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May 30, 2017 Eaton Email to Difuntorum, McCurdy & Lee:

In its May 1, 2017 order, the California Supreme Court directed the State Bar Board of Trustees, and the Trustees in turn directed the Rules Revision Commission, to reconsider whether the proposed ethical obligation for a prosecutor to meet certain conditions before subpoenaing a lawyer to present evidence about a former or current client (proposed Rule 5-110(E))

“should be imposed on all attorneys, not only prosecutors. To the extent the Board chooses to recommend a more broadly applicable rule patterned on the language in proposed rule 5-110(E), the court directs the Board to reconsider whether substitution of the terms ‘reasonably necessary’ for ‘essential’ under proposed paragraph (E)(2), and ‘reasonable’ for ‘feasible’ under proposed paragraph (E)(3), would be appropriate.”

I have reviewed the materials in Randy’s helpful May 16, 2017 assignment memo on this issue. I also have reviewed the discussion of ethical issues related to deposing opposing counsel in civil litigation in the Tuft Rutter Group Guide on Professional Responsibility. (¶¶8:945 – 947) as well as the leading case, *Carehouse Convalescent Hosp. v. Sup.Ct.* (2006) 143 Cal.App.4th 1558 (*Carehouse*).

The ABA Model Rules, through subsection 3.8(e), limit this ethical restraint to criminal proceedings. I have not found any jurisdiction that extends the concept to civil proceedings. Even in the context of criminal proceedings, “[t]he rule is rarely invoked in disciplinary matters.” (Annotated Model Rules of Professional Conduct, Seventh Edition, p. 390.)

There is case law in other jurisdictions that, like California, restricts such deposition in civil proceedings as a matter of discovery. (See e.g., *Shelton v. American Motors Corp.* (8th Cir. 1986) 805 F.2d 1323, 1327; *Cascone v. Niles Homes for Children* (W.D.Mo. 1995) 897 F.Supp. 1263, 1267: “[A] party shouldn’t be able to use a deposition to sucker-punch the other side’s quarterback or listen in on the other side’s huddle.”) Both *Shelton* and *Cascone* are cited with approval in *Carehouse*. (See *Carehouse*, *supra*, 143 Cal.App.4th at 1564-1565.)

In *Carehouse*, the Court of Appeal issued a writ preventing plaintiffs’ counsel from deposing defense counsel in a case of alleged nursing home negligence. Plaintiffs sought to depose defense counsel about defense counsel’s calculation of staff ratios based on raw data that plaintiffs’ counsel also had. The first sentence of the Court’s opinion declares its conclusion: “The adversarial system of justice presumes that the attorneys for each side oppose one another, not depose one another.” (*Id.* at 1560.) The Court went on to identify three independent hurdles that a party seeking to rebut the presumption against deposing opposing counsel must overcome before being allowed to depose opposing counsel. The parties seeking the deposition must show: “(1) they lack other practicable means of obtaining [the] information” sought by the

deposition, and (2) such information is crucial to their case.” (*Id.* at 1564.) Even if the party seeking the deposition carries its burden on the first two hurdles, the party resisting the deposition may still block the deposition by showing that the information sought is work product or privileged. (*Id.* at 1563-1564.)

The question the Commission faces is whether a sturdy, judge-made rule of civil *discovery* that addresses requests to depose opposing counsel should be made a rule of *ethics* that subjects an attorney to discipline for making such a request if the attorney lacks a reasonable belief that: (1) there is no other practicable means of obtaining the information the attorney seeks from opposing counsel; or (2) the information sought is crucial (or some other degree of importance) to the attorney’s case; or (3) the information is not protected from disclosure as attorney work product or any applicable privilege.

I believe that such requests should be covered by a rule of ethics. The Commission should be cautious about creating an ethical obligation not found in the ABA Model Rules. (See Commission Charter, paragraph 3: Commission mandated to “eliminate, when and if appropriate, unnecessary differences between California’s rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association’s Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.”) But extending a rule of discovery to a rule of ethics based on whether the attorney lacks reasonable belief in engaging in the targeted discovery conduct would not be an outlier if adopted. The handiest example is the Commission’s extension of a prosecutor’s *Brady* discovery obligations (or more) to defense counsel in proposed Rule 5-110(D).

Crafting language that would apply to both those who practice criminal law and those who practice civil law is tricky. For one thing, the disruption to a criminal defendant’s Sixth Amendment right to counsel implicated by a request to subpoena counsel in criminal proceedings is not implicated in civil proceedings. That may suggest there should be a higher bar for criminal prosecutors to clear before seeking to subpoena defense counsel than civil counsel -- on either side -- would have to clear. But I am nonetheless convinced that the need to discourage, even potentially punish, indefensible gamesmanship in civil proceedings warrants coverage of the rule to both kinds of matters.

Based on the above analysis (and a look at a Thesaurus), I propose adopting Attachment 2 to Randy’s Proposed Rule 3.4(h) in his May 16, 2017 memo with the below red-lined modifications:

(g) 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.; or

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

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- (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
- (2) the evidence sought is ~~[reasonably necessary/essential]~~ critical to the successful completion of an ongoing investigation or prosecution⁵ or defense of a criminal or civil proceeding; and
- (3) there is no other ~~[reasonable/feasible]~~ practicable alternative to obtain the information.

