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Proposed Rule 5-110(E):

I disagree with softening the requirements of paragraph (E) as proposed by the Commission. I believe that the potential interference in the attorney-client fiduciary relationship is so great that a subpoena should be used only as a last resort to obtain essential information. I am also not sure how well a rule applicable to all lawyers would work, as indicated by my attempts to draft rules or rule provisions that incorporate the Court's suggestions. These are discussed below and attached. Here are my responses to the possible approaches suggested by staff:

(1) Recommend that the concept of paragraph (E) be revised to apply to all lawyers as a change to be made to the current rules on an expedited basis. To consider this option a proposed amended rule 5-220 is provided as Attachment 1. This draft implements changes to the Court's approved rule 5-220 made operative on May 1, 2017.

First, I don't think that the appropriate place for a rule provision is rule 5-220. Rule 5-220 applies to *suppression* of evidence. The implication of including a prohibition on subpoenas of lawyers in a rule prohibiting suppression necessarily is that the targeted lawyer is suppressing evidence. I don't think that is what underlied the ABA's adoption of MR 3.8(e). I believe the concern was primarily with the interference with the attorney-client relationship engendered by federal prosecutors who served a great number of subpoenas on lawyers during the 1980s. Twice the ABA attempted to address this situation through resolutions condemning the practice. Finally, the ABA adopted the rule when the resolutions had no discernible effect. Although there are some lawyers who might engage in suppressing evidence, I don't think we should imply that is true of all lawyers by prohibiting the serving of subpoenas in a subsection of a rule on evidence suppression.

Second, although proposed rule 5-220(B) is intended to apply to all lawyers, by its terms, specifically its limitation "ongoing investigation or prosecution" in (B)(2), it appears to apply only to criminal prosecutors. I have tried to address this in my proposed rules or rule provisions, all of which are attached.

Third, rather than placing the rule in 5-220, I've two alternative suggestions: inserting a rule provision in current rule 5-310, concerning witnesses, as 5-310(C); or drafting a standalone rule, proposed rule 5-130. My preference would be the latter.

Proposed rule 5-310:

Rule 5-310 ~~Prohibited Contact With~~ Interactions With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.
- (C) Subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a past or present client unless the lawyer seeking the subpoena reasonably believes:*
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is reasonably necessary to the successful completion of an ongoing criminal investigation or prosecution or in a civil proceeding, is essential to prove the claim or defense asserted; and
 - (3) there is no other feasible alternative to obtain the information

Discussion:

Paragraph (C) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

In 5-310, I recommend changing the title to "Interactions With Witnesses" rather than "Prohibited Contact With Witnesses". I think "Interactions" is broad enough to bring within it the conduct prohibited in (C).

I have also tried to revise the language to that the rule unambiguously applies not only to prosecutors in a criminal action but to all lawyers. See introductory paragraph.

In deference to the court's suggested softening of the standard, I've applied the "reasonable" standard to criminal actions but retained the "essential" standard for civil actions. Question whether that same more lenient standard in criminal proceedings should also apply to subpoenas served by the defense on prosecutors?

I've also tried to get away from the limitations implied in the clause "investigation or prosecution" by adding a reference to "claim or defense" in a civil proceeding.

I've kept the "feasible" standard in the last subparagraph because any such subpoena should be used only as a last resort.

Finally, I've added a discussion paragraph taken from the Massachusetts rule that is included as Attachment 6.

Proposed Rule 5-130:

Rule 5-130. Subpoenaing Lawyer to Testify About a Client

A lawyer shall not subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a past or present client unless the lawyer seeking the subpoena reasonably believes:*

- (A) The information sought is not protected from disclosure by any applicable privilege or work product protection;
- (B) The evidence sought is reasonably necessary to the successful completion of an ongoing criminal investigation or prosecution or, in a civil proceeding, is essential to the prove the claim or defense asserted; and
- (C) There is no other feasible alternative to obtain the information.

Discussion:

Rule 5-130 is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

Proposed new standalone rule 5-130 is identical to 5-320(C), discussed above. The only difference is that it is a standalone rule rather than part of another rule. Because I don't think that the provision fits neatly into either 5-220 or 5-320 (or any other current California rule), I recommend a standalone rule. There is no particular reason for the numbering; I wanted to place what I think of as an important provision early in Chapter 5, but I think it work fine as rule 5-400.

