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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUN 5 2006

Attorneys for Defendant // JOSEPH CAVALLINO, CLERK of the Court

By: R. HEALY, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

JOSEPH CAVALLO,

Defendant.

Case No. 05ZF0118

**DEFENDANT JOSEPH G.
CAVALLO'S NOTICE OF
DEMURRER & DEMURRER TO
INDICTMENT; POINTS AND
AUTHORITIES IN SUPPORT**

TO: THE PEOPLE AND THE CLERK OF THE ABOVE COURT

YOU WILL PLEASE TAKE NOTICE that defendant JOSEPH G. CAVALLO, on June 23, 2006 at 8:30 a.m., or as soon thereafter as counsel may be heard in Department 36 of the above entitled court, will demur to the Indictment on the grounds that it fails to state a cause of action and that it is uncertain.

Said demurrer is based on the attached Demurrer and Memorandum of Points, Authorities and Argument.

DATED: June 5, 2006

Respectfully submitted,

LAW OFFICE OF JOHN D. BARNETT

John D. Barnett

By: JOHN D. BARNETT
Attorneys for Defendant
JOSEPH CAVALLO

DEMURRER TO INDICTMENT

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1 **POINTS, AUTHORITIES AND ARGUMENT**

2 I. **Introduction**

3 Mr. Cavallo is charged in three of the counts in the Indictment. Count 1
4 charges him with conspiracy to commit "attorney capping" in violation of Section
5 6152(a) of the Business and Professions Code.

6 Counts 2 and 3 allege he conspired to violate an Insurance Regulation (section
7 2071 or Title 10 of the California Code of Regulation) punishable as an alternative
8 misdemeanor-felony under Insurance Code Section 1014. He is not charged in
9 Counts 4 or 5.

10 The indictment in this case charges violations of law that are regulatory, in that
11 they are predicated on the Insurance Code, and regulations promulgated under it, to
12 govern the conduct of bail bondsmen and bail agents. Nothing in the relevant
13 Chapter of the Insurance Code purports to regulate the conduct of attorneys, nor are
14 the statutes in Chapter 7 (i.e., Ins. Code Sections 1800-1823) concerned at all with
15 bail agents referring or suggesting an attorney to those persons to whom they provide
16 bail services. Because the regulation listed in the Indictment (§ ²⁰⁷¹~~1071~~) purports to
17 reach beyond the statutes it is designed to implement, interpret or make more specific,
18 it is invalid under case law and controlling statutes, and thus Counts 2 and 3 of the
19 Indictment do not state a cause of action against Mr. Cavallo.

20 In addition, the Indictment is impermissibly ambiguous and uncertain in
21 important particulars that renders it vague within the requirements of the notice
22 requirements of the state and federal due process clauses.

1 **II. Argument**

2 **A.**

3 **COUNTS 2 AND 3 OF THE INDICTMENT DO NOT STATE A**
4 **CAUSE OF ACTION AGAINST MR. CAVALLO**

5
6 (1) Counts 2 and 3 Impermissibly Rely on a Regulation That Is Invalid
7 Because it Has No Proper “Reference” under Government Code Section
8 11349(e)

9 Counts 2 and 3 of the Indictment do not state a cause of action because it does
10 not provide the minimum information necessary to enable Mr. Cavallo to determine
11 by what authority he is being charged with a crime. In addition, the statute and
12 regulation listed in those counts do not state a valid cause of action or crime, because
13 they all depend on the validity of an invalid regulation, promulgated in violation of
14 Government Code Sections 11342.2 and 11349, subdivision (e).

15 Specifically, both Counts 2 and 3 allege that Mr. Cavallo has conspired to
16 commit the crime of “attorney recommendation by a bail licensee” in violation of
17 Insurance Code Section 1814, which makes it a wobbler to violate “any foregoing
18 provision of this chapter [Chapter 7 of the Insurance Code], or of any rule of the
19 commissioner made pursuant thereto.” The indictment further lists Section 2071 of
20 Title 10 of the California Code of Regulations.