Attached:

Eaton Comments on Rule re subpoena of opposing counsel.doc

June 23, 2017 Mohr Email to Difuntorum, McCurdy & Lee:

Lauren and all:

I've attached a proposed rule 3.4, with language to address the concept in MR 3.8(e)/5-110(E), which the Supreme Court rejected. However, the Court in its 5/1/17 order directed the BOT to consider drafting rule more generally applicable to both civil and criminal proceedings.

In drafting the proposed language, I also considered the cases cited in the Rutter Guide at section 8:945 et seq, as well as Dan Eaton's 5/29/17 comment, with which I largely agree. I also took into consideration the points made in the Commission's response to George Cardona's dissent regarding proposed rule 5-110(E), which the Supreme Court did not have available in its review of proposed rule 5-110.

Some points about the attached:

1. I've inserted the provision as paragraph (f), which derives from MR 3.8(e)/5-110(E), in proposed rule 3.4, rather than as paragraph (h) as in Randy's and Dan's proposal. I did this because paragraphs (a) through (e) of the Commission's submitted proposed rule 3.4 appear to apply primarily to pre-trial conduct, while paragraphs (f) and (g) of the Commission's submitted rule apply primarily or solely to trial conduct. I think the subpoena issue will largely play out pre-trial. This is not a critical point; I simply wanted to explain my placement. Please note there is no concern here with paralleling the organization of the Model Rule, as the Commission's submitted rule, derived from current Cal. rules 5-200(E), 5-220 and 5-310, already diverges substantially from the Model Rule's organization.

⁵ The term "prosecute" is not limited to criminal proceedings. (Code of Civil Procedure § 583.120(b); see also *Binyon v. State of Calif.* (1993) 17 Cal App.4th 952, 955; *Oskooi v. Fountain Valley Regional Hosp. & Med. Ctr.* (1996) 42 Cal.App.4th 233, 238.)

2. My proposed language differs somewhat from what Dan Eaton has proposed:

a. In the introductory clause, I wanted to emphasize that the rule applies to both criminal and civil proceedings, not just to "any proceeding." It is more words but I wanted to clarify the rule's applicability to all lawyers including prosecutors, notwithstanding the existence of a rule that applies solely to prosecutors.

b. In subparagraphs (2) and (3), I recommend retaining the language from MR 3.8(e), i.e., "essential" in subparagraph (2) and "feasible" in subparagraph (3). I realize that Dan's proposed language ("critical" in sub (2) and "practicable" in sub (3)) are derived from the California case law, Carehouse and Spectra-Physics, but I don't think we should recommend departing from a national standard by using different language.

c. The proposed retention of the ABA language is also supported by the points made in the Commission's response to the Cardona dissent to 5-110(E). Although that response addresses the issue only in the criminal law context, I think the reasoning of both Carehouse and Spectra-Physics supports the conclusion. A subpoena of a lawyer should be permitted only as a last resort. Substituting "reasonably necessary" in subparagraph (2) and "reasonable" in subparagraph (3) would frustrate that intent.

d. In subparagraph (2), I draw a more explicit distinction between criminal and civil proceedings than in Dan's proposed provision. Although I agree that "prosecute" can be used to denominate both the prosecution of a criminal accused and the prosecution of a civil claim, I think a disciplinary rule should be more specific in what conduct is being covered. I think the term "prosecute" is primarily understood to apply to criminal actions. On the other hand, there is a proposed rule provision that does use "prosecute" to apply more generally. Proposed rule 1.8.5(b)(3) and (4) provide a lawyer may:

(3) advance the costs of *prosecuting* or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and

(4) pay the costs of *prosecuting* or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

The other 44 uses in the proposed Rules, however, of prosecute or words that derive from prosecute all relate to the criminal law context. Again, this is not a critical point but I think we should discuss it at our meeting.

3. I've also added a Comment, derived from Mass. RPC 3.8, cmt. [4], that sets forth the principal policy that underlies the proposed provision, and have added citations to Carehouse and Spectra-Physics. That policy is reflected in the ABA rationale for the provision, as described in the Commission's response to the Cardona 5-110(E) dissent.

a. There is a subsidiary issue regarding the citations, i.e., whether we should cite to Court of Appeal cases or limit our citations only to Supreme Court cases. Because the Commission has included cites to other Court of Appeal cases in its proposed rules, I have done so here.

Attached to original email but included below:

RRC2A - [3.8][5-110(E)] - Rule 3.4 [Related to 3.8(e)] - ZDFT2 (06-22-17)-
KEM_RED.docx

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 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;

(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

(gh) 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] 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.⁶ 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.

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

June 26, 2017 Difuntorum Email to Mohr:

Kevin:

Please see text below. I understand the arguable difference between “evidence” and “information” as used in MR 3.8(e), but wouldn’t the rule be clearer if either “evidence” or “information” was used throughout this rule? Which term is considered to represent the superset and which is the subset? The prohibition in the precatory language refers to “evidence” so that might lead a reader to construe “information” as a subset of “evidence” but I don’t think that is the intent. If just one term was used throughout the

⁶ Derived from Mass. Rule of Professional Conduct 3.8, Cmt. [4], which provides:

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

rule it might alleviate that potential ambiguity. The national uniformity interest is less in this rule (hence your numbering recommendation) so I don't think the MR's use of "evidence" and "information" is compelling if there is a potential ambiguity. At the very least, I think some potential ambiguity might be avoided by changing "information" to "evidence" in (f)(3).

