Officer Involved Shooting Investigations

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The Role of Office of Special Prosecutions

- No statute requires officer involved shootings be reviewed by prosecutors
- ALL officer involved shootings have been reviewed by the Office of Special Prosecutions since 2009

Reviewed for violations of Alaska criminal law

(Homicides and Assaults)

❖Not policy violations

❖Not civil liability

Process

- Law enforcement responds to incident and investigates
- Office of Special Prosecutions (OSP) is notified of incident
- OSP views the scene when possible
- OSP observes interviews in real time when possible
- Provides advice on search warrants or issues requiring legal guidance in the investigation and potential prosecution
- Reviews all evidence and reports
  - Autopsy
  - Ballistics
  - 911 calls
  - Police reports
  - Scene diagrams
  - Photos
  - Scene reconstruction reports
  - Radio traffic
  - Audio recordings
  - Video recordings –
    - dash cam;
    - body worn;
    - cell phone;
    - security cameras;
    - etc.

Basic Principles

- The American legal system is based on the presumption of innocence
- The government is required – as a matter of due process – to establish every element of a crime beyond a reasonable doubt
- The accused must be acquitted if the government fails to establish each element of the offense beyond a reasonable doubt.
- Defendants challenge the charges against them by challenging the proof of the necessary elements or by presenting a defense.
  - **Defense** = the government must *disprove* beyond a reasonable doubt.
  - **Affirmative defense** = the defense bears the burden of persuasion (*i.e.*, defendant must prove by a preponderance of the evidence)

Execution of Public Duties

- Enforcement of criminal law requires the police to detain, arrest, and incarcerate individuals.
- Interference with liberty would ordinarily constitute a violation of criminal law.
- Justification of execution of public duties relieves government officials (police) of criminal liability in most instances.
- All individuals have access to sophisticated process of criminal appeal and may bring a civil claim for damages, if warranted.

Laws Governing Shootings

- Homicide or assault (AS 11.41.100-220), and
  - Intentional/knowing
  - Dangerous Instrument = Firearm
  - Serious Physical Injury; death; fear of serious physical injury or death
- Justification defenses (AS 11.81.330-370).
  - Self Defense
  - Defense of Others
  - Use of force in making an arrest or terminating an escape

Law Enforcement Use of *Non-Deadly* Force

AS 11.81.370 – Use of Force by Police

(a) In addition to using force justified under other sections of this chapter, a peace officer may use *nondeadly* force and may threaten to use deadly force when and to the extent the officer reasonably believes it necessary to make an arrest, to terminate an escape or attempted escape from custody, or to make a lawful stop.

Law Enforcement Use of *Deadly* Force

AS 11.81.370 – Use of Force by Police

(a) … The officer may use deadly force only when and to the extent the officer reasonably believes the use of *deadly* force is necessary to make the arrest or terminate the escape or attempted escape from custody of a person the officer reasonably believes

(1) has committed or attempted to commit a felony which involved the use of force against a person;

(2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person; or

(3) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

Law Enforcement Use of Deadly Force

AS 11.81.370 – Use of Force by Police

(b) The use of force in making an arrest or stop is not justified under this section unless the peace officer reasonably believes the arrest or stop is lawful.

(c) Nothing in this section prohibits or restricts a peace officer in preparing to use or threatening to use a dangerous instrument.

Law Enforcement Use of Deadly Force

- A balance of two competing interests:
  1. The intrusion on a suspect's privacy interest (deadly force is the ultimate seizure)
  2. The government's need to make the seizure (the importance of the arrest for public safety)

Release of Evidence in a Criminal Case

- Prosecutors must protect the Constitutional rights of everyone
- U.S. Constitution 5th Amend.; Alaska Constitution Art. I § 7
  - "No person shall . . . be deprived of life, liberty, or property without due process of law."
- U.S. Constitution 6th Amend.; Alaska Constitution Art. I § 11
  - "In all criminal prosecutions, the accused shall enjoy the right to . . . Trial by an impartial jury . . . And to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have counsel for his defense."
- Trial by media does not provide for these rights

ETHICS RULES
(Alaska Rules of Professional Conduct)

- **Rule 3.6**. Trial Publicity.
- (a) A lawyer . . . shall not make an extrajudicial statement that . . . will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- Lawyers can state under (b):
  - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
  - (2) information contained in a public record;
  - (3) that an investigation of a matter is in progress;
  - (4) the scheduling or result of any step in litigation;
  - (5) a request for assistance in obtaining evidence and information necessary thereto;
  - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
  - (7) in a criminal case, in addition to subparagraphs (1) through (6):
    - (i) the identity, residence, occupation and family status of the accused;
    - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    - (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

ETHICS RULES
(Alaska Rules of Professional Conduct)

- **Rule 3.8** Special Responsibility of a Prosecutor
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a *substantial likelihood of heightening public condemnation of the accused* and exercise reasonable care to *prevent investigators, law enforcement personnel,* employees or other persons assisting or associated with the prosecutor in a criminal case *from making an extrajudicial statement* that the *prosecutor would be prohibited from making* under Rule 3.6 or this Rule.

