

DATE: May 16, 2017

TO: Members, Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Paragraph (E) of Proposed Amended Rule 5-110 of the Rules of Professional Conduct - Consideration Following Action by the Supreme Court

BACKGROUND

At the Board of Trustee's October 1, 2016 meeting, the Board adopted proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California and directed staff to submit the amendments to the Supreme Court of California for approval on an expedited basis. (See Board open agenda item [701 OCTOBER 2016](#) and the [Board minutes](#) for that meeting.) In proposed amended rule 5-110, a new paragraph (E) addressed 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.

On May 1, 2017, the Supreme Court of California ("Court") issued an order on the State Bar's request to approve the proposed amendments to rules 5-110 and 5-220. The State Bar's request was granted in part and denied in part. Approval of paragraph (E) of proposed amended rule 5-110 was denied. However, the order provides instructions for further consideration of paragraph (E) by the State Bar. On May 12, 2017, the Board referred the further consideration of paragraph (E) to the Commission that was appointed by the Board on March 9, 2017 and indicated that the Commission should make recommendations for a response to the Court, including revised rule amendment proposals.

DISCUSSION

I. Supreme Court Order and Options for Action

The Court's May 1, 2017 order addresses the State Bar's further consideration of paragraph (E) as follows:

"The request to add paragraph (E) to rule 5-110, regarding the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client, is denied. The court directs the Board to reconsider whether this is an ethical obligation that 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. The Board may submit a recommendation for a new or revised rule on this subject matter at any time it deems appropriate."

(Paragraph four of Administrative order 2017-04-26, filed May 1, 2017 in Supreme Court case no. S239387.)

As indicated above, there are two main issues: (1) whether the concept of paragraph (E) should be a rule applicable to all lawyers rather than a rule that is only applicable to a prosecutor in a criminal matter; and (2) whether the Court's specific language substitutions should be recommended for adoption. Once the Commission has considered these two issues, the Commission could determine procedurally whether to recommend these changes on an expedited basis.

Although not expressly indicated by the Court's order, the Commission is free to consider whether to recommend paragraph (E) as a concept considered but no longer recommended for adoption in any form. If this option is chosen, the Commission would need to articulate reasons for not recommending a rule.

In addition, unlike the action taken on paragraph (D) of proposed amended rule 5-110 (see Commission staff memorandum on paragraph (D)), the Court approved version of amended rule 5-110 does not include any "reserved" provisions either in the rule text or the rule Discussion for including the concept of paragraph (E). This makes sense because a duty of general application presumably should not be included in a rule that is intended to state the special responsibilities of a prosecutor in a criminal matter. This might also suggest that the concept of paragraph (E) need not be considered on an expedited basis.¹ Instead, the State Bar's response to the Court might propose that any change be made in the comprehensive proposed rules that were not expedited (e.g., in proposed rule 3.4).

To facilitate the Commission's study of the Court's instructions, staff provides the following options for action. These are not intended to be the only options for consideration.

- (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.
- (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.
- (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.

¹ The Court's order states the State Bar may resubmit a revised proposal at "at any time it deems appropriate." (Paragraph four of Administrative order 2017-04-26, filed May 1, 2017 in Supreme Court case no. S239387.)

- (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.
- (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.

Options 1 and 2 above agree with the Court's observation that the concept of paragraph (E) warrants consideration as a rule of general application and not simply a rule limited to prosecutors. Attachment 5 provides an excerpt from the U.S. Attorneys Manual stating "Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients." This is provided as an example of a policy that provides conditions for issuing subpoenas that extends to both criminal and civil matters. Below is an excerpt from the proposed rule 3.8 report and recommendation pending with the Court. This excerpt presents the Commission's pros and cons on the recommended adoption of the concept of paragraph (E).

6. Recommend adoption of Model Rule 3.8(e).

- Pros: It is an important public policy to protect the lawyer-client relationship. (Compare proposed Rule 4.2 [2-100].) Subpoenaing a lawyer to present evidence in a criminal matter about a client will necessarily drive a wedge between them and destabilize the relationship.
- Cons: First, California has not had a rule similar to this, but to the knowledge of the drafting team unwarranted subpoenas to attorneys have not posed a significant issue, either in civil or criminal cases. Second, the ability to issue subpoenas to attorneys, and the issues posed by such subpoenas are not unique to prosecutors and do not flow from the special obligations or responsibilities of prosecutors, making this an unusual addition to a rule supposedly unique to prosecutors. Third, subparagraphs (2) and (3) of Model Rule 3.8(e) create a unworkable standard that would be virtually impossible to satisfy: the information must be "essential" to the investigation and there must be "no other feasible alternative."

