

**April-May 2026 WSBA Bar News Ethics & the Law Column**

## **Doing Justice: RPC 3.8 and the Special Responsibilities of Prosecutors**

**“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”  
~RPC 3.8, cmt. 1**

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Although most lawyers think their practice area is unique, only one has its own rule: prosecutors. RPC 3.8 is entitled “Special Responsibilities of a Prosecutor” and our opening quote points at the reason. While prosecutors are certainly not expected to check their role as an advocate at the courtroom door,<sup>1</sup> Comment 1 to RPC 3.8 elaborates on the central role of prosecutors in our system of justice: “This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”<sup>2</sup> Washington is by no means unique in this regard. The Washington rule is patterned on its ABA Model Rule counterpart and traces its lineage to Canon 5 in the original ABA Canons of Professional Ethics adopted in 1908.<sup>3</sup> The rule also echoes longstanding guidance from the courts, with, for example, the United States Supreme Court noting that a prosecutor “is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”<sup>4</sup>

Put broadly, RPC 3.8 breaks down into three primary areas. First, Paragraphs (a) through (e) address charging, investigation, and disclosure.

Second, Paragraph (f) deals with pretrial publicity. Finally, Paragraphs (g) and (i) speak to post-conviction remedial measures when new evidence of innocence is discovered. In this column, we'll briefly survey all three.

Before we do, however, four qualifiers are in order.

First, RPC 3.8 is not the sole repository for rules that touch on prosecutors specifically. RPC 3.6(b)(7), for example, also addresses pretrial media statements by prosecutors. Comment 2 to RPC 1.11, in turn, was amended in 2021 to conform the imputation of an elected prosecutor's former client conflicts under that rule to the Washington Supreme Court's decision in *State v. Nickels*, 195 Wn.2d 132, 456 P.3d 795 (2020).<sup>5</sup> Today, however, we'll focus on RRC 3.8.<sup>6</sup>

Second, prosecutors work for the government and other rules apply to government lawyers generally—such as newly adopted RPC 1.7(c) that addresses conflicts when a governmental legal department is required by statute or other law to represent agencies within a governmental entity that may be adverse.<sup>7</sup> Here, we'll focus on the role of prosecutors under RPC 3.8 rather than broader considerations applicable to government lawyers generally.<sup>8</sup>

Third, "prosecutor" is a defined term under RCW Chapter 36.27. Under RCW 36.27.020, the duties of a prosecuting attorney in Washington include

(among other things) both criminal and civil litigation. Because RPC 3.8 is focused on criminal prosecution, we'll take that same approach here.

Finally, while RPC 3.8 is specific to prosecutors, the other RPC also apply.<sup>9</sup> Again, today we'll focus on RPC 3.8.

### ***Charging, Investigation and Disclosure***

RPC 3.8(a) through (e) address pretrial areas that broadly reflect procedural rights protected by constitutional law, court decisions, and court rules.<sup>10</sup> Although the rights highlighted by RPC 3.8(a)-(e) are central to the criminal justice system, these provisions do not claim to reflect all procedural rights afforded criminal defendants.<sup>11</sup> Similarly, because these elements of RPC 3.8 mirror underlying procedural rights, those rights are typically enforced directly rather than through either citation to RPC 3.8 or through the disciplinary system.<sup>12</sup> In other words, if an accused isn't informed of their right to counsel and an incriminating statement results, the admissibility of the statement will likely be litigated in the criminal proceeding as a motion to suppress under *Miranda*<sup>13</sup> rather than as an asserted violation of RPC 3.8(b). That said, the "special responsibilities" of prosecutors included in RPC 3.8 reflect the unique—and uniquely powerful—role prosecutors play in our system.

RPC 3.8(a) requires that a prosecutor “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]”<sup>14</sup> RPC 3.8(b) and (c), address, respectively, a prosecutor’s duties to assure that an accused has been advised of the right to counsel and to not seek waiver of important pretrial rights from an unrepresented accused.<sup>15</sup> RPC 3.8(d) broadly reflects the obligation under *Brady* to disclose known evidence that “tends to negate the guilt of the accused or mitigates the offense[.]”<sup>16</sup> RPC 3.8(e) generally prohibits a prosecutor subpoenaing a lawyer “to present evidence about a past or present client” unless the prosecutor “reasonably believes” that the information is not protected by privilege, is essential to an ongoing investigation or prosecution, and cannot be obtained in any other way.<sup>17</sup>