Violation of Constitutional Rights

- **AS 11.76.110. Interference with constitutional rights.**

(a)(3) A person commits the crime of interference with constitutional rights if under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, the person intentionally deprives another of a right, privilege, or immunity in fact granted by the constitution or laws of this state.

Steps To A Faster Release Of Video

- Office of Special Prosecutions increased personnel assigned
  - 3 prosecutors → 7 prosecutors
- Commitments from law enforcement to provide reports faster
- Greater coordination with the Crime Lab on only essential testing
- Better communication with the State Medical Examiners Office

Balance public's desire for transparency
with
thorough investigation and
protection of citizens' Constitutional Rights

[3.26] Officer Involved Shootings and Fatalities

POLICY

All instances in which federal, state or municipal law enforcement officers use deadly force or cause death or serious physical injury to a person that are referred to the Department of Law will be reviewed by the Office of Special Prosecutions ("OSP"). These incidents are generally referred to as officer-involved shootings ("OIS") but can also include in-custody deaths, injuries caused during a vehicle pursuit, or any other situation in which deadly force was used or death or serious physical injury was caused.

Law enforcement agencies should be instructed to contact OSP when such incidents occur. All reports, lab results, and other materials pertaining to the investigation should be sent to the Chief Assistant Attorney General for OSP or the assigned Assistant Attorney General ("AAG") within OSP. The assigned AAG will determine whether to bring criminal charges against the involved officers.

PROCEDURE

When an officer uses deadly force or causes death or serious physical injury (which may include an officer involved shooting, officer involved vehicle collision, or an in custody death), the investigating law enforcement agency should be advised to contact the Chief AAG for OSP or the on-call AAG. The office chief will designate a primary on-call AAG and back-ups. This information should be provided to the relevant supervisors at AST, APD, JPD, FPD, and any other municipal departments as needed. The on-call AAG can forward the "OIS phone" [redacted] to their personal cell-phone or carry the OIS phone.

Initial Call and Investigation

Answer call from law enforcement – The on-call AAG should consult with the investigating agency as needed. For incidents investigated by APD, the AAG will respond as necessary in the same manner as an Assistant District Attorney from the Anchorage District Attorney's Office would for a homicide investigation and coordinate with the investigating detectives. For AST and other departments, the AAG will take phone calls from the investigators as needed in order to help them determine which search warrants should be obtained, questions to ask percipient witnesses, forensic

testing that should be requested, and other areas of the investigation in which the Department regularly assists law enforcement. The AAG may travel to the scene if warranted and feasible.

CDCO and DAO Notification – After being contacted by law enforcement, the on-call AAG should notify the Deputy Attorney General, Division Director, and the District Attorney for the relevant jurisdiction that an OIS has occurred and that OSP is responding. The on-call AAG should provide follow-up information with a summary of the incident when appropriate. In situations where the local DAO may bring charges against a civilian related to the same investigation, the AAG should communicate with the assigned ADA and investigators to ensure that all relevant lines of investigation are pursued.

Subsequent Investigation

Open file in PBK – The investigation materials should be restricted in PBK such that they can only be accessed by OSP and CDCO. The assigned AAG should request sufficient initial information from the law enforcement agency to open an investigation file in PBK. This includes biographical information for officers and subjects, the agency report number, the date and time of the incident, and contact information for next-of-kin.

Officer Interviews – The assigned AAG should work with the investigating officers and any retained counsel to schedule voluntary interviews with the involved officer(s). The AAG should collaborate with the investigators to ensure that the officer is properly advised that the interview is part of a criminal investigation and completely separate from any administrative investigations.

Coordinate with any involved ADAs - If the investigation will also be relevant to a prosecution by the local DAO, the AAG should coordinate with the assigned ADA to ensure that the two prosecutions do not conflict. The involved officer should not be subpoenaed to grand jury until a charging decision on the OIS has been made by OSP.

Next-of-kin outreach – After the investigating agency has performed next-of-kin notification, the assigned AAG and paralegal should reach out to the family to explain the process for the investigation. Minimal details should be provided in order to not prejudice the investigation, but the family should be given the same information that the Department would share with the family members of a homicide victim. Updates should be provided as requested.

