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CRIMINAL PROCEDURE—AFTER UNITED STATES v. KLUBOCK: CAN MASSACHUSETTS' NEW ETHICAL RULE CURB THE PRACTICE OF SUBPOENAING THE ATTORNEYS OF GRAND JURY TARGETS?

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CRIMINAL PROCEDURE—AFTER United States v. Klubock: CAN MASSACHUSETTS' NEW ETHICAL RULE CURB THE PRACTICE OF SUBPOENAING THE ATTORNEYS OF GRAND JURY TARGETS?

Our system of jurisprudence is underpinned by the very basic supposition that the critically important frank communication between attorney and client would not occur if the attorney-client [relationship] were readily subjected to outside scrutiny.1

INTRODUCTION

No outside scrutiny of an attorney-client relationship could be more chilling than the scrutiny of a federal prosecutor intent on prosecuting the client for a criminal violation. Yet increasingly, federal prosecutors are subpoenaing attorneys,2 demanding that they provide evidence about their clients when those clients are “targets” of grand jury investigations. As a number of commentators have noted,3 the practice of subpoenaing defense attorneys to provide documents or testimony before the grand jury raises serious concerns. At least, if an attorney raises a legal challenge to the subpoena, the additional litigation may disrupt the preparation of the client’s defense.4 If the attor-

2. See infra notes 46-47 and accompanying text.
4. “[A]n attorney-client subpoena thoroughly disrupts the representation of the client. Subpoena litigation is customarily fast-track, intensive litigation which diverts counsel from the task of representation.” Consolidated Memorandum of Defendant-Intervenors, Massachusetts Bar Association, Boston Bar Association and Massachusetts Association of Criminal Defense Lawyers, in Opposition to Plaintiffs’ Motion for Preliminary Injunction
ney complies with the subpoena and appears before the grand jury, the relationship of trust between attorney and client may be fatally undermined. At worst, if the subpoena demands the production of information highly prejudicial to a client, compliance with the subpoena may terminate the attorney-client relationship, effectively denying the client representation by his or her counsel of choice.

Federal prosecutors employing the subpoenas point to significant government interests at stake. An attorney may be the only feasible source for information vital to the successful indictment and prosecution of his or her client. Effective crime control is one of the fundamental functions of government. An attorney may be participating in a client's criminal activities. It has long been recognized that the attorney-client privilege does not shield the parties from disclosure when attorney and client are both participants in criminal activity.

Although commentators and the defense bar have expressed concern about the practice of subpoenaing attorneys during grand jury investigations, thus far proposals for reform have not been notably successful. In a series of cases, defense attorneys appealed to the federal courts to quash attorney subpoenas on the basis of the courts' supervisory power over the grand jury. Although several courts were initially responsive, the tide soon turned the other way. In 1985, the Department of Justice responded to concern about the practice of subpoenaing attorneys by promulgating guidelines regulating the use


5. "The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship." In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946 (E.D. Pa. 1976).

6. "The practice of [calling a lawyer before the grand jury] permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification." Id. at 945-46.

7. See infra notes 45-60 and accompanying text.


9. See In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968 (2d Cir. 1985), rev'd en banc, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); In re Grand Jury Subpoena No. 81-1 (Harvey), 676 F.2d 1005, withdrawn on other grounds, 697 F.2d 112 (4th Cir. 1982).

10. See, e.g., In re Grand Jury Proceedings (Hill), 786 F.2d 3 (1st Cir. 1986); In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); Matter of Klein, 776 F.2d 628 (7th Cir. 1985); In re Grand Jury Subpoena (Battle), 748 F.2d 327 (6th Cir. 1984); In re Grand Jury Proceedings (Schofield), 721 F.2d 1221 (9th Cir. 1983); In re Grand Jury Proceedings (Freeman), 708 F.2d 1571 (11th Cir. 1983).
However, commentators have tended to agree that the guidelines do not sufficiently protect the attorney-client relationship.12

Recently, in Massachusetts, the Supreme Judicial Court (S.J.C.) addressed the increase in attorney subpoenas by means of an ethical rule governing prosecutorial conduct. In response to a petition from the Massachusetts Bar Association (M.B.A.), the court adopted Prosecution Function 15 (PF 15)13 into its canon of ethics. The rule, which applies to federal as well as state prosecutors,14 makes it unethical for a prosecutor to subpoena an attorney whose client is a grand jury “target” to obtain information about that client unless the prosecutor receives prior judicial approval for the subpoena.

