

FULL TEXT OF PUBLIC COMMENT – TABLE OF CONTENTS

<u>Commenter</u>	<u>Page</u>
Ham Jim A1-2017-1	1
Los Angeles County Bar Association A1-2017-3	3
State Bar COPRAC (Spencer) A1-2017-4	7
State Bar Office of Chief Trial Counsel (Moawad) A1-2017-2	9
United States Department of Justice (Ludwig) A1-2017-5	11



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July 27, 2017

Via E-Mail

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

*Re: Public Comment on Proposed Rule 5-110(E) [Rule 3.8(e)]
Special Responsibilities of a Prosecutor*

Dear Ms. Lee:

I am a former member of the second Commission for the Revision of the Rules of Professional Conduct and have been a practicing attorney for more than 35 years. I have been a 30-plus year member of the Los Angeles County Bar Association's Committee on Professional Responsibility and Conduct, chairing that committee twice, and also served a term on COPRAC many years ago. I am an active member of the Association of Professional Responsibility Lawyers, chairing its public statements committee, and acting as its liaison to the ABA's Committee on Professional Discipline. I have also taught legal ethics at the University of Southern California's Gould School of Law.

ABA Model Rule 3.8(e) includes a provision limiting the ability of a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. The Commission is considering an alternative – Alternative 1 – which would revise proposed Rule 3.4 to impose a similar restriction on all lawyers, not just prosecutors.

I oppose Alternative 1. First, 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. In the absence of such evidence, there does not appear to be any need or justification for the addition of a disciplinary rule of this sort. To my knowledge, no other state has adopted such a disciplinary rule.

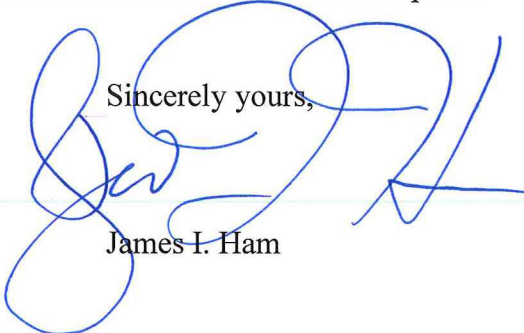
Second, in the civil context, existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse. The Discovery Act contained in the Code of Civil Procedure contains procedures requiring parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena. In addition, if necessary, parties may obtain a

protective order against subpoenas that improperly seek privileged attorney-client communications. Civil courts – both state and federal – have ample authority to regulate civil discovery through the issuance of protective orders and sanctions for abuse of the subpoena process.

There are many circumstances where issuance of a subpoena to a civil attorney concerning the attorney's involvement with a client or former client is appropriate because the attorney is in possession of unprivileged material relevant to a particular controversy. For example, transactional lawyers who were involved in business negotiations or transactions now in dispute may be subpoenaed to testify about unprivileged communications with third parties, and their files may contain numerous relevant and unprivileged documents, including unprivileged communications from the client. Attorneys may also be subpoenaed in connection with disputes over trust and estate matters, or in malpractice proceedings, or where the attorney has engaged in misconduct or otherwise abused the attorney-client privilege to further a client's fraud.

Third, 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. The courts already have the power to sanction attorneys for litigation abuse, and underlying conduct can already be reviewed by the Office of Chief Counsel under existing law. For example, Rule 3-200 [proposed Rule 3.1] prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person. Proposed California Rule 3.2 provides that a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

For the foregoing reasons, I cannot recommend Alternative 1 for adoption.

Sincerely yours,

James I. Ham

RRC3 Proposed Rules Public Comment Form 5-110(E)

Professional Affiliation	LACBA Professional Responsibility and Ethics Committee
Commenting on behalf of an organization	Yes
Name	Gayle Eskridge
City	Torrance
State	California
Email address	geskridge@eskridgelaw.net
If you have a preference (for either Alternative 1, 2, or 3), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	PREC_Comment_Letter.pdf (1169k)
Attachment	
Attachment	
Receive Mass Email?	To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

August 23, 2017

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Re: Proposed Rule of Professional Conduct 5-110(E)

Dear Ms. Lee:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") appreciates the opportunity to comment on the draft alternatives to Proposed Rule of Professional Conduct 5-110(E) prepared by the State Bar's Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission"). Under the new numbering system proposed by the Rules Revision Commission, current Rule 5-110 would be renumbered as Rule 3.8. For consistency, instead of referring to proposed Rule 5-110(E) in this letter, we refer to proposed Rule 3.8(e).