21 Section 2071 reads:

22 “No bail licensee shall in any manner, directly or indirectly, suggest the
23 name of or recommend any attorney to any arrestee or person purporting
24 to act for or represent an arrestee.”

25 In order to be valid the crime alleged in the indictment must be a conspiracy
26 to violate a statute which validly defines a crime. So, the Indictment alleges that Mr.
27 Cavallo has conspired to violate a regulation, the violation of which is made a crime
28 by Section 1814 of the Insurance Code. As noted, Section 1814 only authorizes the

1 promulgation of regulations by the Insurance Commissioner “pursuant to” Chapter
2 7 of the Insurance Code.

3 Chapter 7 deals exclusively with licensing bail bond agents, and the application
4 for license, the test, the term of the license, and the grounds for revocation and or
5 discipline of a licensee.

6 Insurance Code Section 1812 provides that the Insurance commissioner may
7 promulgate “reasonable rules (or regulations) necessary, advisable, or convenient for
8 the administration and enforcement of the provisions of this chapter.” The power of
9 the executive officer (i.e., the Commissioner of Insurance) is not unlimited, and the
10 doctrine of separation of powers, as well as very explicit statutory language in the
11 Government Code has been held to limit the rule-making power in very specific ways.

12 Section 11342.2 of the Government Code provides:

13 “Whenever by the express or implied terms of any statute, a state agency
14 has authority to adopt regulations to implement, interpret, make specific
15 or otherwise carry out the provisions of the statute. No regulation
16 adopted is valid or effective unless consistent with and not in conflict
17 with the statute and reasonably necessary to effectuate the purpose of the
18 statute.”

19 In other words, while the Commissioner can make “necessary, advisable or
20 convenient” rules or regulations for the “administration and enforcement” of Chapter
21 7 of the Insurance Code, by the express terms of Section 1812, no such regulation “is
22 valid or effective” unless it is “consistent with and not in conflict with the statute”
23 and it is “reasonably necessary to effectuate the purpose of the statute.” Under this
24 statute, which specifically states that regulations that fail to effectuate the purpose of
25 a statute under which they are promulgated are not valid, there must be something in
26 Chapter 7 of the Insurance Code that is “implemented, interpreted or made specific”
27 by a regulation before it is valid. (See e.g., *City of San Jose v. Dept. of Health*
28 *Services* (1998) 66 Cal.App.4th 35, 41-42 [“The rulemaking authority of the

1 Department is limited by statute. [N]o regulation adopted is valid or effective unless
2 consistent and not in conflict with the statute and reasonably necessary to effectuate
3 the purpose of the statute.' (Gov.Code, § 11342.2.) A regulation is invalid (as 'in
4 conflict with' a statute) if it would 'alter or amend the [governing] statutes or enlarge
5 or restrict the agency's statutory power.'" [Citations.]" quoting *California Beer &*
6 *Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control* (1988) 201
7 Cal.App.3d 100, 106-107; *California Teachers Association v. California Commission*
8 *on Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1101 [same]; *California*
9 *Beer and Wine Wholesalers Assn., Inc. v. Dept. of Alcoholic Beverage Control* (1988)
10 201 Cal.App.3d 100, 106-107 [same, quoting *Webb v. Swoap* (1974) 40 Cal.App.3d
11 191, 196, and citing to *Harris v. Alcoholic Beverage Control Appeals Board* (1964)
12 228 Cal.App.2d 1, 6]; *Cabral v. State Board of Control* (1981) 112 Cal.App.3d 1012,
13 1017 [Declaring Regulation 649.12 invalid because it purported to alter by expanding
14 the requirements for eligibility for benefits under the Victims of Violent Crimes
15 Act];)

