Attorney Subpoenas and Massachusetts Rule PF 15

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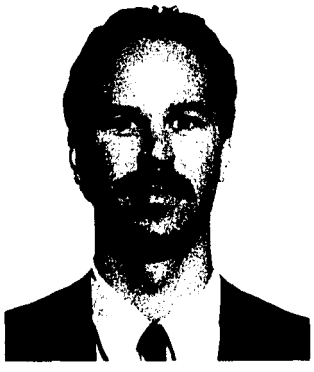

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Introduction

In October 1987 the U.S. Court of Appeals for the First Circuit upheld a controversial Massachusetts ethical rule known as PF 15, which regulates the use of attorney subpoenas.[2] The Court's decision ended two years of litigation in which the U.S. Justice Department had challenged the validity of the rule as applied to federal prosecutors.

PF 15, which has been adopted by both the SJC and the United States District Court for the District of Massachusetts, requires prosecutors to obtain prior judicial approval of attorney subpoenas.[3] PF 15 provides:

1. The authors wish to thank Max Stern and Judy Zeprun for their comments on a previous draft of this article. Parts of this article originally appeared in Stern & Hoffman, "Privileged Informers: The Attorney-Subpoena Problem and a Proposal for Reform," 136 *U. Pa. L. Rev.* 1783 (1988), and are used here with permission of the authors. Author David Hoffman participated as counsel in the litigation challenging PF15, *United States* v. *Klubock*. *See* note 2 *infra*.

2. *United States* v. *Klubock*, 832 F. 2d 649, 658 (1st Cir.) *aff'd en banc by an equally divided court*, 832 F.2d 664 (1st Cir. 1987). As used in this article the term "attorney subpoena" means a grand jury or other subpoena issued to an attorney for the purpose of eliciting evidence about the attorney's client.

3. PF 15 is codified in SJC Rule 3:08, which is incorporated in the Local Rules of the Massachusetts federal district court. *See* Local Rule 5(d)(4)(B). PF 15 became effective on January 1, 1986.

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.

Because the rule does not outline a procedure for obtaining such prior judicial approval or a substantive standard for judges to use in determining whether to approve the issuance of attorney subpoenas, practice under PF 15 is still evolving. Moreover, since the practice of subpoenaing attorneys to testify about their clients was almost unheard of until recently, other legal principles governing the use of such subpoenas (such as attorney-client privilege, the constitutional right to counsel, and the courts' supervisory power) are likewise in a state of flux.

This article is intended as an introduction to this rapidly developing area of the law. Part I discusses the problem the attorney subpoena poses for the attorney-client relationship. Part II reviews the history of PF 15. Part III examines other sources of law which regulate the use of attorney subpoenas. Part IV describes current practice under PF 15, and Part V proposes substantive and procedural guidelines to govern practice under PF 15.

I. The Attorney-Subpoena Problem

A. *A "New Investigative Tool"*

Until very recently, the notion of subpoenaing a lawyer to testify about a client, in the very matter in which the lawyer was serving as advocate, was almost unthinkable. In the criminal context, prior to 1980, federal prosecutors generally believed that lawyers were *not* potential sources of information in criminal investigations.[4] Subpoenas to lawyers were rare and the government was generally not successful in enforcing them.[5] However, during the 1980s, Justice Department officials reexamined traditional assumptions about attorney subpoenas and concluded that the attorney subpoena was a "new investigative tool" which could be used if non-privileged information in the hands of the attorney could be identified.[6] This change in prosecutorial doctrine coincided with developments in substantive criminal liability which made it more feasible to characterize the provision of legal services as relevant to proof of a criminal enterprise.[7] The result has been a sharp increase in the number of subpoenas to lawyers, based upon aggressive and imaginative exploitation of arguable exceptions to the attorney-client and work-product privileges.[8] In Massachusetts, the Justice Department has acknowledged issuing from 50 to 100 such subpoenas per year.[9]

B. *The Problem with Attorney Subpoenas*

Serving a subpoena upon defense counsel in a criminal case in order to obtain information about the attorney's client is disruptive at best, and fatal to the client's representation at worst.[10] As the First Circuit has put it, "[t]he serving of a subpoena under such circumstances will immediately drive a chilling wedge between the attorney/witness and his client."[11] There are several reasons why attorney subpoenas pose a threat to the attorney-client relationship and the traditional balance between prosecution and defense in the criminal justice system.

First, the power to subpoena one's adversary usually carries with it the power to control who the adversary will be.[12] If the lawyer has been subpoenaed to the trial, or will be as a result of a grand jury subpoena, the lawyer will usually have to withdraw, since a lawyer is generally prohibited from acting as an advocate and witness in the same trial.[13]

4. W. Landers, Remarks at the Conference on Defending the Right to Counsel, held at New York University Law School (Nov. 15, 1986) (tape recording on file with the *University of Pennsylvania Law Review*). At the time of the conference, Mr. Landers was Deputy Associate Attorney General and his responsibilities included acting as a spokesperson for the Justice Department on matters related to attorney subpoenas. *Id.*

5. *See, e.g., United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977) (upholding subpoena, but stating broad grounds for disallowance); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674 (5th Cir. 1975); *Tillotson* v. *Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *Baird* v. *Koerner*, 279 F.2d 623, 630–32 (9th Cir. 1960). *Cf. Rice* v. *Baron*, 456 F.Supp. 1361, 1370 (S.D.N.Y. 1978) (advocate-witness rule "'was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel'") (citations omitted).

6. *See* Landers, *supra* note 4.

7. *See, e.g.*, RICO, 18 U.S.C. §§1961–68 (1982 & Supp. IV 1986); Continuing Criminal Enterprise Act, 21 U.S.C. §848 (1982 & Supp. III 1985 & West Supp. 1987).

8. One national survey of over 1,000 practicing criminal defense lawyers found that attorneys were subpoenaed infrequently prior to 1980, but documented a "dramatic increase" in the practice since then, with an "enormous" jump between 1983 and mid-1985. Genego, "Risky Business: The Hazards of Being a Criminal Defense Lawyer," *Crim. Just.*, Spring 1986, at 2, 40.

9. *See United States* v. *Klubock*, 832 F.2d 649, 658 (1st Cir.), *aff'd en banc by an equally divided court*, 832 F.2d 664 (1st Cir. 1987). The Court of Appeals noted that, given the district's statistics for criminal business, the government's admission raised the possibility of attorney subpoenas in from 10.7% to 32.6% of criminal cases in the district. *See id.*

10. It is important to note that the attorney-subpoena problem has concerned and affects not only criminal defense lawyers but all sectors of the bar. Attorneys who specialize in tax, corporate, real estate, and probate matters have often been served with such subpoenas when their clients have become the subjects of grand jury investigations. Indeed, one study of the attorney-subpoena problem found that the "vast majority" of attorney subpoenas have been directed to attorneys whose practices are primarily civil. Rudolf & Maher, "A Subpoena a Day Keeps the Clients Away," *Crim. Just.*, Fall 1986 at 4, 5.

11. *Klubock*, 832 F.2d at 653.

12. *See id.* at 654 (service of subpoena "potentially give[s] [the prosecutor] control over who shall be his attorney/adversary").

13. *See Klubock*, 832 F.2d at 654 (service of subpoena will possibly cause defense attorney to resign as counsel for his client since Canons of Ethics prohibit the attorney from being witness and attorney in the same case); *United States* v. *Diozzi*, 807 F.2d 10, 12–13 (1st Cir. 1986) ("[A]ttorneys [can]not serve the dual roles of defense counsel and sworn government witnesses in the same trial."). *But see Kroungold* v. *Triester*, 521 F.2d 763, 766 (3d Cir. 1975) (when attorney is called as witness and nothing in her testimony will be prejudicial to her client, attorney is not disqualified).

Second, the power to subpoena an attorney into the grand jury room to investigate the attorney's representation of a client has an enormously intimidating effect. This threat may well be the motive for an aggressive prosecutor. As noted in a recent American Bar Association report, "the prospect of striking at one's adversary by inflicting crippling blows on the adversary's attorney has proven increasingly irresistible to many lawyers."[14]

Third, if during the course of the representation, the attorney disappears into the grand jury room to answer questions about the client, the client may lose confidence in either the attorney's loyalty or her ability to protect the client and to maintain the client's confidences.[15] Thus is eroded the relationship of trust and confidence which lies at the heart of the attorney-client relationship.[16]

Fourth, the subpoena causes incalculable damage even if it is, or can be, quashed. The subpoena typically "open[s] a 'second front' when the defendant has neither the time nor the resources to successfully fight on two battlegrounds."[17] The existence of the second battleground may cause the defendant to lose ground in the main battle.[18]

Finally, a correlative problem is posed by the risk of improper compromise or even betrayal of the client's rights under the pressure of the government's investigative power. The subpoena creates the risk that the subpoenaed attorney will disclose confidential information that can and should remain confidential. The nub of the problem is that attorneys do not always move to quash a subpoena even when they should,[19] and may not even inform their clients that they (the attorneys) have been subpoenaed.[20]

II. The History of Massachusetts Rule PF 15

The organized bar has responded to the mounting concern over the use of attorney subpoenas with rare unanimity. A number of state and national bar associations, including the American Bar Association, have adopted attorney subpoena proposals, some of which either have been adopted or are currently under consideration by the courts and legislatures throughout the United States.[21]

The Massachusetts Bar Association in 1984 introduced the first such proposal, which called for prior judicial review of attorney subpoenas. The proposal called for an *ex parte* hearing in which the prosecution would be required to establish that the information sought was relevant, nonprivileged, and unavailable from other sources; that compliance with the subpoena would not be unreasonable or oppressive; and that the subpoena was not sought for purposes of harassment.[22]

This proposal was adopted in part by the Massachusetts Supreme Judicial Court as an ethical rule ("PF 15"), which requires that the prosecutor obtain prior judicial approval of attorney subpoenas.[23] It is not clear why the SJC adopted the rule in its present form—i.e., without standards or guidelines for its implementation.[24] One

14. American Bar Association Criminal Justice Section, Report to the House of Delegates 2, 6 (Feb. 1986) (hereafter "1986 ABA Report") (noting that "[t]he unregulated power to subpoena attorneys also carries with it the potential for mischief inherent in any situation where one adversary can pummel his opponent without violating the rules"). *See also In re Grand Jury Matters (Hodes and Gordon)*, 593 F.Supp. 103, 107 (D.N.H.) (describing actions of U.S. Attorney as "harassing"), *aff'd*, 751 F.2d 13 (1st Cir. 1984); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958, 970 (D. Mass. 1985) (finding that attorney subpoenas were unreasonable and oppressive).