- (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**;

June 26, 2017 A. Tuft Email to Difuntorum, McCurdy & Lee:

You raise an interesting distinction in the rule I had not noticed before. Initially, I agree with your statement that "information" would be assumed to be a subset of "evidence." That is how I read the rule. I believe that "evidence" is arguably more narrow than "information" so depending on what policy is being sought to be achieved, one could keep that general connotation in mind.

I don't know that this is the answer, but I assume "information" is used in (f)(1), of Kevin's proposal, because it is "information," and not only "evidence," that is protected by the attorney-client privilege (see Evid. Code § 952; but note CCP §§ 2018.010 , et seq. do not use the word "information" but I think "information" can be reasonably applied to the items contained there [e.g. "impressions; conclusions; opinions; or legal research or theories" all constitute "information"]).

I can't think of why "evidence," as opposed to "information," is used in (f)(2).

Personally, I don't see how the use of both words would create an application issue; nonetheless, because we are in the drafting stage we may as well draft with purpose and justify the use of whatever words the group agrees to go with and articulate the reason(s) why.

June 26, 2017 Cardona Email to Difuntorum, McCurdy & Lee:

Here are my thoughts on Rule 5-110(E), prompted by Dan Eaton's comments and the cases he discusses in those comments:

First, it appears to me that *Carehouse Convalescent Hosp. v. Sup. Ct.*, 143 Cal. App 4th 1558 (2006), and the other cases on which it relies, all address a very specific situation, that is, where an attorney seeks to depose opposing counsel in the very matter to which the deposition relates. Thus, for example, in *Carehouse*, the notice of deposition was issued to the attorney for Careahouse who had prepared its earlier responses to requests for admission and interrogatories. And, the court premised the rule it adopted on the particular policy interests posed by an effort to depose opposing counsel, namely:

- (1) "The practice runs counter to the adversarial process and to the state's public policy to prevent attorneys from taking undue advantage of their adversary's industry and efforts. Discovery was hardly intended to enable a learned profession to perform its functions on wits borrowed from the adversary."
- (2) "Attorney depositions are disruptive, and add to the length and expense of litigation. Rather than preparing the clients' case for trial, counsel must be prepared (often by retaining additional counsel) to place himself or herself in the witness box, being a responsive witness while remaining a partisan advocate."
- (3) "Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent."

143 Cal. App. 4th at 1562-63. It is to "effectuate these policy concerns" that California applies a "three-prong test in considering the propriety of attorney depositions," with each of the prongs deliberately posing "an independent hurdle to deposing an adversary's counsel." *Id.* at 1563; see also *Stull v. YTB International, Inc.*, 2010 WL 3702424 (S.D. Ill. Sep. 8, 2010) (unpublished) (citing *Carehouse* as support for similar three-pronged rule because "taking the deposition of opposing counsel is highly disfavored and is alloed only in exceptional circumstances"); *Melendrez v. Superior Court of the State of California*, 215 Cal. App. 4th 1343, 1353 n.12 (2013) (even if "an attorney verifies discovery responses on the part of a corporate client" *Carehouse's* three-pronged rule would apply to make it unlikely that deposition of that attorney would be permitted).

Second, in contrast to the very limited application of the three-prong rule set forth in *Carehouse*, Rule 5-110(E) (like its analog, ABA Model Rule 3.8(e)), is far broader in its application. It is not limited to depositions, but extends to all types of subpoenas

(including subpoenas simply for documents), and extends beyond an attorney's current opposing counsel (that is, opposing counsel in the matter in which the subpoena is issued) to an attorney who previously represented a party to the current matter or even an attorney whose past client is not a party to the present matter. Thus, for example, if I were investigating a currently unrepresented target for public corruption, the rule would apply to a subpoena to the target's prior bankruptcy attorney to obtain non-privileged financial records provided by the target to that bankruptcy attorney to support a prior bankruptcy filing. Subpoenas such as this do not appear to implicate all of the unique policy interests that support *Carehouse's* strict rule intended to severely limit depositions of current opposing counsel.

Third, the limited circumstances to which *Carehouse's* strict rule applies (depositions of current opposing counsel), appears to me to suggest that a less strict rule is appropriate for the far broader circumstances to which Rule 5-110(E) may apply. Thus, in effect, *Carehouse's* recognition that the rule it derives: (1) non-privileged; (2) no other "practicable" means to obtain the same information; and (3) "crucial" to preparation of the case, is appropriate to the policy interests that favor extraordinary limits on attorney depositions, suggests that a less restrictive rule remains appropriate for attorney subpoenas that do not implicate all of the policy concerns posed by deposing current opposing counsel. To me, this suggests that what I view as the less restrictive test: (1) non-privileged; (2) no other "reasonable alternative" to obtain the same information; and (3) "reasonably necessary" to successful completion of the case, is appropriate for the broader range of subpoenas that would fall within the scope of the ethical rule.

Fourth, similarly supporting adoption of the "reasonable alternative" and "reasonably necessary" version of the rule is the May 24, 2017 letter from State Bar Counsel urging adoption of this approach because these terms are "fairer, more definite, clearer, and more appropriate" for a disciplinary rule than the proposed alternatives.

For all these reasons (as well as those set forth in my earlier dissent), I remain of the view that 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.

June 26, 2017 Mohr Email to Difuntorum, McCurdy & Lee:

Randy:

Last week I was also a bit confused by the apparent interchangeable use of "evidence" and "information" in MR 3.8(e). At first glance, it didn't make a lot of sense to create possible confusion by using two terms.