16 In this case, the regulation invoked in the Indictment (Counts 2 and 3) does not
17 address any of the subjects which are covered by any of the statutes in Chapter 7 of
18 the Insurance Code.¹ Therefore, it does not "implement, interpret, make specific or
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20 ¹ Those subjects include: § 1800, License requirement; § 1800.4. Bail bond defined; § 1800.5, Exempt
21 transactions; § 1800.6. Local regulations; § 1800.7, Execution of bail bonds by individuals; §
22 1800.75. Unauthorized advertising; § 1800.8, Permits; § 1801. Bail licenses; § 1802. Bail agent's license;
23 § 1802.1, Notice of appointment; § 1802.2, Successor bail licensee. use of predecessor's name;
24 § 1802.5. Bail permittee's license; § 1802.6. Additional license; § 1802.7,
25 Deposit of securities in lieu of bond; § 1802.71, Substitution of bond for securities, conditions; §1802.72,
26 Application for recovery of securities by former bail licensee § 1802.73. Form and contents of application;
27 § 1802.74, Notice of application, publication, payment of expenses; § 1802.75, Examination of applicant's
28 books and records, costs of examination; § 1802.76, Failure to pay expense
of publication; collection by commissioner; § 1802.77, Delivery of securities to applicant;
§ 1803. Bail solicitor's license; § 1803.5, Repealed by Stats. 1982, c. 517, p. 2400, §290;
§ 1804. Application for license; § 1805, Issuance of license; requirements; § 1806, Licensure requirements;
grounds for suspension, revocation or refusal to issue; § 1807, Grounds for suspension or revocation;
§ 1807.5. Hearing; § 1807.7. License periods; § 1808, Notice of intent to
continue license; application for renewal; expiration of license; § 1809, Rebates;
§ 1810. Natural persons; corporations; § 1810.5. Examinations; § 1810.6,
Frequency and scope of examination; § 1810.7, Eligibility for examination for licensure; continuing
education; approval of providers of education for licensure; false representations of educational requisites;
rules and regulations; fees; Internet or correspondence courses; § 1810.8. Death of licensee, Qualifications
for renewal of license; § 1811. Fees; § 1812, Rule making power;

1 otherwise carry out the provisions of the statute” and it is invalid. Moreover, it is not
2 “reasonably necessary to effectuate the purpose of the statute” which also rendered
3 the regulation invalid pursuant to Government Code Section 11342.2.

4 In addition, to be valid, any regulation adopted by any agency or executive
5 officer in California must meet the requirements of Government Code Section 11349
6 (*Baber v. Napa State Hospital* (1989) 209 Cal.App.3d 213), which states in relevant
7 part:

8 “(b) ‘Authority’ means the provision of law which permits or obligates
9 the agency to adopt, amend, or repeal a regulation.

10 * * *

11 “(d) ‘Consistency’ means being in harmony with, and not in conflict
12 with or contradictory to, existing statutes, court decisions, or other
13 provisions of law.

14 (e) ‘Reference’ means the statute, court decision, or other provision of
15 law which the agency implements, interprets, or makes specific by
16 adopting, amending, or repealing a regulation.” (Excerpt, Government
17 Code Section 11349).

18 While subdivision (a) of Section 11349 references what has already been made
19 clear in Insurance Code Section 1812, i.e., the Insurance Commissioner has statutory
20 authority to “adopt, amend, or repeal a regulation,” and subdivision (c) is a
21 restatement of the principles of Government Code Section 11342.2, discussed above,
22 *subdivision (e)* adds something critical to this case. Under Subdivision (e) there must
23 be a “reference” of a “statute, court decision, or other provision of law” which the
24 regulation “implements, interprets, or makes specific.”

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26 _____
27 § 1813. Suspension, revocation, and denial of license; § 1814. Violation; penalty;
28 § 1815. Certification of licensees to county clerks; § 1819. Certification of facts; prima facie evidence;
§ 1820. Display of license; § 1821. Hearing upon denial of license; applicable code provisions; § 1822.
Change of address by licensee or applicant, notice; § 1823. Surety companies,
buildup or reserve funds; authorized investments; use of funds.