As submitted to the California Supreme Court, proposed Rule 3.8 included proposed paragraph (e) which limited the ability of a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. This proposal tracked the language of ABA Model Rule 3.8(e). In its May 1, 2017 order, the Supreme Court directed the State Bar to consider whether "this is an ethical obligation that should be imposed on all attorneys, not only prosecutors." In response, the Rules Revision Commission developed alternative revisions, which were approved by the State Bar's Board of Trustees on July 13, 2017 and released for a 45-day public comment period ending on August 28, 2017.

Alternative 1 presents a revision to proposed Rule 3.4 (titled "Fairness to Opposing Party and Counsel"), proposing that the subpoena restriction be imposed on all lawyers, not just prosecutors. This would be accomplished by creating a new paragraph (f) to proposed Rule 3.4. PREC is not commenting on Alternatives 2 and 3 prepared by the Rules Revision Commission.

¹ Please note that, as a matter of policy, the members of PREC who are current members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting with respect to this comment letter.

PREC is opposed to Alternative 1 of proposed Rule 3.8 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.

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. In addition, if necessary, parties may obtain a protective order against subpoenas that improperly seek privileged attorney-client communications. Civil courts have ample authority to regulate discovery through the issuance of protective orders and sanctions for abuse of the subpoena process.

In addition, there are many circumstances where issuance of a subpoena to a civil attorney is appropriate because the attorney is in possession of relevant, unprivileged material relevant to the controversy. For example, transactional lawyers who were involved in business transactions now in dispute may be subpoenaed to testify about unprivileged communications with third parties, and their files may contain numerous unprivileged documents. Attorneys may also be subpoenaed in connection with disputes over trust and estate matters, or in malpractice proceedings, or where the attorney has engaged in misconduct or otherwise abused the attorney-client privilege to further a client's fraud.

Against this backdrop, we are unaware of any studies, empirical data, or anecdotal evidence suggesting that a rule of attorney discipline is necessary to curb abuses of civil subpoenas directed against other attorneys. The absence of abuse in this area also suggests why other states have not extended the ABA Model Rule 3.8 provision to reach civil proceedings.

Given the existence of adequate procedural safeguards and the lack of evidence that a disciplinary rule is needed to protect the public, the courts, and the administration of justice in the context of civil proceedings, we do not believe that Alternative 1 should be adopted.

Finally, 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.

Model Rule 3.8 was developed by the ABA due to concern over what was seen as attempts by Federal prosecutors to interfere with the relationships between criminal defendants and their lawyers, in derogation of their rights under the Sixth Amendment. This interference took the form of the subpoenaing of defense lawyers to appear before Federal grand juries. The mere fact of the subpoena created a risk to the lawyer-client relationship. Clients naturally would be concerned about whether their lawyers would look out for their own interests rather than their clients' interests. To take one of a number of possible examples, the client might be concerned that the lawyer would be tempted to sacrifice the client's interest because of an offer or threat by the Federal prosecutor.

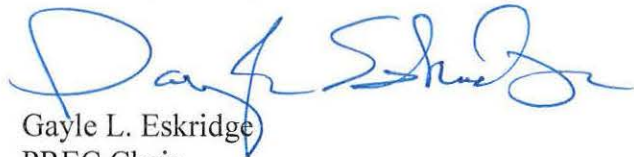
The purpose of professional discipline is "... to protect the public, the courts and the legal profession." *In re Kreamer*, 14 Cal.3d 524, 532 (1975). A prosecutor's use of a subpoena to interfere with an accused's relationship with his or her lawyer is wrongful no matter what later transpires between the Federal prosecutor and the defense lawyer. Even if the subpoena were withdrawn quickly, the threat and fear would remain. The bell could not be unrung. This is intolerable in the Sixth Amendment context, and Model Rule 3.8(e) addresses the issue directly. A prosecutor's use of a subpoena in this manner is wrongful, and it should be the subject of discipline under the standard of *In re Kreamer*.

