

## **Petition for Amendment of Utah Rule of Professional Conduct 3.8, Special Duties of a Prosecutor**

Mr. Cantarero,

Thank you for taking time to speak with me yesterday. I appreciated your understanding and assistance in how to proceed with a proposal of this type. As I mentioned to you, the foundation of my proposal stems from my service as a Deputy Utah County Attorney in the office's Criminal Division, for nearly 27 years. I recently retired from public service and am now on inactive status with the Utah State Bar. For some time I have felt that Rule 3.8 should be amended in two ways to update a prosecutor's ethical duties to victims of criminal offenses, and to assure equal application of the law to all persons to be charged and prosecuted for violation of a criminal law. I proposed the following amendments to Rule of Professional Conduct 3.8:

### 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 ensure 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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ~~and~~
- (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;
- (f) Exercise reasonable care to assure that the constitutional and statutory rights of persons who suffer the consequences of another's criminal acts are protected and effectuated; and
- (g) Assure that criminal statutes and ordinances, any element or provision of a statute or ordinance, including the level of the offense, or any combination of statutes or ordinances, sentencing enhancements or similar provisions of law, are applied in equal fashion to all persons who are similarly situated in relation to those laws by personal circumstance or criminal history, and without regard to race, color, sex, national origin, sexual orientation, gender identity, age, religion or creed, in charging an offense, and during the prosecution thereof.

I offer the following comments pursuant to Judicial Council Code of Judicial Administration

Rule 11-102, regarding the need for and anticipated effect of the proposal.

Paragraph (f).

Prosecutors have a special duty that is spread across many fields, specifically, enforce the law, protect society, bring justice under the law to victims, make victims whole through restitution, and be a general minister of justice for the defendant. It's not uncommon for a prosecutor to be so busy focusing attention in one of these fields to loss track of the responsibilities in one of the others, especially when the bulk of prosecution efforts on behalf of victims is performed and coordinated by others in the office. Under current laws, victims possess a right to intervene in a case when they sense that their rights have been, or are being, impinged, yet most hesitate to do so due to personality, fear, or financial cost for representation. The court can correct issues when raised, yet, shouldn't there be some consequence for a manifest dilatory prosecutor? To my knowledge, currently there isn't a rule of professional conduct which allows victims of criminal violations to file a complaint with the bar as victims are not seen as clients of a prosecutor. The amendment corrects that deficiency in the rules, but only if shown that the prosecutor failed to exercise a reasonable effort in a case. It's anticipated that the effect of this proposal will be prosecutors paying greater attention to the victim's constitutional and statutory rights in a case, modify their approach or case management procedures in relation to them if necessary, and more fully effectuate and empower the victim's interest in their case.

Paragraph (g):

Prosecutors have a constitutional requirement upon them to treat all person equally under the law. They take an Oath to support, obey and defend two constitutions. The question is how to assure a prosecutor is fulfilling that requirement. Though a federal lawsuit can be filed for a violation of an established constitutional right, little will be accomplished by doing so as a prosecutor possesses "absolute immunity" from such. It's very difficult to pierce this mantle of immunity. Rule 3.8 lags behind the societal trend of today regarding equal treatment of persons under the law and accountability for a prosecutor not doing so. My proposal gives greater strength and foundation to the Oath to which a prosecutor subscribes, and their constitutional requirements. It also presents an alternative avenue of review to those who believe they have been injured by a prosecutor's unequal application of the law towards them and in their case. It's anticipated that the effect of this amendment will be that prosecutors will be more watchful of their constitutional duties of equal treatment to all persons, seek to assure with greater vigilance the equal application of laws in charging decisions and the equitable charging of offense levels as established by the law, prosecute offenses with an enhanced sensitivity to their obligation to be ministers of justice, better understand the application of law to individual circumstances, eliminate personal bias, and monitor the justice system for any appearance of inequitable application of the law.

Thank you for this opportunity,

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