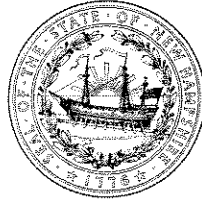


ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE  
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II  
DEPUTY ATTORNEY GENERAL

June 1, 2007

Eileen Fox, Esq., Clerk  
New Hampshire Supreme Court  
1 Charles Doe Drive  
Concord, NH 03301

Re: R-2007-0002, In re March 15, 2007 Referral from the Advisory Committee on Rules (Professional Conduct Rules)

Dear Clerk Fox:

I am writing to provide written comments and to request the opportunity to present oral testimony on certain proposed amendments to the New Hampshire Rules of Professional Conduct. Specifically, I am submitting comments on proposed Rules 3.6(d) and 3.8(e) and (f). I want to begin, however, by commending the Advisory Committee on Rules for its hard work on this project. A complete review of the ethics rules is a substantial undertaking. It is clear that the Committee carefully considered a number of comments during this process, including comments submitted by the Attorney General's Office.

While I respect and appreciate the work the Committee put into this project, I am very concerned that the Committee's recommendations on Rules 3.6(d) and 3.8(e) and (f) stem from problems identified in other jurisdictions and do not reflect the realities of legal practice in New Hampshire. I have explained to the Committee my reasons for asserting that certain additions to these two rules are unnecessary and would actually have a substantial detrimental effect on law enforcement, the practice of law in this state, and the public interest. I urge the Court to adopt all of my recommendations on these two rules, for the reasons described below.

**Proposed Rule 3.6 Trial Publicity**

As I have stated in my previous comments, this Office recognizes that some changes to existing Rule 3.6 are necessary to bring the rule into compliance with the First Amendment requirements outlined by the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). Those concerns have been addressed by the Advisory Committee's recommended revisions to Rule 3.6(c), which this Office fully supports.

The remaining portions of existing rules regarding trial publicity have worked very well in this State. New Hampshire has not experienced problems with prejudicial pretrial publicity caused by comments made by lawyers about pending cases. Prosecutors in this State, in particular, are rarely, if ever, criticized for saying too much about a case in the press. That is because the existing rules and, as a result of the Committee's recommendations, the proposed rules, would provide clear guidance to attorneys who are presented with press inquiries about pending cases. Members of the New Hampshire Attorney General's Office interact with the media on almost a daily basis about cases prosecuted by this office. We are frequently questioned, or even criticized, by members of the media from other states because we are viewed as too restrictive in our public comments about cases. We routinely rely on the existing Rule 3.6 as the basis for our limited public comments about pending cases and commend the Committee for recommending re-adoption of current Rule 3.6(b).

On the other hand, as public servants and members of law enforcement, we have an important duty to explain our actions to the public when questioned about pending cases. The public has a right to inquire about and understand our actions. Dissemination of some information can also act as a valuable public service by warning the public about the dangers of criminal conduct, and educating the public about the criminal process. Any changes to the rules regarding trial publicity that would alter the existing balance between unfair prejudicial publicity and the public's right to be informed about criminal cases and would have a detrimental impact on the practice that has developed in this State over many years.

More specifically, proposed Rule 3.6(d) would have a directly negative effect on existing practice. That proposed rule, drawn from an ABA model, has the most wide-reaching negative ramifications of any of the proposed amendments. Proposed Rule 3.6(d) would permit defense attorneys to respond to perceived negative comments in the press about a pending case, regardless of the source. While limited to responses that "a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity," this proposal would virtually eliminate all restrictions on public comment and would open the door to a "war of words" in the press.

Most significantly, the proposed rule is not limited to responding to public comments made by the opposing lawyer or opposing party. The only limitation is that a lawyer or client cannot have initiated the publicity to which the lawyer is responding. ABA comments on the model rule specifically note that public comments can be made in response to public statements made by "third persons." Thus, any time media coverage is viewed as detrimental, a lawyer would not be subject to the restrictions on extrajudicial statements under Rule 3.6(a). I believe that, in criminal cases, defense lawyers would have virtually unfettered discretion to comment about their cases whenever negative press appears because their subjective perception of "undue prejudicial effect" would be the controlling factor.

