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# A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys

Fred C. Zacharias

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A significant recent amendment to the American Bar Association's Model Rules of Professional Conduct restricts the ability of prosecutors to subpoena lawyers.[1] The amendment reacts to a bevy of proposals, spanning over a decade, that focus specifically on grand jury subpoenas directed to attorneys.[2] Six states have adopted the new model rule in some form.[3] At least two

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1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1983) (added 1991). *See generally* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. (forthcoming June 1992) (discussing the controversy over Model Rule 3.8(f) and arguing that the controversy reflects the bar's normative vision of how the law should apply to lawyers); Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules 114-26 (Dec. 7, 1991) (unpublished manuscript, on file with the *Minnesota Law Review*) (discussing the history and normative validity of the enactment of Model Rule 3.8(f)). The ABA first suggested reform in 1986 and 1988. *See* ABA, *Resolution on Attorney Subpoenas* (Feb. 1988) [hereinafter *1988 ABA Resolution*], *reprinted in* Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1853-54 (1988); ABA, *Resolution on Subpoenaing Attorneys Before the Grand Jury* (Feb. 1986) [hereinafter *1986 ABA Resolution*], *reprinted in* Stern & Hoffman, *supra*, at 1852. The 1988 Resolution strengthened the 1986 Resolution and expanded the rule's application to all prosecutorial attempts to obtain lawyer testimony relating to representation of a client's affairs, before the grand jury or elsewhere. Model Rule 3.8(f) tracks the 1988 proposal.

2. *See infra* text accompanying notes 14-31. Model Rule 3.8(f) applies to all prosecution subpoenas directed to attorneys, not just those issuing from the grand jury. The rule does not address attorney subpoenas in lawsuits between private civil litigants, which present many of the same problems. Because concern over grand jury subpoenas was the driving force for reform, this Article confines itself to analyzing grand jury subpoenas. Nevertheless, much of the analysis applies equally to the other contexts.

3. *See* MASS. SUP. CT. R. 3:08 (Prosecution Function 15) (1986); N.H.

have rejected it.[4]

This Article demonstrates that Model Rule 3.8(f) and the related proposals to limit lawyers' grand jury testimony rely upon the wrong remedy. Grand jury subpoenas of lawyers raise a legitimate concern: lawyer testimony about client affairs may undermine clients' trust. Reformers universally have advocated judicial review of the issuance of these subpoenas, a procedural safeguard that does not protect clients' interests in attorney loyalty once the reviewing court allows an investigation to proceed. At the same time, routine judicial review of grand jury subpoenas interferes with valid law enforcement interests. This Article suggests that a more appropriate remedy would focus on the two sources of the problem: lawyers' initial failure to inform clients about the limits of confidentiality and the subsequent secrecy in which the subpoenaed testimony takes place. Providing clients with access to their lawyers' grand jury statements would assure clients that the lawyers are

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RULES OF PROFESSIONAL CONDUCT Rule 4.5 (1987); PA. RULES OF PROFESSIONAL CONDUCT Rule 3.10 (1988); R.I. SUP. CT. R. 47 (Rule 3.8(f)) (1988); TENN. SUP. CT. R. 8 (DR 7-103) (1987); VA. SUP. CT. R. 3A:12 (1987); *cf. In re* Almond, 50 Crim L. Rep. (BNA) 1532, 1532 (R.I. Mar. 18, 1992) (rejecting petition to grant waiver from new Rhode Island rule for federal prosecutions). Several other jurisdictions, including Florida, are in the process of considering similar changes.

4. *See D.C. Adopts New Ethics Rules, Permits Non-Lawyer Partners*, 6 Laws. Man. on Prof. Conduct (ABA/BNA) No. 3, at 53, 55 (Mar. 14, 1990) (reporting District of Columbia's rejection of Model Rule 3.8(f)); *New York's Courts Adopt Changes to Ethics Rules*, 6 Laws. Man. on Prof. Conduct (ABA/BNA) No. 9, at 172, 175 (June 6, 1990) (reporting New York's rejection of Model Rule 3.8(f)); *see also* Baylson v. Disciplinary Bd., 764 F. Supp. 328, 337-41 (E.D. Pa. 1991) (rejecting the applicability of its state attorney subpoena rule to federal prosecutions); *Illinois Rejects Amending Rule to Cover Subpoenas to Lawyers*, 5 Laws. Man. on Prof. Conduct (ABA/BNA) No. 6, at 106, 106-08 (Apr. 12, 1989) (reporting the Illinois Supreme Court's rejection of an attorney subpoena rule proposed by state bar association).

After initially rejecting a similar rule, *see id.*, the Illinois Supreme Court adopted Model Rule 3.8(f) on November 20, 1991. ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.8(c) (1990) (added 1991). Federal prosecutors promptly filed suit to enjoin the rule's enforcement, Foreman v. Attorney Registration and Disciplinary Comm'n, No. 91-C8257 (N.D. Ill. filed Dec. 24, 1991), and state prosecutors asked the Illinois Supreme Court to reconsider adoption of the rule. *In re* Illinois Rules of Professional Conduct, Rule 3.8(c), No. MR-8038 (Ill. filed Dec. 24, 1991). As a result, the Illinois Supreme Court stayed enforcement of the rule. *In re* Illinois Rules of Professional Conduct, Rule 3.8(c), No. MR-8038 (Ill. Dec. 27, 1991) (order staying enforcement of Rule 3.8(c)). The federal lawsuit has been dismissed with prejudice pending the Illinois Supreme Court's ruling on the merits. Foreman v. Attorney Registration and Disciplinary Comm'n, No. 91-C8257 (N.D. Ill. Dec. 30, 1991) (order of dismissal).

keeping their word and acting in the clients' best interests. This Article illustrates that opening the grand jury to clients of attorney-witnesses would help secure attorney-client relationships without damaging the grand jury's traditional investigative role.

## I. BACKGROUND

Over the past decade, prosecutors increasingly have resorted to the tactic of subpoenaing lawyers to appear as witnesses before the grand jury.[5] Although the recent practice has provoked concern about the continued vitality of the attorney-client privilege, in fact lawyers have always been subject to compulsory disclosure of information that might incriminate their client.[6] Communications relating to ongoing crimes or past crimes in which the client has used the lawyer's services fall within the "crime-fraud" exception to the privilege.[7] Infor-

5. *See* Seymour Glanzer & Paul R. Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 J. CRIM. L. & CRIMINOLOGY 1070, 1070 & nn.1-2 (1984) (referring to and citing authority for the recent onslaught of attorney subpoenas); Stern & Hoffman, *supra* note 1, at 1787, 1789 (discussing and citing authority for the "explosion" of attorney subpoenas); Robert N. Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 AM. CRIM. L. REV. 95 (1985) (noting and citing authority for the trend of increasing resort to subpoenas). In United States v. Klubock, 832 F.2d 649 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc), the court reviewed statistics from the U.S. Justice Department and concluded that the Department's current practice of issuing 50-100 attorney subpoenas per year reflected a significant increase. *Id.* at 658.

6. The information discussed here may be encompassed by attorney-client confidentiality. The Model Rules, for example, recognize only a limited "crime-fraud" exception to confidentiality. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983). The fact that information is confidential does not render the information immune from disclosure under subpoena or court order. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1983) (a lawyer must comply with a court order to disclose); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981) (a lawyer may disclose when required by law or court order). It is the attorney-client privilege which governs the testimony that grand juries may procure.

7. Wigmore's classic definition of the attorney-client privilege states:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (J. McNaughton rev. ed. 1961). Virtually all jurisdictions recognize some form of "crime-fraud" exception. This exception is defined most succinctly in the Uniform Rules of Evidence, which provide that there is no privilege when "the

mation regarding the client's identity[8] or payment of fees[9] ordinarily is considered unprivileged even if it implicates the client in conspiracy or white collar crimes. An attorney who is accused of participating in criminal activity may use information furnished by the client to exonerate herself;[10] the client cannot raise the privilege to prevent disclosure.[11] Conversely, the at-

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services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." UNIF. R. EVID. 502(D)(1) (1974). The exception applies even when the lawyer is unaware of the client's plans. *See In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982); United States v. Hodge and Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977). Some courts also have interpreted the exception expansively to apply to communications about past crimes when those communications are inseparable from information about a prospective crime. *See* United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984). For a general discussion of the privilege and its exceptions, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 365 & nn.62-63, 371 & n.91 (1989) (citing authorities).

8. *See, e.g.*, Phaksuan v. United States (*In re* Osterhoudt), 722 F.2d 591, 592 (9th Cir. 1983) (per curiam) (holding that the privilege does not encompass the client's identity); *In re* Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983) (per curiam) (same); *In re* Twist, 689 F.2d 1351, 1352 (11th Cir. 1982) (same); Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948) (same); *see also* Glanzer & Taskier, *supra* note 5, at 1076-80 & n.35; Matthew Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1282-86 (1976) (citing authorities). Some courts have held, however, that the attorney client privilege covers the client's identity when disclosure would be tantamount to disclosure of the attorney's communications, *In re* Durant, 723 F.2d 447, 453 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984), or would provide the last link in incriminating the defendant, *In re* Pavlick, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc); Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960); *see also In re* DeGuerin, 926 F.2d 1423, 1431 (5th Cir. 1991) (noting the narrow application of the privilege).

9. *See, e.g.*, Doe v. United States (*In re* Shargel), 742 F.2d 61, 64 (2d Cir. 1984) (upholding subpoena inquiring into fee arrangement); *In re* Witnesses Before the Grand Jury, 729 F.2d 489, 492 (7th Cir. 1984) (holding that the privilege includes fee information only where "disclosure would result in the disclosure of confidential communications"); *In re* Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982) (holding fee information not privileged); United States v. Jones (*In re* Grand Jury Proceedings), 517 F.2d 666, 674-75 (5th Cir. 1975) (upholding an attorney subpoena seeking information regarding the payment of bond and fees); *see also* Zwerling, *supra* note 8, at 1286-90.

10. Throughout this Article, I refer to the defense lawyer/potential witness in the female gender. For balance, I treat other actors in the process (e.g., clients and prosecutors) as male.

11. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-96 (2d Cir.) (rejecting claim that lawyer must keep silent in defense of civil suit), *cert. denied*, 419 U.S. 998 (1974); Sullivan v. Chase Inv. Servs., Inc., 434 F. Supp. 171, 188 (N.D. Cal. 1977) (permitting attorney charged as aider and abettor to reveal privileged information to the extent "necessary to his defense"); United States v. Amrep Corp., 418 F. Supp. 473, 474 (S.D.N.Y. 1976) (permitting general counsel to reveal privileged corporate documents in order

torney may not invoke the client's privilege as a shield against her own liability.[12] Thus, with the modern expansion of criminal law to more activities in which lawyers are intimately involved, prosecutors increasingly have looked to lawyers for information.[13]

The response by the bar and scholarly commentators has been uniformly negative.[14] The issuance of grand jury subpoenas to defense attorneys has significant costs. The mere fact that counsel must appear in the grand jury room, even to assert the attorney-client privilege, can drive a wedge between the lawyer and client. The client may become suspicious of whether the lawyer has truly remained silent.[15] The client may

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to exonerate self). The professional codes all recognize a similar exception to confidentiality rules. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) & cmt. (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981).

12. *See In re* Special Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980) (holding that the attorney-client privilege belongs only to the client); *In re* FMC Corp., 604 F.2d 798, 801 (3d Cir. 1979) (same); *cf. In re* Doe, 602 F. Supp. 603, 607-08 (D.R.I. 1985) (holding that, where both attorney and client are involved in fraud, work product privilege is negated).

13. *See, e.g.*, David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 473 (1986) ("The recent emphasis on white-collar crime presents prosecutors with new temptations to make the examination of attorneys an integral part of their investigations."); Ellen R. Peirce & Leonard J. Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821, 829-30 (1985) (discussing a relationship between the expansion in the criminal law and the increased use of subpoenas and citing authorities); Cramton & Udell, *supra* note 1, at 114-16 (detailing new laws which contribute to an increase in attorney subpoenas).

