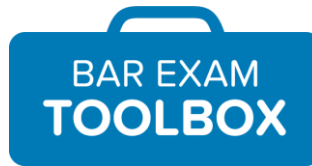


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are doing another in our "Listen and Learn" series. This one is on the unique responsibilities of prosecutors. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: This is Lee from the Law School Toolbox and the Bar Exam Toolbox. Given the recent focus on prosecutors in the news these days, this might be a good time to review professional rules that are specifically directed at the unique duties owed by those responsible for bringing criminal charges. While this topic is tested every now and then on the bar exam, issues prosecutors face often intersect with other rules that apply to all lawyers, whether involved in the criminal process or not.

Lee Burgess: First, let's look at the specific rule that applies to prosecutors – Rule 3.8. I will focus here on the language of the rule that concerns the duties of a prosecutor before a person is convicted of a crime. While we are quoting the relevant language from the ABA version of the rule, the language is essentially the same under both the ABA and California versions.

Lee Burgess: The prosecutor in a criminal case shall, (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (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 pre-trial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of 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, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.



Lee Burgess: Now, let's consider how this rule might show up on a future exam by looking at how the rule has been dealt with in the past. The following hypo is taken from the [July 2009 California bar exam](#):

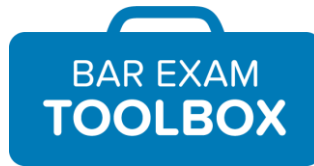
Lee Burgess: "Alex, an attorney, represents Dusty, an actor, who was recently arrested for battery after Vic reported Dusty knocked him down when he tried to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Lee Burgess: After Paul, the prosecutor, filed a criminal complaint against Dusty, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior. Paul interviewed Dusty's housekeeper Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vick down. Paul told Henry to avoid contact with Alex.

Lee Burgess: Confident that Dusty is nevertheless guilty, Paul had decided to proceed with a preliminary hearing."

Lee Burgess: So, when considering Rule 3.8, is there a problem with how Paul is proceeding to the preliminary hearing? The short answer is "Yes." Paul, the prosecutor, has a heightened responsibility not possessed by a defense attorney or an attorney involved in a civil matter. Specifically, under subdivision (a) of Rule 3.8, a prosecutor must not proceed with a prosecution when he or she suspects there is lack of probable cause. A prosecutor owes a duty to the public he or she serves not to pursue criminal convictions that lack merit. This duty is usually measured in terms of whether the prosecutor believes a conviction can be obtained beyond a reasonable doubt. This is different from the standard of duty owed by a defense attorney in a criminal case, because that attorney does not have to believe in the defendant's innocence before agreeing to represent them. It is also different from the duty owed by a civil attorney who may have doubts about the strength of a client's case. A civil attorney can proceed with that representation if it is not a frivolous case, a much lower standard than probable cause. I should note though, any attorney proceeding with a problematic case that is just this side of frivolous, should make sure the client understands their case is not strong, but that is a subject for another time.

Lee Burgess: There is another problem with this fact pattern though. We are told Paul asked the police officer to destroy the original police report of the incident because it was vague and required more detail. According to Rule 3.8 subdivision (d), Paul is required to disclose evidence that might negate or mitigate the defendant's



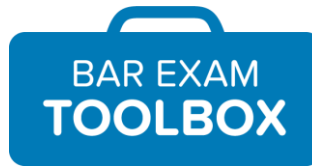
responsibility for the crime. Such evidence must be disclosed, even if it might only have a potential impact on the eventual sentence the defendant receives if convicted. Paul's actions could be viewed as trying to avoid handing over a report that potentially impacts the strength of the case Paul is trying to bring against Dusty.

Lee Burgess: Of course, don't forget to always raise viable counterarguments. Here you could argue Paul was simply asking for a report from the police officer with more detail. He was not asking the police officer to fabricate details just to include more into the report. The problem, of course, is that Paul asked the officer to destroy the original report – a fact that suggests an improper motive.

Lee Burgess: However, Paul's actions also raise a question about a potential violation of yet another rule of professional responsibility that also applies to attorneys who are not prosecutors – specifically, this may be an issue of fairness, which is governed by Rule 3.4. For our purposes, the relevant portion of the ABA version Rule 3.4 provides: A lawyer shall not, (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) falsify evidence, counsel, or assist a witness to testify falsely, or offer inducement to a witness that is prohibited by law; (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

Lee Burgess: The California version of Rule 3.4 includes the above language and adds two more specific provisions that expand on the responsibilities of a prosecutor by stating: A lawyer shall not, (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce; and (e) advise or directly or indirectly cause a person to secrete himself or herself, or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

Lee Burgess: Paul's request to the officer to destroy the original report could easily be seen as a violation of Rule 3.4 subdivision (a), and that he is denying the defense access to the original report, which might have value to their preparation of the case. If you are answering this question in California, you should point out that a prosecutor cannot suppress evidence the defense is entitled to receive. Subdivision (c) of the ABA rule might also be triggered, because Paul's failure to provide the document could be viewed as a violation of his obligation to abide by the rules of a tribunal under which require him to provide evidence to the defense. If you were writing an essay about this fact pattern on the bar exam, you might even want to raise the possibility that Paul might be flirting with a



violation of subdivision (b) of ABA Rule 3.4, which prohibits falsifying information. While there were no specific facts saying Paul was trying to get the officer to falsify information, and might not warrant an in-depth discussion, the possibility should be raised to show you have the ability to see the other side of the issue.

Lee Burgess: Finally, we must address the final set of facts from the July 2009 question. Again, we are told Paul interviewed Dusty's housekeeper, who told Paul Dusty did not knock down Vic – evidence that directly contradicts Vic's statement. If this was not bad enough, Paul then tells the housekeeper to avoid Dusty's attorney Alex. Paul can again be charged with two separate violations of the federal rules.

Lee Burgess: First, Paul is required to reveal this information to Alex, because this is evidence that could potentially exonerate Dusty. Thus, the failure to provide the evidence to Alex would be viewed as a violation of Rule 3.8 subdivision (d). However, Paul's actions also violate ABA Rule 3.4 subdivision (a), because he is trying to deny Alex access to this evidence by telling the housekeeper to avoid contact with Alex. Again, the California version of the rule specifically prohibits a prosecutor from encouraging a witness to become unavailable. It should be noted any attorney in any jurisdiction, not just a prosecutor, would probably be in violation of the rules on fairness for encouraging a witness to avoid or become unavoidable to the opposing side. The only potential exception to this is if the witness is an employee of the attorney and falls within the attorney-client privilege, or is subject to another privilege that would prevent the witness from testifying willingly.

Lee Burgess: That is all we have for you today. We hope you found these hypos to be helpful examples of how to work through exceptions to the confidentiality questions. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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