SUPREME COURT OF VIRGINIA
DOUGLAS B. ROBELEN, CLERK
SUPREME COURT BUILDING
100 NORTH 9TH STREET, 5TH FLOOR
RICHMOND, VIRGINIA 23219
(804) 786-2251 V / TDD
FAX: (804) 786-6249

MURIEL-THERESA PITNEY
CHIEF DEPUTY CLERK

Supreme Court of Virginia Press Release

Media Contact: Douglas B. Robelen, Clerk

Release Date: March 22, 2019

THE SUPREME COURT OF VIRGINIA REQUESTS PUBLIC COMMENT ON A PROPOSED COMMENT TO A RULE OF PROFESSIONAL CONDUCT

RICHMOND – The Supreme Court of Virginia is considering modifying Rule 3.8 ("Additional Responsibilities of a Prosecutor") of the Rules of Professional Conduct by adding a Comment 5. Proposed by the Virginia State Bar Standing Committee on Legal Ethics and approved by the Council of the Virginia State Bar, proposed Comment 5 is an entirely new comment that explains what "disclosure" means as used in Rule 3.8(d), regarding a prosecutor's duty to make known to the defense the existence of exculpatory evidence. Rule 3.8 in its current form is set forth below, with Comment 5 (underscored) included.

Comments on the proposed modified Rule must be received by **May 21, 2019** and must be forwarded to:

Douglas B. Robelen, Clerk
Supreme Court of Virginia
100 North Ninth Street
5th Floor
Richmond, VA 23219

OR via email with the subject line "comment on VSB rule" to:

scvclerk@vacourts.gov

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 statement that the prosecutor would be prohibited from making under Rule 3.6.

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.

[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 defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if 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.

[5] Paragraph (d) requires disclosure of the existence of exculpatory evidence known to the prosecutor. As referred to in Comment 4, the duty is dependent on actual knowledge. Once the prosecutor knows particular evidence is exculpatory, the prosecutor must timely identify and disclose that evidence.