14. *See, e.g.*, William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 874-75 (1988) [hereinafter *Genego Survey*] (describing the threat of attorney subpoenas on the adversary process in the context of an empirical survey); William J. Genego, *Prosecutorial Control Over a Defendant's Choice of Counsel*, 27 SANTA CLARA L. REV. 17, 18 (1987) [hereinafter Genego, *Prosecutorial Control*] (describing attorney subpoenas as part of a serious "threat . . . to the adversary process"); Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283, 320-22 (1990) (discussing a resolution approved by the New York bar, but rejected by New York courts, that would limit attorney subpoenas); Stern & Hoffman, *supra* note 1, at 96 n.4, 133 (noting that "prosecutors' enthusiasm for subpoenaing their legal adversaries has exceeded its appropriate bounds" and discussing the extensive opposition to attorney subpoenas); Thomas K. Foster, Note, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 GA. L. REV. 747, 750-52 (1986) (noting the grand jury critics' charge of prosecutorial abuse in the attorney subpoena procedure).

15. *See In re* Sturgis, 412 F. Supp. 943, 946 (E.D. Pa. 1976) (discussing how an attorney's presence in the grand jury room may plant "doubts in the cli-

doubt the lawyer's loyalty in appearing against him, particularly if the lawyer initially exaggerated the extent of her duty of confidentiality.[16] To the extent the lawyer must answer some questions (either before or after a judicial ruling on a motion to quash), the likely chill upon the attorney-client trust relationship increases.[17] As potential clients become aware of the possibility of lawyer testimony, they may come to withhold information from their attorneys[18] or desist from retaining counsel during the grand jury process.[19]

A valid subpoena for testimony creates a related set of problems for the attorney. When the grand jury's investigation calls into question the propriety of the attorney's own conduct, the attorney's interests may conflict with the client's.[20] If the lawyer is likely to become a witness against her client at trial,

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ent's mind"); *see also* Weiner, *supra* note 5, at 103 ("[S]ecrecy of . . . grand jury proceedings may fuel [the client's] suspicions."); Foster, *supra* note 14, at 756 n.41 ("The client may suspect that his attorney's testimony led the grand jury to indict him.").

16. Consider the following scenario:

> Client Trusting consults attorney Careless regarding a pending federal investigation. Careless tells Trusting "everything you say is confidential." Trusting then informs Careless of his involvement in a narcotics ring. Trusting gives Careless a $10,000 retainer, paid in cash. Two months later, the grand jury issues a subpoena to Careless.
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> When Careless tells Trusting that information regarding fees is ordinarily unprivileged and that the information that Trusting confided about ongoing crimes may be subject to the "crime-fraud" exception, Trusting will feel betrayed. Careless's belated promise to assert the privilege whenever possible will not keep Trusting from doubting Careless's loyalty, competence, and word.

17. *In re* Harvey, 676 F.2d 1005, 1009 n.4 (4th Cir.) (noting the chilling effect on communications from the client, "especially if the client is indicted"), *vacated*, 697 F.2d 112 (4th Cir. 1982) (en banc). As Robert Weiner points out, however, the degree to which an attorney subpoena chills the attorney-client relationship inevitably "varies with the circumstances in which the subpoena issues." Weiner, *supra* note 5, at 109. A subpoena limited to documents or fee information may not call for information that the client considers intimate or highly confidential. *Id.*

18. *See* Stern & Hoffman, *supra* note 1, at 1794 (arguing that clients will hesitate to confide and lawyers will hesitate to probe for information); *cf.* Fisher v. United States, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer.").

19. *See In re* Shargel (Doe v. United States), 742 F.2d 61, 63 (2d Cir. 1984) (expressing concern that the lack of privilege covering the disclosure of client identity "may discourage some persons from seeking legal advice at all"); *see also* Foster, *supra* note 14, at 757 (noting the possibility that clients will "forego representation during the grand jury proceedings").

20. Suppose, for example, that the grand jury threatens to indict the lawyer for accepting tainted fees or for providing legal advice to the client's ongo-

another conflict of interest develops.[21] The prosecutor's action in subpoenaing the lawyer to the grand jury therefore raises the possibility that the lawyer may have to withdraw or be disqualified.[22] The client's constitutional right to choose and retain his counsel is thereby diminished.[23]

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ing criminal enterprise. *See supra* note 16. The lawyer inevitably will be tempted to defend her conduct at her client's expense.

Under the Model Rules, a conflict of interest is defined as a situation in which representation of a client "may be materially limited . . . by the lawyer's own interests." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981) (providing that a conflict exists when "the exercise of [a lawyer's] professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests"). When a lawyer's own conduct is the subject of a grand jury investigation, the lawyer's judgment almost automatically will be affected. Even if the lawyer and client both deny wrongdoing, the lawyer has a potential interest in shifting the blame (perhaps to his client), plea bargaining, and maintaining appearances to avoid disbarment and loss of reputation. A series of scenarios in which accusations against attorneys have caused such conflicts of interest are discussed in Earl J. 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, 351 n.2 (1986).

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.16, 3.7 (1983) (defining the circumstances when a lawyer must withdraw in order to prevent a violation of the rules); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110, DR 5-102 (1981) (same).

22. Failure of a lawyer to withdraw voluntarily when a conflict of interest develops may be grounds for disqualification by the court. Wheat v. United States, 486 U.S. 153, 160 (1988) (upholding the disqualification of a criminal defense attorney, over the defendant's objection, on the basis of the court's interests in "ensuring that criminal trials are conducted within the ethical standards of the profession" and "the rendition of just verdicts"); United States v. Klubock, 832 F.2d 649, 654 (1st Cir.) (noting that the service of a subpoena will generally require the defense counsel to withdraw), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc); *In re* Doe (Roe v. United States), 759 F.2d 968, 973 (2d Cir.) (stating that a government subpoena of an attorney was "surely setting the stage for the attorney's ultimate disqualification"), *vacated*, 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *In re* Sturgis, 412 F. Supp. 943, 945-46 (E.D. Pa. 1976) ("The practice [of attorney subpoenas] permits the government by unilateral action to create the possibility of a conflict of interest . . . which may lead to a suspect's being denied his choice of counsel by disqualification."); *see also* Stern & Hoffman, *supra* note 1, at 1790 n.23 (citing authorities).

23. *See generally* Foster, *supra* note 14, at 770-75 (arguing that attorney subpoenas violate a defendant's Sixth Amendment right to choose counsel). Although Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), affirms that the Sixth Amendment encompasses some right to choose counsel, *id.* at 624, the Court has clearly established that the right is limited and subject to the superior interest of the proper administration of justice. *See* Wheat v. United States, 486 U.S. 153, 160 (1988); *see also supra* note 22 (quoting *Wheat*).

Finally, critics of the attorney subpoena procedure lament the potential for prosecutorial abuse.[24] Although valid law enforcement reasons clearly exist for seeking attorney testimony, some prosecutors may use attorney subpoenas simply to fish for information or to gain a tactical advantage by reducing the defense lawyer's effectiveness.[25] Perhaps worse, some prosecutors may employ the tactic selectively, to target defense lawyers whom they dislike or who are more formidable adversaries.[26]

For all of these reasons, calls for reform have been rampant ever since the practice of subpoenaing lawyers to the grand jury became common.[27] In 1985, the U.S. Department of Justice adopted internal guidelines restraining federal use of such subpoenas,[28] but this action did not quiet the critics.[29] The

24. In a recent report, an ABA committee concluded 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." ABA, REPORT TO THE HOUSE OF DELEGATES 6 (Feb. 1986) [hereinafter *1986 ABA Report*]. A few instances of prosecutorial abuse have been documented. *See In re* Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H.) (finding harassment), *aff'd*, 751 F.2d 13 (1st Cir. 1984). However, commentators who have emphasized the potential for abuse have, for the most part, simply assumed that it will occur in a significant number of cases. *See* Zwerling, *supra* note 8, at 1264 (noting the "Department of Justice's gross misuse of grand juries"); Foster, *supra* note 14, at 752 ("In no other phase of the grand jury system has prosecutorial abuse been more widely exercised.").

25. *See* United States v. Klubock, 832 F.2d 649, 654 (1st Cir.) (noting the "potential for abuse" inherent in the "natural tendencies promoted by adversarial postures"), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc). Reduced effectiveness arguably results from a decrease in client trust, an adverse effect on the lawyer's professional judgment or zeal, and diversion of defense resources. *See* David S. Rudolf & Thomas K. Maher, *The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client*, 1 CRIM. JUST., Spring 1986, at 14, 16 (noting defendant's difficulty in marshalling resources to fight the attorney subpoena and mount the defense); Foster, *supra* note 14, at 770-75 (discussing different aspects of reduced effectiveness); *cf.* Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985) (noting that a lawyer who chooses to act both as an advocate and as a witness "diminishes his effectiveness in both roles").

26. *See Genego Survey*, *supra* note 14, at 783, 818-19 (analyzing claims by lawyers that attorney subpoenas are used to target particular attorneys). In civil litigation, tactical motions to disqualify attorneys have become routine. *See* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (noting the need for judicial scrutiny of disqualification motions). The remedy has, for the most part, consisted of judicial scrutiny of, and disfavor toward, such motions. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 72 n.118 (1991) (citing authorities).

27. *See, e.g.*, Peirce & Colamarino, *supra* note 13, at 824-25; Weiner, *supra* note 5, at 97; Zwerling, *supra* note 8, at 1265; Foster, *supra* note 14, at 750-52.

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guidelines do not affect state prosecutors and, in some respects, leave significant loopholes even in the federal realm.[30] The continuing criticisms have led the ABA and several local jurisdictions to adopt ethical rules forbidding prosecutors from subpoenaing attorneys to testify on matters relating to client representation without first obtaining judicial approval. These rules limit the availability of subpoenas, based on the need for the information and the lack of alternative sources of information.[31]

## II. THE LEGITIMACY OF THE CRITICS' CONCERNS

The following analysis addresses the crux of the calls for reform, not peripheral issues concerning what form changes should take, who should adopt them, and how they should be administered.[32] I accept the critics' complaints on their own

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2.161(a), at 35-37 (Oct. 1, 1990) (added July 18, 1985) [hereinafter *DOJ Guidelines*] (section entitled, "Policy with Regard to the Issuance of Grand Jury or Trial Subpoenas to Attorneys for Information Relating to the Representation of Clients"). The guidelines direct U.S. Attorneys (1) to consider the potential effect of attorney subpoenas on the attorney-client relationship, (2) to limit their requests for subpoenas to cases where alternative sources of information have proven fruitless and the information is probably needed, and (3) to seek pre-issuance authorization for any subpoena from the Assistant Attorney General of the Criminal Division. *Id.*

29. *See, e.g.*, Gross, *supra* note 14, at 320-22; Stern & Hoffman, *supra* note 1, at 1817-20.

30. The Department of Justice regulations are simply guidelines for self-restraint. *See generally* Michael F. Orman, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145, 165-74 (arguing that the guidelines provide a prudent formula for self-restraint within a sphere recognized as the proper domain of executive discretion). They abjure any intent to create substantive rights (in defendants or attorneys) or to create standards "enforceable at law." *DOJ Guidelines*, *supra* note 28, § 9-2.161(a)(E), at 36. Nor do they contain any mechanism for outside supervision. Finally, they provide that alternatives will be pursued only if the investigation will not be impaired. *Id.* §§ 9-2.161(a)(B), (C), at 36.

31. *See supra* note 3 (citing recently enacted rules in six states). Past and current reform proposals by the bar are analyzed in Stern & Hoffman, *supra* note 1, at 1820-24.

32. One could impose limits on prosecutorial use of attorney subpoenas through the exercise of judicial supervisory authority, administrative guidelines, legislation, or (as most current proposals suggest) rules adopted in the local professional code. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum (Dorokee Co. v. United States), 697 F.2d 277, 281 (10th Cir. 1983) (suggesting that a preliminary showing of relevance and need is appropriate); *In re* Schofield, 507 F.2d 963, 964-65 (3d Cir.) (requiring prosecutors to make a preliminary showing of relevance and proper purpose, and allowing a court to weigh the need before issuing an attorney subpoena), *cert. denied*, 421 U.S. 1015

terms; I assume the validity of the law regarding attorney-client privilege, choice of counsel, and general subpoena power of prosecutors and the grand jury.[33] I focus simply on whether the potential effect on client trust justifies the proposed limits on prosecutorial discretion to call attorneys to the grand jury stand.

