

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 486

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Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor Offenses

Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 4.3, 5.1, 5.3, and 8.4(a), (c) and (d) impose obligations on prosecutors when entering into plea bargains with persons accused of misdemeanors. These obligations include the duty to ensure that each charge incident to a plea has an adequate foundation in fact and law, to ensure that the accused is informed of the right to counsel and the procedure for securing counsel, to avoid plea negotiations that jeopardize the accused's ability to secure counsel, and, irrespective of whether an unrepresented accused has invoked the right to counsel, to avoid offering pleas on terms that knowingly misrepresent the consequences of acceptance or otherwise pressure or improperly induce acceptance on the part of the accused.¹

I. Introduction

This opinion addresses a prosecutor's obligations under Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 4.3, 5.1, 5.3, and 8.4(a), (c), and (d) when negotiating with an unrepresented individual who is or may be entitled to counsel at the time the prosecutor initiates the plea bargaining process for a misdemeanor charge. The opinion also addresses a prosecutor's duties when plea bargaining with an unrepresented accused on a misdemeanor charge irrespective of whether the accused has invoked the right to counsel. These ethical obligations exist independently of any constitutional or statutory obligations prosecutors may have to an accused.

Part I emphasizes the unique role that prosecutors play in the administration of justice and highlights (i) the expansion of misdemeanor criminal enforcement and (ii) the displacement of trial by plea bargaining. Part II identifies evidence of practices that have developed in some jurisdictions to manage misdemeanor pleas. Part III turns to Model Rule 3.8, addressing first the need for guidance and then examining the text and scope of Rules 3.8(a)-(c) and related rules as they apply to misdemeanor plea bargaining. Part IV identifies the specific obligations of a prosecutor under Rules 3.8(b) and (c) with respect to the accused's right to counsel. Part V interprets Rules 4.1, 4.3, and 8.4 as they apply to negotiation and entry of plea bargains.

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

A. The Special Role of Prosecutors

The professional integrity of prosecutors is essential to the administration of criminal justice.² Their special role is reflected in a distinctive standard of professional responsibility. Under the Model Rules, a prosecutor “has the responsibility of a minister of justice and not simply that of an advocate.”³ Canon 5 of the 1908 American Bar Association Canons of Professional Ethics stated that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”⁴ The ABA Model Code of Professional Responsibility also emphasized a categorical difference between the responsibility of a public prosecutor and “that of the usual advocate.”⁵ A prosecutor’s duty

is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he may also make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.⁶

As this Committee has emphasized in prior opinions, there are “many excellent prosecutors who scrupulously follow or exceed the mandates of the Rules of Professional Conduct.”⁷ This opinion focuses on the distinctive challenges and obligations of prosecutors when negotiating pleas in misdemeanor cases.

² See JOHN JAY DOUGLASS, NATIONAL COLLEGE OF DISTRICT ATTORNEYS, ETHICAL ISSUES IN PROSECUTION 36 (1988) (“The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.”) (quoting former prosecutor Carol Corrigan, Commentary, *Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986)).

³ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1]. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 454 at 3 n.10 (2009) (a prosecutor’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 at 1 (2014) (same).

⁴ Specific references to the American prosecutor as a minister of justice date to the nineteenth century. See, e.g., *People v. Davis*, 18 N.W. 362, 363 (Mich. 1884) (the prosecutor is a “sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected”); *Hurd v. People*, 25 Mich. 405, 416 (1872) (“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success.”), *superseded on other grounds by statute*, 1986 Mich. Pub. Acts 114, as stated in *People v. Koonce*, 648 N.W.2d 153, 155-56 (Mich. 2002).

⁵ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980).

⁶ *Id.*

⁷ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-467 at 6 (2014) (on the supervisory and managerial responsibilities of prosecutors); *id.* at 1 (“We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples” for this and other opinions of the Committee.).

B. Background on Misdemeanor Enforcement

Misdemeanors make up approximately 80 percent of state criminal dockets.⁸ The number of misdemeanor prosecutions is estimated to have doubled since 1972.⁹ The expansion has had a “concentrated impact on communities of color.”¹⁰ Most misdemeanor arrests result in charges – declination rates are low in many states, sometimes as low as 3 or 4 percent.¹¹ And “the vast majority of defendants plead guilty” at their initial appearance.¹² The result is a significant increase in the pre-trial dockets of state and local courts, and daunting legal and administrative burdens for both judges and prosecutors.¹³ Collateral consequences for

⁸ See Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1148 n.3 (2006) (citing Wisconsin data showing that in 2002, 79 percent of criminal cases filed in the state were for “criminal traffic or misdemeanor” offenses); ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010) (listing data from study of 11 state dockets). A more recent study estimates that “there are three times as many misdemeanor cases as felony cases filed nationally each year.” Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 764 (2017).

Although there is variation in the exact classification of low-level offenses across state and federal jurisdictions, in this opinion we use the term “misdemeanor” in its generic sense to refer to any criminal offense less serious than a felony according to the law of the relevant jurisdiction.

⁹ See ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 11 (2009) (“Most people who go to court in the United States go to misdemeanor courts,” describing growth of misdemeanor prosecutions since 1972); Alexandra Natapoff, *Misdemeanors*, in 1 REFORMING CRIMINAL JUSTICE 71 (Erik Luna, ed. 2017) (“Most criminal convictions in this country are misdemeanors, and most Americans experience criminal justice through the petty offense process.”). *But see* Stevenson & Mayson, *supra* note 8, at 747, 764 (estimating a seventeen percent decline in state misdemeanor filings over the last decade while reporting that the total number of misdemeanor cases remains substantial: 13.2 million in 2016).

