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*PAST NYSDAA PRESIDENT

May 24, 2006

Mr. Steven C. Krane, Chair
Committee on Standards of Attorney Conduct
New York State Bar Association
1 Elk Street
Albany, NY 12210

Dear Mr. Krane:

Thank you for the opportunity to submit comments on behalf of the District Attorneys Association of the State of New York in connection with the proposed Rules of Professional Conduct, particularly proposed Rule 3.8, *Special Responsibilities of Prosecutors*. Before discussing the elements of proposed Rule 3.8, I would like to advise the committee responsible for compiling the re-write of the Ethical Standards that the District Attorneys' Association joins the United States Attorneys from the four Districts of New York, the New York County District Attorney's Office and the Bronx County District Attorney's Office in the comments which they have submitted.

As a general observation, Courts have long recognized that prosecutors must often make difficult discretionary decisions about whether to bring criminal charges. These decisions may hinge on their assessment of the credibility of witnesses or the cumulative significance of evidence. In any particular case, honest and reasonable people may differ in making these discretionary decisions. Prosecutors within the same office may disagree. Judges and juries may eventually come to a different conclusion about the credibility of the witnesses or the strength of the evidence. And cases that may appear to be strong at the outset may fall apart later because witnesses disappear, refuse to testify, or recant. In order to insure that prosecutors would not be afraid to go forward with cases that they believed were just, their discretionary decisions about whether to bring charges were held to be immune from civil lawsuit. A general concern expressed within the District Attorneys Association about these rules is that they will allow good faith prosecutorial judgments to be second guessed and where others subsequently disagree, prosecutors will find themselves accused of unethical behavior and potentially subject to serious disciplinary action.

For example, if a judge issues a trial order of dismissal in a case, will the prosecutor face disciplinary action? If we lose a Batson argument at the appellate level, might a charge be filed that the prosecutor acted unethically? At what point will every legal decision be transformed into an ethical decision and will there be a chilling effect on a prosecutor zealously advocating a perfectly reasonable point of view because the consequences of losing the argument might be the filing of a

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grievance? Of great concern is the possibility that a prosecutor, acting consistently with State and Federal Constitutional mandates, could find herself subject to discipline for violating an overly broad disciplinary rule. It is within this context that I am submitting the following comments on proposed Rule 3.8 on behalf of the District Attorneys Association of the State of New York:

Rule 3.8(a)

The Criminal Procedure Law sets forth in explicit detail the standards of proof required at each stage of a prosecution, from arrest through conviction and there is a large body of decisional law on the subject. We are concerned that a judicial finding of insufficiency of proof at some stage of the proceedings will constitute prima facie evidence of misconduct in that the prosecutor "reasonably should have known" that the evidence was insufficient, yet "continued to prosecute." The D.C. rule from which proposed rule 3.8(a) is derived is accompanied by a comment that would foreclose such an interpretation. The proposed comment accompanying Rule 3.8(a) does nothing to limit the reach of a rule that would render good faith prosecutorial decision making subject to discipline based upon an adverse legal ruling. Surely it is not in the public's interest for prosecutors, concerned about losing their ability to practice law, to "shade ... decisions instead of exercising the independence of judgment required by [the] public trust" Imbler v. Pachtman, 424 U.S. 409, 423 (1976). In holding prosecutors absolutely immune from civil suit for decisions we make which are " intimately associated with the judicial phase of the criminal process," the Supreme Court quoted a California Supreme Court opinion which applies to this proposed rule with equal force:

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. ... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." Pearson v. Reed, 44 P. 2d 592, 597 (Cal. 1935), quoted in Imbler v. Pachtman, 424 U.S. at 424, 430.

Moreover, our experience dealing with witnesses in criminal cases, both victims and ordinary witnesses, gives us substantial reasons to not endorse proposed rule 3.8(a) as written. It is not uncommon, particularly in domestic violence cases, for victims to express reservations about participating in the prosecution of someone close to them. Under this proposed rule, a prosecutor who learns of a victim's prospective refusal to testify could subject himself to discipline by engaging in plea negotiations knowing that he could not go forward and establish a prima facie case if the victim makes good on a threat to refuse to testify. The same holds true for witnesses who threaten to absent themselves from proceedings. It is unfair to victims and the public at large to impose a requirement that a prosecutor "throw in the towel" the moment a victim or witness expresses some reservation about participating in the criminal process. DR 7-

103 adequately addresses the obligation of a prosecutor to not knowingly proceed with a prosecution that is not supported by evidence establishing guilt, and incorporates statutory and constitutional standards of conduct that are of the highest ethical measure. Rule 3.8(a) should simply incorporate DR 7-103 as currently written.

Rule 3.8(b)

The proposed rule states a generally understood ethical consideration. Of concern to the Association is the prospect that this ethical rule could be used to discipline a prosecutor in an ongoing investigation of a suspect who has a lawyer and define rights of criminal defendants beyond those guaranteed by State and Federal Constitutions and the Criminal Procedure Law. See e.g. United States v. Hammad, 846 F.2d 854 (2d Cir. 1988), revised 858 F.2d 834 (2d Cir. 1988). This rule requires some modification to reflect our view that these rules ought not to seek to define the rights of criminal defendants which are amply covered in the United States and New York Constitutions and the case law that has developed from those provisions.

