rules of Professional Conduct. The first article appeared in October 2007 and examined Rule 3.8(a)[1] and the area where the prosecutor's discretion is arguable at its greatest: her screening and charging power. The second article appeared in February 2008 and delved into one of the most contentious areas of the role of the prosecutor: her duty to disclose exculpatory material to the defense pursuant to rule 3.8(d).[2] Having examined the charging decision and the requirement to turn over exculpatory material, we turn now to 3.8(b)—the prosecutor's responsibility to ensure that the accused's right to counsel has been fulfilled, and 3.8(c)—the prohibition on a prosecutor to seek to obtain a waiver of important pretrial rights from the accused. The article closes with a look at 3.8(e)—the rule governing a prosecutor's use of the grand jury in subpoenaing a lawyer. As with the previous articles, the focus is on the Model Rule language and individual state deviations from the Model Rule, the thinking being that there is a benefit to all prosecutors to know not only what

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their particular state rule holds, but also how it differs from the Model Rule and how other states have addressed the same issue.

Although paragraphs (b), (c) and (e) may not seem as crucial to a prosecutor as paragraphs (a)—charging, and (d)—exculpatory material, considering that they, like all paragraphs of Rule 3.8 fall under the Rule's mandatory *"shall"* imperative, a prosecutor needs to be aware of duties that arise under these sections of the Rule as well. And, unlike the rules governing charging and the disclosure of exculpatory material, areas that prosecutors instinctively know what the right course of action is—do not charge unless you at a minimum have probable cause and err on the side of disclosure in turning over exculpatory material—the positive and mandatory duties imposed upon a prosecutor in relation to a defendant's right to counsel under Rule 3.8(b) are not as obvious. Similarly, the prohibitions imposed by 3.8(c) and (e) are well worth reviewing if for no other reason than that erring in these subjects, as in all areas governed by Rule 3.8, may result in ethical charges being brought against a prosecutor.

The fourth and final article in this series will appear in the next issue of *The Prosecutor*. That article discusses the remaining sections of Rule 3.8 beginning with 3.8(f)—what a prosecutor may and may not say in statements outside of court. This is an issue that arises on a daily basis across the nation. While the prosecutor as a public official and the chief law enforcement officer in her jurisdiction has a duty to keep the public informed, doing so in an improper way may not only open up the prosecutor to ethical charges, but also to having her shield of prosecutorial immunity stripped away in a subsequent civil proceeding.

The final issue to be addressed is the prosecutor's duty to take action in the realm of wrongful convictions. While the requirement that a prosecutor seek to remedy wrongful convictions has always been part of a prosecutor's overarching duty as a Minister of Justice,[3] the American Bar Association has sought to codify these duties in Rule 3.8. Thus 3.8(g) and 3.8(h) spell out what these duties, as envisioned by the ABA, are. Although sections (g) and (h) have only been adopted by three states as of now, considering the current public perception of a prevalence of wrongful convictions, and the fact these sections will likely soon be incorporated in most states' version of Rule 3.8, it behooves all prosecutors to know what the Model Rule mandates in this regard.

Although the fourth article will be the final article of this series on Rule 3.8, no look at a prosecutor's ethical and professional duties is complete without a discussion of prosecutorial immunity. The two issues are inexplicably linked, with the Supreme Court noting that it is precisely because prosecutors make themselves amenable to professional discipline under Rule 3.8 that we as a society are willing to grant them this extraordinary personal protection.[4] Although the Supreme Court has held the line on this vital protection of the American prosecutor system, it would be naïve to think that the battle is over in this regard. Thus, an article examining the historical context and current extent of prosecutorial immunity will follow the final article on Rule 3.8.

## Rule 3.8(b)—The Prosecutor's Duty to Protect the Accused's Right to Counsel

Model Rule 3.8(b) mandates that a prosecutor shall "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."[5] Thirty-seven states have adopted the Model Rule version of section (b) in its entirety, reflecting a manifest recognition of the importance of an accused's Sixth Amendment right to counsel and the prosecutor's duty to ensure such rights are upheld. The states which have adopted the Model Rule language in this regard are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington and West Virginia.[6] California has also adopted the Model Rule language in its proposed but not yet enacted rule.[7] As noted below, the Model Rule does not discuss section (b) in the comments. Out of the Model Rule states, (and counting California in this category), two states—California and Michigan, do provide some additional guid-

ance in their comments. Five states—Georgia, Texas, Virginia, Wisconsin and Wyoming have adopted versions different from the Model Rule. None of these states differ in substance from the Model Rule. Rather, as is often the case with jurisdictions that have decided to go it their own way, they instead provide some additional guidance to their prosecutors. And, in doing so, they also help illuminate to an extent the overall purpose of the Model Rule. Finally seven jurisdictions—the District of Columbia, Florida, Hawaii, Maine, New York, Ohio and Oregon have not adopted the equivalent of the Model Rule duty for prosecutors to ensure that an accused's Sixth Amendment right to counsel is protected.

## Reasonable Effort

The comments to the Model Rule do not include a discussion further illuminating the meaning of section (b). The positive mandate for prosecutors to make reasonable efforts to ensure that the accused has been informed of the right, procedure for obtaining counsel, and as given a reasonable opportunity to exercise these rights, thus joins the imperative in section (a) that a prosecutor must refrain from prosecuting a charge she knows is not supported by probable cause as the only parts of Rule 3.8 that are not further clarified in the comments. Presumably the ABA believed that the wording in section (b) was clear—that a prosecutor must make reasonable efforts to assure an accused's right to counsel has been fulfilled. Certainly on a large scale, this duty falls under a prosecutor's over-reaching Minister of Justice duty: No prosecutor could or would stand silently or idly by if in her jurisdiction those accused of crimes were denied their Sixth Amendment right to counsel on a *systemic* basis. Similarly, nor could a prosecutor laboring in a system where these rights were uniformly provided, stand silently or idly by if she observed that in a *particular* instance, an accused had not been advised of the right and procedure for obtaining counsel and or denied a reasonable opportunity to obtain counsel. While the former instance falls under the prosecutor overall duties as a Minister of Justice and the chief law enforcement officer in her jurisdiction, the latter would also entail the prosecutor's advocate duties: No prosecutor wants to see her conviction reversed on appeal due to something as basic as a denial of the right to counsel for the accused. If nothing else, as with any retrial, the defendant gains an advantage and the victims are re-victimized one more time in court. In this regard, section (b) merely affirms what all prosecutors know—the accused has a constitutional right to counsel, and such a right is meaningless unless the accused has been, as the rule holds, advised of both the right and the procedure for exercising it, and given a reasonable opportunity to do so. However, what section (b) also does, is to in essence transfer a responsibility that *in practice* lies initially with the police and subsequently with the judiciary, into an *ethical mandatory positive* duty on the part of the prosecutor.

