



THE COMMONWEALTH OF MASSACHUSETTS  
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March 7, 2014

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

Dear Ms. Berenson:

The Office of Attorney General Martha Coakley appreciates the opportunity to comment on the rule changes proposed by the Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct. As the Commonwealth's chief law enforcement agency, our office has a particular interest in Rule 3.8's provisions governing prosecutors and thus focuses on the proposed revisions to that rule.

We applaud the Committee's efforts to clarify the rules regulating prosecutors, and to ensure that they function at the highest levels of ethics and professionalism, respect the relationships between defendants and their counsel, and recognize their own responsibility to prevent the punishment of the innocent. By this letter, we respectfully offer suggestions for how the Committee's goals in revising Rule 3.8 can be achieved even more effectively.

**Proposed Rule 3.8(a) – Threatening to Prosecute**

To begin, we appreciate the apparent intent behind the provision of Proposed Rule 3.8(a) requiring prosecutors to "refrain from . . . threatening to prosecute a charge that the prosecutor knows is not supported by probable cause." However, we are concerned that, absent clarification, prosecutors could be deterred from taking action, or be accused of impropriety, in situations beyond those about which the Committee was likely most concerned. The proposed rule would seemingly bar a prosecutor from referring to the potential for prosecution where she has not yet found probable cause, but does have valid reasons to believe probable cause would be uncovered through further investigation. The Committee should clarify, whether in the rule's text or comments, that its bar does not extend to such circumstances.

### **Proposed Rule 3.8(e) – Subpoenas to Attorneys**

We suggest that the Committee take this opportunity to add certain comments to Proposed Rule 3.8(e), which, of course, corresponds to current Rule 3.8(f). Each of these comments is consistent with the apparent intent of the rule and existing Massachusetts law, and addresses questions about the operation of the rule that have arisen in matters confronted by our office.

We first recommend a comment along the following lines:

The rule is implicated only when a prosecutor seeks to subpoena a client’s attorney, the office of the client’s attorney, or members of the attorney’s legal staff to whom the rules of privilege, work product, and discovery would apply. It is not implicated when a prosecutor seeks to subpoena persons who work with or are retained by the attorney, but are outside that legal staff.

Such a comment would be in harmony with the plain language of the rule. A subpoena to one who is not within an attorney’s legal staff cannot be deemed a “subpoena [to] a lawyer” and does not place the lawyer in the position of having “to present evidence about [his or her own] client.” It would also be consistent with traditional rules regarding when the privileges and obligations of an attorney extend to others. See Mass. R. Crim. P. 14(a)(5); Commonwealth v. Bing Sial Liang, 434 Mass. 131 (2001). A subpoena seeking information from one beyond an attorney’s legal staff would not infringe upon the attorney-client privilege or the work product doctrine, or place the attorney in the uncomfortable situation of having to balance the obligation to comply against the duties owed to the client. It thus would not involve the risks that the rule was intended to prevent, that is, the potential for “intru[sion] into the client-lawyer relationship,” Mass. R. Prof. Conduct cmt. 4, and “driv[ing] a wedge of distrust between lawyer and client,” Stern v. United States Dist. Court, 214 F.3d 4, 14 (1st Cir. 2000).

We next suggest the inclusion of a comment to this effect:

Only the person to whom the subpoena would be directed has standing to oppose the prosecutor’s request for authorization to issue a subpoena. A client who is the subject of information sought from a subpoenaed attorney does not independently have standing to oppose the request.

