

2014-4

Synopsis: Prosecutors have a responsibility to take reasonable steps to prevent law enforcement personnel from making extrajudicial disclosures that the prosecutor would be barred from making directly.

Facts: The Vermont Department of Public Safety has either adopted a new policy or is considering adopting a policy that would authorize its officers to release the results of preliminary breath tests (PBTs) in DUI cases. PBT results are not admissible as evidence, but may be relied upon by investigating officers for the limited purpose of determining probable cause to make an arrest or to request an evidentiary test. 23 V.S.A. §1203(f).

Requesting attorney from the Vermont Department of State's Attorneys asks whether the new state police policy, if implemented, would put state prosecutors in violation of their ethical responsibilities under Vermont Rules of Professional Conduct 3.6(a) and 3.8(f).

Analysis: V.R.P.C. 3.6 titled "Trial Publicity" states, in subparagraph (a) the following:

- a. A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This rule prohibits an attorney who is participating in an investigation or litigation from making an "extrajudicial statement" that the attorney knows or should know will be made public and will have a substantial likelihood of materially prejudicing a pending or potential future adjudicative proceeding. Rule 3.6 applies to the lawyer and to any other lawyer associated in the same firm or government agency. Rule 3.6 does not extend to investigative agencies and policy agencies

who report to a prosecutor.

Rule V.R.P.C. 3.8 titled “Special Responsibilities of a Prosecutor” sets forth standards that apply to prosecutors in criminal cases. Rule 3.8(f) states:

The prosecutor in a criminal case shall:

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case who are in the employment or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

As quoted above, Rule 3.8(f) prohibits a prosecutor from making extrajudicial comments that “have a substantial likelihood of heightening public condemnation of the accused”. The Rule goes on to impose an obligation on prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case ... from making an extrajudicial statement that the prosecutor would be prohibited from making directly under Rule 3.6 or [under Rule 3.8.]”

Rule 3.6 notes certain subjects that are more likely than not to have a material prejudicial effect on a proceeding. Among the subjects expressly referenced are:

- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test.
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.

Releasing a preliminary breath test result that gives law enforcement officers justification

for requesting additional testing is the type of information that would have a substantial likelihood of heightening public condemnation of the accused. Such a test result is, by statute, inadmissible in the criminal prosecution. 23 V.S.A. §1203(f). Disclosure of such preliminary test results falls squarely within the type of disclosure addressed in Comment 5, subparagraphs 3 and 5, quoted above. A reasonable reading of the rules and comments in concert requires the conclusion that a prosecutor is not permitted to make extrajudicial statements about preliminary breath test results. The question remains whether a prosecutor will be in violation of the Rules of Professional Conduct if a police agency, not under the direct control of the prosecutor, releases such information.

The Rules make clear that the prosecutor has a responsibility with respect to the actions of police agencies involved in the investigation. The prosecutor's obligation is to "exercise reasonable care to prevent [investigators and law enforcement officers] from making improper extrajudicial statements" that the prosecutor would be prohibited from making directly. To meet that reasonable care obligation, Comment 6 to Rule 3.8 states, "[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals." A directive from prosecutors to police agencies that they should not disclose the results of preliminary breath tests should prove sufficient. The police would be expected to honor such a request from state prosecutors. If such a directive from state prosecutors proves insufficient, the prosecutors will need to consider what further steps may be reasonable to prevent law enforcement personnel from making prejudicial extrajudicial disclosures that the prosecutor would be barred from making directly.