

**MEMBER/PUBLIC COMMENT**  
**The State Bar of California**  
**180 Howard Street, San Francisco, CA 94105-1639**  
<http://www.calbar.ca.gov>

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**Proposed Amendments to the Rules of Professional Conduct**

The State Bar seeks comments on three alternatives for draft rules regarding when attorneys may issue subpoenas to other attorneys.

**Deadline: Aug. 28, 2017**

Note: Publication for public comment is not, and shall not, be construed as a recommendation or approval by the Board of Trustees of the materials published

**Subject**

Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

**Background**

By statute, the Board of Trustees (“Board”) has the authority to adopt amendments to the Rules of Professional Conduct of the State Bar of California that are binding upon all members of the State Bar once those rules are approved by the California Supreme Court. (Business and Professions Code sections 6076 and 6077.) On May 1, 2017, the Supreme Court of California (“Supreme Court”) issued an order on a State Bar 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 Supreme Court granted approval in part and denied in part. The approved aspects of revised rules 5-110 and 5-220 were made operative on May 1, 2017. These proposed rules were submitted to the Supreme Court on an expedited basis separate from the State Bar’s proposed comprehensive revisions to the entire rules that were submitted to the Court on March 30, 2017. Supreme Court action on the State Bar’s comprehensive rule revisions is pending.

**Discussion/Proposal**

As submitted to the Supreme Court, rule 5-110 included proposed paragraph (E) which provides that a prosecutor shall 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. The Board assigned this matter to the State Bar’s Commission for the Revision of the Rules of Professional Conduct (“Commission”) for

study and development of revised rule proposals. The Commission met on July 5, 2017 to carry out this assignment. Following study, the Commission developed three alternative rule revisions: Alternative 1 (a revision to proposed rule 3.4 stating a subpoena restriction imposed on all lawyers), Alternative 2 (a revision to proposed rule 3.8 that would apply only to prosecutors), and Alternative 3 (a revision to proposed rule 3.8 that would also apply only to prosecutors but would have a narrower scope than Alternative 2).

The Commission drafted Alternative 1 to obtain public comment on a proposed subpoena rule revision that would apply to all lawyers and would include as an option 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. Because 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).

Alternative 2 is a proposal for a revised paragraph (e) of proposed rule 3.8 governing subpoenas of any lawyer of an accused, including an accused's lawyer in any past or present civil matter. Alternative 2 also includes as options the language substitutions in the Supreme Court's order. Unlike Alternative 1, Alternative 2 retains the limited scope of the Board's original proposed rule as an ethical obligation imposed only on a prosecutor in a criminal matter. Because this rule would apply only to a subpoena issued by a prosecutor in a criminal matter or a grand jury proceeding, it is appropriate to place this duty in the rule governing the special responsibilities of a prosecutor. 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.

Alternative 3 is a proposal for a 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 would not apply in situations where a subpoena is issued to an accused's lawyer in any past or present civil matter. Accordingly, Alternative 3 is a proposal for a rule that is narrower than the rule previously adopted by the Board and narrower than the ABA Model Rule counterpart.

To facilitate the Commission's fully informed consideration of the three alternative drafts, public comment also is requested on the threshold policy question of whether there should be any rule at all on the subject of subpoenas of other lawyers. At the Commission's July 5, 2017 meeting it was observed that while many jurisdictions have adopted a version of the ABA's subpoena rule, 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](#) showing the state variations for Model Rule 3.8(e).)

At its meeting on July 13, 2017, the Board of Trustees considered the three alternative rule revision proposals prepared by the Commission and authorized a 45-day public comment period on the proposals.

