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March 6, 2014

Supreme Judicial Court
Standing Advisory Committee on the Rules of Professional Conduct
c/o Senior Attorney Barbara Berenson
John Adams Courthouse
One Pemberton Square
Boston MA 02108

By Electronic Mail to barbara.berenson@sjc.state.ma.us

Re: Proposed Amendments to the Rules of Professional Conduct

Dear Attorney Berenson:

On behalf of the Committee for Public Counsel Services I am pleased to offer comments on the proposed changes to the Rules of Professional Conduct. Our comments are focused on the following rules:

Rule 1.6 Confidentiality

Rule 3.1 Meritorious Claims and Contentions

Rule 3.3 Candor toward the Tribunal (adjudicatory hearings)

Rule 3.5 Impartiality and Decorum of the Tribunal (post-trial contact with jurors)

Rule 3.8 (e)(2) - Special Responsibilities of a Prosecutor

Our detailed comments are attached. Please let me know if you or the Standing Advisory Committee have any questions or need more information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Anthony J. Benedetti".

Anthony J. Benedetti
Chief Counsel

The Committee for Public Counsel Services' Comments on Proposed Amendments to
the Rules of Professional Conduct

March 6, 2014

Proposed changes to Rule 1.6(b) (1)-(2) – Confidentiality

These changes are a marked departure from the current level of protection accorded to confidential communications. CPCS is concerned that further expanding those situations in which a lawyer may breach confidentiality inappropriately erodes the attorney-client relationship. The dissent of Carol Beck, Elizabeth Mulvey, Andrew Perlman, Constance Rudnick and Constance Vecchione sets out our concerns and has our support. As they point out, there is no substantial reason to further erode the confidential relationship between attorney and client. If anything, this relationship should be enhanced and guarded with zeal. Only in that way can we vindicate the right to counsel.

Proposed changes to Rule 3.1 – Meritorious Claims and Contentions

The Advisory Committee has recommended revisions to Rule 3.1 and its Comments, and CPCS supports those changes. In recognition of the fundamental constitutional rights at stake in care and protection proceedings under G.L. c. 119, CPCS also recommends making the following change to the Advisory Committee's proposed version of Comment [3] to Rule 3.1:

The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. The principle underlying the provision that a criminal defense lawyer may put the prosecution to its proof in all circumstances often will have equal application to proceedings in which the involuntary commitment of a client, or the involuntary removal of a child by the state from the custody of his or her parents or guardians, is in issue.

Comment [3] already acknowledges that the involuntary commitment of a client involves the threatened deprivation of an important liberty interest. CPCS proposes the added language to Comment [3] because parents and children face a similar deprivation of liberty in proceedings that are brought by the state under G.L. c. 119 to take custody of children or to terminate parental rights. See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State”). Cf. In re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (noting that termination of parental rights proceedings have been viewed as “tantamount to a ‘civil death penalty’”).

In all such proceedings, children and indigent parents – like persons facing involuntary commitment – have a constitutional and a statutory right to court-appointed counsel. See Dept. of Public Welfare v. J.K.B., 379 Mass. 1, 3 (1979); G.L. c. 119, § 29; G.L. c. 210, § 3(b). The right to counsel entails the right to the effective assistance of that counsel. See Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Parents’ and children’s right to counsel and their right to the effective assistance of counsel necessarily mean the right to have counsel put the state, as petitioner, to its proof before it deprives clients of vital liberty interests. Children also have an important interest in being free from abuse and neglect. The courts cannot properly weigh that interest unless counsel for parents and children zealously advocate for their clients and ensure that the state meets its burden of proof.

