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June 14, 2010

**VIA FACSIMILE (415) 538-2171
AND U.S. MAIL**

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.8 of the Rules of Professional Conduct

Dear Ms. Hollins:

On October 20, 2009, District Attorney Gregory D. Totten wrote to express concerns regarding proposed Rule 3.8, which would replace existing rule 5-110 of the Rules of Professional Conduct of the State Bar. I appreciate that changes have since been made to proposed rule 3.8(a). However concerns remain regarding paragraphs (b), (c) and (f).

Rule 3.8(b)

This rule is unnecessary. The court has the duty to advise the defendant of the right to counsel. (Pen. Code, §§ 860, 987.) There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty.

Comment 1B states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e., to make efforts to assure that the accused is advised of the right to, and procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. Paragraph (b) of rule 3.8 should be deleted.

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Rule 3.8(c)

This rule prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*. California law already prohibits an unrepresented defendant from waiving preliminary hearing. (Pen. Code, § 860; *In re Van Brunt* (1966) 24 Cal.App.2d 96, 104, overruled on other grounds in *In re Smiley* (1967) 66 Cal.2d 606, 627.) If a case is going to be resolved by way of guilty plea rather than by trial, the defendant must waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) The standard guilty plea forms include these waivers, and the court must satisfy itself that the waivers are free and voluntary before they are accepted.

A defendant has the constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) This is a choice by the defendant, not by the prosecution, and not by the court. The court does not really “approve” a defendant’s exercise of this right.

The application of the proposed rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The proposed rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling “approving” self-representation.

While I appreciate the concern in protecting the rights of unrepresented defendants, the proposed rule is overbroad and unnecessary.

Rule 3.8(f)

The rule would require prosecutors to “exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution” from making certain extrajudicial statements. This rule should not be adopted because it could be read as requiring the prosecutor, in every case, to issue directives to police, victims, witnesses, and other persons over which prosecutors have no supervisory authority. This would include statements by independent elected officials such as police chiefs.

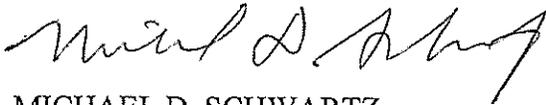
Comment 6 explains that this duty applies “even when such persons are not under the direct supervision of the prosecutor.” Rules 5.1 and 5.3, which are cited in Comment 6, make attorneys responsible only for persons over whom they have managerial authority or direct supervisory authority. The State Bar should not mandate prosecutors to issue directives to persons in other agencies over whom they have no supervisory or managerial authority.

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CONCLUSION

We hope the State Bar will modify the provisions discussed above in accordance with our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Schwartz". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

MDS/ck

pc: W. Scott Thorpe, CDAA