15. *See* Alschuler, "The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel," 54 *U. Colo. L. Rev.* 67, 73 (1982); Weiner, "Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform," 23 *Am. Crim. L. Rev.* 95, 102–03 (1986).

16. *See United States* v. *Klubock*, 832 F.2d at 653 (noting that "the client is uncertain at best, and suspicious at worst, that his *legitimate* trust in his attorney may be subject to betrayal") (emphasis in original). *See Morris* v. *Slappy*, 461 U.S. 1, 21 & n.4 (1983) (Brennan, J., concurring in the result) (noting need for "relationship characterized by trust and confidence" between attorney and client); ABA Standards for Criminal Justice §4-3.1 (commentary) (2d ed. 1980) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence").

17. Rudolf & Maher, "The Attorney Subpoena: You are Hereby Commanded to Betray Your Client," *Crim. Just.*, Spring 1986, at 14, 16.

18. 1986 ABA Report, *supra* note 14, at 2. *See also Klubock*, 832 F.2d at 653 (majority opinion).

19. In *Klubock*, 832 F.2d at 649, the Government admitted in the district court that "most lawyers do not file a motion to quash." (Record Appendix at 500.)

20. *See* Note, "The Attorney-Client Privilege After Attorney Disclosure," 78 *Mich. L. Rev.* 927, 927–29 (1980) (citing examples of attorney waiver of the attorney-client privilege without clients' consent and/or knowledge).

21. For a discussion of developments in other states, see Stern & Hoffman, *supra* note 1, at 1821–23 & nn.188–93. Detailed attorney-subpoena legislation, proposed by the National Network for the Right to Counsel, was introduced in Congress by Senator Paul Simon, as S. 2713. *See* Cong. Rec. S11438 (Aug. 10, 1988). For the text of the proposed legislation, see Stern & Hoffman, *supra* note 1, at 1850–51.

22. The MBA proposal stated, in pertinent part:

RESOLVED, that it is the position of the MBA that it should be considered to be unprofessional conduct and inimical to the administration of justice for a prosecutor or other government attorney to subpoena an attorney to the grand jury, or to any state or federal administrative body with a similar function, without prior judicial approval in circumstances where the prosecutor or such other government attorney seeks to compel the attorney/witness to provide evidence concerning a person who at the time is represented by the attorney/witness. "Prior judicial approval" in such cases should be withheld unless, after a hearing conducted with due regard for the need for the secrecy of grand jury proceedings, the court finds (1) the information sought is not protected from disclosure by the attorney-client privilege or the work-product doctrine; (2) the evidence sought is relevant to an investigation within the jurisdiction of the grand jury; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Mass. Bar Ass'n, Resolutions (1984).

23. Mass. Supreme Judicial Court Rule 3:08 (PF 15) (1987); for the text of PF 15, see *supra* text accompanying note 3. The text of the MBA Criminal Justice Section's report in support of the Resolution appears in the Appendix of this article.

24. During the period that the SJC allowed for comment on the proposed rule, a number of letters were sent to the Court urging adoption of the rule, and a few urging the Court not to adopt it. Apparently none, however, urged adoption of PF 15 in the form that was ultimately accepted by the Court.

may suppose that, by promulgating such an open-ended rule, the SJC was leaving to the trial courts the task of developing standards and procedures to implement PF 15.

With its adoption by the SJC, PF 15 became an ethical rule of the United States District Court for the District of Massachusetts by virtue of that court's local rules, which incorporate the SJC's ethical rules.[25] The district court made this incorporation even more explicit in 1986, when the Court amended its local rules so that they refer specifically to SJC Rule 3:08, which includes PF 15.[26] Finally, the validity of PF 15 was upheld by the First Circuit in *United States* v. *Klubock* after the Justice Department challenged its application to federal prosecutors. Thus, PF 15 regulates practice in both the state and federal courts of Massachusetts.

III. Other Sources of Law Regulating the Use of Attorney Subpoenas

PF 15 was intended to supplement traditional protections afforded the attorney-client relationship, because these protections were deemed inadequate to protect that relationship against the increasing use of attorney subpoenas. The scope of protections available under existing case law thus forms an important backdrop to PF 15.

A. *Attorney-Client Privilege and Work-Product Doctrine*

At one time it might have been thought that the attorney-client privilege, together with the work-product doctrine, would prevent the use of attorney subpoenas. In many cases, however, the scope of attorney-client privilege has been eroded by the exceptions for information concerning fees and client identity[27] and the crime/fraud doctrine, under which communications that would otherwise be privileged lose that protection if they were made for the purpose of committing a crime or fraud.[28] In addition, the conditional privilege for attorney work product is subject to the same exceptions as is the attorney-client privilege.[29]

Client identity and fee information have generally been considered to fall outside the scope of the attorney-client privilege either because they do not constitute communications relating to the substantive legal advice rendered by the attorney or because they are not confidential. Courts have held that client identity and fee information are relevant and discoverable by subpoena even where the information sought from the attorney would incriminate the client.[30] Some courts have held that when the government seeks such information from the attorney, it must "show a need for the information sought."[31]

In an effort to mitigate the harshness of this rule, the courts have developed two distinct rationales for protecting client identity and fee information in certain circumstances.[32] The narrower rationale, known as the legal advice theory, protects against disclosure of client identity or fee arrangements when such disclosure would be "tantamount to" revealing an "otherwise protected confidential communication."[33] This principle, which has been adopted by a majority of the circuits, limits the type of communications that qualify for protection to those that are necessary to obtain legal advice and "which might not have been made absent the privilege."[34]

The broader (but minority) rationale, known as the incrimination theory, protects against compelled disclosure of such information if it would have a "significant incriminatory effect."[35] This theory bars disclosure (1) where "a strong probability exists that disclosure of

25. *See* Local Rule 5(d)(4)(B).

26. *See id.*

27. *See generally* Comment, "The Attorney-Client Privilege and the Federal Grand Jury: Client's Identity and Fee Arrangements," 13 *Am. J. Crim. L.* 67 (1985); Note, "Benefactor Defense Before the Grand Jury: The Legal Advice and Incrimination Theories of the Attorney-Client Privilege," 6 *Cardozo L. Rev.* 537 (1985).

28. *See In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *see also* J. Wigmore, *Evidence* (McNaughton rev. 1961) §2298 (contrasting disclosure of "prior wrongdoing" that is privileged and "future wrongdoing" that is not). *See generally* Silbert, "The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, the Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct," 23 *Am. Crim. L. Rev.* 351 (1986).

29. Work product protection is important because neither the attorney-client privilege nor the fifth amendment necessarily bars discovery of the materials that an attorney prepares and collects. The attorney-client privilege protects from disclosure only communications between the client and attorney. It does not bar disclosure of information obtained by the attorney from third parties, documents from third parties, or documents from any other source (unless they are attorney-client communications). Moreover, the fifth amendment applies only to statements compelled from the lips or files of the defendant herself rather than from the lips or files of her attorney. *See Fisher* v. *United States*, 425 U.S. 391, 396–401 (1976).

30. *See, e.g., In re Grand Jury Subpoena Duces Tecum (Shargel)*, 742 F.2d 61, 63 (2d Cir. 1984) (government may seek client identity and fee information "as evidence of unexplained wealth which may have been derived from criminal activity,...and as evidence of the violation of the tax laws").

31. *E.g., In re Grand Jury Proceedings (John Doe, Esq.)*, 602 F.Supp. 603, 607 (D.R.I. 1985) (citing *United States* v. *Pioggia*, Cr. No. 82-231-K (D. Mass. Sept. 21, 1983) (Keeton, J.)), *aff'd sub nom. In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26 (1st Cir. 1985).

32. Both rationales—the legal advice theory and the incrimination theory—derive from *Baird* v. *Koerner*, 279 F.2d 623 (9th Cir. 1960), which neatly exemplifies both theories. In *Baird*, an attorney was asked to pay back taxes anonymously to the IRS on behalf of his clients. *Id.* at 626. The attorney refused to comply with an IRS subpoena seeking the clients' identities, claiming attorney-client privilege. *Id.* at 627. The Ninth Circuit upheld the attorney's claim of privilege, *id.* at 634–35, noting that disclosure of the client's identity would be tantamount to revealing the substance of the attorney's communication with the clients, *id.* at 630 (*i.e.*, legal advice theory), and would also provide the government with the missing link needed to indict the clients, *id.* at 633 (*i.e.*, incrimination theory).

33. *See* Note, *supra* note 27, 6 *Cardozo L. Rev.* at 555–57 & n.107 (*quoting In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 453 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984)).

34. *See id.* at 556 (*citing Fisher* v. *United States*, 425 U.S. 391, 403 (1976)).

35. *See* Note, *supra* note 27, 6 *Cardozo L. Rev.* at 553–55.

such information would implicate that client in the very criminal activity for which legal advice was sought,"[36] and (2) where "the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment."[37]

The other exception that has been used to overcome attorney-client privilege and the work-product doctrine is the crime/fraud exception. This exception has been applied where the prosecutor shows that the communication in question was made for the purpose of perpetrating a crime or fraud.[38] Some courts have held that in order successfully to invoke the crime/fraud exception, the prosecutor must show a nexus between the alleged unlawful scheme and the attorney-client communications at issue.[39]

Given the potentially broad scope of this exception, one would have expected the courts to have established strict standards for its availability. Yet courts have often permitted the crime/fraud exception to be established on the basis of an *in camera* or *ex parte* showing,[40] or have required only a prima facie showing by the prosecutor.[41] Moreover, in some cases the prosecution, in order to establish a prima facie case, has not been required to adduce any independent evidence beyond the statement or information that she is seeking to elicit.[42]

36. *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *see also United States* v. *Strahl*, 590 F.2d 10, 11 (1st Cir. 1978); *In re Grand Jury Proceedings (Doe)*, 602 F.Supp. 603, 609–10 (D.R.I. 1985).

37. *In re Grand Jury Proceedings (Pavlik)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (*en banc*).

38. *See, e.g., United States* v. *Horvath*, 731 F.2d 557, 562 (8th Cir. 1984); *Grieco* v. *Meachum*, 533 F.2d 713, 718 n.4 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976); *see also Doe*, *supra* note 36, 602 F.Supp. at 608; *Commonwealth* v. *Dyer*, 243 Mass. 472, 505–06 (1922).

39. *See, e.g., In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) ("government must first make a prima facie showing of a violation sufficiently serious to defeat the privilege, and second, establish some relationship between the communication at issue and the prima facie violation") (footnote omitted).

40. *See* Silbert, *supra* note 28, at 362–64 & nn.88–89.

41. *See, e.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983), *enforced*, 727 F.2d 941, 946 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984).

42. *See* Silbert, *supra* note 28, at 365–67; Fried, "Too High a Price: the Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," 64 *N.C.L. Rev.* 443, 464–66 (1986). *But see United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.) (requiring that "government must first establish a prima facie case of fraud independently of the said communications"), *cert. denied*, 406 U.S. 944 (1972).

The crime/fraud exception to the attorney-client privilege also applies to the work-product privilege. Thus the prosecution could seek to open the door to *all* defense materials, written or unwritten (except possibly mental impressions of the attorney), upon a proper showing that the materials sought were collected or created by the attorney for the purpose of perpetrating a crime or fraud.[43]

The work-product privilege, as a source of protection from attorney subpoenas, is subject to other limitations as well.[44] First, the doctrine pertains only to materials prepared in anticipation of litigation.[45] This limitation potentially leaves open to discovery all materials accumulated by the lawyer at a stage not involving litigation or in matters not related to any litigation. Second, for material covered by the *Hickman-Nobles* line of cases rather than Rule 16 (*i.e.*, intangible work product), the privilege is a qualified one which arguably can be overcome upon a proper showing of need by the prosecution. Indeed, the Supreme Court has suggested that even the protection for opinion work product may not be absolute.[46] Finally, it is not clear that work-product privilege continues after the representation in which the material was accumulated ends.[47]

Taken together, these limitations suggest that, in the attorney-subpoena setting, the work-product doctrine will often fail of its essential purpose—that is, the creation of a zone of privacy within which the attorney can represent the client's interests "free from unnecessary intrusion by opposing parties and their counsel."[48]

B. *Constitutional Right to Counsel*

A number of attorneys and commentators have looked to the protection afforded by the sixth amendment to the United States Constitution as a bulwark against the increasing use of attorney subpoenas. For example, attorneys have frequently—and sometimes successfully—fought subpoenas on the ground that the attorney's likely subsequent disqualification would infringe her client's sixth amendment right to counsel.[49] In *United States* v. *Diozzi*, for example, the First Circuit noted that although the defendant's constitutional right to be represented by counsel of choice is a qualified (not absolute) right, the government "bears a heavy burden" of justification if it seeks to disqualify counsel on the ground that her testimony is needed at trial.[50]

In a number of cases, courts have relied on sixth amendment concerns as the basis for overturning deci-

43. *See In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802–03 (3d Cir. 1979); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980); *In re Grand Jury Proceedings (John Doe, Esq.)*, 602 F.Supp. 603, 607–08 (D.R.I. 1985). *See generally* Silbert, *supra* note 28 at 355–58 (discussing the work-product privilege and the crime/fraud exception).

44. The rules limiting the use of civil discovery techniques to obtain attorney work product are derived from the Supreme Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The principles announced in *Hickman* were supplemented by Federal Rule of Civil Procedure 26(b)(3), which creates a conditional privilege, and Federal Rule of Criminal Procedure 16(b)(2), which creates an absolute bar to discovery of certain types of tangible trial preparation material. In *United States* v. *Nobles*, 422 U.S. 225 (1975), the Court made it clear that *Hickman* applied to criminal as well as civil cases, but that Rule 16(b) applied only to pretrial discovery. *Id.* at 234–40. Thus, to determine the precise scope of the work-product protection, one must look to the overlapping and sometimes conflicting lines of authority deriving from *Hickman*, *Nobles*, F. R. Civ. P. 26 and F. R. Crim. P. 16.

45. *See* note 44, *supra*; Hickman, 329 U.S. at 508–14; F. R. Crim. P. 16(b).

46. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 401–02 (1981).

47. *See generally* Note, "The Work Product Doctrine in Subsequent Litigation," 83 *Colum. L. Rev.* 412, 421–24 (1983) (noting split of authority on this question).

48. *Nobles*, 422 U.S. at 237 (quoting *Hickman*, 329 U.S. at 510–11).

49. *See, e.g., United States* v. *Diozzi*, 807 F.2d 10, 15–16 (1st Cir. 1986) (government must "justify" any request to disturb a criminal defendant's constitutional right to counsel of choice). For a brief discussion of a *civil* litigant's constitutional right to counsel, see *Botashnick* v. *Port City Constr.*, 609 F.2d 1101, 1118–19 (5th Cir. 1980).

50. *Diozzi*, 807 F.2d at 12. Indeed, the *Diozzi* court went on to hold that an erroneous order disqualifying counsel from a criminal case should result in an automatic reversal, without any showing of prejudice by the defendant. *Id.* at 15–16. *See also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 443 (1985) (Stevens, J., dissenting on other grounds) ("in a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal").

sions to disqualify a defendant's counsel of choice.[51] Such a result reflects the practical reality that one of the most important decisions that a criminal defendant makes is her choice of counsel.[52] Most courts faced with a motion to disqualify a defendant's attorney tend to balance the harm to the client and the infringement of her sixth amendment right to counsel against the government's need for the attorney's testimony and the need to enforce ethical standards barring the attorney from serving as advocate and witness.[53] Balancing these interests, courts have reached a variety of results, including partial disqualification and disqualification of some but not all of the attorneys involved in a case.[54]

Massachusetts, like every other state, guarantees the right to counsel as a matter of state law.[55] But there are apparently no reported Massachusetts decisions involving a challenge on state constitutional grounds to an attorney subpoena. Courts in other states, however, have interpreted their constitutions as barring the use of a criminal defendant's attorney as a witness against her.[56]

C. *Courts' Supervisory Power*

A third source of attorney-client protection is the federal courts' authority under Federal Rule of Criminal Procedure 17(c) to quash subpoenas where "compliance would be unreasonable or oppressive."[57] Even before the adoption of Rule 17(c), however, federal courts exercised their inherent supervisory power over grand juries to curb abuses.[58] For example, courts have responded to particular types of prosecutorial misconduct, such as the knowing use of false or perjured testimony, by dismissing indictments or quashing subpoenas.[59]

In the context of attorney subpoenas, the federal courts in Massachusetts have sometimes employed their supervisory powers to require that the government make a preliminary showing before an attorney subpoena would be enforced or before the subpoena could be served on the attorney.[60] Other federal courts, however, have not required a showing of need or relevance as a prerequisite for enforcing an attorney subpoena. In fact, the trend in the federal courts is not to require pros-

51. *See, e.g., United States* v. *Washington*, 797 F.2d 1461 (9th Cir. 1986); *United States* v. *Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984).

52. *See United States* v. *Rankin*, 779 F.2d 956, 958 (3d Cir. 1986); *United States* v. *Laura*, 607 F.2d 52, 55 (3d Cir. 1979) (noting that "attorneys are not fungible"); Note, "Second Circuit Rejects Need Requirement for Attorney Subpoena, *In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick)*," 60 *St. John's L. Rev.* 524, 525 n.3 (1986).

53. *See, e.g., United States* v. *Garcia*, 517 F.2d 272, 273 (5th Cir. 1975); *Cunningham, supra* note 51, 672 F.2d at 1070.

54. *See, e.g., United States* v. *Agosto*, 675 F.2d 965 (8th Cir. 1982); *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978); *Garcia, supra* note 53, 517 F.2d at 272; *United States* v. *Castellano*, 610 F.Supp. 1151 (S.D.N.Y. 1985). Ironically, the principle on which several of these courts disagree is whether the constitutional right to counsel of choice includes the ability to *waive* the right to assistance of an attorney who either is a potential witness or has a conflict of interest. *Compare, e.g., Garcia*, 517 F.2d at 272 (client can waive that right), *with Dolan*, 570 F.2d at 1177 (client cannot waive that right). The fact that criminal defendants, when faced with the decision whether to give up their counsel of choice or stick with an attorney who may be compelled to testify against them, often choose the latter, poignantly suggests the need for regulation of the government's use of defense attorneys as witnesses.