Such a comment would be consistent with the manner in which the rule has been understood. See Stern v. United States Dist. Court, 214 F.3d 4, 14 (1st Cir. 2000) (referring to “[t]he presence of the attorney to be subpoenaed” and notification of “the targeted attorney”); Petition for a Writ of Certiorari of Daniel C. Crane, Bar Counsel at 5, Crane v. Stern, 531 U.S. 1143 (2001) (No. 00-425) (explaining that Rule 3.8(f) “provides that the lawyer who is the target of the subpoena shall have an opportunity to appear at the hearing where the prosecutor seeks judicial approval”). It would also be in harmony with closely analogous decisional law. See In re Rhode Island Grand Jury Subpoena, 414 Mass. 104, 107-11, 117 (1993) (holding that “an investigated person or other entity has no standing to intervene to move to quash a [grand jury] subpoena served on a third party,” even if the challenge is based on a claim of privilege, and “only the party subpoenaed—not the party claiming a privilege in the documents—has standing to intervene to

move to quash the subpoena,” based in part on “the need to eliminate unwarranted delay of the investigative process”).<sup>1</sup> This view of standing would not leave the client’s interest in shielding privileged information unaddressed, as the attorney would still be obligated to assert the attorney-client privilege on the client’s behalf and maintain confidentiality as appropriate. See Mass. R. Prof. Conduct 1.6 cmts. 5A, 5B, 20, 22.

The third comment we propose is one along these lines:

The rule does not require a prosecutor to establish in an adversarial proceeding, or the court to determine, that the criteria set forth in subsection (e)(1) are satisfied before a subpoena may be authorized.

Such a comment would make clear that, while the rule requires the prosecutor to satisfy himself or herself that the criteria of subsection (e)(1) (now (f)(1)) are met before seeking authorization to issue a subpoena, it does not call for the prosecutor to convince the court of that fact in the adversarial proceeding. That view is consistent with the plain language and structure of the rule. It is further supported by the fact that, while the rule’s developers adopted part of the comment to the analogous ABA rule verbatim, they omitted its statement that “[t]he prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.” Compare Mass. R. Prof. Conduct 3.8(f) cmt. with ABA Model R. Prof. Conduct 3.8(f) cmt.

The Bar Counsel who was part of the committee that developed the rule<sup>2</sup> confirmed the accuracy of the above view, stating:

Rule 3.8(f) does not create any new ground for a judge to disapprove the service of a subpoena upon an attorney. . . . Insofar as Rule 3.8(f)(2) directs a prosecutor to obtain prior judicial approval, the Rule requires only that the prosecutor participate in a hearing where a judge will determine the validity of the subpoena under whatever legal doctrine independently governs the matter. Nothing in the Rule changes or adds to the grounds that would otherwise exist for a judge to disapprove the service of a subpoena upon a lawyer. And nothing in the Rule alters the burden of proof that would otherwise exist for any of the grounds on which a judge might disapprove the service of a subpoena upon a lawyer. Rule

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<sup>1</sup> While the case involved a subpoena to a target’s accountant, not his attorney, the SJC expressly indicated that its determination regarding the issue of standing was “[i]mplicit in” and “warranted by the same concerns for the efficiency of criminal investigations” underlying its holding in In re Grand Jury Subpoena, 411 Mass. at 497. In re Rhode Island Grand Jury Subpoena, 414 Mass. at 111. The fact that the earlier opinion extended to attorneys is evident from its admonition that “in cases involving attorney-custodians, [prosecutors] must comply with S.J.C. Rule 3:08, PF 15,” the predecessor to Rule of Professional Conduct 3.8(f). In re Grand Jury Subpoena, 411 Mass. at 498 n.11.

<sup>2</sup> See Chief Justice Herbert P. Wilkins, The New Massachusetts Rules of Professional Conduct: An Overview, 82 Mass. L. Rev. 261, 262 (1997) (discussing work of committee).

3.8(f)(1) does require a prosecutor, before causing the service of such a subpoena, to have a reasonable belief that the information sought by the subpoena is not protected from disclosure by any applicable privilege, the evidence sought is essential to the successful completion of an ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information. However, the Rule does not require the prosecutor to prove those beliefs to the satisfaction of a judge before the subpoena is served if the underlying belief is not otherwise relevant to an independent ground for testing the validity of the subpoena.