The proposed addition to Comment [3] brings Rule 3.1 in line with the common law. In Care and Protection of Valerie, 403 Mass. 317 (1988), the Supreme Judicial Court held that children and indigent parents in care and protection cases have the

same right to present meritless claims and defenses as criminal defendants do under Commonwealth v. Moffett, 383 Mass. 201, 207-09 (1981):

We note the filing of a so-called “*Moffett*” brief in connection with the issue whether there was clear and convincing evidence of the mother’s unfitness. The term is derived from *Commonwealth v. Moffett*, 383 Mass. 201, 207-209 (1981), in which the court set forth guidelines to appointed counsel in a criminal case who, the court said, “should not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.” *Id.* at 207. At the same time, counsel, appointed as well as retained, has the responsibility not to advance groundless contentions. See S.J.C. Rule 3:07, DR 7-102 (A)(2), as appearing in 382 Mass. 785 (1981).

...
We have already held that in care and protection cases, “parents are entitled to the effective assistance of counsel.” *Care & Protection of Stephen*, [401 Mass. 144, 149 (1987)]. We are asked to apply *Moffett* to a care and protection case. We do so.

Care and Protection of Valerie, 403 Mass. at 318. CPCS has long interpreted Valerie and Moffett to extend to the representation of parents and children at trial. It makes little sense to permit counsel to present meritless defenses on appeal but not at the trial level beforehand. Indeed, counsel must present all claims and defenses to the trial court in order to preserve them for appeal. See Adoption of Mary, 414 Mass. 705, 712 (1993).

Proposed changes to Rule 3.3 (b) - Candor Toward the Tribunal

This is a new section which fails to clearly define the scope of its application. The proposal adds the following sections to the rule:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (Emphasis added.)

Although tribunal is defined in Rule 1.1, it is not clear if adjudicative proceedings are limited to those that are heard by a tribunal.

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body

acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Adjudicative proceedings are not defined, but it is assumed by CPCS that it is limited to proceedings before a tribunal as defined in Rule 1.1. To avoid confusion so that the application is clear, we suggest that the first phrase of the proposed rule be amended to read: A lawyer who represents a client in an adjudicative proceeding before a tribunal..."

This will make it clear that the duty to disclose under this Rule does not apply to any other proceeding, especially with administrative agencies. This will not relieve the lawyer of the duties under Rule 3.3(a) or Rule 4.1.

There is support for this amendment in the comments to the rule.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

The comment's examples make it clear that it is the integrity of the tribunal and its processes that is to be protected and respected. The offending conduct must relate to a proceeding before a neutral third party, such as a hearings officer or an arbitrator. This comment also makes clear, as the rule does not, that the criminal or fraudulent conduct must be related to the proceeding and it does not limit the scope of confidentiality found in Rule 1.6.

Proposed changes to Rule 3.5 - Impartiality and Decorum of the Tribunal

The Advisory Committee has submitted two alternative revisions to Rule 3.5. The first alternative, which was unanimously supported by the Advisory Committee, recommends adoption of Rule 3.5 of the ABA Model Rules of Professional Conduct, and would permit attorneys to initiate communications with jurors after trial. CPCS, as the Commonwealth's agency principally charged with the protection of criminal defendants' due process and other fair trial rights, urges the Court to adopt the ABA Model Rule, as is unanimously recommended by the Advisory Committee.

The present Massachusetts Rule of Professional Conduct 3.5(d) virtually prohibits any meaningful or likely communication with jurors after a trial. The rule is a rarity in this country, as the majority of jurisdictions have enacted ethical rules about post-trial juror contact consistent with the ABA Model Rule 3.5.¹ The rule now in effect in Massachusetts deprives litigants, especially indigent litigants, of what is often their only chance to unearth and present to the court extraneous influences that have tainted the verdict. ABA Model Rule 3.5 contains no such prohibition, and provides meaningful and adequate safeguards against wrongdoing by unethical attorneys.