Because of that concern, I consulted the original 1990 ABA Report on 3.8(e) (attached) that is cited in the Commission's response to George's dissent to RRC2's 5-110(E) to see if there had been any explanation for the inconsistent use. There is nothing in that

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report that expressly addresses the issue you've raised but after reading the report, I concluded that we could leave the language the same. Here's my reasoning:

1. Use of "evidence" in the introductory clause is appropriate because what the prosecution would be seeking is *admissible evidence* that the lawyer would be subpoenaed *to present* in a criminal or grand jury proceeding. The same would be true of a rule that applies to both criminal and civil proceedings, the ultimate goal being the presentation by the opposing lawyer of admissible evidence at the trial or other proceeding.
2. However, to get to the point where there is admissible evidence, the prosecutor must obtain information, whether through criminal discovery propounded to the defense or third parties, or through investigation. Those processes are intended to produce information, which can be presented to the court, which determines whether any of the information is admissible evidence. The ability to obtain the information from which evidence is extracted and subject to a court's determination of admissibility is the focus of subparagraphs (1) and (3), so the use of "information" in those subparagraphs is appropriate.
3. Successful completion of any claim or defense, criminal or civil, however, requires evidence. That is the focus of subparagraph (2), so the use of "evidence" in that paragraph is appropriate.

Again, I have no specific historical reference that supports the foregoing analysis. My attempt at imparting logic to the ABA's language might simply be revisionist -- and ultimately inaccurate -- history, the ABA's language being simply the result of oversight during the drafting process. In any event, my preference when considering this issue last week was to leave the ABA language intact. Although I agree with you that the need for national uniformity might not be as great with an anti-subpoena provision that is more generally applied to both criminal and civil proceedings, I thought that consideration was sufficient support on balance to leave the language as is.

However, given your concern with the language, I think the Commission should at least address the issue at our meeting on July 5. If the Commission were to decide to use one word consistently, I would probably lean more in favor of using the word "information" rather than "evidence" because the former term is broader and less subject to a unilateral narrow interpretation by the recipient of a discovery request. Thanks,

Attached:

RRC2 - [3.8][5-110(E)] - ABA Report & Resolution re 3.8(f) [3.8(e)] - Report 118 (1990).pdf

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY
AND
SECTION OF CRIMINAL JUSTICE
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct and the Comment to that Rule be amended by adding a new paragraph (f) and Comment as follows:

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

. . . .

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(a) the information sought is not protected from disclosure by any applicable privilege;

(b) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(c) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Comment

19 Paragraph (f) is intended to limit the issuance of lawyer
20 subpoenas in grand jury and other criminal proceedings to
21 those situations in which there is a genuine need to intrude
22 into the client-lawyer relationship. The prosecutor is
23 required to obtain court approval for the issuance of the
24 subpoena after an opportunity for an adversarial hearing is
25 afforded in order to assure an independent determination that
26 the applicable standards are met.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS
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REPORT TO THE HOUSE OF DELEGATES

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(c) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Comment

Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.

REPORT

A.

NEED FOR THE AMENDMENT

Proposed Model Rule 3.8(f) brings the substantive standard governing "Special Responsibilities of a Prosecutor" into general conformity with the ABA's February 1988 resolution which limits the issuance of attorney subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the attorney-client relationship. The proposed change to the Model Rules embodies the principles of the ABA's 1988 resolution by creating an ethical standard requiring prior judicial approval of such subpoenas; by specifying the matters which must be considered in granting such approval; and by providing that the court evaluating the propriety of the subpoena do so in the context of an adversarial hearing. In doing so, the proposed rule minimizes to the extent possible the adverse impact such subpoenas have on the attorney-client relationship and it minimizes ethical conflicts created by attorney subpoenas. Indeed, ethical and practical concerns have led a number of jurisdictions to adopt ethical rules limiting the issuance of attorney subpoenas. The most well-known is the rule adopted by the Massachusetts Supreme Court in October of 1985. That rule, known as "PF-15," makes it unprofessional conduct for a prosecutor to issue a grand jury subpoena to an attorney without prior judicial approval. In at least one jurisdiction, Illinois, the Supreme Court rejected an ethics rule proposed by the Illinois State Bar Association and supported by the ABA limiting the issuance of attorney subpoenas.

1. The History Of The ABA's Prior
Resolutions Dealing With Attorney
Subpoenas

In February 1986, the ABA House of Delegates approved a resolution requiring prior judicial approval of all subpoenas sought to be issued to attorneys for information relating to clients, and incorporation of several substantive standards to govern when such approval should be granted.¹ This resolution was prompted by the ABA's concern over the increasing incidence of subpoenas directed to attorneys for information relating to clients, and by the effect these subpoenas might have on the adversary system and the attorney-client relationship -- the trust placed by the clients in their attorneys and the confidentiality implicit in that relationship itself.

However, the problem has not been corrected. In the seven months preceding the 1986 resolution, according to Department of Justice statistics, approximately 170 federal grand jury subpoenas were issued to attorneys for information about a client -- an average of about one each working day (24 per month). In the thirteen months immediately after the 1986 resolution was approved, approximately 525 federal grand jury and trial subpoenas were issued to attorneys for information about a client -- an average of almost two per working day (40 per month).

