

# Ethical considerations for Government Lawyers

BY BRETT KANDT, ESQ



**“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the government becomes the law-breaker, it breeds contempt for law; it invites every man to become a law unto himself.”**

—*Olmstead v. United States*,  
277 U.S. 438, 485 (1928) (Brandeis, L., dissenting)

This cautionary observation from former U.S. Supreme Court Justice Louis Brandeis demonstrates why there are ethical duties that are unique to government lawyers, whether they are prosecutors or attorneys in government civil practice. When the government lawyer errs, it can undermine public confidence in government and the justice system.

## The Ethical Prosecutor

The prosecutor bears a great responsibility in our criminal justice system to ensure that the investigative and trial processes are lawful and fair. “A prosecutor’s primary duty is not to convict, but to see that justice is done.”<sup>1</sup> In light of this obligation, Rule of Professional Conduct (RPC) 3.8 assigns special responsibilities to prosecutors, while national prosecution standards further delineate a prosecutor’s ethical duties.<sup>2</sup> Prosecutorial misconduct occurs when a prosecutor knowingly or recklessly violates these ethical standards and denies a defendant a fair trial.<sup>3</sup>

The prosecutor's authority to exercise discretion in charging decisions is a key component of our criminal justice system. RPC 3.8(a) requires a prosecutor to refrain from prosecuting a charge not supported by probable cause, while subsection (b) requires a prosecutor to make reasonable efforts to ensure an accused's Sixth Amendment right to counsel is honored, and subsection (c) prohibits a prosecutor from seeking a waiver of preliminary hearings or other important pretrial rights from an unrepresented accused.

While there are specific statutory responsibilities imposed upon prosecutors in criminal procedure that fall within the scope of RPC 3.4's obligation of fairness to an opposing party and counsel, the most fundamental duty is the U.S. Supreme Court's pronouncement in *Brady v. Maryland* that due process requires the timely disclosure of all material evidence possessed by the prosecution team that is favorable to the defense.<sup>4</sup> The *Brady* rule is codified in RPC 3.8(d), requiring disclosure of all evidence known to a prosecutor that tends to negate the guilt of the accused or to mitigate the offense. Subsection (d) further requires, in connection with sentencing, the disclosure of all unprivileged mitigating information known to a prosecutor, unless subject to a protective order.

Comment 1 to ABA Model Rule 3.8 specifies that a prosecutor has "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." As prosecutors have increasingly taken on a more proactive role in reversing wrongful convictions, this ethical duty has evolved and grown.<sup>5</sup> In cases in which there is credible evidence of actual innocence, the belief that the prosecutor's responsibility as a "minister of justice" requires affirmative corrective action has led to the creation of conviction integrity units in some prosecutors' offices. The comment further notes that "[a]pplicable 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."

RPC 3.8(f) extends the prohibition on extrajudicial statements set forth in RPC 3.6(a) to statements by the prosecutor in a criminal proceeding likely to increase public condemnation of the accused. The limitations of the

rule are aimed at extrajudicial statements that can violate the right to a fair trial, specifically comments likely to influence the outcome of a trial, and comments likely to prejudice the jury venire.<sup>6</sup> Comment 6 to the ABA Model Rule 3.6 observes that "[c]riminal jury trials will be most sensitive to extrajudicial speech." Prosecutors are further required under RPC 3.8(f) to exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting the prosecution from making extrajudicial statements prohibited under Rule 3.6.

Rule 3.6(b) specifies the type of actual information directly relevant to a case that is appropriate for disclosure, which may include "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." Subsection (b)(7) details additional information that may be appropriate for disclosure in a criminal prosecution, including:

- 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.

Comment 5 to the ABA Model Rule 3.6 enumerates certain subjects that are "more likely than not to have a material prejudicial effect on a [criminal] proceeding" including "the character, credibility, reputation or criminal record" of a suspect, the possibility of a guilty plea 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." Other subjects noted in the comment include the identity or nature of physical evidence expected to be presented, any opinion as guilt or innocence, and "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." Finally, the comment cautions that statements detailing criminal charges should include a disclaimer "that the charge is merely an accusation, and that the defendant is presumed innocent until and unless proven guilty."