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While there is nothing wrong with such a rule per se—presumably the fact the large majority of jurisdictions have adopted the rule verbatim speaks to an acceptance and approval of the rule—a rule that both incorporates a reasonable (here in terms of "reasonable efforts") standard, and an imperative (here expressed in the "shall" imperative of Rule 3.8 as a whole) could presumably, if not ideally, have provided additional guidance. Possibly recognizing this, the last jurisdiction to consider adopting the Model Rules—California, has done so. Thus, the comments to the proposed California rule note that "'[r]easonable efforts' include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining counsel and taking appropriate measures if this has not been done."[8] If nothing else, California equates the duties imposed in section (b) with not only ascertaining whether a defendant's right to counsel have been fulfilled, but also with taking action to remedy the situation if such is not the case. There is no reason to believe that the Model Rule, or any of the jurisdictions adopting the Model Rule language, or the states with their own language, would expect anything less. Clearly "reasonable efforts" has to be

equated with some action to remedy an inappropriate situation. The comment to the Michigan rule also implicitly accepts this view by noting that "the obligation is discharged if the prosecutor has taken reasonable and appropriate steps to assure that the defendant's rights are protected."[9] As the Model Rule definition makes clear, *reasonable* "denotes the conduct of a reasonably prudent and competent lawyer."[10] As discussed above, no reasonable prosecutor would *not act* if such a fundamental flaw as a denial of counsel to a defendant arose in her jurisdiction.

## When and to Whom Does Duty Apply

Another issue left unresolved by the language of the rule itself is when does the duty espoused in section (b) attach? Again, the California proposed rule states the obvious in this regard—"[p]aragraph (b) does not apply where there is no right to counsel."[11] Acknowledging the obvious, the duty cannot attach if the right it is sought to protect did not exist in the first place. This would appear to hold true in any state that has adopted the Model Rule language. Thus, while Model Rule section (b) remains silent on whether a right to counsel must first exist for the section to be triggered, it makes logical sense to infer that a right must first exist before a prosecutor will be responsible for informing the suspect of that right. It would be in a sense, "putting the cart before the horse" to require a prosecutor to inform a suspect of rights which may or may not exist at some point in the future. This does not mean that a prosecutor should lower her guard in terms of ensuring that the system as a whole protects the accused's Sixth Amendment right to counsel, nor to ensure that in her specific case the right has been provided, only that if the right has not attached, ethical charges cannot be brought against the prosecutor should she have not acted.

A second issue left unaddressed by the rule language of section (b) is to whom does the duty extend? That the rule encompasses prosecutors is obvious. But what about those under her control? And since the duty is affirmative and mandatory, can a prosecutor be faulted for inaction by others in her office or by law enforcement personnel working on a case? Again, the jurisdiction that most recently examined the rule, California, provides some guidance in this regard, noting in the comments that "[t]he term 'prosecutor' in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function."[12] Michigan, which has adopted the Model Rule language verbatim, provides additional guidance, implicitly noting that a line has to be drawn where the prosecutor's control ends. Thus the comments to Michigan Rule 3.8 states that "[o]f course, not all of the individuals who might encroach upon those rights are under the control of the prosecutor. The prosecutor cannot be held responsible for the actions of persons over whom the prosecutor does not exercise authority."[13] Again, although not specifically addressed in the Model Rule language or any of the other states' rules, the Michigan and (proposed) California rule comments state the obvious in this regard: the prosecutor has a reasonable duty to ensure that all under her control abide with the duties enshrined in section (b). However, simple fairness and reasonableness also dictate that she cannot and should not be held responsible for those beyond her control.

## Texas and Wyoming – Narrowing Rule to Interrogations

The Model Rule language on its face is broad. It does not seek to limit it to the obvious sphere of specific interrogations or questioning of suspects. As such, a prosecutor should read the rule broadly and as discussed above, view it as invoking a duty to ensure that the right to counsel is fulfilled in both the systemic sense and in a particular case by case basis. Not only does the plain meaning of the word in the Model Rule dictate that the rule be interpreted in such a fashion, but so does a comparison to a more limited and specific rule versions. Thus, in comparing the Model Rule (b) language with the Texas and Wyoming equivalent sections, one can surmise the difference. Both Texas and Wyoming limit the positive duty imposed by section (b) to situations involving interrogations of an accused. The Texas rule thus states that the prosecutor shall "*refrain from conducting or assisting in a custodial interrogation of an accused* unless the prosecutor has made reasonable efforts to assure that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[14] While the last clause of

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the Texas rule is identical to the Model rule, the first clause limits the duty to instances of custodial interrogations. Wyoming's rule is similar in that it also adopts the Model rule "make reasonable efforts" clause, but also adds an initial clause that broadens the Texas limitation to include not only when the prosecutor herself interview an accused, but also when she counsels law enforcement who are about to interview an accused. The initial clause of the Wyoming rule thus holds that a prosecutor shall, "*prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused*, 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,"[15] the latter clause being the Model rule language.

Wyoming does not expand on the rule language in her comments, presumably because the language itself is clear. Texas, however, does provide some further guidance, noting first that "…a prosecutor should not initiate or exploit any violation of a suspect's right to counsel…"[16] However, Texas also makes clear that lawful questioning after knowing waivers of the right to counsel is not prohibited. In this regard, the Texas comments states that "[p]aragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel."[17] Texas, in other words, extends the obvious acknowledgement of the California proposed rule that the duty does not extend to where the right does not exist, to the equally obvious acknowledgement that if the right is waived, the duty does not forbid otherwise lawful questioning.