Affidavit of Arnold R. Rosenfeld, Bar Counsel ¶ 10, Stern, 184 F.R.D. 10 (No. 98-10896-B); see also Petition for a Writ of Certiorari of Daniel C. Crane, Bar Counsel at 5, Crane, 531 U.S. 1143 (No. 00-425) (discussing Rosenfeld Affidavit); Arnold R. Rosenfeld, Bar Counsel, Bar Overseer Column, Changes in the Rules of Professional Conduct Relating to the Prosecution and Defense Function (March 1999), <http://www.mass.gov/obcbbo/prosecut.htm> (last visited Dec. 12, 2013) (discussing rule's "two step process").

Fourth, we suggest a comment to this effect:

The requirement that there be an opportunity for an adversarial proceeding does not entitle a person who opposes issuance of a subpoena to an evidentiary hearing, to obtain discovery, to compel the presence of witnesses, or otherwise to secure information from the prosecution concerning the investigation at issue.

This comment, too, would be consistent not only with the rule's text, but with its intent, as reflected in the observations of the Bar Counsel who served on the drafting committee. As he stated:

[N]either the language nor the intent of Rule 3.8(f) require a prosecutor to breach the secrecy of the grand jury in order to satisfy the requirement that the prosecutor obtain prior judicial approval after an opportunity for an adversarial proceeding. The Rule does not require the proceeding to be public, nor does it require the prosecutor to forego the presentation of information to the judge in camera where it is necessary and appropriate to preserve the secrecy of the grand jury.

Affidavit of Arnold R. Rosenfeld, Bar Counsel ¶ 12, Stern, 184 F.R.D. 10.

Indeed, in other contexts in which pretrial adversary hearings to resolve criminal discovery issues are required, full evidentiary hearings have been found unnecessary. See Commonwealth v. Draheim, 447 Mass. 113, 117 (2006) (stating that, in order to compel individuals to submit saliva samples through buccal swabs, "[t]he Commonwealth must make that showing at an adversary, though not necessarily evidentiary, hearing; the judge may act on an indictment, affidavit, and uncontroverted statements of a prosecutor made and recorded in open court").<sup>3</sup>

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<sup>3</sup> Cf., e.g., United States v. Three Parcels of Real Property, 43 F.3d 388, 394 n.2 (8th Cir. 1994) (stating that Supreme Court's mandate that an "adversary hearing" be conducted before civil forfeiture "does not necessarily imply that a full-blown evidentiary hearing is required. 'Due process . . . does not mandate a full evidentiary hearing in every situation . . . the hearing must be appropriate to the nature of the case.'" (alterations in original) (quoting, without internal

And even if the proceeding were held in camera, the revelation of grand jury information would amount to a breach of grand jury secrecy and run counter to the interests that it protects. See, e.g., WBZ-TV4 v. District Attorney, 408 Mass. 595, 599 (1990) (discussing importance of and multiple rationales for secrecy); In re John Doe Grand Jury Investigation, 415 Mass. 727, 729-30 (1993) (same). Allowing a full evidentiary hearing, discovery, or compulsory process would also run counter to the interest in “eliminate[ing] unwarranted delay of the investigative process” that motivated the SJC to deny standing to targets in Rhode Island Grand Jury Subpoena. 414 Mass. at 108, 111. At the same time, a process without these features would still afford the “adversary” the chance to present arguments based on her own knowledge and burdens.

In any event, we recommend that the SJC add a provision to the Rules of Criminal Procedure that either restates or refers to the requirements of new Rule 3.8(e). The rule is, after all, “more than an ethical standard. It adds a novel procedural step . . . .” Stern, 214 F.3d at 20 (discussing Local Rule 3.8(f)). The placement of its requirements in the Rules of Professional Conduct creates the potential that they will be overlooked. Referencing those requirements where prosecutors are more likely to look for them, and see them on a regular basis, can only further the objectives of the rule.

