

**American Bar Association
CPR Policy Implementation Committee**

Variations of the ABA Model Rules of Professional Conduct

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) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(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;

(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, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was

	<p>convicted, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor’s jurisdiction,</p> <p style="padding-left: 40px;">(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p style="padding-left: 40px;">(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</p> <p>(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.</p> <p>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/pic/</p> <p>Comments not included.</p> <p>*Current links to state Rules of Professional conduct can be found on the ABA website: http://www.abanet.org/cpr/links.html*</p>
<p>AL Effective 2/19/09</p>	<p>(d) Adds “not willfully fail to” before “make timely disclosure;”</p> <p>Does not adopt MR (f), (g) and (h);</p> <p>Replaces (e):</p> <p style="padding-left: 40px;"><i>(e) exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6; and</i></p> <p>Adds (2):</p> <p style="padding-left: 40px;"><i>(2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:</i></p> <p style="padding-left: 80px;"><i>(a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and</i></p> <p style="padding-left: 80px;"><i>(b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as</i></p>

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	<i>provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.</i>
AK Effective 4/15/09	Does not adopt (c), (g) and (h).
AZ Effective 12/1/03	Does not adopt (g) and (h)
AR Effective 5/1/05	Does not adopt (f), (g) and (h) Replaces (e): <i>(e) 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.</i>
CA Current Rule	[California's Rules of Professional Conduct are structured differently from the ABA Model Rules. Please see California Rules : http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf]
CO Effective 1/1/08	Modified (g) and (h): (g) Changes "likelihood" to "probability;" adds to end, "within a reasonable time;" (g)(1) Deletes "promptly" before "promptly;" (g)(2) Equivalent to MR but changes language to: "if the judgement of conviction was entered by a court in which the prosecutor exercises prosecutorial authority;" (g)(1)(A) is MR (g)(1)(i) but deletes "promptly;" change "that evidence" to "the evidence;" deletes clause, "unless...delay;" Adds (g)(1)(B): <i>(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.</i> (h) Deletes "in the prosecutor's jurisdiction;" adds clause, "in a court in which the prosecutor exercises prosecutorial authority" before "of an offense;" changes language after "the prosecutor shall" with: "take steps in the appropriate court, consistent with applicable law, to set aside the conviction."
CT Effective 1/1/07	(1) – (4): same as MR (a) – (d) Does not have MR (e), (g) and (h) (5): same as MR (f) but deletes language before "exercise" in the middle of the paragraph and deletes "or this Rule" at end
DE	Same as MR

Effective 7/1/03	
District of Columbia Effective 2/1/07	<p>Does not adopt MR (g) and (h) First paragraph: adds “not” to end (a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person; (b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause; (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a <i>prima facie</i> showing of guilt; (d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense; (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor’s action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or (g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.</p>
FL Effective 5/22/06	<p>Does not have MR (b) (b) and (c): same as MR (c) and (d) Does not have MR (e), (f), (g) and (h)</p>
GA* Effective 1/1/01	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p><i>(b) refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;</i> (c) Reserved; (d) Deletes language after “mitigates the offense;” <i>(e) exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this Rule;</i> (f) is MR (e); (g) is MR (f) but deletes language after “accused;”</p>

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	<p>Adds to end: “The maximum penalty for a violation of this Rule is a public reprimand;” Does not have MR (g) or (h).</p>
<p>HI* Effective 1/1/94</p>	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p><i>A public prosecutor or other government lawyer shall:</i> <i>(a) not institute or cause to be instituted criminal charges when [the prosecutor or government lawyer] knows or it is obvious that the charges are not supported by probable cause; and</i> Adopts MR (b) but not (c) through (h).</p>
<p>ID Effective 5/4/10</p>	<p>Same as MR</p>
<p>IL Effective 1/1/2010</p>	<p>Adds: “The duty of a public prosecutor is to seek justice, not merely to convict” before “The prosecutor...shall;” Replaces “that have a substantial likelihood” with “pose a serious and imminent threat;” Deletes (g) and (h).</p>
<p>IN Effective 1/1/05</p>	<p>Does not adopt (g) and (h)</p>
<p>IA Effective 7/1/05</p>	<p>Does not adopt (g) and (h)</p>
<p>KS Effective 7/1/07</p>	<p>Does not adopt (g) and (h)</p>
<p>KY Effective 7/15/09</p>	<p>Does not adopt MR (c); (c) is the same as MR (d); (d) is the same as MR (e); (e) is the same as MR (f); Does not adopt MR (g) or (h).</p>
<p>LA Effective 3/1/04</p>	<p>Does not adopt (g) and (h)</p>
<p>ME Effective 8/1/09</p>	<p>Changes text of Rule to: “The prosecutor shall;” (a) Adds “criminal or juvenile” before “charge;” Adds: <i>(b) make timely disclosure in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of evidence or information known to the prosecutor after diligent inquiry and within the prosecutor’s possession or control, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment;</i> <i>(c) refrain from conducting a civil, juvenile, or criminal case</i></p>

