

In this hypothetical, a government lawyer acts as an administrative prosecutor before a regulatory agency or board (hereinafter “board”) in a proceeding that follows the board’s finding that there is probable cause to proceed with a hearing. Once she is assigned to prosecute a matter, the lawyer represents the agency in administrative hearings by presenting the evidence establishing a violation of the relevant law or regulations to the board. After the lawyer presents the board’s case and the defendant or respondent presents his case, the board evaluates the evidence and makes a decision.

In this case, the board has made a preliminary determination that there is probable cause for a case to proceed against a defendant or respondent, but the lawyer has made her own evaluation of the case and believes that the evidence is insufficient to proceed with the case.

QUESTIONS PRESENTED

Does Rule 3.8 apply to the lawyer acting as administrative prosecutor, thereby forbidding her from proceeding with a case if she does not believe there is probable cause to support a finding of a violation? Alternatively, if Rule 3.8 does not apply, may the lawyer proceed with the case if she determines that there is no non-frivolous basis for doing so, notwithstanding the board’s previous finding of probable cause?

APPLICABLE RULES AND OPINIONS

The relevant Rules of Professional Conduct are Rules 3.1¹ and 3.8.²

¹ **Rule 3.1 Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

² **Rule 3.8 Additional Responsibilities Of A Prosecutor**

A lawyer engaged in a prosecutorial function shall:

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

ANALYSIS

Rule 3.8

Rule 3.8 refers to a lawyer “engaged in a prosecutorial function,” rather than specifically to a “prosecutor in a criminal case,” as in the ABA Model Rule. The Committee Commentary explains that this change was intended to “eliminate any confusion on the part of any lawyer (such as a County Attorney or assistant Attorney General) who may be acting in the role of a prosecutor without being a member of a Commonwealth’s Attorney’s office.” However, it is clear from the context of the Rule and comments that it refers to criminal prosecutions only, not the administrative proceedings that are involved in this hypothetical.

For example, comment [1b] refers to the criminal code section involving deferred prosecutions in order to illustrate an example involving a “plea of guilty to a charge or charges.” Comment [2], interpreting Rule 3.8(b), refers to “constitutional rights such as the right to counsel and silence.” The language of Rule 3.8(d) nearly directly tracks the language of case law on a criminal defendant’s constitutional right to be informed of exculpatory evidence,³ and Rule 3.8(e) specifically refers to persons “assisting or associated with the prosecutor in a *criminal case*” (emphasis added). Taken together, it is apparent that the Rule applies to a lawyer who is prosecuting a criminal violation in any capacity, but does not apply to a lawyer who is acting as a “prosecutor” outside of the criminal context. Therefore, the lawyer in this example is not subject to Rule 3.8(a).

Rule 3.1

Rule 3.1 unquestionably applies to the lawyer in this hypothetical, as it applies to any lawyer, regardless of the type of matter involved or the nature of the lawyer’s employment. This means that the lawyer cannot “bring or defend” a proceeding if it is frivolous and there is no good faith argument for extending, modifying, or reversing existing law. The lawyer in this hypothetical is concerned that she may be violating Rule 3.1 by prosecuting a case in which she does not believe there is probable cause to support the violation. Unlike Rule 3.8(a), the standard in Rule 3.1 is not expressed in terms of “probable cause” but rather in terms of whether there is a basis for the claim that is not frivolous. Although this standard is weaker than the probable cause standard, the lawyer may not substitute the board’s finding of probable cause for her own independent judgment of whether there is a non-frivolous basis to proceed with the case. Therefore, the lawyer should not proceed unless there is a non-frivolous basis for doing so.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion
January 15, 2015

³ See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (referring to “evidence favorable to the accused...where the evidence is material either to guilt or to punishment”).