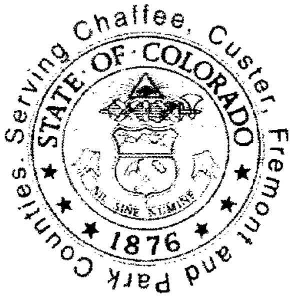

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April 25, 2006

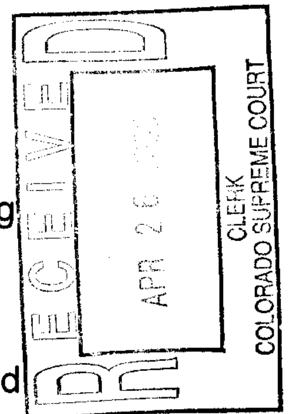
COPY

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

Re: Comment in Opposition to the Proposed Change to Rule 3.8 of the Colorado Rules of Professional Conduct

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

The Office of the District Attorney, within and for the Eleventh Judicial District of the State of Colorado hereby respectfully submits this Comment in opposition to the proposed change to Rule 3.8 of the Colorado Rules of Professional Conduct (Special Responsibilities of a Prosecutor) and hereby proposes certain changes to Rule 3.8, Colo. R.P.C. to establish uniformity between the Rule and modern Fifth Amendment jurisprudence.



INTRODUCTION

On December 30, 2005, the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional conduct (The "Committee") submitted to the Colorado Supreme Court a Report and

Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct. The Committee proposes a substantive change to Rule 3.8(c), Colo. R.P.C. which would excise the safe harbor permitting a prosecutor: (1) to obtain a waiver of important pre-trial rights, such as the right to a preliminary hearing, from an accused appearing pro se with the approval of the tribunal and (2) to engage in the lawful questioning of a suspect who has waived the rights to counsel and silence. The Proposed Rule relegates those provisions to the Official Comment to the Rule.

Rule 3.8, Colo. R.P.C. currently distinguishes between those provisions of the Rule applicable to a prosecutor dealing with an accused and those provisions applicable to a prosecutor dealing with a suspect. The proposed rule change would eliminate the distinction between a suspect and an accused.

The Proposed Comment would suggest that a prosecutor secure a Miranda type waiver even in a non-custodial setting; a requirement that has its roots in the focus-of-the-investigation jurisprudence rejected in Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

BACKGROUND ON RULE 3.8(b) AND RULE 3.8(c), COLO. R.P.C.

The Colorado Supreme Court adopted the current Colorado Rules of Professional conduct effective January 1, 1993. Rule 3.8, Colo. R.P.C., in particular, was based to a considerable extent on the American Bar Association Standards of Criminal Justice Relating to the Prosecution Function. See Committee Comment to Rule 3.8, Colo. R.P.C. Indeed, Rule 3.8, Colo. R.P.C. is the synthesis of Standard 3-3.9 (Discretion in the Charging Decision), see Rule 3.8(a), Colo. R.P.C., Standard 3-3.10 (Role in First Appearance and Preliminary Hearing), see Rules 3.8(b) and 3.8(c), Colo. R.P.C., Standard 3-3.11 (Disclosure of Evidence by the Prosecutor), see Rule 3.8(d), Colo. R.P.C., and Standard 3-1.4 (Public Statements), see Rule 3.8(e), Colo. R.P.C.

The American Bar Association Standards of Criminal Justice Relating to the Prosecution Function recognizes the vital role of a prosecutor in investigating suspected illegal activity when it is not adequately dealt with by other agencies. Standard 3-3.1(a). As a necessary incident to this investigative function, a prosecutor is all too often an indispensable party to the questioning of both suspects and witnesses. In this regard, Standard 3-3.1(g) cautions that a prosecutor should avoid interviewing a prospective witness except in the presence of a third person in order to avoid becoming

a witness should it become necessary to impeach the witness. The ABA Commentary to Standard 3-3.1 provides:

> After written statements are secured by investigators, it is proper under our system, and indeed wise, for the prosecutor to interview such witnesses personally, not only to verify the investigator's report but to become familiar with the personality of the witness in order to anticipate how the witness will react on the stand.