#### **Proposed Rule 3.8(f) – Extrajudicial Statements by Associated Individuals**

We next have concerns about the provisions of Proposed Rule 3.8(f) and Comment 6 directing prosecutors to seek to prevent certain extrajudicial statements by “persons assisting or associated with the prosecutor . . . even when such persons are not under the direct supervision of the prosecutor.” We find the goal of these provisions laudable, as statements by individuals a step removed from the prosecutor’s office can still be prejudicial. Moreover, we appreciate Proposed Comment 6’s indication that “[o]rordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.” However, by the comments’ very terms, the rule seems to make prosecutors responsible for supervising those whom they have no ability to supervise. We recommend striking any language that may potentially subject prosecutors to serious consequences for that which is beyond their control.

#### **Proposed Rules 3.8(h)-(i) – Knowledge of Exculpatory Evidence**

Next, we recommend that the Committee clarify those provisions that would require a prosecutor to take certain steps when she “knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” or “knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit.” Proposed Mass. R. Prof. Conduct 3.8(h), (i).

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citations, Littlefield v. City of Afton, 785 F.2d 596, 603 (8th Cir.1986), overruled on other grounds by Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992)))

In particular, the provisions could be read to impose obligations, and thus consequences for noncompliance, upon prosecutors who “know” of the existence of certain evidence, but are not aware that the evidence possesses the characteristics stated in the rule. Included in this category are prosecutors who were not integrally involved with the matter at issue. The Committee’s apparent intent may be better captured in language referring to prosecutors who “know that new, credible and material evidence creates” a certain likelihood, or “know that clear and convincing evidence establishes” a certain fact.

Additionally, that which is encompassed within the phrases “did not commit an offense of which the defendant was convicted” and “was convicted of an offense that the defendant did not commit” is not as clear as it may seem. See Proposed Mass. R. Prof. Conduct 3.8(h), (i). For example, if there is no doubt that a defendant committed the act at issue – firing the shot that killed the victim, for example – but new evidence calls into question his sanity at the time, or supports some other affirmative defense, does it show that he “did not commit [the] offense of which the defendant was convicted”? Reasonable jurists might disagree as to the answer. Defining “commission of an offense,” whether in the rule’s text or a comment to it, would add clarity.

Similarly, Proposed Rule 3.8(h) could benefit from a definition of the term “material.” It is not clear whether a fact is material only when it likely would have changed one’s decision, or whenever it would have been taken into account by a decision-maker. The distinction may matter where, for example, the new evidence is cumulative of other, previously-possessed evidence favorable to the defense.

Next, we recommend that Rule 3.8(i) incorporate a standard other than that of “clear and convincing evidence.” As the Supreme Judicial Court has noted on multiple occasions, that standard has been found unclear. See, e.g., In re Andrews, 449 Mass. 587, 591 n.6 (2007) (noting that that “intermediate standard” has been found to be “of doubtful utility” and “too difficult to articulate, even by an appellate court of last resort”; the court’s “cases . . . have questioned the use of this standard of proof in [different] contexts”; and it presented “significant problems” (quoting Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 275-276 (1978), and collecting cases)).

Finally, all those affected by the rule would benefit from additional and more definitive guidance regarding Proposed Rule 3.8(i)’s key requirement that “the prosecutor shall seek to remedy the conviction.” We appreciate that, in noting what the “[n]ecessary steps may include” in Proposed Comment 8, the Committee likely sought to accommodate a range of possible scenarios. However, such a comment leaves prosecutors without definitive direction, and it increases the risks that the rule’s objectives will not be met or prosecutors will face unexpected allegations of impropriety.

We hope the above comments are helpful to the Committee and are grateful for the opportunity to participate in the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed R. Bedrosian, Jr.", written in a cursive style.

Edward R. Bedrosian, Jr.  
First Assistant Attorney General