Because a subpoena on a criminal defense attorney may negatively impact the attorney-client relationship in a way which cannot be controlled by a court, regulating subpoenas in the criminal context may justify a disciplinary rule. The same is not true in the civil context. The issuance of a subpoena to an opposing counsel might cause some delay and additional expense, but it does not by itself interfere with the lawyer-client relationship. It therefore can be regulated through the civil discovery process and by the trial court. *See Carehouse Convalescent Hospital v. Superior Court*, 143 Cal.App.4th 1558 (2006).

Accordingly, we do not believe that Rule 3.8 should be expanded to include civil proceedings.

Thank you again for the opportunity to comment on Proposed Rule of Professional Conduct 3.8(e).

Very Truly Yours,



Gayle L. Eskridge
PREC Chair



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

August 25, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Reconsideration of Proposed Rule 5-110(E) of the Rules of Professional Conduct

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the proposed alternatives for Rule 5-100(E) of the Rules of Professional Conduct concerning subpoenaing lawyers. COPRAC supports adoption of either Alternatives 2 or 3, imposing duties on prosecutors subpoenaing lawyers in grand jury or criminal proceedings. COPRAC does not support the adoption of Alternative 1, which would expand the duties imposed on prosecutors subpoenaing lawyers in grand jury or criminal proceedings to all attorneys, not only prosecutors.

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. First, the Civil Discovery Act expressly permits subpoenaing lawyers and imposes a well-developed procedural mechanism for doing so. That mechanism provides notice and opportunity to object to a former or existing client whose records are sought from an attorney. *See* Cal. Civ. Code § 1985.3. Unless the client is also a party to the litigation, the assertion of the objection alone is sufficient to stop the production absent a court order. In terms of eliciting testimony from an opposing party's lawyer, case law in the civil arena has already been developed to curb that practice. *See, e.g., Spectra-Physics, Inc. v. Superior Court*, 198 Cal.App.3d 1487 (1988).

Second, a host of legitimate reasons may exist to subpoena lawyers in civil cases because evidence in the 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. An ethical limitation on seeking what would otherwise be clearly relevant and admissible evidence in civil litigation serves no useful purpose and may in fact chill an attorney's zealous representation of a client by seeking to obtain information from all available sources.

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. COPRAC is not aware

of any justification for imposing limitations different from those articulated in the Civil Discovery Act and well-developed case law on a lawyer's ability to obtain relevant, non-privileged information simply because it is in the possession of another attorney.

On balance, the proposed Alternative 1 Rule 3.4 would create an ethical rule imposing duties and restrictions on seeking evidence in a civil case that appears inconsistent with existing case law and statutes. If grounds exist to further limit the right to subpoena lawyers in civil cases, those further limitations should come from the legislature or develop through case law, as has been the case to date. A new ethical rule imposing further limitations on lawyer subpoenas that are potentially contrary to existing law will not serve the profession well in the Committee's opinion.

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 limitations on subpoenaing lawyers – particularly defense counsel – seem justified. COPRAC therefore supports adoption of either Alternative 2 or 3, but as between the two, COPRAC has no opinion.

Finally, as to the Supreme Court's suggestion that the term "reasonably necessary" replace "essential" and the term "reasonable" replace "feasible," COPRAC is concerned that replacing the terms "essential" and "feasible" would make the Rule so nebulous as to, in practical effect, render it of little use. If the purpose of the Rule is, as it was at least historically, to address potential misuse of the power of the state when attempting to obtain information in the possession of a defendant's or other lawyer, the more narrow standard of "essential" and "feasible" seems more appropriate to actually limit the activity the Rule intends to curb. A standard based on what the prosecutor "reasonably believes" is "reasonably necessary" seems too low to have any impact.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne", with a long, sweeping horizontal line extending to the right.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR
OF CALIFORNIA

OFFICE OF CHIEF TRIAL COUNSEL

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August 18, 2017

Justice Lee Edmon
Randall Difuntorum
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comment on proposed revisions to Rules 3.4 and 3.8 of the Proposed Rules of Professional Conduct

Dear Justice Edmon and Mr. Difuntorum:

The Office of Chief Trial Counsel (OCTC) thanks the Commission for the opportunity to again express its comments on the issues the Supreme Court referred to the State Bar in its May 1, 2017 Order, regarding rules involving attorneys subpoenaing other attorneys to obtain information on clients or former clients. With any revision to any of the Rules of Professional Conduct, OCTC wants to assure that the rules (1) protect the public; (2) are not purely aspirational; and (3) can be understood by the membership and enforced by our office. Also, the Comments to the Rules should be used sparingly and only to elucidate, and not to expand upon, the rules themselves.