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1 In the case of Regulation ~~1072~~, listed in Counts 2 and 3 of the Indictment, the
2 reference cannot be a court decision, because the Insurance Code Section that gives
3 the Commissioner the authority to promulgate the regulations that this indictment is
4 concerned with [I.e., Ins. Code § 1814] are the provision of "this chapter" or Chapter
5 7 of the Insurance Code. As noted above (in footnote 1), we have listed all of the
6 sections of Chapter 7 of the California Insurance Code, and their legislative titles.
7 None relate to the power of a bail agent to refer to or suggest an attorney to a person
8 who is a bail customer of the bail agent, or who is a representative of such a customer.

2071

9 Absent any valid reference, Regulation ~~1071~~ is also invalid, and this Court has
10 the authority and the obligation, pursuant to Government Code Section 11350, to
11 declare Title 10, Section 1071 to be invalid.

12 Moreover, because this is a criminal case, and because the Commissioner of
13 Insurance has made a rule, the violation of which has criminal consequences, but
14 which is not made strictly pursuant to the legislative authority granted to him in
15 Government Code Sections 11342.2, 11349, subdivisions (b) and (e), and Insurance
16 Code Section 1812, any prosecution of Mr. Cavallo, who is not a licensee under
17 Chapter 7 of the Insurance Code, and who is not a person or in a profession with
18 which any of the provisions of Chapter 7 are concerned, would violate both due
19 process and the separation of powers doctrine.

20 The Constitutional principle of "separation of powers" originates in the
21 American system of government with the U.S. Constitutional doctrine of "checks and
22 balances" and finds support in general statements that the Executive has the exclusive
23 discretion to commence, maintain or terminate a criminal prosecution.² (And See
24 U.S. Const., Art. 2, Sec. 1 [Executive]; Art. 3, Sec. 1 [Judiciary].)

25 The California Constitution divides the governmental powers in a manner
26 similar to that of the federal government.

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² See e.g., *United States v. Cox* (5th Cir. 1965) 342 F.2d 167, cert. denied sub. nom. *Cox v. Hauberg*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700, *United States v. Ream* (5th Cir. 1974) 491 F.2d 1243, 1246.

1 Article III, Section 3 states:

2 "The powers of state government are legislative, executive, and
3 judicial. Persons charged with the exercise of one power may not
4 exercise either of the others, except as permitted by this Constitution."

5 Article VI of the state charter creates the Executive branch of government, and
6 establishes its powers.

7 In this case, the Insurance Commissioner has clearly not been given the
8 constitutional authority to enact penal statutes (in the form of regulations) *unless* they
9 meet the requirements of Insurance Code 1812 [i.e., they are enacted to "administer[]
10 or enforce[] the provisions of Chapter 7 of the Insurance Code], and they comply with
11 Government Code Sections 11342.2 and 11349. Since the regulation that forms the
12 essence of Counts 2 and 3 of the Indictment against Mr. Cavallo in this case does not
13 comply with those statutes, no criminal prosecution can be predicated on an alleged
14 conspiracy to violate that [invalid] regulation.

15 As such, because the Indictment alleges the violation of a valid provision of
16 law in Counts 2 and 3, it is subject to this general demurrer, and Counts 2 and 3 of the
17 Indictment must be stricken as to Mr. Cavallo.

18 **B.**

19 **THE INDICTMENT IS IMPERMISSIBLY VAGUE AND**
20 **UNCERTAIN AND IS SUBJECT TO A GENERAL DEMUR ON**
21 **DUE PROCESS AND STATUTORY GROUNDS**

22 Defendant demurs to the Indictment on the ground it fails to provide sufficient
23 notice of the offense charged and on the ground that the accusatory pleading "does
24 not substantially conform to the provisions of §§ 950-952" (Penal Code § 1004(a)).

25 Penal Code § 806³ requires that indictments meet the same requirements as to
26 form and substance as Informations. Section 951 specifies that the accusatory
27 pleading should include a "statement of [the] act or omission" which constitutes the
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³ Unless otherwise specified, all statutory references are to the California Penal Code.

1 crime charged.