In February 1988, the ABA House of Delegates adopted a new resolution which modified and strengthened the 1986 resolution in a number of respects. The February 1988 resolution provided as follows:

BE IT RESOLVED, That where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship concerning a person who is or was represented by the attorney, the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney without prior judicial approval after an opportunity for an adversarial proceeding; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court finds, on reasonable notice to the attorney and the client:

1. the information sought is not protected from disclosure by any applicable privilege;

2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative;

3. the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives reasonable and timely notice;

4. the purpose of the subpoena is not to harass the attorney or his or her client; and

5. the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.

BE IT FURTHER RESOLVED, That at the hearing, the prosecutor seeking to subpoena information as defined above, must submit to the appropriate court an affidavit

making a particularized showing of the facts establishing all of the requirements specified above. The affidavit shall be disclosed to the attorney and the client. However, upon a special showing of compelling need, the affidavit may be maintained as an ex parte affidavit until such time as the need for secrecy is no longer compelling; and

BE IT FURTHER RESOLVED, That any hearing seeking judicial approval for a grand jury subpoena shall be conducted with consideration for the need for secrecy; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Two of the provisions of the 1988 resolution, in particular, were important departures from the earlier 1986 resolution.

First, the procedure set forth in the 1986 resolution called for an ex parte hearing at which the prosecutor would seek the permission of the court, under specified standards, to issue a subpoena to an attorney for information relating to a client. Under that procedure, however, there was no check on the overzealous prosecutor who either intentionally or unwittingly overstated the factual basis for the request. Moreover, permitting the prosecutor to argue the merits of the justification for a subpoena without the opportunity for the attorney sought to be subpoenaed to be present, to relegate the facts presented and to make argument, tended to lead the reviewing court to serve as a "rubber stamp" for the prosecutor. Therefore, the 1988 ABA Resolution requires an adversarial hearing before the court.

Second, the 1988 Resolution reflects the belief that in light of the impact such subpoenas have on attorney-client relationships, there should be some showing that the evidence sought is essential to the successful completion of an ongoing investigation or prosecution, and not merely relevant to an investigation as provided in the earlier 1986 Resolution.

2. Implementation of the February 1988 Resolution Requires the Proposed Amendment to Rule 3.8.

Notwithstanding the laudable objectives of the ABA's February, 1988 resolution, the problem of attorney subpoenas continues to "pose for resolution a critical problem in

criminal law today".² Statistics released by the Department of Justice indicate that during a single twenty month period from 1985 through 1987 almost 700 attorney subpoenas were being authorized by the Department (an annual rate of 420 per year). More recently, in a four month period from October 1988 through January 1989, attorney subpoenas for 179 attorneys were issued by the Department of Justice (an annual rate of nearly 540 per year). These numbers, of course, do not include attorney subpoenas issued by state prosecutors.

Based upon the number of attorney subpoenas being issued, both the practicing bar and legal writers have urged that additional measures be adopted to curb the continuing and troubling flow of attorney subpoenas. Indeed, many have persuasively argued that the 1988 ABA resolution should be buttressed by an ethical rule which would incorporate its standards and would thus limit the overzealous and unnecessary use of attorney subpoenas. The 1988 Resolution, itself, called for its principles to be "implemented by state and federal authorities through appropriate means such as rules of court, statutes and case law. Surely, the ABA by urging such action, should provide a model for the recommended state and federal rules through this proposed amendment to the Model Rules. Absent such an ethical rule limiting the indiscriminate use of attorney subpoenas, the problem of these subpoenas will worsen in both their number and in their potential impact on the relationship between attorneys and their clients.

3. The Increasing Flow of Attorney Subpoenas Seriously Disrupts Attorney-Client Relationships.

The Association of the Bar of the City of New York, which studied the problem of attorney subpoenas, concluded that the unnecessary and overbroad use of subpoenas served upon defense attorneys by prosecutors "threatens both the integrity of the criminal justice system and the ability of large classes of defendants to obtain representation."³ The bar group further observed that the impact of the ever-increasing flow of subpoenas has created a furor unmatched in recent decades. Across the United States, lawyers, judges and legal scholars have recognized the serious impact which such subpoenas are having on existing and potential attorney-client relations. Indeed, the "excessive use of subpoena power poses . . . one of the single greatest threats to the defense bar and to the defendants' ability to obtain criminal representation."⁴

Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and attorney. One, but

only one, aspect of that relation is the privilege not to disclose confidential communications between the client and the attorney, the oldest privilege for confidential communications known to the common law.⁵ The United States Supreme Court has observed that "the purpose of the privilege is to encourage clients to make full disclosure to their attorneys."⁶ The full and frank communication encouraged by the privilege promotes "broader interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client."⁷ Any rule regulating subpoenas to lawyers must, at a minimum, provide for full protection of the privilege.