¹⁰ See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 51 & fig.1.10 (2018) (an empirical study of New York City courts, describing data showing that “the dramatic expansion of misdemeanor arrests has been hyperconcentrated on ... black, and ... Latino individuals”); Stevenson & Mayson, *supra* note 8, at 737 (finding a “profound ... remarkably constant” racial disparity in the misdemeanor arrest rate over the last thirty-seven years); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 55-56 (2016) (reporting data showing that while African Americans make up 63 percent of the population of Baltimore, for “misdemeanor street offense[s], unconnected to a more serious charge” between 2010 and 2015, they comprised 91 percent of trespassing charges, 91 percent of failure to obey charges, 88 percent of hindering charges, 84 percent of disorderly conduct charges, and 90 percent of people charged with resisting arrest where no other charge supported the resisting charge); Sean Webby, *Policing in San Jose: Strict Enforcement of “Conduct Crimes,” Are Latinos Targeted?*, THE MERCURY NEWS (Apr. 4, 2009), <https://www.mercurynews.com/2009/04/04/policing-in-san-jose-strict-enforcement-of-conduct-crimes-are-latinos-targeted/> (reporting that 70 percent of arrests for disturbing the peace, 57 percent of charges for resisting arrest, and 57 percent of arrests for public drunkenness were of Latinos, even though this group comprises less than a third of San Jose residents).

¹¹ See Natapoff, *supra* note 9, at 78.

¹² *Id.*; see also BORUCHOWITZ ET AL., *supra* note 9, at 8 (“In New York City in 2000, almost 70 percent of misdemeanor cases were disposed of at the first appearance – most through a guilty plea.”); *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *Hearing*] (statement of Prof. Erica J. Hashimoto at 3), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Hashimoto%20Testimony.pdf>.

¹³ Hearing times in some jurisdictions run as short as three minutes. See ALISA SMITH ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, RUSH TO JUDGMENT: HOW SOUTH CAROLINA’S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS 19 (2017) (reporting that in South Carolina courts the hearings for misdemeanors and other minor crimes average 3.29 minutes and just two minutes long if a few outlier cases are excluded); ALISA

misdemeanor convictions have also expanded.¹⁴ A misdemeanor conviction can lead to denial of employment, expulsion from school, deportation, denial of a professional license, and loss of eligibility for a wide range of public services including food assistance, public housing, health care, and federal student loans.¹⁵

To realize the legitimate law enforcement objectives of plea bargaining, a practice that has become “an essential component of the administration of justice,”¹⁶ there must be “fairness in securing agreement between an accused and a prosecutor.”¹⁷ This is particularly so in the misdemeanor setting where, as the Supreme Court has warned, “the volume of . . . cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”¹⁸ Observance of the special obligations of prosecutors under the Rules of Professional Conduct is critical to achieving fair guilty pleas.

II. Evidence of Plea Bargaining Practices in Misdemeanor Cases

Notwithstanding the commitment of most prosecutors to high professional standards, there is evidence that in misdemeanor cases where the accused is or may be legally entitled to counsel, methods of negotiating plea bargains have been used in some jurisdictions that are inconsistent with the duties set forth in the Rules of Professional Conduct. As the report of a comprehensive five-year study chaired by a distinguished group of former prosecutors and judges summarized, “[w]hether because of a desire to move cases through the court system, a desire to keep indigent defense costs down, or ignorance, pervasive and serious problems exist in misdemeanor courts across the country because counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented.”¹⁹ Methods of negotiating pleas documented in this report and other studies include:

SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 14-15 (2011); BORUCHOWITZ ET AL., *supra* note 9, at 32.

¹⁴ See *National Inventory of the Collateral Consequences of Conviction*, JUSTICE CENTER, COUNCIL OF STATE GOVERNMENTS; JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 225-300 (2015); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489-94 (2010); BORUCHOWITZ ET AL., *supra* note 9, at 12-13 (listing collateral consequences); *People v. Suazo*, 118 N.E.3d 168, 178 (N.Y. 2018) (requiring a jury trial where a misdemeanor conviction carries the potential penalty of deportation; “even if deportation is technically collateral, it is undoubtedly a severe statutory penalty that flows from the federal government as the result of a state criminal conviction”). A misdemeanor conviction can also result in sentence enhancements should the person reoffend. See *Nichols v. United States*, 511 U.S. 738, 746-48 (1994) (upholding use of misdemeanor DUI conviction to add 25 months to a subsequent felony drug sentence).

¹⁵ See sources gathered *supra* note 14.

¹⁶ *Santobello v. New York*, 404 U.S. 257, 260 (1971); see also *id.* at 261 (the plea bargain “leads to prompt and largely final disposition of most criminal cases[,] . . . and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty”). Counting both misdemeanors and felonies, “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 566 U.S. 134, 143 (2012); see also *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

¹⁷ *Santobello*, 404 U.S. at 261.

¹⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (citation omitted).

¹⁹ NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85 (2009) [hereinafter JUSTICE DENIED]. The Committee added that “when counsel is not provided, all too often, the defendant’s waiver of legal representation is inadequate under Supreme Court precedents. As a result, there is a shocking disconnect between the system of justice envisioned by

- (i) requiring or encouraging plea negotiation with a prosecutor before the right to counsel has been raised;²⁰
- (ii) using delay or the prospect of a harsher sentence to dissuade the accused from invoking the right to counsel;²¹
- (iii) gathering arrestees into court *en masse* and instructing them, prior to any advice regarding the right to counsel or other rights, that they must tell the clerk of the court how they intend to plead;²²
- (iv) using forms to obtain waivers of the right to counsel and other rights either as a condition of negotiating a plea or following a negotiation absent proper

the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's courts." *Id.* (citation omitted). The Committee's co-chairs included a former director of the Federal Bureau of Investigations, a former state attorney general, a former district attorney and chair of the National District Attorney's Association, two former United States Attorneys, and a former state district and state supreme court judge.

²⁰ See Thomas B. Harvey et al., *Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton*, 29 CRIM. JUST. POL'Y REV. 688, 699 (2018) (reporting from court observations in St. Louis, Missouri "that mention of a defendant's right to counsel occurred after the defendant, prosecutor, and judge have discussed sentencing and have decided that the defendant will enter a formal guilty plea. . . . [P]roceedings usually lasted only a few minutes."); STEPHEN F. HANLON ET AL., SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE, AMERICAN BAR ASS'N, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE 8-9 (2017); SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 6 (2015) [hereinafter ACTUAL DENIAL]; SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS 29-33 (2014); JUSTICE DENIED, *supra* note 19, at 89 ("In several courts, the Committee's investigators found that defendants were encouraged to negotiate with prosecutors without the assistance of counsel, and in one court they were required to do so."); see also BORUCHOWITZ ET AL., *supra* note 9, at 9, 16-17.