## Wisconsin

Wisconsin has chosen to adopt a somewhat different approach that combines the Model Rule sections (b) and (c), as well as touch upon the duty of an attorney to inform a person about the attorney's role in the matter.[18] Thus, Wisconsin Supreme Court Rule 20:3.8 (b) mandates that when a prosecutor communicates with an unrepresented person the prosecutor *shall* inform the person of "the prosecutor's role and interest in the matter."[19] Wisconsin's addition of this language is reflective of both Model Rule 4.3 and Wisconsin Rule 20:4.3, which requires attorneys to be truthful in representing themselves to unrepresented persons.

In terms of an equivalent to the Model Rule 3.8(b), however, Wisconsin addresses the issue in its section (c). However, the Wisconsin rule focuses strictly on instances when a prosecutor herself is "communicating with an unrepresented person who has a constitutional or statutory right to counsel."[20] In such a circumstance, the Wisconsin "prosecutor shall inform the person of the right to counsel and the procedure to obtain counsel and shall give the person a reasonable opportunity to obtain counsel."[21] Wisconsin's section (c), dealing with the requirements of informing an unrepresented person of their right to counsel, thus parallels the requirements of the Model Rule, and like the comments to the proposed California rule, delineate that the rule is only applicable when an unrepresented person has a statutory or Constitutional right to counsel.

Wisconsin also provides guidance in its section (d) about what a prosecutor may discuss with an unrepresented person. Presumably such a discussion would only ensue after the prosecutor has informed the person about her role and interest in the case as per Wisconsin Rule 3.8(b), about the person's right to counsel, procedure for obtaining counsel, and after she has afforded the person a reasonable opportunity to obtain counsel, as per Wisconsin Rule 3.8(c), and after the person either has declined to obtain or is not entitled to an attorney. Whatever the latter case may be, Wisconsin section (d) holds that a Wisconsin prosecutor, when dealing with such an unrepresented person, "may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights."[22] However, a Wisconsin prosecutor, other than a municipal prosecutor, may not provide legal advice, including whether to obtain counsel, accept or reject an offer, waive important procedural right, or how the tribunal is likely to rule."[23] Nor may a Wisconsin prosecutor, other than a municipal prosecutor, assist the unrepresented person in completing the guilty forms, preliminary hearing waiver form or jury waiver form.[24] While Wisconsin thus touches upon the issues covered by Model

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Rule 3.8(b) and (c) in its sections (b), (c) and (d), and does so in both a unique and somewhat more permissive manner, Wisconsin draws the line at prosecutors, other than municipal prosecutors, providing legal advice and completing guilty or waiver forms for the unrepresented person.

While Wisconsin does provide some additional leeway ("may negotiate a resolution which may include a waiver of constitutional and statutory rights") for its prosecutors, and some specific prohibitions ("shall not…provide legal advice…, or assist the person in the completion of…guilty plea forms..."), Wisconsin also makes an interesting "other than municipal prosecutors" distinction. The Wisconsin comments do not clarify why this distinction is made. However, it may be the realistic acknowledgement that municipal prosecutors, dealing with largely if not entirely lower level crimes where a liberty interest is not at stake, and where the persons accused wish to be able to resolve their cases through plea negotiations with the prosecutor, can be entrusted to aid in the resolution of such cases in a fair and expeditious manner.

Considering that Wisconsin is the only state to make this distinction, an argument could be made that Wisconsin is out of step with her sister states. However, a contrary argument could just as easily be made. In other words, while it is true that only Wisconsin has made this distinction, instead of being out of step, Wisconsin actually is simply facing the realities of municipal-like courts across the country: without prosecutors negotiating directly with the large number of otherwise law abiding citizens who come into court in an unrepresented manner and who want to resolve the matter without obtaining counsel, these courts could not function. Under Model Rule 3.8(c) [discussed in further detail below], it is unethical for a prosecutor to seek to obtain from such an unrepresented accused a waiver of an important pretrial right, such as the right to a preliminary hearing. If seeking to get an unrepresented accused to waive a statutorily provided right such as a preliminary hearing is unethical, arguably if not certainly, it would also be unethical for the prosecutor to seek to get the same unrepresented accused to waive a constitutionally guaranteed right such as the right against self-incrimination. Yet, by negotiating a plea wherein the accused in a municipal court, for example pleads guilty to the lesser charge in exchange for the prosecutor dropping the higher charges, that is exactly what has occurred—the prosecutor has obtained from the unrepresented accused a waiver of an important pretrial right. Perhaps by including the "other than a municipal prosecutor" exclusion in its 3.8(d) section, Wisconsin has recognized this reality and come to the conclusion that rather than tacitly accept a situation wherein prosecutors in municipal courts are expected to skirt a broad ethical rule in order ensure such courts operate efficiently, if at all, the better approach is to acknowledge the realities of how such courts operate, keeping in mind the specific safeguards of sections (b) and (c), and trust that Wisconsin prosecutors in fact are fair, and permit them to dispose of such lower-level cases through negotiations with unrepresented persons.

## Broad Language—Georgia and Virginia's Versions of Subsection (b)

A far cry from the detailed provisions provided in Wisconsin's version of Rule 3.8(b), both Georgia and Virginia have taken the opposite route and adopted simple and broad language for their equivalent rule sections. Georgia's version of section (b) succinctly holds that the prosecutor in a criminal case shall, "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel."[25] Georgia thus, rather then imposing a positive duty on the part of its prosecutors to ensure that the defendant's right to counsel is protected, simply mandates that prosecutors should not do anything to interfere with accused's reasonable efforts to exercise this right. In this regard, and unlike under the Model Rule, prosecutors in Georgia are thus not required to take any steps to assure the accused's counsel rights have been met, instead they are only prohibited from inhibiting an accused's efforts to exercise his rights. In this regard, the Rule also presupposes that an accused is educated and aware of his constitutional and statutory rights to counsel. At first glance this may appear to be less protective than other state versions of the Rule. However, this is unlikely to be a real issue in practice as *Miranda* requires an advice of rights prior to custodial interrogation.[26] Moreover, judicial procedure requires a knowing and intelligent waiver before plea agreements will be accepted. In practice an accused will be appraised of his rights at numerous stages of the adjudicatory process, and thus his rights will likely be sufficiently protected.