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.

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. Civil attorneys can abuse the subpoena process as readily as criminal prosecutors. Further, if the rule is going to apply to civil proceedings, it should also apply to administrative proceedings. The State Bar Act and the Rules of Professional Conduct sets forth a comprehensive scheme for regulating the entire practice of law in California, including when attorneys appear before administrative agencies (see *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 67-69; *In the Matter of Moriarty* (Review Dept. 2017) 2017 WL 1424407) and "the standards governing an attorney's ethical duties do not vary according to the many areas of practice." (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 511.)

OCTC agrees with the Supreme Court's suggestion that the rule substitute the term "reasonably necessary" for the term "essential" in what was subsection Rule 5-110(E)(2) of the former proposal on this issue. The term "reasonably necessary" is a more definite, understandable, and 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) of proposed Rule 5-110. Again, the term "reasonable" is more definite, clear, and appropriate than "feasible."

Of the three alternatives, OCTC prefers Alternative 1 [Proposed Rule 3.4(f) of the Rules of Professional Conduct] as fairer and more appropriate. It applies to both civil and criminal cases. OCTC also prefers using the term "reasonably necessary" and "reasonable" in the rule, as just discussed.

OCTC supports Comment 2 to Alternative 1 [Proposed Rule 3.4(f) of the Rules of Professional Conduct].

As between Alternative 2 and Alternative 3, OCTC prefers Alternative 2 as fairer and more appropriate. Criminal defense attorneys should not be treated differently than other attorneys.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'S. Moawad', followed by a horizontal line.

Steven J. Moawad
Chief Trial Counsel

RRC3 Proposed Rules Public Comment Form 5-110(E)

Professional Affiliation	United States Department of Justice
Commenting on behalf of an organization	Yes
Name	Stacy M. Ludwig
City	Washington, DC
State	Washington DC
Email address	Stacy.Ludwig2@usdoj.gov
If you have a preference (for either Alternative 1, 2, or 3), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	No Rule is Necessary
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Letter_to_the_California_Commission_for_the_Revision_of_the_California_R.._08_28_17.pdf (74k)
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U.S. Department of Justice

August 28, 2017

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
c/o Mimi Lee
Office of Professional Competence, Planning, and Development
180 Howard Street
San Francisco, CA 94105

Re: Revisions to Proposed California Attorney Subpoena Rule

Dear Commission Members:

Introduction

On behalf of the U.S. Department of Justice (“the Department”), including the over 400 Department attorneys who practice in California, 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 United States v. Sup. Ct. of N.M., et al., 839 F.3d 888 (10th Cir. 2017), applying such a rule to 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 whether to review the Tenth Circuit’s decision.

If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the 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.¹ 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, if the Commission concludes that the proposed rule only should apply to prosecutors, we think that Alternative 2 is the better choice. Regardless of which alternative the Commission decides to adopt, however, we also strongly agree with the Chief Trial Counsel that the proposed rule should permit a

¹ Although we oppose application of such a rule to federal prosecutors practicing in federal court, we acknowledge that each federal district court in California has adopted the Rules of Professional Conduct of the State Bar of California through their local rules, see N.D. Cal. Civ. R. 11-4(a); S.D. Cal. Civ. R. 83.4(b); E.D. Cal. R. 180(e); C.D. Cal. Civ. R. 83-3.1.2.

lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where “the evidence sought is *reasonably necessary*” and “there is no other *reasonable* alternative to obtain the information.”