Conversely, this Article's analysis does not consider the unstated, but possibly legitimate, functions that reducing the number of attorney subpoenas might serve.[34] Any reform that

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(1975); HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 986, 101st Cong., 2d Sess. 36 (1990) (declining to recommend legislation, but recognizing a potential need for it); *DOJ Guidelines*, *supra* note 28, § 9-2.161(a), at 35-37 (imposing legally unenforceable internal limits on federal attorney subpoenas). As a theoretical matter, the legitimacy of interfering with the grand jury's traditional province seems different, depending on the approach. Legislatures, for example, clearly would be justified in recasting the grand jury's investigative role, and, indeed, good arguments have been made for such a change. Similarly, courts unquestionably are empowered to amend the elements of common law attorney-client privilege. In contrast, implementing remedies for internal flaws of the grand jury system or changing the substantive law of privilege may exceed the authority of ethical code drafters. Arguably, code drafters must confine themselves to regulating conduct within the legal system *as it exists* and to framing lawyers' attitudes toward the system. *Cf.* Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-1260 (1991) (noting the increasing "legalization" of the codes).

33. Most current reform proposals, although bemoaning the failure of grand juries and the attorney-client privilege to protect defendants' interests, do not purport to make systemic or substantive changes. They rest almost exclusively upon the impact of attorney subpoenas upon the attorney-client relationship and attempt to limit or undo that effect. *See, e.g.*, ABA Standing Comm. on Ethics and Professional Responsibility and Section of Criminal Justice, *Report to the House of Delegates* 2, 5-6 (Feb. 1990) [hereinafter *1990 ABA Report*] (recommending addition of Model Rule 3.8(f) relying on client concerns and systemic effects of underestimating them); Peirce & Colamarino, *supra* note 13, at 833-36 (identifying client concerns and proposing a judicially imposed preliminary showing rule); Stern & Hoffman, *supra* note 1, at 1789-94, 1825-54 (discussing loyalty concerns and alternative methods of limiting issuances of attorney subpoenas, then proposing strict limits); Weiner, *supra* note 5, at 102-10, 125-33 (discussing client interests and proposing administrative guidelines); Foster, *supra* note 14, at 755-58, 775-79 (identifying client concerns and proposing a judicially imposed preliminary showing rule).

34. Reducing the number of attorney subpoenas would, for example, protect attorneys' legal practices. *See Genego Survey*, *supra* note 14, at 815-19 (describing the impact of prosecutorial practices directed at lawyers upon the economic self-interest of the criminal defense bar). It also would mitigate some of the dangers inherent in the grand jury's traditional discretion to investigate and might rectify the adversarial imbalance inherent in prosecutors' unilateral ability to obtain criminal discovery from defense attorneys. *See generally* Genego, *Prosecutorial Control*, *supra* note 14, at 19-21 (analyzing prosecutorial practices, including attorney subpoenas, for a perspective on

prohibits or limits the use of attorney subpoenas will have the indirect effect of preserving client interests. My concern here is whether reforms relying on such an indirect approach are adequately tailored to the specific problem the reforms purport to address. In other words, I assume the reforms are truly aimed at mitigating the impact of subpoenas on good attorney-client relationships and ask whether society could achieve that goal with less impact on the government's law enforcement interests in issuing valid subpoenas. Because proponents of reform disclaim any intent to change the substantive law governing the attorney-client privilege and clients' ability to retain lawyers with conflicts of interest, I also do not consider the advantages of changing those doctrines.

At the outset, it is important to recognize that the law comprising client "rights" approaches the attorney-client relationship differently than do the professional codes. The codes set ideal standards for legal practice.[35] At least some parts of the codes elevate society's interest in creating and maintaining perfect attorney-client relationships to the status of a "prime directive."[36] Because of confidentiality's contribution to enhancing

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whether one adversary can exercise control over the other). *Cf.* Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory To Define Individual Constitutional Rights*, 1987 WISC. L. REV. 1, 33-65 (analyzing fee forfeiture proceedings in terms of their systemic impact on the defense bar).

In proposing Model Rule 3.8(f), the ABA did express its concern that the increasing number of attorney subpoenas might threaten the existence of a high quality criminal defense bar. *1990 ABA Report*, *supra* note 33, at 2, 5-6; *see also Genego Survey*, *supra* note 14, at 816-17 (suggesting that prosecutorial targeting of defense lawyers may drive them from practice). Even assuming that speculative effect, it does not support the proposed remedy any more than it would support an artificial numerical limit on subpoenas. Providing judicial review neither focuses on the reasons why subpoenas affect the bar's willingness to provide representation (e.g., fear of reprisal for representing clients aggressively) nor reacts to those reasons. In any event, the dire predictions concerning the willingness of criminal defense lawyers to practice have not been borne out by an exodus from the defense bar.

35. *See* Zacharias, *supra* note 26, at 107 n.259 (discussing the hortatory function of professional codes).

36. As Professor Fried notes: "[T]here is a profound theoretical tension between the view of the attorney-client relationship implicit in the modern law of privilege and the view of the relationship that underlies the ethical duty of confidentiality as most attorneys understand it." Fried, *supra* note 13, at 490; *see also* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 1-8 (1975) (arguing that a lawyer's ethical obligation to preserve client confidences and trust is paramount in importance); Zacharias, *supra* note 7, at 355 n.18 (distinguishing the tradition underlying professional confidentiality from the tradition underlying the attorney-client privilege).

client trust and belief in attorney loyalty,[37] professional confidentiality rules recognize few countervailing interests.[38] Other ethical provisions—for example, those prescribing the duty of zealousness—arguably also treat attorney loyalty as paramount in importance.[39]

Once matters reach the litigation stage, however, the codes recognize that legal rules take precedence over professional ideals.[40] In defining client rights, the law takes into account cli-

37. *See* ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 82 (Proposed Alternative Draft 1981) (explaining the instrumental bases for confidentiality); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.3 (1986) (analyzing instrumental bases); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1473 (1966) (arguing that confidentiality's justifications make it the foundation of an orderly adversarial process).

38. The Model Rules, for example, recognize exceptions to confidentiality only to protect the lawyer, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983), and when a client's future crime is likely to cause imminent death or substantial bodily harm, *id.* Rule 1.6(b)(1). The Model Code of Professional Responsibility is not much more liberal. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981) (allowing disclosure to prevent future crime). As I have discussed elsewhere, empirical studies suggest that neither clients nor lawyers believe the rules give adequate regard to third-party or societal interests. *See* Zacharias, *supra* note 7, at 392-96.

39. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1981) (requiring a lawyer to seek all lawful objectives of his client by reasonably available means); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 & cmt. (1983) (requiring lawyer to act with zeal). Although the codes sometimes authorize lawyers to temper their zeal, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983) ("[A] lawyer is not bound to press for every advantage."), the duty to pursue the best results for clients and set aside concern for third parties and the truth pervades the rules, *see, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE 50-91 (1988) (discussing the effects of the adversariness on "principles" of lawyer partisanship and nonaccountability); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035-41 (1975) (arguing against an overly partisan approach to legal representation).

40. For example, the strict confidentiality rules in both the Code and the Model Rules provide exceptions when a court orders disclosure of information (i.e., the information is unprivileged). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1983) ("The lawyer must comply with the final orders of a court or other tribunal . . . requiring the lawyer to give information about the client [and] a lawyer may be obligated or permitted by other provisions of law to give information about a client."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981) ("A lawyer may reveal . . . confidences or secrets when . . . required by law or court order."). Similarly, the codes recognize that, once a lawyer is before a tribunal, she must temper her zeal to the extent necessary to function as an officer of the court. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (limiting permissible arguments); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1981) (requiring that a lawyer make certain disclosures and refrain from particular conduct even if

ents' interests in a suitable attorney-client relationship. Yet it also factors into the balance countervailing societal concerns that, in some circumstances, outweigh clients' desire for unfettered attorney loyalty.

The basic attorney-client privilege, for example, rests on the same values as those underlying the confidentiality prescribed in the codes.[41] However, the definition of and exceptions to the privilege incorporate the interests of opposing litigants in obtaining information.[42] The exceptions reflect the conclusion that a standard of total secrecy is not necessary to maintain clients' general sense of attorney loyalty or to assure effective representation throughout the legal system.[43]

Similarly, the law acknowledges clients' interests in selecting attorneys they trust, maintaining a good working relationship with those attorneys, and being able to keep the attorneys through the case.[44] But, again, courts have rejected the notion that clients are entitled to an attorney who is free of responsi-

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against her client's best interests); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (requiring "candor" towards the tribunal); Fried, *supra* note 13, at 497 (discussing the fact that both codes elevate the lawyer's duty to the court above the duty to the client).

41. *See* James A. Gardner, *A Reevaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 289-339 (1963) (describing the ways in which justifications for the privilege mirror those underlying confidentiality); Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069-91 (1978) (same).

42. For example, the privilege applies only to communications specifically given or received for the purpose of obtaining or communicating legal advice. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass 1950) (setting forth Judge Wyzanski's oft-cited definition and explanation of the privilege). Similarly, exceptions like the "crime-fraud" exception and liberally interpreted "waiver" and "abandonment" exceptions often enable opposing litigants to pierce the privilege. *See* Zacharias, *supra* note 7, at 371 n.91 (citing authorities).

43. In interpreting the exceptions and in balancing the client interests against societal and third-party interests in ferreting out the truth, courts consciously have construed the privilege narrowly. Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547 (D.D.C. 1970). *But see 1990 ABA Report*, *supra* note 33, at 6 (asserting that the mere issuance of a subpoena directed toward confidential but unprivileged information undermines client trust).

44. *See, e.g.*, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) (acknowledging the client's right to choose counsel); United States v. Harvey, 814 F.2d 905, 923 (4th Cir. 1987) (discussing the importance of the client's right to choose counsel); United States v. Cunningham, 672 F.2d 1064, 1070-72 (2d Cir. 1982) (same).

bility to legal rules or other societal concerns.[45] Courts have held that the Fifth and Sixth Amendment interests in choosing counsel and maintaining a "meaningful client relationship" are limited.[46]

What all of this means is that, as a matter of substantive law, clients' rights are restricted to a far greater extent than is reflected in the professional codes. Clients have a constitutional right to choose counsel, but no right to keep counsel if withdrawal or disqualification is appropriate.[47] Clients have a statutory or common law right to maintain the secrecy of communications with their attorneys, but no right to prevent the disclosure of such communications in the context of judicial proceedings when the information is unprivileged or subject to an exception.[48] The difference between clients' legal rights and client interests reflected in the professional codes may present serious problems for lawyers in gauging what they should promise clients at the outset of the representation. But the mere existence of ideals and standards of conduct in the codes is not a basis for refusing disclosure of information in court. Stated another way, when a grand jury seeks pertinent information about a client for valid law enforcement reasons and legal rules do not exempt that information from disclosure, the client's status as a client creates no inherent entitlement to preclude access.

Nevertheless, grand jury subpoenas directed to counsel implicate valid client concerns. Clients are entitled to attorney loyalty, so long as loyalty is defined as "not acting against the client's interests unless required to do so by law or superior professional mandates." Clients may expect to receive the maximum effort of their lawyers, including full assertion of the attorney-client privilege and preservation of confidentiality

45. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 176 (1986) (stating that the right to effective counsel does not mandate violations of ethical rules requiring attorneys to prevent client perjury).

46. *See* Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (holding that a criminal defendant has no constitutional right to a "meaningful attorney-client relationship"); United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir. 1982) (stating that the client's choice of counsel is limited by the government's interest in the "fair and proper administration of justice"); United States v. Hobson, 672 F.2d 825, 828 (11th Cir.) (stating that client choice is subject to the overriding interest in "public confidence in the integrity of our legal system"), *cert. denied*, 459 U.S. 906 (1982).

47. Wheat v. United States, 486 U.S. 153, 162-63 (1988) (stating that a client has no right to keep an attorney who has a conflict of interest).

48. *See supra* text accompanying notes 6-12.

when legally possible.[49] For "loyalty" and "zeal" to produce the societal benefits to which they are geared, clients also must be allowed to know, or be reassured, that this loyalty and zeal exist.[50] Finally, some attorney subpoenas stem from prosecutorial abuse which, if exposed, would strip the grand jury of the authority to seek otherwise confidential information.[51] Clients justifiably can claim an inherent right to an opportunity to protest such misconduct before it produces harm.