While Georgia's language is admirable for its simplicity, one needs to make note of the "*reasonable* efforts to obtain" qualification. By inserting a reasonable standard here, Georgia presumably is acknowledging that in instances where an accused uses his Sixth Amendment right to counsel as a means solely to frustrate the proceedings, the prosecutor may interject and advocate as appropriate. A situation where this could arise would, for example, be where a defendant incessantly seeks to fire his counsel pre-trial in order to gain delay. The Georgia rule seems to acknowledge that under such circumstances the prosecutor, as the advocate for the State, may ethically provide the State's position on such attempts without running afoul of the ethical duty to "refrain" from making any effort that could otherwise be interpreted as interfering with the accused's effort to obtain counsel.

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Virginia's version of Rule 3.8(b) is similarly brief and succinct, and in essence merely reaffirms the obvious, holding that "[a] lawyer engaged in a prosecutorial function shall: (b) not knowingly take advantage of an unrepresented defendant."[27] Taking advantage of an unrepresented defendant could include any number of actions involving interrogations, negotiations, or agreements. Comment 1B to the Virginia Rule articulates the policy rationale for adopting such broad language, noting that it 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."[28] The comment goes on to provide an example of behavior that would constitute a violation of this provision of Rule 3.8, "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."[29] This provision goes beyond the mere preservation of an accused's right to counsel, but will protect all rights of the accused and prevent any behavior on behalf of the prosecutor who may mislead an unrepresented person. In short, Virginia simply seems to tell her prosecutors to do the right thing at all times for the right reason.

Nevertheless, comment two to Virginia's Rule identifies that there are circumstances in which a prosecutor's actions will not be implicated. Section (b) will not be implicated if an accused executes a knowing and voluntary waiver, nor if an accused appears pro se and the court approves the negotiated settlement.[30] Thus, a Wisconsin prosecutor is still permitted to negotiate with pro se defendants, including representing the nature of the charges and the terms of any plea agreement. These comments presumably reflect an understanding that it is not only inefficient to prohibit discussions with unrepresented defendants, but that such negotiations are permissible because there are other protections such as *Miranda*, and requiring approval by the tribunal in place to preserve an accused's rights.

## States With No Comparable Provision

States that have adopted the Model Rule's language in its entirety, states which have included additional language, and states which have limited their language in order to include a broader range of prosecutorial activity have all been discussed thus far. This leaves one final category: jurisdictions that have not adopted any comparable provision. There are only seven jurisdictions that have not yet adopted a provision regarding prosecutorial advisement of an unrepresented defendant's right to counsel. Florida, Hawaii, Maine, New York, Ohio, Oregon and the District of Columbia have all determined not to include this provision among the special responsibilities of a prosecutor. Unfortunately the comments to these respective states do not shed any light on why this particular provision was not included in their state versions of Rule 3.8. It could be surmised that the provision was not included because it is subsumed within the prosecutor's role as a Minister of Justice. Comment one to the Model Rule states in pertinent part, "[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."[31] This evinces an overall recognition that a

prosecutor has duties that exceed those specifically articulated in the sections of the Rule. Perhaps these jurisdictions, recognizing this, simply believe that no further guidance is needed in this regard; their prosecutors will do the right thing for the right reason.

## Rule 3.8(c)—Not Seek Waiver of Rights from Unrepresented Accused

Subsection (c) of Rule 3.8 is a corollary to (b), in that it also deals with restrictions on prosecutors communicating with an unrepresented accused. The Model Rule states that a prosecutor shall, "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."[32] The comments to the Model Rule explain the reason and the exceptions to this rule. First the comment notes that since in some jurisdictions a defendant may waive a preliminary hearing and "thereby lose a valuable opportunity to challenge probable cause," a prosecutor should not seek to obtain waivers of "preliminary hearings or other important pretrial rights from unrepresented persons.[33] This common sense prohibition on a prosecutor in essence seeking to obtain an unfair advantage from an *unrepresented* accused goes without saying. However, there are some equally obvious exceptions to the rule, the first being that the prohibition, as the Model Rule comment makes clear, does not apply "to an accused appearing pro se with the approval of the court," and the second being that otherwise lawful questioning of an uncharged defendant who has knowingly waived his right to counsel and silence likewise is not prohibited.[34]

Just as the affirmative duty to make reasonable efforts to assure an accused has his rights to counsel protected was uniformly accepted across the nation, so has the prohibition espoused in section (c) been uniformly accepted. This can be seen by the fact that thirty-three states—Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, West Virginia and Wyoming have adopted the Model Rule language verbatim. Iowa has also adopted the Model Rule language, but adds to the Model Rule comment language an exclusion with regard to non-incarceration possible offenses. Idaho thus explains that paragraph (c) "does not apply to a defendant charged with a simple misdemeanor for which the prosecutor reasonably believes the defendant will not be incarcerated."[35] Iowa does not further explain in the comments the reasoning for this exclusion. Presumably, however, the reasoning is similar to the "other than municipal prosecutors" distinction made by Wisconsin discussed above. In other words, in the mass-defendant, lower-offense level type courts, such as municipal courts and others where jail time is not a realistic possibility, Wisconsin and Iowa, relying upon other safeguards and the Minister of Justice fairness inherent in the prosecution profession, seek to conform the ethical rules to the realities of such courts.[36]

As with section (b), there is also a contingent of states that have tweaked their section (c) language. Thus eight states: California (again in their proposed but not yet enacted rule), Massachusetts, New Jersey, Tennessee, Texas, Vermont, Virginia and Wisconsin have rules that at first glance seem to differ from the Model Rule. Tennessee, for example, simply states that a prosecutor "shall not advise an unrepresented accused to waive important pretrial rights."[37] While there arguably could be a distinction between the Model Rule language of "not seek to obtain" and the Tennessee language of "not advise," the fact that Tennessee adopts verbatim the Model Rule comment language points to the difference being more of a stylistic than substantive difference. Similarly, California has written the pro se exception of the Model Rule comment into its proposed language, holding that a prosecutor shall "not seek to obtain form an unrepresented accused a waiver of important pretrial rights *unless the tribunal has approved the appearance of the accused in propria persona*,"[38] while Massachusetts adds in her rule to the standard Model Rule prohibition on obtaining from unrepresented accused waivers of important pretrial rights, "*unless a court has first obtained from the accused a knowing and intelligent written waiver of counsel*."[39] Again, while both California and Massachusetts thus provide rule language somewhat different from the Model Rule, the underlying prohibition remains: absent pro se or court approval situations, prosecutors may not seek to obtain waivers of impor-

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tant pretrial rights from an unrepresented accused.