A subpoena rule which does no more than recognize the attorney-client privilege, however, will ignore other important aspects of the relationship between a client and his attorney. In those jurisdictions which have adopted the Model Rules of Professional Conduct, Rule 1.6(a) prohibits an attorney from revealing any information relating to representation of a client. Similarly, DR 4-101 requires an attorney to keep a client's "confidences and secrets," the latter term being defined as "information gained in the professional relationship which the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁸

Because information protected by the attorney-client privilege is not coterminous with information which an ethical attorney is supposed to hold confidential, there is much information in the hands of an attorney which remains exposed to the subpoena power, even if that power is limited by the privilege. For example, the prevailing judicial position is that, absent special circumstances, an attorney may be compelled by subpoena to reveal information about the identity of the client and the size and source of the fee-information frequently sought by government attorneys.⁹ Similarly, an attorney in possession of documents received from a client in the course of a case may be compelled by subpoena to produce those documents, assuming that the client personally could be compelled to produce the documents were they in the client's hands.¹⁰

Since a subpoena may compel production of information which, though unprivileged, is certainly confidential under Rule 1.6 and DR 4-101, the mere issuance of the subpoena undermines the client's confidence and trust. Nearly a decade ago, Judge Becker of the Eastern District of Pennsylvania observed:

[W]e are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client . . . The dangers and disadvantages of the practice have been demonstrated in [various] cases. . . . The practice permits the government by unilateral action to create the possibility of a conflict of interest between the attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship.¹¹

Other courts have recognized the problem in similar terms:

[W]hen a subpoena is issued against an attorney in an ongoing attorney-client relationship, the attorney may well be placed in the position of becoming a witness against his client or risking contempt. [T]here is the strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed.
 . . .¹²

Moreover, if the information sought by the subpoena will require the attorney's testimony at trial, the lawyer may well be disqualified from continuing to represent the client. Model Rule 3.7.

As the foregoing cases and comments from authorities recognize, the trust and confidence which is the foundation of the attorney-client relationship do not rest solely on the expectation that only privileged communications between client and attorney will remain undisclosed. Clients seeking counsel in criminal proceedings do not draw fine distinctions or follow the nuances of the privilege and its expectations. Confronted by a powerful adversary and by a seemingly bewildering array of procedures, with their liberty at stake, clients rightfully expect that their lawyer will, within the constraints of the law and the profession's code of ethics, zealously argue their case at every turn. There could be few things more destructive of this expectation than the spec-

tacle of their own attorney forced by their adversary to supply information detrimental to their interest.

In addition, a prosecutor's subpoena of a defense lawyer may have a significant inhibiting effect on the lawyer. The United States District Court for the District of New Hampshire articulated the traumatic impact of such subpoenas on defense attorneys as follows:

The actions of United States Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law. . . . The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguards.

Also to be considered is the ever increasing specter of malpractice suits, the possible vindictiveness of prosecution counsel towards a successful, recalcitrant, obnoxious or obfuscating adversary, the jeopardizing of the attorney-client relationship, real or imaginary, the reluctance of capable attorneys to continue or to consider a full or partial career in the practice of criminal law and the further depletion in the paucity of capable trial lawyers because of a concatenation of events leading to abuse of process.¹³

That Judge Loughlin's fears are real is demonstrated by one of the most startling findings of Professor Genego's study, cited earlier: of those members of the National Association of Criminal Defense Lawyers responding to the study, 14% said they would no longer take a serious criminal case due to their apprehension of receiving a subpoena compelling information from them.

4. The Adoption Of An Ethical Rule Limiting The Issuance Of Attorney Subpoenas Has Increasingly Been Recognized As A Necessary Step To Preserve Attorney-Client Relationships.

The ethical and practical concerns discussed above have led a number of jurisdictions to adopt ethical rules limiting the issuance of attorney subpoenas. The most well-known is the rule adopted by the Massachusetts Supreme Court in October of 1985. That rule, known as "PF-15" makes it unprofessional conduct for a prosecutor to issue a grand jury subpoena to an attorney without prior judicial approval.¹⁴ The Department of Justice unsuccessfully challenged PF-15 in federal district court in United States v. Klubock on the grounds that the state rule violated the Supremacy Clause and the Federal Rules of Criminal Procedure and that the federal district court's supervisory power did not extend far enough to permit those courts from incorporating the rules in their own local rules.¹⁵ After the District Court upheld PF-15, the government appealed. The ABA filed an amicus brief in the Circuit Court, and the rule was upheld both by a three-judge panel, and the Circuit Court sitting en banc.¹⁶

The First Circuit articulated the basis for its decision in Klubock:

[S]erving of a subpoena will immediately drive a chilling wedge between the attorney/witness and his client. . . . [T]he client is uncertain, . . . suspicious. . . . [T]he subpoenaed attorney/witness may himself feel intimidated. . . .

[There is an] immediate conflict of interests created between the attorney/witness has separate legal and practical interests apart from those of his client. . . . The mere possibility of such a conflict is sufficient to create a problem. A minimal overview by an impartial observer . . . can go far in preventing the creation of these ethical conflicts between the attorney/witness and his client.

[There is a] diversion of interests and resources brought about by the conversion of the attorney into a witness. The attorney . . . must dedicate his own time

and resources to looking after his own interests. . . . [T]he unrestricted use of . . . subpoenas . . . will tend to discourage attorneys from providing representation in controversial criminal cases.

[B]y the service of a . . . subpoena on the attorney, the attorney is converted into a possible witness in a case against his client. Because of the Canons of Ethics . . . counsel will possibly be required to resign as attorney for his client. The right to counsel of choice under the Sixth Amendment is . . . implicated. . . . It is clear that courts should get an ethical handle on this situation at the earliest possible moment.¹⁷

The government has not sought review of the First Circuit's decision in Klubock. Moreover, since the Massachusetts Supreme Court's adoption of PF-15, New Hampshire, Tennessee, Virginia and the Air Force Judge Advocate General have adopted similar ethical rules limiting the issuance of attorney subpoenas. And, similar rules are being considered in the District of Columbia, Pennsylvania (where the adoption of the rule is being contested by Federal prosecutors), Rhode Island and New York.

