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January 14, 2010

Aida Salfiti
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comment on Proposed Amendments to the State Bar Rules, Divisions 1 and 3, Individuals not Members of State Bar.

Dear Ms. Salfiti:

Enclosed is a comment on the Proposed Amendments to the State Bar Rules, Divisions 1 and 3, Individuals not Members of State Bar. This comment proposes an amendment to California Rules of Court 9.42, regarding certified law students. This comment includes the following: (1) the text of the proposed rule; (2) a description of the problem to be addressed; (3) the proposed solution and alternative solutions; (4) a statement of any likely implementation problems; (5) a statement of need for urgent consideration; (6) a list of known proponents and opponents; and (7) a statement of any known fiscal impact.

This proposed amendment is supported by:

Alameda County Bar Association
Coalition on Homelessness, San Francisco
East Bay Community Law Center (Berkeley)
Homeless Action Center (Oakland, Berkeley)
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
National Lawyers Guild, San Francisco
Public Interest Law Firm (San Jose)
San Diego County Office of the Public Defender
San Francisco Office of the Public Defender
Santa Clara County Office of the Public Defender
Women Defenders

Thank you for your review. Please contact Laura Hurtado at 415-543-9697 ext. 222 if you have any questions.

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Sincerely,

Oren Sellstrom | ^{RS}

Oren Sellstrom
Associate Director of Litigation
Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Laura Hurtado

Laura Hurtado
Fellow
Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Encl: Comment on Proposed Amendments to the State Bar Rules, Divisions 1 and 3,
Individuals not Members of State Bar

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January 14, 2010

Re: Comment on Proposed Amendments to the State Bar Rules, Divisions 1 and 3, Individuals not Members of State Bar.

As a comment on the Proposed Amendments to the State Bar Rules, Divisions 1 and 3, Individuals not Members of State Bar, we propose the following amendment to California Rules of Court, rule 9.42.

TEXT OF THE PROPOSED RULE OR AMENDMENT

We propose an amendment to California Rules of Court, rule 9.42, regarding certified law students. The exception under Rule 9.42(d)(4), which allows certified law students to prosecute infractions without the personal appearance of the supervising attorney or other licensed attorney, should be eliminated. Instead, we propose that law students working for the prosecution follow the requirements of the existing Rule 9.42(d)(3).

Removing subsection (d)(4) would eliminate the current disparity between law students who prosecute infractions and all other law students in the State of California. Certified law students would still be able to prosecute infractions, but only under the direct supervision and in the personal presence of a licensed attorney.

A DESCRIPTION OF THE PROBLEM TO BE ADDRESSED

No other law student in California is allowed to appear in court without the personal appearance of his or her supervising attorney. This rule change is necessary both for the benefit of the law students and to maintain the standards of the legal profession.

To allow law students to appear in court without the personal appearance of their supervising attorneys compromises the integrity of our criminal justice system. Public prosecutors have a unique role in the criminal system, and as such, the highest ethical standards apply. Prosecutors have a special obligation to do justice, as opposed to obtain convictions. Because of this important role, non-lawyers should not be allowed to prosecute criminal defendants without proper supervision by a licensed attorney. The burden of a prosecuting law student's mistakes rests directly on the backs of



vulnerable people who are facing criminal charges without representation.¹ Certified law students are not required to have ethical instruction, and are often unclear or uncomfortable exercising the specific duties of prosecutors, such as reviewing charges for probable cause.

Although law students are only allowed to prosecute infractions, as opposed to misdemeanors and felonies, without the personal presence of a supervising attorney, infractions are still criminal charges that have serious implications for the defendant. For example, in San Francisco, the Office of the District Attorney primarily relies on certified law students to prosecute homeless people facing infraction charges for violations that they often cannot avoid, such as sleeping or drinking in public. Although the penalty for such an infraction is merely a fine (rather than incarceration), these infractions regularly result in misdemeanor arrest warrants when a homeless person fails to appear or is unable to pay the fine. These arrest warrants create criminal records that keep people on the street by preventing them from getting jobs, treatment, and housing. In San Francisco, and most other cities, an outstanding warrant can disqualify a person from receiving public benefits, including housing assistance, and thereby perpetuates the condition of homelessness. Homeless people are also regularly arrested and taken to jail as a result of these warrants. Since infraction charges do result in restrictions on the liberty of a homeless or low-income person, only attorneys or law students working under the direct supervision of an attorney should be allowed to prosecute these cases.