The comments to the proposed California rule and to the Massachusetts rule, however, do provide some additional guidance of interest to all prosecutors with regard to cooperating persons and with regard to the definition of "accused." Thus, California makes an exception to its section (c) prohibition in instances wherein prosecutors seek from an unrepresented accused "a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation,"[40] and Massachusetts explains that the term "accused" as used in its Rule 3.8(c) "does not apply until the person has been charged."[41] Presumably thus in both California and Massachusetts, prosecutors have potentially greater leeway in seeking waiver of initial pretrial rights in order to facilitate cooperating agreements.

While the Model Rule and the rules of states that have gone their own way with regard to section (c) mention "pretrial" rights, Texas has chosen to go it alone and is the only state in which the provisions of subsection (c) are also applicable to an accused's rights at trial and post-trial. Texas Rule 3.09(c) provides that a prosecutor shall, "not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights."[42] The choice of language in "initiate or encourage" arguably limits the applicability of the section somewhat, by permitting a prosecutor to accept a waiver of rights, so long as they do not initiate the discussion regarding the waiver, nor encourage it. Regardless of such an arguable nuance in the Texas rule, the inclusion of *trial* and *post-trial* rights is one that expands the scope of the provision dramatically. The expansion is not necessarily a bad thing, as it recognizes that the "important" rights exist at every stage of the adjudicatory process. Fundamental rights that may implicate an accused's life and liberty in tremendous ways are present from the beginning to the end of a criminal case. While the Model Rule and all other states have chosen to limit the scope of the provision to pretrial rights, the prosecutor's role as a Minister of Justice would necessarily require her to act ethically and dutifully with respect to a waiver of rights at any stage of the process. The inclusion of these rights within Texas's subsection (c) is consistent with these ideals. In this regard it should also be noted that New Jersey differ from the Model Rule in a similar fashion in that its section (c) prohibits the seeking of waivers of "important *post-indictment* pretrial rights."[43]

Texas also includes some unique guidance in its comments. Thus comment (4) to Texas Rule 3.09 outlines several situations in which subsection (c) is inapplicable. First, the provision does not apply to persons who knowingly, intelligently, and voluntarily waive their rights in open court, nor will it apply to those appearing pro se with approval of the court.[44] Second, the Rule is inapplicable to prosecutors who wish to advise an unrepresented person when he wishes to plead guilty and has not requested a lawyer, and is not entitled to appointed counsel.[45] However, for a prosecutor to advise an unrepresented person under such circumstances the following criteria must first be fulfilled: the advice given must be accurate; the court must have approved the prosecutor advising the accused; and the practice cannot be prohibited by any other laws, practice or procedure.[46] As we have seen in other states which have approved negotiations and advice between a prosecutor and an unrepresented accused,[47] the Texas provisions require approval of the court before such actions are taken. The Texas Rule appears to grant more leeway to prosecutors, but nevertheless balance this with oversight by the court.

The final grouping of states that have adopted language different from the Model Rule belong to Virginia and Vermont. Both these states have plain and simple language that cuts to the true purpose of any rule pertaining to an unrepresented person—do not take advantage of him and treat him fairly. Thus Vermont simply mandates that its prosecutors must "not seek to obtain *unfairly* from an unrepresented accused a waiver of important pretrial rights,"[48] while Virginia even more succinctly instructs its prosecutors to "not knowingly take advantage of an unrepresented defendant."[49] Both add the standard Model Rule pro se and lawful questioning exceptions in their comments. In addition, Virginia also includes the statement that the intent of the rule is to protect the unrepresented defendant from overzealous prosecutors discussed above with regard to section (b), while Vermont notes that its prohibition does not "forbid appropriate plea negotiations."[50]

Wisconsin closes out the category on states that have adopted rule language different from the Model Rule's section (c). As noted and discussed above under the discussion

for section (b), Wisconsin merges her discussion in this regard into three sections: (b) dealing with the duty to inform the unrepresented person about the role and interest of the prosecutor, (c) dealing with the prosecutor protecting the unrepresented person's right to counsel, and (d) dealing with when, what and under what circumstances a prosecutor may discuss and negotiate the matter with an unrepresented person.

### States With No Comparable Model Rule Version

Nine jurisdictions have no comparable version of Model Rule 3.8, subsection (c) Alaska, Georgia, Hawaii, Kentucky, Maine, New York, Ohio, Oregon, and the District of Columbia have all determined not to include a provision regarding the waiver of important pretrial rights in their version of Rule 3.8. New York, however, in essence adopts the Model Rule by referencing the Model Rule approach in its comments.[51] New York thus explains in Comment (2) that "[a] defendant who has no counsel may waive a preliminary hearing or other important pretrial rights 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."[52] Clearly, although New York did not adopt the language of the Model Rule within the text of its rule, New York nevertheless embraces the essential purpose of subsection (c) as something New York prosecutors *should* take into account when dealing with an unrepresented defendant. New York thus joins the Model Rule approach. One could also surmise that the remainder of jurisdictions that have chosen not to include the Model Rule language in their rules did so because they believed the duties imposed and prohibitions stated were implicit in a prosecutor's role as a Minister of Justice. While possibly correct, before one jumps to this conclusion, however, it behooves all prosecutors to know that there is a fundamentally contrary view.

*One could also surmise that the remainder of jurisdictions that have chosen not to include the Model Rule language in their rules did so because they believed the duties imposed and prohibitions stated were implicit in a prosecutor's role as a Minister of Justice.*

Alaska stands alone in not only choosing not to include the Model Rule section (c) language in its Rule 3.8, but also in specifying why the language is not included. While uniformity and consensus many times indicate the better approach, the divergent path may also be illuminating, if not the better approach. Considering this, Alaska's rationale deserves repeating in full, to wit:

> Alaska Rule 3.8 does not include paragraph (c) of the model rule. This paragraph would prevent a prosecutor from taking part in a legitimate interrogation of an arrested suspect. It would also prohibit a prosecutor from offering pretrial resolutions of a criminal case, such as pretrial diversion or becoming a government witness. If a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available.[53]

While Alaska is undoubtedly correct in her estimation of the logical conclusion of the Model Rule, it should be remembered that all concerns expressed in the Alaska comment have also been dealt with by other states that have adopted the Model Rule either by tweaking the Model Rule language or through wording in their comments. Thus, for example, the Model Rule comment addresses lawful questioning, Wisconsin and Iowa (arguably) discuss the pretrial resolution scenario in the context of non-incarceration level cases, California includes the cooperating witness scenario, and Vermont and Virginia focus on unfairness and simply not taking advantage of unrepresented defendants.