When PF 15 was promulgated, the United States District Attorney for Massachusetts promptly sued in federal court seeking a declaratory judgment that the rule would not apply to federal prosecutors. In United States v. Klubock15 the First Circuit Court of Appeals affirmed PF 15’s validity as a federal court rule. Nevertheless, there remain a number of unresolved issues with respect to PF 15. In fact, the Klubock litigation had the ironic effect of narrowing the parameters of discussion and deflecting attention from the rule’s actual operation. For example, despite a proposal from the M.B.A. that would have specified standards to aid judges in determining whether an attor-


12. See Stern & Hoffman, supra note 3, at 1819-20; Comment, An Ethical/Legal Tug of War, supra note 3, at 375-76. But see Weiner, supra note 3, at 125-33.

13. Prosecution Function 15 states: “It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.” MASS. SUP. JUD. CT. R. 3:08, PF 15.

14. PF 15 applies to federal prosecutors because the Massachusetts federal district courts adopt, by local court rule, the S.J.C.’s ethical rules of conduct:

Acts or omissions by an attorney admitted to practice before this court pursuant to this Rule 5, or appearing and practicing before this court pursuant to Rule 6, individually or in concert with any other person or persons, that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts, embodied in Rules 3:05, 3:07 and 3:08 of said court.


15. 832 F.2d 649, aff’d en banc, 832 F.2d 664 (1st. Cir. 1987).
ney subpoena should be served,16 the rule as promulgated is silent in this respect. Additionally, the rule leaves unspecified the type of proceeding at which a judge should decide whether a subpoena should be served. Answers to these and similar questions are crucial to judging PF 15's effectiveness as a solution to the attorney subpoena controversy.

As background to an examination of PF 15, this comment first reviews the grand jury's powers and its role in the criminal process. It then discusses the rationales advanced by prosecutors and defense attorneys for and against the use of attorney subpoenas, and considers whether the attorney-client relationship is sufficiently protected by current federal practice and procedure, including the attorney-client privilege, motions to quash subpoenas under Federal Rule of Criminal Procedure 17(c), and the Department of Justice's guidelines on attorney subpoenas. It examines the impact of PF 15 on existing federal procedures and considers the effect of including additional substantive and procedural provisions to strengthen the rule. Finally, it considers whether the district courts' rulemaking power is sufficient for the task of resolving the attorney subpoena controversy.

I. THE FEDERAL GRAND JURY

The federal grand jury in theory functions as both a "sword and a shield": "Its responsibilities . . . include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."17 In keeping with its charge to help protect society from criminal activity, the grand jury has broad investigatory powers.18 Grand jury operations are clothed in secrecy, and free of many of the constraints that govern trial juries.19

16. See infra note 249 for the text of the M.B.A. proposal.
18. See, e.g., United States v. Dionisio, 410 U.S. 1, 15 (1972) ("A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it.").
19. Several recent Supreme Court decisions have detailed the operations of the grand jury and reaffirmed the scope of its powers. See United States v. Calandra, 414 U.S. 338, 342-46 (1974); Branzburg v. Hayes, 408 U.S. 665, 686-88 (1972). As the Court noted in
The grand jury's existence is guaranteed by the fifth amend­
ment,20 testimony to the protective function it performed during the
American Revolution.21 The federal courts call the grand jury into
existence and have the responsibility for issuing and enforcing grand
jury subpoenas.22 Federal prosecutors, representatives of the execu­
tive branch, serve as the grand jury's guide in the legal intricacies
which jurors must understand to assess whether there is probable
cause to indict. In theory, control and oversight of the federal grand
jury are shared by the judicial and the executive branches. Its sup­
posed independence has provided a guarantee that its extensive powers
would not be abused. Yet the nature of the grand jury's investiga­tive
powers is problematic. In a democratic society, the secrecy of grand

\* Calandra, the grand jury deliberates in secret. The federal grand jury is unconstrained by
the rules of evidence, including rules on hearsay and relevance, that govern the petit jury.
On the basis of evidence presented by the prosecutor, grand jury members decide whether
probable cause exists to indict a particular person for a serious crime. However, the grand
jury also performs a more active investigatory function, aiding in the investigation to deter­
mine whether a crime has been committed. Historically, the grand jury has begun investi­
gations based on its own knowledge, on tips or rumors, or on evidence proffered by a
prosecutor. Id.