2 On the other hand, § 959, seems only to require that it be alleged that the
3 offense be charged in the language of the statute, while § 952 says the charging
4 language must be “sufficient to give the accused notice of the offense of which he is
5 accused.”

6 (1) Ambiguities in the Indictment

7 Count One

8 Count 1 of the Indictment alleges a conspiracy to commit the crime of “attorney
9 capping” in violation of Section 6152(a) of the California Business and Professions
10 Code. That statute reads:

11 “(a) It is unlawful for: (1) Any person, in an individual capacity or in a
12 capacity as a public or private employee, or for any firm, corporation,
13 partnership or association to act as a runner or capper for any attorneys
14 or to solicit any business for any attorneys in and about the state prisons,
15 county jails, city jails, city prisons, or other places of detention of
16 persons, city receiving hospitals, city and county receiving hospitals,
17 county hospitals, superior courts, or in any public institution or in any
18 public place or upon any public street or highway or in and about private
19 hospitals, sanitariums or in and about any private institution or upon
20 private property of any character whatsoever. (2) Any person to solicit
21 another person to commit or join in the commission of a violation of
22 subdivision (a).”

23 It is immediately apparent that the crime of “attorney capping” in violation of
24 Business and Professions Code Section 6152(a) can be violated in at least two distinct
25 ways: (1) it can be committed by acting “as a runner or capper” for any attorneys in
26 almost any location, or (2) it can be committed by “soliciting another person to”
27 become a capper or runner in violation of 6152(b)(1).

28 ///

1 It is impossible to determine, from the allegations and evidence in support of
2 the indictment, which aspect of Section 6152(a) Mr. Cavallo is accused of conspiring
3 to violate.

4 In addition, it is possible that the Indictment is charging a conspiracy with two
5 related objects, i.e., to solicit people to engage in capping and running, and to engage
6 in capping and running.

7 The ambiguity is enhanced rather than reduced by a review of some of the
8 alleged "overt acts (referred to here as OAs.)") Although the Indictment avers that
9 the "following overt acts" were committed "pursuant to and for the purpose of
10 carrying out the objects and purposes of the conspiracy", those objects and purposes
11 are not alleged anywhere in the Indictment, and it is impossible to tell what they
12 might be.

13 OA3 alleges that co-defendant Castro "instructed Sara Chavez to refer Xtreme
14 clients to defendant Cavallo." Is this alleging that the conspiracy was to accomplish
15 the act by Castro of soliciting Sara Chavez to refer cases to Cavallo, or is it alleging
16 that the conspiracy was to have clients referred to Cavallo?

17 Similarly, OA5, OA6, OA7 all suggest it is soliciting the employees of Xtreme
18 Bail Bonds that is the object of the conspiracy.

19 However, OAs9-11 [co-defendant Cruz recommended that Martha Marquez
20 hire Cavallo to represent her boyfriend Christian Vera] and OAs12-18
21 [recommending several persons to hire Cavallo] appears to allege that the object of
22 the conspiracy was to actually engage in capping and running.

23 The first OA to mention any conduct by Cavallo is OA8, which merely alleges
24 that Cavallo "loaned Castro" \$50,000.

25 The only other OAs to mention conduct by Cavallo are OAs 26, 29, 32, and
26 each of them alleges that Cavallo told a person referred by Xtreme that he would give
27 them a discount because they were referred.

28 ///

1 From these four alleged acts, Defendant Cavallo is unable to determine what
2 he is alleged to have conspired to do.

3 **Count Two**

4 Oddly, although Count 2 alleges a conspiracy to violate an insurance regulation
5 (see discussion in the argument above), the overt acts alleged in Count 2 appear to be
6 identical to each and every overt act alleged in Count 1.

7 **Count Three**

8 In Count 3, there is no conspiracy alleged, however, the Indictment charges Mr.
9 Cavallo, an attorney, with a violation of an Insurance regulation, designed to regulate
10 the conduct of licensed bail bond agents, not attorneys.

