

Public Comment Letter Timely Received but Distributed Late to the Commission

See Footnote 12 of the
Commission's Memo
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ADDA

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September 11, 2016

The Honorable Lee Edmon, Chair

Commission for the Revision of the Rules of Professional Conduct

State Bar of California

180 Howard Street

San Francisco, CA 94105-1639

Dear Judge Edmon:

The Association of Deputy District Attorneys' members are responsible for the prosecution of criminal cases. We are, correctly, obligated to adhere to ethical standards of prosecution which standards include restrictions on extrajudicial comments in the context of an ongoing criminal case. That said, we are writing to take vigorous issue with Proposed Rule 3.8(f) which provides as follows:

"A prosecutor in a criminal case should

(f) 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 prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

We take exception to the proposed promulgation of this rule for the following reasons:

1. There is no legal authority for the proposition that prosecutors have supervisory or managerial authority over law enforcement personnel, specifically, municipal police agencies and the Police Chiefs who are responsible for their agency.

Municipal police agencies are under the supervision of the governmental jurisdiction for which they are employed, or, in some cases, the governmental agency that contracts for their services. A sheriff is accountable to the voters of the county in which he or she has been elected. Neither a Police Chief, who is responsible to his or her City Manager, to the City Council, and/or to the elected Mayor of that jurisdiction; nor a sheriff, who is responsible to the electorate, is under the supervision of a prosecutor who is handling a specific case. In short, neither Sheriffs nor Police Chiefs, and the men and women who make up their agencies, are not under the general authority of a prosecutor. To conjure up a rule that purports to confer such supervisory responsibility over a Chief or Sheriff is to unfairly expose working prosecutors to ethical risks over which they have not control. For example, each time a member of law enforcement makes

a statement that defense counsel can assert is extrajudicial in nature in relation to a particular trial, the deputy district attorney will be subject to ethical risk even though the law enforcement statement has no instant relation to the actual case, but is uttered in a broader context.

2. Implementation of Rule 3.8(f) will compromise and undermine the responsibilities of a law enforcement agencies in addition to placing working prosecutors at unfair risk.

The responsibilities of a law enforcement agency do include providing evidentiary testimony at a criminal trial. But that responsibility is only one element of the many duties and responsibilities of a municipal police agency. Other responsibilities include (but are not limited to) informing the local jurisdiction of potential public safety problems; informing the public and policy makers of needed changes in the laws to better protect citizens; providing assistance to victims of crime; developing deployment strategies to maximize protection of the community; providing intervention services to persons who are homeless, suffering from mental illnesses, or suffering from addictions; proactively engaging with the community to enhance community and individual safety; informing the community of specific potential dangers that exist; as well as engaging in public discourse over various public safety strategies that would best protect their city.

What the implementation of Rule 3.8(f) would do, however, would be to obligate a prosecutor, in the context of one individual case, to trump all of the myriad other responsibilities of a police agency. Implementation of Rule 3.8(f) could have the effect of muzzling a law enforcement agency when public safety policy issues are being debated, it could prevent implementation of proactive strategies to enhance public safety in a jurisdiction, and it could hamper the ability of a Chief or Sheriff to engage with State officials in the context of pending Legislation, to name just a few examples.

The Association of Deputy District Attorneys believe 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, including independently appointed Police Chiefs and independently elected Sheriffs..

The State Bar should not obligate prosecutors to issue directives to persons in other agencies over whom they have no supervisory or managerial authority. To do so would unfairly place prosecutors at risk of ethical discipline over matters over which they have no control.

Sincerely,



Timothy H. B. Yaryan
Legislative Counsel and Advocate