The reasons for grand jury secrecy are:
'(1) To prevent the escape of those whose indictment may be contemplated; (2) to
insure the utmost freedom to the grand jury in its deliberations, and to prevent
persons subject to indictment or their friends from importuning the grand jurors;
(3) to prevent subornation of perjury or tampering with the witnesses who may
testify before grand jury and later appear at the trial of those indicted by it; (4) to
encourage free and untrammeled disclosures by persons who have information
with respect to the commission of crimes; (5) to protect innocent accused [sic]
who is exonerated from disclosure by the fact that he has been under investiga­
tion, and from the expense of standing trial where there was no probability of
guilt.'
Rose, 215 F.2d 617, 628-29 (1954)).

20. The fifth amendment reads in part: "No person shall be held to answer for a
capital, or otherwise infamous crime, unless on a presentment or indictment of a grand
jury." U.S. CONST. amend. V.

See, e.g., Dionisio, 410 U.S. at 16: "[t]he Fifth Amendment guarantees that no civilian
may be brought to trial for an infamous crime 'unless on a presentment or indictment of a
Grand Jury.' " Id. (quoting U.S. CONST. amend. V).

21. As tensions between colonists and Great Britain rose, colonial grand juries often
refused to indict people charged with offences committed in protest against continuing Brit­
ish rule. The most celebrated case is that of John Peter Zenger, a New York newspaper
publisher whom the British authorities sought to prosecute for criminal libel. M. FRANKEL

22. See FED. R. CRIM. P. 6 (describing procedures for summoning and discharging
grand juries, procedures governing juror selection, rules for recording proceedings and re­
quiring secrecy, and the procedure for returning an indictment). See FED. R. CRIM. P. 17
(governing procedure for the issuance of federal subpoenas, including grand jury
subpoenas).
jury proceedings and their compulsory nature are at odds with ideals of openness and fairness. The grand jury has commanded continuing allegiance because it contributes substantially to effective law enforcement and because it retains, whether or not deserved, "the image [of] an independent protector of individual liberties."  

A. Charges of Grand Jury Abuse and Proposals for Reform  

In recent years, discussion of grand jury reform has been based largely on a perception that the grand jury is no longer an independent institution in any significant sense. There is wide agreement that the grand jury has become a working tool of the prosecutor. Jurors no longer act on their own knowledge of criminal activity in the com-
nity. They assess probable cause based on evidence presented to them by a prosecutor. Inevitably they rely on prosecutors for assistance in comprehending the complexities of federal criminal statutes.

In *The Grand Jury An Institution on Trial*, Marvin Frankel, former District Court Judge for the Southern District of New York, and Gary Naftalis, a former United States attorney, argue convincingly that "it is not profitable to mourn the grand jury's 'loss' of independence." They point out that in a modern society, law enforcement is inescapably an activity for professionals. The danger, of course, is that those professionals will misuse what Frankel and Naftalis refer to as the grand jury's "awesome range of powers."

If it is true that the grand jury now functions primarily as an arm to law enforcement authorities, the case can be made that certain due process protections and other individual rights not currently recognized in the grand jury context should be extended to individuals subpoenaed to appear before the grand jury. In fact, there have been some changes in this area during the last decade. The Federal Rules of Criminal Procedure have been amended to require that all grand jury proceedings be recorded. A number of states have implemented additional major reforms proposed by the American Bar Association, including the right to counsel in the jury room and use of the trial rules of evidence before the grand jury. However, in the federal system in particular, substantive movement toward grand jury reform has