The American Bar Association Standards of Criminal Justice Relating to the Prosecution Function, thus anticipated that a prosecutor may question anyone, including a suspect. Of course, where a person is subjected to custodial interrogation, a Miranda advisement would be in order.

The American Bar Association Standards of Criminal Justice Relating to the Prosecution Function, however, impose on the prosecutor an obligation to secure a waiver of the rights to counsel and to remain silent where formal charges have been filed. The ABA Commentary to Standard 3-3.10 (Role in First Appearance and Preliminary Hearing) noted:

> ..., [P]rosecutors should not seek to obtain waivers of preliminary hearings or any important pretrial rights from unrepresented accused persons. This proscription does not apply, however, to an accused person appearing pro se with the approval of the tribunal nor does it forbid the questioning of a person who has lawfully waived his or her rights to counsel or to remain silent.

Although current Rule 3.8(a) – (e), Colo. R.P.C. tracks the corresponding subsections of the American Bar Association Model Rules of Professional conduct, the Colorado Supreme Court adopted an amplified Rule 3.8(c) by adding to the Model Rule the following underlined language almost verbatim from the commentary to Standard 3-3.10, American Bar Association Standards of Criminal Justice Relating to the Prosecution Function (1993):

> 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, 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 resulting Colorado Rule, however, created for the first time a clear distinction between an accused and a suspect and set forth corresponding prosecutorial obligations to secure a Miranda type waiver of the rights to counsel and to remain silent from a suspect, whether or not the suspect was subject to a custodial interrogation.

At the time of the publication of the American Bar Association Standards of Criminal Justice Relating to the Prosecution Function in 1993, and the adoption of the Colorado Rules of Professional conduct in 1993, there existed considerable uncertainty with regard to when a person was

entitled to a Miranda advisement. [1] For example, the California Supreme Court in People v. Stansbury, 846 P.2d 756, 1050 (Cal. 1993), held that the following factors were the "most important considerations" in determining custody for Fifth Amendment purposes: (1) the site of the interrogation, (2) whether the investigation had focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning. California was not alone in placing heavy emphasis on whether the investigation had focused on the subject in Miranda custody determinations. See e.g. State v. Harman, 752 P.2d 99, 101 (Haw. 1988)(while focus of the investigation upon the defendant, standing alone, will not trigger the application of the Miranda rule, it is an important factor in determining whether the defendant was subjected to custodial

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[1] The United States Supreme Court first tackled incommunicado interrogations in Escobedo v. Illinois, 378 U.S. 478, 490-491, 84 S.Ct. 1758, 1765 (1964) by holding that where an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, no statement elicited by the police during the interrogation may be used against him at a criminal trial. In Miranda v. Arizona, 384 U.S. 436, 444, 86.Ct. 1602, 1612 (1966), the Court refined its approach in Escobedo and held: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The Court explained: "that is what we meant in Escobedo when we spoke of an investigation that had focused on an accused." Id. at fn. 4.

interrogation); State v. Carson, 533 P.2d 1342, 1346 (Kan. 1975) (the fact that the investigation has focused on a particular individual is still frequently one of the determinative factors arriving at a decision whether a Miranda warning is required); State v. Thurlow, 434 A.2d 1 (Me. 1981)(whether investigation by the police has focused on the defendant as a person suspected of committing the crime under investigation is one circumstance to be weighed in determining whether an investigation is custodial within the meaning of Miranda v. Arizona); Commonwealth v. Simala, 252 A.2d 575, 578 (Pa. 1969)(the focusing test continues to be relevant in determining whether an individual is in custody); and State v. Hartman, 703 S.W.2d 106, 120 (Tenn. 1986)(admissibility of defendant's un-Mirandized statement turned on whether he was suspected or accused of a crime at the time of the interview).

It is in the context of the prevailing general understanding prior to 1994 that the American Bar Association Standards of Criminal Justice Relating to the Prosecution Function and the Colorado Rules of Professional Conduct must be interpreted. Hence, where the Commentary to Standard 3-3.10 suggests that a prosecutor may question a person who has lawfully waived his or her rights to counsel or to remain silent, it must be understood that this occurs where he is already formally charged with a

crime, at or after his first appearance in court. The requirement then that such person be advised of his rights to counsel and to remain silent is congruent with the "focus of the investigation" jurisprudence.