Discussion

Rule 3.8(e) of the American Bar Association’s Model Rules of Professional Conduct, which forms the basis of the proposed California attorney subpoena rule and is substantially the same as Alternative 2, was adopted in 1990 and subsequently amended in 1995. It was adopted based on reports in the mid-1980’s and 1990’s finding that prosecutors, and federal prosecutors in particular, increasingly were subpoenaing attorneys to the grand jury to provide testimony related to their clients.² In the more than a quarter-century since its adoption, thirty-three jurisdictions have adopted a version of the Rule.³ Eighteen jurisdictions, however—including six of the ten most populous jurisdictions—did not adopt the Rule.⁴ When Commission Member George Cardona previously pointed out this fact, the Commission was quick to conclude that this “does not necessarily demonstrate that there is no problem or that such a problem might not reasonably be anticipated.”⁵ The Commission, however, has not and cannot demonstrate that there is or might be a problem with subpoenas being issued in these jurisdictions, and California, in particular. There simply is no empirical evidence of which we are aware that prosecutors, let alone federal prosecutors, in California use subpoenas to interfere with attorney-client relationships in a way that would warrant creating an ethical rule to regulate their doing so.⁶ In

² See Brief of *Amicus Curiae* Am. Bar Ass’n at 3-9, *Sup. Ct. of N.M., et al. v. United States*, No. 16-1323 (Sup. Ct. filed June 5, 2017) (hereinafter “ABA Brief”); see also Am. Bar Ass’n, *A Legislative History: The Development of the ABA Model Rules of Prof’l Conduct, 1982-2013* 529-30 (Art Garwin, ed., 2013).

³ Alphabetically, they are Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. See Am. Bar Ass’n Comm. on Prof’l Resp. Policy Implementation Comm., *Variations of the ABA Model Rules of Prof’l Conduct: Rule 3.8(e)* (May 6, 2015) (hereinafter “Model Rule 3.8(e) Variations”), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf. Although the ABA’s chart indicates that West Virginia “[d]oes not have” a version of Model Rule 3.8(e), the most recent version of West Virginia Rule 3.8 does contain a version thereof. See W. VA. RULES OF PROF’L CONDUCT R. 3.8(e) (2014).

⁴ They are, based on 2016 population rankings by the U.S. Census Bureau (in parentheses): California (1), Texas (2), Florida (3), New York (4), Pennsylvania (6), Michigan (10), Virginia (12), Maryland (19), Alabama (24), Oregon (27), Connecticut (29), Arkansas (33), Utah (31), Mississippi (32), Hawaii (40), Maine (42), the District of Columbia (49), and Wyoming (51). See Model Rule 3.8(e) Variations, *supra* n.3; U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016 (NST-EST2016-01)*, available at <https://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx>.

⁵ See Comm’n Response to Dissent Submitted by George Cardona on the Recommended Adoption of Proposed Rule 3.8(e) at 2, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018653.pdf>. Interestingly, after a study by the Bar Association of the City of New York in 1985 that ostensibly did provide such evidence, see ABA Brief at 5, New York nevertheless declined to adopt a version of Model Rule 3.8(e).

⁶ Indeed, the ABA offers no support in its *amicus* brief in *Sup. Ct. of N.M.* for its “belie[f] . . . that the need to

addition, the Department of Justice has adopted a policy regarding issuance of subpoenas to attorneys for information relating to the representation of clients, and the policy generally requires that a Department attorney obtain high level supervisory approval prior to issuing the subpoena.⁷ Accordingly, we do not think that such a Rule is necessary.

Not only is there an absence of empirical evidence that would justify an ethical rule regulating circumstances in which a prosecutor may issue a subpoena to another lawyer, as the U.S. Court of Appeals for the Tenth Circuit recently concluded, applying such a rule to federal prosecutors, at least in the grand jury context, violates the Supremacy Clause.⁸ The Supreme Court of New Mexico has filed a petition for a writ of certiorari with the Supreme Court in Sup. Ct. of N.M., et al. v. United States.⁹ The United States opposes the grant of the Supreme Court of New Mexico's petition, and has filed a conditional cross-petition seeking review of the Tenth Circuit's ruling with respect to trial subpoenas in the event that the Supreme Court grants the New Mexico Supreme Court's petition.¹⁰ Although we recognize that the Tenth Circuit's decision only constitutes persuasive authority in California, we think that it would be prudent for the Commission to defer any action on the proposed rule until the Supreme Court has decided whether to review the Tenth Circuit's decision.