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28. *Id.* at 23.
29. *Id.* at 22-23.
30. *Id.* at 5.
31. In 1982, the American Bar Association (A.B.A.) published a Model Grand Jury Act proposing a number of reforms, including among others the right to counsel in the grand jury room, transactional immunity, the right of a "target" to testify if he or she signs a waiver of immunity, a requirement that all grand jury proceedings be recorded, and a prohibition against calling lawyers to testify to matters learned during the legitimate preparation of a case or being subpoenaed to produce work product material concerning the client's case. A.B.A. SECTION OF CRIMINAL JUSTICE, A.B.A. GRAND JURY POLICY AND MODEL ACT 2 (1977-82) [hereinafter A.B.A. GRAND JURY POLICY AND MODEL ACT].

As Emerson notes, the major reason for these proposed reforms is to extend to grand jury witnesses (particularly those whose activities are the subject of grand jury investigation) at least some of the due process rights the criminal justice system grants after indictment. D. EMERSON, *supra* note 25, at 14.

32. "Recording of Proceedings: All proceedings, except when the grand jury is deliberating or voting, shall be recorded." FED. R. CRIM. P. 6(e)(1).
33. D. EMERSON, *supra* note 25. Emerson selected California, Colorado, Massachusetts, New Mexico, New York and South Dakota as study sites because these states had implemented major grand jury reforms. However, they are by no means the only states to have done so. *Id.* at 16.
been slow. In the absence of legislative reform, federal grand jury witnesses have invoked constitutional rights or the courts’ supervisory power and have asked federal judges to curb perceived abuses of grand jury procedures. In general, these appeals have sought protection from the grand jury’s substantial power to compel testimony and the production of documents.

B. The Grand Jury’s Subpoena Power

A corollary of the broad investigative powers traditionally ascribed to the grand jury is its far reaching subpoena power. In this context the “longstanding principle” that “the public . . . has a right to every man’s evidence” is regularly cited. The only exceptions recognized to this principle are those in which the person called to testify or to produce documents is protected by a “constitutional, common-law,

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34. A.B.A. GRAND JURY POLICY AND MODEL ACT, supra note 31, at 3.
35. For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), newsmen claiming that the first amendment protected their right not to reveal to the grand jury the identity of news sources, asked the courts to create a qualified privilege for newsmen. They sought the protection of the judiciary, which would have determined whether the state had made a sufficient showing of need and relevance when a reporter was called on to testify before a grand jury and reveal information about the identity of a confidential source. The Supreme Court declined “to embark the judiciary on . . . [the] long and difficult journey . . . [t]he administration of a constitutional newsman’s privilege would [re]present.” Id. at 703-04.

In In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973), cert. denied, 421 U.S. 1015 (1975), the court accepted plaintiff’s invitation to exercise a supervisory role over grand jury subpoenas. The Third Circuit Court of Appeals held that before an individual resisting a grand jury subpoena was found in contempt of court, the government was required to make a preliminary showing that the evidence sought was “relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and [was] not sought primarily for another purpose.” Id. at 93.

In several cases in which attorneys were subpoenaed to provide information about clients who were targets of grand jury investigations, the attorneys argued that if they were forced to comply, their clients’ sixth amendment right to effective counsel and/or fifth amendment right to due process would be violated. See In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968 (2d Cir. 1985) and the en banc opinion reversing that decision, In re Grand Jury Subpeona Served Upon Doe, 781 F.2d 238 (2d Cir.), cert. denied 475 U.S. 1108 (1986).

36. The basic investigative advantage of the grand jury stems from its ability to use the subpoena authority of the court that impanelled it. The grand jury may use the subpoena duces tecum to obtain tangible evidence and the subpoena ad testificandum to obtain testimony. Both subpoenas are supported by the court’s authority to hold in contempt any person who willfully refuses, without legal justification, to comply with a subpoena’s directive.


or statutory privilege." Courts have generally interpreted these testimonial shields narrowly to allow the grand jury to pursue all possible leads in its investigatory capacity. While the United States Supreme Court has consistently affirmed the judiciary's power to supervise the issuance of grand jury subpoenas, the Court's recent cases suggest that the lower courts' power must be used sparingly. Nonetheless, a judicial supervisory power exists if grand jury investigations are "instituted or conducted other than in good faith." To date, the Court has not defined with any precision the extent of the federal courts' power to quash grand jury subpoenas, except to suggest caution in its exercise.