### **Any Known Fiscal/Personnel Impact**

None

### **Attachments**

1. [Clean text of alternative drafts 1, 2 and 3](#)

Alternative 1 - Proposed New Paragraph (f) to Proposed Rule 3.4, Subpoena Rule Imposing Duties on All Lawyers, Not Only Prosecutors

Alternative 2 - Proposed Revised Paragraph (e) of Proposed Rule 3.8, Subpoena Rule Imposing Duties Only on Prosecutors

Alternative 3 - Proposed Revised Paragraph (e) of Proposed Rule 3.8, Subpoena Rule Imposing Duties Only on Prosecutors Narrowed to Apply Only to Subpoenas of Current or Former Counsel in a Criminal Matter

2. [Commission's Memoranda](#) to the State Bar's Board of Trustees considered at the Board's July 13, 2017 meeting – 702 JULY 2017 (including the full text of the Supreme Court's May 1, 2017 order

### **Source**

Commission for the Revision of the Rules of Professional Conduct of the State Bar of California.

### **Deadline**

Aug. 28, 2017

### **Direct Comments To**

Comments should be submitted using the online [Public Comment Form](#). The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

However, if you cannot use the online form, comments may be submitted by mail to the address indicated below.

### **Mimi Lee**

Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard St.  
San Francisco, CA 94105-1639



**Alternative 1 – Proposed New Paragraph (f) to Proposed Rule 3.4,  
Subpoena Rule Imposing Duties on All Lawyers, Not Only Prosecutors,  
Adopted by the Commission on July 5, 2017**

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**Rule 3.4 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 current or former client unless the lawyer seeking the subpoena reasonably believes: <sup>\*</sup>
  - (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]<sup>⊕</sup> to the successful completion of an ongoing criminal investigation or prosecution, or is

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<sup>⊕</sup> This language is bracketed to indicate that comment is sought on which term ("essential" or "reasonably necessary") the public believes is appropriate for this rule.

[essential/reasonably necessary]<sup>⊕</sup> to support the claim or defense asserted in an ongoing civil investigation or proceeding; and

- (3) there is no other [feasible / reasonable]<sup>⊖</sup> 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
- (h) 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. (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].)

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

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<sup>⊖</sup> This language is bracketed to indicate that comment is sought on which term (“feasible” or “reasonable”) the public believes is appropriate for this rule.

**Alternative 2 – Proposed Revised Paragraph (e) of Proposed Rule 3.8,  
Subpoena Rule Imposing Duties Only on Prosecutors,  
Adopted by the Commission on July 5, 2017**

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**Rule 3.8 Special Responsibilities of a Prosecutor**

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*.<sup>+</sup>
- (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]<sup>⊕</sup> to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other [feasible/reasonable]<sup>⊖</sup> alternative to obtain the information; and
- (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 3.6.

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<sup>+</sup> The parts of this rule designated as “*Reserved*” (paragraph (D) and Comments [3] and [4]) are the subject of pending consideration by the State Bar and the Supreme Court of California.

<sup>⊕</sup> This language is bracketed to indicate that comment is sought on which term (“essential” or “reasonably necessary”) the public believes is appropriate for this rule.

<sup>⊖</sup> This language is bracketed to indicate that comment is sought on which term (“feasible” or “reasonable”) the public believes is appropriate for this rule.

- (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,
    - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (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.
- (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 3.8 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 (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial\* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) 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 (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 (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 (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 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 (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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

**Alternative 3 – Proposed Revised Paragraph (e) of Proposed Rule 3.8,  
Subpoena Rule Imposing Duties Only on Prosecutors Narrowed to Apply  
Only to Subpoenas of Current or Former Counsel in a Criminal Matter,  
Adopted by the Commission on July 5, 2017**

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**Rule 3.8 Special Responsibilities of a Prosecutor**

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*.<sup>+</sup>
- (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]<sup>⊕</sup> to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other [feasible/reasonable]<sup>⊗</sup> alternative to obtain the information; and
- (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

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<sup>+</sup> The parts of this rule designated as “*Reserved*” (paragraph (D) and Comments [3] and [4]) are the subject of pending consideration by the State Bar and the Supreme Court of California.

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<sup>⊗</sup> This language is bracketed to indicate that comment is sought on which term (“feasible” or “reasonable”) the public believes is appropriate for this rule.

from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

- (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,
    - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (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.
- (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 3.8 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.*<sup>+</sup>

[4] *Reserved.*<sup>+</sup>

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial\* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) 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 (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 (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 (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 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 (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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

## **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

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### **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.<sup>1</sup>

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

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### **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.