Options 1, 2, 3 and 4 each incorporate the language substitutions posed in the Court's order, namely substituting the terms "reasonably necessary" for "essential" in paragraph (E)(2), and "reasonable" for "feasible" under paragraph (E)(3) but they are placed in brackets. This is because consideration of these substitutions is a standalone issue for the Commission's deliberations. Attachment 6 provides relevant excerpts from the proposed rule 3.8 dissent and Commission response to the dissent that is currently pending with the Court. The dissent and response address these language substitutions.

II. Commission Member Comments

In advance of the Commission's meeting on May 25, 2017, Commission members may send comments about this matter to staff.² Commission members should not send comments to any other member of the Commission. Staff will collect all Commission member comments submitted and post them as a part of the open session agenda materials for the May 25, 2017 meeting.

ATTACHMENT(S) LIST

1. Discussion draft of proposed amended rule 5-220 - concept of paragraph (E) revised to apply to all lawyers as a change to be made to the current rules on an expedited basis. Clean and redline version provided.
2. Discussion draft of proposed rule 3.4 - concept of paragraph (E) 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. Clean and redline version provided.
3. Discussion draft of proposed amended rule 5-110 - concept of paragraph (E) as a rule for prosecutors only resubmitted to the Court on an expedited basis. Redline version provided.
4. Discussion draft of proposed rule 3.8 - concept of paragraph (E) as a rule for prosecutors only to be considered as a part of the Court's review of the comprehensive proposed rules and not on an expedited basis. Redline version provided.
5. Excerpt from the U.S. Attorney Manual stating "Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients."
6. Excerpts from the proposed rule 3.8 dissent and Commission response to the dissent.

² Send to Lauren.McCurdy@calbar.ca.gov with a copy to Randall.Difuntorum@calbar.ca.gov and Mimi.Lee@calbar.ca.gov.

Attachment 1

**Rule 5-220 Suppression of Evidence;
Subpoenaing a Lawyer to Present Evidence
(Rule as Approved by the Supreme Court Including Commission's
Original Paragraph (E) of Proposed Rule 5-110 - REDLINE)**

A lawyer shall not:

- (A) ~~A member shall not~~ suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce ~~;~~ or
- (B) 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 [reasonably necessary/essential] to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other [reasonable/feasible] alternative to obtain the information.

Discussion:

See rule 5-110 for special responsibilities of a prosecutor.

Attachment 2

Rule 3.4 Fairness to Opposing Party and Counsel

(Rule as Approved by the Board Including Paragraph (e) of Proposed Rule 3.8) - REDLINE

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) 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~~
- (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:*
 - (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] to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other [reasonable/feasible] alternative to obtain the information.

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.

Attachment 3

Rule 5-110 Special Responsibilities of a Prosecutor
(Rule Approved by the Supreme Court, Effective May 1, 2017
Commission's Original Paragraph (E) of Proposed Rule 5-110) - REDLINE

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) *Reserved.*
- (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 [reasonably necessary/essential] to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other [reasonable/feasible] alternative to obtain the information;
- ~~(E)~~(F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- ~~(F)~~(G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) Promptly disclose that evidence to an appropriate court or authority, and
 - (2) If the conviction was obtained in the prosecutor's jurisdiction,
 - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

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- (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

~~(G)~~(H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*

[4] *Reserved.*

[5] Paragraph ~~(E)~~(F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph ~~(E)~~(F) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph ~~(F)~~(G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph ~~(F)~~(G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must

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be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (GH), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (FG) and (GH), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

Rule 3.8 Special Responsibilities of a Prosecutor
(Rule as Approved by the Board Including Commission's
Original Paragraph (e) of Proposed Rule 3.8 - REDLINE)

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) *Reserved.*
- (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 [reasonably necessary/essential] to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other [reasonable/feasible] alternative to obtain the information;
- (ef) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.
- (fg) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

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- (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (eh) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*

[4] *Reserved.*

[5] Paragraph (ef) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (ef) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (ef) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (fg) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (fg) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must

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be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

[8] Under paragraph (e)(h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f)(g) and (e)(h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

EXCERPT FROM THE U.S. ATTORNEY'S MANUAL

9-13.410 - Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients

A. Authorization of the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. Such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division before they may issue, unless the circumstances warrant application of one of the exceptions set forth in subsection D below. However, any subpoena to be issued to an attorney in a civil or criminal matter arising principally under the internal revenue laws must be submitted to the Tax Division for authorization pursuant to Tax Division policies and procedures. In instances requiring Department approval in which the matter arises under both the internal revenue and non-tax laws, the submission must be made to the Criminal Division for authorization, which will consult with the Tax Division unless the circumstances warrant application of one of the exceptions set forth in subsection D below.