Additionally, the current rule is not beneficial to law students. Their professional growth and development as future attorneys depends in large part on constructive feedback from experienced attorneys. However, because of the exception in Rule 9.42(d)(4), no experienced attorney is observing and instructing the law students during or after these proceedings. Prosecutors spend most of their work day appearing in court proceedings; so this rule virtually assures that in a busy office, the law students receive little or no specific advice on their performances. This has resulted many times in the prosecutors' students being admonished from the bench, during motions, at trial, and on appeal, even though the ultimate responsibility for meeting duties to the court and following ethical rules rests on the licensed prosecutor and does not belong to the students.

For example, a law clerk for the District Attorney's Office was reprimanded by the Appellate Division for not filing an opening brief for eight cases she was appealing. A law clerk was lectured by a traffic court commissioner for not attaching an officer's declaration in her opposition to a Motion to Suppress. A law clerk was chastised for opposing a Motion to Dismiss when it was clear to the commissioner that the interests of justice were served by dismissal of the citation. And a law student was disciplined for pursuing an appeal that did not state the grounds for the appeal. In each of these situations, no supervising attorney was present to hear, respond to, or provide feedback on these important issues raised by the bench.

¹ A person facing an infraction criminal charge does not have the right to court-appointed counsel. Cal. Penal Code §19.6.

Our criminal justice system is founded on the principle that defendants have the right to equal treatment and justice under the law. It is fundamentally unfair to give prosecutors an advantage that is not given to the criminal defense. A law student could not defend homeless or low-income people facing criminal charges unless he or she was under the direct and immediate supervision and in the personal presence of the supervising attorney. This restriction should not be lifted, as allowing law students to defend clients against criminal charges without the personal appearance of a supervising attorney would raise serious concerns regarding the adequacy of counsel. Thus, removing subsection 9.42(d)(4) is the only way to rectify this current inequality.

THE PROPOSED SOLUTION AND ALTERNATIVE SOLUTIONS

The proposed solution allows certified law students to appear in court for the prosecution only when their supervising attorney or any deputy, assistant, or other staff attorney is physically present to supervise them.

ANY LIKELY IMPLEMENTATION PROBLEMS

NONE. The State Bar would not have any additional responsibilities under the proposed rule change.

ANY NEED FOR URGENT CONSIDERATION

This rule should be amended as soon as possible.

KNOWN PROPONENTS

Alameda County Bar Association Board of Directors
 Coalition on Homelessness, San Francisco
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 National Lawyers Guild, San Francisco
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 San Diego County Office of the Public Defender
 San Francisco Office of the Public Defender
 Santa Clara County Office of the Public Defender
 Women Defenders

KNOWN OPPONENTS

We assume that District Attorney Offices that currently use law students to prosecute infraction charges would oppose this rule change.

In San Francisco, the Office of the District Attorney primarily uses certified law students to prosecute homeless people facing infraction charges. Prosecution is targeted: Most of

the cases heard in traffic court are not prosecuted by the Office of the District Attorney. For example, failure to stop at a stop sign is an infraction, but is not prosecuted by the District Attorney. Driving on a suspended license is a misdemeanor, and is also not prosecuted by the District Attorney's Office. Only those infractions which are most frequently committed by poor people as a direct consequence of their poverty, or which are typically used by police officers in targeted enforcement, are prosecuted by the District Attorney's Office.

ANY KNOWN FISCAL IMPACT

None.

ANY PREVIOUS ACTION TAKEN BY THE JUDICIAL COUNCIL

This rule was amended and renumbered effective January 1, 2007. It was adopted as rule 983.2 by the Supreme Court effective December 29, 1993.

Dated: January 14, 2010

Respectfully Submitted,

Oren Sellstrom / RS

Oren Sellstrom
Associate Director of Litigation
Lawyers' Committee for Civil Rights
of the San Francisco Bay Area

Laura Hurtado

Laura Hurtado
Fellow
Lawyers' Committee for Civil Rights
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