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<sup>1</sup> 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.<sup>2</sup> Among the issues in this case is the

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<sup>2</sup> 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 5<sup>th</sup> 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.<sup>3</sup> 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:

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

<sup>3</sup> 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).

## Attachment 2: Commission's Memoranda to Board

- (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.



## Attachment 2: Commission's Memoranda to Board

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:

## Attachment 2: Commission's Memoranda to Board

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:<sup>\*</sup>
  - (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.<sup>4</sup> 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.

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<sup>4</sup> 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](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)



**RRC3 – Rule 5-110(E)**  
**Post-Agenda E-mails, etc. – Revised (October 11, 2017)**

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**October 5, 2017 Cardona Email to Difuntorum & McCurdy:**

I remain of the view that no rule governing the issuance of subpoenas to attorneys is necessary. In this regard, I note as follows.

(1) The Commission's charter instructed us to begin with the California rules, making changes only as necessary. California has had no rule governing subpoenas to attorneys, and, as discussed below, there does not seem to be any compelling reason to adopt a new rule governing such subpoenas, whether in civil or criminal cases.

(2) None of the public comments that has been received makes out any compelling reason for adoption of a rule. If this were a serious problem, one would expect comments from the bar vigorously advocating a need for the rule. We have received no such comments. To the contrary, on the civil side, the few comments we have received unanimously favor not adopting such a rule, making the case that any issues are already addressed by existing rules and case law. On the criminal side, no comment provides any empirical evidence supporting the need for a rule. Were attorney subpoenas issued by prosecutors a serious concern to the defense bar, we would have expected extensive comments making this clear (as we received in connection with proposed Rule 5-110(D) addressing prosecutors' disclosures of exculpatory information).

That we received no such comments suggests that this is not an issue of serious concern that warrants adoption of a new rule. Moreover, OCTC, the agency tasked with enforcement of the rules, and which would be expected to have seen instances of abuse if they existed, has stated that it "is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence about a current or former client."

(3) The goal of national uniformity will not meaningfully be furthered by adoption of the rule. Many of the largest jurisdictions (in terms of numbers of lawyers, and more particularly, numbers of lawyers with multi-jurisdictional practices that may bring them within the scope of the California rules) have not adopted a rule governing prosecutor subpoenas to attorneys. This includes New York, DC, Florida, and Texas – all jurisdictions with federal prosecution offices of similar size and caseload to those in California. That these jurisdictions have not seen a need to adopt such a rule suggests that there is no significant level of abuse that would compel adoption of the rule.

**October 6, 2017 Tuft Email to Difuntorum, A. Tuft, Mohr & McCurdy:**

I offer the following observations and recommendations for the Commission's consideration.

1. It is significant that we have not received any comments from the criminal defense bar regarding the two alternative versions of proposed Rule 5-110(E). This supports the view that "other law" is sufficient to address the threat of prosecutorial

intrusion into an accused's attorney-client relationship and that there is a insufficient empirical evidence to justify the need for a disciplinary rule in California.

2. The long standing dispute over issuing subpoenas to current and former lawyers of a suspect to testify before grand juries has had little recurrence in California; perhaps because state prosecutors rarely seek indictments from grand juries and DOJ's guidelines have generally been followed in federal proceedings.

3. The only legitimate objective for an ethics rule is to prevent unjustified intrusions into an accused's constitutional right to counsel and to due process of law. A corollary policy would be to insure that counsel are not subject to unnecessary conflicts that require counsel's withdraw, especially when there is a growing need for competent counsel for persons facing criminal charges. While criminal defense counsel are not fungible and many lawyers lack the resources to fight subpoenas to give testimony against their clients, positive law affords remedies against prosecutors obtaining privileged information from counsel and for abusive attempts to interfere with an accused's attorney-client relationship.