## The Ethical Government Civil Attorney

Government officials have a fiduciary duty to act in the public's best interest, and the attorney-client relationship between a government official and his or her attorney is tempered by this broader duty to the public.<sup>7</sup> A government civil attorney, like a prosecutor, is held to a higher standard as a result, and has a corresponding responsibility to act in the best interests of the public in the course of representing a government client.

The duties articulated in RPC 1.13(a), regarding representation of an organization acting through its duly authorized constituents, apply to the representation of a government entity or official. Comment 9 to the ABA Model Rule 1.13 states: "The duty defined in this Rule applies to governmental organizations." The attorney therefore represents the government entity acting through government officials that are the entity's duly authorized constituents; the immediate attorney-client relationship exists between the attorney and the government officials acting in their official capacities on behalf of the government entity.

However, in Nevada this representation carries a special responsibility under RPC 1.13(f):

In dealing with an organization's ... constituents, a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent.

Therefore, in Nevada an attorney has an affirmative duty to communicate to each government official with whom he or she has an immediate attorney-client relationship that the client is the government entity, not the official. Only by clearly establishing the boundaries of the attorney-client relationship and communicating that information can an attorney provide effective representation.

Because transparency and accountability in government are essential



# Ethical Considerations for Government Lawyers

to a free society, a government attorney must carefully balance the public’s right to access with any legal or ethical constraints on his or her ability to disclose information or otherwise engage in public discourse. RPC 1.6 generally restricts the disclosure of information related to the representation of a client; however, subsection (b)(6) permits disclosure if required by another law. Nevada’s public records law (NRS Chapter 239) and open meeting law (NRS Chapter 241) clearly fall within the scope of RPC 1.6(b) (6), but these are limited in turn by certain exceptions, such as those for privileged attorney-client communications and attorney work-product.<sup>8</sup>

RPC 1.6(b) works in tandem with RPC 1.13(b), regarding the referral to a higher authority of violations of law by someone acting on behalf of an organization. Comment 9 to the ABA Model Rule 1.13 reflects a different standard for a government civil attorney in determining how to proceed under the rule, attributable to an attorney’s duty to act in the best interests of the public in the course of representation:

In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

## Conflicts of Interest

RPC 1.9 and RPC 1.11 place specific limitations on current and former government lawyers from participating in matters in which an attorney participated “personally and substantially” before moving into or out of public service.<sup>9</sup> RPC 1.11(d) permits screening to avoid the imputed or vicarious disqualification of an entire office.<sup>10</sup>

## ENDNOTES:

1. *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987); see also *Berger v. United States* 295 U.S. 78, 88 (1935).
2. See *Criminal Justice Standards for the Prosecution Function*, American Bar Association (4th Ed. 2017); *National Prosecution Standards*, National District Attorneys Association (3rd Ed. 2009).
3. See *Thomas v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. 468, 402 P.3d 619 (2017).
4. 373 U.S. 83, 87 (1963).
5. However, subsections (g) and (h) of the ABA Model Rule 3.8, which place an affirmative duty on prosecutors to disclose and investigate “new, credible and material evidence” of a wrongful conviction and, in the face of “clear and convincing evidence” that a defendant was wrongfully convicted, to seek to remedy the conviction, have not been adopted in Nevada.
6. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).
7. See, e.g., *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest); see also NRS 281A.020(1)(a) (public office is a public trust and shall be held for the sole benefit of the people).
8. See, e.g., *Canarelli v. Eighth Judicial Dist. Court of Nev.*, 464 P.3d 114 (Nev. 2020).
9. See also ABA Model Rule of Professional Conduct Rule 1.11 cmt. (2002).
10. See *State v. Eighth Judicial Dist. Court of the State*, 130 Nev. 158, 321 P.3d 882 (2014) (rejecting the “appearance-of-impropriety” standard).

**Sending and receiving your clients’ files privately is our business.**

**Find out how much safer communication with your clients can be using AXEL Go.**

Visit [www.AXELGo.app](http://www.AXELGo.app)

**BRETT KANDT** is general counsel to the Nevada State Board of Pharmacy. He previously served 20 years in the Office of the Nevada Attorney General, most recently as Chief Deputy Attorney General. He is chair of the State Bar of Nevada’s Standing Committee on Ethics and Professional Responsibility.