This opinion addresses only the ethical obligations of prosecutors, including obligations under Rules 5.1, 5.3, and 8.4(a) toward lawyers and non-lawyers directed or supervised by the prosecutor. The opinion does not address the obligations of courts and court staff. While the Committee recognizes that courts and court staff are involved in some of the practices discussed in this opinion, prosecutors have independent and specific obligations in these circumstances, as discussed in this opinion.

²¹ See STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 25 (2004) [hereinafter *GIDEON'S BROKEN PROMISE*] (describing Rhode Island judge who "told the defendant that by requesting a lawyer, the defendant likely would receive three years of jail time instead" of six months, and California judges who told defendants "If you plead guilty today, you'll go home. If you want an attorney, you'll stay in jail for two more days" and noting that the judicial encouragement of waivers of fundamental rights is "especially acute" with regard to juvenile defendants); see also JUSTICE DENIED, *supra* note 19, at 85-86, 87 (noting that in Mississippi "[m]onths may pass before counsel is appointed, causing many people charged with non-violent offenses to serve more time in pretrial custody than warranted for the offenses themselves") (citations omitted); see also *id.* at 85-86, 89; BORUCHOWITZ ET AL., *supra* note 9, at 18-19.

²² See SMITH ET AL., *supra* note 13, at 8 (reporting from court observation in Richland County that defendants in a "packed courtroom" were told in an address that took less than two minutes that "everyone needed to form a line and come to the front of the room to tell the clerk how they intended to handle their case today. . . . No mention was made of the right to counsel. . . . Over the next hour or so, the defendants formed a line and the clerk worked through the [cases]. This process, though technically in open court, was a secret to observers who were present – whatever conversations the clerk had with those facing charges were not on the record and were inaudible to those in the seating area.").

confirmation that the defendant understands the forms and the rights being waived;²³

- (v) permitting police officers involved in the investigation of a crime or arrest to act as prosecutors and negotiate pleas;²⁴
- (vi) advising defendants of the right to counsel but failing to provide any procedure for asserting or validly waiving that right before requiring plea negotiation with a prosecutor;²⁵ and
- (vii) failing to inform indigent defendants of the procedure for requesting a waiver of court application fees associated with assignment of a state subsidized defense lawyer.²⁶

²³ See Harvey et al., *supra* note 20, at 700 (describing process of signing waivers after judge accepted uncounseled guilty plea); BORUCHOWITZ ET AL., *supra* note 9, at 16 (describing forms presented with instructions simply to sign); *GIDEON'S BROKEN PROMISE*, *supra* note 21, at 25 (reporting witness testimony that “in many Georgia courts, the clerk provides defendants with a complicated form that, if signed, serves as a waiver of counsel and guilty plea. Defendants are told that their case will not be called unless they sign the form.”).

Forms are sometimes used after displaying a video describing the right to counsel and other important rights. See ACTUAL DENIAL, *supra* note 20, at 15-16 n.17 (describing use of video recordings to advise defendants of rights); SMITH & MADDAN, *supra* note 13, at 15, 23 tbl.8 (describing use of video advisements and written forms). However, in some jurisdictions no effort is made to ensure that all the defendants gathered in the screening area have seen the full video or understand its contents (e.g., a video may begin before some defendants arrive or end after others have been called to appear or have to step out of court). See ACTUAL DENIAL, *supra* note 20, at 15-16 n.17; SMITH ET AL., *supra* note 13, at 8.

²⁴ SMITH ET AL., *supra* note 13, at 19 (In South Carolina’s minor crimes courts, police officers “were the majority of prosecutors in all counties, and nearly the sole prosecutor of defendants in [four]. . . . [T]hey negotiated directly with the defendants who they accused of violating the law. . . . Defendants were almost three times more likely to enter a plea of guilty or no contest when confronted by a police-officer-prosecutor . . .”). See also State ex rel McLeod v. Seaborn, 244 S.E.2d 317, 319 (S.C. 1978) (holding that practice of arresting officers acting as prosecutors in certain misdemeanor cases does not constitute unauthorized practice of law); State v. Messervy, 187 S.E.2d 524, 525 (S.C. 1972) (noting that this practice in the state’s magistrates courts has “been followed under a ruling of the attorney general since 1958”). For evidence of the practice in another jurisdiction, see State v. Aberizk, 345 A.2d 407 (N.H. 1975) (dismissing challenge of misdemeanor defendant to arresting officer serving as both prosecutor and witness). Cf. N.J. Supreme Court Advisory Comm. on Prof’l Ethics, Op. 672 *Conflict of Interest: Municipal Police Officer Serving as Municipal Prosecutor*, (1993), 1993 WL 137686, at *1 (“[T]he specter of an appearance of impropriety so permeates this situation as to preclude the dual service.”); Ohio Bd. of Comm’rs on Grievances and Discipline, Advisory Op. No. 89-23 (1989), 1989 WL 535028, at *1-2 (advising that an impermissible conflict of interest arises from county prosecutor serving simultaneously as city police officer within same county if “one position is a check on, or subordinate to the other,” if the officer acting as a prosecutor is “aware of the possibility of being called as a witness in the same case,” or if there would otherwise be an “appearance of impropriety”).

²⁵ See *GIDEON'S BROKEN PROMISE*, *supra* note 21, at 24-25 (describing observation of Georgia court “mass arraignment of defendants charged with jailable misdemeanors during which the judge informed defendants of their rights and then left the bench. Afterwards, three prosecutors told defendants to line up and follow them one by one into a private room. When the judge reentered the courtroom, each defendant approached with the prosecutor, who informed the judge that the defendant intended to waive counsel and plead guilty to the charges.”) (citations omitted).

²⁶ See ACTUAL DENIAL, *supra* note 20, at 6 (noting that a county in Michigan charges \$240 for all misdemeanor representation, a practice that contributes to 95% of defendants waiving counsel and 50% “pleading guilty at first appearance”); BORUCHOWITZ ET AL., *supra* note 9, at 19 (describing pressure to waive right to counsel arising from the amount of application fees in New Jersey, South Carolina, and Washington).