Adoption of Model Rule 3.5 is necessary because, notwithstanding the Trial Court's employment of extensive protective measures, in terms of jury instructions and other safeguards, sometimes extraneous influences taint jury verdicts. While such occurrences are not epidemic, or even widespread, they are real. The experience of other jurisdictions with lawyer-initiated contact uncovering rare but grave instances of

¹ Andrew Perlman, *Post-Trial juror contact in Massachusetts: a history, some problems and a proposal for reform*. Mass. B. Assoc. (2009). (By 2008, 32 states had adopted the ABA rule, some variation of it, or no rule at all. These included Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas Louisiana, Maine, Maryland, Minnesota, Nebraska, Nevada, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.) Since that time, at least Hawaii and New Jersey have also adopted rules that foster lawyer-initiated communications with jurors.

unlawfully tainted verdicts, in conjunction with the improprieties uncovered as a result of lawyer-initiated contact in Commonwealth v. Solis, 407 Mass. 398 (1990), itself, signals that adoption of Model Rule 3.5 is an important change, particularly in criminal matters where due process and a convicted person's liberty interest are at stake.

Prior to 1991, the rule in Massachusetts regarding post-trial contact with jurors was consistent with the ABA Model Rule and the majority of other jurisdictions' juror-contact rules. As originally enacted in 1972, the Massachusetts disciplinary rule governing post-verdict contact with jurors provided:

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his action in future jury service.

Pursuant to an unusual procedural history that began with this Court's decision in Commonwealth v. Fidler, 377 Mass. 192 (1978), and continuing with its decision in Commonwealth v. Solis, 407 Mass. 398 (1990), a new rule was adopted by a divided Court on August 26, 1991. This new version of DR 7-108(D) prohibited lawyers from initiating any post-verdict communications with jurors absent "leave of court for good cause shown[.]" Current Mass. R. Prof. C. 3.5(d) continues the prohibition formerly contained in DR 7-108(D).

There was strong opposition to the enactment of the current prohibition. As former Supreme Judicial Court Chief Justice Herbert Wilkins said in a letter to Massachusetts Lawyers Weekly on August 26, 1991: "The [proposed restriction] will inhibit counsel's attempts to discover flaws in the administration of justice... [and] may impinge on rights of free speech, the effective assistance of counsel, and due process. It will surely tend

to inhibit the appropriate disclosure of misconduct in the administration of justice.” This Court itself has acknowledged that the current rule affords “no process within the defendant’s control, by which the defendant can seek to discover whether there were extraneous influences on the jury....” Solis, 407 Mass. at 404.

In the years since this Court adopted the prohibition, Massachusetts has stood as an outlier among the vast majority of states by restricting the ability of attorneys to gather admissible evidence in defense of their clients who were convicted in trials that denied them their right to a fair jury trial and to the due process of law.² Now, over twenty years later, this Court has the opportunity to bring greater justice and more transparency to trial by jury in the Commonwealth of Massachusetts by adoption of the Model Rule. CPCS urges the Court to reconsider the three principal constitutional concerns raised by Justice Wilkins, consider the lack of evidence that other jurisdictions have experienced any significant problems or concerns with their allowance of lawyer-initiated post-trial juror contact, and revise Rule 3.5(d) to accord with the ABA Model Rule.

Adoption of Model Rule 3.5 might well result in some verdicts being challenged that would otherwise remain undisturbed. It can be expected to increase the number of motions for new trial based on juror misconduct or the intrusion of improper influences and extraneous evidence into jury deliberations. This is likely inevitable. An examination of the law and practice in other states, however, demonstrates that Model Rule 3.5 can co-exist with a respect for the finality of verdicts, the need for secrecy and candor in jury deliberations, and the desire to safeguard all citizens who serve as jurors from harassment, coercion, and duress.

² Id.

It is important to acknowledge that the current rule poses little problem for those few criminal defendants who possess the wealth or notoriety which might well produce either independent juror pronouncements or media-ferreted disclosures. It does, however, shut off forever the chance that most poor persons would have any meaningful opportunity to uncover extraneous influences that could invalidate their convictions. Such a result is offensive to our common quest for equal justice, and is destructive of our common goal to promote the integrity of the jury deliberation process. This Court should look to the practice in Massachusetts before the 1991 change to the rules, as well as cases in other jurisdictions, in considering this proposed revision. The stories of defendants whose rights to an impartial jury were vindicated as a result of communications lawyers had with jurors in the wake of tainted verdicts are compelling.