This policy extends to proposed subpoenas to paralegals, investigators, or other employees or agents of attorneys, if the information sought relates to the attorney's representation of a client, including information that the employee or the agent of the attorney, rather than the attorney personally, acquired.

The authorization requirement applies only to subpoenas for information related to the representation of a client. It does not apply to all subpoenas involving attorneys or their employees or agents. For example, Criminal Division authorization is not required to issue:

- A subpoena to a bank for the records of an attorney's trust account, because trust accounts tend to hold the pooled funds of numerous clients, and records related to such accounts ordinarily do not relate to individual clients, and do not contain or reflect privileged or confidential attorney-client communications.
- A subpoena for internal law office business documents (pay records of law office employees, law firm tax returns, etc.), because it relates to the day-to-day business operations of the law firm, and not to the representation of a client. Subpoenas for billing and payment records related to the representation of a client, however, must be authorized by the Criminal Division.
- A subpoena seeking information regarding the attorney's personal activities, and not regarding his/her representation of a client.
- A subpoena seeking corporate business information, and which is directed to an attorney who serves as a corporate officer. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John Doe, in his capacity as secretary of the XYZ Corporation."

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B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, Department personnel must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division applies the following principles:

1. The information sought shall not be protected by a valid claim of privilege.
2. All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
3. In a criminal investigation or prosecution, there must be 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.
4. In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
5. The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
6. The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

D. Exceptions to Criminal Division Authorization

1. **Friendly Subpoenas for Client-Related Information.** The United States Attorney or Assistant Attorney General responsible for a matter may authorize the issuance of a "friendly subpoena" for client-related information, that is, in a situation in which an attorney witness expressly agrees in writing (including by email) to provide the information, but requests the formality of a subpoena. Before issuing any such subpoena, the responsible United States Attorney or Assistant Attorney General must evaluate the request consistent with subsection C of this policy. If the friendly subpoena seeks testimony, information, or materials identified in Items (D)(2)(a)-(h) below, the federal prosecutor handling the case may authorize the issuance of the subpoena.

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2. Information Not Protected by Privilege or Circumstances Not Offending Attorney-Client Relationship. In addition, authorization by the Criminal Division is not required where the contemplated subpoena is limited to seeking one or more of the following categories of information, since such subpoenas do not raise concerns regarding the potential application of the attorney-client privilege or the potential for negative impact upon the attorney-client relationship:
 - a. Records of property transactions, including real estate closing statements, sales contracts, and payment records.
 - b. Information or materials provided by a client to an attorney for the purpose of disclosure to third parties, including information or materials provided for disclosure in bankruptcy proceedings, tax filings, immigration proceedings, or similar matters and transactions.
 - c. Publicly filed documents not reasonably available from other sources.
 - d. Testimony or materials necessary to respond to a claim of ineffective assistance of counsel, including, but not limited to, petitions filed pursuant to 28 U.S.C. § 2255 and D.C. Code § 23-110.
 - e. Testimony or materials necessary to probe the viability of, or respond to, a formal, written claim or assertion by a civil litigant or a criminal defendant that he or she reasonably relied on the advice of counsel in engaging in the conduct at issue in the specific matter in which the information is sought. This exception does not apply to subpoenas intended to probe the possibility or viability of an advice-of-counsel defense that has not formally been claimed or asserted by a civil litigant or criminal defendant.
 - f. Testimony or materials within the scope of an explicit and unchallenged waiver, or other express form of consent by the attorney's client to disclosure of the subject information.
 - g. Information or materials produced or created in discovery, including deposition testimony, if such information or materials are not subject to a protective order.
 - h. Testimony or materials that the court presiding over the underlying proceeding has ordered a party to produce or provide.
- E. **Submitting the Request.** Requests for authorization should be submitted to the Policy and Statutory Enforcement Unit (PSEU), Office of Enforcement Operations, Criminal Division. When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena duces tecum, listing the documents sought, must accompany the submission.
- F. **No Rights Created by Guidelines.** These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any

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limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

Attachment 6

Wisconsin SCR 20:3.8(e) Special responsibilities of a prosecutor.

* * * * *

- (e) A prosecutor shall not subpoena a lawyer in a grand jury or other 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;
 - (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.

* * * * *

Comment

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[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.