A prosecutor's use or endorsement of practices such as these would violate the Model Rules of Professional Conduct, as discussed in Parts III through V below.

III. The Prosecutor's Responsibilities Under Model Rule 3.8 and Related Rules

A. The Need for Guidance

Model Rules 3.8(a), (b), and (c) provide the foundation for analysis. Yet more than thirty years after their adoption by the American Bar Association there is still relatively little interpretive authority.²⁷ We address each of these sections of Rule 3.8 and its relationship to other provisions of the Rules of Professional Conduct below. At the outset, however, we note that faithful interpretation of the special responsibilities of a prosecutor under the Model Rules demands sensitivity to the higher calling of the role.²⁸ In some respects a prosecutor's duties exceed the requirements of statutory and constitutional law.²⁹

²⁷ Rule 3.8(d) is discussed in detail in an earlier opinion of this Committee, *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009). However, as the Illinois State Bar Association has summarized, "[t]here is a dearth of legal opinions, not only in Illinois but in other states, on prosecutors seeking to obtain a waiver of an important pretrial right from a pro se defendant." Ill. State Bar Ass'n, Advisory Op. 14-02, 2014 WL 2434672, at *2 (2014); *see id.* at *3 (concluding nonetheless that "a prosecutor may convey a plea offer to a pro se defendant prior to a court proceeding, regardless of who initiates the contact" as long as the prosecutor does "not recommend the plea or otherwise force, threaten or coerce the person to waive any important pretrial right," and the prosecutor "clearly identif[ies] that he or she is not disinterested, clarif[ies] any misconception the person may have about the prosecutor's role and advise[s] the person about the right to secure counsel."). *See also* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-500, 2014 WL 10383870, at *7 (2014) (concluding that prosecutor may not condition guilty plea and eligibility for favorable deferred adjudication program on defendant's waiver of right to discovery because practice violates Rule 3.8(d), constitutes a "coercive practice" in violation of Rules 8.4(a) and (d) and "abdicat[es] his responsibility as a minister of justice by not according the defendant procedural justice"; explaining that "[a] *pro se* defendant would have little or no understanding of the importance of his procedural right of discovery; and even if he had some understanding, the prosecution threat of facing increased penalties, including incarceration, if he does not accept [the program] and its conditions, negates any voluntary waiver of such procedural rights"); *see also* Va. State Bar Legal Ethics Advisory Op. 1876, 2015 WL 4977834, at *4-6 (2015) (identifying duty of prosecutor who knows defendant is a noncitizen to include reference to immigration consequences in the plea or request the court to include such consequences in the plea colloquy under the state version of Rule 3.8(b), which prohibits "knowingly tak[ing] advantage of an unrepresented defendant"; prohibiting a prosecutor from offering legal advice under Rule 4.3 to an unrepresented non-citizen defendant). Wisconsin amended its rules for prosecutors in the wake of *United States v. Acosta*, 111 F.Supp. 2d 1082, 1092-97 (E.D. Wis. 2000), *aff'd sub nom.* *United States v. Olson*, 450 F.3d 655, 681-82 (7th Cir. 2006). *See* WIS. SUP. CT. R. 20:3.8 (creating, inter alia, affirmative duty to inform an unrepresented person of the prosecutor's "role and interest in the matter" and of the person's right to counsel; specifying terms upon which prosecutor may negotiate a plea bargain with an unrepresented person); *see also* Wis. Bar Ass'n, Formal Op. E-09-02, slip op. at 3-4 (2009).

²⁸ *See In re Swarts*, 30 P.3d 1011, 1031 (Kan. 2001) ("A prosecutor is a servant of the law and a representative of the people of Kansas. When one undertakes the responsibility of prosecution we must view his or her conduct by an enhanced standard.") (internal quotation marks and citation omitted).

²⁹ *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 at 4 (2009) ("Courts as well as commentators have recognized that the ethical obligation [of a prosecutor under Rule 3.8(d)] is more demanding than the constitutional obligation."); *see also* ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT, *Prosecutors* 61:601 (ABA/BNA 2019) ("Model Rule 3.8 goes beyond what constitutional guarantees require of prosecutors on the subject of pretrial responsibilities to the unrepresented accused.").

B. Model Rule 3.8(a) and the Duty to Ascertain the Existence of Probable Cause to Charge

Rule 3.8(a) prohibits the prosecution of “a charge that the prosecutor knows is not supported by probable cause.” The provision avoids undue interference with the exercise of prosecutorial discretion.³⁰ As Comment [1] emphasizes, however, the prosecutor has a “specific obligation [] to see that the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence.”³¹ Read together with the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, and the prohibition on conduct “prejudicial to the administration of justice” in Rule 8.4(d), it is axiomatic that a prosecutor must actually exercise informed discretion with respect to the selection and prosecution of each charge. Thus, a prosecutor may not negotiate pleas without first making an independent assessment of the relevant facts and law for each charge.³² While it is common for prosecutors to make a careful assessment of evidence compiled incident to a decision to offer a plea, in some jurisdictions the volume of misdemeanor cases and their relatively lower stakes may dispose a prosecutor to rely uncritically on a police report or citation and a criminal background check.³³ Unless the prosecutor has reasonable confidence in the thoroughness of the fact finding and the evenhandedness of the judgment of other law enforcement officers who prepare the supporting documents and investigation, reliance on them is likely to be misplaced and the very discretion the Rule is designed to protect may be abused.

If a prosecutor’s workload is too heavy to permit the independent assessment of each charge as required by Rule 3.8(a) and the supervision of other state actors and their work product relevant to each case as required by Rules 5.1(b) and (c) and 5.3(b) and (c), the prosecutor may not be able to provide the competent representation required by Rule 1.1, nor act with the diligence required by Rule 1.3. A supervising prosecutor is responsible, under Rules 5.1(a), 5.3(a), and 8.4(a), for establishing policies, practices, and methods of monitoring prosecutors and non-lawyers that give “reasonable assurance” of compliance with prosecutors’ ethical obligations, including the obligation to be diligent and perform competent work.³⁴ In the words of Comment [2] to Rule 1.3, a lawyer’s workload “must be controlled so that each matter can be handled competently.”

³⁰ See also MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103(A) (1980).

³¹ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1].

