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State of Colorado

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May 25, 2006

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Proposed Rule Changes to Rule 3.8 of the Colorado Rules of Professional Conduct

Dear Madam Chief Justice and Associate Justices of the Colorado Supreme Court:

It is my privilege, as District Attorney for the Second Judicial District, State of Colorado, to submit this letter presenting concerns that I have regarding the proposed change to Rule 3.8 of the Colorado Rules of Professional Conduct (Special Responsibilities of a Prosecutor) and proposing changes which, I believe, are in accordance with the original intentions of the Colorado Supreme Court when it adopted the current Rule 3.8 and in line with United States Supreme Court authority regarding the Fifth and Sixth Amendments as they relate to the issues the Rule addresses.

In May of 1992 and effective the beginning of 1993, the Colorado Supreme Court adopted the current Rules of Professional Conduct, including Rule 3.8 (the "Rule"). The Colorado rules represented local adoption of the American Bar Association Model Rules of Professional Conduct, with

certain departures taken by this Court from those Model Rules. In particular, Colorado's Rule 3.8(c) was a departure from Model Rule 3.8(c). The Model Rule had provided that the prosecutor in a criminal case shall:

> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

This Court added to the provision the following language which was not in the Model Rule but which closely tracked language in the Official Comment to the Model Rule:

> "except that this does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence."

The 1993 rule adopted by this Court thus melded the Model Rule with the Model Rule Comment. This action was taken by the Court notwithstanding the Colorado submitting committee's recommendation that Rule 3.8 be adopted exactly as set out in the Model Rules.[1] It is apparent

[1] The Colorado Model Rules Committee's comment to its proposed Rule 3.8 had stated: "Because this provision is based to a considerable extent on the

that this Court felt it important that the added language be clearly seen as part of the Rule, rather than a comment thereto which would not have the same force and effect.

The change now being proposed to 3.8(c) essentially seeks—in the spirit of conforming the Rule to the Ethics 2000 incantation of the Model Rules—to undo that which this Court did in 1993. To the extent that the Court acted to assure that prosecutors were able to act appropriately in their capacities as the chief law enforcement officers for their judicial districts, the Court's actions in 1993 were grounded on sound public policy. The proposed revision is not. For this reason, I urge the Court to reject the committee's proposed change to the text of Rule 3.8(c), and instead to leave intact the language this Court, on its own initiative, inserted in 1993.

There is a second issue lurking in Rule 3.8 that has generated problems, and the present occasion of this Court considering the entire Rule

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ABA Standards of Criminal Justice Relating to the Prosecution Function which many jurisdictions have adopted and because it deals with a specialized area of practice, the Committee felt it should leave this provision as it was set out in the Model Rules." Colo. R.P.C. 3.8, Committee Comment.

and its comments seems an appropriate time to address the issue. The Rule provides, at the outset, that:

> "The prosecutor *in a criminal case* shall: . . ."

(Emphasis added.) By its very terms and with only one exception (current subsection (f) insofar as it refers to a grand jury proceeding), the Rule applies only when a case has been filed. This reading of the Rule is further buttressed by the use of the word "accused" in subsections (b) and (c). The use of the term "accused" is significant. The term "accused" is well understood and constitutionally based. It has a well-established and critical meaning in the specific context of the right to counsel. The right to counsel for one who is an "accused" is different than the right to counsel for one who is not an "accused," with a different constitutional source. A person is an "accused" for right-to-counsel purposes only at or after the point in time when adversary judicial proceedings have been initiated against him. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); People v. Vigoa, 841 P.2d 311, 315-16 (Colo. 1992). Although that point may differ from state to state, in Colorado that point comes when the prosecutor files a case by grand jury indictment, by complaint, or by information. Vigoa, 841 P.2d at 315-16; People v. Aalbu, 696 P.2d 796, 808

(Colo. 1985). Subsections (b) and (c), which expressly address an "accused," are not to be understood as imposing duties on prosecutors regarding a person who is not an "accused." A person who is under investigation, and is being questioned at a time when no charges have been filed, is not an "accused."

As such, I believe that a prosecutor's obligations under the Rule accrue only after the case is filed.[2] To those engaged in criminal practice and well-versed in criminal constitutional doctrine, it seems, this point would appear to be adequately covered by the current language of the Rule and accompanying commentary. I am aware, however, that a contrary position has been adopted in formal proceedings by those charged with the

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[2] The question thus arises why there is a provision in subsection (c) stating the Rule is inapplicable to the post-waiver questioning of a "suspect." After all, if one is not an "accused" the Rule does not apply, even if one is a "suspect," and so there should not be a need to specify further the Rule's inapplicability. The reason is that one may be at the same time an "accused" in formal judicial proceedings and a suspect in another matter. See, e.g., McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Questioning as to that other matter is constitutionally allowed (assuming, of course, that any required waivers have been given). The last sentence of subsection (c) appropriately restricts the Rule, so that it does not preclude *all* questioning (and the obtaining of a related waiver) of a person simply because the person has acquired the status of "accused" in one matter.

responsibility of prosecuting violations of the rules. See Summary Judgment Order, dated August 3, 2004, in 03PDJ0830.[3]

