

**Prosecution Function
and
Defense Function**

A Comparison of Roles and Responsibilities

Judge Ellen K. Berz

Dane County Circuit Court, Branch 11

SIMILARITIES

PROSECUTOR		DEFENSE COUNSEL
3-1.3(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.	Conflicts of Interest	4-3.5(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.
Facts Outside the Record 3-5.9 The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.	Facts Outside the Record	Facts Outside the Record 4-7.8 Defense counsel should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.
3-2.8(c) A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.	Relationship with Courts	4-7.1(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.
3-5.2(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom. 3-5.2(b) When court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.	Courtroom Conduct	4-7.1(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom. 4-7.1(c) When court is in session, defense counsel should address the court and should not address the prosecutor directly on all matters relating to the case.

<p>3-3.1(d) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.</p> <p>3-3.1(g) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.</p>	<p>Witnesses</p>	<p>4-4.3(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised to decline to give to prosecutor or defense counsel for codefendants information which such person has the right to give.</p> <p>4-4.3(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.</p>
<p>Public Statements</p> <p>3-1.4(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.</p> <p>BUT WITH THE ADDITIONAL RESPONSIBILITY:</p> <p>3-1.4(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.</p>	<p>Public Statements</p>	<p>Public Statements</p> <p>4-1.4 Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.</p>

DIFFERENCES

PROSECUTOR		DEFENSE COUNSEL
<p>3-1.2(c) The duty of the prosecutor is to seek justice, not merely to convict.</p>	Function	<p>4-1.2(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.</p>
<p>3-3.1(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.</p> <p>3-3.1(c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.</p> <p>3-3.1(e) A prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.</p>	Investigation	<p>4-4.1(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel if facts constituting guilt or the accused's stated desire to plead guilty.</p>
<p>3-3.2(b) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.</p> <p>3-3.2(f) The prosecutor should not require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.</p>	Witnesses	<p>4-4.3(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.</p> <p>4-4.3(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.</p>

<p>3-6.1 The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.</p> <p>3-6.1(d) A prosecutor should not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecutor's position and not disclosed by defense counsel.</p>	<p>Sentencing</p>	<p>4-8.1(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.</p>
<p>3-4.1(a) The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.</p>	<p>Plea Discussions</p>	<p>4-6.2(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.</p>
<p>3-3.9(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction</p>	<p>Charging Decision</p>	
	<p>Client Advocacy</p>	<p>4-3.6 Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.</p>

I am a prosecutor whose oath of office binds me to uphold and defend the constitution and all other laws of the lang. This undertaking, I shall perform faithfully and well.

I shall do so by giving to the accused speedy justice consistent with the due process of law during the investigation and prosecution of crimes. In doing so, the constitutional and statutory rights of the accused will be shielded or protected from violation and abuse. While it is true that justice delayed is justice denied, it is also true that speedy justice that is violative of due process of law will result in a hasty, malicious and oppressive prosecution of the accused.

To give the accused due process of law, I should at least know, if not master, criminal law and the rules of criminal procedure and evidence and to give justice of the approximation to the accused, I should have the courage of my conviction by making decisions uninfluenced by considerations other than the facts and the law.

Knowing that justice is always tempered by the heart and mind of the man who ministers to it, I should take care that I am not unduly influenced by personal, material, coercive or tempting considerations that tend to obfuscate the eye of justice.

I should bear in mind that in serving the state, I am not expected to send innocent persons to jail; neither I am expected to let the guilty go unpunished.

In my relations with the court and the parties, I should be guided in my official actuations by the high ethics of the legal profession so that the dignity of the court may always be maintained and the faith and confidence of the parties in the administration of justice may be strengthened.

When all else are considered and I find myself still doubt, I should lean heavily upon my conscience for guidance because conscience is the voice in man that guides him aright.

If I can achieve all these in the performance of my duties as prosecutor, I shall feel amply rewarded because I shall live at peace with my conscience in the knowledge that I have done my duty to myself and to my country in conformity with my oath of office.

Credo

I am a public defender.

I am the guardian of the presumption of innocence, due process, and fair trial.

To me is entrusted the preservation of those sacred principles.

I will promulgate them with courtesy and respect, but not with obsequiousness and not with fear.

For I am partisan; I am counsel for the defense.

Let none who oppose me forget that with every fibre of my being I will fight for my clients.

My clients are the indigent accused.

They are the lonely, the friendless.

There is no one to speak for them but me.

My voice will be raised in their defense.

I will resolve all doubt in their favor.

This will be my credo: this and the Golden Rule.

I will seek acclaim and approval only from my own conscience.

And if upon my death there are a few lonely people who have benefited, my efforts will not have been in vain.

— James Doherty, 1957



***"Why shouldn't I be able to plead insanity?
I hired YOU to defend me, didn't I?"***