Moreover, in the criminal context, Rule 3.6(d) is entirely one-sided. Defense lawyers would be free to comment publicly even though the initial public statements were made by victims, witnesses, or even reporters and editorial writers over whom prosecutors have no control. Prosecutors would not be able to respond to comments made by defense lawyers

because prosecutors are still bound by Rule 3.8, which provides even greater restrictions on prosecutors' ability to make extrajudicial comments. Defense lawyers have no comparable limitations. So long as a defense lawyer reasonably believes a public comment is required to protect a client, the lawyer would be able to make pretrial comments about victims, witnesses, or the State's evidence. The comments could prejudice prosecution of the case, to the detriment of the public's interest in achieving justice. Moreover, a prosecutor would be prevented from responding in most cases as a result of Rule 3.8.

Proposed Rule 3.6(d) is entirely new, has no parallel in the existing rule and has a substantial likelihood of unfairly changing practice in this State, which evenhandedly restricts lawyers' public comments about pending cases.

### **Proposed Rule 3.8 Special Responsibilities of a Prosecutor**

I have recommended to the Committee that existing Rule 3.8 be readopted in its entirety. However, the Committee has recommended adoption of the ABA model rule. I urge the Court to reject the Committee's recommendation. As with Rule 3.6, existing Rule 3.8 provides clear guidance to prosecutors and has not proven to be problematic in its application. More specifically, however, the Attorney General's Office objects to proposed Rule 3.8(e) regarding the issuance of subpoenas to attorneys and proposed Rule 3.8(f) regarding additional restrictions on prosecutors' extrajudicial comments.

#### **Rule 3.8(e) Lawyer Subpoenas**

Based on a review of the history of this rule in other jurisdictions, it is our understanding that it originated from an effort by certain federal prosecutors to subpoena criminal defense lawyers before the grand jury to investigate the source of lawyer fees in organized crime and drug cases. *See generally Stern v. U.S. Dist. Ct. of Mass.*, 214 F.3d 4, 7 (1st Cir. 2000); Andrea F. McKenna, *A Prosecutor's Reconsideration of Rule 3.10*, 53 U. Pill. L. Rev. 489, 494-95 (1992). The purpose of the rule is to prevent the disruption of the existing attorney-client relationship and to reduce the possibility that the defendant will lose faith in the criminal defense lawyer if the lawyer is subpoenaed by the government. *See Whitehouse v. U.S. Dist. Ct. of R.I.*, 53 F.3d 1349, 1354 (1st Cir. 1995). Subpoenaing a lawyer to any criminal proceeding is a rare occurrence in this State. There is no evidence that the practice has been the subject of abuse.

The Attorney General's Office investigates and prosecutes complex white collar and corporate crimes. The office also investigates crimes committed by lawyers themselves. In both situations, placing ethical restrictions on the prosecutor's ability to subpoena a lawyer where the suspect has used the lawyer to perpetrate the crime or where the lawyer has committed a separate crime would undermine the State's ability to investigate and prosecute these types of cases. The rules of professional conduct should not be a shield to prevent lawyers who commit crimes from being held accountable like all other citizens. On those rare occasions when a lawyer is subpoenaed in a criminal case, there is invariably extensive litigation about the ability of the prosecutor to obtain evidence or testimony from the lawyer. There is no need for adoption of additional ethical restrictions on prosecutors in light of the judicial branch's ability to review applicable privileges and to issue appropriate orders.

Indeed, placing ethical restrictions on a prosecutor's ability to subpoena a lawyer may have separation of powers implications when the prosecutor is acting as the legal counsel to the grand jury. See *United States v. Williams*, 112 S. Ct. 1735, 1742-46 (1992); *Stern*, 214 F.3d at 15-17 (noting that *Williams* prohibits judicial oversight from interfering with independence of grand jury system); cf. *In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984) (noting that district court could control the timing of the issuance of a grand jury subpoena to avoid harassment but could not prevent the subpoena from being issued altogether because "[j]udges may not, in the guise of exercising supervisory power, create new privileges or enlarge or distort existing ones").

In fact, this Court has recognized that it is inappropriate to impose limitations on the power of the grand jury to gather evidence in New Hampshire because "[t]he conduct of grand jury proceedings in this jurisdiction is little regulated by either Constitution or statute. This is another way of saying that its common law powers are not restricted." *Powell v. Pappagianis*, 108 N.H. 523, 524 (1968) (quotation omitted). Specifically, the Court held that "[i]n the absence of any constitutional or statutory restrictions on the common law powers of a grand jury in this state, it is not a part of the judicial function to import them from other jurisdictions." *Id.* at 525.

Significantly, proposed Rule 3.8(e) is not limited to issuance of subpoenas in situations where the subpoena would disrupt or undermine an existing attorney-client relationship. Rather, the proposed rule limits a criminal prosecutor's ability to subpoena any lawyer before *any* tribunal at *any* stage in the proceedings. By its very terms, the rule limits a prosecutor's ability to subpoena a lawyer even if the attorney-client relationship is over. Thus, even as written, the rule is far broader than its intended purpose. Cf. *In re Grand Jury Matters*, 751 F.2d at 18-20 (upholding the order quashing attorney subpoena issued on the eve of the client's felony trial but noting that the subpoena could be reissued at a later time when it would not disrupt the attorney-client relationship).

Furthermore, the rule places substantial limits on the ability to subpoena a lawyer even if the information sought is not privileged. Specifically, the proposed rule prohibits issuance of subpoenas in grand jury or other criminal proceedings unless the prosecutor reasonably believes: (1) the information is not privileged; (2) the evidence is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information. There is no justifiable reason for imposing these three criteria. A lawyer may be a fact witness or a client may have waived the attorney-client privilege. Evidence relating to doctors, clergy, therapists, and other professionals engaged in communication may be privileged to the same extent as the attorney-client privilege. See, e.g., RSA 329:26; RSA 330-A:19, RSA 516:27; RSA 516:35; N.H. R. Ev. 503, 504, 505. Nonetheless, these professionals often are subpoenaed as witnesses if the information they have is not privileged. Lawyers should not be provided with special status to avoid the obligation to testify if the information they possess is not privileged. See *In re Grand Jury Matters*, 751 F.2d at 18 ("There can be no absolute rule that frees an attorney, merely because he is such, to refuse to give unprivileged evidence to a grand jury.").

More significantly, non-lawyer professionals may be subpoenaed to testify even if the information they possess is privileged, as long as there is a showing that the testimony is essential and not available through other means. *In re Grand Jury Subpoena For Medical Records of Curtis Payne*, 150 N.H. 436, 442-43 (2004). However, for those non-lawyer professionals, if the information sought is not privileged, no additional hurdles exist to subpoenaing the information. *See State v. Settle*, 124 N.H. 832, 836-37 (1984) (defendant was required to produce records in response to subpoena because he waived attorney work-product privilege); *see also Desclos v. Southern N.H. Med. Ctr.*, 153 N.H. 607, 611-19 (2006) (applying different analysis depending on whether privilege was waived or the privilege should be pierced).

By creating an ethical rule that imposes almost insurmountable obstacles upon criminal prosecutors before they can subpoena lawyers, proposed Rule 3.8(e) creates a *de facto* exemption for lawyers that is not applicable to other professionals obligated to testify. Indeed, other jurisdictions have recognized that the existence of the attorney-client privilege itself is sufficient protection from abuse of the grand jury process. *State ex rel. Doe v. Troisi*, 459 S.E.2d 139, 147 (W. Va. 1995) (prosecutor is not obligated to demonstrate compelling need for information from attorney unless it appears subpoena is being issued for an improper purpose). To the extent that the proposed rule is meant to address abuse of process in this state, there is no evidence that such abuse has occurred.

The requirements that the evidence sought must be both “essential,” proposed Rule 3.8(e)(2), and otherwise unavailable, proposed Rule 3.8(e)(3), imposes an extremely high burden, unduly restricting access to non-privileged evidence. As noted above, this restriction improperly interferes with the grand jury’s ability to gather relevant non-privileged evidence. *See United States v. Calandra*, 414 U.S. 338, 345 (1974) (“The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. . . . [C]itizens generally are not constitutionally immune from grand jury subpoenas . . . and that the long standing principle that the public . . . has a right to every man’s evidence . . . is particularly applicable to grand jury proceedings.”) (citations and quotation omitted); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

Moreover, the proposal could prevent prosecution of certain types of cases. For example, where a criminal defendant asserts a claim of ineffective assistance of counsel, the defendant has waived the attorney-client privilege to the extent necessary to resolve the ineffective assistance claim. *Petition of Dean*, 142 N.H. 889, 890-91 (1998). Nonetheless, under proposed Rule 3.8(e), a prosecutor would still be prohibited from subpoenaing the defense lawyer unless the prosecutor could show that the information was “essential” and unavailable through other means. In a case where a defendant is willing to testify on the ineffective assistance claim, the State could presumably obtain information about the attorney-client communications from the defendant, potentially rendering the lawyer’s testimony non-essential. Justice would not be served if the defendant could lie, knowing that the truth would be shielded from subpoena under Rule 3.8(e).

For these reasons, the Attorney General's Office does not believe that professional rules should include additional restrictions on prosecutors' ability to subpoena lawyers. The Court should not adopt proposed Rule 3.8(e).

### **Rule 3.8(f) Prosecutors' Extrajudicial Comments**

The Attorney General's Office also objects to proposed Rule 3.8(f) (which amends existing Rule 3.8(e)). The proposed amendment places additional restrictions above and beyond Rule 3.6 limitations on prosecutors' ability to make public comments about pending cases. This Office believes that current Rule 3.8(e) works well in requiring prosecutors to make reasonable efforts to prevent police officers and other persons associated with the prosecutor from making public comments that would be prohibited under Rule 3.6. However, by adding a requirement that any public comments be "necessary" for a legitimate law enforcement purpose, proposed Rule 3.8(f) would essentially prohibit most public comments by prosecutors.<sup>1</sup> For the reasons addressed above, the existing rules work well in practice and should be readopted.

Moreover, prosecutors have a duty as public servants to explain their conduct and actions as long as their comments do not prejudice the defendant. The proposed rule would essentially eliminate the prosecutor's ability to make public comments at all. It would rarely be "necessary" for legitimate law enforcement purposes for the prosecutor to make extrajudicial statements, unless there is a valid concern for public safety. Thus, prosecutors might not be able to update the public on the progress or status of a case without violating the professional rules. While the ABA comments to Model Rule 3.8 suggest that there is a safe harbor in proposed Rule 3.8(f) for comments that would comply with Rule 3.6, no such protection exists in the proposed rule itself. Moreover, it would be difficult to understand the need for additional restrictions in light of the fairly clear guidelines delineated in current Rule 3.6. For these reasons, the Attorney General's Office opposes adoption of proposed Rule 3.8(f).

I thank you for your careful consideration of these comments. I understand that the Supreme Court has not yet scheduled a public hearing on the proposed rules. Given the importance of the proposed changes and the impact these changes could have on law enforcement in this State and government officials' ability to be responsive to the public, I ask that this Court schedule a public hearing on the Advisory Committee recommendations before taking action on the Professional Conduct Rules.

---

<sup>1</sup> As noted above, this change would bar prosecutors from responding to press statements made by defense lawyers who felt that they could issue public comments pursuant to proposed Rule 3.6(c). Thus, the combination of the changes to both Rule 3.6(c) and Rule 3.8(f) would create an entirely one-sided war-of-words in the media about pending cases.

I would appreciate being notified of the hearing date, as I plan to personally attend to elaborate on these comments and to answer any of the Court's questions about this Office's concerns regarding the proposed changes to Rules 3.6 and 3.8.

Sincerely,

A handwritten signature in black ink that reads "Kelly A. Ayotte". The signature is written in a cursive style with a large, looping initial "K".

Kelly A. Ayotte  
Attorney General

cc: All County Attorneys (via e-mail)