³² See MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. [5] (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”). See also CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.6(c) (AM. BAR ASS’N 2015) (“The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant’s actual culpability.”); *id.* at 3-5.6(g) (“A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.”).

³³ See *State v. Young*, 863 N.W.2d 249, 253 (Iowa 2015) (“Given the pressures of docket management, there is a risk that the ability of the system to function efficiently and at low cost, rather than the reliability of fact-finding, will shape judicial outcomes. . . . [T]he risk of an inaccurate verdict in uncounseled misdemeanor cases is higher than in most felony prosecutions.”); see also KOHLER-HAUSMANN, *supra* note 10, at 131 (noting from lengthy New York City court observations and interviews with district attorneys, judges, and public defenders that “arraignment plea offers are based largely on prosecutorial practice and policy, and only minimally on factual or legal investigation”); *id.* at 125, 133, 138 (same). Evidence that misdemeanor convictions are not always tied to factual guilt can be found in studies going back to the 1950s. See *id.* at 62. On increases in misdemeanor dockets over the last three decades, see *id.* at 110, 111 fig. 3.1, 119.

³⁴ On the prosecutor’s managerial and supervisory responsibilities, see ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014). See also MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [6] (“Like other

In Formal Opinion 441, the Committee addressed the ethical obligations of lawyers representing indigent criminal defendants when caseloads interfere with competent and diligent representation.³⁵ The same analysis applies to prosecutors. If workloads interfere with competent and diligent representation, appropriate remedial steps must be taken by the prosecutor and/or the supervising attorney to whom the prosecutor reports by, for example, reassigning cases or limiting other duties.³⁶

C. Model Rule 3.8(b) and the Right to Counsel

Rule 3.8(b) requires the prosecutor to “make reasonable efforts to assure 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.” This opinion does not address constitutional issues, but our analysis of a prosecutor’s responsibilities under Rule 3.8(b) is aided by identifying circumstances in which the right to counsel applies. In a series of cases beginning with *Argersinger v. Hamlin*, the Supreme Court has held that the Sixth Amendment right to state subsidized counsel applies to misdemeanors if the punishment includes either actual imprisonment or a suspended sentence that may result in imprisonment.³⁷ Federal courts are divided over the test to determine when the Sixth Amendment right to state subsidized counsel attaches,³⁸ but there is no doubt that it can attach as early as an initial appearance,³⁹ that plea bargaining is a “critical

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.”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. No. 2, 2018 WL 3019993, at *2 (discussing prosecutor’s post-conviction duties regarding potential wrongful conviction, “[t]he Rules apply not only to individual prosecutors but also to their offices.”); *id.* at *2 n.3 (referencing both state analogue to Model Rule 3.8 cmt. [6] and Rule 5.1(a)); Or. State Bar Ass’n Bd. of Governors, *Trial Publicity*, Formal Op. 2007-179, 2007 WL 7261223, at *8 (2007) (a prosecutor’s level of responsibility under state analogues to Model Rule 5.1 and 5.3 “depends on the level of the prosecutor’s authority over the investigator” with whom she works); *id.* *8 n.8 (describing circumstances under state analogue to Model Rule 5.1 in which a supervising prosecutor would be responsible for impermissible pre-trial publicity). *See also* MODEL RULES OF PROF’L CONDUCT R. 8.4(a) & R. 8.4 cmt. [1] (2019) (“Lawyers are subject to discipline when they ... knowingly assist or induce another to [violate or attempt to violate the Rules of Professional Conduct] or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.”).

³⁵ *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 441 at 1, 7 (2006) (“[L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers”; possible ameliorative measures might include, for example, reassigning cases to others, refusing new cases, or reassigning non-representational work to others).

³⁶ *Id.* at 1, 7.

³⁷ *See* *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending right to counsel to misdemeanors and petty offenses involving imprisonment); *see also* *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (“a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution of the crime charged”) (quoting *Argersinger*, 407 U.S. at 40); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (clarifying that the Sixth Amendment right to counsel does not apply where state law provides both for fines and imprisonment, and a defendant is sentenced only to a fine).

³⁸ Compare *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (en banc) (holding that Sixth Amendment right to counsel attaches “only at or after the time that adversary judicial proceedings have been initiated” and therefore does not extend to pre-indictment plea negotiations) (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)), *with* *United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992) (holding that although Sixth Amendment right presumptively attaches only at or after the initiation of adversary judicial criminal proceedings ... [a] defendant may rebut this presumption by demonstrating that ... the government had crossed the constitutionally significant divide from fact-finder to adversary” at an earlier stage) (internal quotations and citations omitted).

³⁹ *See* *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

phase” of the representation during which the assistance of counsel is important to ensure fair and accurate outcomes,⁴⁰ and that the Sixth Amendment protects against interference with the right to counsel whether counsel is subsidized by the state, appointed, or independently retained.⁴¹ As importantly, a right to state subsidized counsel in misdemeanor cases may exist in circumstances not covered by the U.S. Constitution.⁴² An accused person also has a constitutional right to proceed *without* the assistance of counsel, but the waiver of such assistance must be knowing, voluntary, and intelligent.⁴³

The first draft of the Model Rules addressed the accused’s right to counsel, enjoining a prosecutor to “advise the defendant of the right to counsel and provide assistance in obtaining counsel.”⁴⁴ The language of the current rule is more precise in several respects. First, rather than simply enjoin the prosecutor to “provide assistance,” it specifies that the lynchpin to assistance is ensuring (i) that the accused is advised of the procedure for obtaining counsel and (ii) that the nature and timing of prosecution does not interfere with this procedure. Second, it replaces the restrictive term of art “defendant” with the more flexible term “accused,” thus clarifying that the assistance obligations of the Rule apply before the filing of an indictment. Third, the shift to passive voice makes the prosecutor responsible for ensuring that the accused is aware of the state’s procedure for obtaining counsel and has adequate time and access to the necessary administrative

⁴⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel”); *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). The right may attach even before a prosecutor decides formally to proceed with charges. See *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 207–08 (2008) (rejecting claim that the Sixth Amendment right to counsel attaches only after a prosecutor has formally decided to prosecute; the government’s commitment is “sufficiently concrete” once an accusation is “filed with a judicial officer” by the police incident to arrest and incarceration, triggering an initial appearance). The key for attachment of the Sixth Amendment right is initiation of “adversary judicial proceedings.” *Gouveia*, 467 U.S. at 187.

