**IN THE SUPREME COURT OF FLORIDA**

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| **THE FLORIDA BAR** | ) | |
| **Re: Petition to Amend Rules Regulating The Florida Bar** | ) | **Case No. SC04-2246** |

**COMMENTS BY THE FLORIDA PROSECUTING ATTORNEY'S ASSOCIATION TO THE PROPOSED AMENDMENTS OF RULE 4-3.8(b) AND THE ADDITION TO THE RULE OF 4-3.8(e)**

The following comments are offered by the Florida Prosecuting Attorney's Association, Inc., who represents the 20 State Attorneys of Florida and its some 1700 Assistant State Attorneys. The Association's main purpose is to seek justice for all citizens of Florida.

The proposed amendment to 4-3.8(b) appears to impose an affirmative duty upon prosecutors to see that an "accused" had been advised of his right to counsel and the procedure for obtaining counsel and given a reasonable opportunity to obtain counsel. While this language seems superficially simple and laudatory, we believe it is ambiguous and imposes a duty on prosecutors that under Florida law and federal law is the primary responsibility of the Courts or interrogating officers. If "accused" is given the restrictive meaning of someone who has been formally charged or arrested and therefore has a sixth amendment right to counsel as to those charges, a detailed set of procedures is already in place to insure that an unrepresented defendant is brought before the court, fully advised of his rights and if he or she is indigent, appointed an attorney at the earliest stages of litigation. The prosecutor's role in this process and his direct contact with an unrepresented defendant seems to have been intentionally minimized with the Court being given the authoritative role.

If "accused" is given a broader meaning to apply to uncharged suspects, including suspects that are not in police custody, then it is affected by a complex body of law concerning when the "right" to counsel attached and inappropriately injects the prosecutor as an antagonist in the police investigation. Thus, we believe the rule should acknowledge that it is the prosecutor's responsibility to assist the Court in seeing that a charged defendant is advised of his rights according to the rules of procedure. Obligating a prosecutor to have contact with and give advice to an unrepresented defendant is in our opinion both unwise and unnecessary under current Florida procedures.

The following comments and observations are made regarding proposed Rule 4-3.8(e)(2) which subjects prosecutors to professional discipline for subpoenaing a lawyer to present relevant, non-privileged evidence about a past or present client unless the information sought is believed **essential** to successful completion of an ongoing investigation or prosecution. This criterion is unduly burdensome, as relevance, not necessity, is the more appropriate standard. Otherwise, this subsection effectively creates an exclusive self-exemption for the legal profession from their obligation as witnesses, in circumstances where neither the Courts nor the legislature have provided one and wrongly elevates our chosen vocation over all the other professional and personal relationships.

Since Florida's legislature and courts have consistently recognized the greater societal interest in the investigation and resolution of criminal allegations, we are unclear why the committee deems it necessary to have a special rule subjecting prosecutors to discipline for attempting to acquire relevant, non-privileged evidence from an attorney. The rule presumes that any testimony will intrude on the attorney-client relationship even though its application is not restricted to seeking information that, though unprivileged, is within the attorney's obligation of confidentiality or even to seeking information that bears some direct

connection to the attorney-client relationship. Similarly, the rule would apply equally whether the current or former client was a suspect, a victim, or a witness and would apply to evidence that was exculpatory rather than incriminating.

The rule's application in an investigative context is difficult to gauge in that it presupposes that the substance of the testimony will be known in advance. The purpose of an investigation is to learn which witnesses may have relevant evidence and to determine whether the accumulated facts justify prosecution. It is neither immoral nor unethical to seek relevant evidence from every available witness in an effort to determine if a person is guilty or innocent of a claimed crime. Since the courts have developed a significant body of case law regulating various substantive and procedural aspects of subpoenaing an attorney, this rule will effectively be a substantive modification of settled legal issues and the prosecutor's statutorily granted subpoena powers. In our collective experience, claims of abuse have been exceedingly rare since prosecutors are necessarily reluctant to subpoena defense attorneys. Certainly, the remedies provided by the rules of procedure are a more appropriate means to curb abuse than the prophylactic rule that is being recommended.

Additionally, the circumstances under which a lawyer's testimony may become relevant, although uncommon, are more varied and less likely to intrude on the attorney-client relationship than the rule contemplates. Attorneys can be eyewitnesses to client conduct completely unrelated to their rendition of legal services. Occasionally, lawyers themselves engage in criminal acts against or with their clients.

Similarly, incompetence of counsel is a frequent post-conviction claim, one that is universally made in capital cases. (It is unclear if these quasi-criminal proceedings are governed by the proposed rule). Such a claim fully waives the attorney-client privilege and entitles the prosecution to access the accused

attorney's file. While some of these claims are found justified, many more are exposed as unfounded or even intentionally falsified by the former client. The prior lawyers testimony is always relevant, frequently helpful and sometimes absolutely necessary to resolving these claims. Similar issues can arise in motions for new trial, motions to withdraw an allegedly involuntary guilty or no contest plea or in "Nelson" hearings in which a defendant asserts a right to a different court appointed counsel because of the alleged incompetence of or misconduct by their current counsel. This is not to suggest that subpoenaing an attorney is always the wisest or first choice to resolve factual issues; clearly, however, more flexibility is required than allowed by the proposed rule.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished to **John F. Harkness, Jr., Esquire, P.O. Box 389, Tallahassee, FL 32302-0389**, by U. S. Mail this 23rd day of December, 2004.

Respectfully Submitted,

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