It is worth noting that the above-cited cases concerning disqualification may have limited application in the context of federal grand jury proceedings, where the client's sixth amendment rights have not yet attached. *See Kirby* v. *Illinois*, 406 U.S. 682, 689–90 (1972). Although the Supreme Court has never squarely addressed the question of whether a grand jury witness has a right to counsel, *compare United States* v. *Mandujano*, 425 U.S. 564, 603 (1976) (Brennan, J., concurring), *with In re Groban*, 352 U.S. 330, 333 (1957), 15 states (including Massachusetts) now permit grand jury witnesses to have counsel in the grand jury room. *See* M. R. Crim. P. 5(c); Comment, "Grand Jury—Attorney-Client Privilege and Right to Counsel for the Party Under Investigation, *In re Special Grand Jury No. 81-1 (Harvey)*," 19 *Wake Forest L. Rev.* 487, 509 n.178 (1983).

55. *See* Massachusetts Declaration of Rights, art. 12. The right to counsel is protected under the state constitution of every state except Virginia, which provides the same protection by statute. *See* Stern & Hoffman, *supra* note 1, at 1825 & n.201.

56. *See, e.g., Kaeser* v. *State*, 620 P.2d 872, 874 (Nev. 1980) (mere testimony by defendant's counsel did not violate defendant's right to fair trial, but trial court violated state constitution's right to counsel provision by allowing state to call defendant's attorney as witness to impeach alibi testimony); *State* v. *Thomas*, 53 Or. App. 375, 631 P.2d 1387, 1391 (1981) (same).

57. Although the text of Rule 17(c) suggests that it applies only to subpoenas *duces tecum*, federal courts have generally acted on the assumption that they have the power to quash subpoenas *ad testificandum* as well. *See generally* Bresler, "Quashing Witness Subpoenas Without Explicit Authority From the Federal Criminal Rules," *Crim. L. Bull.* (forthcoming July/Aug. 1989).

58. *See McNabb* v. *United States*, 318 U.S. 332, 340 (1943) (district courts' supervision of grand juries includes the duty of "establishing and maintaining civilized standards of procedure and evidence"); *see also Fay* v. *New York*, 332 U.S. 261, 297 (1947) (Murphy, J., dissenting).

59. *See United States* v. *Hogan*, 712 F.2d 757, 762 (2d Cir. 1983); *United States* v. *Asdrubal-Herrera*, 470 F.Supp. 939, 942–43 (N.D. Ill. 1979); *United States* v. *Gallo*, 394 F.Supp. 310, 315 (D. Conn. 1975). In Massachusetts, this issue has been raised most recently by the superior court's dismissal of a murder indictment in *Commonwealth* v. *Lewin*, SJC No. 5065 (remand to superior court, Apr. 12, 1989), where the prosecution failed to inform defense counsel or the court that the indictment was based on false information.

60. *See, e.g., In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958, 964 (D. Mass. 1985) (approving requirement of prior judicial approval of attorney subpoena); *United States* v. *Pioggia*, No. 82-231-K (D. Mass. Sept. 21, 1983) (same). Some other jurisdictions have also taken this view. *See In re Punelli*, Misc. No. 1-39 (S.D. Iowa Sept. 17, 1985) (same). *See also Williams* v. *District Court*, 700 P.2d 549, 554–56 (Colo. 1985) (en banc) (prosecutor must make preliminary showing of need for attorney subpoena).

A number of courts, including the First Circuit, have stated that a preliminary showing of need could be required under the court's supervisory power, but declined to establish such a rule on the facts then before the court. *E.g., In re Pantojas*, 628 F.2d 701, 705 (1st Cir. 1980) (declining to "impose [such a rule] on district courts within the circuit *at this time*" but stating that "[d]istrict courts should...feel free to require such showings by the government as a means of assuring themselves that grand juries are not overreaching") (emphasis added); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 & n.1 (9th Cir. 1983) (court is free to require preliminary showing of need and relevance of attorney subpoena but declines to do so on facts of present case).

ecutors to make any preliminary showing in order to enforce attorney subpoenas.[61]

The use of supervisory power to quash attorney subpoenas has been litigated in the First Circuit primarily in cases where the particular circumstances surrounding the issuance of the subpoena were dispositive. In *In re Grand Jury Matters (Hodes and Gordon)*,[62] for example, the First Circuit upheld a district court decision to quash five attorney subpoenas.[63] In *Hodes and Gordon*, the district court had found that the U.S. Attorney's actions in issuing grand jury subpoenas to five attorneys who were on the verge of trial in state court, were "without doubt harassing" and had a "chilling effect" on the attorneys' representation of their clients.[64] Affirming the district court's decision to quash the subpoenas, the First Circuit emphasized the *timing* of the U.S. Attorney's actions and avoided creating a blanket rule concerning attorney subpoenas.[65] Indeed, the court intimated that it might permit such subpoenas in the future if they are issued "at a more suitable moment or upon a more substantial showing of immediate urgency and need."[66] Nevertheless, the court reaffirmed the principle that federal courts have the supervisory power to quash subpoenas "even though the subpoenaed materials are not covered by a statutory, constitutional, or common law privilege."[67] In doing so, the court expressed a particular concern about the threat that attorney subpoenas pose to the right to counsel.[68]

D. *Ethical Obligations of the Attorney to Resist the Subpoena*

A further source of regulation of attorney subpoenas can be found in the canons of ethics that govern the profession. But, as noted above, the available statistics suggest that few attorneys served with subpoenas resist.[69] In *Klubock*,[70] the government acknowledged that, while approximately 50 to 100 federal grand jury subpoenas are served each year in Massachusetts upon attorneys for documents or testimony concerning their clients, most of the subpoenaed attorneys do not file motions to quash.[71] In fact, the evidence produced in *Klubock* suggested that only a handful of the attorneys subpoenaed each year in Massachusetts by the federal government resisted to the point of moving to quash.[72]

To be sure, lawyers' apparent reluctance to resist government subpoenas may be understandable: the subpoena creates intense pressure by virtue of the fact that the attorney herself may have been threatened with, or fear, investigation. Even if she has no reason to fear such investigation, she may wish to avoid confrontation or publicity. She also may lack the money, energy, time, knowledge, or ability to wage the aggressive and complicated battle which subpoena litigation frequently involves. Since an order denying a motion to quash a subpoena may not be immediately reviewable, she may hesitate to resist the subpoena and thereby risk con-

61. *See, e.g., In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985), *vacated*, 781 F.2d 238 (2d Cir. 1986) (*en banc*); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.) *vacated as moot*, 697 F.2d 112 (4th Cir. 1982) (*en banc*). In the two circuits that do require the government to make a preliminary showing of need and relevance, such a showing is required for enforcement of *all* grand jury subpoenas regardless of whether they are directed to attorneys or others. *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973), *cert. denied sub nom. Bank of Nova Scotia v. United States*, 462 U.S. 1119 (1983); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Subpoena Duces Tecum (Dorokee Co.)*, 697 F.2d 277, 281 (10th Cir. 1983).

62. 751 F.2d 13 (1st Cir. 1984).

63. Courts in other circuits have also decided not to enforce particular attorney subpoenas because of the circumstances under which they were issued. In such cases, as in *Hodes and Gordon*, courts have struck a balance between the government's stated need for the attorney's testimony and the potential resultant harm to the defendant. *See, e.g., United States v. Crockett*, 506 F.2d 759, 760 (5th Cir.) (noting that "[a]s a general rule, a party's attorney should not be called as a witness"), *cert. denied*, 423 U.S. 824 (1975); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943, 945–46 (E.D. Pa. 1976) (declining to enforce attorney subpoena with respect to work product, but noting that "[t]he matter at issue can be understood only in light of the unusual nature of the criminal investigation which underlies it"); *In re Terkeltoub*, 256 F.Supp. 683, 686 (S.D.N.Y 1966) ("balancing the claim of need for the testimony against the potential hurt of it" and finding "no overriding necessity for compelling the attorney's testimony at this time").

64. *In re Grand Jury Matters (Hodes and Gordon)*, 593 F.Supp. 103, 107 (D.N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984).

65. *In re Grand Jury Matters (Hodes and Gordon)*, 751 F.2d at 19–20. *See also In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26, 27 (1st Cir. 1985) (noting that timing of the subpoena was an important factor cited by the *Hodes and Gordon* court).

66. *Hodes and Gordon*, 751 F.2d at 19–20.

67. *Id.* at 17–18.

68. *Id.* at 17 (noting "the importance that the federal Constitution places upon the right to counsel"); *id.* at 18 (noting that the attorney subpoena "implicates serious policy concerns").

69. *See supra* note 19.

70. 832 F.2d at 649.

71. *Klubock* (Record Appendix at 500).

72. As the district court judge observed in *Klubock*, relatively few attorneys, given the numbers cited by plaintiffs, "appear to avail themselves of [the] opportunity [to quash] and, thus, may be compromising their clients' interests..." (Record Appendix at 500).

