Rules governing prosecutors' disclosure

- KRPC
- Due process clauses: 5th Amendment (federal cases);14th Amendment (state)
- Statutes: KSA 22-3212, 22-3213; 18 USC 3500
- Rules: FRCrP 16, 26.2
- Orders: Pretrial Order #1
- US Att'y Manual

Comparison – KRPC v. other sources

- *Scope* of disclosure
- *Timing* of disclosure
- Whether *request* necessary
- Whether obligations *waivable* by opponent
- *Sentencing* and mitigating evidence

McDade Amendment

- “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.”
  - 28 USC 530B(a)

Ethics/law

- “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a *legal* duty has been breached.”

- KRPC, Prefatory Rule 226[20]

Ethics/law ct'd

- KRPC Prefatory Rule ("Scope") on purposes of rules of *ethics*:
  - **Self-governance:** "provide guidance to lawyers" or "a just basis for a lawyer's self-assessment"
  - **Regulatory framework:** "provide a structure for regulating conduct through disciplinary agencies"

Ethics/law ct'd

- KRPC does not directly constitute "law" according to KRPC's "Scope" provision:
  - "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation"
  - Rules "are not designed to be a basis for civil liability"
  - "purpose of the rules can be subverted when they are involved [sic] by opposing parties as procedural weapons"

Text of 3.8(d)

- "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 and **to the tribunal** all **unprivileged** mitigating information known to the prosecutor…"
- KPRC 3.8 is titled "Special Responsibilities of a Prosecutor"

Special ethical duties of prosecutors

- "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."
  - Comment [1] to KRPC 3.8

Scope of 3.8(d)

- *What* does KRPC 3.8(d) require to be disclosed?
  - Materiality
  - Admissibility
  - Format of information
  - Knowledge requirement
  - Waiver

scope– *Brady* rule's materiality requirement

- *Brady* rule limited by "materiality" requirement (at least on appeal)
  - Evidence is "favorable" if it is impeaching or exculpatory. S*ee Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (per curiam)
  - Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Cooper*, 654 F.3d 1104, 1119 (10th Cir. 2011) (quotation omitted).

Scope – SCOTUS distinguishes ethical duties from *Brady* doctrine

- Although *Brady* "only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations"
  - *Cone v. Bell*, 556 U.S. 449, 470 n. 15 (2009)

Scope – SCOTUS recognizes disclosure duty under ABA Standards broader than const'l

- "the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."
  - Kyles v. Whitley, 514 U.S. 419, 437 (1995)
  - quoting MRPC 3.8(d) & ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993)

Scope – USAM limits to “material”

- Limits scope of exculpatory & impeachment evidence to that which is “material”
  - US Att’y Manual 9-5.001
- But recognizes difficulty in determining materiality pretrial
  - “prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence”

Scope – NDAA limits to “material”

- “the prosecutor should pursue the discovery of *material* information, and fully and promptly comply with lawful discovery requests from defense counsel”
  - National District Attorneys Association, National Prosecution Standards, Standard 4-9.1 (“Prosecutorial responsibility”)

Scope – 3.8(d) has no materiality requirement

- "the plain language of Rule 3.8(d) does not impose a materiality element" *In re* Feland, 820 NW2d 672, 678 (ND 2012)
- ABA Formal Opinion 09-454 says "Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."
  - ABA says disclosure required "even if the prosecutor is not personally persuaded that the testimony is reliable or credible"

Scope – reason 3.8(d) lacks materiality limitation

- "A prosecutor's ethical duty to disclose all exculpatory evidence to the defense does not vary depending upon the strength of the other evidence in the case"
- Prejudice to defendant not relevant to whether ethical rule violated, but only to sanction
  - *In re* Feland, 820 NW2d 672 (2012)

Scope – KRPC v. other rules re: materiality

- 3.8(d) lacks materiality requirement
- *Brady* doctrine, other rules require disclosure only of material evidence (but arguably the *Brady* materiality limitation applies only in post-trial setting)
- *Kyles* Court is correct here – 3.8(d) is broader than const'l

Scope – 3.8(d) has no admissibility requirement

- No express limitation to admissible evidence
- ABA Formal Op. 09-454 interprets MRPC 3.8(d) as having no such limitation, as inadmissible evidence may:
  - Lead defense lawyer to admissible evidence or witness
  - Help in plea negotiations

Scope – USAM limits disclosure to admissible evidence

- “While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.”

Scope – KRPC v. other rules re: admissibility

- Again, 3.8(d) lacks admissibility requirement
- Ethical rule is more protective of defendant's rights

Scope – format of “evidence or information:

- ABA Formal Opinion 09-454
  - ethical duty of disclosure “is not limited to admissible ‘evidence,’ such as physical and documentary evidence, and transcripts of favorable testimony”
  - “it also requires disclosure of favorable ‘information.’”

Scope – electronic communications

- Memo from Dep. AG James M. Cole 3/30/11 discusses retention & dissemination of e-comm's
- Memo addressed to not only USAO but also FBI, DEA, USMS, BATF, BOP
- Memo applies to DOJ & "all law enforcement personnel participating as members of a prosecution team"

Scope – electronic communication

- Cole memo requires prosecution team members to practice retention
- Memo tells prosecutor to evaluate whether to disclose based on whether:
  - "reflects bias"
  - "contains impeachment information"
  - "contains any information (regardless of credibility or admissibility) that appears inconsistent with any element of the offense or the Government's theory of the case"

Scope – 3.8(d) limited to “known to prosecutor”

- Regarding both exculpatory/impeachment and mitigating sentencing info., disclosure obligation limited to what is “known to the prosecutor”
- KRPC 1.0(g) says “known” means “actual knowledge of the fact in question”
- But 1.0(g) recognizes that actual knowledge may be inferred from circumstances

Scope – USAM does *not* limit to material in prosecutor's possession

- "It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team."
- "Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution…."