11 In both Counts 2 and 3 it is impossible to determine from the Indictment what
12 Mr. Cavallo is alleged to have done constituting the crimes charged.

13 Moreover, as to Count 3, there is absolutely no specific “recommendation”
14 alleged. Rather, the count is alleged to have taken place over a 22-month period.
15 However, the regulation involved does not define an ongoing course of conduct, but
16 a specific act – that of suggesting the name of or recommending an attorney to “any
17 arrestee or person purporting to act for or represent an arrestee.” The regulation
18 reads:

19 “No bail licensee shall in any manner, directly or indirectly, suggest the
20 name of or recommend any attorney to any arrestee or person purporting
21 to act for or represent an arrestee.” (Cal. Insurance Code, Title 10, §
22 2071)

23 Given the overt acts also alleged in the indictment (twice for each allegation),
24 and given the fact that *some* of them can be interpreted as alleging that Castro or Cruz
25 did “suggest” or “recommend” Cavallo as an attorney for several different “arrestees”
26 or “persons purporting to act for or represent” arrestees, the Indictment is also
27 impermissibly vague because it is impossible to determine which specific violation
28 of Section 2071 that is potentially comprised by the factual allegations in the

1 Indictment is charged in Count 3.

2 (2) Argument

3 The due process right to notice gives the defendant the right to have the
4 accusatory pleading tell him what, specifically, he is accused of, so he knows what
5 he must meet.

6 "In a number of cases the Court has emphasized two of the protections
7 which an indictment is intended to guarantee, reflected by two of the
8 criteria by which the sufficiency of an indictment is to be measured.
9 These criteria are, first, whether the indictment 'contains the elements
10 of the offense intended to be charged, "and sufficiently appraises the
11 defendant of what he must be prepared to meet"' and, secondly, 'in case
12 any other proceedings are taken against him for a similar offense
13 whether the record shows with accuracy to what extent he may plead a
14 former acquittal or conviction.'" *Russell v. United States* (1962) 369
15 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 240

16 There is an obvious tension between the due process right to notice and modern
17 simplified pleading procedure embodied in Penal Code § 952 et. seq. Recognizing
18 that conflict, a number of cases hold that an accusatory pleading which complies with
19 those sections does not necessarily give sufficient notice to conform to constitutional
20 requirements.

21 These cases establish that the due process notice requirement is designed to:
22 (1) give the defendant a reasonable opportunity to prepare and present his defense and
23 prevent him from being surprised at trial; (2) enable the defendant to plead any
24 judgment as a bar to any subsequent prosecution for the same offense; and (3) inform
25 the court of the facts alleged so that it may decide whether they are sufficient under
26 the law to support a conviction.

27 "It has long been recognized that there is an important corollary
28 purpose to be served by the requirement that an indictment set out 'the

1 specific offense, coming under the general description,' with which the
2 defendant is charged. This purpose, as defined in *United States v.*
3 *Cruikshank*, is 'to inform the court of the facts alleged, so that it may
4 decide whether they are sufficient in law to support a conviction if one
5 should be had." *Russell v. United States, supra*, 369 U.S. 749, 82 S.Ct.
6 1038, 8 L.Ed. 240

7 In the present case, the indictment fails this constitutional test in two ways.
8 The indictment is uncertain in that it is impossible to tell from the allegations of the
9 indictment what, specifically, defendant is charged with doing, or failing to do.
10 Further, the facts alleged cannot support a conviction, because, the statute is
11 unconstitutional as applied in this case, because it violates the First Amendment right
12 of freedom of speech. In the present case, the indictment fails this constitutional test
13 in two ways.