II. A GROWING CONTROVERSY: SUBPOENAS TO ATTORNEYS WHOSE CLIENTS ARE SUBJECTS OF GRAND JURY INVESTIGATIONS

The 1980's have seen significant growth in the use of federal grand jury subpoenas issued to attorneys whose clients are grand jury "targets." These subpoenas are aimed at obtaining information about the attorneys' clients. While precise documentation of secret grand jury proceedings is impossible, no one denies that there has been

38. Id. The testimonial shields most pertinent in the grand jury context are the following: (1) the privilege against self-incrimination based on the fifth amendment of the U.S. Constitution (confirmed as existing in the grand jury context in Counselman v. Hitchcock, 142 U.S. 547 (1892)), 8 J. Wigmore, WIGMORE ON EVIDENCE (P. Tillers rev. ed. 1983) at § 2252; and (2) the common law attorney-client privilege, operative "[w]here legal advice of any kind is sought [] from a professional legal adviser in his capacity as such, [] the communications relating to that purpose, [] made in confidence [] by the client [] are at his instance permanently protected [] from disclosure by himself or by the legal adviser, [] except the protection be waived." Id. at § 2292.


40. "Grand juries are subject to judicial control and subpoenas to motions to quash." Branzburg, 408 U.S. at 708. Similarly, in Calandra, the Court reviewed restrictions on the grand jury's subpoena power and noted that "[j]udicial supervision is properly exercised in such cases to prevent the wrong before it occurs." Calandra, 414 U.S. at 346.


42. Branzburg, 408 U.S. at 707.

43. The process has been viewed with concern because of its potentially deleterious effects on attorney-client relationships and because of its possible impact on the adversary system as a whole. See infra notes 61-87 and accompanying text.
a significant increase in attorney subpoenas during this decade.\textsuperscript{44} In response to concern expressed about these “attorney subpoenas,” the government urges that a new focus on white collar crime, organized crime, and well financed drug dealing operations requires aggressive tactics, and that these tactics are sanctioned by law. On its side, the defense bar expresses concern for defendants’ right to effective counsel and even for the continued viability of the adversary system of criminal justice.

A. The Government’s Need for Information

The government has important interests at stake in maintaining unimpeded the grand jury’s subpoena power. That power has been seen as crucial to the effective functioning of the grand jury as an investigatory body. As the Supreme Court noted in \textit{Branzburg v.}  

\begin{footnote}{44} See Weiner, \textit{supra} note 3, at 95 n.1 (collecting reported cases that illustrate the trend).

The \textit{Klubock} litigation provided unusual statistical evidence of the practice in Massachusetts: in \textit{Klubock}, United States District Attorney Weld indicated that within the last four years, federal prosecutors had issued from fifty to one hundred subpoenas annually to attorneys whose clients were targets in grand jury investigations. Memorandum in Support of Motion for Preliminary Injunction at 21, United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), \textit{aff’d}, 832 F.2d 649 (1st Cir.), \textit{aff’d en banc}, 832 F.2d 664 (1st Cir. 1987). The First Circuit Court of Appeals concluded that meant that from 10.7% to 32.6% of the federal criminal cases in Massachusetts resulted in subpoenas issued to attorneys whose clients were targets of grand jury investigations. United States v. Klubock, 832 F.2d 649, 658 (1st Cir. 1987).

In 1985, Professor William Genego surveyed members of the National Association of Criminal Defense Lawyers, inquiring whether they had received grand jury subpoenas or I.R.S. summonses, or had been the targets of disqualification motions, actions seeking forfeiture of legal fees, or undercover “sting” operations. Genego, \textit{supra} note 3, at 2. Genego reported that of those who responded, 18% reported having received grand jury subpoenas to testify concerning a client. \textit{Id.} at 4. Those reporting receipt of grand jury subpoenas indicated that 68% were received between 1983-85; 18% between 1980-82; 11% between 1975-79 and 4% before 1974. (Genego indicated there exists some bias in reporting events that occur over time.) \textit{Id.} at 4, