

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1812

Adding new paragraph (g) to Alaska Rule of Professional Conduct 3.8, amending the first paragraph of the Comment, and adding new paragraphs to the Comment regarding a prosecutor's duties.

IT IS ORDERED:

Alaska Rule of Professional Conduct 3.8 is amended to read as follows:

Rule 3.8. Special Responsibilities of a Prosecutor

* * *

(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.

* * * *

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, 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.

[2] 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.

[3] 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.

[4] 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).

[5] 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.

[Reporter's Note: Paragraphs 6 and 7 are Committee additions which do not appear in the Current Comment.]

[6] 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.

[7] 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.

DATED: December 4, 2013

EFFECTIVE DATE: April 15, 2014

/s/
Chief Justice Fabe

/s/
Justice Winfree

/s/
Justice Stowers

/s/
Justice Maassen

/s/
Justice Bolger