14 A. The Indictment Fails to Give Adequate Notice of the Act or Acts
15 Which Constitute the Alleged Crimes or They Refer to Acts Which
16 Cannot Lawfully Be Prosecuted

17 "It is an elementary principle of criminal pleading, that where the
18 definition of an offense, whether it be at common law or by statute,
19 'includes generic terms, it is not sufficient that the indictment shall
20 charge the offense in the same generic terms as in the definition; but it
21 must state the specifics, -- it must descend to particulars.'" *United States*
22 *v. Cruikshank*, (1876) 92 U.S. 542, 558, 23 L.Ed. 588 (1876)

23 The statute in the present case is, undeniably, generic, and, as shown above,
24 allows prosecution of different types of conduct. Unfortunately, without explanation,
25 it is impossible to tell from the vague language used in the statute, and not clarified
26 in the indictment, what, specifically, Mr. Cavallo is accused of having done. Under
27 these circumstances, the minimal requirement of due process is that the accusatory
28 pleading tell the defendant what specifically he is charged with doing.

1 "In an indictment upon a statute, it is not sufficient to set forth the
2 offence in the words of the statute, unless those words of themselves
3 fully, directly, and expressly, without any uncertainty or ambiguity, set
4 forth all the elements necessary to constitute the offense intended to be
5 punished." *United States v. Carroll*, 105 U.S. 611, 612, 26 L.Ed. 1135
6 (1882). (Please see also *Russell v. United States*, *supra*, 369 U.S. 749,
7 82 S.Ct. 1038, 8 L.Ed. 240)

8 The indictment in this case cannot stand, because it does not comport with the
9 basic notice requirements of the state and federal due process clauses.

10 In fact, as noted above, it alleges acts in the conjunctive relating to the same
11 type of conduct over a 22-month period, without advising the court or the defendant
12 which specific act is charged in Count 3, or what is the object of the conspiracy
13 alleged in Count 2..

14 "Void for vagueness simply means that criminal responsibility
15 should not attach where one could not reasonably understand that his
16 contemplated conduct is proscribed. (*United States v. National Dairy*
17 *Corp.* (1963) 372 U.S. 29, 32)" *Bowland v. Municipal Court* (1976) 18
18 Cal. 3d 479

19 But this statute is not merely vague in that there is no definition for the term
20 "suggesting" (as opposed to referred). In addition, the violation of the regulations
21 alleged here is doubly vague because it is not possible to tell from the Indictment to
22 whom (i.e., which one of many alleged) the attorney was suggested, or when. This
23 indictment is impermissibly vague because it is impossible to tell what the crime
24 alleged comprises.

25 "As generally stated, the void-for-vagueness doctrine requires that a
26 penal statute define the criminal offense with sufficient definiteness
27 that ordinary people can understand what conduct is prohibited and in
28 a manner that does not encourage arbitrary and discriminatory

1 enforcement.” *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358, 75
2 L.Ed.2d 903, 909, 103 S.Ct. 1855.

3 In the present case, the regulation does tend to encourage arbitrary or
4 discriminatory enforcement. Specifically, in this case the Indictment alleges that one
5 of the people to whom Mr. Cavallo was suggested was the boyfriend of a friend of the
6 “suggestor”, and Mr. Cavallo was her friend. (See OV 10 in Counts 1 and 2)

7 In this case, then, Count 1 fails to advise the defendant or the court what,
8 specifically, he is alleged to have conspired to do, Count 2 is duplicative of Count 1
9 and it suffers from the identical vagueness as Count 1 because it merely repeats the
10 identical 39 overt acts, and Count 3 is vague because it alleges a single violation of
11 an insurance regulation, without stating when (over a 22 month period) that violation
12 took place, and without saying which, of at least five possible situations referred to
13 in the overt acts alleged in Counts 1 and 2 (covering the identical 22-month period),
14 situation is the one allegedly involved in Count 3.

15 Finally, all three counts fail to allege the specific factual way the offense
16 charged was committed, as required, consistent with due process by the terms of
17 Penal Code Section 951.

18 One important reason for requiring the statute and the indictment to give
19 adequate notice of what the council member may and may not do, in advance, is to
20 allow the defendant to ask the Court to review it to determine if it, indeed describes
21 conduct which the state may lawfully prohibit. This is a requirement of the due
22 process clause as described by the Court in *Russell v. United States, supra*, 369 U.S.
23 749, 82 S.Ct. 1038, 8 L.Ed. 240 and *United States v. Cruikshank, supra*, 92 U.S. 542,
24 558, 23 L.Ed. 588.