4. DOJ and George Cardona cite compelling reasons for issuing subpoenas for non-privileged evidence from lawyers in criminal investigations and cases. I would add to the list of examples cited on page 5 of DOJ's August 28, 2017 letter the flood of fee forfeiture cases in which the Supreme Court has generally disposed of constitutional challenges to even "retroactive" forfeiture of fees that are proceeds of a crime. The Court has confirmed in these cases that the Sixth Amendment does not provide an absolute right to counsel of choice. *United States v. Monsanto*, 491 U.S. 600 (1989), *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) and recently *Luis v. United States*, 136 S. Ct. 1083 (2016).

5. Abusive prosecutorial conduct designed to interfere with an accused's attorney-client relationship would likely violate Rule 3.8(b) (prosecutor must give defendants reasonable access to counsel) and Rule 8.4(d) (conduct prejudicial to the administration of justice). The Court in *Monsanto* also intimated that abusive attempts designed to oust counsel would violate the Sixth Amendment and Fifth and Fourteenth Amendments.

6. Lawyers in California have a duty to assert the attorney-client privilege and take reasonable steps to preserve client secrets, including bringing motions to quash grand jury and other subpoenas in criminal proceedings. Evidence Code §955, Bus & Prof. Code §6068(e) ). Defense counsel are not immune from having to produce physical evidence of a crime (Rule 5-220) or even from search warrants (Probate Code §1524(c)). As one commentator stated, a more appropriate remedy to a disciplinary rule restricting prosecutors from issuing grand jury subpoenas is for lawyers to properly advise their clients at the outset about the limits of the duty of confidentiality. Fred Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev 917 (1992).

7. For these reasons, I recommend we do not adopt Alt 2 or 3. There is no legitimate basis for adopting Alt 1. The reasons advanced by Jim Ham and COPRAC



**RRC3 – Rule 5-110(E)**  
**Post-Agenda E-mails, etc. – Revised (October 11, 2017)**

are compelling. The fallback positions by OCTC and DOJ in favor of Alt 1 lack legal and empirical support. Alt 1 is an example of the organized bar attempting to replace existing procedural and substantive law with its own view of proper lawyering.

8. The Supremacy Clause issue is not trivial. If we are to consider Alt 2 or 3, I recommend deferring adoption of either option until the Supreme Court has decided whether to review the Tenth Circuit's decision in *United States v. Sup. Ct of New Mexico*.

9. Finally, if we are to have a rule, I recommend we consider a narrower rule that focuses on the risk of harm to the defendant's right to counsel, such as the following:

"A 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 if the prosecutor knows or reasonably should know that the evidence is subject to the attorney-client privilege.

**Attached:**

1196086\_1.docx

**October 6, 2017 Mohr Email to Difuntorum, McCurdy, A. Tuft & Lee:**

I've attached a Synopsis Table with some suggested responses. In some instances I've suggested alternative responses given that we don't know what the final votes will be.

My own position, after further consideration of the proposed rules, the background on the ABA's adoption of MR 3.8(e), and the public comments that were submitted, is that a subpoena rule analogous to MR 3.8(e) is not warranted in either the civil or criminal context.

However, if the Commission were to favor a rule for prosecutors only, then I would support a rule that is identical to MR 3.8(e), i.e., that retains the "essential" and "feasible" standards in subparagraphs (2) and (3), respectively.

Please let me know if you have any questions. Thanks,

**Attached:**

RRC2 - [3.8][5-110(E)] - 45-day Public Comment Synopsis Table - REV (10-06-17)-KEM.doc

**October 10, 2017 Rothschild Email to Difuntorum & McCurdy:**

For what it's worth, the Supreme Court denied cert. in Supreme Court of New Mexico v. United States last week.

<b>No. 16-1323</b> <b>Vide 16-1450</b>	
Title:	<b>Supreme Court of New Mexico, et al., Petitioners v. United States</b>
Docketed:	May 4, 2017
Linked with 16A789	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(14-2037, 14-2049)
Decision Date:	June 7, 2016
Rehearing Denied:	December 2, 2016

DATE	PROCEEDINGS AND ORDERS
Feb 02 2017	Application (16A789) to extend the time to file a petition for a writ of certiorari from March 2, 2017 to April 3, 2017, submitted to Justice Sotomayor.
Feb 13 2017	Application (16A789) granted by Justice Sotomayor extending the time to file until April 3, 2017.
Mar 14 2017	Application (16A789) to extend further the time from April 3, 2017 to May 1, 2017, submitted to Justice Sotomayor.
Mar 17 2017	Application (16A789) granted by Justice Sotomayor extending the time to file until May 1, 2017.
May 01 2017	Petition for a writ of certiorari filed. (Response due June 5, 2017)
May 11 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Jun 01 2017	Brief amicus curiae of Association of Corporate Counsel filed.