Rule 3.8(c)

This rule enjoins the prosecutor from obtaining from an unrepresented "accused a waiver of important pretrial rights." If included among these "important pretrial rights," are the constitutional privilege against self incrimination and the right to counsel as they are contained in the prophylactic warnings embodied in Miranda, we believe the rule goes too far if, in addition, the word "accused" means someone other than a formally charged individual. If the definition of "accused" is confined to one who is formally charged, then New York Law would likely render the attempt to secure a waiver of the "rights" described above a futile exercise (People v. Samuels, 49 NY2d 218). On the other hand, if the term "accused" includes those yet to be formally charged, the Rule creates an unwarranted encroachment on a prosecutor's ability to question a suspect who may well wish to (knowingly and voluntarily) waive both his or her privilege against compulsory self incrimination and the right to counsel during such questioning. The "comment" section to the proposal Rule, however, seems to recognize that lawful questioning of an uncharged suspect is not forbidden.

Rule 3.8(d)

This rule governs a prosecutor's obligation to disclose exculpatory and mitigation evidence relating to both guilt and punishment. The rule would seem to require disclosure to the court of anything that a court might possibly consider mitigating evidence in connection with sentencing. This seems somewhat strange given the otherwise adversarial nature of the proceedings. We believe that it is more consistent with the ethical obligations of prosecutors in an adversarial proceeding to make any disclosure of arguably mitigating evidence to the defense and leave it to counsel to decide if the evidence should be presented to the court for consideration in imposing sentence.

Rule 3.8(e)

This proposed rule, which would create grounds for attorney discipline to deter prosecutors from issuing subpoenas to attorneys, appears to be intended to undermine case law. Nearly all courts have rejected the idea that a special threshold exists before a grand jury

subpoena may be issued to an attorney for non-privileged materials. See e.g.,Fisher v. United States, 425 U.S. 391, 403 (1976); Bellis v. United States, 417 U.S. 85, 88 (1974); Priest v. Hennessy, 51 N.Y.2d 62 (1980); In re Nassau County Grand Jury (Doe Law Firm), 4 N.Y.3d 665 (2005). . The language of this proposed rule tracks the Model Rules of Professional Conduct. However, only one trial court in New York adopted this language Matter of Grand Jury Subpoena of Lynne Stewart 144 Misc2d 1012 (Sup. Ct. N.Y. County, 1989). In fact, Justice Leslie Crocker Snyder, the author of the opinion, began the paragraph encompassing the rule with the words "Federal law notwithstanding." The First Department reviewed the underlying Stewart prosecution on two occasions and declined both times to adopt Justice Snyder's rule. In re Grand Jury Subpoena of Lynne Stewart 156 AD2d 294 (1st Dept. 1989) and People v Lynne Stewart 230 AD2d 116 (1st Dept. 1997). Nonetheless, the proposed rule would have this language become the standard by which ethical conduct would be judged. Legislative changes in criminal procedure should not be attempted through the back door by the adoption of "ethics" rules.

Rule 3.8(f)

Prosecutors are keenly aware of their ethical obligations to the accused with respect to extrajudicial statements, particularly to the media. If the objective of the rule is to control the dissemination of inappropriate information about a case or the accused by a prosecutor, it would be more instructive to draft a rule such as Rule 3.6 that specifically identifies what is appropriate to disclose and what is not appropriate to disclose. If Rule 3.6 properly addresses the ethical obligations of both prosecutors and defense counsel in making extrajudicial statements, then Rule 3.8(f) is superfluous. The special requirement to exercise reasonable care to prevent other law enforcement personnel from making an extrajudicial statement that the prosecutor would be prohibited from making is an unworkable rule. Prosecutors have no authority over police agencies and their public relations practices. The statement in the comment accompanying Rule 3.8(f) that "*[o]rdinarily*, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals", offers little assurance that an individual prosecutor will not be subject to discipline for the conduct of non-lawyers associated with a case.

Rule 3.8(g)

Rule 3.8 (g) refers to "new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted." While of course a public prosecutor should and must never countenance or abide the conviction of an innocent person, the language of the Rule is overly broad if not amorphous. The preferred language and the procedure set forth in New York Disciplinary Rule 7-103 are in accord with constitutional requirements, and would seem to provide adequate protection to the defendant against a wrongful conviction. The Rule also enjoins the prosecutor to "investigate the guilt or innocence of the convicted defendant." While it is unlikely that a responsible prosecutor would eschew further investigation of new and material evidence pointing to a convicted defendant's innocence, since to do so would also seem to ignore the possibility that another who is criminally responsible enjoys unwarranted freedom, nevertheless, we believe that mandating such a further investigation would be unnecessary. Disclosure of exculpatory information to the defendant and/or his or her attorney is the first, best action, which should operate as the optimal safeguard against a wrongful conviction continuing. To the extent that no compelling authority

or reason for the adoption of such a subsection has been posited, particularly as an analogue to the Rule is not found in the ABA's model rules, we would argue that its mandates appear to be unwarranted.

Rule 3.8(h)

This rule requires a prosecutor to take appropriate steps where the prosecutor discovers clear and convincing evidence that an innocent person has been convicted. To the extent that it imposes an obligation to take some remedial measures upon discovering information that suggests that a person may have been wrongfully convicted, it is redundant in light of the obligations under Rule 3.8(g). It is our position that the interests of a wrongfully convicted defendant are best served and the ethical obligations of prosecutors satisfied by the prompt disclosure to the defense attorney of information that suggests that an innocent person has been wrongly convicted.

Once again, thank you for the opportunity to comment on behalf on the District Attorneys Association of the State of New York on the proposed rule on Special Responsibilities for Prosecutors.

Very truly yours,

Hon. Frank J. Clark
Erie County District Attorney
President, District Attorneys Association of the State of New York