If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the Chief Trial Counsel that the proposed rule should apply to all lawyers.¹¹ As the Supreme Court of California implicitly has recognized, the concerns underlying an attorney subpoena rule are not limited to criminal investigations and cases.¹² Nor are they limited to circumstances in which a criminal defense

protect against prosecutorial ethical misconduct in the grand jury context . . . remains as critical today as when Congress passed Section 530B. . . ." See ABA Brief at 22.

⁷ See U.S. Attorney's Manual § 9-13.410 (Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients).

⁸ See United States v. Sup. Ct. of N.M., et al., 839 F.3d 888, 923, 928 (10th Cir. 2017) (holding that, in the grand jury context, "the [essentiality and no-other-feasible alternative] provisions of [New Mexico] Rule 16-308(E) conflict with federal law and are preempted"); United States v. Colo. Sup. Ct., 189 F.3d 1281, 1283-84, 1289 (10th Cir. 1999) (holding that the then-existing Colorado Rule of Professional Conduct regulating attorney subpoenas, as modified by the U.S. District Court for the District of Colorado to exclude grand jury proceedings, "is not inconsistent with federal law and can be adopted and enforced . . . against federal prosecutors").

⁹ Petition for a Writ of Certiorari, Sup. Ct. of N.M., et al. v. United States, No. 16-1323 (Sup. Ct. filed May 1, 2017).

¹⁰ Conditional Cross-Petition for a Writ of Certiorari at 2, United States v. Sup. Ct. of N.M., et al., No. 16-1450 (Sup. Ct. filed June 5, 2017).

¹¹ See Letter from Steven J. Moawad, Chief Trial Counsel, State Bar of Cal., to Justice Lee Edmon & Randall Difuntorum, Office of Prof'l Competence, Planning and Development, State Bar of Cal. (June 29, 2017), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018652.pdf> (hereinafter "OCTC Letter").

¹² See Order Re Request for Approval of Amendments to Rule 5-110 and Rule 5-220 of the Rules of Professional Conduct of the State Bar of California, Admin. Order 2017-04-26, S239387 at 1 (Cal. May 1, 2017) (*en banc*), available at http://www.calbar.ca.gov/Portals/0/documents/ethics/2d_RRC/AdministrativeOrder2017-04-26.pdf.

attorney is subpoenaed. Any time that a lawyer is subpoenaed to provide evidence about a current or former client, there is a potential impact on the attorney-client relationship. In the criminal context, this impact must be balanced with “the public’s interest in maintaining a grand jury with broad investigative power and the right to every man’s evidence.”¹³ Although this strong public interest is at least equal to the interests of private litigants in civil cases, if the Commission concludes that the proposed rule only should apply to prosecutors, we think that Alternative 2, which generally is consistent with Model Rule 3.8(e), is the better choice. Because it is consistent with Model Rule 3.8(e), prosecutors can rely on the existing authority interpreting that Rule to guide their conduct.

Regardless of which alternative the Commission decides to adopt, we strongly agree with the 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 *reasonably necessary*” and “there is no other *reasonable* alternative to obtain the information.”¹⁴ As the Chief Trial Counsel reasoned, the phrase “reasonably necessary” and the term “reasonable” provide fair, definite, and clear guidance as to the standard by which a lawyer conduct will be judged.¹⁵ Indeed, the Commission already has defined the terms “reasonable” and “reasonably” in proposed California Rule 1.0.1, ostensibly because they are used throughout the proposed California Rules of Professional Conduct.¹⁶ We also think that the phrase “reasonably necessary” and the term “reasonable” strike the appropriate balance between protecting attorney-client relationships and the public interest in investigating and prosecuting criminal conduct. As the First Commission for the Revision of the Rules of Professional Conduct of the State Bar of California observed:

It is a difficult, if not impossible, task to decide *ex ante* what evidence will be “essential” to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of “evidence reasonably necessary to the successful prosecution” is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.¹⁷

¹³ ABA Brief at 7 (quoting Am. Bar Ass’n Crim. Justice Sec. Report to the House of Del. & Recomm. 111D at 7 (Feb. 1986)).