⁴¹ See *Johnson v. Zerbst*, 304 U.S. 458, 460, 469 (1938) (holding right to counsel violated where defendant allegedly invoked right in discussion with prosecutor and jailer but was not permitted by either to contact a lawyer and was tried and convicted); *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (gathering state cases finding violation of right to counsel where accelerated pre-trial and trial process compromised appointed counsel’s preparation of defense); *In re Motz*, 136 N.E.2d 430, 433 (Ohio Ct. App. 1955) (right to counsel violated where court refused a continuance to permit counsel retained by defendant to prepare, counsel withdrew, court refused to appoint new counsel, and defendant forced to trial pro se). Although we do not address how Rule 3.8 applies to the right to counsel in custodial interrogations, we note that the Fifth Amendment right to counsel can apply to misdemeanor defendants. See *Miranda v. Arizona*, 384 U.S. 436, 469–70 (1966); cf. *infra* notes 45 & 47.

⁴² State law frequently guarantees a right to subsidized counsel in circumstances in which the federal constitution does not. See *State v. Young*, 863 N.W.2d 249, 272 (Iowa 2015) (citing 2009 study showing that a majority of states provide a right to subsidized counsel broader than the Sixth Amendment “actual imprisonment” standard); *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (state constitutional right to due process requires right to state subsidized counsel at initial appearance). See also *Pretrial Right to Counsel*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-right-to-counsel.aspx> (offering 50 state survey of state constitutional and statutory provisions establishing right to counsel) (last visited Apr. 30, 2019).

⁴³ See *Faretta v. California*, 422 U.S. 806, 835 (1975); see also *Godinez v. Moran*, 509 U.S. 389, 390 (1993) (“[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.”). “[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.” *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original). Whether a waiver is knowing, intelligent and voluntary is a question of law on which we do not opine.

⁴⁴ MODEL RULES OF PROF’L CONDUCT R. 3.10(b) (Discussion Draft 1980).

assistance to invoke it, irrespective of whether another state actor (e.g., the judge, the court clerk, the public defender office) is legally charged with providing counsel, making indigence determinations, or soliciting and recording waivers of the right. Fourth, the modifier “reasonable” in “reasonable efforts” clarifies that a prosecutor is not required to suffer undue delay or otherwise compromise legitimate law enforcement objectives in order to meet the obligations of the Rule. The prosecutor is therefore charged with specific responsibilities to ensure that those who are or may be entitled to counsel are afforded the information and reasonable time necessary to retain a lawyer.⁴⁵

D. Model Rule 3.8(c) and the Duty Not to Seek Waivers of Important Pretrial Rights

Rule 3.8(c) provides that a prosecutor “shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.” As with Rule 3.8(b), there is no direct analogue to this provision in the 1908 Canons or the 1969 Code. The first draft of the Model Rules provided that a prosecutor “shall not induce an unrepresented defendant to surrender important procedural rights, such as the right to a preliminary hearing.”⁴⁶ The Rule as adopted is broader for several reasons. First, it prohibits seeking a waiver from an unrepresented “accused” and is therefore not limited to someone who is formally a “defendant.” Second, “inducement” implies efforts to persuade, whereas “seek to obtain” reaches even a bare request. Finally, the replacement of “procedural rights” with “pretrial rights” broadens the scope of the Rule by extending its application to all “important” rights (whether classified as substantive or procedural) and by explicitly targeting the pretrial stage – a particularly delicate phase of prosecution where judges exercise minimal or only intermittent supervision, the leverage of a prosecutor is extraordinary, and the risks and consequences of improper waiver by an unrepresented accused person are correspondingly acute.⁴⁷ As the Comment makes clear, the Rule does not apply to individuals who have elected to proceed pro se “with the approval of the

⁴⁵ Although the Rule applies broadly to the right to counsel, this opinion is limited to its application in the context of misdemeanor plea bargaining. For guidance on the right to counsel under the Fifth Amendment in custodial interrogation, see ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT, *Prosecutors* 61:616 (ABA/BNA 2019) (citing CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-2.7, 3-3.2, 3-3.6 (AM. BAR ASS’N 1992)).

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 3.10(c) (Discussion Draft 1980).

⁴⁷ The example of a preliminary hearing indicates, as the Comment notes, that in jurisdictions where waiver can lead to the loss of a chance to challenge probable cause or use the preliminary hearing to ascertain relevant facts about the prosecution’s case, prosecutors should not seek to deprive defendants of those opportunities. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2]. The contemporaneous ABA Standards of Criminal Justice, Prosecution Function, noted these features of the preliminary hearing in some jurisdictions. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION, Standard 3-5.1 (AM. BAR ASS’N 1980). But in its general reference to “important pretrial rights” the Rule as adopted plainly sweeps beyond that illustration. See ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT 61:617 (“the phrase is broad enough to cover pretrial rights grounded on federal or state constitutions, statutes, or case law”). As the Comment emphasizes, “prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.” MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2] (emphasis added). See also ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT 61:617 (ABA/BNA 2019) (“Rule 3.8(c) precludes prosecutors from seeking a waiver of important pretrial rights from an unrepresented accused, even when this conduct maybe permissible as a matter of constitutional law.”). The Rule’s reference to other “important pretrial rights” is particularly relevant to misdemeanor plea bargaining because there is often no requirement of a preliminary hearing or grand jury to provide an external check on prosecutors in misdemeanor cases and there are many important pretrial rights (among them not only the right to counsel but the right to disclosure of exculpatory evidence, the right to inspect evidence, and other discovery rights). This opinion addresses the right to counsel.

tribunal,” or to “the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.”⁴⁸

IV. Duties Arising from the Accused’s Right to Counsel

As discussed in Parts III.C through III.D above, Model Rules 3.8(b) and (c) provide that the “prosecutor in a criminal case shall:

(b) make reasonable efforts to assure 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.”⁴⁹