	<p><i>against any person whom the prosecutor knows that the prosecutor represents or has represented as a client;</i> <i>(d) refrain from conducting a civil, juvenile, or criminal case against any person relative to a matter in which the prosecutor knows that the prosecutor represents or has represented a complaining witness.</i></p> <p>Doesn't adopt MR (b) through (h).</p>
MD Effective 7/1/05	<p>Does not adopt (g) and (h). Does not include MR (e) (e), MR (f): replaces "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor" with "an employee or other person under the control of the prosecutor"</p>
MA Rules effective 9/1/08	<p>(c) Adds to end: "unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;" Adds: <i>(e) 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;</i> (f) is similar to MR (e) but moves language starting with "the prosecutor" to subparagraph (f)(1); Deletes (f) through (h); Adds: <i>(h) not assert personal knowledge of the facts in issue, except when testifying as a witness;</i> <i>(i) not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and</i> <i>(j) not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.</i></p>
MI* Rules effective 10/1/88	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p>Does not adopt MR (e) through (h); Adds: <i>(e) 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.</i></p>
New Proposed	<p>Same as 1988 Rule.</p>

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11/24/09	
MN Effective 10/1/05	Does not have MR (e)(3) Does not adopt (g) and (h) (f) - deletes the first half of (f) and revised it to read: (f) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
MS Effective 11/3/05	Does not adopt (g) and (h) (e): retains former MR Does not have current MR (e)
MO Effective 7/1/07	Does not adopt (g) and (h).
MT Effective 4/1/04	Does not adopt (g) and (h) Adds to end of last sentence in (f): “consistent with the Confidential Criminal Justice Information Act”
NE Effective 9/1/05	Does not adopt (g) and (h)
NV Effective 5/1/06	Does not adopt (g) and (h)
NH Effective 1/1/08	Does not adopt (g) or (h)
NJ Effective 1/1/04	(c): adds “post-indictment” before “pretrial” (d): “make timely disclosure to the defense of all evidence or information ...” (e)(1) and (2): combined, language is the same.
NM Effective 11/2/09	Changed to Rule 16-308; Subparagraphs (a) through (f) renamed “A” through “F;” Deletes (g) and (h); (f) Replaces “under Rule 3.6 or this Rule” with “Rule 16-306 of the Rules of Professional Conduct.”
NY Effective 4/1/09	Adds to title: “AND OTHER GOVERNMENT LAWYERS;” <i>(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.</i> <i>(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this</i>

