RULE 1.1– COMPETENCE

COMPETENCE

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, and thoroughness and preparation reasonably necessary for the representation.”

COMPETENCE LOOKS AT PERFORMANCE

› Generally, the standard of competence does not require specialization.
› Looks at background, experience and the nature of the issues.
› Most issues require the same skills as those generally possessed by any practitioner.
› Issues may be resolved by preparation, by association of competent counsel, or, when feasible, referral to more experienced counsel.

MAINTAINING COMPETENCE

› Education should be utilized to maintain competence.
› Practice in any capacity requires the study and application of precedents pertinent to that practice.
› Professional accountability requires that competence be maintained. Lack of knowledge will not excuse performance which does not measure up to professional standards.

RULE 3.8–SPECIAL RESPONSIBILITY OF PROSECUTORS

› Obligations are in addition to, not in place of, other requirements of the Rules of Professional Conduct.
› Obligations exceed case law governing criminal law.
› Rules change.
› Competence includes a knowledge of the limits of prosecutorial practice.

RULE 3.8(a)–CHARGING DECISIONS

› “The prosecutor shall in a criminal case shall: (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”
Is the standard high enough?
Abuse of the charging process may also violate Rule 8.4
RULE 3.8(b)–INTERVIEWING THE ACCUSED

The prosecutor in a criminal case shall:
(b) Prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused, make reasonable efforts to assure that the accused has been advised of his right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel.

When does one become the accused?
What is an interview?
Reasonable investigative steps.

RULE 3.8(c)–WAIVERS BY THE UNREPRESENTED

“The prosecutor in a criminal case shall:
(c) Not seek to obtain from an unrepresented accused a waiver of important rights, such as the right to a preliminary hearing.

Does not apply to an accused who is appearing pro se with the approval of the court.
Does not apply to lawful questioning of an uncharged suspect.

RULE 3.8(d)–DISCLOSURE OF INFORMATION

“The prosecutor in a criminal case shall:
(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.

AN OBLIGATION THAT EXCEEDS BRADY

No materiality requirement.
Extends to sentencing.
Impact of judicial decisions.

RULE 3.8(e) AND 3.6–MEDIA ISSUES

“The prosecutor in a criminal case shall:
(e) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a 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 from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

RULE 3.6–WHAT CAN WE SAY

The Rule applies as to all lawyers.
General information in the public record.
Scheduling, biographical information, time and place of arrest, agencies involved, and information necessary for apprehension.
Statements in response to adverse publicity.
No lawyer associated with a firm or government agency can make such a statement.
WHAT CAN’T WE SAY UNDER 3.6

Comment Five
The character, credibility or criminal record of a party, suspect or witness.
In a criminal case, the prospect of a plea of guilty, or the existence of a confession, statement or refusal to give a statement.
Test results of any kind or the refusal to take a test.
An opinion to the guilt or innocence of any party.
Evidence that may be inadmissible or prejudicial to the accused.
A statement of any charge unless it is accompanied by a clarification that it is merely an allegation and the Defendant retains the presumption of innocence.

AVOIDING ALLEGATIONS OF MISCONDUCT

- Be familiar with the Rules and your obligations under the case law.
- Make complete records, both in Court and in your office.
- Make sure you and the agencies you work with understand your obligations.
- Consider ethical obligations in your case analysis and understand your obligations under each.

ANSWERING ALLEGATIONS OF MISCONDUCT

- Never leave an allegation of misconduct unanswered.
- Respond immediately to any bar counsel inquiries.
- If necessary, supplement the court record.
- If you are in a hole, stop digging.
- To not hesitate to take corrective measures.