With this background, let us consider what should happen in the absence of any reform of attorney subpoena rules. What can an effective, loyal defense counsel do to ensure that her client's "rights" are vindicated? In a world of ideal client representation, what would the client get?

The first important step comes at the beginning of the representation, when the lawyer explains the nature of the attorney-client relationship and describes what the attorney may keep secret. Because a client's sense of loyalty depends, in part, on not feeling "betrayed" by a lawyer who later reveals information, the effective lawyer owes it to her client to define the contours of privilege and confidentiality accurately.[52] This duty

49. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1983) (requiring a lawyer called to testify concerning a client to invoke the privilege when it is "applicable," unless the client has waived the privilege); *see also* Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.) (noting the attorney's obligation to assert the privilege), *cert. denied*, 352 U.S. 833 (1956). In the grand jury context, an effective lawyer would assert the privilege by moving to quash the subpoena whenever the privilege arguably applies. *See infra* text accompanying notes 55-56.

50. In theory, clients who trust lawyers will use them to resolve disputes and cooperate with them in a way that enhances effective representation. When this occurs, society can maintain an orderly and efficient adversarial system of justice. *See* Zacharias, *supra* note 7, at 358 (citing authorities which support this argument). Under this "instrumental" view, procedures must exist to make clients aware that lawyers are trustworthy, or else clients simply will not confide. *But see id.* at 363-67, 386-87 (questioning the degree to which confidentiality furthers client trust when lawyers fail to explain confidentiality at the outset of representation).

51. Federal district courts have authority to quash grand jury subpoenas when "compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c). Courts have used this provision to prevent subpoenas designed to harass a prospective attorney-witness or her client. *See, e.g., In re* Legal Servs. Ctr., 615 F. Supp. 958, 969-70 (D. Mass. 1985) (quashing an "unreasonable" attorney subpoena); *In re* Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H.) (quashing an attorney subpoena in part because of the prosecutor's "flip comment" regarding the potential effect of the subpoena on the attorney's practice), *aff'd*, 751 F.2d 13 (1st Cir. 1984).

52. *See supra* note 16. I and others have written about the importance of an accurate promise of confidentiality at the beginning of the representation.

arises because a lawyer's failure to tell a client about an exception (e.g., "crime-fraud") does not eliminate the exception when an opposing party seeks to invoke it.[53] In all aspects of litigation, clients rely on their lawyers at their own peril.[54]

When the grand jury issues a subpoena to the lawyer, the lawyer is obliged to maximize her client's interests in keeping the information secret. The good lawyer would assert the attorney-client privilege if it is even arguably applicable, move to quash the subpoena if the government does not adequately limit the subpoena's scope, and pave the way for the client to

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A lawyer who tells her client, "everything you say is confidential," misleads the client. She also sets the stage for a situation in which she must disclose and, in the client's eyes, betray the trust she has encouraged. *See, e.g.*, Zacharias, *supra* note 7, at 386-87; *see also* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 675-744 (1990) (analyzing the absence of lawyer candor in a variety of situations). An overbroad promise of confidentiality neglects the fact that the lawyer may have to disclose unprivileged information the client provides. The advice also ignores the existence of privilege exceptions that come into play once the representation moves from the confidential "advice stage" to the litigation context.

In the attorney subpoena context, the expansion of professional confidentiality rules (as in the Model Rules of Professional Conduct) serves to heighten "the tension between the testimonial disclosures mandated by the crime-fraud exception and attorneys' understanding of their ethical obligations." Fried, *supra* note 13, at 492. Because lawyers are responsible for protecting clients' rights as they exist under the law, it is part and parcel of their employment to recognize the tension and to avoid clients' misunderstanding regarding what they may safely confide. *See* KENNETH MANN, DEFENDING WHITE COLLAR CRIME 103-04 (1985) (explaining why lawyers should, to enhance their effectiveness, empower their clients to avoid disclosures that would damage the representation); *cf.* Fried, *supra* note 13, at 498 ("Perhaps the legal profession must take collective responsibility for bringing the attorney-client privilege more nearly into harmony with its own view of what is necessary and ethically appropriate.").

53. *See, e.g.*, *In re* Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.) (per curiam) (holding that a lawyer's inadvertent disclosure of documents despite the client's instruction to maintain the privilege binds the client), *cert denied*, 444 U.S. 915 (1979).

54. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979) (noting that a court may dismiss a client's claim for counsel's gross negligence in responding to discovery requests); *see also* Taylor v. Illinois, 484 U.S. 400, 416-418 (1988) (holding that a criminal defense lawyer's failure to provide a witness list precludes the client from calling defense witnesses); Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) (finding a counsel's disregard of professional obligations attributable to client). Of course, when a lawyer's actions injure her client, the client may be able to recover against the lawyer in a malpractice or other civil suit. In the criminal context, a client may seek reversal on ineffective assistance of counsel grounds. *But cf.* Jones v. Barnes, 463 U.S. 745 (1983) (holding that a client may not challenge a conviction on the basis that his lawyer failed to raise valid claims urged by the client).

appeal a negative ruling on the motion.[55] Once the legal proceedings are complete and the validity of the subpoena is upheld, however, the lawyer must comply.[56]

At this point, or earlier, the effective lawyer should consider the need to withdraw from the representation. Under most professional codes, the lawyer may not continue her representation of a client if she is likely to become a witness against the client[57] or if her decisions in the grand jury room may be affected by her personal interests.[58] She best serves her client by withdrawing early, both to prevent further damage to the client[59] and to obtain the new attorney's supporting explanation of her conduct.[60] If this explanation comes before the grand jury testimony occurs, the client's sense of betrayal can

55. *See supra* note 49 (citing authorities). As a general matter, when a putative grand jury witness loses a motion to quash, he must either comply with the subpoena or be cited for contempt in order to appeal. United States v. Ryan, 402 U.S. 530, 532 (1971); Cobbledick v. United States, 309 U.S. 323, 327-28 (1940). In Perlman v. United States, 247 U.S. 7 (1918), the Supreme Court established an exception for situations in which the witness seeks to preserve a privilege for a third party. *Id.* at 12. In the attorney subpoena context, courts have applied the *Perlman* exception to allow the client to intervene and appeal "when circumstances make it unlikely that [the] attorney would risk a contempt citation in order to allow immediate review of a claim of privilege." *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); *see also In re* Berkley & Co., 629 F.2d. 548, 551-52 (8th Cir. 1980) (permitting a corporation to appeal an order directing its attorney to disclose documents); *In re* FMC Corp., 604 F.2d 798, 800-01 (3d Cir. 1979). A few courts have, however, denied the applicability of *Perlman*. *See In re* Oberkoetter, 612 F.2d 15, 18 (1st Cir. 1980) (suggesting that an attorney must risk contempt charges to preserve her client's appeal). *See generally* Glanzer & Taskier, *supra* note 5, at 1075-76 (citing and discussing authorities).

56. *See supra* note 40.

57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983).

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).

59. Delay in withdrawing may increase the client's costs in retaining and bringing a new lawyer up to speed, undermine the client's plea bargaining position, or increase the client's sense of betrayal when the client later learns that the lawyer was representing him despite impaired, or apparently impaired, judgment. In deciding when to withdraw, a lawyer continues to be bound by her obligation to protect the client's interests. She therefore must take reasonable steps to mitigate the negative consequences of withdrawal upon the client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. (1983) (noting the duty to mitigate).

60. The second attorney has every incentive to explain why the first attorney's withdrawal was appropriate. Because the second attorney already has the business, there is no reason to backbite. If the attorney can demonstrate that the first attorney's conduct does not reflect a betrayal, the client may be more willing to trust other lawyers, including his current representative.

be minimized and the ability of the new attorney to establish a good attorney-client relationship is enhanced.[61]

The effective attorney thus is in a position to safeguard most of her client's "rights." She can act loyally, assert privilege and confidentiality, and arrange for a pre-testimony opportunity to be heard in opposition to the subpoena, either on privilege or prosecutorial misconduct grounds. By conducting herself appropriately from the outset of the representation, she can also reduce the danger of any potential conflict of interest or need to withdraw. The only facets of perfect representation she cannot control are those affected by the client's interest in knowing what occurs in the grand jury room.[62]

Any reform proposal that is truly directed at preserving appropriate attorney-client relations must be measured against this "ideal representation" that an effective, loyal attorney would provide. To the extent a lawyer fails to preserve a client's rights, the client has legal remedies. The client may pursue a civil lawsuit, professional discipline, and, in criminal cases, an appeal on grounds of ineffective assistance of counsel. Nevertheless, reformers must recognize that lawyer ineffectiveness is not a problem inherent in the nature of attorney subpoenas. Nor is the damage caused by ineffectiveness in the grand jury context necessarily greater than in any other.[63]

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61. Of course, if the prosecutor subpoenas the replacement attorney, the cycle begins anew and the effect on the attorney-client relationship may be magnified. This potential problem, however, is probably a red herring. I have found no reported cases in which a prosecutor has sought to subpoena or disqualify lawyers sequentially. Presumably, courts would greet such tactics with distrust.

62. Undoubtedly, the lawyer will tell the client what occurred in the grand jury proceedings. Her assurances, however, may not do the trick. The client will not necessarily believe that the lawyer asserted the privilege and protected the client's interests fully. The client may believe that testifying even with respect to unprivileged information, in and of itself, represented an act of disloyalty. Arguably, the client will, as a result, trust the lawyer less in the future.

63. I do not minimize or underestimate the practical impediments to proving malpractice, obtaining discipline, and establishing ineffective assistance of counsel claims. My point is simply that the deficiencies in the existing remedial mechanisms are evident with respect to all aspects of attorney-client relations. The attorney-subpoena situation is not so different as to merit a unique prophylactic rule protecting clients' rights.

Outside of the grand jury context, for example, courts routinely bind clients to their attorneys' waiver of privilege, whether or not the waiver was intentional or made after consultation. *See* Zacharias, *supra* note 7, at 371 n.91 (citing authorities). Similarly, lawyers are empowered to give up clients' claims and defenses. *See* Taylor v. Illinois, 484 U.S. 400, 418 (1988) (noting that, with some exceptions, a lawyer has "full authority to manage the conduct

## III. THE INADEQUACY OF PRE-ISSUANCE JUDICIAL REVIEW

Proposals to curtail the use of attorney subpoenas have taken a variety of approaches. Most conform in significant respects to Model Rule 3.8(f). The essential provisions of Model Rule 3.8(f) forbid prosecutors from issuing subpoenas to attorneys to obtain information "about a . . . client"[64] without prior judicial approval.[65] The rule also requires courts to deny approval unless the prosecutor can demonstrate that the information sought is unprivileged,[66] "essential to the successful completion of an ongoing investigation or prosecution,"[67] and unavailable from any other source.[68] Other proposals have added the requirement that the prosecutor show that he has no purpose to harass the attorney or client.[69]

Although short and limited in scope, Model Rule 3.8(f) calls for a dramatic shift in the historical functioning of the grand jury. Commentators have, for decades, questioned the grand jury scheme and urged courts and legislatures to protect grand jury targets.[70] Nevertheless, lawmakers and judges

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of the trial"). A trial lawyer's decision of whether to object to particular evidence may make the difference between acquittal and conviction and often determines a client's ability to appeal. *See id.* at 434 (Brennan, J., dissenting) (agreeing that a client sometimes is bound by the lawyer's tactical errors at trial); *see also infra* note 83 (citing authorities). These situations all involve potential damage to the client that is far less speculative than the damage that may accrue from compliance with a valid subpoena to appear before the grand jury. Yet, in each, clients are relegated to the traditional legal remedies when they believe their lawyer has acted ineffectively.

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1983) (added 1990). Other proposals cover information "obtained as a result of the attorney-client relationship." *See, e.g., 1988 ABA Resolution, supra* note 1, at 1853.

65. The *1986 ABA Resolution, supra* note 1, would have required only an ex parte hearing. The *1988 ABA Resolution, supra* note 1, and Model Rule 3.8(f) call for a full adversarial proceeding.

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f)(1)(i) (1983) (added 1990).

67. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f)(1)(ii) (1983) (added 1990).

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f)(1)(iii) (1983) (added 1990).

69. *See, e.g., 1988 ABA Resolution, supra* note 1, at 1853.

70. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.2(c), at 350-52 (1985) (summarizing the criticisms of the grand jury system); *see also* MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1977) (reviewing the grand jury system and proposing reforms); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J.

steadfastly have resisted imposing limits upon grand jury secrecy, discretion to cast a wide investigative net, and prerogative to act free of outside interference.

In *United States v. Dionisio*,[71] for example, the United States Supreme Court abjured judicial authority to supervise the reasonableness of grand jury subpoenas: "No grand jury witness is 'entitled to set limits to the investigation that the grand jury may conduct.' "[72] The Court accorded grand juries this broad discretion largely to avoid saddling them with "mini-trials" and preliminary hearings that would impede or delay their investigative functions.[73] Although the Court acknowledged that "[t]he grand jury may not always serve its historic role as a protective bulwark standing . . . between the ordinary citizen and an overzealous prosecutor,"[74] the Court nonetheless balanced the competing considerations and concluded that a grand jury "must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."[75]

The upshot of *Dionisio* and subsequent decisions[76] is that witnesses and targets have no general right to impede or test

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CRIM. L. & CRIMINOLOGY 1159 (1984); William B. Lytton, *Grand Jury Secrecy—Time for Reevaluation*, 75 J. CRIM. L. & CRIMINOLOGY 1100 (1984).

71. 410 U.S. 1 (1973).

72. *Id.* at 15 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)); *see also id.* at 16 (reasoning that "there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer a question or comply with a grand jury request"). The Court, in recognizing the grand jury's "broad investigative powers" because "a sufficient basis for an indictment may only emerge at the end of the investigation," granted the grand jury leeway to "act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." *Id.* at 15-16 (citing Branzburg v. Hayes, 408 U.S. 665, 701 (1972)); *see also* Hendricks v. United States, 223 U.S. 178, 184 (1912) (holding an indictment not insufficient for lack of definiteness). The facts of *Dionisio* involved an obvious "fishing expedition" by a grand jury that had subpoenaed voice exemplars from approximately 20 persons in the hope of matching them against the voices in wiretapped conversations. 410 U.S. at 3. Yet the Court refused to intervene to protect the rights of the witnesses and targets of the investigation. *Id.* at 18.

73. *Dionisio*, 410 U.S. at 17.

74. *Id.*

75. *Id.* at 17-18.

76. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349-352 (1974) (rejecting a grand jury witness's right to invoke the exclusionary rule); United States v. Mara, 410 U.S. 19, 21-22 (1973) (applying *Dionisio* in overruling a lower court's decision to require a preliminary showing of reasonableness before a grand jury could obtain handwriting exemplars).

grand jury subpoenas. The decisions emphasize the need for secrecy and speed, both of which are compromised by judicial review.[77] Prosecutorial misconduct may still be challenged.[78] Some courts will, in limited fashion or in extreme cases, entertain a supported claim that a subpoena fails to seek relevant evidence.[79] But courts have shied even from suggesting a universal requirement, such as that in the ABA proposals, which would make prosecutors establish a threshold of need before proceeding.[80]

However radical, reforms may still be justified if, in more than a general way, they serve rights that clients have in preventing lawyer testimony before the grand jury. Proposals like the ABA's suggest two kinds of change. They establish mandatory judicial procedures that must be followed before the grand jury can require the attorney's testimony. And they set substantive standards for the issuance of a subpoena. To evaluate the proposals, one must analyze each aspect in turn.

For the client who has an effective lawyer, creating a

77. *See Dionisio*, 410 U.S. at 17 n.16 (discussing the problem of delay engendered by the lower court ruling); Costello v. United States, 350 U.S. 359, 362-363 (1956) (refusing to respond to a Fifth Amendment claim in part due to the necessity for secrecy and speed in grand jury hearings).

78. *See, e.g.*, YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 668-69 (7th ed. 1990) (summarizing cognizable witness objections to subpoenas on the grounds of prosecutorial misuse of the grand jury, noting the need for a prima facie showing by the claimant, and citing authorities); *see also In re* Ellsberg (United States v. Doe), 455 F.2d 1270, 1274 (1st Cir. 1972) (granting an indicted defendant the right to challenge the continued use of the grand jury to build a case against him); United States v. Pennsalt Chemicals Corp., 260 F. Supp. 171, 181 (E.D. Pa. 1966) (citing the need to balance the policy of grand jury discretion against the need to ascertain whether there has been abuse).

79. *See, e.g., In re* Schofield, 507 F.2d 963, 964-965 (3d Cir.) (requiring an affidavit with some preliminary showing supporting relevance of items sought in any grand jury subpoena), *cert. denied*, 421 U.S. 1015 (1975); *see also In re* Grand Jury Subpoena Duces Tecum (Derokee Co. v. United States), 697 F.2d 277, 281 (10th Cir. 1983) (requiring showing of relevance and "proper purpose" (quoting *In re* Schofield, 507 F.2d at 964)).

80. The United States Courts of Appeal for the Third and Tenth Circuits have suggested that prosecutors may be expected to provide a preliminary showing of relevance and "proper purpose" prior to issuing specific kinds of grand jury subpoenas. *See Derokee*, 697 F.2d at 281; *Schofield*, 507 F.2d at 964-65. Virtually all other courts have rejected that concept. *See, e.g., In re* Anderson, 906 F.2d 1485, 1496 (10th Cir. 1990); *In re* Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986); *In re* Certain Complaints Under Investigation (Williams v. Mercer), 783 F.2d 1488, 1525 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); *In re* Doe, 781 F.2d 238, 243 (2d Cir.) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *In re* Klein, 776 F.2d 628, 634 (7th Cir. 1985); *In re* Weiner (Doe v. United States), 754 F.2d 154, 156 (6th Cir. 1985); *In re* Grand Jury Proceeding (Schofield v. United States), 721 F.2d 1221, 1223 (9th Cir. 1983).

mandatory judicial review procedure does not enhance the protection of any right. When an arguable claim of privilege exists, the effective lawyer will, under any scheme, assert the client's position and move to quash. Because the good lawyer will make the determination of whether to withdraw because of a conflict of interest either at the point she receives the subpoena or after a motion to quash, the judicial review process also does not speed appropriate disqualifications.

In practice, the mandatory review procedure has two effects, neither of which is inherently necessary to vindicate clients' rights. First, it imposes an artificial obstacle to the whole set of attorney subpoenas. By requiring grand juries to justify each subpoena, the procedure slows the grand jury's investigation and undermines the secrecy that courts have considered important to such investigations.[81] Second, mandatory judicial review protects clients who retain bad lawyers. It serves as a prophylactic protection against counsel who are ineffective in asserting their clients' privilege and who fail to file appropriate motions to quash.

At first glance, simply creating an obstacle to subpoenas is not even an arguably valid justification for reform. Although the grand jury system often has been criticized, the current proposals do not draw their logic (or popular support) from over-arching flaws in the system. Presumably, any general restructuring of the pretrial investigative scheme should be accomplished through directed legislation rather than professional rules adopted by the bar.

This "obstacle" function can, however, be viewed in a more favorable light. By making subpoenas more difficult, the ABA's reforms would reduce the likelihood that lawyers will have to testify or withdraw for conflicts of interest. As an empirical matter, more clients would be able to keep their lawyers. Fewer would sense the possibility of attorney disloyalty. Moreover, by imposing general restraints, the reforms would help prevent prosecutorial misuse of the subpoena power in cases where proof of abuse is difficult to find. Hence, the argument goes, the reforms maximize clients' rights and set a tone discouraging subpoenas.

The difficulty with this approach lies in its failure to ac-

81. *See* Butterworth v. Smith, 110 S. Ct. 1376, 1380 (1990) (discussing the importance of grand jury secrecy); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958) (listing five objectives of grand jury secrecy, citing United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931)).

knowledge adverse consequences of limits on prosecutorial and grand jury discretion. Clients can be more secure in their lawyers, but only because the government is artificially barred from helpful information to which it may, as a substantive legal matter, be entitled. The ABA rule and related proposals hinder the investigative process without even attempting to gear the remedy to the reasons attorney subpoenas threaten the attorney-client relationship. Similarly, in shielding lawyers from disqualification, the proposals do not focus on whether conflicts of interest meriting disqualification preexist. Logically, one should not adopt such a scattershot approach—with its concomitant law enforcement costs—unless one first concludes that tailored remedies are unavailable.

The second function of the judicial review procedure—preventing potentially ineffective representation by lawyers in asserting the privilege—would help reassure clients that their rights are being safeguarded. Traditionally, however, the criminal justice system has resisted "prophylactic" remedies that apply where the underlying concern (here, lawyer incompetence) may be absent.[82] Courts and lawmakers have not been willing to safeguard defendants against errors or omissions by attorneys even in contexts where the potential harm to clients is greater.[83] The reasons for this hard-heartedness are obvious.

82. *See* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1449 (1985) (criticizing *Miranda*'s use of a prophylactic rule); Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176-181 (1988) [hereinafter Grano I] (arguing that the adoption of prophylactic rules is an illegitimate exercise of judicial power); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 123-156 (1985) [hereinafter Grano II] (arguing against the use of prophylactic rules); *see also* New York v. Quarles, 467 U.S. 649, 655-58 (1984) (rejecting the application of *Miranda*'s prophylactic rule to protect the right against self-incrimination); Manson v. Brathwaite, 432 U.S. 98, 106-107 n.9 (1977) (rejecting the dissent's call for a rule forbidding the use of any suspect identification obtained through an impermissibly suggestive procedure).

83. For example, courts ordinarily refuse to presume prejudice to a criminal defendant, even when he can show his lawyer has been ineffective. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 693 (1984). Similarly, in most cases, defendants are precluded from appealing convictions when counsel has failed to object to the government's evidence or to cross-examine witnesses. *See, e.g.*, Edwards v. United States, 256 F.2d 707, 709 (D.C. Cir.) (refusing to reverse a conviction where counsel failed to file a motion at trial), *cert. denied*, 358 U.S. 847 (1958); Illinois v. Washington, 241 N.E.2d 425, 428-29 (Ill. 1968) (same); *see also* United States v. Clayborne, 509 F.2d 473, 479 (D.C. Cir. 1974) (presuming that an attorney's failure to cross-examine was a tactical decision which forecloses review); United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970) (holding that a counsel's sleeping at trial was not grounds for reversal). In-

Prophylactic rules aid some clients who have no need of aid, at some cost to law enforcement.[84] If the system protects each client whose lawyer makes an incorrect decision, there is no need for defense lawyers to decide.[85] Our heritage is to encourage and rely on lawyers to vindicate clients' rights. The pre-reform grand jury system allows competent lawyers to do so, without prophylactic judicial intervention.

These conclusions bring us to the substantive content of the proposed reforms. Disclaimers aside,[86] the proposals, in ef-

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deed, counsel, rather than the defendant, may control the issues to be argued on appeal. *See* Jones v. Barnes, 463 U.S. 745, 751-54 (1983) (upholding a counsel's choice of issues over defendant's objection).

These examples reflect decisions not to reverse convictions, rather than the rejection of prophylactic rules to prevent errors before they occur. There is no question that trial judges have the power to protect defendants *before trial*, for example by disqualifying defense counsel in order to avoid any potential future effects of a conflict of interest. The existence of such discretionary authority, however, should not be viewed as support for a self-initiating prophylactic rule. Ordinarily, unless a defendant identifies and raises a potential problem (e.g., a conflict), courts consider the defendant bound by counsel's failure to protect his interests. *See* United States *ex rel.* Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980) (stating that a court normally does not need to initiate an inquiry into the propriety of an attorney's representation of multiple clients); *cf.* FED. R. CRIM. P. 44(c) (requiring a court to inquire into the multiple representation of federal defendants).

84. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973) (noting that prophylactic rules, by their nature, "will occasion windfall benefits for some defendants who have suffered no constitutional deprivation"). Perhaps the clearest example of the negative judicial attitude towards prophylactic rules is the absence of a requirement that police provide counsel for all defendants subject to interrogation. Such a rule is the logical solution to the problem identified in *Miranda v. Arizona*; that is, the inherently coercive atmosphere surrounding stationhouse interrogation. Miranda v. Arizona, 384 U.S. 436, 445-458 (1966). Yet courts have resisted imposing an across-the-board requirement both for cost reasons and the desire to avoid interfering with law enforcement when the underlying concern (i.e., coercion) is absent. *Id.* at 474.