No information is available in Massachusetts as to whether, or how often, the subpoenaed attorneys consulted with their clients before acquiescing to the subpoenas. But common sense suggests that fully informed clients—themselves the targets of grand jury investigations—would want their lawyers to resist subpoenas for information about the clients. The infrequency of motions to quash may indicate that attorneys fail both to resist the subpoenas and to inform the clients either of the existence of the subpoena or, more likely, of the legitimate avenues available for resistance. *See* Note, *supra* note 20, at 927–29 (citing examples of attorney waiver of the attorney-client privilege without clients' consent and/or knowledge).

tempt, which she may well have to do if the client's appellate rights are to be saved.[73]

But understandable as the attorney's reluctance to resist the subpoena may be, acquiescence by the attorney is not acceptable under the ethical principles governing the profession, since, by virtue of at least three separate but related ethical rules, the attorney is obligated to resist the effort to make her testify against her client.

First, the attorney is obligated to preserve the confidentiality of communications with the client. Disciplinary Rule 4-101 requires that the attorney not reveal any confidence of the client or any client "secret," defined as information "the disclosure of which would be embarrassing or would be likely to be detrimental to the client," without, *inter alia*, full disclosure to and informed consent from the client. Virtually any disclosure before the grand jury affecting the client can be assumed to run afoul of the stricture against revealing client secrets, since the government is looking for information detrimental to the client. While the rule does allow disclosure when "required by law or court order," DR 4-101(C)(2), this exception is not an invitation to the attorney to testify before the grand jury, without an objection, since the attorney has available under law various courses of action to pursue in order to test the lawfulness of the subpoena.

The authority underpinning the disciplinary rule makes clear the harm that may flow from the attorney's revealing the client's confidences or secrets, and, accordingly, the attorney's obligation to resist such disclosure. As stated in the ethical considerations under Canon 4, EC 4-1:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client....The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

While the disciplinary rule obviously grows out of the attorney-client privilege, and is supported by the forceful rationale for the privilege,[74] it is broader than the privilege, encompassing within its plain terms all information the client may wish protected, including the client's identity and fee information, "without regard to the nature or source of information or the fact that others share the knowledge."[75]

Second, the attorney is obligated to avoid becoming a witness in a matter involving his client, especially a witness adverse to the client. As the *Klubock* panel observed:

> [B]y the service of a...subpoena on the attorney, the attorney is converted into a possible witness in a case against his client. Because the Canons of Ethics...prohibit an attorney from being a witness in a case in which he is also an attorney, counsel will possibly be required to resign as attorney for his client. Not only the right to counsel of choice under the Sixth Amendment but also due process is thus implicated, because the attorney/prosecutor is potentially given control over who shall be his attorney/adversary.[76]

The disciplinary rules require that the lawyer not accept employment in litigation when he knows or it is obvious that he will be called as a witness, DR 5-101(B), and that, once retained, he may not continue to represent the client if "it is apparent that his testimony is or may be prejudicial to his client," DR 5-102(B). The reason for the general rule against the attorney testifying, even when providing testimony favorable to the client, is well established:

> If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness....An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.[77]

And, obviously, the problems of the attorney as witness are greatly exacerbated when the attorney's testimony, as in the grand jury context, is adverse to the criminal

73. The denial of a motion to quash is not immediately appealable in the D.C., First, and Tenth circuits. Therefore, in those circuits the attorney must be cited for contempt in order to obtain review of an adverse decision concerning her assertion of the attorney-client privilege. *See In re Oberkoetter*, 612 F.2d 15, 16 (1st Cir. 1980) (discussing the "well-settled rule that an attorney has no right to appeal from a district court order directing him to testify before the grand jury with respect to an attorney-client communication"); *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1464–66 (10th Cir. 1983) (similar), *enforced*, 727 F.2d 941, 946 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984); *In re Sealed Case*, 655 F.2d 1298, 1300–01 (D.C. Cir. 1981) (similar). The majority view in other circuits is that disclosure orders are immediately appealable. *See, e.g., Branch* v. *Phillips Petroleum Co.*, 638 F.2d 873, 878 n.3 (5th Cir. 1981); *In re International Horizons, Inc.*, 689 F.2d 996, 1001 (11th Cir. 1982); *In re Berkley & Co.*, 629 F.2d 548, 551 (8th Cir. 1980) (citing cases); *W.T. Thompson* v. *General Nutrition Corp.*, 671 F.2d 100, 102–03 (3d Cir. 1982).

74. As Wigmore observed, "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 J.H. Wigmore, *Evidence* (McNaughton rev. 1961) §2291, at 545; *see Upjohn* v. *United States*, 449 U.S. 383, 389 (1981) ("[i]ts purpose is to promote full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958, 962 (D. Mass. 1985).

75. EC 4-4; *see* discussion in Section III-A, *supra*.

76. *Klubock*, 832 F.2d at 654.

77. EC 5-9. *See Hickman* v. *Taylor*, 329 U.S. 495, 513, 517 (1947) (Jackson, J., concurring) (similar).

defendant or putative defendant, since it is difficult to see how the attorney-client relationship can survive such a turnabout.[78] The harm thus visited upon the client is twofold: evidence against him is provided by his attorney, and, in all likelihood, he loses his attorney of choice.

Third, the attorney is obligated to represent the client zealously and loyally.[79] As Ethical Consideration 5-1 states, "[n]either [the attorney's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." It seems obvious that the attorney who, without challenging the subpoena, appears before the grand jury, possibly to incriminate his client, probably violating the client's confidences and disqualifying himself from continued representation, falls far short of zealous and loyal representation.

In sum, then, the attorney, served with a grand jury subpoena for information concerning his client, faces a trio of ethical obligations (themselves implicating constitutional as well as significant jurisprudential concerns), which cannot be disregarded and which require the attorney to take all reasonable steps to protect the client.

IV. Current Practice Under PF 15

At present in Massachusetts, attorney subpoenas are most commonly employed by federal prosecutors investigating white collar and narcotics offenses. Although Massachusetts state prosecutors have seldom used the attorney subpoena to assist investigations, this may change,[80] and it remains to be seen under what circumstances such subpoenas will be used and what procedures the state prosecutors will follow if attorney subpoenas come into accepted use.

The practice of federal prosecutors is regulated by the attorney-subpoena Guidelines promulgated by the Department of Justice in July 1985 in response to the increasing concern expressed by the bar about the use of such subpoenas.[81] The Guidelines begin with a candid recognition 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."[82] The Guidelines also call for the Justice Department to "exercise close control over the issuance of such subpoenas," attempting in each case to "strike the proper balance between the public's interest in the fair administration of justice and effective law enforcement and [the] individual's right to the effective assistance of counsel."[83] The Guidelines acknowledge, in particular, "the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client."[84]

The Guidelines apply both to defendant's prior and present counsel and contain both procedural and substantive provisions. The substantive provisions of the Guidelines call for a five-step analysis of the subpoena request. First, the subpoena must be "reasonably needed" for the successful completion of a warranted criminal investigation, prosecution, or civil litigation matter. Second, the department must have exhausted the alternative means of obtaining the information sought. Third, the need for the subpoena must outweigh the risk to the attorney-client relationship, including the risk that the attorney will be disqualified from representing the client because of the subpoena. Fourth, the subpoena must be narrowly tailored as to subject matter and the time period covered. Finally, the information sought must be non-privileged.[85]

The procedural mechanism established by the Guidelines requires that all attorney subpoenas receive prior approval from the Assistant Attorney General of the Criminal Division of the Department. As a practical matter, such approval is readily given—it appears that less than 5% of the applications are denied.[86]

Under these new procedures, the specific path which an attorney subpoena application follows in the Justice Department requires approval both within the local U.S. Attorney's office and the Justice Department

78. *See United States* v. *Diozzi*, 807 F.2d 10, 12–13 (1st Cir. 1986) ("[A]ttorneys [cannot] serve the dual roles of defense counsel and sworn government witnesses in the same trial"); DR 5-102(B) (mandating withdrawal when the attorney's testimony will be prejudicial to the client); *cf. Kaeser* v. *State*, 620 P.2d 872, 873 (Nev. 1980) ("[G]reat mischief may result when defense counsel is called as a prosecution witness"); *State* v. *Thomas*, 53 Or. App. 375, 631 P.2d 1387, 1390 (1981) (defendant's right to effective representation may be impaired when counsel is on the witness stand for the prosecution).

79. *See, e.g.*, DR 7-101; *In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp at 969.

80. Since most prosecutions brought by the district attorneys' offices are for street crimes, the attorney subpoena is likely to remain a rarity with the district attorneys' offices. This is not necessarily so, however, when the district attorney is working in conjunction with the Attorney General's office on an investigation. For several reasons, the Massachusetts Attorney General's office seems likely to make greater use of attorney subpoenas. First, the Attorney General's criminal division has made sophisticated crime—public corruption, white collar crime, and drug trafficking—a high priority. *See, e.g., Boston Herald*, June 7, 1987, p. 7. This is precisely the type of criminal activity for which federal prosecutors have utilized the vast majority of attorney subpoenas. Second, the United States Supreme Court has recently narrowed the scope of the federal criminal fraud statute, essentially stating that a deprivation of "good government" alone is not within federal jurisdiction. *See McNally* v. *United States*, 107 S. Ct. 2875 (1987). While Congress may amend the statute, and although most fraud cases do involve property, the Supreme Court has, nonetheless, removed a class of corruption cases from federal jurisdiction. It is expected that the state prosecutors, particularly the attorneys general with their statewide jurisdiction, will step into the void left in the wake of the Supreme Court's ruling. This is especially likely in Massachusetts where, as noted, such crime is an announced priority.

81. *Guidelines, United States Attorney's Manual*, §9-2.161(a) (1985); Stern & Hoffman, *supra* note 1, at 1817.

82. *Id.*, preamble.

83. *Id.*

84. *Id.*, §9-2.161(a)(E)(4).

