
**E-92-6 Prosecutor contact with unrepresented
criminal defendant**

Question

Before any court appearance has taken place and before defense counsel has been requested, retained or appointed, can a prosecutor ethically meet with a criminal defendant, ask questions and discuss the charge?

Opinion

Yes. A prosecutor must, however, always remain mindful of his or her duties under SCR 20:3.8 and 4.3 when speaking with an unrepresented defendant and must first always advise the defendant of the constitutional rights to remain silent and to counsel. A prosecutor also must avoid giving advice to an unrepresented defendant on how best to proceed or on the advisability of waiving procedural or constitutional rights. Further, a prosecutor should try to avoid one-on-one conversations or meetings with an unrepresented defendant where the prosecutor might later be called as a witness.

The responsibility of a public prosecutor differs from that of the usual advocate in that a prosecutor's duty is to seek justice, not merely to convict. *Berger v. United States*, 295 U.S. 78, 88 (1935). The American Bar Association Standards for Criminal Justice and guidelines promulgated by the National District Attorneys Association are helpful adjuncts to the Rules of Professional Conduct as to what is recommended, permissible and ethical conduct for prosecutors.

If an unrepresented criminal defendant approaches a prosecutor to discuss the case and potential settlement options, a prosecutor may meet with the defendant. *Disciplinary Proceedings Against Mauch*, 107 Wis. 2d 557, 319 N.W.2d 877 (1982). Charging conferences are commonly held in some prosecutors' offices in Wisconsin, where defendants are brought before a district attorney by the investigating police officer before a formal criminal complaint is issued. There is nothing improper or unethical with this type of proceeding.

To ensure compliance with SCR 20:4.2, at the outset of any meeting or communication between an unrepresented defendant and a prosecutor, the prosecutor first should ascertain if the defendant is represented by appointed or retained counsel or desires to speak with a lawyer before talking with the prosecutor. Upon a defendant's expression of a desire to talk with counsel or to obtain counsel, a prosecutor must cease all further discussions. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Maine v. Moulton*, 474 U.S. 159, 170-71 (1985). Any discussions or questioning after an assertion of the right to counsel or after counsel is retained or appointed violates the defendant's constitutional rights, and also constitutes an ethical violation. *Mauch, id.*; Ethics Committee Formal Opinions E-87-8 and E-91-6; *Disciplinary Proceedings Against Brey*, ___ Wis. 2d ___, ___ N.W.2d ___ (Oct. 14, 1992); Annotation: "Attorney Discipline—Communicating With a Party Represented by Counsel," 26 A.L.R.4th 102.

If the defendant wants to proceed without counsel, the prosecutor then must carefully and clearly advise the defendant of his or her Fifth and Sixth Amendment rights (*Miranda* rights), and ask if the defendant wants to give up these rights. Current law requires that a waiver be "knowing, voluntary and intelligent," but application of this standard to specific facts is subject to considerable uncertainty. In *Patterson v. Illinois*, 487 U.S. 285, 292-94 (1988), a closely divided supreme court held that a prosecutor could talk with an unrepresented defendant after first advising the defendant of the *Miranda* rights and obtaining a knowing and intelligent waiver.

A prosecutor must be wary of later becoming a witness if a waiver of *Miranda* rights is challenged. Obtaining a signed, written waiver and having at least one or two other law enforcement witnesses present at the meeting is a prudent practice to avoid such situations. See "Annotation: Waiver of Right to Counsel," 101 L. Ed. 2d 1017 (1988).

Any time a prosecutor speaks with an unrepresented defendant, a prosecutor must be mindful of the inherent imbalance of power, superior access to information, knowledge of the law, and so on, which give a prosecutor a great advantage over an unrepresented defendant. *Brey, id.* A defendant may waive an important procedural safeguard in hope of obtaining early release, from fear of reprisals or as the result of emotional distress. See *Spano v. New York*, 360 U.S. 315 (1959). It is a violation of SCR 20:3.8(c) for a prosecutor to secure a waiver of rights under circumstances indicating that the waiver is not knowing, voluntary or intelligent.

While the supreme court has recognized the value of plea bargaining, *Santobello v. New York*, 404 U.S. 257 (1971), and has permitted the practice of a prosecutor's threatening more severe punishment in exchange for a plea, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), these decisions contemplated the involvement of defense counsel in the plea bargaining process. In negotiating with an unrepresented criminal defendant, a prosecutor must be careful not to use improper harassment or false representation of the facts, overstating the strength of the prosecutor's case or not disclosing exculpatory evidence in order to influence the defendant's decision. See *Brady v. United States*, 397 U.S. 742 (1970).

If a criminal defendant asks for legal advice ("Do you think I should take the deal?"), a prosecutor may not ethically provide such advice, as a clear conflict of interest exists. SCR 20:1.7. If a defendant asks for an opinion as to the outcome of the case ("Will the judge follow your probation recommendation?"), or general advice on the merits of trial versus a plea, a preliminary hearing versus a waiver, and so on, a prosecutor is ethically forbidden from advising a defendant one way or the other. SCR 20:3.8(c).

In such situations, the most ethical and prudent response by a prosecutor would be to say, "You need to talk to your own lawyer about that. I cannot give you any advice whatsoever."