Scope – Const. does not limit to material in prosecutor's possession

- "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."
  - *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)

Scope – KRPC v. other rules

- *Brady* doctrine, USAM, other rules require disclosure of favorable evidence not in prosecutor's possession
- 3.8(d) is *less* protective here

Timing – 3.8(d)

- KRPC requires prosecutor to "make *timely* disclosure to the defense…"
  - No further express discussion of timeliness in the KRPC (or MRPC)

Timing – ABA opinion

- But ABA says that information "once known to the prosecutor, must be disclosed under Rule 3.8(d) *as soon as reasonably practical*."
- ABA's rationale is that such information is needed:
  - In conducting defense investigation
  - Deciding whether to raise affirmative defense
  - Determining defense strategy in general

Timing – *Jencks Act*

- Various rules and statutes permit prosecution to withhold disclosure of witness statement until witness has testified on direct exam.
  - Jencks Act 18 USC 3500
  - FRCrP 26.2 (“Producing a Witness’s Statement”)
  - FRCrP 16(a)(2) (“Information Not Subject to Disclosure”)
  - KSA 22-3212(b) (general discovery statute does not require disclosure of statements of state witnesses)
  - KSA 22-3213 (“little Jencks Act”)

Timing – constitutional requirement

- No Supreme Court case directly addressing timing issue
- general rule is not as soon as possible
- 2nd Circuit: "we have never interpreted due process of law as requiring more than that *Brady* material must be disclosed in time for its effective use at trial"
  - *US v. Coppa*, 267 F.3d 132, 142 (2nd Cir. 2001)

Timing – USAM on *exculpatory*

- "Exculpatory information must be disclosed *reasonably promptly* after it is discovered"
  - USAM 9-500

Timing – USAM on *impeachment*

- "Impeachment evidence, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently.
  - USAM 9-5.00
- But USAM allows disclosure "at a time and in a manner consistent with the policy embodied in the Jencks Act" but only "[i]n some cases" where interests such as "witness security and national security" outweigh goals of early disclosure

Timing – *Lafler & Frye*

- *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) (IAC in advising defendant to reject plea offer)
- *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (IAC in failing to communicate favorable prosecution plea offer to defendant)

- These cases may affect what constitutes "timely" disclosure under 3.8(d)
  - Kimberly Knoll, *Prosecutors' Discovery and Disclosure Requirements After Lafler v. Cooper*, 52 Washburn L.J. 97 (Fall 2012)

Timing – KRPC v. other rules

- 3.8(d)'s requirement of "timely" disclosure w/ABA's gloss of "as soon as reasonably practical" is more protective of defendant's rights

- Tension between Jencks Act & *Giglio v. United States*, 405 US 150 (1972), on duty to disclose impeachment materials included in witness statements

Timing – protective order

- 3.8(d) provides exception to disclosure "when the prosecutor is relieved of this obligation by a protective order of the tribunal"
- Comment [3] says protective order available "if disclosure of information to the defense could result in substantial harm to an individual or to the public interest"
- ABA Formal Op. 09-454 gives 2 examples:
  - undermine an ongoing investigation
  - jeopardize a witness

Sentencing – 3.8(d)

- "disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor"
  - Disclosure both to defense *and* "to the tribunal"
  - "unprivileged" [why this exception to disclosure?]
  - Again limited to that which is "known to the prosecutor"

waiver by opponent – 3.8(d) v. *Ruiz*

- ABA says that defendant cannot absolve prosecutor of duties under 3.8(d), "therefore a prosecutor may not solicit, accept or rely on the defendant's consent." Formal Op. 09-454
- But Supreme Court has upheld fast track plea agreement under which defendant waived right to receive impeachment evidence and evidence supporting affirmative defenses
  - *United States v. Ruiz*, 536 U.S. 622 (2002)

Mens rea

- Colorado says 3.8(d) not violated unless prosecutor acts with mens rea of intent
  - *In re Attorney C*, 47 P.3d 1167 (Colo.2002)

- North Dakota says no intent requirement
  - in *In re Feland*, 820 NW2d 672 (ND 2012)
  - Plain language of 3.8(d) lacks intent requirement
  - Other rules (e.g., 3.4(c)) illustrate that drafters of rules know how to include mens rea requirement

Other ethical rules – 3.4(d)

- Constitution does not require disclosure of *inculpatory* evidence
  - *Weatherford v. Bursey*, 429 U.S. 545, 560 (1977)
- But 3.4(d) prohibits lawyer from "in pretrial procedure … fail[ing] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party"
- A Kansas state prosecutor has been censured in part based on violating this rule by failing to disclose that KBI chemist would be testifying re: estimated BAC in complainant's bloodstream
  - *In re Jordan*, 278 Kan. 254 (2004)

Other ethical rules – 8.4

- "Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4"
  - KRPC 3.8, comment [1]
- KRPC 8.4 ("Misconduct") is catchall