85. *Guidelines*, *supra* note 81.

86. *See* Stern & Hoffman, *supra* note 1, at 1818 and n.176.

in Washington, D.C. The subpoena application is prepared by the Assistant U.S. Attorney who is conducting the grand jury investigation. The application must then be approved by the Chief of the Criminal Division, the U.S. Attorney, and, finally, the Assistant Attorney General in charge of the Criminal Division in Washington.[87]

In federal court in Massachusetts, PF 15 approval is sought by applying to the district court judge handling miscellaneous business (or the judge who has handled that particular grand jury matter previously). The practice of the U.S. Attorney's Office in Massachusetts has been to submit the application *ex parte* and under seal (*in camera*), and to incorporate the information submitted in compliance with the DOJ approval procedure.[88]

While these procedures and the DOJ Guidelines appear to provide significant protection against abusive practices, the Guidelines specifically state that they do not create enforceable rights:

> These guidelines...are set forth solely for the purpose of internal Department of Justice guidance. *They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal,* nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.[89]

While PF 15, like the DOJ Guidelines, does not provide an independent and sufficient basis on which to quash a subpoena that has been issued without compliance with its terms,[90] such non-compliance is surely relevant in determining whether a subpoena is "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c). Moreover, PF 15 is a *rule* of conduct for all attorneys practicing in Massachusetts. Therefore, it must be assumed that prosecutors will strictly adhere to it and will not risk professional discipline.

As the following vignettes illustrate, practice under PF 15 has varied considerably.[91]

1. In the spring of 1987, a federal prosecutor subpoenaed fee information from an attorney in a criminal case. The attorney represented a target of the grand jury. The application for the subpoena was supported by an *ex parte, in camera* affidavit, and the subpoena was issued. Subsequently, the attorney-witness moved to quash. While the government, in opposing, revealed some of the information contained in its prior submission to the court, the attorney-witness was not permitted, despite a motion requesting the information, to examine these submissions in their entirety. Before the court could decide the motion to quash, the attorney-witness and the prosecutor worked out an arrangement whereby the subpoena was substantially narrowed and then complied with.

2. In the summer of 1986, a federal prosecutor applied to the court through an *in camera, ex parte* affidavit for a testimonial subpoena to a target corporation's attorney. The subpoena issued, and the attorney resisted through a motion to quash. The court refused to disclose the government's submission to the attorney-witness. Eventually, the subpoena's scope was narrowed by agreement, and the attorney complied with the narrower subpoena.

3. In the fall of 1986, a federal prosecutor submitted his *ex parte, in camera* application under PF 15 for a testimonial subpoena to the target corporation's in-house counsel. That attorney was representing the target in its defense of the prospective criminal charges. The subpoena was issued, and the attorney moved to quash on privilege grounds. The judge denied the broad motion to quash, and ordered the attorney into the grand jury room, where he could invoke the attorney-client privilege to specific questions, which he did. While the judge eventually rejected most of the attorney's privilege claims, the grand jury had already proceeded sufficiently in its investigation that it never called the attorney back.

4. In November, 1986, a federal prosecutor presented a judge with *ex parte, in camera* submissions in support of a subpoena for the attorney's entire file on the client. The judge refused to authorize the subpoena, and ordered that, if the government wished to go forward, it was required to serve upon the attorney its motion, under an impoundment order. The motion was served; it identified the subject matter of the grand jury's inquiry, the need for and relevance of the information sought by subpoena, and the reason the prosecutor believed the information was not privileged. The attorney-witness, however, in the course of the PF 15 proceedings, contested on the ground of privilege. With apparent encouragement from the judge, the government significantly modified its subpoena, and the attorney complied.

5. In 1987, an assistant district attorney in Essex County subpoenaed an attorney for a videotape belonging to the client and held by the attorney. When the prosecutor was asked whether he had complied with PF 15, he acknowledged that he had not, admitting that he was unaware of its existence, and he withdrew the subpoena. The subpoena was not subsequently reissued.

It should be emphasized that the examples above constitute only a fraction of practice under PF 15, and

87. W. Landers, *supra* note 4.

88. This information is based on a telephone conversation in December 1988 between one of the authors, David Shaughnessy, and a high-ranking official in the United States Attorney's office in Boston, who asked not to be identified.

89. *Guidelines, supra* note 81, §9-2.161(a) (emphasis added). Even without this disclaimer, the unenforceability of a federal agency's internal guidelines is suggested by existing case law. *See United States* v. *Caceres*, 440 U.S. 741, 755-56 (1979); *cf. Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (failure of Social Security Administration employee to follow Claims Manual instructions in advising applicant does not entitle applicant to retroactive benefits).

90. *See Klubock*, 832 F.2d at 657 (stating that the remedy for non-compliance "is to be resolved in different proceedings").

91. Authors Hoffman and Shaughnessy obtained the information in the text that follows in conversations with attorneys in Massachusetts who have received attorney subpoenas.

lessons should be drawn cautiously from them. It is not known, for instance, if subpoena applications under PF 15 have been made that were denied by the court without notice to the attorney, or whether subpoenas may have been significantly narrowed in *ex parte, in camera* proceedings. Also, of course, little is known of those subpoenas that issued under PF 15 and were not challenged by the attorney-witness. In fact, because few opinions have been published that address the procedures and substantive standards that the courts will employ under PF 15, the area remains largely uncharted.[92]

V. Proposed Practice Under PF 15

Practice under PF 15 is evolving, and, as the above examples suggest, the courts appear to have responded to their responsibilities under the new rule in differing ways. As practice under PF 15 is developed through actual litigation, certain facts and principles should be kept in mind. First is the fact that a subpoena to an attorney for information concerning the client is, for the reasons discussed in this article, extremely troublesome and often dangerous, causing both disruption to the attorney-client relationship at issue as well as potential harm to all other attorney-client relationships, as clients may become less confident that their lawyers will or can protect their secrets. Even the DOJ Guidelines clearly acknowledge the special dangers associated with such subpoenas.[93]

Second, PF 15 was urged by the bar, and should reasonably be seen as adopted by the courts, in order to address the growing problems of subpoenas to attorneys by providing an additional measure of protection beyond what is afforded by a motion to quash.[94] That is, PF 15 must not be seen as embracing the *status quo ante*—otherwise it would serve no purpose—but must instead be utilized to augment and extend existing law that has not adequately protected attorneys from subpoenas that disrupt the attorney-client relationship. The fact that the rule does not contain specific procedures and standards in no way contradicts this approach, since it is appropriate for the courts to develop procedures and standards when they have before them full argument by litigating parties.

Third is the fact that PF 15 is a disciplinary rule, and thus should be interpreted harmoniously with other disciplinary rules and ethical considerations governing attorney conduct, and specifically with the admonishments in the rules protecting client confidences.[95]

Fourth is the fact that there is considerable consensus among both federal prosecutors and other sectors of the bar concerning procedures and standards applicable to the issuance of subpoenas to attorneys. Specifically, the ABA, MBA, many other state bar associations that have endorsed regulation of attorney subpoenas, and the Department of Justice, as reflected in its Guidelines, appear to agree that a thorough screening should occur before such a subpoena issues, and that the subpoena should issue only when a compelling need for it has been demonstrated. This agreement should constitute an appropriate starting point for the courts in fashioning procedures and standards.

Finally, the adoption of PF 15, while it no doubt signifies a concern with the growing problem of subpoenas to attorneys, clearly falls short of prohibiting such subpoenas. Thus, the rule can properly be seen as an effort to control a practice that has caused alarm among members of the bar, while allowing the issuance of subpoenas to attorneys in appropriate cases.

A. *Notice and the Opportunity to be Heard*

As indicated above, the United States Attorney's office in Massachusetts takes the position that the PF 15 application for judicial approval of the subpoena is to be submitted *ex parte* and *in camera*, and in conformity with the DOJ guidelines. Thus, the application must demonstrate that the subpoena is narrowly drawn, reasonably needed, and otherwise in conformity with the Guidelines, but this demonstration is to be kept secret from the attorney-witness. At least one judge, as indicated, has rejected this approach and has required that the subpoenaed attorney be allowed to challenge the issuance of the subpoena as part of the PF 15 process. This is a sensible approach.

The dangers and drawbacks of the *ex parte, in camera* proceedings are manifest, and its benefits questionable. Such an approach ignores completely the attorney and her client. The prosecutor's submission may very well be inaccurate or incomplete,[96] but inaccuracy or incompleteness can only be brought to the court's attention by the attorney and client. Moreover, if history can be trusted, it should be expected that in many if not most cases that proceed *ex parte* and *in camera*, the prosecutor's initial request will be overly broad.[97] One does not have to assume prosecutorial bad faith or overreaching here; instead, one must recognize only that disputes that are resolved based on the information provided by

92. One decision that has been published by Westlaw is *In re Grand Jury Subpoena*, 1986 Westlaw 135539 (D. Mass. Nov. 26, 1986), but the court does not set out comprehensive standards.

93. *See* text accompanying notes 81–83.

94. *See* Report of the Criminal Justice Section of the Massachusetts Bar Association (Appendix of this article) ("the issuance of subpoenas [to attorneys] without prior judicial approval threatens to impair the effectiveness of the attorney/witness, to undermine the attorney-client relationship, and to diminish the societal interest in vigorous and independent advocacy by lawyers").

95. *See* section III D, *supra*.

96. This may be the case even if the subpoena application proceeds through the entire Department of Justice review, discussed *supra*, since this review also occurs without benefit of comment from the attorney or client, and relies on the facts and circumstances as presented by the Assistant United States Attorney seeking the subpoena.