(2) Recommend that the concept of paragraph (E) be revised to apply to all lawyers as a change to be considered as a part of the Court's review of the comprehensive proposed rules and not on an expedited basis. To consider this

option a proposed amended rule 3.4 is provided as Attachment 2. This draft implements changes to the Board adopted version of proposed rule 3.4 that is currently pending with the Court.

I've attached an alternative version of a revised proposed rule 3.4, which incorporates the changes I've discussed in item #1, above.

I've inserted the provision as paragraph (f) because it fits better in the chronology of a proceeding's events. I don't think this does damage to a national standard as proposed 3.4 is substantially different from MR 3.4 already, bringing in parts of California rules not in the MR.

(3) Recommend that the concept of paragraph (E) remain as a rule for prosecutors only and resubmit this proposal to the Court on an expedited basis. To consider this option a proposed amended rule 5-110 is provided as Attachment 3. This draft implements changes to the approved rule 5-110 made operative on May 1, 2017.

I agree with this approach but I think the Court was pretty clear that it did not want the provision in the prosecutor rule, given that paragraph (D) and Comments [3] and [4] were "reserved," but the provisions after paragraph (E) were re-lettered.

My only question is whether the Supreme Court had access to the Commission's response to the Cardona dissent re paragraph (E) that was included with the proposed rule 3.8 materials but not with the 5-110 materials. Given the specific concerns raised in that response and the current concerns the Chief has raised regarding federal immigration officers at California courthouses, there is a question whether the Court might want to reconsider paragraph (E) on an expedited basis.

(4) Recommend that the concept of paragraph (E) remain as a rule for prosecutors only as a part of the Court's review of the comprehensive proposed rules and not on an expedited basis. To consider this option a proposed amended rule 3.8 is provided as Attachment 4. This draft implements changes to a modified version of the Board adopted proposed rule 3.8 conformed to substance of approved rule 5-110 made operative on May 1, 2017.

I am also fine with this. See my response to item #3.

(5) Recommend that the concept of paragraph (E) be withdrawn as a concept considered but no longer recommended for adoption in any form. Similar to other concepts considered but rejected, the Commission would need to articulate reasons for not recommending a rule.

I am opposed to this approach. See items #3 & 4 and Commission response to Cardona dissent re 5-110(E).

RRC3 – Rule 5-110(E)
Post-Agenda E-mails, etc. – Revised (May 22, 2017)

Attached:

RRC2A - [3.4][5-310] - Rule [Related to 3.8] - ZDFT1 (05-18-17)-KEM_RED.docx
RRC2A - [3.8][5-110] - Proposed New Rule 5-130 - DFT1 (05-19-17)-KEM_RED.docx
RRC2A - [3.8][5-110] - Proposed Rule 5-310 - DFT1 (05-19-17)-KEM - Cf. to
Current.docx

Rule 5-310 ~~Prohibited Contact With~~ Interactions With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.
- (C) Subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a past or present client unless the lawyer seeking the subpoena reasonably believes:*
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is reasonably necessary to the successful completion of an ongoing criminal investigation or prosecution or in a civil proceeding, is essential to the prove the claim or defense asserted; and
 - (3) there is no other feasible alternative to obtain the information

Discussion:

Paragraph (C) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

Rule 5-130. Subpoenaing Lawyer to Testify About a Client

A lawyer shall not subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a past or present client unless the lawyer seeking the subpoena reasonably believes:*

- (A) The information sought is not protected from disclosure by any applicable privilege or work product protection;
- (B) The evidence sought is reasonably necessary to the successful completion of an ongoing criminal investigation or prosecution or, in a civil proceeding, is essential to the prove the claim or defense asserted; and
- (C) There is no other feasible alternative to obtain the information.

Discussion:

Rule 5-130 is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably* incurred by a witness in attending or testifying;
 - (2) reasonable* compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable* fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;
- (f) subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a past or present client unless the lawyer seeking the subpoena reasonably believes:*
 - (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing criminal investigation or prosecution or in a civil proceeding, is essential to the prove the claim or defense asserted; and
 - (3) there is no other feasible alternative to obtain the information;
- (g) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or
- ~~(e)~~h in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense.

See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

[3] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.