

AGENDA ITEM

702 JULY 2017

DATE: July 7, 2017

TO: Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

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

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California (“Supreme Court”) issued an order on the State Bar’s request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar’s request was granted in part and denied in part. Proposed rule 5-110(E) states the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a current or former client. Rule 5-110(E) was not approved but the Supreme Court’s order provides instructions for the State Bar’s further consideration. The Board of Trustees (“Board”) referred this matter to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) for study and development of revised rule proposals. This item requests that the Board circulate, for a 45-day public comment period, proposed rule amendments developed by the Commission following a study of the Supreme Court’s order.¹

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

BACKGROUND

Attachment 2 is Board agenda item 703 MAY 2017. This agenda item provides the relevant background for this matter including the full text of the Supreme Court’s May 1, 2017 order.

¹ Attachment 1 provides the clean text of alternative drafts that are recommended for public comment circulation.

DISCUSSION

As submitted to the Supreme Court, the Board's amendments to Rule 5-110 included proposed paragraph (E) which provides that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information. The proposed rule provision tracked the language of ABA Model Rule 3.8(e), which is applicable only to prosecutors. In its May 1, 2017 order, the Supreme Court directed the State Bar to reconsider whether "this is an ethical obligation that should be imposed on all attorneys, not only prosecutors." The Supreme Court also directed the State Bar to consider whether the substitution of the terms "reasonably necessary" for "essential" under paragraph (E)(2), and "reasonable" for "feasible" under paragraph (E)(3) would be appropriate.

At its meeting on July 5, 2017, the Commission studied the instructions provided by the Supreme Court on proposed Rule 5-110(E). The Commission also considered input from the Office of the Chief Trial Counsel ("OCTC") in a June 29, 2017 letter addressing both paragraph (D) and paragraph (E) of proposed Rule 5-110. Regarding paragraph (E), OCTC's letter states:

Also, if there is going to be a proposed rule addressing the conditions required for a criminal prosecutor to issue a subpoena to present evidence about an attorney's former or current client, the rule should apply to all attorneys, not just criminal prosecutors. OCTC agrees with the Supreme Court's suggestion that such a rule substitute the term "reasonably necessary" for the term "essential" in what was subsection (E)(2) of the former proposal. The term "reasonably necessary" is a fairer, more definite and understandable, and more appropriate term. California should not discipline attorneys who honestly and reasonably believed the proposed witness was reasonably necessary. Likewise, OCTC also agrees with the Supreme Court's suggestion that such a rule substitute the term "reasonable" for the term "feasible" in what previously was subsection (E)(3). Again, the term "reasonable" is fairer, more definite, clearer, and more appropriate than "feasible."

The Commission was provided with an excerpt from the United States Attorneys Manual setting forth "Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients." This was provided as an example of a policy that provides conditions for issuing subpoenas that extends to both criminal and civil matters. Similarly, the Commission was provided with an excerpt from Wisconsin's version of Model Rule 3.8(e) that deletes the word "criminal" and extends the rule to subpoenas by a prosecutor in "a grand jury proceeding or other proceeding."

The Commission also was provided with an amicus brief filed by the American Bar Association ("ABA") in the United States Supreme Court. The ABA's brief supports a petition for writ of certiorari filed by the Supreme Court of New Mexico, the Disciplinary Board of New Mexico, and the Office of the Disciplinary Counsel of New Mexico.² Among the issues in this case is the

² The United States Supreme Court case is *United States, Petitioner v. Supreme Court of New Mexico, et al.*, Case No. 16-1450. The lower court case is *United States v. Supreme Court of*

question whether New Mexico Rule of Professional Conduct 16-308(E), which is identical to ABA Model Rule 3.8(e), applies to federal prosecutors bringing a matter before a grand jury. In part, the ABA amicus brief provides valuable background on the ABA's adoption of Model Rule 3.8(e). The brief explains that Model Rule 3.8 was adopted following consideration of a 1986 report of the ABA Criminal Justice Section that included observations on increasing frequency of federal grand jury subpoenas issued to opposing counsel in criminal matters.

Following study, the Commission has drafted three alternative proposed rule amendments for which a 45-day public comment period is requested. At its July 5th meeting, the Commission reserved its deliberations on the policy question of whether this ethical obligation to refrain from subpoenas of other lawyers except under certain conditions should be contained in a rule applicable to all lawyers as opposed to prosecutors only. In the 2016 public comment circulation of the initial proposed rule 5-110, only three comments that addressed paragraph (E) were received.³ It is possible that the *Brady* disclosure aspect of proposed rule 5-110 resulted in less attention being paid to paragraph (E). It is anticipated that the present public comment that focuses on proposed paragraph (E) will garner a more robust response that will better inform the Commission's consideration of this major question and facilitate the Commission's preparation of a well-developed recommendation to the Board.

Alternative 1 – Proposed New Paragraph (f) to Proposed Rule 3.4: This alternative proposal allows the State Bar to obtain public comment on a rule that would apply to all lawyers and would include as options the language substitutions in the Supreme Court's order. This proposal would modify proposed Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"). Rule 3.4 was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. As Alternative 1 is intended to be a rule generally applicable to all lawyers, it would not be appropriate to place this ethical obligation in proposed Rule 3.8 (the counterpart to current Rule 5-110 in the Bar's comprehensive revisions) because Rule 3.8 addresses only the special responsibilities of a prosecutor in a criminal matter. If Alternative 1 were ultimately adopted by the Board, then staff would prepare and submit to the Supreme Court a supplemental rule filing that modifies the version of Rule 3.4 previously submitted to the Supreme Court as a part of the State Bar's comprehensive revisions.

As drafted by the Commission, Alternative 1's new paragraph (f) of Rule 3.4 provides that:

A lawyer shall not:

* * * * *

(f) subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a current or former client unless the lawyer seeking the subpoena reasonably believes:

New Mexico, United States Court of Appeals for the Tenth Circuit Case Nos. 14-2037 and 14-2049.

³ Of the three comments received, one raised an issue that the provision might conflict with California law (2016-67, David Boyd), one favored a rule provision with a less stringent standard as suggested by the Court (2016-85, U.S. Department of Justice), and one approved the rule as proposed and eventually submitted to the Court (2016-322, COPRAC).

(1) the information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) the evidence sought is [essential/reasonably necessary] to the successful completion of an ongoing criminal investigation or prosecution, or is [essential/reasonably necessary] to support the claim or defense asserted in an ongoing civil investigation or proceeding; and

(3) there is no other [feasible/reasonable] alternative to obtain the information;

As indicated above, the Commission has placed in brackets optional language for public commenters to consider in paragraphs (f)(2) and (f)(3). These options should allow commenters to consider the original language adopted by the Board as well as the substitute language in the Supreme Court's order. The public comment solicitation will specifically identify this issue as one on which comment is sought. By issuing optional language for public comment, the Board preserves flexibility in adopting a final rule after consideration of the comments received.

Alternative 1 also includes a proposed new Comment [2] to clarify paragraph (f) as follows:

[2] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. (See generally, *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558 [50 Cal.Rptr.3d 129]; *Spectra Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487 [244 Cal.Rptr. 258].)

Alternative 2 – Proposed Revised Paragraph (e) of Proposed Rule 3.8 Governing Subpoenas of Any Lawyer of an Accused, Including Lawyers in Civil Matters: This alternative proposal would retain the limited scope of the Board's original proposed rule as an ethical obligation imposed only on a prosecutor in a criminal matter and would include as options the language substitutions in the Supreme Court's order. Because this rule would not apply to all lawyers, it is appropriate to place this duty in the rule governing the special responsibilities of a prosecutor in a criminal matter. However, the Commission is not recommending expedited action by the Board or the Court to implement this change in current Rule 5-110. If this Alternative 2 ultimately is adopted by the Board and approved by the Supreme Court, then this change would modify proposed Rule 3.8 that was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. Unlike the Supreme Court's instructions for the State Bar's reconsideration of Rule 5-110(D) (re *Brady* disclosures), the Court did not "reserve" a place for a subpoena obligations provision in the approved amended version of Rule 5-110 that became operative on May 1, 2017. Instead, the Supreme Court's order expressly stated that the Bar may submit a recommendation for a new or revised rule on the subject of subpoena obligations at any time that the Board deems appropriate. Accordingly, if Alternative 2 is finally adopted by the Board, staff would prepare and submit a supplemental filing to the Supreme Court that modifies the version of Rule 3.8 submitted on March 30, 2017 with State Bar's comprehensive revisions. In fact, a State Bar supplemental filing on proposed Rule 3.8 is necessary regardless of whether this alternative is adopted because the Supreme Court's changes to Rule 5-110 operative on May 1, 2017 call for conforming changes to the version of proposed Rule 3.8 presently on file and pending action by the Supreme Court.