One need go no further than the Solis case itself to illustrate the point. There a court officer usurped judicial authority with respect to the deliberating jury's request for a transcript, and its announcement that it was deadlocked on the lesser charge. Had Solis' public defender not spoken with one of the jurors shortly after the verdict, the court officer's misconduct would likely have never been discovered, and the illegal verdict would never have been able to be challenged. Id.

In Nevers v. Killinger, 990 F. Supp. 844 (E.D. Mich. 1997), a murder conviction was vacated when defense counsel was speaking with jurors and was told by some that they had been exposed to a range of extraneous information during deliberations, including television coverage which suggested the City of Detroit was on the verge of riot in anticipation that the defendants, two police officers accused of murder in the death of a suspect, might be acquitted. The Court stated that it "[could not] imagine a more prejudicial extraneous influence than that of a juror discovering that the City he or she

resides in is bracing for a riot — including activating the National Guard and closing freeways — in the event the defendant on whose jury you sit is acquitted. The magnitude of such extraneous influence cannot be overlooked.” *Id.*, at 871. This “extraneous influence” was brought to light only because an attorney, acting within the authority of the Michigan Rules of Professional Conduct, had initiated conversations with some jurors and by so doing learned of the violation.

In Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002), a death sentence was vacated after attorneys spoke, in accordance with the North Carolina Rules of Professional Conduct, with jurors who disclosed that a husband of one juror had exerted intense and unyielding pressure on his wife to vote for the death penalty.

There are numerous additional cases where the accused’s fundamental right to a fair and unbiased jury was jeopardized because of grave improprieties that occurred in the course of jury deliberations. A review of this case law establishes the need for enactment of Model Rule 3.5.³

³ “Extraneous influence” claims rising to the level of Sixth Amendment violation are undeniably serious matters. A smattering of federal habeas cases dealing with such claims reveal various circumstances where it is hard to imagine a trial judge not welcoming a chance to weigh the admissible evidence and the legal arguments of counsel to determine if a verdict were indeed constitutionally infirm. *See, e.g., Bauberger v. Haynes*, 2009 U.S. Dist. LEXIS 100216 (M.D.N.C. October 29, 2009) (murder conviction; juror brought dictionary to jury room that was used by jurors to discern meanings of various words included in malice instructions); *Novelo v. Yates*, 2009 U.S. Dist. LEXIS 73376 (C.D. Cal. June 18, 2009) (extraneous influence from juror reading of news accounts); *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005) (juror learned during trial that defendant had submitted to polygraph test, evidence of which had not been admitted). And there are numerous cases where the extraneous influence concerned the defendant’s “bad character” or criminal past. In *Parker v. Gladden*, 385 U.S. 363 (1966), the Supreme Court held that the defendant’s Sixth Amendment rights were violated as there was “extreme prejudice” where the bailiff remarked to some jurors that the defendant was a “wicked fellow,” that he was guilty, and that if there was anything wrong in finding defendant guilty, the Supreme Court would correct it. *See also, e.g., Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995) (granting habeas petition where one juror informed others of the defendant’s violent past); *Jeffries v. Blodgett* (Jeffries I), 5 F.3d 1180, 1191 (9th Cir. 1993) (granting habeas petition where the jury learned the defendant previously committed armed robbery); *Dickson v. Sullivan*, 849 F.2d 403, 408-09 (9th Cir. 1988) (granting habeas petition after jurors were told that defendant, on trial for bludgeoning a man to death with a pool cue, had “done something like this before”); *Bonner v. Holt*, 26 F.3d 1081 (11th Cir. 1994) (granting habeas petition where jury learned defendant was a “habitual offender”); *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970) (affirming grant of habeas petition where jurors learned from other jurors that the “defendant had been in trouble all his life; that he had been suspended from the police force in connection with the unauthorized use of a prowler car; that he had been involved in a fight in a tavern; that one of the juror’s husband

Such cases all rest on the bedrock principle that the Sixth Amendment guarantees all criminal defendants the right to a competent and unimpaired jury. Parker v. Gladden, 385 U.S. 363, 364 (1966); Remmer v. United States, 347 U.S. 227, 229 (1954). CPCS urges this Court to recognize that this right is rendered meaningless if a defendant is without the means to protect it.