In 1994, however, the United States Supreme Court in Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) rev'g People v. Stansbury, 846 P.2d 756, 1050 (Cal. 1993) clarified the correct standard for triggering the Miranda requirements and explicitly rejected the focus of the investigation analysis. Specifically, the Court noted: "a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda." Id. at 1529-1530. Unfortunately, neither Rule 3.8(c), Colo. R.P.C. nor the American Bar Association Ethics 2000 Model Rules of Professional Conduct have incorporated this paradigm shift.

THE NEED FOR A CONSISTENT APPROACH

The current version of Rule 3.8(c), Colo. R.P.C. leads to a confusing situation wherein a prosecutor must abide by a third layer of prophylaxis by providing a Miranda styled advisement to obtain a waiver of the rights to silence and counsel in a non-custodial setting where Miranda does not

require such action.[2] The problem is compounded where a prosecutor directs his investigator to interview a non-custodial suspect. Where the investigator acts as the agent of the prosecutor he may well be required to advise the suspect of the rights to counsel and silence, whereas had the investigator proceeded on his own instincts no such advisement would be necessary.

The current Rule suggests that a prosecutor may speak, without any constraints, to a witness. Yet, when the witness makes an unexpected incriminatory statement which may render him a suspect in criminal activity, Rule 3.8(c), Colo. R.P.C. suggests the prosecutor must stop the interview and obtain a waiver of the rights to silence and counsel. The reason for this approach appears to be that now the witness has turned into a suspect who has become the focus of a criminal investigation. The above examples illustrate that the ethical implications of an inconsistent approach towards basic constitutional principles, absent sound policy considerations

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[2] The Court in Davis v. United States, 512 U.S. 452, 458, 114 S.Ct. 2350, 2355 (1994) noted that Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), by holding that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation, created a second layer of prophylaxis for the Miranda right to counsel designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights.

to the contrary, are confounding.[3] The Proposed Rule and Comments merely exacerbate the existing confusion.

This court has previously reconciled the interpretation of the Colorado Rules of Professional Conduct with constitutional doctrine and the Colorado Rules of Criminal Procedure. See In Re Attorney C., 47 P.3d 1167 (Colo. 2002). In Re Attorney C. dealt with whether Rule 3.8(d), Colo. R.P.C. imposes a greater obligation on a prosecutor than do the mandates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and Rule 16, Crim. P. The court noted:

> ..., the language of Crim. P. 16(I)(a)(2), Rule 3.8(d), and ABA Standard 3-3.11(a) is substantially identical. We have explicitly adopted a materiality standard with respect to our procedural rules, and we are disinclined to impose inconsistent obligations upon prosecutors. We therefore also adopt a materiality standard as to the latter, such that we read Rule 3.8(d) as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused.

In Re Attorney C, 47 P.3d 1167, 1171 (Colo. 2002). [Emphasis added].

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[3] This Court did impose a contrary policy consideration in the context of deceptive representations to suspects in the case of In Re Pautler, 47 P.3d 1175 (Colo. 2002) which arguably is at odds with Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851 (1986). Police officers, without adverse Fifth Amendment suppression consequences, may make certain misrepresentations to suspects so long as they do not give rise to involuntary confessions. Colorado v. Spring at 576, 858. In this context, lawyers are held to a higher ethical standard than police officers.

A rule of professional conduct, in the interest of advancing sound public policy, should be consistent with intersecting principles of constitutional jurisprudence. There no longer exists a public policy reason to require a prosecutor to secure a Miranda waiver from a person who is not subject to custodial interrogation even though he may be a suspect in a criminal investigation. Therefore, a prosecutor's obligations under Rule 3.8(c), Colo. R.P.C. should be reconciled with modern Fifth Amendment jurisprudence. See e.g. Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994); People v. Matheny, 46 P.3d 453 (Colo. 2002).