As drafted by the Commission, Alternative 2's proposed revised paragraph (e) of proposed Rule 3.8 provides that:

The prosecutor in a criminal case shall:

* * * * *

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client unless the prosecutor reasonably believes:

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

The Commission has developed this alternative draft to obtain public comment on the language substitutions presented in the Supreme Court's order in the context of a proposed rule that otherwise is substantially identical to the rule originally adopted by the Board. Alternative 2 is limited to a prosecutor in a criminal matter, including a grand jury proceeding. Unlike Alternative 1, Alternative 2 does not extend to a lawyer in a civil proceeding. Although substantially identical to the rule originally adopted by the Board, the Commission has implemented one stylistic revision to the language originally adopted by the Board. The Commission has replaced the reference to a "past or present client" with "current or former client." The latter phrase is the usual language used throughout the rules. Neither the current rules nor the Board adopted proposed rules use the phrase "past or present client" and including it here could lead to ambiguity in construing the language.

Alternative 3 – Proposed Revised Paragraph (e) of Proposed Rule 3.8 Narrowed to Apply Only to Subpoenas of Current or Former Counsel in a Criminal Matter: Like Alternative 2, this alternative proposal would retain the limited scope of the Board's original proposed rule as an ethical obligation imposed only on a prosecutor in a criminal matter, including a grand jury proceeding, and would include as options the language substitutions in the Supreme Court's order. Also like Alternative 2, this change would modify proposed Rule 3.8 that was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. The difference with Alternative 2 is that Alternative 3 narrows the scope of regulated subpoenas to only those subpoenas that are issued to a criminal defense counsel. In Alternative 2, the scope is significantly broader because it does not matter whether the subpoena is issued to an attorney who is representing or previously represented a client in a criminal *or civil* matter. In both instances, a prosecutor's compliance with the rule is required. In contrast, under Alternative 3 the rule does not apply in situations where the subpoena is issued to a lawyer who previously represented the accused in a civil representation.

As drafted by the Commission, Alternative 3's proposed revised paragraph (e) of proposed Rule 3.8 provides that:

The prosecutor in a criminal case shall:

* * * * *

- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client represented by the lawyer in a criminal matter unless the prosecutor reasonably believes:^{*}
 - (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) the evidence sought is [essential/reasonably necessary] to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other [feasible/reasonable] alternative to obtain the information; and

The Commission has developed this alternative draft to obtain public comment on the language substitutions presented in the Supreme Court's order in the context of a proposed rule that is narrowed to address only those situations that implicate an accused's Sixth Amendment right to counsel. The Commission acknowledges that these circumstances will always implicate the underlying public protection concern that the rule is intended to address. Other situations may involve abusive subpoenas that intrude on the attorney-client relationship but the Commission believes that the greatest threat of harm is to attorney-client relationships that impair an accused's Sixth Amendment right to counsel. In addition, the Commission observes that there are other existing professional conduct standards that generally apply to abusive subpoenas. (See, e.g., Business and Professions Code section 6068, subdivisions (c) and (g), that impose a duty to maintain only actions or proceedings that are just and that prohibit the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest.)

The Commission requests authorization for a 45-day public comment period on the three above alternative rule amendment proposals. Aside from the three alternative drafts, the Commission also requests that the public comment posting indicate that the Board is interested receiving public comments on the foundational question of whether there should be any rule at all on the subject of subpoenas of other lawyers.⁴ The Commission believes that this approach preserves the greatest flexibility for the Board to adopt a rule after consideration of the public comments received. Representatives of the Commission will attend the Board's July 13, 2017 meeting to present each alternative draft.

FISCAL/PERSONNEL IMPACT

None.

⁴ At the Commission's July 5, 2017 meeting one Commission member observed that while many jurisdictions have adopted a version of ABA Model Rule 3.8(e), some of the jurisdictions that have rejected the rule include: District of Columbia; Florida; Maryland; Massachusetts; New York; Texas; and Virginia. (See ABA table posted at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf .)

RULE AMENDMENTS

This agenda item requests authorization for a 45-day public comment period on proposed amendments to the Rules of Professional Conduct. Board action to adopt the amendments would occur only after the public comment process. Rule of Professional Conduct amendments adopted by the Board do not become binding and operative unless and until they are approved by the Supreme Court of California.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board of Trustees agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board of Trustees authorizes staff to make available, for public comment for a period of 45-days, alternative proposals to amend the Rules of Professional Conduct concerning the ethical obligations applicable when a subpoena is issued to a lawyer to present evidence about a former or current client, as set forth in Attachment 1; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT(S) LIST

1. Clean text of alternative drafts of proposed rules: Alternative 1 – Rule 3.4; Alternative 2 – Rule 3.8, which broadly governs subpoenas of lawyers; and Alternative 3 – Rule 3.8, which is narrowed to apply only to subpoenas of lawyers in criminal matters, all of which are recommended for public comment circulation
2. Board Agenda Item 703 MAY 2017 (including the Supreme Court's May 1, 2017 order)