### Rule 3.8(e) – Using and Not Abusing the Subpoena Power of the Grand Jury

Alaska's concerns aside, few if any prosecutors would deliberately set out to violate section (c) by seeking to obtain an unfair advantage over an unrepresented defendant by having him or her waive an important pretrial right, or as per section (b) fail to rectify a court system wherein an

accused's Sixth Amendment rights are impaired or violated. Ensuring that a defendant's pre-trial and Sixth Amendment rights are protected falls within the prosecutor's over-reaching Minister of Justice duties. Pursuing every possible lead in a prosecution, however, including seeking to obtain evidence in the possession of a defense counsel, tend to fall within her advocacy role. An over-aggressive pursuit of such evidence, may lead to an incursion into the realm of attorney-client privilege—an area that we as a profession and a society view as sacrosanct. Thus Model Rule 3.8(e) mandates that when a prosecutor employs the power of the grand jury in ferreting out potential evidence by subpoenaing a lawyer, she needs to ensure that this power is used sparingly and judiciously lest she unnecessarily intrude into the sacrosanct client-lawyer relationship.

Before one delves into the text of Rule 3.8(e), one should note that this is an area where it behooves a prosecutor to take a step back from her adversarial mode and invoke her role as a Minister of Justice. In other words, by the time a prosecutor decides the time has come to employ the powers of the grand jury to subpoena a lawyer in order to obtain what she reasonably believes is evidence that lawyer is harboring, the relations between the prosecutor and the attorney has likely deteriorated into what could be termed the "sand-lot" mentality—the prosecutor sees her actions as being justified and necessary due to the real or perceived unethical, if not illegal, actions by the defense counsel in keeping evidence from the prosecution. Similarly the defense attorney views any actions by the prosecutor in subpoenaing him in order to obtain material in his possession as a heavy-handed means to intimidate him into submission while also trampling on the hallowed client-lawyer relationship. Regardless who is correct in such a situation, and likely there is some truth to both sides' *perceptions*, the prosecutor, wearing both her advocate fedora and her Minister of Justice stetson, needs to consult Rule 3.8(e) before proceeding further.

Model Rule 3.8(e) reads in its entirety:

The prosecutor in a criminal case shall:

(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;

## Model Rule Discussion

The comments to the Model Rule make clear that the purpose behind section (e) is to "limit the issuance of lawyer subpoenas in grand jury or other criminal proceedings to those situations in which there is a *genuine* need to intrude into the client-lawyer relationship."[54] The majority of states have adopted either an identical or very similar rule, possibly indicating a fairly unanimous view across the profession as to the importance of this section. In fact, the two states that deviate from the Model Rule language insert *additional* rather than less requirements upon the prosecutor.

Thus, in Alaska, Arizona, Colorado, Delaware, Georgia, Kentucky, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, Washington, Wisconsin and Wyoming, prosecutors labor under state rule 3.8(e) sections that are identical to the Model Rule. As such, before a prosecutor subpoenas a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, she must first reasonably believe that (1) the information sought is *not protected by a privilege*, (2) the information is *essential* to the successful completion of an investigation or prosecution, and (3) that there is *no other feasible means* to obtain the information.[55]

Except for affirming in the comments that the purpose behind the rule is to limit incursion into the client-lawyer relationship to those situations where there is a "genuine" need, neither the Model Rule nor the states that have adopted the Model Rule provide any further guidance. It seems, however, that the initial triggering mechanism for a prudent prosecutor contemplating issuing a subpoena for an attorney, is whether she has a *reasonable belief* that material sought will fall under realm of Rule 3.8(e). Unfortunately, the Model Rules' definition of "reasonable belief" is somewhat circuitous, noting simply that reasonable belief "denotes that the lawyer believes the matter in

*(Continued on page 34)*

question and that the circumstances are such that the belief is reasonable."[56] This lack of precise guidance arguably is not a major problem for prosecutors who are trusted to use their vast discretion on a daily basis. In fact, the Rules contemplate that lawyers as a whole, resolve "difficult issues of professional discretion…through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[57] However, in this regard a prosecutor must also keep in mind that the entire Rule 3.8 is cast in the imperative. The "shall" command of Rule 3.8 limits the prosecutor's reasonable discretion in that an imperative rule "define[s] proper conduct for the purposes of professional discipline," while rules cast in the permissive "may" "define areas under the Rules in which the lawyer has discretion to exercise professional judgment.[58] In short, as with all sections of Rule 3.8, a prosecutor should err on the side of caution. Any contemplated subpoena to a lawyer for evidence pertaining to his past or present client should automatically set off warning bells within the prosecutor's mind, compelling a careful analysis as to (1) whether a privilege would apply, (2) the evidence is essential, and (3) there is any other feasible way to obtain such evidence. This does not, of course, mean that the prosecutor needs to abandon the issuing of such a subpoena, only that before she exercises her advocacy power in this regard, she has subjected her rationale in doing so to a careful analysis under both Rule 3.8(e) and her over-arching duties as a Minister of Justice.

## Deviations from the Model Rule

In addition to the twenty-seven states that have adopted the Model Rule's version of section (e), seven states incorporate the Model Rule version with some deviations. These alternatives range from minor stylistic changes to incorporating a judicial adversarial hearing requirement as a pre-condition to the issuing of the contemplated subpoena. Minnesota, North Carolina, New Jersey and Ohio fall in the minor changes category, while in Rhode Island and Massachusetts the prosecutor must seek judicial approval as part of fulfilling her ethical duties in this regard.

Minnesota's Rule 3.8(e) tracks the Model Rule's language with the exception that it leaves out the "no other feasible alternative" requirement found in subsection (3) of the Model Rule.[59] There is no explanation in the Minnesota comments for this deviation from the Model Rules. There is, however no indication that this omission leads Minnesota prosecutors to abuse their powers to subpoena lawyers to give evidence about past or present clients. For one thing, in practical terms, once such a subpoena is issued, it will likely be met with a motion to quash and litigation in court wherein the appropriateness and need for the subpoena will be tested. It is thus only in terms of possible disciplinary matters that the absence of another feasible alternative means would come into play for Minnesota prosecutors.

North Carolina likewise adopts the Model Rule language. However, unlike Minnesota, which excises one part of the Model Rule, North Carolina adds a clause extending the prohibition from grand jury subpoenas to also "participate in the application for the issuance of a search warrant to a lawyer."[60] This addition is common sense: if the area sought to be protected by Rule 3.8(e) is client-lawyer relationship, as made clear by both the North Carolina and the Model Rule comments, then the manner with which a breach of this relationship may occur is irrelevant. The North Carolina extension thus makes perfect sense and something all prosecutors, not just North Carolina prosecutors, should bear in mind. North Carolina also adds "in connection with an investigation of someone other than the lawyer"[61] language to make clear the obvious: the provisions of Rule 3.8(e) "applies only when someone other than the lawyer is the target of a criminal investigation."[62] Although unsaid, this certainly also holds true for the Model Rule jurisdictions.

New Jersey and Ohio's versions speak towards the presumed conjunctive nature of the Model Rule version's three-partite test. Thus, while the Model Rule inserts an "and" after the second and before the third listed requirement to demonstrate that the prosecutor must reasonably believe the information is not protected by a privilege, is essential to the prosecution, *and* no other feasible alternative exists, Ohio achieves the same conjunctive requirement by simply adding "all of the following apply" before listing the privilege, essential and alternative requirements.[63]

New Jersey takes a somewhat different approach to the conjunctive three-part test by combining the Model Rule's privilege and essential subsections into one subsection and adding a disjunctive either-or. New Jersey thus seems to

adopt a somewhat stricter version wherein unless a prosecutor believes that *either* the information sought is not protected by an applicable privilege, *or* is essential to an ongoing investigation or prosecution, *and* there is no other feasible alternative, she cannot issue the envisioned subpoena.[64]

*Massachusetts in effect adopts the Rhode Island view that judicial oversight is advisable when it comes to a prosecutor issuing a subpoena to a lawyer in a criminal matter to present evidence about a past or present client.*

Rhode Island and Massachusetts round out the group of states that have deviated from Model Rule 3.8(e). However, unlike Minnesota, North Carolina, Ohio and New Jersey, Rhode Island and Massachusetts inject the judiciary into the process by mandating that prior to a prosecutor subpoenaing a lawyer, she obtain judicial approval. While Rhode Island and Massachusetts are the only states that mandate judicial involvement in this area, as noted above, once a prosecutor issues a subpoena that falls within the realm contemplated by Rule 3.8(e), it will inevitably result in a motion to quash being filed, thus having the practical effect of ending up in litigation before a judge. Rhode Island and Massachusetts have thus arguably merely codified in their version of the rule, what all states implicitly acknowledge.

Rhode Island's Rule 3.8(f)[65] thus reads in its entirety that a prosecutor in a criminal case shall "not, *without prior judicial approval,* subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship."[66] Rhode Island added this prohibition to her Rules of Professional Conduct in 2007 because of, as the Rhode Island comments make clear, the increasing incidence of grand jury and trial subpoenas directed towards attorneys."[67] The comments further provided guidance to a court reviewing what in Rhode Island presumably in effect becomes an application to the court for such a subpoena, noting that prior judicial approval should be withheld *unless*: (1) the information sought is not protected from disclosure by an applicable privilege, (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative, (3) the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter in a reasonably limited period of time, and gives reasonable and timely notice, (4) the purpose of the subpoena is not to harass the attorney or his or her client, and (5) the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information."[68]

Massachusetts in effect adopts the Rhode Island view that judicial oversight is advisable when it comes to a prosecutor issuing a subpoena to a lawyer in a criminal matter to present evidence about a past or present client. Massachusetts thus adopts verbatim the Model Rule 3.8(e) language. Massachusetts, however, puts the Model Rules' three sub-sections into one paragraph, and then adds a second paragraph that mandates not only "prior judicial approval," but also clarifies that such approval can only come "after an opportunity for an adversarial proceeding."[69]

All prosecutors, including those who practice in Model Rule jurisdictions as well as those who practice in jurisdictions that have not adopted an equivalent section to Model Rule 3.8(e), should be aware of the Massachusetts and Rhode Island judicial approval approach. While their jurisdictions may not mandate judicial approval in their rules of professional conduct, once they seek to subpoena a lawyer for evidence pertaining to the lawyer's former or present clients, chances are, as noted above, they will end up before a judge on a motion to quash regardless. The Rhode Island and Massachusetts approach of prior judicial approval is thus the likely result regardless if mandated in a state's particular rule or not. This was, for example, precisely what the Kansas Supreme Court held in a 2010 case involving a prosecutor's subpoena for the names of a lawyer's past clients. While Kansas Rule 3.8(e) mirrored the Model Rule language, and thus did not contain the prior judicial requirement of Rhode Island and Massachusetts, the Kansas Supreme Court nevertheless announced, after noting the "indispensability of [the] attorney-client privilege in the effective and efficient functioning of the administration of

justice,"[70] a rule that prosecutors must obtain prior judicial approval before issuing such subpoenas. Similarly, even in jurisdictions that do not contain an equivalent of the Model Rule 3.8(e) prohibition, prosecutors need to be aware that other laws or procedures may nevertheless require a similar judicial pre-approval procedure. It is thus very possible, and considering the importance of the attorney-client privilege in our society, arguably the better approach, that if not prior to issuance, then prior to effectuation of a prosecutor issued subpoena to a lawyer for potentially privileged information pertaining to his past or present client, the prosecutor not only engage in the three-part test spelled out in the Model Rules, but also be prepared to argue to a judicial officer why she should prevail pursuant to that argument. Her combined role as an advocate and a minister of justice compel nothing less.