Jun 05 2017	Brief of respondent United States in opposition filed.
Jun 05 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 05 2017	Brief amicus curiae of The American Bar Association filed.
Aug 07 2017	Reply of petitioners Supreme Court of NM, et al. filed.
Aug 30 2017	DISTRIBUTED for Conference of 9/25/2017.
Oct 02 2017	Petition DENIED. Justice Gorsuch took no part in the consideration or decision of this petition.

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<b>Other</b>		

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**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

<b>TOTAL = 5</b>	<b>A = 0</b>
	<b>D = 5</b>
	<b>M = 0</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
A1-2017-1	Ham, James (7-28-17)	No	D	<ol style="list-style-type: none"> <li>1. To my knowledge, there is no empirical or anecdotal evidence suggesting that civil attorneys are abusing the subpoena power by subpoenaing other attorneys to present evidence about a past or present client.</li> <li>2. In the civil context, existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse. The Discovery Act contained in the Code of Civil Procedure contains procedures requiring parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena.</li> <li>3. It is not clear why this particular perceived abuse should be singled out in the civil arena for special disciplinary treatment. Attorneys who issue legal process of any kind without a reasonable belief that their actions are legally justified and appropriate are not acting professionally. But it is the responsibility of the courts, in the first instance, to referee the conduct of litigation which by its nature is adversarial.</li> </ol>	<a href="#">After further consideration of proposed rule 3.4(f) [alternative 1] and the public comments received, the Commission agrees with the Commenter that a disciplinary rule analogous to Model Rule 3.8(e) that applies to all lawyers, including those in civil practice is not warranted. Regulation of subpoenas served on lawyers in the civil context is adequately addressed by the Discovery Act in the Code of Civil Procedure and the exercise of a court's inherent authority to supervise and control the proceedings before it.</a>

<sup>1</sup> A = AGREE with proposed Rule      M = AGREE with proposed Rule ONLY IF MODIFIED

**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

<b>TOTAL = 5</b>	<b>A = 0</b>
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No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
A1-2017-2	State Bar Office of Chief Trial Counsel ( <a href="#">"OCTC"</a> ) (Moawad) (8-18-17)	Y	D	<p><u>1.</u> OCTC is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence about a current or former client. The superior courts and administrative courts appear to be able to control any abuses through their current authority and the current rules, without a new rule of professional conduct.</p> <p><u>2.</u> But, if there is going to be a rule addressing the conditions required before a criminal prosecutor can issue a subpoena to present evidence about an attorney's former or current client, it should apply to all attorneys.</p> <p><u>3.</u> OCTC agrees with the Supreme Court suggestion to substitute the term "reasonably necessary" for the term "essential" and "reasonable" for the "feasible."</p> <p><u>4.</u> Of the three alternatives, OCTC prefers Alt. 1 as fairer and more appropriate.</p> <p><u>5.</u> As between Alt. 2 and Alt. 3, OCTC prefers Alt. 2 as fairer and more appropriate. Criminal defense attorneys should not be treated differently than other attorneys.</p>	<p><a href="#">[ALT1] The Commission agrees that there is no need for a disciplinary rule governing the issuance fo subpoenas to a lawyer in either the criminal or civil context.</a></p> <p><a href="#">[ALT2] The Commission agrees that there is no need for a disciplinary rule governing the issuance of subpoenas to a lawyer in a civil context. See response to James Ham, A1-2017-1, above. However, in the criminal context, the Commission continues to believe that such a rule is appropriate, that proposed alternative 2 is preferable, and that the Model Rule standards ("essential" and "feasible" in subparagraphs (e)(2) and (e)(3), respectively) should be retained. See response #2 to COPRAC, A1-2017-4, below.</a></p>