As noted above, Rule 3.5 as presently written prohibits lawyers from initiating any communication with a member of the jury “without leave of court granted for good cause shown.” Under the current rule, there is “no process within the defendant’ control, by which the defendant can seek to discover whether there were extraneous influences on the jury.... The defendant ... must let the information come to him.” Solis, 407 Mass. at 404. Precisely how an advocate can establish “good cause” in the absence of speaking to the only people who are in a position to know whether “good cause” exists is a legal conundrum. “Requiring attorneys to show good cause in order to interview jurors makes such a challenge enormously difficult by hindering access to information vital to a determination of whether the preventive measures have actually worked, whether the defendant’s rights have adequately been protected.” *Limitations on Attorney Post-Verdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*. 94 Colum. L. Rev. 1950, 1966 (1994).

was an investigator and that he knew all about plaintiff’s background and character, which was bad; and that petitioner’s father was always getting him out of trouble”); United States v. Keating, 147 F.3d 895 (9th Cir. 1998) (on direct appeal, granting new trial where the information about defendant’s prior conviction was available to the jury for some time, was discussed between jurors, and was highly prejudicial); Roman v. Hedgpeth, 2008 U.S. Dist. LEXIS 79509 (C.D. Cal. Oct. 8, 2008) (habeas relief from murder conviction where jurors held redacted transcript of defendant’s police interrogation up to light, revealing discussion of prior convictions and prior incarceration). All of these courts found that the jurors’ consideration of the extrinsic evidence could not have been harmless beyond a reasonable doubt, or found actual prejudice, i.e., that the constitutional error had a substantial and injurious effect or influence in determining the jury’s verdict. It is hard to imagine a criminal justice system not welcoming the enhanced opportunities for jurors who have witnessed such extraneous influences to speak up, should they be so inclined, which an appropriately-regulated, greater allowance of communications with prosecutors and defense counsel, would allow.

No reasonable member of the criminal justice system would think the court officer's conduct in Solis should not have been uncovered. The same can be said for the grave extraneous influence revealed by lawyer-initiated contact in the cases cited above. But the current rule approves the notion that it is sufficient to address only those occasional injustices that might fall into a defendant's lap because he or she had a juror who was bold or assertive or upset enough by the extraneous influence to have sought out an attorney, member of the press, or some other interested party, to reveal the improprieties.

Moreover, common sense would dictate that there may well be unlawful influences that lawyers and judges would recognize, but that the average juror would fail to appreciate. Solis is a perfect example of this. The jurors in Solis could easily have presumed that the court officer, whom they had seen be sworn in by the court to do his duty properly, and act officially with the support and approval of the judge throughout the trial, was allowed to speak to them as he did.

Resistance to the adoption of Model Rule 3.5 has historically been based on four separate and distinct concerns: (1) preventing juror harassment by attorneys; (2) maintaining the secrecy and attendant candor of jury deliberations; (3) promoting the finality of verdicts; and (4) opening the floodgates to post-trial motions for new trials based on tainted deliberations. See, e.g., Fidler, 377 Mass. at 195. While all serious issues, none of these concerns justify retention of the current prohibition against lawyer-initiated contact with jurors after trial, particularly in light of the ethical limitations that would be placed on lawyers by the provisions of the Model Rule.

