

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2017-F-163

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense.

OPINION

Tennessee Rule of Professional Conduct 3.8(d) is a separate ethical obligation of prosecutors and was not meant to be coextensive with a prosecutor's legal disclosure obligations. This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. A prosecutor's ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*. Once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or mitigates the offense, or otherwise falls within RPC 3.8(d)'s disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable.

INTRODUCTION

Tennessee Rules of Professional Conduct 3.8(d) imposes special ethical duties on prosecutors representing the government in criminal litigation, including certain duties of disclosure of favorable information to the defendant. This opinion gives guidance in addressing the scope of those duties.

ISSUES

- I.** Does a prosecutor's duty under RPC 3.8(d) to disclose to the defense "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense" and in connection with sentencing, "all unprivileged mitigating information known to the prosecutor" extend beyond the "material" standard as construed by federal or state constitutional decisions?

- II.** What constitutes "timely disclosure" under RPC 3.8(d)?

DISCUSSION

I.

RPC 3.8 (d) states that “the prosecutor in a criminal case: 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”.¹

Federal constitutional case law requires prosecutors to disclose certain exculpatory information to the defense. Brady v. Maryland, 373 U.S. 83 (1963) requires disclosure of “material evidence” favorable to the accused. Other federal rules and statutes require a federal or state prosecutor to disclose certain prior statements of any witness the prosecutor intends to use at trial prior to when that witness testifies. See 18 U.S.C section 3500 (the “Jencks Act”).

Some states have held that the prosecutor’s responsibilities under *Brady* and its progeny only apply to “material” information. The argument for this position is that Rule 3.8 is simply an ethical codification of *Brady*.² None of the cases that support this position offer evidence to support that interpretation.³

A majority of states hold that the ethical duty of a prosecutor is broader and extends beyond *Brady*.⁴

In reaching this conclusion, the Supreme Court of North Dakota held that there is a distinction between compliance with an ethical rule and ensuring that an accused is not wrongly convicted. That court viewed the different purposes and objectives served by the two proceedings.⁵ “The primary concern in disciplinary proceedings is to ensure attorneys act in conformity with the ethical standards embodied in the Rules of Professional Conduct, regardless of the surrounding circumstances.”⁶ “A prosecutor’s ethical duty to disclose all exculpatory evidence to the defense does not vary depending upon the strength of the other evidence in the case.” *Id.*

¹ Tennessee Rules of Professional Conduct, Rule 3.8 (d) Special Responsibilities of a Prosecutor.

² State ex rel. Okla. Bar Ass’n v. Ward, 353P. 3d 509, 521 (Okla 2015); In re Riek, 350 Wis. 2d 684, 695-697 (2013); Disciplinary Counsel v. Kellogg-Martin, 124 Ohio St. 3d 415, 419 (Ohio 2010).

³ N.Y. St. Bar. Assn. Comm. Prof. Eth., Formal Op. 2016-3 at page 2 (2016)

⁴ In re Larsen, No. 20140535, 2016 WL 3369545 (Utah June 16, 2016); N.Y. St. Bar. Assn. Comm. Prof. Eth., Formal Op. 2016-3 (2016); In re Kline, 113 A. 3d 202 (D.C., 2015); Shultz v. Comm’n for the Lawyer Discipline of the State Bar of Texas, No. 55649, 2015 WL 985916, at 1 (Tex. Bd. of Disciplinary App. Dec. 17, 2015); VA Legal Eth. Op. 1862 (Virginia Legal Ethics Opinions) 2012 WL 9511066 ; In re Disciplinary Action Against Feland, 820 N.W. 2d 672, 678 (N.D. 2012); In re Jordan, 913 So. 2d 775 (La. 2005).

⁵ In re Kline, 113 A. 3d 202 (D.C., 2015).

⁶ In re Disciplinary Action Against Feland, 820 N.W. 2d 672, 678 (N.D. 2012).

American Bar Association Formal Opinion 09-454 extensively addresses the relationship between Model Rule 3.8(d), which is identical to Tennessee Rule of Professional Conduct 3.8(d), and a prosecutor's disclosure obligations under the United States Constitution. The ABA Opinion concludes that the drafters of Model Rule 3.8(d) "made no attempt to codify the evolving constitutional case law."⁷ ABA Formal Opinion 09-454 specifically states that the rule "does not implicitly include the materiality limitation recognized in the constitutional case law," but rather "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."⁸

Courts, including the Sixth Circuit Court of Appeals, have held that the *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor.⁹ In the Tennessee case of *Brooks*,¹⁰ the Sixth Circuit Court of Appeals quoted the U.S. Supreme Court, "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligation."¹¹ ABA Opinion 09-454 sets out that the ABA Standards for Criminal Justice acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.¹²

Comment [1] to Tennessee Rules of Professional Conduct 3.8 states that: "A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost."

Based on the text and history of Rule 3.8 of the Tennessee Rules of Professional Conduct there is no evidence that the rule contains an implicit materiality limitation or was otherwise intended to codify constitutional law. We join the ABA Committee and other jurisdictions that conclude that RPC 3.8 is a separate ethical obligation of prosecutors and was not meant to be coextensive with a prosecutor's legal disclosure obligations. This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. A prosecutor's ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*.

II.

Timely disclosure is mandated under RPC 3.8(d). The question of what constitutes "timely" was also addressed by ABA Opinion 09-454 which found that in order for disclosure of information to be "timely", it must be made early enough that the information can be used effectively. "Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor,

⁷ ABA Formal Opinion 09-454, at page 3.

⁸ ABA Formal Opinion 09-454, at page 2.

⁹ *Brooks v. Tenn.*, 626 F. 3d 878, 892 (6th Cir. 2010).

¹⁰ *Id.* At 892.

¹¹ *Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769. 1783 n. 15, 173 L. Ed. 2d 701 (2009).

¹² ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d. ed. 1993).

must be disclosed under Rule 3.8(d) as soon as reasonably practical.”¹³ The only exception to the timely requirement is “except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”¹⁴ Comment [3] to RPC 3.8 recognizes that if disclosure of information to the defense could result in substantial harm to an individual or the public interest the prosecutor may seek an appropriate protective order from the tribunal.

“Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty. Because the defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case, timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant’s arraignment.”¹⁵ Once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or that otherwise falls within Rule 3.8(d)’s disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable.¹⁶

CONCLUSION

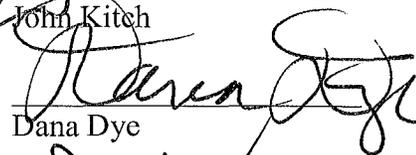
Tennessee Rule of Professional Conduct 3.8(d) is a separate ethical obligation of prosecutors and was not meant to be coextensive with a prosecutor’s legal disclosure obligations. This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. A prosecutor’s ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*. Once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or mitigates the offense, or falls within RPC 3.8(d)’s disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable.

This 15th day of March, 2018.

ETHICS COMMITTEE



John Kitch



Dana Dye



Joe Looney

APPROVED AND ADOPTED BY THE BOARD

¹³ ABA Formal Opinion 09-454, at page 6.

¹⁴ Tennessee Rules of Professional Conduct, 3.8(d).

¹⁵ ABA Formal Opinion 09-454, at page 6.

¹⁶ N.Y. St. Bar. Assn. Comm. Prof. Eth., Formal Op. 2016-3, at page 9 (2016)