**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

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	<b>D = 5</b>
	<b>M = 0</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
A1-2017-3	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (Eskridge) (8-23-17)	Y	D	<p>We are not commenting on Alt. 2 or Alt 3.</p> <p>We are opposed to Alt. 1 because existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse, and we are unaware of any empirical data or anecdotal evidence suggesting the existence of a problem involving the abuse of civil subpoenas directed against attorneys in the context of civil proceedings.</p> <p>To the extent that ABA Model Rule 3.8 was designed to deter federal prosecutors from interfering with the relationship between criminal defendants and their lawyers, the same concerns are not present in the civil context.</p>	<a href="#">See Response to James Ham, A1-2017-1, above.</a>
A1-2017-4	Committee on Professional Responsibility and Conduct (" <a href="#">COPRAC</a> ") (Spencer) (8-25-17)	Y	D	<p><a href="#">1.</a> COPRAC does not believe extension of the duties concerning subpoenaing lawyers to all attorneys and to civil matters is appropriate for a number of reasons:</p> <p>First, the Civil Discovery Act expressly permits subpoenaing lawyers and imposes a well-developed procedural mechanism for doing so.</p> <p>Second, a host of legitimate reasons may exist to subpoena lawyers in civil cases because evidence in the</p>	<a href="#">1. See Response to James Ham, A1-2017-1, above.</a>

**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

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	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
				<p>possession of an attorney is often relevant in civil litigation, particularly in cases involving attorney-client fee disputes, professional negligence, or advice of counsel defenses.</p> <p>Third, in addition to the prohibition on seeking privileged information, the proposed rule would impose ethical duties on lawyers seeking non-privileged information – which would otherwise be freely discoverable under existing civil discovery standards and case law.</p> <p><u>2. In the context of criminal proceedings, where prosecutors wield the power of the state and a defendant's life and/or liberty is at stake, ethical limitation on subpoenaing lawyers – particularly defense counsel – seems justified. COPRAC therefore supports adoption of either Alt. 2 or Alt. 3, but as between the two, COPRAC has no opinion. <b>COPRAC is concerned that the Supreme Court's suggestion that the words "essential" in proposed rule 3.8(e)(2) and "feasible" in 3.8(e)(3) might be replaced with "reasonably necessary" and "reasonable," respectively, would make the Rule so nebulous as to, in practical effect, render it of little use.</b></u></p>	<p><u>2. <b>[ALT1]</b> After further consideration of the alternative proposed provisions limited to prosecutors and the public comment received, the Commission agrees that a rule is justified for prosecutors for the reasons stated in its previous response to the dissent from the proposed provision. The Commission also determined that the ALT2 version of the proposed rule is preferred because of its similarity to the Model Rule, and agrees that the Model Rule standards ("essential" and "feasible" in subparagraphs (e)(2) and (e)(3)) should be retained, again for the reasons stated in the</u></p>

**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

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No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
					<a href="#">Commission's response to the dissent.</a>  2. <a href="#">[ALT2] After further consideration of the alternative proposed provisions limited to prosecutors and the public comment received, the Commission has determined that a provision corresponding to Model Rule 3.8(e) is not warranted. The Commission believes that other law is sufficient to address the threat of prosecutorial intrusion into an accused's attorney-client relationship. Further, the Commission has determined there is insufficient empirical evidence to justify the need for such a disciplinary rule in California.</a>
A1-2017-5	United State Department of Justice (Goldsmith & Ludwig) (8-28-17)	Y	D	We respectfully submit that there is no empirical evidence of prosecutors, let alone federal prosecutors, in California using subpoenas to interfere with attorney-client relationships in a way that would warrant creating an ethical rule to regulate their doing so. In addition, as the U.S. Court of Appeals for the Tenth Circuit recently recognized in <u>U.S. v. Sup. Ct. of N.M., et al.</u> , 839 F.3d 888 (10th Cir. 2017), applying such a rule to	<a href="#">[ALT1] See response to OCTC, A1-2017-2, above.</a>  <a href="#">[ALT2] See response to OCTC, A1-2017-2, above.</a>