Charging Decision

Screening - Once the investigating agency has provided the required materials, the case should be reviewed in accordance with the Criminal Division's screening policy. The assigned attorney will review the investigation and determine whether the use of force was justified under state law and what charges, if any, are warranted. The review shall not include a review of the law enforcement agency's policies and procedures unless those policies and procedures are directly relevant to determining whether the officer's actions violated state law. No analysis issued by OSP shall include any policy and procedure opinions or recommendations to an outside agency. As stated in

more detail in the Division's screening policy, charges should be filed if doing so is consistent with providing justice and there is sufficient, admissible evidence to convince a trier of fact beyond a reasonable doubt that a criminal offense was committed. Except in exceptional circumstances, a screening decision should be made as soon as possible and no later than two weeks after receiving the completed investigation file.

Charging a case – If the AAG determines that a criminal charge is warranted, the Deputy Attorney General and Division Director should be so informed. After consulting with CDCO, the head of the officer's agency (if appropriate) and the local district attorney should also be informed. The AAG should proceed with the case consistent with Department policy and the Rules of Professional Conduct.

Declining a case – If charges are not warranted, the AAG should prepare a letter memorializing her legal review. It should be addressed to the head of the law enforcement agency and prepared in a manner consistent with past practice. The letter should clearly explain the relevant facts revealed by the investigation and the rationale for why charges were not pursued. It should also state the scope of the review conducted and that OSP did not review the matter for any policy or procedural violations. The letter should be sent to the head of the law enforcement agency that employed the officer and counsel for the involved officers. A copy should also be sent to the Deputy Attorney General and Division Director. A copy should also be placed in the "OIS Binder" and online file folder maintained by OSP.

Family Contact – If charges are filed, the victim's family should be informed of the decision consistent with both statute and Department policy. If charges are not filed and prior to issuing a final legal review letter, the assigned AAG and paralegal should meet with the family of the deceased to hear their concerns and explain the decision not to file charges. A copy of the letter should be provided to the family after it is finalized and shared with the law enforcement agency.

Media Requests – In order to provide transparency, the decision letter to the agency is treated by DOL as a public record. After the letter has been provided to the agency, the deceased's family, and the involved officers (via counsel) it may be shared with media organizations.

PURPOSE

To ensure consistency, any officer involved fatality or serious physical injury referred to the Department of Law shall be reviewed by the Office of Special Prosecutions for the evaluation of any potential charges relating to law enforcement's use of force.

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Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

The duty to refrain from disruptive conduct applies to any proceeding of a tribunal. See Rule 9.1(u).

Rule 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April 15, 2009)

COMMENT

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

Paragraph (b) identifies specific matters about which a

lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April 15, 2009)

COMMENT

Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Paragraph (a)(3) requires a balancing between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or

the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9, and 1.10 have no application to this aspect of the problem.

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 9.1(c) for the definition of "confirmed in writing" and Rule 9.1(g) for the definition of "informed consent."

Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) [Deleted]

(d) 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;

(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; and

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new and credible evidence creating a reasonable likelihood that a defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to the appropriate court, the defendant's lawyer, if known, and the defendant, unless a court authorizes delay or unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to the court and served on the defendant's lawyer and the defendant. For purposes of this rule: (1) the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently; (2) the term "credible" means evidence a reasonable person would find believable; (3) the phrase "appropriate court" means the court which entered the conviction against the defendant and, in addition, if appellate proceedings related to the defendant's conviction are pending, the appellate court which is conducting those proceedings; and (4) the phrase "defendant's lawyer" means the lawyer, law firm, agency, or organization that represented the defendant in the matter which resulted in the conviction.

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April 15, 2009; amended by SCO 1812 effective April 15, 2014)

ALASKA COMMENT

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 constructive 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.

COMMENT

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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

The exceptions in paragraphs (d) and (g) recognize that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this COMMENT is intended to restrict the statement which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Under paragraph (g), the reasons for the evidence being unknown (and therefore "new") are varied. It may be "new" because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed "new" evidence.

A prosecutor does not violate paragraph (g) of this rule if the prosecutor makes a good faith judgment that the new evidence is not of such a nature as to trigger the obligations of paragraph (g), even though the prosecutor's judgment is later determined to have been erroneous.

LAW REVIEW COMMENTARIES

"Guilty But Mentally Ill: The Ethical Dilemma of Mental Illness as a Tool of the Prosecution," 32 Alaska L. Rev. 1 (2015).

Rule 3.9. Advocate in Nonadjudicative Proceedings.

A lawyer representing a client before a legislative body or committee or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April 15, 2009)

COMMENT

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.