85. *Cf.* Smith v. Murray, 477 U.S. 527, 533-536 (1986) (holding a client bound by the lawyer's tactical decision); Murray v. Carrier, 477 U.S. 478, 485-497 (1986) (same).

86. Proponents have always justified reform on the basis that a peculiar reason to protect the attorney-client relationship exists in the grand jury subpoena context. *See, e.g.*, Stern & Hoffman, *supra* note 1, at 1827-29 (discussing the unique aspects of grand jury subpoenas); Foster, *supra* note 14, at 756-78 (discussing the effect of grand jury secrecy on the attorney-client relationship). They have avoided resting their recommendations on any need to change the scope of the attorney-client privilege or the "crime-fraud" exception. *See, e.g.*, Peirce & Colamarino, *supra* note 13, at 860-63 (discussing the impact on the attorney-client relationship and accepting the current state of the law regarding the attorney-client privilege); Weiner, *supra* note 5, at 123-24 (proposing administrative guidelines, but accepting status quo in the law of attorney-client privilege).

fect, expand the attorney-client privilege and support that expansion by weakening the grand jury's powers. Prosecutors must do more than show that an attorney subpoena seeks unprivileged or "crime-fraud" knowledge. The judicial review requirements apply to all information "about a client"[87] or "obtained as a result of the attorney-client relationship,"[88] categories that extend well beyond the privilege.[89] Moreover, to overcome the presumption of non-subpoenability, the prosecutor must establish not only an exception to privilege, but also must prove that the information is "essential" and that "there is no other feasible alternative to obtain the information."[90] Neither of these substantive elements come from the evidentiary law defining privilege and its exceptions. When one contrasts the proposed standards with cases in which courts have declined even to evaluate whether subpoenaed information is "relevant,"[91] one sees how far-reaching the new limitations are.

In part, proponents justify the heightened substantive requirements as a mechanism to counteract prosecutorial abuse. Because abusive attorney subpoenas can adversely affect attorney-client relationships, proponents conclude that the subpoenas should be available only as a last resort.[92]

Unfortunately, that conclusion assumes the answer to the key issue: whether prosecutors routinely subpoena lawyers

87. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1983) (added 1990).

88. *1988 ABA Resolution*, *supra* note 1, at 1853.

89. The privilege applies only to communications between attorney and client, and only when those communications are made for the purpose of obtaining or giving legal advice. 8 WIGMORE, *supra* note 7, § 2292, at 554. Indeed, the category of information encompassed by the reform proposals may exceed even the category considered confidential under the professional codes. The codes require not only an underlying "attorney-client relationship," but also that the information "relate to" or be "gained in" the relationship. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981).

90. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.8(f)(ii)-(iii) (1983) (added 1990). The *1986 ABA Resolution*, *supra* note 1, omitted the requirement that the subpoenaed testimony be "essential," substituting a relevance threshold. *Id.* at 1852.

91. *See, e.g.*, Blair v. United States, 250 U.S. 273, 281-83 (1919) (holding that a witness may not raise challenges related to the subject matter of a grand jury investigation); *cf. In re* Schofield, 486 F.2d 85, 93 (3d Cir. 1973) (establishing the requirement that prosecutors make a preliminary showing of relevance in order to obtain handwriting samples, photographs, and fingerprints), *cert. denied*, 421 U.S. 1015 (1975).

92. *See, e.g.*, Foster, *supra* note 14, at 752.

rather than other available sources of information.[93] In theory, the professional codes already require prosecutors to act in good faith. They forbid conduct intended merely to harass[94] and charge prosecutors with a special ethical duty to "do justice."[95] Federal guidelines governing attorney subpoenas also impose practical impediments to their issuance.[96] Perhaps most importantly, prosecutors' natural incentives favor the avoidance of attorney subpoenas. Prosecutors know that lawyers, unlike other grand jury witnesses, are likely to resist subpoenas and that judges will view attorney subpoenas with distaste.[97] Moreover, because attorney witnesses are aligned with their client's interests, the attorneys will try to testify unfavorably and will use any information they can glean from the grand jury proceedings to prepare the defense. Absent empirical evidence to the contrary, one therefore would expect prosecutors to prefer alternative witnesses. The reformers' unsupported assertions of prosecutorial abuse, alone, cannot support a restrictive rule.

The most plausible explanation for the proposed substantive limits on attorney subpoenas is the fear that lawyer-witnesses will be intimidated when appearing before grand jurors and, as a result, will make errors of judgment in deciding whether particular questions threaten clients' rights. Logically, however, this rationale at most justifies a substantive standard

93. In its report accompanying its proposed Rule 3.8, the ABA relied upon statistics reflecting the number of attorney subpoenas prosecutors have issued in recent years. *1990 ABA Report*, *supra* note 33, at 5. These statistics do not resolve the issue. First, the ABA's statistics include all attorney subpoenas, not simply those arising in the grand jury context. Attorney subpoenas after indictment are subject to more judicial supervision than grand jury subpoenas and, because public, threaten attorney-client relationships to a lesser extent. Perhaps more important, the number of attorney subpoenas in the ABA report—especially when adjusted to remove non-grand jury subpoenas—does not seem particularly high in comparison to the number of federal investigations and prosecutions that take place. By itself, the ABA's statistical evidence hardly supports the proposition that prosecutorial abuse is rampant.

94. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(1) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1983).

95. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1983).

96. In addition to setting stringent substantive requirements, the guidelines make trial level prosecutors obtain approval for attorney subpoenas from supervisors high in the hierarchy of the Justice Department. *See DOJ Guidelines*, *supra* note 28, § 9-2.161(a)(D), at 36.

97. *See, e.g.*, United States v. Klubock, 832 F.2d 649, 653-54 (1st Cir.) (discussing attorney subpoenas disapprovingly), *vacated*, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (upholding local attorney subpoena rule, but noting with reference to the panel decision that the rule is not perfect).

asking whether the subpoena "calls for privileged information," the standard currently applicable to motions to quash subpoenas. More fundamentally, the proposition that lawyers are unable to think strategically in the grand jury room stands several assumptions of the criminal justice system on their head. Rightly or wrongly, the legitimacy of grand juries rests on the belief that grand jurors themselves will protect the rights of witnesses and targets.[98] Since we do not worry that lay witnesses will be intimidated into waiving rights by mistake,[99] it is peculiar to emphasize the fear of lawyer-witnesses who are familiar with the courtroom setting. Indeed, a trial lawyer's essential skills include making evidentiary assessments, such as the applicability of the privilege. If we are willing to bind clients to their lawyers' snap judgments at trial,[100] certainly we should be just as willing to do so for grand jury testimony, the substance of which the lawyer has advance warning.

The image of lawyers erroneously waiving client rights before the grand jury makes sense only in one respect. Unlike other aspects of the representation, a defense lawyer's grand jury testimony and objections occur in a setting from which the client is excluded. As a result, the client cannot be completely confident that the lawyer has acted protectively. The client must rely on the lawyer's report of what transpired, rather than on his own observations and evaluation. To the extent the reform proposals bolster clients' continued faith in lawyers who have acted competently, they support the attorney-client privilege and the values it serves.

The flaw inherent in the judicial review remedy is, again,

98. *See* Wood v. Georgia, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution."); Hurtado v. California, 110 U.S. 516, 554-55 (1884) (Harlan, J., dissenting) ("In the secrecy of the investigations by grand juries, the weak and helpless . . . have found, and will continue to find, security against official oppression . . . and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.").

99. *See* United States v. Mandujano, 425 U.S. 564, 579-581 (1976) (rejecting the right of a grand jury witness to receive *Miranda* warnings and to have counsel in grand jury room); *cf. In re* Groban, 352 U.S. 330, 335 (1957) (rejecting the right to counsel in an analogous statutorily-authorized investigative process).

100. *See* Oregon v. Applegate, 591 P.2d 371, 373 (Or. Ct. App. 1979) (summarizing the reasons for considering objections not made at trial as waived), *review denied*, 287 Or. 301 (1979). Of course, most jurisdictions recognize a category of trial errors which may be raised on appeal even absent an objection. *See, e.g.*, FED. R. CRIM. P. 52(b) (setting out the "plain error" rule).

obvious. Pre-issuance judicial review increases the difficulty of enforcing subpoenas. However, once a court approves the subpoena itself—holding, in essence, that the information sought is unprivileged, essential, and unique—the remedy does not assuage any of the client's concerns. The client still has no way of knowing that his lawyer is keeping the trust to the extent she legally can. Indeed, because the pre-issuance hearing results from a mandatory procedure, the client does not even have the minimal evidence of loyalty and aggressiveness that he might have felt if the lawyer had filed a motion to quash on her own.

In short, the current reform proposals are not tailored to the specific threat posed by attorney subpoenas. The approach of simply making subpoenas more difficult weakens the grand jury's traditional investigative power. The proposals change the law of attorney-client privilege, expanding its scope and using procedural terminology to negate the exceptions—all while denying any intent to question the correctness of the substantive law. Although the reforms help immunize lawyers from the inconvenience of testifying and the possibility of having to withdraw from a case, the reforms do not reinforce attorney-client trust. They do not give clients and observers a reason to believe that their attorneys are looking after their interests when the attorneys must work behind closed doors.

## IV. REMEDYING CLIENT CONCERNS

Although the above analysis calls the current reform proposals into question, it also illustrates that the proposals do identify legitimate client concerns. Attorney subpoenas threaten client trust and may cause future clients to delay in retaining lawyers or giving necessary information to them. As we have seen, these dangers stem largely from the fact that the subpoenaed attorney testifies secretly. If a client were in a position to know how his attorney acted on the stand, he could evaluate the attorney's loyalty and aggressiveness on his behalf without capitulating to suspicion and speculation.

Suppose, for example, that a prosecutor and court follow Model Rule 3.8(f), and the court orders the subpoenaed lawyer to tell the grand jury about payments from the client. This information is probably unprivileged and relevant to whether the grand jury should file an indictment seeking forfeiture of the

fees under several modern statutes.[101] Discussions concerning the services provided in exchange for the fees, however, are privileged. Under the current grand jury scheme, the client has no way of knowing that the lawyer will protect, or has protected, this information when on the stand. Disclosing the grand jury testimony to the client would provide reassurance.

Of course, a client who sees his lawyer testify under subpoena may feel betrayed at the mere fact that the lawyer is testifying, giving information against him, or cooperating with a law enforcement agency. Uninformed clients may persist in the belief that a truly competent lawyer would have found a way to avoid appearing. But the reform proposals do not address these perceptions, at least not if the proposals are honest in accepting the law of privilege. Clients are simply not entitled to avoid the betrayal, if it is betrayal, that accompanies disclosure of unprivileged information in the course of litigation. Without the added effect of secrecy, disclosure in the grand jury context involves no greater damage to the attorney-client relationship than disclosure of "confidential" but unprivileged information in the course of civil discovery.[102] Similarly, the

101. *E.g.*, 21 U.S.C. §§ 881-83 (1988) (forfeiture of proceeds from the sale of illegal drugs); *see also supra* note 9 (citing authorities on the unprivileged nature of fee agreements).

102. The ABA Committee which proposed Model Rule 3.8(f) attempted to overcome this objection by offering the following syllogism: The codes recognize a category of confidential but unprivileged information, but clients do not "draw fine distinctions or follow the nuances of the privilege and its expectations." *1990 ABA Report*, *supra* note 33, at 7. Hence, "there could be nothing more destructive of th[e] expectation" of attorney loyalty than for clients to learn that lawyers are disclosing information. *Id.* at 7-8. Moreover, because the number of attorney subpoenas has increased in recent years, the procedure now poses "one of the single greatest threats to the defense bar and to defendants' ability to obtain criminal representation." *Id.* at 5 (quoting ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON THE ISSUANCE OF SUBPOENAS IN CRIMINAL CASES BY STATE AND FEDERAL PROSECUTORS 1 (July 1985)).