***Pretrial Publicity***

RPC 3.8(f) generally prohibits a prosecutor from “making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused[.]” Under that same provision, prosecutors must also “exercise reasonable care” to prevent investigators and other law enforcement personnel “assisting or associated with the prosecutor in a criminal case” from making such statements. Comment 5 to RPC 3.8 explains that “[p]aragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial

likelihood of prejudicing an adjudicatory proceeding.<sup>18</sup> Comment 6 to RPC 3.8, in turn, underscores that prosecutors have a duty under RPC 5.1 and 5.3 to supervise, respectively, public statements by lawyers and nonlawyer staff working with them.<sup>19</sup> Comment 6 tempers this somewhat in practical recognition that law enforcement personnel often do not work directly for a prosecutor by noting that “[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.”

### ***Post-Conviction Remedial Measures***

Reflecting the increased availability of DNA testing and other sophisticated scientific techniques that in some circumstances either raised substantial questions about convictions or exonerated defendants outright following convictions, the ABA in 2008 adopted a pair of amendments to Model Rule 3.8 addressing those circumstances.<sup>20</sup> ABA Model Rule 3.8(g) articulates a duty on the part of prosecutors to disclose newly discovered material evidence “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]”<sup>21</sup> ABA Model Rule 3.8(h), in turn, requires prosecutors who become aware of “clearing 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.”<sup>22</sup>

In 2010, the WSBA proposed adoption of Washington versions closely paralleling their ABA Model Rule counterparts, together with a “safe harbor”—RPC 3.8(i)—that a prosecutor’s independent judgment made in good faith excused a violation of the new provisions even if that judgment was later found to be wrong.<sup>23</sup> The Supreme Court adopted RPC 3.8(g) and (i) but not (h)—leaving the latter listed as “Reserved.”<sup>24</sup>

### ***Summing Up***

Lawyers in private practice routinely handle cases that are of great personal and economic import to the clients involved. Prosecutors, however, operate in a different arena than private litigants. Professor Brooks Holland neatly summarized this difference—and the reason for a special rule—in his chapter on criminal practice in the WSBA Legal Ethics Deskbook:

The cost of . . . [a prosecutor’s] judgment when exercised wrongly can be the imposition of unjust punishment, including conviction of an innocent person. Nevertheless, the law often defers to a prosecutor’s internal judgments in defining and pursuing the People’s objectives, with the political process acting as the chief control on this judgment. But, . . . Washington [RPC 3.8] . . . externally reinforce[s] the People’s objectives with ethics rules to ensure that “justice” is uniformly defined and pursued.<sup>25</sup>

## ABOUT THE AUTHOR

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<sup>1</sup> See *State v. Orozco*, 144 Wn. App. 17, 20, 186 P.3d 1078 (2008) (“[A] prosecutor has no duty of impartiality under RPC 3.8.”).

<sup>2</sup> Citing the predecessors to RPC 3.8 and parallel Washington case law, the Court of Appeals in *State v. Finnegan*, 6 Wn. App. 612, 619 n.6, 495 P.2d 674 (1972), observed: “It has long been established prosecuting attorneys of this state are quasi-judicial officers and have the duty to see that one accused of a crime is given a fair trial.” See also *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969) (describing the role of a prosecutor in similar terms).

<sup>3</sup> See generally *State v. Finnegan*, *supra*, 6 Wn. App. at 619 n.6 (citing the Washington versions of Canon 5 and CPR DR 7-103). ABA Canon 5 framed the duty of a prosecutor as “to see that justice is done.” See also ABA Formal Op. 150 at 2 (1936) (discussing ABA Canon 5). ABA Code of Professional Responsibility DR 7-103 replaced Canon 5 in 1970. ABA Model Rule 3.8, in turn, replaced DR 7-103 in 1983. See generally ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 525, 529 (2013) (ABA Legislative History). Washington adopted RPC 3.8 in 1985. See generally Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional*

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*Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 874-75 (1986) (discussing the adoption of, in relevant part, Washington RPC 3.8). The Washington rule and associated comments were amended in 2006 to conform to earlier amendments to the corresponding ABA Model Rule. See Washington Supreme Court Order 25700-A-851, July 10, 2006 (adopting amendments); WSBA, Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct at 49-50 (2004) (explaining amendments). The Washington rule was further amended in 2011 as will be discussed above. Comment 10 to Washington RPC 3.8 was added in 2015 as a part of a package of amendments addressing practice by limited license legal technicians. See Washington Supreme Court Order 25700-I-1096, Mar. 23, 2015.