**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

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No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
				<p>federal prosecutors, at least in the grand jury context, violates the Supremacy Clause. There are petitions for writs of certiorari pending before the Supreme Court. If the Commission nevertheless thinks that it is necessary and appropriate to limit the circumstances in which state and federal prosecutors ethically can compel an attorney to provide non-privileged evidence in criminal investigations and cases, we think that it would be prudent for the Commission to defer any action on the proposed rule until the Supreme Court has decided to review the Tenth Circuit's decision.</p> <p>If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the Office of Chief Trial Counsel that the proposed rule should apply to all lawyers, because the attorney-client relationship also may be affected when an attorney is subpoenaed in a civil case.</p> <p>Although there is a strong public interest in giving prosecutors broad investigative authority in criminal investigations and cases that is at least equal to the interests of private litigants in civil cases, we thank that Alt. 2 is the better choice.</p>	

**Proposed Rule on Subpoenaing Attorneys  
Synopsis of Public Comments**

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	<b>M = 0</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI <sup>1</sup>	Comment	RRC Response
				Regardless of which alternative the Commission decides to adopt, however, we also strongly agree with the Office of Chief Trial Counsel that the proposed rule should permit a lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where “the evidence sought is <i>reasonably necessary</i> ” and “there is no other <i>reasonable</i> alternative to obtain the information.”	



**Proposed Rule on Subpoenaing Attorneys  
Public Comment Position Summary**

<b>Commenter</b>	<b>Broad Rule (Alt. 1)</b> (applies to all lawyers including prosecutors and lawyers in civil matters)	<b>Prosecutor Rule (Alt. 2)</b> (subpoena of any lawyer)	<b>Narrow Prosecutor Rule (Alt. 3)</b> (subpoena of criminal defense counsel only)	<b>Supreme Court's Alternative Language<sup>1</sup></b>	<b>Does Not Express Support for Any Rule</b>
<b>James Ham</b>	<b>Opposed to a Civil Rule</b> (rationale: no evidence of abuse)	[no comment]	[no comment]	[no comment]	✓
<b>LACBA</b>	<b>Opposed to a Civil Rule</b> (rationale: existing rules are adequate)	[no comment]	[no comment]	[no comment]	✓
<b>COPRAC</b>	<b>Opposed to a Civil Rule</b> (rationale: would wrongly impose an ethical rule inconsistent with existing case law and statutes)	<b>Either Alt. 2 or Alt. 3</b> (no preference)	<b>Either Alt. 2 or Alt. 3</b> (no preference)	<b>Disagrees due to concerns that the Court's language would render the rule "nebulous"</b>	<b>Supports either Alt. 2 or Alt. 3</b>
<b>OCTC</b>	<b>Opposed</b> (rationale: not aware of a great need for a rule in civil or criminal matters)  <i>[NOTE: BUT IF MUST HAVE A RULE, IT SHOULD APPLY TO ALL LAWYERS]</i>	<b>Prefers Alt. 2 over Alt. 3, if must have a prosecutor only rule</b>	<b>Prefers Alt. 2 over Alt. 3, if must have a prosecutor only rule</b>	<b>Agrees with Court's language</b>	<i>[Only if must have a rule, then rule should apply to all lawyers]</i>
<b>U.S. DOJ</b>	<b>Opposed</b> (rationale: there is an applicable Supremacy Clause issue pending in federal court)  <i>[NOTE: BUT IF MUST HAVE A RULE, IT SHOULD APPLY TO ALL LAWYERS]</i>	<b>Prefers Alt. 2 over Alt. 3, if must have a prosecutor only rule</b>	<b>Prefers Alt. 2 over Alt. 3, if must have a prosecutor only rule</b>	<b>Agrees with Court's language</b>	<i>[Only if must have a rule, then it should apply to all lawyers. If it must be a prosecutor only rule, then Alt. 2 is the better choice]</i>

<sup>1</sup> 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.