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	<p><i>responsibility by a protective order of a tribunal.</i></p> <p>Does not adopt (c) through (h).</p>
NC Effective 3/1/03	<p>Refected (g) and (h)</p> <p>Adds to (e) at the end: "or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless...."</p>
ND Effective 8/1/06	<p>Does not adopt (g) and (h)</p> <p>(d): replaces "make timely disclosure to the defense of" with "disclose to the defense at the earliest practical time"</p>
OH Effective 2/1/07	<p>First paragraph: adds "not do any of the following" to end</p> <p>(a): replaces "refrain from prosecuting" with "pursue or prosecute"</p> <p>(b) and (c): did not adopt</p> <p>(d): adds "fail to" to beginning and before "disclose," deletes "and to the tribunal" and "protective"</p> <p>(e): deletes "not," adds "all of the following apply" to end</p> <p>(f): did not adopt</p> <p>(g) and (h): did not adopt</p>
OK Effective 1/1/08	<p>Does not adopt MR (g) and (h) but adds:</p> <p><i>(g) The lawyer upon whom a subpoena is served shall be afforded a reasonable time to file a motion to quash compulsory process of his/her attendance. Whenever a subpoena is issued for a lawyer who then moves to quash it by invoking attorney/client privilege, the prosecutor may not press further in any proceeding for the subpoenaed lawyer's appearance as a witness until an adversary in camera hearing has resulted in a judicial ruling which resolves all the challenges advanced in the lawyer's motion to quash.</i></p>
OR Effective 12/1/06	<p>Does not have MR (b), (c), (e), (f), (g) and (h)</p> <p>(b): Identical (d)</p>
PA Effective 7/1/06	<p>Does not include MR (e) [see PA rule 3.10]</p> <p>Does not adopt (g) and (h)</p>
RI Effective 4/15/07	<p>Does not adopt MR (e);</p> <p>(e) is the same as MR (f);</p> <p>Does not adopt (g) or (h);</p> <p>Adds:</p> <p><i>(f) 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.</i></p>
SC Effective 10/1/05	<p>Does not adopt (g) and (h)</p>
SD	<p>Does not adopt (g) and (h)</p>

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Effective 1/1/04	(d): replaces “tens to negate the guilt” with “tends to exculpate”; deletes “or mitigates the offense”; replaces “mitigating information” with “exculpatory information”
TN Effective 1/1/2011	<p>Moves “shall” to the beginning of (a)-(f);</p> <p>(c) is equivalent to MR but changes wording to: <i>(c) shall not advise an unrepresented accused to waive important pretrial rights;</i></p> <p>(f) Replaces “investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case” with “employees of the prosecutor’s office;”</p> <p>Adds at the end: “and discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.”</p> <p>Replaces (g)(1) and (2) with: <i>(1) if the conviction was obtained outside the prosecutor’s jurisdiction, promptly disclose that evidence to an appropriate authority, or</i> <i>(2) if the conviction was obtained in the prosecutor’s jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</i></p> <p>(h) Similar to MR but puts “was convicted” before “in the prosecutor’s jurisdiction”</p>
TX* Effective 3/1/05	<p><i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i></p> <p><i>(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured 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;</i></p> <p>(c) Replaces “seek” with “initiate or encourage efforts;” replaces language after “important” with “pre-trial, trial or post-trial rights;”</p> <p>Does not adopt MR (e) through (h);</p> <p>Adds: <i>(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.</i></p>
UT Effective 11/1/05	<p>Does not adopt (g) and (h)</p> <p>Deletes MR (e)</p> <p>(e): only includes part of MR (f): 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</p>

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	making under Rule 3.6.
VT Effective 9/1/09	(a) Deletes “such as the right to a preliminary hearing;” (b) Adds “inquest” after “grand jury;” (c) Adds “who are in the employment or under the control of the prosecutor” after “prosecutor in a criminal case;” Deletes (g) through (h).
VA Effective 1/1/04	Does not adopt (g) and (h) 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.
WA Effective 9/1/06	Does not adopt (g) and (h) (d): deletes “unprivileged”
WV* Effective 1/1/89	<i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i> Does not adopt MR (e) through (h); <i>(e) 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.</i>
WI Effective 7/1/07 (g) and (h) effective 7/1/09	Does not have MR first paragraph (a): replaces “refrain from prosecuting” with “A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute” (b) 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. (c) 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 procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

	<p>(d) 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:</p> <p>(1) 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</p> <p>(2) 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.</p> <p>(e): adds “A prosecutor shall” to beginning and deletes “criminal”</p> <p>(f) A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:</p> <p>(f)(1): same as MR (d)</p> <p>(f)(2) same as MR (f) but deletes language before “exercise” and “or this Rule” from end</p> <p>Adopted slightly modified MR 3.8(g) and (h):</p> <p>(g) WI Rule changes “shall” to “shall do all of the following:”</p> <p>(i) Changes “promptly disclose” to “promptly make reasonable efforts to disclose”</p> <p>(iii) Adds “make reasonable efforts to” before “undertake;” deletes “make reasonable efforts to” before “cause.”</p>
<p>WY Effective 7/1/06</p>	<p>Does not adopt (g) and (h)</p> <p>(b), adds to beginning: “prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused,”</p> <p>Does not have MR (e)</p> <p>(e): same as MR (f)</p>

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