Prosecutorial ethics: Holding to account "ministers of justice"

I have been thinking a lot lately about ethics and the criminal justice system. Locally and across the nation we have been seeing what happens when people lose faith in the effectiveness and fairness of the criminal justice system. Many see a system that struggles to hold police accountable for misconduct and disproportionately impacts Blacks and other people of color. Systems are composed of individuals and I know many, many individuals of good faith are asking tough questions about the systemic challenges facing the criminal justice system.

One of the most influential roles in the criminal justice system is the prosecutor. Most of the practicing bar are not prosecutors, granted, but we are all voters and thus have the opportunity to hold elected prosecutors and those who appoint prosecutors to account. I thought it might be helpful to review the ethics rules applicable to prosecutors—both to establish a baseline and to inquire whether the current rules provide a sufficient foundation for today's challenges.

Minister of justice

Like all lawyers, prosecutors—federal and state—are accountable for all ethics rules, and in addition for a rule specific to prosecutors. While the focus is often on the specific requirements set forth in Rule 3.8, "Special Responsibilities of a Prosecutor," it bears repeating that prosecutors are subject to the same rules as the rest of us—so issues such as competence, diligence, conflicts, honesty, dealing with unrepresented parties, supervision, and reporting the misconduct of others apply to them as well. Where Rule 3.8 specifically is concerned, Minnesota follows, with some exceptions, the ABA model rule for prosecutors.

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The comments to both the Minnesota rule and the model rule start with a well-known precept: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[1] This ministerial role is important but undefined, and much has been written about it by scholars. Ministering justice can mean different things, but what I believe is indisputable is a rejection of the idea that the ends justify the means. The focus is not the conviction or the win or even the protection of the public, but rather to guarantee that justice—as we broadly think about it in this country—is done in each case. This is a heavy responsibility.

The particulars

Rule 3.8, in both its Minnesota and ABA versions, sets out specific obligations for the ministers of justice. First, to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.[2] This requirement is obvious and foundational. Second, to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given an opportunity to obtain counsel.[3] This is part of the prosecutor's role in ensuring the integrity of the process. For example, while it might be the job of others to explain how to apply for court-appointed counsel, ultimately the prosecutor must make reasonable efforts to assure this actually happens in all cases. Third, to not seek to obtain from an unrepresented accused person a waiver of important pretrial rights, such as the right to a preliminary hearing.[4]

Fourth, and pivotally, to 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.[5] Both state and federal law establish a constitutional due process framework for disclosure obligations. This framework is widely known by shorthand reference to the main underlying case, *Brady*, which held that criminal defendants have a due process right to receive favorable information from the prosecution.[6] In 2009 the ABA made clear, and I find persuasive, the opinion that Rule 3.8(d) is *not* co-extensive with constitutional case law regarding disclosure, but rather is separate and broader.[7] The distinction lies in the issue of materiality.

A prosecutor's constitutional obligation extends only to favorable information that is "material," or in other words evidence that may affect the outcome. Rule 3.8, however, contains no such limiting language. As noted in ABA Opinion 09-454:

> Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[8]

For all of the reasons cited in the ABA opinion, I'm persuaded that this is correct. But the Minnesota Supreme Court has not had an opportunity to address this question, and some states, like Louisiana, disagree.[9] Many jurisdictions in Minnesota have an open file rule (excepting work product), a practice that is consistent with both constitutional due process requirements and the ethics rules. Not every jurisdiction can say this, however, and I strongly encourage the jurisdictions that can't to review the ethics requirements in addition to the constitutional requirements.[10]

Rule 3.8 also emphasizes the timely nature of disclosure. The ABA opinion states that "for the disclosure of information to be timely, it must be made early enough that the information can be used effectively."[11] Effective use encompasses many things beyond just preparation for trial, and they include conducting a defense investigation, determining affirmative defenses or case strategy in general, and (perhaps most importantly) choosing whether to plead guilty.[12]

Minnesota's Rule 3.8 includes two additional subparts, similar but not identical to the model rule, including Rule 3.8(e) on not subpoenaing defense counsel except under certain circumstances, and preventing extrajudicial statements by staff and others in keeping with the prosecutor's obligations under Rule 3.6 regarding trial publicity. Interestingly, the ABA model rule includes two *additional* subparts not present in Minnesota's rule. ABA Rule 3.8(g) and (h) both address a prosecutor's ethical obligation to take action upon receipt of evidence that casts doubt on whether a defendant committed a crime of which he has been convicted.

Beyond the rules

The prosecutor's role is so central to the just functioning of the system that many standards exist to guide their conduct. In reviewing those standards, I was struck by two contained in the ABA Criminal Justice Standards for the Prosecution Function. First, a "prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."[13] Second, and particularly relevant today, is "[a] prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work."[14]

Prosecutors carry a heavy burden as ministers of justice in our system, and there is so much more on the ethical requirements of the job than can be addressed in this column. Hopefully this information provides some guidance on ways the profession, through its votes, can hold these among us to account in performing this critical role. Are there other or different ethical rules that would further this goal? I am interested in your viewpoint. Thank you to all prosecutors who lead as ministers of justice. ▲

Notes

[1] Rule 3.8, MRPC, cmt. [1].

[2] Rule 3.8(a), MRPC.

[3] Rule 3.8(b), MRPC.

[4] Rule 3.8(c), MRPC.

[5] Rule 3.8(d), MRPC. Subpart (d) continues, "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."

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] ABA Formal Opinion 09-454, *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense* (7/8/2009).

[8] *Id.* at 4.

[9] *In re Seastrunk*, 2017 BL 374915 (La 10/18/17) (holding ethics rule is no broader than *Brady/Bagley*); *See In re Kline*, 113 A.3rd 202 (D.C. 2015) (holding ethics rule requires prosecutor to disclose all potentially exculpatory information in his possession regardless of whether that information meets materiality requirements of *Brady*).

[10] Court rules set forth important requirements as well. Rule 9.01, Minnesota Rules of Criminal Procedure, broadly requires disclosure of "all matters… that relate to the case" without a court order but upon the defendant's request.

[11] ABA Formal Opinion 09-454 at 6.

[12] *Id.*

[13] ABA Criminal Justice Standards for the Prosecution Function 3-1.2(f) (4th Ed. 2017).

[14] *Id.* at 3-1.6(b).