¹⁴ See OCTC Letter, *supra* n.11.

¹⁵ See *id.*

¹⁶ PROPOSED CAL. RULES OF PROF’L CONDUCT R. 1.0.1(h), available at http://www.calbar.ca.gov/Portals/0/documents/ethics/2D_RRC/2017_Proposed-Rules-Final-040417.pdf (“‘Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.”).

¹⁷ See Commission Member Dissent, Submitted by George Cardona, on the Recommended Adoption of Proposed Rule 3.8 at 2, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018653.pdf>.

In addition, “[i]f ‘feasible’ means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If ‘feasible’ means that the alternative is reasonable, the more familiar term ‘reasonable’ should be used.”¹⁸

It is crucial that prosecutors be able to subpoena non-privileged evidence in criminal investigations and cases. In bankruptcy and investment fraud cases, for example, defendants may have retained lawyers to draft false bankruptcy filings or investment solicitations based on false information that the defendants themselves provide. In money laundering cases, defendants may have persuaded lawyers to deposit and withdraw funds in their trust accounts by making false representations regarding the source and purpose of the funds. In tax cases, defendants may have disclosed to a lawyer a wealth of historical documents relating to assets and expenses that reveal violations of the tax code. In each of these situations, although the information sought clearly is not privileged, it may be difficult to tell whether the information is “essential” to a prosecution or whether there are other “feasible” alternatives to obtain the information. Even assuming that there are other “feasible” ways to obtain this information, these alternatives may be unnecessarily intrusive to others who are innocent of any wrongdoing. Adopting an ethical rule that limits the circumstances in which prosecutors can compel an attorney to provide non-privileged evidence in criminal investigations and cases unnecessarily limits the ability of prosecutors and grand juries to investigate persons who have used and would use attorneys to conceal their crimes. Worse still, it limits the abilities of prosecutors and grand juries to investigate attorneys who discredit and undermine the public’s trust in the legal professional by intentionally engaging in criminal acts with their clients. Although the proposed Rule purports only to regulate prosecutors, as the Supreme Court has recognized, a grand jury “depends largely on the prosecutor’s office to secure the evidence or witnesses it requires.”¹⁹

Conclusion

We are grateful for the opportunity to comment and want to thank the Commission for their important work on the revisions to the California Rules. In the absence of any empirical evidence that prosecutors or other lawyers in California are using subpoenas to interfere with attorney-client relationships improperly, however, we do not think that there is a need for an ethical rule to regulate the issuance of subpoenas to attorneys. If the Commission disagrees, we think that it would be prudent for the Commission to defer any action on the proposed rule until such time as the Supreme Court determines whether such a rule, as applied to federal prosecutors, would violate the Supremacy Clause. Moreover, because there is a potential impact on the attorney-client relationship any time a lawyer is subpoenaed to provide evidence about a current or former client, we agree with the Chief Trial Counsel and see no reason why such a rule should not apply to all lawyers. If the Commission concludes that the proposed rule only should apply to prosecutors, however, we think that Alternative 2 is the better choice. Regardless of which alternative the Commission decides to adopt, however, we strongly agree

¹⁸ Id.

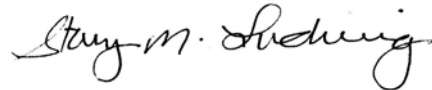
¹⁹ United States v. Sells Eng’g, Inc., 463 U.S. 418, 430 (1983). Indeed, it is unclear how a federal grand jury would issue a subpoena on its own insofar as Rule 17 of the Federal Rules of Criminal Procedure states that the clerk of court must issue a subpoena “to the party requesting it” and that the “party must fill in the blanks before the subpoena is served.” Fed. R. Crim. P. 17(a); see also 1 Sara Sun Beale, et al., Grand Jury Law & Practice § 6:2, at 6-13 (2d ed. 2016) (observing that grand jury subpoenas are “issued and served by representatives of the federal prosecutor’s office”).

with the 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 *reasonably necessary*” and “there is no other *reasonable* alternative to obtain the information.”



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Sincerely,



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