THE PROSECUTOR AS INVESTIGATOR

American Bar Association Standards of Criminal Justice Relating to the Prosecution function, Standard 3-3.1 recognizes the prosecutor's role in the investigation of crime when it states: "the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." The commentary offers the following rationale for promoting the prosecutor's involvement in the investigation of criminal activity:

> There are instances in which a citizen is reluctant to prosecute, from ignorance, fear, inertia, or other motive, or in which the police have not taken the initiative. This may be because the area of illegal activity in question is not one that

> attracts law enforcement interest, as in the case of certain commercial frauds, or where law enforcement officials are themselves involved. It is important, therefore, that in some circumstances the prosecutor take the initiative to investigate suspected criminal acts independent of citizen complaints or police activity.

From a practical standpoint, prosecutors often work closely with law enforcement personnel in the investigative stages of important, complex, or sensitive cases. The prosecutor's participation in a suspect interview serves a vital public role, namely the development of an investigation along a constitutional path. The prosecutor may also be in a better position to ensure that the interview focuses on all elements of a possible offense or highlight and explore possible defenses. The prosecutor may thus be in a position to protect a suspect's rights while ensuring the admissibility of evidence.

There may be times, though, when law enforcement personnel may well choose not to provide a Miranda advisement where none is constitutionally required. A prosecutor's obligations in providing a Miranda type advisement in that non-custodial setting would put those obligations at odds with law enforcement's tactical considerations creating an unnecessary conflict. This, in turn, may cause law enforcement to exclude the prosecutor from his investigative functions to the detriment of the public's interest in effective law enforcement and prosecution. With respect

to the questioning of a person, a prosecutor should be able to proceed under the same Fifth Amendment jurisprudence as a law enforcement officer. That means a prosecutor should not be required to elicit a Miranda type waiver in a non-custodial setting. Where the prosecutor was held to that higher standard, a most contrived result occurred in finding misconduct. See United States v. Acosta, 111 F.Supp.2d 1082 (E.D. Wis. 2000).

THE ACOSTA CASE

American Bar Association Ethics 2000 Model Rules of Professional Conduct Rules 3.8 (b) and 3.8(c) are identical to Wisconsin Supreme Court Rule 20:3.8. A federal court interpreting Wisconsin S.C.R. 20:3.8 in United States v. Acosta, 111 F.Supp.2d 1082 (E.D. Wis. 2000) held that Rule 3.8(b) applies to pre-charging prosecutorial questioning. The Court in Acosta found that the federal prosecutor in that case had violated Rule 3.8(b) by not advising a suspect during a pre-charging interview of the procedure for obtaining counsel. Indeed, the federal prosecutor did question a person while in custody, sought and obtained a valid Miranda waiver after a proper advisement, but did not explain the procedure for obtaining counsel.

Initially, the federal magistrate found:

> In the context of the April 30, 1998 interview, defendant Pedro Martinez was not an "accused." Thus, based on a plain reading of S.C.R. 20:3.8, it was not applicable to the April 30, 1998 interview of defendant Pedro Martinez.

Magistrate's Recommendation to the Honorable Lynn Adelman RE: Defendant Pedro Martinez' Motions to Suppress, Case No. 98-CR-104 dated November 26, 1999, page 29.[4]

The federal district judge, however, placed no weight on the first sentence of Rule 3.8 stating "the prosecutor in a criminal case ...." Furthermore, the federal district judge rejected the contention that Rule 3.8(b) involves only the sixth Amendment right to counsel. The court explained that the Fifth Amendment right to counsel "is more known" and is consistent with a prosecutor's duty as a minister of justice to assure that he comply with Miranda. United States v. Acosta, 111 F.Supp.2d 1082, 1094 (E.D. Wis. 2000). Then, the court concluded that this duty appears to require prosecutors to assure that "in custody" suspects who have not yet been formally charged are advised of their right to counsel under Rule 3.8(b). Id.

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[4] Magistrate's Recommendation to the Honorable Lynn Adelman RE: Defendant Pedro Martinez' Motions to Suppress is available upon request.

