

VARIATIONS OF RULE 5-110(E) SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Rule Adopted By The Board & Submitted To The Supreme Court:

Rule 5-110(E)

The prosecutor in a criminal case shall:

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(E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
- (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
- (3) There is no other feasible alternative to obtain the information;

Recommendation Of Dan Eaton (5/30/17 Email)

Rule 3.4(h)

A lawyer shall not:

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(h) subpoena a lawyer in any proceeding to present evidence about a past or present client unless the lawyer reasonably believes:*

- (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
- (2) the evidence sought is critical to the successful completion of an ongoing investigation or prosecution or defense of a criminal or civil proceeding; and
- (3) there is no other practical alternative to obtain the information.

Recommendation Of George Cardona (6/26/17 Email):

. . . if we adopt a rule governing subpoenas to attorneys, it should be a version of the rule that uses the "reasonable alternative" and "reasonably necessary" language.

Recommendation Of Kevin Mohr (6/26/17 Email):

Rule 3.4(f)

A lawyer shall not:

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(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 **essential** to the successful completion of **an ongoing criminal investigation or prosecution or in a civil proceeding, is essential to support the claim or defense asserted**; and
- (3) there is no other **feasible alternative** to obtain the information;

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Comment

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[2] 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. See *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558; *Spectra Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487.

Recommendation Of OCTC (Letter dated 6/29/17):

Also, if there is going to be a proposed rule addressing the conditions required for a criminal prosecutor to issue a subpoena to present evidence about an attorney's former or current client, the rule should apply to all attorneys, not just criminal prosecutors. OCTC 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 also agrees with the Supreme Court's suggestion that such a rule substitute the term **"reasonable [alternative]"** for the term "feasible [alternative]" in what previously was subsection (E)(3). Again, the term "reasonable" is fairer, more definite, clearer, and more appropriate than "feasible."