

DATE: May 25, 2017

TO: Members, Board of Trustees Regulation and Discipline Committee

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Reconsideration of Proposed Rule 5-110(E) of the Rules of Professional Conduct – Request for Release for Public Comment

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California (“Supreme Court”) issued an order on the State Bar’s request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar’s request was granted in part and denied in part. Proposed rule 5-110(E) states the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a current or former client. Rule 5-110(E) was not approved but the Supreme Court’s order provides instructions for the State Bar’s further consideration. The Board of Trustees (“Board”) referred this matter to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) for study and development of revised rule proposals. This agenda item reports on the status of the Commission’s study of proposed rule 5-110(E). No Board Committee action is requested at this time.

Members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND

Attachment A is Board agenda item 703 MAY 2017. This agenda item provides the relevant background for this matter including the full text of the Supreme Court’s May 1, 2017 order.

DISCUSSION

For its meeting on May 25, 2017, the Commission was provided with the instructions from the Supreme Court and a May 24, 2017 written comment from OCTC. In relevant part, the OCTC comment states:

If there is going to be a rule addressing the conditions required for a prosecutor to issue a subpoena to present evidence about a former or current client, the rule should apply to all attorneys, not just prosecutors. OCTC also agrees with the Supreme Court’s suggestion that such a rule substitute the term “reasonably necessary” for the term “essential” in what was subsection (E)(2) of the former

proposal. The term “reasonably necessary” is a fairer, more definite and understandable, and more appropriate term. California should not discipline attorneys who honestly and reasonably believed the proposed witness was reasonably necessary. Likewise, OCTC agrees with the Supreme Court’s suggestion that such a rule substitute the term “reasonable” for the term “feasible” in what previously was subsection (E)(3). Again, the term “reasonable” is fairer, more definite, clearer, and more appropriate than “feasible.”

The Commission also was given an excerpt from the U.S. Attorneys Manual providing “Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients.” This is an example of a policy that provides conditions for issuing subpoenas that extends to both criminal and civil matters. Similarly, the Commission was given an excerpt from Wisconsin’s version of ABA Model Rule 3.8(e) that deletes the word “criminal” and extends the rule to subpoenas by a prosecutor in “a grand jury proceeding or other proceeding.” (Attachment B provides the excerpts from the U.S. Attorneys Manual and the Wisconsin rule.)

At the Commission’s meeting, the Commission voted to table consideration of rule 5-110(E) until the Commission’s July 5, 2017 meeting. At that meeting the Commission will consider the major issue of whether this professional conduct standard should be a rule for all lawyers or only for a prosecutor in a criminal matter. Because a rule of broader application was not considered in the course of the Bar’s rule revision project, any such proposal should be given due consideration with adequate opportunity for public comment and the Board’s and the Supreme Court’s final action on the other aspects of rule 5-110 should not be delayed.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE RESOLUTION

None.

ATTACHMENT(S) LIST

- A.** Board Agenda Item 703 MAY 2017 (including the Supreme Court’s May 1, 2017 order)
- B.** Excerpts from the U.S. Attorneys Manual and the Wisconsin version of Model Rule 3.8(e)