The ramifications, on the administration of justice, of such a contrary application of the Rule would be significant and negative. It would preclude prosecutors from participating in, or from advising law enforcement personnel in, the interrogation of uncharged suspects done in a manner wholly consistent with constitutional standards. Police would be motivated not to involve the prosecutor, for they would know that the prosecutor would have to prohibit action that the officers, on their own, would be entirely free to take. Such a stance would discourage, rather than encourage, the collaborative involvement of prosecutors, with the result that police too frequently would choose to conduct their affairs without the benefit of consultation and advice from prosecutors. This would be detrimental to the interests of justice. See, e.g., American Bar Association Standards for Criminal Justice, The Prosecution Function (3d. Ed. 1993), § 3-2.7 (Relations With Police) (specifying the prosecutor's responsibility to advise and train the police). Furthermore, it would impair prosecutors' ability to fulfill their own investigative responsibilities—see id. at § 3-3.1(a)

[3] It is my understanding this order is available to the Court upon request through the Office of the Presiding Disciplinary Judge.

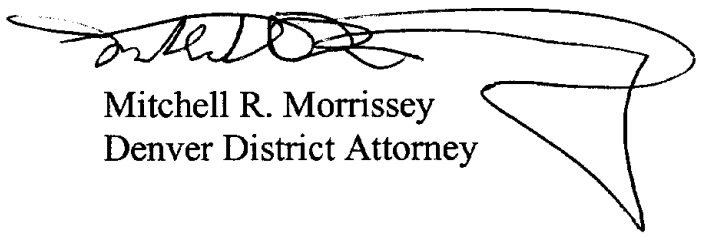
(Investigative Function of Prosecutor) (articulating an affirmative responsibility of a prosecutor to investigate suspected illegal activity not adequately dealt with by other agencies)—including the vital ability to interview suspects, an investigative step that often yields exculpatory information and leads to a decision not to pursue criminal charges. The very fact that formal disciplinary charges have been brought founded on the contrary interpretation, with the attendant potential that future similar charges may be lodged, presently operates to chill police and prosecutors from pursuing the practices most conducive to the sound administration of criminal justice.

For these reasons, I urge the Court to consider inserting a clarifying discussion in the comment to the Rule.

To assure that the intent of the Rule and this Court is clear and that the Rule is construed in accordance with United States Supreme Court authority, I propose the following Rule 3.8 and supporting Comment.

I welcome the opportunity to meet with you at the scheduled hearing to discuss the various proposals.

Sincerely,



Mitchell R. Morrissey
Denver District Attorney

Attachments: Denver District Attorney's Proposed Changes to Rule 3.8
Denver District Attorney's Proposed Changes to Rule 3.8, marked to show proposed changes from current Rule 3.8
Denver District Attorney's Proposed Changes to Rule 3.8, marked to show differences from Standing Committee's proposed Rule 3.8

PROPOSED CHANGES TO RULE 3.8
As proposed by the Denver District Attorney

May 25, 2006

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

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 pretrial rights, such as the right to a preliminary hearing, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.

(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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

> (1) the information sought is not protected from disclosure by any applicable privilege;
>
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (3) there is no other feasible alternative to obtain the information;

(f) except as provided in Rule 3.6(b) and 3.6(c), and except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that 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.

Comment to RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2A] This rule by its terms applies only in criminal cases, that is, where a criminal court action has been commenced by the formal filing of criminal charges. The term "accused" is used to connote the person against whom the formal charges have been filed and are pending.

[2B] The word "suspect" is used in the last sentence of paragraph (c) because a person may happen to be an accused in a criminal case and at the same time be an uncharged suspect with regard to one or more other possible offenses. A prosecutor need not, merely because of the existence of a criminal action and the resultant status of a person as an "accused" in that action, refrain from questioning the person regarding those other possible offenses, where the questioning is in accordance with law including any requirements for a waiver of the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe

consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Rule is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

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Marked to show proposed changes from current Rule 3.8

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(d) make timely disclosure to the defense of all evidence ~~of~~ 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; ~~and~~

~~(e) 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.~~

~~(f)~~ not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless~~:~~

~~(1)~~ the prosecutor reasonably believes:

(~~i~~1) the information sought is not protected from disclosure by any applicable privilege;

(~~ii~~2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(~~iii~~3) there is no other feasible alternative to obtain the information;

(f) except as provided in Rule 3.6(b) and 3.6(c), and except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that 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.

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[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

~~[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.~~

[2A] This rule by its terms applies only in criminal cases, that is, where a criminal court action has been commenced by the formal filing of criminal charges. The term "accused" is used to connote the person against whom the formal charges have been filed and are pending.

[2B] The word "suspect" is used in the last sentence of paragraph (c) because a person may happen to be an accused in a criminal case and at the same time be an uncharged suspect with regard to one or more other possible offenses. A prosecutor need not, merely because of the existence of a criminal action and the resultant status of a person as an "accused" in that action, refrain from questioning the person regarding those other possible offenses, where the questioning is in accordance with law including any requirements for a waiver of the rights to counsel and silence.

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[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

~~COMMITTEE COMMENT~~

~~Because this provision is based to a considerable extent on the ABA Standards of Criminal Justice Relating to the Prosecution Function which many jurisdictions have adopted and because it deals with a specialized area of practice, the Committee felt it should leave this provision as it was set out in the Model Rules.~~

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May 25, 2006

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~~[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.~~

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