
**E-93-3 Prosecutor contact with criminal
defendant before first court appearance**

Question

Can a prosecutor ethically discuss an unrepresented criminal defendant's case with the defendant after a formal criminal prosecution has been commenced by the filing and service of a criminal summons and complaint, but before the first court appearance?

Opinion

Yes. Prosecutors must, however, always remain mindful of their professional responsibilities under SCR 20:3.8 and SCR 20:4.3. These duties and concerns were addressed in Formal Opinion E-92-6, which should be referred to in such situations.

While case law suggests that custody is the trigger for a law enforcement officer's duty to commence any discussion with a suspect or defendant by a recitation of the so-called *Miranda* rights [*Miranda v. Arizona*, 384 U.S. 436 (1964)], the Rules of Professional Conduct impose their own set of duties on attorneys when dealing with unrepresented persons and persons represented by counsel. SCR 20:4.2 and SCR 20:4.3.

The Sixth Amendment guarantees the accused, *after* the initiation of formal criminal charges, the right to rely on counsel as the "medium" between the accused and the government. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). This Sixth Amendment right to counsel arises at the time of indictment or the filing of a formal criminal complaint. *Massiah v. U.S.*, 377 U.S. 201 (1964).

The filing of a criminal complaint and issuing of summons to a defendant is an initiation or commencement of formal criminal charges. Whether or not a prosecutor is constitutionally or ethically required to first advise a criminal defendant of *Miranda* rights in all contexts is not addressed by this opinion.

Prudent practice suggests that a prosecutor who issues a formal criminal charge and who later is contacted by a defendant wanting to "work out" a settlement should first ascertain if the defendant is currently being represented

by counsel. If so, the interview may not proceed without the consent of counsel. If the defendant is not represented by counsel and wants to proceed with the discussion nonetheless, the prosecutor can ethically continue with settlement discussions. Prudence also suggests that the prosecutor should make pertinent “notes to the file” of the discussions, the fact that the defendant was not represented and of the defendant’s desire to proceed with discussions on his or her own.