Regarding the potential for juror harassment, the Model Rule specifically prohibits it. It also prohibits any communication by an attorney that involves misrepresentation,

coercion, or duress. It also prohibits communication by the attorney if the juror indicates that he or she does not wish to speak with the attorney. To ignore the clear language of the Rule is to risk a complaint with the Board of Bar Overseers. Surely judges in the Trial Court would not countenance such misconduct. From the chambers of the trial judge, to the desk of Bar Counsel, the processing of such a complaint would be swift and sure. Moreover, from a purely tactical perspective, it is obvious that juror harassment or coercion is clearly against the interest of an attorney who seeks to engage a juror in conversation after trial.

Moreover, there is no reason to doubt that the express language of the proposed rule, combined with the standard disciplinary-review process, would have any lesser deterrent effect in Rule 3.5 than it does in any other ethical rule.

Historically, these clear and easily understood rules have worked. Prior to 1991, when attorneys in the Commonwealth were permitted to initiate contact with jurors after deliberations (and thus, it can be presumed, there was more post-trial communication with jurors than there is at present), there was not a single recorded complaint regarding juror harassment or the like.⁴ As former Chief Justice Wilkins wrote with characteristic succinctness, “[the prohibition] is intended to deal with a problem that is not shown to exist.”⁵

As an added safeguard, the rules governing communication between counsel and jurors could and should be clearly articulated by the Trial Court in brief model instructions prior to a jury’s discharge. Such instructions make eminent sense and are

⁴ 2006 Report of the MBA’s Jury Communications Task Force n. 6.

⁵ Wilkins, Letter to Massachusetts Lawyers Weekly, August 26, 1991.

recommended by the ABA Standards for Criminal Justice.⁶ A practice and/or requirement that such an instruction be given by the trial judge would remove any surprise element that might be experienced by a juror were a lawyer to approach him or her after a trial, particularly where jurors have been instructed during the trial to neither expect nor engage in contact with any of the lawyers in the trial outside the courtroom.

It is instructive in this vein to consider a similarly serious context where lawyers' adherence to rules of conduct is trusted by this Court. Throughout the 1990's and early 2000's litigation over defendant access to statutorily-privileged treatment records of witnesses in criminal cases bedeviled the Court. In Commonwealth v. Dwyer, 448 Mass. 122 (2006), this Court resolved this tension by requiring that attorneys, acting as officers of the court, sign orders agreeing to be bound by restrictions on disclosure imposed by the trial judge. 448 Mass. at 146. The solution arrived at in Dwyer recognized that attorneys are officers of the court, and stakeholders in the administration of justice, and that the overwhelming majority may be relied upon to follow the rules and abide by their ethical obligations. There is no reason to believe that any different result would obtain with respect to attorneys speaking to jurors than with attorneys handling sensitive treatment records.

In terms of encouraging candor and protecting the secrecy of deliberations, while at the same time ensuring that the floodgates to frivolous litigation are not opened, proposed Massachusetts Rule of Evidence 606 certainly aids these objectives while permitting lawyer-initiated contact with jurors.⁷ Massachusetts evidence law, as

⁶ "At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or member so the press." ABA Standards for Criminal Justice: Discovery and Trial by Jury (3d ed. 1996), Trial by Jury, standard 15-4.3.

⁷ In Commonwealth v. Tavares, 385 Mass. 140, 155 n.25 (1982), the Court stated that Proposed Mass. R. Evid. 606(b)"is the federal rule, and is in accord with the current Massachusetts rule admitting evidence of extraneous information and excluding evidence of mental processes"(quotation and citations omitted).

reflected in Tavares and Proposed Rule 606, narrowly limits the admissibility of any evidence regarding the jury's deliberations to include only extraneous prejudicial information or outside influence that seeped into the jury's deliberations. The present law provides guidance regarding what is, and more importantly, what is not, a proper subject for communication. It sharply narrows the scope of inquiry at any evidentiary hearing on a motion for new trial based on allegations of extraneous influence. Jurors' opinions on evidence, their assessment of credibility, the weight they gave to evidence, and their resolution of conflicts would all fall outside the bounds of proper inquiry. Only extraneous evidence and improper outside influences could be considered.

