

Learning to Lose
Utah Prosecution Council
Fall Conference, 2024

- The Utah Rules of Professional Conduct are found here:
https://legacy.utcourts.gov/rules/ucja.php#Chapter_13
- [Rule 3.8 Special Responsibilities of a Prosecutor](#)

Rule 3.8. Special Responsibilities of a Prosecutor.

Effective: 11/1/2005

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.

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 and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by

the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes 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.

[3a] Utah has not adopted the ABA version of Rule 3.8. ABA Model Rule 3.8(d), requiring the prosecution to inform the tribunal of mitigating information related to sentencing, creates an unreasonable burden and is not deemed workable where the same information is required to be disclosed to the defense counsel who should be in the best position to decide what to present to the tribunal. The ABA's paragraph (e) regarding limitations on subpoenaing lawyers to grand juries or other legal proceedings is viewed as unnecessary, as there are adequate safeguards in place for federal prosecutors, and the Utah criminal justice system does not typically use the grand jury procedure. Utah has not adopted the ABA's proposed paragraph (f), because the changes are either unnecessary because of, or are potentially inconsistent with, the provisions of Rule 3.6.

- [There are several outstanding documentaries on the UNC – Duke rivalry. HBO's The Battle for Tobacco Road, is one of the best. https://www.imdb.com/title/tt1514261](https://www.imdb.com/title/tt1514261)
- [For a fascinating look at the "other side of the "Miracle on Ice" see ESPN 30for30 "Of Miracles and Men," the story of the 1980 Russian Olympic Hockey Team. From a review by Variety: "Miracles and Men" is a potent reminder that as much as we might like to reduce opponents and enemies to black-hatted stereotypes, there were flesh-and-blood men underneath those red uniforms – and that the joy of victory, to quote an old line, invariably comes with the agony of defeat."](#)
- CNN Article on The Surrender Cobra:
<https://www.cnn.com/2015/12/18/living/surrender-cobra-feat/index.html>
- The Nightingale's Song explores the Vietnam experience and subsequent careers of five graduates of the United States Naval Academy: John McCain, James Webb, Oliver North, Robert McFarlane, and John Poindexter.
https://en.wikipedia.org/wiki/The_Nightingale%27s_Song

- Fields of Fire is James Webb's novel based upon his experience as a Marine platoon and company commander in Vietnam. [https://en.wikipedia.org/wiki/Fields_of_Fire_\(novel\)](https://en.wikipedia.org/wiki/Fields_of_Fire_(novel))
- The Case of JP
 - o North Carolina State Bar Order of Discipline: <https://www.ncbar.gov/handlers/DisciplinaryOrderHandler.ashx?url=\Paul,%20Janice%20Order%20of%20Disc%20OCR.pdf&keyword=3.8%20and%20%22district%20attorney%22>
- [Losing with grace and dignity. Many Prosecutors' Offices have explicit policies regarding statements to the media following a loss in court. The Mecklenburg County \(North Carolina\) DA's Office policy states:](#)
 - o If reporter questions an ADA about a not guilty verdict, the ADA should say he/she respects the jury's decision and the system and should not criticize the jury, judge, witnesses or the investigating agency. The ADA should not express his/her disappointment in the outcome.
- More clips of Roy Williams' interview with Graham Bensinger may be found here: <https://grahambensinger.com/2021/11/03/roy-williams/>
- The Case of Mike Nifong
 - o North Carolina State Bar Order of Discipline: North Carolina State Bar Order of Discipline: <https://www.ncbar.gov/Orders/06DHC35.pdf>
 - o For a thorough discussion of Duke Lacrosse case see: [Until Proven Innocent: political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case](#) by Stuart Taylor, Jr.; Robert David Johnson.
- A full transcript and recording of [This Is Water](#) can be found here: <https://fs.blog/david-foster-wallace-this-is-water/> Wallace also published the speech in book form. Several years after he gave the speech Wallace took his own life. Multiple articles, documentaries, and even a feature film examine his life.
- Sportswriter John Feinstein was eating dinner with the Duke coaches when Coach K made his famous remark: "Here's to never forgetting tonight!" His article about that night can be found here: <https://www.washingtonpost.com/sports/2021/06/02/mike-krzyzewski-retirement-john-feinstein/>

- Article from the Washington Post on Stephen Colbert and Anderson Cooper's conversation about grief: https://www.washingtonpost.com/entertainment/tv/2019s-best-tv-moment-it-was-stephen-colbert-answering-anderson-coopers-question-about-grief/2019/12/23/ff7cec4e-236b-11ea-a153-dce4b94e4249_story.html
- The Gift of Alzheimer's by Maggie la tourelle can be found here: <https://www.penguinrandomhouse.com/books/239413/the-gift-of-alzheimers-by-maggie-la-tourelle/>