* * * * *

**Commission Member Dissent, Submitted by George Cardona,
on the Recommended Adoption of Proposed Rule 3.8**

. . . Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

Proposed Rule 3.8(e)

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is “essential” to successful completion of the prosecutor’s investigation; and (3) there is no other “feasible” alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent. While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission’s proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

First, while the Commission’s proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors’ use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be “essential” to the investigation and that there be “no other feasible alternative” for obtaining that information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors’ ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where “the services of the lawyer were sought or obtained to enable or aid

anyone to commit or plan to commit a crime or fraud.” Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship. The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting “reasonably necessary” for “essential.” As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: “It is a difficult, if not impossible, task to decide *ex ante* what evidence will be ‘essential’ to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of ‘evidence reasonably necessary to the successful prosecution’ is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.” The First Commission also modified subsection (3) by substituting “reasonable” for “feasible,” explaining that this was “to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If ‘feasible’ means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If ‘feasible’ means that the alternative is reasonable, the more familiar term ‘reasonable’ should be used.” Again, the First Commission’s proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission’s meetings, if there is uncertainty whether the First Commission’s or ABA’s balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission’s recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA’s more stringent limitation.

For all these reasons, I dissent from the Commission’s recommendation of its proposed Rule 3.8(e).

**Commission’s Response to Dissent Submitted by George Cardona
on the Recommended Adoption of Proposed Rule 3.8(e)**

. . . Mr. Cardona also finds fault with paragraph (e), which prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding unless the prosecutor reasonably believes that the information sought is not protected by a privilege, the

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evidence is essential to the ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information. The Commission continues to believe that this provision, adopted by 33 jurisdictions, sets the appropriate standard for a subpoena that can only serve to drive a wedge between lawyer and client.

Paragraph (e) was adopted by the ABA House of Delegates in 1990 after two separate Resolutions issued by the ABA during the 1980's had failed to stem the tide of federal subpoenas that had been served on criminal defense lawyers. (See *ABA Report 118 to House of Delegates recommending that new paragraph (f) be added to Model Rule 3.8* (Feb. 1990). [Paragraph (f) was re-lettered (e) in 2002 as part of the ABA Ethics 2000 revision of the Model Rules].) The proposal was prompted "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." (*Id.* at page 2.)

Mr. Cardona makes three arguments. First, he suggests the fact that some of the largest jurisdictions are among the minority of 17 jurisdictions that have not adopted paragraph (e), apparently implies that there is no problem with subpoenas being issued in these jurisdictions. That there are populous jurisdictions that have not adopted the provision does not necessarily demonstrate that there is no problem or that such a problem might not reasonably be anticipated. The Commission notes that in the 1980's, the precipitating cause of the ABA's resolutions and ultimately, rule amendment, was the increasing incidence of *federal* subpoenas.

Second, Mr. Cardona takes issue with the use of the term "essential" in subparagraph (2) of paragraph (e), stating his view that it "unduly limit[s] prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys." He further suggests the substitution of the first Commission's term "reasonably necessary" for "essential." The Commission disagrees with Mr. Cardona's assessment. The Commission believes that a subpoena served on a criminal defense attorney will inevitably lead to the deterioration of the attorney-client relationship which lies at the heart of our adversary system. Requiring that the prosecutor "reasonably believe" that the evidence sought is "essential" in effect prohibits the prosecutor from going on a fishing expedition for "merely peripheral, cumulative or speculative" information. (See *ABA Report 118*, at page 11.) Further, Mr. Cardona urges that the first Commission's term "reasonable" be substituted for the proposed term "feasible" in subparagraph (3). Again, the Commission believes that in light of the destructive effect such a subpoena will have on the attorney-client relationship, its use should be limited to those situations where the prosecutor has tried all other alternatives. A subpoena should be used only as a last resort.

Third, Mr. Cardona appears to rely on the fact that the first Commission revised the ABA Model Rule as supporting the conclusion there is no indication that prosecutors are misusing the subpoena power. The Commission does not believe that the first Commission's language supports any such conclusion. The Commission is unaware that the first Commission conducted an empirical study to support its proposed changes to the Model Rule. It again notes that the problem the ABA was addressing in 1990 was with the increased incidence of attorney subpoenas in *federal* proceedings. Given the

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current social and political climate, with California's position on several issues in conflict with the position of the federal government, there is a real potential for the renewal of federal attorney subpoenas. They should not be used except in the most compelling of cases. The history of Model Rule 3.8(e) demonstrates that only a rule of professional conduct with stringent standards will be effective in protecting the attorney-client relationship.