With respect to all four concerns advanced in support of retention of the current rule, it is important to note that some states have enacted modifications and rules regarding the manner and time in which juror contact may be initiated. New Hampshire, for example, has a rule that prohibits contact with discharged jurors for 30 days.⁸ Hawaii's rule allows attorneys ten days in which to file a petition for relief based on extraneous influences brought to bear on the jury.⁹ Such rules allow for the orderly process of contacting jurors without simultaneously denying defense access to evidence of improper or extraneous prejudicial influences. Moreover, there appears to be no sign that when Massachusetts law in this area diverged from the rest of the country in 1991 proponents of the current prohibition relied on citation to evidence of other jurisdictions having any "floodgates" problems – with respect to either the conduct of lawyers vis-à-vis jurors, or frivolous motion practice. There is simply no reason to believe that trial lawyers behave any differently, i.e., any less ethically in this context than they do in any other context.

⁸ Rule 77-B of the Superior Court of New Hampshire Applicable in Criminal Cases Filed in Superior Court.

⁹ Rule 3.5 Hawaii Rules of Professional Conduct.

Hawaii's path to the adoption of its current rule involves one of the concerns expressed by Justice Wilkins in his opposition to the enactment of the current rule, i.e., that it may "impinge on the rights of free speech."

Prior to 1996, Hawaii limited attorney contact with discharged jurors in a manner not dissimilar to Massachusetts' current rule. In fact, paragraph (b) of Hawaii's then existing rule stated "[a] lawyer shall not communicate ex parte with a [judge, juror, prospective juror, or other official] except as permitted by law...." (This is the language of the paragraph (b) in Massachusetts' current rule.) In Rapp v. Disciplinary Bd. of Hawaii Supreme Court, 916 F. Supp. 1525, 1538 (1996), this language was ruled unconstitutionally vague and overbroad. The Rapp court recognized that there was a compelling interest in preserving the integrity of the trial process by protecting jurors from post-trial harassment and unnecessary intrusion by lawyers, but at the same time was appropriately wary of the notion that any system of prior restraint on the right to free speech "bears a heavy presumption against its constitutional validity." Id. at 1536. The Rule ultimately adopted by the Supreme Court of Hawaii in the wake of the Rapp decision, which requires trial judges to freely give leave to speak with jurors, strikes a balance that recognizes the value of both of these interests.

Proposed Rule 3.8(e)(2) - Special Responsibilities of a Prosecutor

The Advisory Committee recommends retention of the current rule. This rule requires that a prosecutor obtain "judicial approval after an opportunity for an adversarial proceeding" before issuing a subpoena to a lawyer to obtain evidence about that lawyer's past or present client.¹⁰ The provision would, pursuant to the Advisory

¹⁰ A prosecutor also must not subpoena a lawyer unless the prosecutor reasonably believes that: "(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 . . ." Rule 3.8(f)(1).

Committee's recommendations, appear renumbered as Rule 3.8(e)(2), but otherwise remain unchanged. CPCS agrees with the Committee and urges the Court to retain the present language of Rule 3.8(f)(2). CPCS does so for the reasons set forth in the Committee's Report. CPCS's supplemental arguments are set forth below.

As a practical matter, the protection of the client-lawyer relationship, which all agree is of utmost importance, is well served by the current ethical rule, and it makes eminent sense to retain the current restrictions on the circumstances in which, and the process by which, a prosecutor may seek to force evidence from an attorney.

It is important to note that the issues addressed by the current ethical rule are not adequately addressed by Mass. R. Crim. P. 17, which governs motions to quash subpoenas. The two rules are neither duplicative, nor inconsistent. The first is an ethical rule designed to curtail prosecutors from intruding into the client-lawyer relationships of persons they are prosecuting. This subject matter is appropriate as an ethical rule. Our ethical rules are replete with directives as to how to conduct one's self with respect to other parties and their lawyers, and those rules are an appropriate place to set limitations on a prosecutor's conduct vis-à-vis the lawyer of a person he or she is prosecuting. In contrast, Rule 17 is a procedural rule that concerns, among other things, motions to quash subpoenas that have already issued. The standards set forth in the two rules are different, and the distinct judicial inquiries that the rules provide for are both necessary and reasonable in the unusual circumstance where a prosecutor seeks to intrude upon a criminal defendant's client-lawyer relationship.