B.

EXPLANATION OF THE RESOLUTION

Proposed Model Rule 3.8(f) embodies the principles of the ABA's 1988 resolution by creating an ethical standard requiring prior judicial approval of such subpoenas; by specifying the matters which must be considered in applying for such approval; and by providing that the court evaluating the propriety of the subpoena do so in the context of an adversarial hearing. Proposed Rule 3.8(f) permits subpoenas to attorneys to be requested when essential to an ongoing investigation or prosecution. Rule 3.8(f) accomplishes this in a number of ways. First, the subpoena cannot be issued without prior approval of a judge. This requirement insures that the decision to permit the subpoena will be made by one whose purpose in the system is to be neutral, rather than by the subpoenaed attorney's adversary. Moreover, judicial approval of the subpoena is preferable to prosecutorial, agency or institutional guidelines for its issuance because of the line of authorities holding that an agency's violation

of its own guidelines -- including the federal government's guideline dealing with attorney subpoenas -- affords the aggrieved person no remedy of any sort.¹⁸

Second, Rule 3.8(f) provides that the subpoena may not be issued until after an opportunity for an adversarial proceeding. The need for the procedural safeguards to be implemented by means of an adversarial hearing are obvious. The absence of opposing counsel permits the presentation of facts which may be overstated or unsupported. Proposed Rule 3.8(f) avoids this by establishing standards and providing judicial review to assure they have been met.

Third, proposed Rule 3.8(f) requires the information sought by the subpoena be essential to the successful completion of an ongoing investigation or prosecution and not be merely peripheral, cumulative or speculative. This essentiality standard is critical in light of the potential impact attorney subpoenas have. Indeed, even the Department of Justice has recognized that information should be subpoenaed from attorneys only when "there [are] reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information."¹⁹

Finally, requiring that the prosecutor seeking to issue the subpoena has unsuccessfully explored or exhausted all other feasible alternatives to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information, generally tracks the Department of Justice Guidelines, with one notable exception.²⁰ The Department of Justice Guidelines require that subpoenas be served only where all reasonable attempts have been made to obtain the information from alternative sources unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from any attorney if such attempt proves unsuccessful.²¹ Proposed Model Rule 3.8(f) requires that there be "no other feasible alternative to obtain the information." While the issue is not susceptible to hard empirical analysis, the lesser standard in the Guidelines has proven inadequate. Subpoenaing an attorney for information concerning a client should only be done as a last resort.

C.

CONCLUSION

The American Bar Association's February 1986 and February 1988 resolutions addressed to attorney subpoenas were important steps towards preserving attorney-client relations. But these resolutions did not resolve the problem. The number of attorney subpoenas continues to increase and their damaging impact on the civil and criminal components of our adversary system worsens. An ABA-approved model ethical code rule such as 3.8(f) would encourage jurisdictions to consider the desirability of adopting such a rule and provide them guidance for doing so. Such an ethical rule is needed to avoid an erosion of client confidence in their counsel. It will also help reduce instances of subpoenas being used as a tactic to disqualify counsel under the advocate-witness rule, and as a means of otherwise improperly litigating against an adversary.

Respectfully submitted,

M. Peter Moser
Chairperson
Standing Committee On Ethics
and Professional Responsibility

Sheldon Krantz
Chairperson
Criminal Justice Section

February 1990

FOOTNOTES

1. The February 1986 Attorney subpoena resolution provided as follows:

BE IT RESOLVED, That a prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court, in an ex parte hearing, finds:

a. the information sought is not protected from disclosure by the attorney-client privilege or the work product doctrine;

b. the evidence sought is relevant to an investigation within the jurisdiction of the grand jury;

c. the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and

d. there is no other feasible alternative to obtain the information sought.

BE IT FURTHER RESOLVED, That the ex parte hearing seeking judicial approval shall be conducted with consideration for the need for the secrecy of grand jury proceedings. The hearing shall be conducted by a judge of a court of general criminal jurisdiction, and, wherever feasible, by the judge supervising the grand jury in question; and

BE IT FURTHER RESOLVED, That no affirmative finding in the ex parte proceeding shall have any evidentiary value in any subsequent adversary proceeding to determine the validity or enforcement of the subpoena; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

2. Sheridan, "Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through An 'Ethical' Rule," Georgetown Jnl. of Legal Ethics, Vol. II, No. 2, pp. 485, 511 (Fall, 1988) (hereinafter "Sheridan").
3. Report, "The Issuance of Subpoenas Upon Lawyers In Criminal Cases By State and Federal Prosecutors: A Call For Immediate Remedial Action," Committee on Criminal Advocacy of the Bar Association of the City of New York (July, 1985), p. 1.
4. Id.. In his 1985 study of the impact of subpoenas issued to criminal defense lawyers, Professor William J. Genego of the University of Southern California Law Center in his 1985 study concluded that subpoenas are being issued to attorneys with alarmingly increasing frequency. Of the attorneys responding to his survey, 18% said they had received grand jury subpoenas at some point, and 68% of those had received them between 1983 and 1985. Only 15% had received them before 1980, while 18% received them between 1980 and 1982. The study also revealed that the subpoenas rain most heavily upon the more experienced advocates. Of those who had practiced more than ten years, 26% said they had received grand jury subpoenas. Of those who had practiced six to ten years, 12% had received them. Of those who were in practice three to five years, 9% had received them, while only 3% of those in practice less than three years had received them. W. Genego, "Reports From the Field: Prosecutorial Practices Comprising Effective Criminal Defense," Champion, May, 1986, pp. 7-18; W. Genego, "Risky Business: The Hazard Of Being A Criminal Defense Lawyer," Criminal Justice (Spring, 1986), pp. 2-42.
5. Klitzman v. Krut, 744 F.2d 955, 960 (3d Cir. 1984); C. McCormick, Law of Evidence 87, at 175 (2d ed. 1972).
6. Fisher v. United States, 425 U.S. 391, 403 (1976).
7. Upjohn Company v. United States, 449 U.S. 383, 389 (1981).
8. Model Code of Professional Responsibility DR 4-101(a) (1979).
9. E.g., United States v. Doe, 722 F.2d 303 (6th Cir. 1983); In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009, dismissed as moot, 697 F.2d 112 (4th Cir. 1982) (defendant became a fugitive; In re Grand Jury Subpoena Served Upon Shargel, 742 F.2d 61, 62-63 (2d Cir. 1984).