It is nonetheless clear that Rule 3.8(b) should only apply where formal charges have been filed against an accused.[5] The Legal Background to the American Bar Association, Annotated Model Rules of Professional Conduct (1999) for Rule 3.8 recognizes that:

> An accused has a Sixth Amendment right to counsel that encompasses more than a right to representation at trial; it also extends to representation at certain "critical stages" of a criminal proceeding. These critical stages are those at which a lawyer's presence is required to secure a defendant's right to a fair trial. At the investigatory stages, particularly in grand jury proceedings, a prosecutor frequently deals with persons who are not entitled to the warnings specified by Miranda v. Arizona, 396 U.S. 868 (1969). The prosecutor has a duty under Rule 3.8(b) to make reasonable efforts to assure that the accused has been advised of the right to, and procedure for, obtaining counsel, and has been given reasonable opportunity to obtain counsel.

[internal citations omitted]. The Legal Background clarifies that Rule 3.8(b) concerns the Sixth Amendment rights of someone accused of a crime by information or indictment. It is well established that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. See e.g. Moran v. Burbine, 475 U.S. 412, 431 (1986).

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[5] It is noteworthy that the mandates of Rule 3.8(b), Colo. R.P.C. compelling a prosecutor to "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" are consistent with the court's obligations under Rule 5(a)(2)(II) and (III), Crim. P. In other words, reading both rules together suggests that a prosecutor's obligations under Rule 3.8(b), Colo. R.P.C. is to ensure that the provisions of Rule 5(a)(2)(II) and (III), Crim. P. are observed by the court.

American Bar Association Ethics 2000 Model Rules of Professional Conduct Rules 3.8 (b) and 3.8(c) might similarly suggest in accordance with United States v. Acosta, 111 F.Supp.2d 1082 (E.D. Wis. 2000) that Rule 3.8(b) is applicable when a prosecutor is dealing with a person not yet formally charged because the Rule no longer distinguishes between an "accused" and a "suspect." Indeed, the Colorado Office of Attorney Regulation Counsel has already advocated the approach that "accused" includes a person who is the focus of an investigation in Attorney P., 03PDJ083 (2003), albeit unsuccessfully, underscoring the state of confusion surrounding the quest for a consistent approach in the application of Rule 3.8 and Fifth Amendment jurisprudence.

THE PROPOSED RULE CHANGE

Proposed Rule 3.8 only uses the term accused in outlining a prosecutors obligations. The Proposed Comment reads in relevant part: "Paragraph (c) does not apply, ..., to an accused appearing pro se with the approval of the tribunal. Not does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence." With respect to the last sentence, the Comment implies that the Rule forbids the lawful questioning of a suspect who has not waived his rights to counsel and silence. Yet, the Rule on its face only concerns the

obligations of a prosecutor in a criminal case. Therefore, the Comment retains the confusion that has existed before in not defining the terms "accused" and "suspect." The question remains whether the Proposed Rule governs a prosecutor's obligations towards a suspect since the Rule does not proscribe a prosecutor's conduct towards a suspect, whether a suspect is a particular type of accused person so that the reference to suspect in the Comments really refers to an accused, or whether an accused is a particular type of suspect; i.e. a suspect charged with a crime.

The Court in Escobedo v. Ilinois, 378 U.S. 478, 84 S.Ct. 1758 (1964) suggested that there becomes a point during an interrogation that a suspect becomes an accused. Specifically the court stated:

> The interrogation here was conducted before the petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of an unsolved crime. Petitioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to.

Id. at 485, 1762. It remains unclear whether this definition of "accused" was abandoned in Miranda v. Arizona or Stansbury v. California.

A plain reading of the Rule, of course, indicates that an accused is one having been accused of a crime and the subject of a formal proceeding. This interpretation is consistent with the ABA Criminal Justice

Standard 3-3.10(a), Rule 5(a)(2), Crim. P. as well as the opening clause of the rule: "The prosecutor in a criminal case shall ...." Furthermore, Rule 3.8, Colo. R.P.C. uses the word "accused" in subsections (c) and (d) three times. Each reference in those rules to "accused" is clearly in connection with a stage in a formal proceeding. For example, the obligations to the accused as enumerated in Rule 3.8(d) mirror those of Rule 16, Crim. P. Surely, Rule 3.8(d) does not require disclosure of information prior to filing charges. Indeed, Rule 16, Part I(b), Crim. P. explicitly provides that "the prosecuting attorney shall perform his obligations ... as soon as practicable but not later than twenty days *after the defendant's first appearance at the time of or following the filing of charges,* ...." [Emphasis added].