The present Comment [4] to Rule 3.8 recognizes what is not reasonably disputed, i.e., that a lawyer subpoena concerning a client – be the client a subject of a Grand Jury presentment or an already charged criminal defendant awaiting trial – inherently causes

an intrusion into the client-lawyer relationship. The Comment reads: “Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.” Any such intrusion should be countenanced only upon careful review. The crux of the present system of judicial inquiry is whether, in the circumstances of the particular case and intended subpoena, the triggering mechanism behind such an intrusion (the issuance of a subpoena) is allowable as an ethical matter for the prosecutor who wants to pull that tactical trigger.

Where a motion to quash pursuant to Rule 17 and the attendant hearing is expected if a subpoena actually issues, the Rule 3.8 “adversarial proceeding” is only a preliminary hearing at which the intention of the prosecutor is put to a test. If the prosecutor prevails and a subpoena is authorized, then presumably the lawyer sets out to prepare for how to respond to the actual subpoena, and/or litigate the actual motion(s) to quash. If the subpoena is for documents and tangible things, that process will then in most cases require the lawyer to engage in a review of his or her possessions for all responsive materials. Presumably that review should and will in many circumstances involve the client. If the subpoena is for testimony, the lawyer should then as well discuss with the client how and in what circumstances the lawyer will respond to questioning (i.e., whether to invoke attorney-client or other privileges), whether there has arisen or is likely to arise a conflict of interest that the subpoena’s issuance may have engendered, and whether and when new counsel should be retained by the client (or an indigent client should seek appointment of new counsel). The level of intrusion that such discussions would have on the client-lawyer relationship, and the risk of distrust by the client that could well be created by the subpoena, cannot be overstated.

Since such circumstances inherently intrude on the client-lawyer relationship, and because no such intrusion should be permitted without the requirements presently set forth in Rule 3.8(f)(1) being satisfied, i.e., without a “genuine need” to cause the intrusion, the pre-subpoena judicial approval and adversarial proceeding requirements should remain in effect. If the prosecutor fails at a Rule 3.8(f) hearing to make the showing required then the intended intrusion into the client-lawyer relationship is over, early on in the process. The lawyer and client need not delve further into what may well be complex and laborious considerations of the evidence sought by the prosecutor (be it testimony and/or documents or other tangible things). In such a case, the lawyer and client likely will no longer need to consider further the possible replacement of the lawyer.

The overarching goal of precluding unnecessary intrusion into the criminal defendant’s relationship with his attorney is served well at present. A zealous prosecutor with weak arguments at the early stage of the process may well be prohibited from going further, and there will have been little or no intrusion into the client-lawyer relationship, and thus little or no potential disruption of that relationship. The present requirement of the preliminary judicial analysis of the prosecutor’s professional conduct in seeking to exact evidence from his target’s lawyer is invaluable, and may well curtail any harmful intrusion on the client-lawyer relationship.

Notably, the position that the judicial-approval requirement for a lawyer subpoena is more appropriately housed in the Rules of Criminal Procedure is discussed in the dissent. While there may be no glaring or significant problem in moving the safeguards of the client-lawyer relationship that are presently set forth in Rule 3.8(f)(2) to the procedural rules, CPCS strongly objects to any change to Rule 3.8(f)(2) unless and until

all of those precautions are restated as a procedural rule or rules. Procedural rules changes often take considerable time to be studied and debated, and involve a different Advisory Committee to the Court. Considering the significance of the issue at hand (protection of the client-attorney relationship and the trust, confidentiality, and privileges that are central to that relationship), the requirements of the current Rule 3.8(f) should remain unchanged at this time.