10. 8 J. Wigmore, Evidence, 2307 (McNaughton Rev. 1961); Fisher v. United States, 425 U.S. 391 (1976).
11. In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 945-46 (E.D. Pa. 1976).
12. In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 n.4 (4th Cir. 1982); see also Grand Jury Policy and Model Act, Princ. No. 23, Commentary at 11 (1977) (attorney subpoenas have "chilling effect on Sixth Amendment rights and confidential relationships").
13. In re Grand Jury Matters, 593 F. Supp. 103, 107 (D. N.H. 1984), aff'd sub nom. United States v. Hodes, 751 F.2d 13 (1st Cir. 1985); see also Sheridan at 489.
14. The rule became part of the Court's Rule 3:08 and was designated PF-15. It reads, "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.
15. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986).
16. United States v. Klubock, 832 F.2d 649 (1st Cir. 1987), aff'd en banc, 832 F.2d 664 (1st Cir. 1987).
17. 832 F.2d at 653-54.
18. United States v. Cacares, 440 U.S. 741 (1979); In re Klein, 776 F.2d 628, 635 (7th Cir. 1985) (Justice Department attorney subpoena guidelines not enforceable in a court of law).
19. D.O.J. Subpoenas Guidelines, 9-2.161(F)(6).
20. D.O.J. Subpoenas Guidelines, 9-2.161(F)(1).
21. See D.O.J. Subpoenas Guidelines, 9-2.161(B).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Criminal Justice Section and Standing Committee on
Ethics and Professional Responsibility

Submitted By: Sheldon Krantz, Chair, Criminal Justice Section and M.
Peter Moser, Chair, Standing Committee on Ethics and
Professional Responsibility

1. Summary of Recommendation.

Proposed amendment to Rule 3.8 of the Model Rules of Professional Responsibility, Special Responsibilities of a Prosecutor, by adding a new paragraph (f) and supporting Comment which are intended to limit the issuance of lawyer subpoenas in grand jury or other proceedings to those situation when there is a genuine need to intrude into the client-lawyer relationship.

2. Approval by Submitting Entity.

The Criminal Justice Section approved the recommendation at a regularly scheduled meeting on August 6 and 7, 1988. The Standing Committee on Ethics and Professional Responsibility approved the recommendation on November 21, 1989, at a regularly scheduled meeting.

3. Previous Submission to the House or Relevant Association Position.

The House of Delegates has adopted two relevant policies: Report 111-D at the February 1986 Mid-year meeting and Report 122-B at the February 1988 Mid-year meeting.

4. Need for Action At This Meeting.

The proposed amendment to Rule 3.8 should be adopted by the House of Delegates. This recommendation should not be deferred. In 1986 and 1988 the House of Delegate adopted two separate resolutions requiring prior judicial approval of lawyer subpoenas because of the potential harm such subpoenas posed to the confidentiality of the client-lawyer relationship. Despite these resolutions, prosecutors not only continued to seek subpoenas, but increased their demands. Consequently, several jurisdictions adopted rules requiring prosecutors to obtain prior judicial approval of subpoenas. The ABA should provide a model for recommended state and federal rules through the proposed amendment to Rule 3.8. Absent such an ethical rule limiting the indiscriminate use of attorney subpoenas, the number of subpoenas may increase and their potential negative impact on the client-lawyer relation may continue to expand.

5. Status of Legislation. (If applicable.)

Not applicable.

6. Cost to the Association. (Both direct and indirect costs.)

Not applicable.

7. Disclosure of Interest. (If applicable.)

Not applicable.

8. Referrals.

Chairpersons of ABA Sections, Divisions and Committees were sent copies of the recommendation on November 14, 1989. No responses have been received as of the date of this form.

9. Contact Person. (Prior to meeting.)

Michael Ross, Chair, ABA Criminal Justice Section's Grand Jury Committee at (212) 696-9700 or Laurie Robinson, the Section's staff director at (202) 331-2260; ABA/net: ABA128, or George Kuhlman, Ethics Counsel, Standing Committee on Ethics and Professional Responsibility, at (312) 988-5300; ABA/net: ABA493.

10. Contact Person. (Who will present the report to the House.)

Sheldon Krantz, Chair, Criminal Justice Section, and M. Peter Moser, Chair, Standing Committee on Ethics and Professional Responsibility.