97. In three of the cases described in section IV, *supra*, such was the situation, and in each, compliance with the subpoena occurred only after it was narrowed.

only one side are apt to reach one-sided conclusions.

Also, unless the attorney-witness is allowed to participate in the pre-issuance process, there is a risk that PF 15 will do more harm than good. The reason is that under the *ex parte* process, the prosecutor makes a full case to the judge for issuance of the subpoena without opportunity for the attorney-witness to provide facts or argument. If the judge then allows the subpoena to issue, the attorney-witness is left the unattractive prospect of litigating a motion to quash before a judge who has already decided the issue once, and may be reluctant to reverse herself. Under prior practice, by comparison, the attorney-witness's motion to quash was heard by a judge who had not yet considered the propriety of the subpoena, who had not been exposed to *ex parte* communications, and who might be unwilling, in light of the attorney-witness's submissions, to accept from the prosecutor *ex parte* justifications for the subpoena.[98]

Finally, the issuance of the subpoena in and of itself can severely damage the relationship between the attorney and the client, as well as attorney-client relationships in general. Prior judicial review under PF 15 is meant to reduce that very harm. Yet PF 15 review can only be meaningful if it is based, and if the subpoenas issue, upon reasonably complete information. Accordingly, if PF 15 is to be effective in stemming the harm that flows automatically from the issuance of subpoenas to attorneys, especially subpoenas that pry broadly into confidential areas, judicial review must be based on more than the assertions of the subpoena proponents.[99]

Prosecutors may argue that allowing the attorney-witness, and, through the attorney-witness, the client, to participate in the PF 15 judicial approval process runs headlong into the need for grand jury secrecy. But there are three responses to this. First, the attorney-witness and client, like others, are bound by the court's order of secrecy, and there is no reason to assume that these orders will not be honored, especially considering the court's power to punish severely violations of such orders.

Second, where some information in the subpoena application arguably raises secrecy concerns, the court may redact the documents before providing them to the attorney-witness. While this procedure may somewhat impede the ability of the attorney-witness to participate in the proceedings, it might nevertheless prove necessary where highly sensitive information is at issue.

Third, once served with the subpoena, the attorney-witness may move to quash on the basis that compliance with the subpoena would be unreasonable or oppressive.[100] There is no reason to think that grand jury secrecy will be unduly compromised by allowing earlier challenge to the subpoena.

Some prosecutors may also argue against pre-issuance involvement by the attorney-witness on the ground that "mini-trials" should be avoided in the grand jury context.[101] But the reluctance of the courts to scrutinize subpoenas has no place when the attorney is subpoenaed for information about the client, since PF 15 explicitly requires judicial involvement before the subpoena issues. Moreover, although an adversarial, pre-issuance hearing may result in two hearings instead of one, the fuller pre-issuance consideration of the subpoena makes it less likely that a motion to quash will be filed. And, if such a motion is filed, it is likely that the scope of those proceedings will be narrowed considerably by the pre-issuance proceedings.

In sum, once the prosecutor submits to the court the subpoena application under PF 15, the attorney-witness should be served with the motion, under any appropriate impoundment or secrecy orders, and should be given a short but reasonable opportunity (1) to move for production of *ex parte* and *in camera* submissions accompanying the motion in order to contest issuance of the subpoena; and (2) to bring to the court's attention any information or concerns relevant to the issuance of the subpoena. The attorney-witness should be provided the information submitted by the government, redacted if necessary, to satisfy the substantive standards for issuance of the subpoena. Also, since the purpose of the attorney-client relationship is to serve the client, and since the attorney-client privilege is held by the client and not the attorney,[102] the court should be satisfied, before proceeding on the application, that the client has been properly informed of the proceedings and that the attorney-witness is prepared and able to protect the client's interests.

B. *Substantive Standards*

There is, as indicated, widespread agreement among the bar at least as to some of the standards that should govern the issuance of subpoenas to attorneys. This general consensus should inform the courts' analyses.

1. *A Showing of Need*

There is little controversy over a two-part, threshold showing of need before issuance of the subpoena should be seriously considered. The Justice Department Guidelines specifically require that the subpoena be reasonably needed for the successful completion of the investi-

98. *See, e.g., In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958 (D. Mass. 1985) (refusing to accept *ex parte, in camera* submissions from prosecutor on motion to quash, and stating that court would consider information contained in those submissions only if they were first disclosed to the attorney-witness).

99. Senate Bill 2713, introduced on August 10, 1988 by Senator Simon and currently pending before the Committee on the Judiciary, similarly requires an adversarial hearing at which information in support of the subpoena is disclosed to the attorney and client. *See* note 21, *supra*.

100. *See* F. R. Crim. P. 17(c).

101. *See U.S.* v. *Dionisio*, 410 U.S. 1 (1973); discussion of *Dionisio* in Stern & Hoffman, *supra* note 1, at 1810–11.

102. *See United States* v. *United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950) (Wyzanski, J.).

gation and that all reasonable attempts to obtain the information from alternative sources be made.[103] The ABA's 1988 resolution on attorney subpoenas would also require that the evidence sought be essential to the successful completion of an ongoing investigation or prosecution and that there be no feasible alternative to obtaining this information.[104] Senate Bill 2713 would similarly require that the information sought be necessary to the continued viability of a legitimate government investigation or prosecution, and that all alternative sources for the information be exhausted.[105]

Clearly, the court should make a determination that the subpoena is needed. Without such a determination, a prosecutor's demand for the most cumulative, unneeded, and easily found piece of evidence could result in the dismissal of a party's lawyer, or in other undesirable consequences. Moreover, as noted, unless PF 15 proceedings require a showing of need for the attorney subpoena, the rule will add little or nothing to the existing case law.

As to what, specifically, should be demonstrated in order to meet the threshold requirement of need, it would seem, in light of the important interests at stake, that the standard should be both demanding and as clear and specific as possible. The ABA resolution of February 1988 and Senate Bill 2713 require a substantial showing of need and are specific enough that either should be effective in providing guidance to those involved in the subpoena process. Both the resolution and the pending bill require what is essentially a showing of necessity—that is, that the evidence sought from the attorney is necessary to the investigation and unavailable from other feasible sources. This seems entirely reasonable, since issuance of the subpoena may very well destroy the attorney-client relationship.

It should be emphasized that judicial screening for necessity is hardly unprecedented.[106] It is performed routinely in the grand jury context whenever the subpoena calls for material subject to the qualified protection for work product. And it naturally forms part of the analysis employed by a court in considering, under Rule 17, whether an apparently burdensome or irregular subpoena is in fact justified. Moreover, there is nothing so mysterious about the process of investigation *per se* which precludes the prosecutor from articulating the need for an item of evidence. As a practical matter, if the evidence is in fact necessary it should not be difficult for a prosecutor to describe the need; conversely, if necessity cannot be demonstrated clearly, it is not unreasonable to presume that it does not exist.

2. *Particularity and Privilege*

As noted in the instances discussed above,[107] it appears that PF 15 has not succeeded in encouraging prosecutors to narrow to appropriate limits the information requested in their subpoenas to attorneys. In fact, in most of those cases, it appears that a time-consuming and wasteful exercise occurred in which overly broad requests worked their way through the PF 15 process, only then to be negotiated, limited, and complied with. The law is clear, however, that subpoenas may not compel production of information protected by privilege, including the attorney-client privilege. The broader the subpoena to the attorney, the more likely it is to reach into protected areas. An obvious solution to the problem of overbroad subpoenas is to require a degree of specificity that clearly protects privileged areas. Virtually all of the standards and guidelines previously discussed do this, with the more recent of these providing detailed and workable standards that should be adopted by the courts.[108] In proceedings under PF 15, prosecutors should be expected to meet such requirements of specificity in order to avoid the needless process of stripping away from the subpoena what is peripheral, nonessential, or intrudes into privileged areas.

3. *Clear and Convincing Showing*

Senate Bill 2713 sets a standard of proof that the government must satisfy at the pre-issuance hearing before it may obtain the attorney subpoena: "the government shall prove by clear and convincing evidence that each of the requirements" for issuance has been satisfied. The clear and convincing standard is appropriate for PF 15 proceedings.

This standard represents the intermediate burden of proof between "preponderance of the evidence" and "proof beyond a reasonable doubt." The Supreme Court has held that the clear and convincing evidence standard is appropriate in cases where certain vital interests are threatened. For example, when a public figure claims defamation, she must prove the publisher's malice by clear and convincing evidence, thereby protecting the freedom of the press in a democratic society.[109] In actions by the state to take a child from her parents, where the

103. *See* text accompanying notes 81–84, *supra*.

104. The ABA Resolution is reproduced in Appendix D of Stern & Hoffman, *supra* note 1, at 1853–54.

105. *See* note 21, *supra*.

106. *See In re Grand Jury Proceedings (Schofield I)*, *supra* note 61, 486 F.2d 85; *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958 (D. Mass. 1985).

107. *See* section IV, *supra*.

108. The 1988 ABA resolution (*see supra* note 104) requires that "the information sought is not protected from disclosure by any applicable privilege" and that "the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time...." Senate Bill 2713 (*see supra* note 21) requires that the subpoena list "with particularity the specific testimony, documents, or tangible objects sought" and that they not be "protected from disclosure by any statutory, common law, or constitutional privilege of the lawyer or client."

109. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 285–86 (1964).

parent-child relationship is at risk, the state must establish, by clear and convincing evidence, that the child is neglected.[110] Massachusetts courts have applied the clear and convincing proof standard in similar cases.[111]

The attorney-client relationship is essential to our system of criminal justice. Thus, the clear and convincing standard properly allocates the burden of proof in situations where an attorney subpoena is sought—*i.e.*, where the government's actions threaten to undermine that vital relationship.

4. *Balancing Need and Harm*

The standards enunciated above would allow the subpoena to issue only if the prosecutor makes a clear and convincing showing that the evidence sought is necessary, unavailable from other sources, narrowly tailored, and not protected by privilege. There is a final issue that needs to be considered, however, and that is the harm that will occur as the result of issuing the subpoena in question.[112]

In implementing PF 15, courts should be concerned about two types of injury: specific and general. There is a general injury to all attorney-client relationships every time a subpoena is issued to an attorney to give evidence against her client. Each time such a subpoena issues, clients and potential clients are less sure that their lawyers can or will protect their confidences. The more specific injury to a particular attorney-client relationship depends upon the facts and circumstances of the relationship which is being compromised by subpoena.

While it can be expected that in most cases the government's showing that the subpoena is narrowly tailored to request only unavailable, non-privileged information that is necessary to the investigation will suffice to justify issuance of the subpoena, there may be specific cases where even this showing should not suffice because of the harm that will flow to a specific attorney-client relationship from allowing the subpoena.[113] In such situations, the court should consider, *inter alia*, the nature and scope of the information requested; the extent to which the attorney's release of the information would be embarrassing or detrimental to the client; the nature of the attorney-client relationship; whether the attorney is currently representing the client; and whether compliance with the subpoena is likely to require the attorney to withdraw.[114] With important interests at stake on both sides, the court should balance these concerns and decide whether the subpoena should issue and, if so, whether it can be further narrowed to reduce the harm to the client.[115]

Conclusion

The unregulated use of attorney subpoenas seriously threatens the attorney-client relationship and provides the prosecutor with enormous power over her adversary. The purpose of PF 15 was to restore the traditional balance between the need for vigorous law enforcement and the confidentiality of the attorney-client relationship by requiring judicial review of attorney subpoenas.

The standards proposed here should lead to the issuance of a relatively small number of narrowly tailored subpoenas. Such a result is both desirable, in order to prevent further inroads on attorney-client confidentiality, and consistent with the history and purpose of PF 15.

110. *Santosky* v. *Kramer*, 455 U.S. 745, 766–67 (1982).

111. *See, e.g., Custody of a Minor*, 389 Mass. 755, 766–67 (1983) (removing child from parents); *Custody of a Minor (No. 2)*, 16 Mass. App. 923, 924 (1983) (same); *Callahan* v. *Westinghouse Broadcasting Co.*, 372 Mass. 582, 587–88 (1977) (defamation of public figure); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 870–71 (1975) (same); *but see Superintendent of Worcester State Hospital* v. *Hagberg*, 374 Mass. 271, 276 (1978) (expressing reluctance to utilize clear and convincing standard).

112. It should be noted that this question of harm is particularly within the knowledge of the subpoenaed attorney and her client, which reinforces the need for their participation in the pre-issuance proceedings.

113. For instance, assume the situation where the client is the target of the grand jury and an indictment for serious offenses is expected. The client is currently represented by the subpoenaed attorney, who, because of a long-standing relationship with the client, special knowledge of the client's situation, and special expertise, is uniquely qualified to represent the client. Compliance with the subpoena will likely require disqualification and the client will be unable to obtain similarly effective representation, both because of the attorney's special knowledge and perhaps because of additional factors, such as the client's resources. In this situation, the court, faced with the client's compelling need, might determine that the government's need was not so great that the subpoena should issue.

114. One district court judge in Massachusetts has ruled that PF 15 is limited only to current representations: former clients are excluded from the rule's ambit. *In re Grand Jury Subpoena*, 1986 Westlaw 13539 (Nov. 26, 1986). This is a most unfortunate ruling in light of the history and of purpose of PF 15, and the general injury to attorney-client relationships whenever an attorney subpoena issues, regardless of whether the attorney is involved in ongoing work for the client or has completed it.

115. *See, e.g., In re Terkeltoub*, 256 F.Supp. 683, 686 (S.D.N.Y. 1966) (balancing need for testimony with potential harm).

APPENDIX

Report of the Massachusetts Bar Association Criminal Justice Section

In 1977, the American Bar Association gave its support to grand jury reform legislation that adhered to approximately 25 principles including the following:

All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

The commentary accompanying this principle provides in part as follows:

Principle #23 is further intended to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships. The ABA purposely did not go into further detail in this proposed principle, believing that an expression of Association concern about

present abuses of the grand jury vis-à-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department in 1977 expressed its support for this principle.

In 1980, the American Bar Association adopted the following additional principle as a basis for grand jury reform legislation:

> No attorney, his agent or employee, shall be questioned by the grand jury concerning matters he has learned in the legitimate investigation, preparation, or representation of his client's cause or be subpoenaed to produce before the grand jury private notes, memoranda, and the like constituting his professional work product.

The particular incident that prompted the Criminal Justice Section to make this proposal occurred recently in New Hampshire when five attorneys, at least several of whom are members of the bar of this state, were subpoenaed to appear before a federal grand jury and to bring with them certain records concerning clients who are targets of the federal grand jury probe and whom the attorneys also represent in pending New Hampshire state court criminal proceedings. The subpoenas ordered the attorneys to produce the following information concerning their clients:

> any and all records concerning legal fees, expenses, and any and all other monies paid to or received by you or your law firm by or on behalf of _____ [client], including but not limited to:
>
> 1. ledgers showing date, amount, form (e.g., cash, check, etc.) and source of any monies received;
> 2. copies of deposit tickets, cancelled checks and all other backup documentation for all monies received;
> 3. retainer agreements and
> 4. copies of all billings and/or charge expense invoices or advices.

On July 5, 1984, The United States District Court for the District of New Hampshire (Loughlin, J.) allowed motions to quash the subpoenas, noting that "[t]he actions of the U.S. Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law as witness New Hampshire Bar Association as one of the intervenors."...Thereafter, the case was appealed to the Court of Appeals for the First Circuit. *In re Grand Jury Matters*, No. 84-1556. Oral argument took place in September and the matter is now under advisement.

There are several issues presented by this appeal including the scope of the attorney-client privilege and the applicability of the work product doctrine in the context of a grand jury investigation. These issues have been fully and ably briefed by the parties to this litigation and the several organizations which have submitted briefs amicus curiae. There is nothing further we can add at this juncture to aid the Court of Appeals with the resolution of these legal issues. Also at stake in this case, however, are broader questions that touch on the role of the lawyer in the administration of justice and the importance of that role to the community. "It is too often overlooked that the lawyer and the law office are indispensable parts of our administration of justice....The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of a practice impairing the lawyer's effective representation of his client." *In re Terkeltoub*, 256 F.Supp. 683 (S.D.N.Y. 1966) (Frankel, J.) quoting *Hickman* v. *Taylor*, 329 U.S. 495, 514–15 (1947) (Jackson, J., concurring).

We take no position on the merits of the pending investigation that reportedly has given rise to the subpoenas that are the subject of the pending First Circuit case. We also express no view on the reach of the attorney-client privilege and the work product doctrine and the applicability, if any, of these legal principles to the facts of the pending First Circuit case. Nevertheless, we do believe that the issuance of subpoenas in this case and in other similar cases without prior judicial approval threatens to impair the effectiveness of the attorney/witness, to undermine the attorney-client relationship, and to diminish the societal interest in vigorous and independent advocacy by lawyers. *See, e.g.*, S.J.C. Rule 3:07, DR5-102(B) (withdrawal as counsel when the lawyer becomes a witness). The principle we propose is a logical application of the more general principles adopted by the American Bar Association and one that we believe serves the best interests of our profession and of the community we serve.

Peter W. Agnes, Jr.
Chairman

Approved by Board of Delegates
November 28, 1984

Case & Statute Comments

Exclusionary Rule—Massachusetts Constitution—Use of Unconstitutionally Obtained Evidence for Impeachment

Commonwealth v. *Fini*, 403 Mass. 567 (1988)

In *Commonwealth* v. *Fini*,[1] the Supreme Judicial Court ruled for the first time that the Commonwealth may not introduce recorded conversations to impeach a defendant where the recorded conversations were obtained in violation of the state wiretapping statute [G.L.M. c.272, §99] and article 14 of the Declaration of Rights, whether the conversations deal with collateral matters or directly with the crimes charged. The Court did reaffirm, however, that the informant who taped the conversations without the defendant's knowledge or consent may testify to the conversations in which he took part, because that testimony would not be the product of a constitutional violation.[2]

Fini represents a departure from precedent. Prior to *Fini*, the Supreme Judicial Court had held that evidence unlawfully obtained and unavailable to the Commonwealth for use in its case-in-chief was nevertheless available to the Commonwealth to impeach a defendant's testimony.[3] In fact, in another case involving the surreptitious recording of a conversation, *Commonwealth* v. *Domaingue*,[4] the Supreme Judicial Court had ruled that the prosecutor had properly impeached the defendant

1. 403 Mass. 567 (1988).

2. *Id.* at 569 n.2.

3. *See Commonwealth* v. *Harris*, 364 Mass. 236, 238 (1973) (uncoerced statements made by the defendant to the police without compliance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were nevertheless admissible to impeach the defendant); *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), *cert. denied*, 425 U.S. 959 (1976) (defendant's incriminating statement to the police was admissible to impeach him if he testified, even though the police knew that the defendant's lawyer had been trying to speak to a police officer involved in the investigation and had not told the lawyer that an interrogation was in progress).

4. 397 Mass. 693 (1986).