NO. 99-1839

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DONALD K. STERN,
Plaintiff-Appellant

v.

UNITED STATES DISTRICT COURT, et al,
Defendants-Appellees

ON APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF AMICI CURIAE MASSACHUSETTS BAR ASSOCIATION, BOSTON BAR ASSOCIATION, AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE POSITION OF THE DEFENDANTS-APPELLEES, SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW

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STATEMENT OF AMICI CURIAE

This appeal deals with a problem of exceptional, current importance to the organized bar across the country. The Massachusetts Bar Association, the Boston Bar Association, and the Massachusetts Association of Criminal Defense Lawyers are convinced that the current practices of the Justice Department regarding the subpoenaing of lawyers to provide evidence concerning their clients to grand juries investigating those clients represent a grave and immediate threat to the right to counsel and to the adversary system itself. These associations view Rule 3.8(f) of the Massachusetts Rules of Professional Conduct, adopted by the District Court in Local Rule 83.6(4)(B), as a reasonable and justified response to the problem — at a time when some response is necessary.

The Massachusetts Bar Association ("MBA") is a voluntary, nonprofit statewide professional association of attorneys in the Commonwealth of Massachusetts. It presently has more than 18,500 members, including lawyers and judges. The purpose of the MBA is to promote the administration of justice and reform in the law; to uphold the honor of the profession of the law; to seek advancements in the field of jurisprudence in this Commonwealth; to promote the public good; and to insure that all citizens of this Commonwealth who seek justice are afforded a full opportunity to obtain it. The MBA offers its experience and perspective to assist in the resolution of this extremely important issue.

The Boston Bar Association ("BBA") is a voluntary organization of over 8,000 lawyers and judges. It is dedicated to furthering

the cause of access to justice, to improving the law and its administration, and to advancing the highest standards of excellence of the profession. The BBA has a continuing interest in issues of attorney discipline and of subpoenas to attorneys and has appeared as amicus curiae in other cases relating to these issues.

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is an organization whose membership consists of over six hundred criminal defense lawyers practicing in the State and Federal Courts of the Commonwealth of Massachusetts. MACDL has been an important voice in the quest to protect the individual rights of citizens of the Commonwealth of Massachusetts guaranteed by the Declaration of Rights of the Massachusetts Constitution and the United States Constitution, including, most particularly, the right to counsel. MACDL members have a keen interest in the preservation of the attorney-client privilege and zealous advocacy on behalf of those accused of crimes.

STATEMENT OF THE CASE

Prior Proceedings

In 1986 the District Court confronted the issue of subpoenas directed to attorneys requiring disclosure of evidence about their clients when it followed the lead of the Massachusetts Supreme Judicial Court and adopted an ethical rule known as Prosecutorial Function 15 ("PF 15"). PF 15 provided:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.

The United States Attorney challenged implementation of the rule. The district court rejected the challenge. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986). A divided panel of this Court affirmed the district court. United States v. Klubock, 832 F.2d 649 (1st Cir. 1987)("Klubock I"). On en banc review, an equally divided Court affirmed the lower court's action in rejecting the challenge. United States v. Klubock, 832 F.2d 664 (1st Cir. 1987)("Klubock II"). This Court addressed a similar disciplinary rule adopted by the United States District Court for the District of Rhode Island, and affirmed that court's rule-making power in Whitehouse v. United States District Court for the District of Rhode Island, 53 F.3d 1349 (1st Cir. 1995).

The adoption of PF 15, however, did not end the controversy.

It appears that the rate of attorney subpoena has not diminished since PF 15 was implemented. This Court noted that in the District of Massachusetts alone, in the four years in the mid-1980s before implementation of PF 15, from 50 to 100 attorney subpoenas per year had been served. 832 F.2d at 658. The lower court in this case observed that from November 1993 to September 1997, the U.S. Attorney for the District of Massachusetts sought authorization from the Department of Justice to serve approximately 199 subpoenas on lawyers concerning their present or former clients. Stern v. Supreme Judicial Court for the Commonwealth of Massachusetts, 184 F.R.D. 10, 13 (D. Maine 1999). The U.S. Attorney's Brief (at 8) reports that other Department of Justice components, such as the New England Bank Fraud Task Force, applied for permission to serve another 122 subpoenas during that same period of time. All 321 requests were granted by the Assistant Attorney General. The U.S. Attorney's Brief also reports that no judicial officer has rejected its request for issuance of an attorney subpoena since implementation of PF 15.

After adoption of PF 15, the bar associations received complaints from the bar that the problems to which PF 15 was directed had not abated. In some instances, prosecutors have simply chosen to withdraw the subpoenas, rather than provoke the judicial tongue-lashings that earlier escapades had prompted. See e.g. In Re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985); In Re Grand Jury Matters, 593 F. Supp. 103 (D.N.H. 1984), aff'd, 751 F.2d 13 (1st Cir. 1984).

In other instances, this Court was confronted with problems

concerning grand jury appearances by lawyers. For instance, in United States v. Edgar, 82 F.3d 499, 505-09 (1st Cir. 1996), the government presented the defendant's former attorney to the grand jury.[1/] Notwithstanding the fact that the attorney/witness twice invoked the attorney-client privilege as a reason to refrain from answering particular questions, the Assistant U.S. Attorney (from this district) succeeded in persuading the attorney/witness to breach the privilege without seeking any judicial ruling. The client was unaware of his former attorney's testimony, and there was no judicial resolution of the attorney's short-lived claim of privilege. 82 F.3d at 506.

This Court was troubled by what occurred in front of the grand jury that indicted Mr. Edgar. It reviewed the "long simmering dispute" between the bar and federal prosecutors over the Justice Department's practice of hauling attorneys before grand juries, and noted the potential, identified in the Klubock decisions, for a "chilling wedge" to be driven between an attorney and his client (or former client). 82 F.3d at 507. The client may be "uncertain" or "suspicious" "that his legitimate trust in his attorney may be subject to betrayal." The Court noted the potential for "immediate conflict of interests" between the attorney-witness and the client, id., and observed that the service of a subpoena on an attorney carries with it the implicit threat that the attorney will become a target. 82 F.3d at 508.

1/ One of the improvements in Rule 3.8(f) over PF 15 is that it explicitly extends its coverage to former attorneys. In Edgar, the government argued that PF 15 did not cover Mr. Edgar's former civil counsel at the grand jury because he no longer represented the defendant.

The Court explained that the attorney-witness, the prosecutor, and the court have responsibilities for protecting the client's attorney-client privilege. The attorney must assert the privilege in order to protect the confidences of the client. The prosecutor must halt questioning if the attorney-witness invokes the privilege, and seek a judicial determination of the validity of the claim of privilege. Finally, the district judge must make a disinterested determination of the issue. 82 F.3d at 508-09.[2/]

Justice Holmes observed that the life of the law is experience. The experience of the District Court in the years since adoption of PF 15 has shown that improvement is needed. Rule 3.8(f) accomplishes this by making three substantive changes. First, it explicitly provides that the Rule applies to subpoenas directed to present attorneys as well as <u>former</u> attorneys. Second, it directs and cabins the ethical considerations that a prosecutor must confront before seeking permission to serve a subpoena on an attorney or former attorney. Third, it explicitly provides that the attorney-witness has an opportunity to request an adversary hearing to contest service of the subpoena.

Rule 3.8(f) provides:

> The prosecutor in a criminal case shall:
>
> . . .
>
> (a) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:

[2/] The Massachusetts Supreme Judicial Court interpreted PF 15 in <u>In the Matter of a Grand Jury Investigation</u>, 407 Mass. 916, 556 N.E.2d 363 (1990).

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

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

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

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

The lower court rejected a challenge brought by the United States Attorney and another federal prosecutor. Stern v. Supreme Judicial Court for the Commonwealth of Massachusetts, 184 F.R.D. 10, 13 (D. Maine 1999). The court found that Rule 3.8(f), when properly interpreted, does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2). 184 F.R.D. at 16. That is the interpretation of defendant-appellee Bar Counsel, who is the party responsible for prosecuting violations of the Rules of Professional Conduct on behalf of the District Court. 184 F.R.D. at 16 n.11, 12 n.3. The lower court found no reason to read Rule 3.8(f) in some different fashion, given the language of the rule itself, and the absence of any reason to suppose that it would be interpreted differently.

The lower court went on to hold that Rule 3.8(f)(2)'s requirement of prior judicial approval is substantively no different from the requirement of prior judicial approval in the similar rule that was upheld in Whitehouse. 184 F.R.D. at 17-18.

The court also found that the requirement that there be an opportunity for an adversarial hearing does not render Rule 3.8(f) invalid. The substance of the disclosure required at the adversarial hearing is no different from that required to survive a motion to quash. "The same degree and timing of disclosure already has been upheld by the First Circuit in Whitehouse." Id. The court also noted that an in camera hearing could be held to protect material from public disclosure, and, in a particular case, if the facts warrant it, some material could be submitted on an ex parte basis. Id. The lower court also rejected the U.S. Attorney's claim that an opportunity for an adversary hearing would cause delays that would interfere with grand jury investigations. 184 F.R.D. at 18-19 and 19 n.15.

Finally, the court rejected the U.S. Attorney's challenge to the ethical criteria enumerated in Rule 3.8(f)(1). Relying on Whitehouse, the court found that the District Court has the power to adopt ethical rules governing attorneys so long as they do not violate the Constitution or a statute. It found no such violations. 184 F.R.D. at 19; Whitehouse, 53 F.3d at 1356, 1364.

ARGUMENT

I. THE ADOPTION OF RULE 3.8(f) WAS A PROPER EXERCISE OF THE AUTHORITY OF THE DISTRICT COURT TO REGULATE THE CONDUCT OF ATTORNEYS APPEARING BEFORE IT.

On appeal, the U.S. Attorney argues that Rule 3.8(f) is inconsistent with federal law because the requirements in 3.8(f)(1) that the evidence be "essential" and that there be "no other feasible alternative" to obtain the information are inconsistent with federal law, and in particular, with Rule 17 of the Federal Rules of Criminal Procedure. The plaintiff attacks the lower court's reading of the Rule that the adversary hearing requirement of (f)(2) is independent of the ethical considerations outlined in (f)(1). Finally, the U.S. Attorney argues that the standards set forth in (f)(1) are not really ethical standards at all, and thus are not saved by the enactment of the Citizens' Protection Act, 28 U.S.C. § 530B.

Each of these arguments should be rejected. As interpreted by the lower court and as urged by defendant Bar Counsel, there is no inconsistency between Rule 3.8 and federal law in general or Fed. R. Crim. P. 17 in particular. The plaintiff relies on a footnote in this Court's Whitehouse opinion to suggest that the requirements that the information be essential and there be no other feasible alternative to obtain the information are inconsistent with Rule 17. See 53 F.3d at 1358 n.12 and Appendix A to the Whitehouse decision. In Whitehouse, this Court observed that the Rhode Island version of Rule 3.8(f) did not limit the grand jury's broad investigative power in the least. While the Rule governs issuance

of subpoenas by attorneys, it does not alter the power of the grand jury to issue subpoenas independently of the prosecutor. 53 F.3d at 1357. In upholding the Rhode Island Rule, the Court observed that the Comment to the Rule (which contains language indicating that judicial approval should not be granted unless the evidence sought is essential and there is no other feasible alternative to obtain the evidence) was not binding, and expressed confidence that district judges would apply the rule consistently with its text and applicable law. 53 F.3d at 1358 n.12. There is no reason to speculate that the district judges in the District of Massachusetts are any less able to interpret the law.

The U.S. Attorney persists in arguing that the lower court in this case incorrectly interpreted Rule 3.8(f) in order to avoid offending the Court's concerns in Whitehouse that the Rhode Island Comment might render the Rhode Island Rule inconsistent with Rule 17. However, the challenge to the lower court's reading of Rule 3.8(f) is unconvincing. Simply because some commentators have adopted a different interpretation does not require the Massachusetts bar disciplinary authorities or the District Court to follow that interpretation. Judge Brody adopted a plausible reading that (f)(1) is an ethical rule meant to inform the exercise of the prosecutor's decision-making process in deciding whether to seek leave of court to serve an attorney subpoena. As interpreted, there is no inconsistency with Rule 17, and there is no reason to disturb that ruling.

The argument that the standard in Rule 3.8(f)(1) is not really an ethics rule is foreclosed by Whitehouse. The Court there

explicitly held that a district court may regulate the issuance of subpoenas to attorney-witnesses under the guise of the ethical rules, and rejected the very same argument made in this case. And if the Rule under review here is an ethics rule, then the recent enactment of the Citizens' Protection Act, 28 U.S.C. § 530B, demonstrates Congress' determination that such rules are appropriate and proper.

A. The District Court Had the Authority to Adopt an Ethical Rule Which Protects the Attorney-Client Relationship Against Misuse of the Grand Jury Subpoena Power.

Our adversary system of litigation is premised on the notion that just and reliable results are best obtained when each side is represented by a zealous and diligent advocate, with each permitted to strike hard — but fair — blows at the other. Central to the system is the attorney-client relationship, by which the attorney owes a duty of undivided loyalty to and is required to preserve the confidences of the client. In criminal cases, the duties of counsel are adjusted to reflect the fact that all the massive force of the government is pitted against the individual: while the attorney for the accused owes undivided loyalty to the client, the duty of the prosecutor is to justice, as well as to the state.

The district court has the well-established authority to adopt rules for the conduct of litigation which are designed to protect the integrity of the adversary system. Since the first Judiciary Act of 1789, which established the federal judicial system, the lower federal courts have had the statutory power to prescribe standards for admission to the bar and to regulate the conduct of

attorneys who appear before them. 28 U.S.C. § 1654; Judiciary Act of 1789, c. 20, § 35, 1 Stat. 73. There is inherent authority as well. Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824); Ex Parte Garland, 71 U.S. (4 Wall) 333, 378-379 (1867); In Re Snyder, 472 U.S. 634, 643 (1985). See Kevlick v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984) and cases cited.

The issue presented here is simply whether or not the adoption of Rule 3.8(f) was within the traditionally broad regulatory power of the district court. Rule 3.8(f) is well within the authority of the district court to regulate advocacy. Under that authority, virtually every district court in the country has adopted some version of the American Bar Association Model Code of Professional Responsibility (hereinafter "Model Code") or the ABA Model Rules of Professional Conduct (hereinafter "Model Rules"), either directly or by incorporation of the rules of the highest court of the state.

The rules of professional conduct pertaining to advocacy are specifically designed to support the adversary system. Their most important function is to regulate unilateral conduct of counsel which can threaten the adversary balance or undermine the reliability of the proceedings. In this respect the advocacy rules are complementary to the rules of procedure and evidence and to court orders regulating the proceedings in any given case. The overall thrust of the advocacy rules is to channel the controversy into a test of the merits, within the forum and under the control of the judge, as opposed to a contest of strength and cunning, played out outside of court and beyond the judge's reach.

There are two principal categories of advocacy rules which

serve this function. First, there are rules against foul play. Thus, for example, it is a disciplinary offense for an attorney to take action designed to harass an opponent, to obtain evidence by illegal means, to unlawfully suppress or obstruct access to evidence, to make a false representation, to present fraudulent evidence, or to pay a witness for testimony. The lawyer may not ordinarily have ex parte communications with the court. The lawyer is required to disclose the existence of adverse controlling legal authority. The lawyer is barred from making certain types of extrajudicial public statements which can unfairly influence the proceedings. And consistent with the special concern for the rights of the criminal defendant, there are special rules for prosecutors, underlining the prosecutor's obligation to ensure that justice prevails. The prosecutor may not institute charges without probable cause, and is required to produce exculpatory evidence. The prosecutor is prohibited from summonsing persons for interview by issuing invalid "desk subpoenas."

Second, there are the rules which ensure the undivided loyalty of lawyer to client. These rules require the lawyer to preserve client information even when it is not protected by privilege. And they extensively regulate conflict of interest and sometimes require disqualification even when all clients consent to multiple representation.

Rule 3.8(f) performs the classic disciplinary role of regulating attorney conduct which takes place outside of open court. A basic aspect of the subpoena power is that, in the absence of a rule such as Rule 3.8(f), it operates in the first

instance at the unilateral command of the prosecutor, completely off the record, shrouded in grand jury secrecy, and beyond court control. Rule 3.8(f) serves both of the traditional interests of the advocacy rules: to prevent foul play by the opposing attorney, and to prevent betrayal by one's own. The rule is intended to prevent the prosecutor from precipitating the breakdown of the attorney-client relationship and to minimize the risk of attorney disloyalty. Furthermore, it acts to deter other types of subpoena abuse, such as where the compulsory process would be used to harass, intimidate, or exhaust the prosecutor's legal adversary.

That there is no Sixth Amendment right to counsel at the grand jury stage is of no moment. First of all, persons who are the subjects of grand jury investigation are often already under indictment, and the effect of an unjustified grand jury subpoena on the client's right to counsel in the pending case is certainly a matter of Sixth Amendment concern. See In Re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984).

Second, even when there are no other pending charges, there is still power under the Fifth Amendment to protect a person under investigation from certain unfair practices. See Stovall v. Denno, 388 U.S. 293, 301-302 (1967) (due process review of pre-indictment identification procedure); United States v. Marion, 404 U.S. 307, 324 (1971) (due process review of pre-indictment delay where there is showing of substantial prejudice resulting from intentional tactical delay). Third, in any event, persons subject to grand jury investigation in fact have attorney-client relationships which are protected by both federal rules and common law. And these

bodies of law not only create privileges for attorney-client communications, Upjohn Co. V. United States, 449 U.S. 383, 389 (1981), and work product information, United States v. Nobles, 422 U.S. 225 (1975), but also provide for motions to quash subpoenas which seek such privileged material — a procedure which is premised on a recognition of the need to protect the attorney-client relationship at the grand jury stage and, which, moreover, contemplates the actual involvement of counsel at that stage.

More fundamentally, whether or not the right to have counsel during the grand jury stage is secured by constitutional provision, or by statute, common law, rule of court, or simply by long-standing custom, the right is universally recognized and respected. Accordingly, there can be no question that the district court has the power and authority to protect that right. Indeed, the government invokes this very same power and authority when it moves the district court to disqualify counsel at the grand jury stage on the ground of conflict of interest. It cannot be that the power exists only when the government urges it.

B. Rule 3.8(f) is a Valid Exercise of the District Court's Power to Protect the Attorney-Client Relationship.

1. Rule 3.8(f) is intended to prevent the realization of very serious evils which threaten the heart of the attorney-client relationship and the adversary system.

Any analysis of the validity of Rule 3.8(f) necessarily begins with an assessment of the evil it was designed to prevent. In adopting the rule, the Justices of the Supreme Judicial Court and the Judges of the District Court clearly recognized the destructive potential of the subpoena aimed directly at an ongoing attorney-client relationship and the dangers presented by permitting unbridled unilateral use of this power by a prosecutor against his adversary. It does not require much imagination to realize that the power to compel an opposing counsel to enter the grand jury room and to there submit to a secret interrogation about his or her client, is a weapon of an entirely different nature and order than any other in the prosecutor's arsenal. Manifestly, the attorney-client subpoena is so potent a weapon, and its mere service so consequential, that it can cause the total collapse of the defense case — by irreparably compromising the rights of the defendant, or by undermining the defendant's trust in the lawyer, or by destroying the capacity of defense counsel to defend.

Subpoenas to attorneys to obtain information about clients create a whole panoply of threats to and stresses on the attorney-client relationship, none of which can be protected adequately by sole resort to a motion to quash under Fed. R. Crim. P. 17(c).

First, and most directly, the subpoena creates the risk that

the subpoenaed attorney will betray the client by disclosing confidential information which can and should remain confidential. The nub of the problem is that attorneys do not always move to quash even when they should. Indeed, a subpoenaed attorney may not even inform the client. In such cases the subpoena becomes self-executing and the existence of a Rule 17(c) remedy is completely irrelevant from the client's point of view. See e.g. United States v. Edgar, 82 F.3d 499 (1st Cir. 1996).

There are reasons for this. The subpoena creates intense pressure. The attorney may have been threatened with, or fear, investigation of himself and may wish to avoid confrontation or publicity. He may not have the money, the energy, the time, or the knowledge and ability, to wage the aggressive and complicated litigation battle that subpoena litigation frequently involves. He may be hesitant to risk contempt, which may well be entailed at a later time if the client's appellate rights are to be saved.

The problem is not ameliorated by the Justice Department Guidelines, in which the government avows that it will not seek privileged information, that it will weigh the rights of the defendant, and so forth. The guidelines, by their own terms, are unenforceable. Moreover, the guidelines are inadequate because the government has an extremely expansive view of what types of attorney-client information are discoverable by and should be sought by a grand jury. In one case in this Circuit, for example, notwithstanding the guidelines, prosecutors subpoenaed the entire client files of lawyers representing certain prospective immigrants on the basis of the government's determination that immigration

petitions filed with the assistance of the lawyers were fraudulent — the very issue that was in litigation. The subpoena was quashed. In Re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985). While prosecutors are surely entitled to argue for extensions in the law in favor of the government, such arguments cannot form the unilateral basis for the fait accompli of destroying the client's privilege.

Second, attorney-client subpoenas affect both the quality of and the choice of counsel. As soon as an attorney becomes a witness, he begins to have his own interest in the proceedings, and his interest may well diverge from that of the client. This conflict may cause the attorney to sacrifice the client's interest. Alternatively, it may cause him to withdraw, either because of the conflict, or merely because he has become a witness, on account of Rule 3.7 (prohibiting attorneys as witnesses). And even if the client wished the lawyer to stay, the government may use the attorney's witness status as grounds to move to disqualify him. See United States v. Castellano, 610 F. Supp. 1151 (S.D.N.Y. 1985).

Third, even if counsel does his duty, and even if the attorney-client relationship survives all the stresses placed on it, the subpoena typically "open[s] a `second front' when the defendant has neither the time nor the resources to successfully fight on two battlegrounds." Rudolf and Maher, "The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client," Criminal Justice, Vol. 1, No. 1, 15 at p. 16 (Spring 1986). An attorney-client subpoena can thoroughly disrupt the representation of the client. Subpoena litigation is customarily fast-track, intensive

litigation which diverts counsel from the task of representation and often entails great expense.

Fourth, the power to bring an attorney into the grand jury room to investigate the attorney's representation of a client has an enormously intimidating effect. And this may well be the very point for an unscrupulous prosecutor. See In Re Grand Jury Matters, 593 F. Supp. 103 (D.N.H. 1984), aff'd, 751 F.2d 13 (1st Cir. 1984) (finding of harassment); In Re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (finding that subpoenas were unreasonable and oppressive).

Fifth, if during the course of the representation, the attorney disappears into the grand jury room to answer questions about the client, the client's confidence in either the attorney's loyalty or his ability to protect the client and to maintain the client's confidences will be shaken. Thus would be eroded the very relationship of trust and confidence which forms the basis for the attorney-client privilege. See Fisher v. United States, 425 U.S. 391, 403 (1976).

In sum, it is simply undeniable that subpoenas to lawyers for information about their clients can seriously threaten the attorney-client relationship, and that the forces that combine to create the threat are set in motion from the moment a subpoena is served. Indeed, the government does not deny it, as the Department of Justice Guidelines were adopted precisely "[b]ecause of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client."

2. Rule 3.8(f) is a reasonable response to the threatened evil.

Rule 3.8(f) is an extremely reasonable measure. It is responsive to the problem. Yet it imposes an exceedingly minimal burden upon the prosecuting attorney. Overall, it is an effective rule, which achieves significant protection for the attorney-client relationship without adversely affecting any legitimate prosecutorial interest.

a. Rule 3.8(f) imposes a minimal burden on the work of the prosecuting attorney.

In reality, the rule scarcely adds any burden to the work of the prosecution. It is essential to note here what the rule does not do. It does not prohibit the government from issuing subpoenas to attorneys for information on their clients. It does not create any right to judicial review where one is not already available under federal law. There is no dispute that an attorney/witness already has the right to move to quash any subpoena under Fed. R. Crim. P. 17. Moreover, the rule creates no new substantive grounds to quash subpoenas that do not already exist under federal law.

The rule causes no appreciable delay. The rule neither requires nor creates the specter of "mini-trials." Nothing in the rule mandates any kind of evidentiary hearing. And the prosecutor will have already assembled the information needed for such a review in order to obtain the administrative approval required by the Justice Department guidelines. Moreover, nothing in the rule prohibits the prosecutor from making an ex parte showing in an

appropriate case.

Obviously, what must be shown to obtain advance permission will vary on a case-by-case basis. Some cases will require hardly more than what is shown on the face of the subpoena. If, for example, the subpoena seeks public land records in the hands of a real estate lawyer who does not represent the client in any ongoing proceeding, no more than those facts may be required. On the other hand, if the prosecutor subpoenas a defense lawyer on the eve of a pending criminal trial, see In Re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984), or seeks production of a client's entire file, see In Re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985), more of a showing may be required. Sometimes the circumstances of a case will call for greater inquiry; on other occasions, lesser.

In short, in the absence of any further direction from the District Court for any case or class of cases, there is no reason why Rule 3.8(f) cannot be satisfied by the same showing necessary to obtain Justice Department approval, or an even lesser showing. Indeed, as an ethical rule, Rule 3.8(f) calls upon the prosecutor merely to set forth the reasons he, in good faith, believes to be sufficient to dispel any legitimate question about the propriety of the subpoena which he reasonably knows the witness/attorney or client could raise. Clearly, the ethical prosecutor will have thought through these reasons in any event.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted
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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitations prescribed by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The Brief uses a monospaced font (12 point Courier) containing no more than 10-1/2 characters per inch. According to the line count feature of WordPerfect 8.0, the Brief contains 618 lines of monospaced type, exclusive of the Table of Contents and Table of Authorities.

Charles W. Rankin

CERTIFICATE OF SERVICE

I certify that I have served the foregoing upon counsel of record by mailing one paper copy of the Brief and one computer disk on November 26, 1999 to:

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