Rule 3.8(b) and (c) are of central importance to misdemeanor prosecutions because many people accused of misdemeanors are issued citations and notices to appear rather than arrested and brought in for questioning. Alternatively, they may be questioned in the field by police, arrested, and, particularly for the indigent, held if they cannot make bail. In these circumstances, they functionally become “unrepresented accused” persons either upon receipt of a citation and notice to appear, or as a consequence of an arrest. And yet, this early in the proceedings they may not be aware of their right to state subsidized counsel, the process for exercising it, or the fact that they have the right to retain a lawyer not paid for by the state. As importantly, a prosecutor may control whether the right to state subsidized counsel attaches because the Sixth Amendment right to counsel may hinge on the classification of the underlying offense and the prosecutor’s decision about what kind of plea to offer.⁵⁰ Under these circumstances, a prosecutor must scrupulously conform to Rules 3.8(b) and (c), as well as Rule 4.3, which prohibits giving legal advice to an unrepresented person whose interests in defending herself may conflict with the prosecutor’s interest in securing a conviction.⁵¹ A prosecutor must also take steps to be reasonably sure that the conduct of her subordinates and agents is “compatible with the professional obligations of the [prosecutor].”⁵²

Accordingly, if the charge associated with a plea offer triggers the right to counsel under *Argersinger* or where the circumstances of the offense, arrest, or initial appearance otherwise indicate that the accused has or may have a right to counsel under state or federal law, the prosecutor may not make a plea offer or seek a waiver of the right to counsel before complying with Rule 3.8(b). The prosecutor must make reasonable efforts to assure that the accused has been advised of the right to counsel and the procedure for obtaining counsel, and has been given a

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2].

⁴⁹ MODEL RULES OF PROF’L CONDUCT R. 3.8 (b) & (c).

⁵⁰ A plea offer of release for time served, for instance, triggers *Argersinger* because it is a sentence of actual imprisonment. Of course, state law, federal statutes, and the requirements of due process may create a legal right to subsidized counsel even though the Sixth Amendment does not. *See* note 42 *supra*. And the unrepresented accused has a core Sixth Amendment right to retain counsel at her own expense unless she elects to proceed pro se on terms approved by the court or by the laws and rules of the jurisdiction.

⁵¹ For a prosecutor’s duties under Rule 4.3 when negotiating pleas in misdemeanor cases, see Part V *infra*.

⁵² ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 at 3 (2014) (quoting Rule 5.3(b)).

reasonable opportunity to exercise that right and obtain counsel. If the prosecutor delegates authority to or otherwise relies upon police officers or other state actors to discuss waivers of rights in misdemeanor cases, pursuant to Rules 5.1(b) and (c), 5.3(b) and (c), and 8.4(a), the prosecutor is responsible for ensuring that Rules 3.8 and 4.3 are not violated during those discussions. As noted earlier in this opinion, under Rules 5.1(a) and 5.3(a) a supervising prosecutor is responsible for establishing policies, practices, and methods of monitoring that give “reasonable assurance” of compliance with prosecutors’ ethical obligations.

Moreover, under Rule 3.8(b) and (c), a prosecutor may not pressure, advise, or induce acceptance of a plea or waiver of the right to counsel after an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke or has initiated the process to invoke that right.⁵³ Even asking an unrepresented accused if she wishes to waive the right to counsel or accept a plea is improper if it is clear from the circumstances that the accused does not understand the consequences of acceding to the request. This is so because legal advice may be necessary to clarify any such misunderstanding, and, consistent with Rules 3.8(b), 3.8(c), and as required by Rule 4.3, a prosecutor is precluded from offering legal advice other than to seek counsel.

On the other hand, if the accused has independently elected to proceed pro se on terms approved by the court or by the laws and rules of the jurisdiction, the prosecutor may negotiate a plea, but any negotiations must comply with the Rules discussed in Part V below.

V. Duties When Plea Bargaining with an Unrepresented Accused

Irrespective of whether an unrepresented accused has invoked the right to counsel, Model Rules 4.1, 4.3 and 8.4(c) constrain a prosecutor’s conduct when negotiating a plea bargain with, e.g., (i) persons who are ineligible under state and federal law for state subsidized defense counsel and cannot afford or otherwise cannot secure private counsel, (ii) those who elect to proceed pro se even though they are eligible for subsidized counsel or could retain private counsel, and (iii) those who have invoked the right to counsel but are still in the process of securing counsel or deciding whether to do so.

Rule 4.1 prohibits a lawyer from knowingly making “a false statement of material fact or law to a third person.” The rule “was intended to incorporate the law of misrepresentation by recognizing that the failure to disclose can amount to a misrepresentation in some circumstances”⁵⁴ Comment [1] emphasizes that misrepresentations can “occur by partially true but misleading statements or omissions that are the equivalent of false statements.”⁵⁵ Rule 4.3 states that “[i]n dealing on behalf of a client with a person who is not represented by counsel” a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if

⁵³ This is so whether the unrepresented accused intends to pursue counsel subsidized by the state or retain counsel at the accused’s expense.

⁵⁴ CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, A LEGISLATIVE HISTORY OF THE DEVELOPMENT OF THE ABA MODEL RULES, 1982-2005, at 522 (2006) [hereinafter LEGISLATIVE HISTORY] (discussion at February 1983 Midyear Meeting). Rules 4.1 and 8.4(c) also apply when the accused has retained counsel, as does Rule 4.2.

⁵⁵ The comment was amended in 2002 according to the recommendations of the Ethics 2000 Commission. The amendment explicitly expanded emphasis on misrepresentation by omission, substituting the current language for the prior, more vague, reference to misrepresentation by “failure to act.” *See id.* at 527-28.

the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”⁵⁶ Finally, Rule 8.4(c) prohibits a lawyer from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁷

In the context of plea negotiations, these rules circumscribe the terms on which a prosecutor may deal with an unrepresented accused. An unrepresented accused, particularly one who lacks experience with the intricacies of the criminal justice system, is in an acutely vulnerable position.⁵⁸ The accused faces the vast array of resources at the prosecutor’s disposal as well as the prosecutor’s legal expertise at a moment in which, even in misdemeanor cases, substantial liberty interests and financial security are in jeopardy.⁵⁹ Moreover, once a prosecutor has committed to pursue a misdemeanor charge in plea negotiations, the interests of the prosecutor and the unrepresented accused are adverse, so the prosecutor must take particular care to avoid giving the impression that she is “disinterested” and to correct any misunderstanding regarding the prosecutor’s role in the matter. From the moment of arrest there is already, within the meaning of Rule 4.3, “a reasonable possibility of ... conflict with the interests of” the unrepresented accused. Accordingly, a prosecutor is prohibited by Rule 4.3 from offering legal advice regarding the substance of the plea, the process of its negotiation and entry, or the consequences incident to conviction.⁶⁰ As discussed below, however, a prosecutor can and sometimes must disclose material information regarding the substance of the plea, the process of its negotiation and entry, and known consequences of a conviction to an unrepresented person.