It is respectfully recommended to the Colorado Supreme Court to take this opportunity to draft and approve a Rule relating to the special responsibilities of a prosecutor that resolves the inherent conflicts present in both current Rule 3.8 and the Proposed Rule, including the respective comments. This may be accomplished by adopting the American Bar Association Ethics 2000 Model Rules of Professional Conduct but providing for clarification as follows:

The prosecutor in a criminal case shall:

(a) NO CHANGE

(b) make reasonable efforts to assure that A CRIMINAL DEFENDANT WHO HAS BEEN FORMALLY CHARGED, has been advised of the right to, and 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 IS NOT SUBJECTED TO CUSTODIAL INTERROGATION, NOR DOES IT FORBID THE LAWFUL QUESTIONING OF A SUSPECT WHO IS IN CUSTODY AND who has waived the rights to counsel and silence.

Comment:

[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 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 a suspect IN COMPLIANCE WITH CONTEMPORARY FIFTH AMENDMENT JURISPRUDENCE.

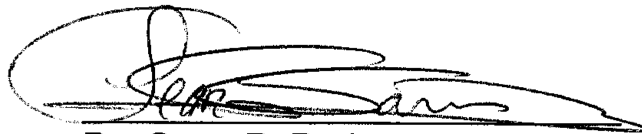
The proposed revised Rule and Comment assures compliance with Miranda where it permits a prosecutor to engage in lawful questioning. Any unlawful questioning may be actionable under Rule 8.4, Colo. R.P.C.

CONCLUSION

Rule 3.8, Colo. R.P.C. as well as Proposed Rule 3.8, including the comments thereto of the American Bar Association Ethics 2000 Model Rules of Professional Conduct are inconsistent with modern Fifth Amendment jurisprudence. There exist no sound public policy reasons for this departure. Therefore, Rule 3.8 should be revised to allow the lawful questioning of a suspect by a prosecutor. The revision suggested above provides clarity to prosecutors when questioning both witnesses and suspects. Furthermore, any professional misconduct by a prosecutor in the course of an interrogation may be dealt with under Rule 8.4, Colo. R.P.C.

Respectfully submitted,

MOLLY CHILSON
DISTRICT ATTORNEY



By: Sean P. Paris
Deputy District Attorney

APPENDIX A TO OFFICIAL COMMENT CONCERNING THE AMERICAN BAR ASSOCIATION ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT

COLORADO RULE OF PROFESSIONAL CONDUCT 3.8 as proposed by the Office of the District Attorney, Eleventh Judicial District

Marked to show changes from the Existing Colorado Rule of Professional Conduct 3.8

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) NO CHANGE

(b) make reasonable efforts to assure that ~~the accused~~ A CRIMINAL DEFENDANT WHO HAS BEEN FORMALLY CHARGED, has been advised of the right to, and 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 IS NOT SUBJECTED TO CUSTODIAL INTERROGATION, NOR DOES IT FORBID THE LAWFUL QUESTIONING OF A SUSPECT WHO IS IN CUSTODY AND who has waived the rights to counsel and silence.

(d) NO CHANGE

(e) NO CHANGE

(f) NO CHANGE

COMMENT

[1] NO CHANGE

[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.~~ 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 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 a suspect IN COMPLIANCE WITH CONTEMPORARY FIFTH AMENDMENT JURISPRUDENCE.

[3] NO CHANGE

APPENDIX B TO OFFICIAL COMMENT CONCERNING THE AMERICAN BAR ASSOCIATION ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT

COLORADO RULE OF PROFESSIONAL CONDUCT 3.8 as proposed by the Office of the District Attorney, Eleventh Judicial District

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) NO CHANGE

(b) make reasonable efforts to assure that a criminal defendant who has been formally charged, has been advised of the right to, and 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 is not subjected to custodial interrogation, nor does it forbid the lawful questioning of a suspect who is in custody and who has waived the rights to counsel and silence.

(d) NO CHANGE

(e) NO CHANGE

(f) NO CHANGE

COMMENT

[1] NO CHANGE

[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 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 a suspect in compliance with contemporary fifth amendment jurisprudence.

[3] NO CHANGE