<sup>4</sup> *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

<sup>5</sup> See Washington Supreme Court Order 25700-A-1337, Apr. 7, 2021). The Supreme Court in *Nickels* held that an elected prosecutor's former client conflicts are generally imputed to the prosecutor's office as a whole.

<sup>6</sup> As Comment 1 to RPC 3.8 notes, RPC 3.8 has also been influenced by the ABA Standards Relating to the Prosecution Function. See generally Thomas R. Andrews, *The Law of Lawyering in Washington* at 8-33 (2012) (Andrews) (discussing the interplay between Washington RPC 3.8 and the ABA Standards noted).

<sup>7</sup> See Washington Supreme Court Order 25700-A-1649, July 2, 2025. This order also includes companion amendments to RPCs 1.0B, 1.10, and 1.13.

<sup>8</sup> Cf. Restatement (Third) of the Law Governing Lawyers § 97 (2000) (addressing governmental lawyers generally). See also RPC 1.13, cmt. 9 (addressing role of lawyers representing government agencies).

<sup>9</sup> See, e.g., *State v. Bland*, 90 Wn. App. 677, 953 P.2d 126 (1998) (analyzing the application of the then-current version of the "lawyer-witness" rule, RPC 3.7, to prosecutors' offices).

<sup>10</sup> See generally Andrews, *supra*, at 8-33 through 8-35 (discussing the underpinnings of Washington RPC 3.8); Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 Geo. J. Legal Ethics 461, 467-74 (2017) (Green) (addressing the development of ABA Model Rule 3.8).

<sup>11</sup> *Id.*

<sup>12</sup> Andrews, *supra*, at 8-35; Green, *supra*, at 478-79. Running "3.8" through the disciplinary notice search engine on the WSBA website will, as of this writing, produce two results—one from 2000 and one from 2018. The former involved a stipulated suspension for failing to disclose material evidence and the latter involved a stipulated admonition for improper pretrial statements. See

<https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1540>.

<sup>13</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

<sup>14</sup> See generally *State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981) ("A prosecutor's information must be based on his belief there is good ground to support the allegation.").

<sup>15</sup> Agreements under which a prosecutor seeks a release of civil claims arising out of an arrest in conjunction with the dismissal of the charges involved are generally not considered to violate RPC 3.8. See WSBA Advisory Op. 1135 (1987) (addressing "release-dismissal" agreements in Washington); ABA, *Annotated Model Rules of Professional Conduct* 475-76 (10th ed. 2023) (ABA Annotated Model Rules) (surveying "release-dismissal" agreements from a

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national perspective). Further, Comment 2 to RPC 3.8 notes that the prohibition in the rule does not “forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.”

<sup>16</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1164, 10 L. Ed.2d 215 (1963); see also *State v. Davila*, 184 Wn.2d 55, 357 P.3d 636 (2015) (discussing *Brady*). RPC 3.8(d), like its ABA Model Rule counterpart, also addresses mitigating evidence on sentencing. ABA Formal Opinion 09-454 (2009) points out that Model Rule 3.8(d) is not simply a codification of *Brady* and notes that *Brady* includes a threshold requirement that the evidence involved be “material” while the rule does not.

<sup>17</sup> Washington adopted RPC 3.8(e) in 2006. *Andrews, supra*, at 8-35. By that point, the ABA Model Rule provision on which it is based had been amended to eliminate a judicial approval requirement for an applicable subpoena. *Id.*

<sup>18</sup> RPC 3.6 was surveyed in this space in the July-August 2025 issue.

<sup>19</sup> For a discussion of a prosecutor’s supervisory responsibilities generally, see ABA Formal Op. 467 (2014).

<sup>20</sup> See generally ABA Legislative History, *supra*, 535-37 (surveying history of the 2008 amendments); ABA Annotated Model Rules, *supra*, 480 (same).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Andrews, supra*, 8-37 to 8-39; see also GR 9 Cover Sheet to Proposed RPC 3.8(g)-(h) (available on the Washington Courts’ rules site at:

[https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplayArchive&ruleId=251](https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=251))

<sup>24</sup> *Id.*

<sup>25</sup> Brooks Holland, *WSBA Legal Ethics Deskbook* at 21-3 (2d ed. 2020).