Comment [2] to Rule 4.3 states that a lawyer is not generally prohibited from “settling a dispute with an unrepresented person,” but a plea bargain is no ordinary arms-length transaction or settlement agreement. The stakes are often significantly higher than in civil matters and the terms must meet specific constitutional standards designed to ensure that the accused’s acceptance is “voluntary, knowing, and intelligent.”⁶¹ Thus while a prosecutor may negotiate a plea bargain with a pro se litigant, the prosecutor’s duties under Rules 4.1 and 8.4(c) are heightened in this setting. Assertions regarding the terms of a plea violate these rules if the prosecutor knows they are materially underinclusive. For example, statements regarding the value of a plea offer, particularly those which omit known collateral consequences of accepting a plea or the legal relevance of a plea to enhancement of a sentence in any subsequent case, can constitute prohibited

⁵⁶ Amendments approved in 2002 on the recommendation of the Ethics 2000 Commission elevated the prohibition on giving advice from the comments to the rule in response to reports that “in negotiations between lawyers and unrepresented parties, the giving of legal advice (often misleading or overreaching) is not uncommon.” *Id.* at 550. The Commission recognized that “although the line may be difficult to draw, it is important to discourage lawyers from overreaching in their negotiations with unrepresented persons.” *Id.* at 549-50. On the law of misrepresentation by omission, see RESTATEMENT (SECOND) OF TORTS § 551 (AM. LAW INST. 1977).

⁵⁷ Comment [1] to Rule 4.1 states that for “dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.”

⁵⁸ Comment [2] to Rule 4.3 emphasizes that “[w]hether a lawyer is giving impermissible advice may depend on the experience and the sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.”

⁵⁹ See Part IB *supra*.

⁶⁰ See Ill. State Bar Ass’n, Advisory Op. No. 02, 2014 WL 2434672, at *3 (“It would be a violation of Rule 4.3 ... should the communication [with a person who has elected to proceed pro se] give value to the plea offer or in any way advise the pro se defendant (‘It is a good offer’ or ‘Take the deal.’).”)

⁶¹ See Part IIIB *supra*.

misrepresentations under Rule 4.1 or deceptive conduct under Rule 8.4(c).⁶² Thus, where a prosecutor knows from the charge selected, the accused's record, or any other information that certain collateral consequences or sentence enhancements apply to a plea on that charge, statements like the following would constitute prohibited misrepresentations:

“Take this plea for time served and you are done, you can go home now.”

“This is a suspended sentence, so as long as you comply with its terms, you avoid jail time with this plea.”

“You only serve three months on this plea, that's the sentence.”

A prosecutor will rarely know all of the potentially relevant collateral consequences of accepting a plea or the exact nature of any subsequent sentence enhancement. However, if the prosecutor knows the consequences of a plea – either generic consequences or consequences that are particular to the accused – the prosecutor must disclose them during the plea negotiation.⁶³

Finally, a prosecutor's duties under these rules do not end once a plea has been accepted. If a prosecutor learns during the plea colloquy with the court or other interactions that the unrepresented accused's acceptance of a plea or waiver of the right to counsel is not in fact voluntary, knowing, and intelligent, or if the plea colloquy conducted by the court is inadequate to ascertain whether the plea or waiver of the right to counsel is in fact voluntary, knowing, and intelligent, the prosecutor is obliged to intervene. The prosecutor cannot, consistent with her role as a minister of justice under Rule 3.8 and the duty to avoid conduct prejudicial to the administration of justice under Rule 8.4(d), knowingly permit an unconstitutional plea to be entered by an unrepresented accused.⁶⁴

VI. Conclusion

Under Model Rules 1.1, 1.3, 3.8(a), and 8.4(a) and (d), prosecutors have a duty to ensure that charges underlying a plea offer in misdemeanor cases have sufficient evidentiary and legal foundation. Under Model Rules 1.1, 5.1, 5.3, and 8.4(a) prosecutors must take appropriate steps to make reasonably sure that the work of their subordinates and agents is compatible with their professional obligations. Under Model Rule 3.8(b) prosecutors must make reasonable efforts to assure that unrepresented accused persons are informed of the right to counsel and the process for securing counsel, and must avoid conduct that interferes with that process. After an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke that right or is in the process of attempting to secure counsel, a prosecutor may not, under Model Rules 3.8(b)

⁶² Furthermore, in the context of plea negotiations, violation of either rule is conduct prejudicial to the administration of justice under Rule 8.4(d).

⁶³ Given the delicacy of balancing the need to disclose material information to avoid either misrepresentation or deception, on the one hand, and the prohibition on legal advice, on the other, the best practice is to carefully record and preserve plea negotiations with an unrepresented accused. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.6(b) (AM. BAR ASS'N 2015) (encouraging record keeping where defendant waives right to counsel and proceeds pro se). Additional guidance is provided in the NAT'L PROSECUTION STANDARDS §§ 2-7.2, 2-7.4 and 2-7.5 (3d ed. 2009).

⁶⁴ *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009).

and (c), pressure, advise, or induce acceptance of a plea or waiver of the right to counsel. Finally, irrespective of whether an unrepresented accused has invoked the right to counsel, a prosecutor must, under Model Rules 4.1, 4.3 and 8.4(c) and (d), avoid offering, negotiating, and entering pleas on terms that knowingly misrepresent the consequences of acceptance, or otherwise improperly pressure, advise, or induce acceptance on the part of the unrepresented accused.

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