The fallacy of this logic is that the cause of the loss of client faith is not the subpoena itself, but rather the defense lawyer's failure to explain what information is truly immune from disclosure. *See supra* note 16. The attempt to bolster the argument by reference to the increasing number of subpoenas is a rhetorical trick. The number remains small when compared to the total number of criminal prosecutions. Clients' chances of losing their attorneys through withdrawal or disqualification are far smaller in the criminal than the civil context, where tactical motions to disqualify counsel have become routine. *See, e.g.*, J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring) (discussing tactical motions to disqualify in civil cases); Rice v. Baron, 456 F. Supp. 1361, 1370 (S.D.N.Y. 1978) (same). For an analysis of prosecutorial motions to disqualify, see Zacharias, *supra* note 26, at 71-74.

possibility that the client's chosen counsel might be disqualified or forced to withdraw because of grand jury testimony does not justify reform, as long as the conflict legally and ethically requires disqualification and stems from information the client has no right to keep secret.[103]

This brings us to the question: how would enabling clients to be present at or to receive a transcript of their attorney's grand jury testimony mesh with law enforcement interests and traditional grand jury secrecy? Secrecy rules vary from jurisdiction to jurisdiction,[104] with Rule 6(e)(2) of the Federal Rules of Criminal Procedure providing the model starting point. Rule (6)(e)(2) provides, in pertinent part:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule.*[105]

Disclosure of a witness's testimony is also permitted upon court order[106] and is routinely required after a witness's testimony against a defendant at trial.[107]

Strikingly exempt from the secrecy requirements is the grand jury witness. Whatever the government's interests in silence may be, they do not entitle the government to secrecy when the witness herself discloses.[108] Since a lawyer-witness

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103. *Cf.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 628-31 (1989) (establishing that the government has an interest in recovering forfeitable assets overriding the Sixth Amendment interest in permitting criminals to use assets to retain defense counsel of their choice); Wheat v. United States, 486 U.S. 153, 159-160 (1988) (stating that the Sixth Amendment right to choose counsel is circumscribed in many respects); *see also supra* note 22 (quoting *Wheat*).

104. *See* KAMISAR ET AL., *supra* note 78, at 639-40. *See generally* LAFAVE & ISRAEL, *supra* note 70, § 8.5 (discussing the secrecy requirements and their origins).

105. FED. R. CRIM. P. 6(e)(2) (emphasis added).

106. FED. R. CRIM. P. 6(e)(3)(C)(i), (ii), (iv).

107. Jencks Act, 18 U.S.C. § 3500 (1988) (requiring the disclosure of prior statements by government witnesses who have "testified on direct examination"). American jurisdictions are divided on the issue of whether defendants are entitled to pretrial disclosure of pretrial statements by witnesses the government intends to call. *See* KAMISAR ET AL., *supra* note 78, at 1146-47 (describing the split in state rules).

108. *Cf.* Butterworth v. Smith, 110 S. Ct. 1376, 1381 n.3 (1990) (noting that federal law and most state laws exempt grand jury witnesses from secrecy requirements, but not addressing the issue of whether statutes could require witnesses to maintain secrecy during the pendency of grand jury investigations).

who continues to represent the client owes the client a professional duty to keep him informed,[109] it follows that the government may not insist that the lawyer keep the client in the dark.

A rule requiring client access to the lawyer's grand jury testimony therefore would not circumscribe any governmental interest in secrecy or law enforcement that society currently recognizes.[110] The real question facing reformers is where the lawyer's responsibilities lie. In other words, if the lawyer withdraws and thereby terminates her obligation to keep the client informed, does the lawyer retain a personal right to keep her grand jury testimony secret?[111]

One key to answering this question concerns when the withdrawal takes place. If the attorney does not withdraw until after her testimony is complete, then clearly her primary obligations are to her client.[112] A rule mandating disclosure is

109. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) (requiring lawyers to keep clients reasonably informed about the status of the matter and to explain a matter to the extent necessary to permit the client to make "informed decisions regarding the representation"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) (providing that a lawyer should make best efforts "to insure that decisions of his client are made only after the client has been informed of relevant considerations"); *id.* EC 9-2 (providing that "a lawyer should fully and promptly inform his client of material developments").

110. Special circumstances implicating such interests may arise. In some situations, letting a client observe the proceedings or learn the identity of the grand jurors might threaten the jurors. However, safeguards to accommodate the jurors' fears easily can be developed. In the circumstances described, one could, for example, limit the client to reviewing an appropriately redacted transcript or to witnessing the proceedings from behind a screen. For our purposes, the essential point remains: The government has no general right to keep the information from the client if the lawyer-witness wants, is willing, or is required to disclose.

111. In United States v. Procter & Gamble Co., 356 U.S. 677 (1958), the Court identified several interests witnesses may have in grand jury secrecy. These include interests in avoiding retaliation or indictment by persons who learn of the testimony and in avoiding the stain of investigation if the witness is exonerated without indictment. *Id.* at 681-82. Lawyer-witnesses share these interests. Insofar as they are inconsistent with the lawyer's duty to keep clients informed, *see supra* note 109, the interests have diminished force.

112. If the lawyer has not withdrawn, her representation of the client must be considered ongoing. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983). A lawyer's first obligation, whether based on fiduciary notions or the codes, is to the interests of her client. *See id.* Rule 1.7 cmt. (describing the duty of loyalty and noting that a "lawyer's own interests should not be permitted to have adverse effect on representation of a client"); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (1981) (stating that a lawyer's personal interest may not "affect adversely the advice to be given or services to be rendered").

consistent with the professional codes in requiring that the attorney's self-interest give way.[113] Similarly, an attorney who identifies a conflict in the midst of her testimony is obliged to protect her client's interest. Her professional duty is to cease testifying and petition the court for a continuance so that the client may obtain conflict-free representation. The new attorney may then, if appropriate, intervene to safeguard the client.[114]

This difficult scenario arises when the attorney recognizes the adverse impact upon her judgment as soon as she receives the subpoena. Suppose the attorney, upon realizing that she has unprivileged information (e.g., regarding the client's ongoing crimes) or that she herself is implicated in a crime, withdraws from the representation before testifying. Suppose further that she has a reason to want to keep the testimony secret from the client—for example, because she fears retaliation if the client learns the substance of her testimony. We know that protecting witnesses is a significant goal of grand jury secrecy.[115] Would eliminating secrecy in this scenario unduly interfere with the lawyer's rights or the grand jury's investigative function? Conversely, would the purpose of attorney subpoena reform be disserved if secrecy were maintained and the client relegated to pre-reform remedies?

The hypothetical attorney has some interest in secrecy. It is important to recognize, however, just how limited that interest is. The attorney has no justification for keeping the fact of her testimony secret, for she is obligated to enable the client to intervene and assert the attorney-client privilege. Similarly, she is not entitled to keep the subject matter secret, because in the course of the motion to quash proceedings, the litigants and court must be told enough about the subject matter to decide if the privilege attaches.[116] The attorney's potential interest in

113. *Cf.* CAL. BUS. & PROF. CODE §§ 6068 (e), (h) (West 1990 & Supp. 1992) (requiring lawyers to maintain client confidentiality "at every peril to himself" and to avoid rejecting representation of the defenseless "for any consideration personal to himself").

114. *See supra* notes 49, 55 (discussing the procedures by which a lawyer-witness may preserve her client's privilege argument and citing authorities).

115. Butterworth v. Smith, 110 S. Ct. 1376, 1380 (1990); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); *cf.* KAMISAR ET AL., *supra* note 78, at 639 n.b ("During the pendency of the investigation, every effort is made to assist the witness who wants to keep his testimony secret.").

116. Some reform proposals, like those urged by the *1986 ABA Resolution*, *supra* note 1, would require only an ex parte showing by the prosecutor. A prosecutor could thus attempt to keep the subject matter of the expected testi-

maintaining secrecy is therefore confined to the actual substance of the testimony—what she does and does not say.

These considerations significantly narrow the range of cases that present legitimate lawyer interests against releasing testimony to clients. Consider what the facts will look like in our hypothetical scenario and what is still subject to secrecy if the lawyer has acted properly. Following a motion to quash, the client has a new lawyer and knows the following: (1) the client's original lawyer has withdrawn because of a conflict of interest or because she may have to appear as a witness at trial against the client, (2) the lawyer will testify in the grand jury under subpoena, (3) the testimony will concern matters described in the hearing on the motion to quash (e.g., fees the lawyer received or ongoing crimes the client discussed with the lawyer), and (4) the court has determined that those matters are unprivileged or subject to an exception. With this much information revealed, one must wonder what sense of loyalty breaching secrecy further would preserve, on the one hand, and how important the remaining secrecy is to the lawyer, on the other. In order to select appropriate reform, one must decide how to balance these limited competing interests.

The client has no right to control the grand jury testimony or to have the lawyer-witness lie on his behalf. Nevertheless, the client retains some "loyalty interests" in knowing the substance of the testimony. The client is entitled to feel secure that the lawyer-witness will not falsely accuse him and to feel secure that the lawyer-witness will assert the privilege where appropriate. Future clients' willingness to rely on lawyers may be affected if it becomes known that current clients doubt they are being treated fairly.

The lawyer, in contrast, has virtually nothing to gain by continued secrecy. The client already knows that the lawyer will testify, and on what subject. The client knows what truthful information the lawyer has.[117] Since the lawyer has no

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mony secret. However, a good lawyer ordinarily would feel obligated to move to quash—or enable the defendant to so move—if potentially privileged information is at issue. *See supra* note 49 and accompanying text. A more adversarial procedure therefore would still occur, and the nature of the subject matter would be revealed.

117. The existence of such knowledge is a factor courts rely upon in deciding whether to reveal grand jury information to third parties pursuant to Rule 6(e)(5) of the Federal Rules of Criminal Procedure. Although judges are reluctant to reveal information while the grand jury's investigation proceeds, they are more likely to do so when the party seeking the information can show a direct need for it and is already familiar with the subject matter. *See*

right to testify falsely, both she and the client know how she should testify. The only possibly legitimate way that keeping the substance of the testimony secret can help the lawyer (e.g., to avoid retaliation) is by enabling the lawyer to testify truthfully while telling the client she has done the opposite.[118]

Preserving the lawyer's ability to mislead the former client is not a sufficient reason to maintain grand jury secrecy in the attorney subpoena context. In so acting, the lawyer would confuse and damage the client's current defense. Although a former client has neither the right to continued representation nor a valid expectation that the lawyer will disobey the legal subpoena, the professional rules recognize some continuing obligations on the lawyer's part.[119] Even after withdrawal, the lawyer must protect a client's interests,[120] regardless of the cost to herself.[121]

The conclusion thus seems inescapable that reform proposals would be justified—or at least consistent with the current conception of lawyers' professional responsibilities—in treating a lawyer-witness's interest in grand jury secrecy as subordinate

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Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 217-224 (1979) (balancing the government's and witnesses' interests in secrecy against a third party's need for the information).

118. In theory, a middle ground exists. The lawyer-witness might be able to avoid telling the client what she said without lying to the client. In practice, however, this option seems meaningless. A lawyer who is afraid of her client's actions simply will not dare to tell the client, "I testified, but I will not tell you what I said." More to the point, whether she plans to lie or simply stay silent, the lawyer has a professional obligation to safeguard her former client's interests. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983) (detailing a lawyer's responsibilities with regard to conflicts of interest involving former clients); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1981) (instructing attorneys to decline proferred employment if it would involve her in "differing interests").

119. The rules governing successive representation of clients provide a direct analogy. They forbid lawyers from representing subsequent clients with interests adverse to former clients in the same or a substantially similar matter. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(A) (1983); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1981) (requiring that lawyers avoid representing "differing interests"). Similarly, a lawyer may not use any information "relating to the [former] representation" to the disadvantage of the former client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(c)(1) (1983). These provisions reflect the common law rule that a lawyer's fiduciary obligations extend beyond the termination of the representation. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 381 cmt. (1957) (requiring that an agent, when the agency relationship terminates without the principal's fault, give the principal relevant information).

120. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983).

121. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(e) (requiring a lawyer to maintain confidentiality "at every peril to himself").

to client interests. If that is the case, no separate law enforcement considerations stand in the way of reforms that would either open the grand jury room to clients while their lawyers testify or entitle clients to transcripts. Such reforms would directly serve the right of clients to assure that lawyers remain suitably loyal and assert all of the clients' legally enforceable interests.[122]

## V. THE IMPACT OF CHANGING REFORM PROPOSALS TO FOCUS ON SECRECY

We can gain insight into the current reform proposals by comparing their potential impact with the potential impact of releasing lawyers' grand jury testimony to clients. Who benefits and loses from the change in focus, and how?