25 Under such circumstances, the vague language of the indictment must be
26 viewed as void under the due process clauses of the state and federal constitutions.
27 (See generally, *People v. Mirmirani* (1981) 30 Cal.3d 375, 382-383, *People v. Cooper*
28 (1944) 64 Cal.App.2d Supp. 946 at p. 949).

1 The regulation in question purports to regulate speech, albeit commercial
2 speech, by bail agents. This type of commercial speech can be regulated and even
3 criminalized under the holdings of the California Supreme Court and those of the
4 United States Supreme Court. However, it has also been held that where a penal
5 provision threatens a constitutionally protected right, such as the first amendment
6 rights of free association, or speech, the particularity requirements of the due process
7 clause are especially important.

8 “Finally, when a criminal statute impacts on First Amendment
9 rights, greater precision should be required to survive a void -for-
10 vagueness challenge. [fn.om] ‘[S]tricter standards of permissible
11 statutory vagueness may be applied to a statute having a potentially
12 inhibiting effect on speech; a man [or woman] may the less be required
13 to act at his [or her] peril here, because the free dissemination of ideas
14 may be the loser.’ (*Smith v. California* (1959) 361 U.S. 147, 151 [4
15 L.Ed.2d 205, 210, 80 S.Ct. 215].)” *People v. Mirmirani, supra*, 30 Cal.
16 3d 375, 383)

17 Prosecution of defendant under this indictment is barred:

18 1. Because of the insurmountable due process notice defects found in the
19 pleading itself;

20 2. Because the Court and defense are completely in the dark about the essence
21 of what these counts are accusing Mr. Cavallo of doing. (*Peer v. Municipal Court*
22 (1982) 128 Cal.App.3d 733 (misdemeanor indictment alleging the unlawful practice
23 of psychiatry, in compliance with § 952, was unconstitutionally vague in that it failed
24 to name the victims or the specific unlawful practice); *Lamadrid v. Municipal Court*
25 (1981) 118 Cal.App.3d 786 (misdemeanor indictment alleging manslaughter in the
26 words of the statute failed to specify “with some particularity which of the several
27 available factual theories the People would rely upon”); *In re Rudolfo A.* (1980) 110
28 Cal.App.3d 845 (word “trespass” was vague in that it failed to specify the particular

1 type of trespass at issue); *Sallas v Municipal Court* (1978) 86 Cal.App.3d 737 (words
2 "controlled substance" held unconstitutionally vague); *People v. Jordan* (1971) 19
3 Cal.App.3d 362 (indictment charging co-defendants with assault with intent to
4 commit murder unconstitutionally vague in that it failed to allege how or by whom
5 gun was fired); *People v. Clenney* (1958) 165 Cal.App.2d 241 (felony information
6 alleging offense in words of statute held vague because phrase "an act forbidden by
7 law" was not further defined); *Russell v. United States, supra*, 369 U.S. 749 ("...
8 where the definition of an offense ... includes generic terms, it is not sufficient that
9 the indictment shall charge the offense in the same generic terms as in the definition
10 ... it must descend to particulars"); and

11 3. Because the regulation Mr. Cavallo is alleged to have violated threatens the
12 right of freedom of speech as plead.

13
14 **III Conclusion**

15 The present indictment must fail for lack of adequate notice, and defendant
16 urges this Court to sustain this general demurrer to this pleading.

17 Accordingly, and for all the reasons stated herein, defendant urges this Court
18 to sustain this general and special demurrer to the Indictment on the ground that it
19 violates his basic constitutional right to notice of the charges he is facing, and violates
20 his basic, fundamental right of freedom of speech, and that as to Counts 2 and 3 it
21 fails to state a cause of action.

22 Dated: June 5, 2006

23
24 Respectfully submitted,

25 LAW OFFICE OF JOHN D. BARNETT

26 

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