## Conclusion

It is hoped that this article aids practicing prosecutors by providing an overview of three of the eight paragraphs of Rule 3.8—The Special Responsibilities of a Prosecutor. The next article will complete the overall examination of Rule 3.8 by discussing section (f)—extrajudicial statements, and (g) and (h)—the prosecutor's ongoing duty to rectify wrongful convictions.

[1] Model Rule 3.8(a) holds that a prosecutor *shall* "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Note that unless otherwise indicated, all references and cites to Rule 3.8 will be either the Model Rules of Professional Conduct or a particular state's version of Rule 3.8 of its Rules of Professional Conduct.

[2] Model Rule 3.8(d) holds that a prosecutor *shall* "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." Model Rules of Professional Conduct, Rule 3.8(d).

[3] Thus the comments to Model Rule 3.8, reads in part that "[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 rectify the conviction of innocent persons.*"

[4] *See Imbler v Pacthman*, 424 U.S. 409, 429 (1976).

[5] Model Rules of Professional Conduct, Rule 3.8(b).

[6] Note that both Iowa and Utah have substituted "ensure" for "assure" in their versions of section (b). While neither state makes it clear why they chose to substitute these transitive verbs, the minute definitional difference between "assure"—"to make safe," and "ensure"—"to make sure, certain, or safe," is arguably a difference without a distinction.

[7] As of March 2012, the proposed California rule had not yet been enacted.

[8] California Rule 3.8 (proposed), comments [1B].

[9] Michigan Rule 3.8, comments.

[10] Model Rule 1.0(h).

[11] California Rule 3.8, comments [1B].

[12] California Rule 3.8, Comments [1A].

[13] Michigan Rule 3.8, comments.

[14] Texas Rule 3.09(b), emphasis supplied.

[15] Wyoming Rule 3.8(b).

[16] Texas Rule 3.09, comments, [1].

[17] Texas Rule 3.09, comments [3].

[18] Model Rule 4.3—Dealing with Unrepresented persons hold that "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

[19] Wisconsin SCR 20:3.8(b) reads in full—"When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter."

[20] Wisconsin SCR 20:3.8(c) reads in full—"When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedure to obtain counsel and shall give that person a reasonable opportunity to obtain counsel."

[21] Wisconsin SCR 20:3.8(c).

[22] Wisconsin SCR 20:3.8(d). The first paragraph of section (d) reads in its entirety—"When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:…"

[23] Wisconsin SCR 20:3.8(d)(1). This first of two subsections of (d) provides the initial list of prohibitive matters for a prosecutor who communicates with an unrepresented person. Thus, (d)(1) states that a prosecutor shall not "otherwise provide legal advice to the person, including, but not limited to whether 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, or…"

[24] Wisconsin SCR 20:3.8(c)(2). The second subsection of (d) provides a second list of prohibitive actions, reading that the prosecutor shall not "assist the person in the completion of (i) guilty plea forms; (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial."

[25] Georgia Rule 3.8.

[26] *See, Miranda*, 384 U.S. at 444.

[27] Virginia Rule 3.8(b).

[28] Virginia Rule 3.8, comment[1b]

[29] *Id.*

[30] Id. at Comment [2].

[31] Model Rule 3.8, comment (1).

[32] Model Rule 3.8.

[33] Model Rule 3.8(c), comment [2].

[34] Model Rule 3.8(c), comment [2].

[35] Iowa Rule 3.8, comment [2].

[36] Before the authors get skewered by critics claiming that by discussing this issue a relaxation of prosecutor ethics standards is being advocated, let us state such is not the case. However, if society wants the gold standard in terms of process, adjudication, representation and yes prosecution in such courts, the authors suggest society fully fund such courts. Until then, depending upon prosecutors to arguably disregard broad ethical mandates in order to ensure the realistic functioning of such courts, and then point to ethical shortcomings on the part of the prosecutors, is simply wrong.

[37] Tennessee Rule 3.8(c).

[38] California Rule 3.8(c).

[39] Massachusetts Rule 3.8(c).

[40] California Rule 3.8, comment [2].

[41] Massachusetts Rule 3.8, comment [2].

[42] Texas Rule. R. Prof Conduct 3.09.

[43] New Jersey Rule 3.8(c).

[44] Texas Rule. R. Prof Conduct 3.09, comment [4].

[45] *Id*.

[46] *Id*.

[47] Such as California and Massachusetts.

[48] Vermont Rule 3.8(c), emphasis supplied.

[49] Virginia Rule 3.8(b).

[50] Vermont Rule 3.8, comment[2].

[51] New York Rule 3.8, comment [2].

[52] *Id*.

[53] Alaska K, Rule 3.8, comments.

[54] Cite to Model Rule 3.8, comment [4] (emphasis supplied).

[55] Paraphrasing Model Rule 3.8(e).

[56] Model Rule 1.0(i), Terminology

[57] Model Rules, Preamble, [9].

[58] Model Rules, Scope, [14]

[59] See Minnesota Rule 3.8(e).

[60] North Carolina Rule 3.8(e).

[61] North Carolina Rule 3.8(e).

[62] North Carolina Rule 3.8, comment [5]

[63] Ohio's Rule 3.8(e) prohibition thus reads: "(e) 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 *all of the following apply*: (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; (3) there is no other feasible alternative to obtain the information."

[64] New Jersey Rule 3.8(e) reads: "not subpoena in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) *either* the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; *and* (2) there is no other feasible alternative to obtain the information."

[65] Rhode Island inverts the Model Rule's (e) and (f) so that (e) deals with extra-judicial statements and (f) with subpoenaing a lawyer.

[66] Rhode Island Rule 3.8(f).

[67] Rhode Island Rule 3.8, comment [6].

[68] The Rhode Island comment looked to two First Circuit cases, *Whitehouse v. U.S. District Court*, 53 F.3d 1349 (1st Cir. 1995) and *U.S. v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) in formulating these standards.

[69] Massachusetts's Rule 3.8(f) reads in its entirety that the prosecutor in a criminal case shall: "(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; *and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.*" Note that Massachusetts's Rule 3.8 differs in other regards from the Model Rule 3.8, the applicable Model Rule section (e) thus appearing in section (f) of the Massachusetts rule.

[70] *State v. Gonzalez*, 234 P.3d1, 12 (Kan., 2010).