Clients would get both more and less from rules formulated on the alternative "secrecy" approach. They receive heightened protection for their right to be sure that lawyers are as loyal as the law allows. Their specific remedy for prosecutorial misconduct remains essentially unchanged.[123] In a practical sense, however, clients lose in their reduced ability to avoid legitimate attorney subpoenas. The secrecy approach discussed here would not include prophylactic hearing rules or impose on the government a requirement to show a need unrelated to client privilege. Nor, in the absence of improper prosecutorial motivation, would it require prosecutors to seek

122. In all aspects of the legal system, clients have varying abilities to use or benefit from rights they are accorded. In some instances, clients need legal assistance simply to understand the significance of what has transpired. Here, some clients may have more difficulty than others in understanding the grand jury testimony and its implications for attorney loyalty. Nevertheless, the testimony provides a starting point for explanatory discussions between lawyer and client. It serves to eliminate the client's suppositions and suspicions regarding what occurred behind closed doors. That alone often will obviate any need for independent legal advice.

123. Although some proposals shift the burden of proof to prosecutors, the proposals still require clients to establish misuse of the grand jury mechanism to avoid the attorney subpoena. *See, e.g., 1988 ABA Resolution, supra* note 1, at 1853 (requiring that a prosecutor establish, and a court find, that the subpoena does not have "the purpose . . . to harass the attorney or his or her client"). A prosecutor has the wherewithal to show the need for a subpoena, but rarely will be able to prove the absence of a purpose to harass. At best, he can submit an affidavit or statement disclaiming such a purpose. In practice, therefore, courts are likely to assume the absence of improper purpose even where reforms shift the burden, unless the defendant can make out a prima facie case of prosecutorial misconduct. Defendants are entitled to do this under pre-reform law as well. *See supra* note 78.

information elsewhere so long as the lawyer-witness presents a legal source. Still, clients have no claim of entitlement to a rule giving them these advantages. A secrecy approach fully protects their rights.

Initially, prosecutors might react negatively to a reform proposal that incorporates an exception to grand jury secrecy.[124] Upon close examination, however, the net effect of the change in focus facilitates law enforcement. Compared to the current proposals, the secrecy approach would limit the grand jury's ability to investigate and subpoena witnesses only to a limited extent. A rule requiring that a lawyer's grand jury testimony be revealed to clients would never prevent the grand jury from obtaining relevant, unprivileged testimony. Although in theory witnesses are more forthcoming in an atmosphere of secrecy, lawyer-witnesses in most cases will be inclined and have a professional obligation to disclose the testimony to clients informally.[125] Confirming the testimony (e.g., by permitting clients to observe it or review a transcript) will have minimal additional impact on legitimate law enforcement interests.[126]

Insofar as the secrecy approach clarifies prosecutors' own role with respect to attorney subpoenas, it benefits prosecutors personally. Both the current proposals and this Article have focused on how the clients' legal rights should affect the grand jury's power to seek attorney subpoenas. Neither has touched upon the separate issue of whether and when prosecutors should, as a matter of professional ethics, use their discretion to exercise, or encourage the grand jury to exercise, that power. The ethical issue is complicated by the prosecutor's duty to "do justice,"[127] and thus perhaps to take into account a target's non-

124. Of course, grand jury secrecy is not sacrosanct. Exceptions already exist, including court-ordered disclosures, disclosures when grand jury witnesses become witnesses at trial, and the general exception allowing witnesses to reveal what they wish. The exception proposed here is arguably similar in kind to the existing exceptions. It applies in limited circumstances and, in scope, allows only revelation of information that a witness would be likely to disclose voluntarily.

125. *See supra* note 109 and accompanying text.

126. Having a transcript might help the defendant's trial lawyer in preparing and executing a cross-examination of the witness to that extent the chances of conviction may be lessened. However, the existence of the Jencks Act (and similar state statutes) suggests that avoiding full cross-examination of trial witnesses is not a valid law enforcement goal. *See* 18 U.S.C. § 3500(e)(3) (1988) (requiring disclosure of trial witness's grand jury statements).

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1983) (re-

enforceable interests in maintaining a good attorney-client relationship and in keeping the counsel of his choice.[128]

A secrecy rule that highlights the elements of the attorney-client relationship rather than creating general limits on subpoenas may help shape prosecutors' ethical thinking. Instead of focusing on ways to overcome an artificial hurdle to law enforcement, prosecutors may start to consider the decision of whether to subpoena an attorney in the rule's terms; that is, how the subpoena will affect the attorney-client relationship. That, in and of itself, would help prosecutors define their role as participants in maintaining a fair adversarial process, in which they may act aggressively so long as the defendant and his counsel can do the same.[129] One would hope that prosecutors would take seriously their obligations to maintain a level adversarial playing field by abjuring marginal subpoenas that significantly impact defendants' use and choice of counsel. At a minimum, a rule that hones in on the element of loyalty should, by emphasizing the importance of the trust relationship, encourage prosecutorial self-restraint in the issuance of attorney subpoenas.

This brief analysis of the impact of the alternative secrecy

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quiring government lawyer to act as a "minister of justice"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) (requiring government lawyers to "seek justice").

128. The precise meaning of the prosecutorial duty to do "justice" is unclear. *See* Zacharias, *supra* note 26, at 46-47 & nn.2, 6 (noting and citing authorities for the proposition that the codes, judicial decisions, and interpretive literature are unclear, and proposing an interpretation of what the codes would consider "justice" at trial); *see also* George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (discussing the role of the prosecutor in administering the criminal justice system); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1168 (1973) (discussing the nature of the prosecutorial obligation to do justice). The concept of prosecutorial justice undoubtedly encompasses some objective consideration of the defendant's interest in receiving a fair trial. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (discussing prosecutors' obligations to defendants); *see also* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 632 (1972) (discussing prosecutors' duty to restrain selves to preserve fair trial); J. Allison DeFoor II, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L. REV. 443, 448 (1983) (noting prosecutor's duty to mitigate guilt under Florida law). Arguably, prosecutors have a general obligation to ensure the proper operation of the adversary system and therefore must help maintain a contest in which a defendant can employ the services of a lawyer he trusts. *See generally* Zacharias, *supra* note 26, at 60-65 (defining the prosecutor's obligation in terms of the adversarial process).

129. *See* Zacharias, *supra* note 26, at 65-74 (discussing the prosecutor's obligation to preserve defense counsel's effectiveness).

approach on the players and the system illustrates that the only real loser is the bar. Compared to the current proposals, the secrecy approach would require lawyers to testify more frequently, bear full responsibility for protecting and asserting clients' interests in preventing testimony,[130] and lose clients (through withdrawal or disqualification) earlier and more often. The secrecy approach also places a premium on lawyer judgment and skill—in initially advising clients about the scope of confidentiality and privilege, in determining when the privilege should be asserted, and in deciding when it behooves them to withdraw.

With the responsibility to carry out these functions, lawyers would become burdened with the possibility of legal liability for failure to act competently. Those whose carelessness in soliciting unprivileged information causes the client discomfort no longer could hide the consequences of their conduct from the client.[131] Moreover, unlike under the current proposals, lawyers whose own acts are under investigation could not use the general existence of client rights as a shield. In relative terms, reforms that focus on secrecy clearly would inconvenience the bar.[132]

## CONCLUSION

When one analyzes the current reform proposals and recognizes their obvious flaws, one comes away with the nagging sense that proponents have a hidden agenda.[133] At least for ob-

130. Lawyers could not, in other words, rely on a prophylactic hearing rule to substitute for their own initiative. *See supra* text accompanying notes 83-85.

131. What this means for the attorney in the hypothetical scenario discussed above is that she accepts the client at her own peril. If she agrees to represent someone whom she fears, or will fear if she disobeys, she must live with the risks inherent in fulfilling her professional and legal obligations.

132. Indeed, the degree to which the current proposals benefit lawyers' personal interests raises serious questions about the proponents' good faith. But identifying the true reasons for the proposals is beyond this Article's scope. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 655-56 (1981) (questioning the motives underlying professional rules); Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 326 (1986) (suggesting that anti-solicitation rules serve primarily the bar); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 691-92 (1981) (discussing the bar's self-interest in promulgating rules); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 629-30 & nn.138-39, 144-45 (1990) (identifying various potentially self-serving professional rules and citing authorities).

133. *Cf.* Koniak, *supra* note 1 (discussing generally the conflict between

servers of the criminal justice system who have a defense orientation, prosecutorial authority to issue attorney subpoenas seems unfair. It gives prosecutors an edge over the defense, an ability to obtain unilateral discovery and exercise one-sided influence over who will present the opposing case. Unfettered subpoena power is a symbol of the grand jury investigative discretion that many consider inherently abusive of individual rights. From the personal perspective of some members of the defense bar, attorney subpoenas may also have significant economic effects.[134] The proposed attorney subpoena reforms arguably could play a part in remedying these "systemic" flaws.

Perhaps because these problems are not universally perceived—or perhaps because they lack support for changing the system on these grounds—proponents of reforms have relied upon other justifications. Having done so, they must be prepared to defend the reforms on the basis of those justifications. The above analysis suggests that they cannot. The proposed remedial schemes simply do not correspond to the aspects of attorney-client relationships that the proposals purport to address. A remedy focusing on grand jury secrecy would serve the values threatened by attorney subpoenas far better. Legitimate client interests would be protected. Law enforcement would not be unduly hampered.

To the extent the current reform proposals stem from a genuine concern over lawyer-client trust rather than a hidden agenda, they reflect, in a microcosm, the ongoing debate over the use of prophylactic rules to protect defendants' rights.[135] The proposed reforms work, if at all, by making the investigative task more difficult—catching some appropriate and some inappropriate subpoenas in the process. Even accepting the merits of prophylactic rules in principle, most observers would

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state-enacted law and the bar's view of what the law should be); Cramton & Udell, *supra* note 1, at 126-63 (discussing Model Rule 3.8(f) and concluding that by "provid[ing] special procedures for lawyers . . . the profession seeks to put itself above the law").

134. The ABA's emphasis on the potential effect of attorney subpoenas on defense lawyers' willingness to continue representing clients indirectly suggests that economic effects are, in fact, on the minds of reform proponents. *See 1990 ABA Report*, *supra* note 33, at 8 (discussing the ability of criminal defendants to obtain representation).

135. *Compare* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 460 (1987) (arguing that *Miranda* reaffirms our constitutional commitment at minimal cost to law enforcement) *with* Grano I, *supra* note 82, at 176 (arguing that Schulhofer neither understands nor responds to legitimacy argument); Grano II, *supra* note 82, at 129 (questioning the legitimacy of prophylactic rules).

agree that they should not be employed until and unless more directed remedies prove unworkable.[136] The essential flaw of reform proposals like the ABA's is their failure to consider whether other remedies for correcting the evils of attorney subpoenas exist.

The secrecy approach suggested in this Article would place the primary responsibility for creating and preserving a meaningful attorney-client relationship on lawyers who are honest with their clients and competent on their behalf. Since the profession has already drawn the correlation between effectiveness and client trust, that is as it should be.[137] In the context of attorney subpoenas, lawyers can ordinarily avoid any threat to clients' sense of loyalty by preparing clients for the risks that disclosure of unprivileged information entails.[138] Nevertheless, a few circumstances are beyond the lawyer's control, including the justifiable suspicions that clients may feel concerning lawyer testimony behind closed doors. The secrecy approach seeks to fill that specific gap, to assure clients their due when the clients' chosen representatives cannot do so themselves.

136. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 652 (1961) (adopting the prophylactic exclusionary rule on the basis that "other remedies have been worthless and futile").

137. *See* Zacharias, *supra* note 7, at 358 & nn.28-31 (explaining and questioning instrumental justifications for attorney-client confidentiality and citing authorities).

138. A full analysis of what lawyers should tell clients about confidentiality is beyond the scope of this Article. As a general matter, the issue is complex. An explanation of confidentiality that is too cursory may trap the client. An overly-detailed explanation also can be counterproductive.

Nevertheless, criminal defense attorneys, in particular, should be able to develop an appropriately balanced warning. The presence of limits on criminal discovery and the availability of the Fifth Amendment privilege mean that there are only a few matters that defense attorneys realistically may be forced to disclose. In cases involving these matters, good representation probably must include educating clients regarding confidentiality's limits. *See supra* note 52 and authorities cited therein.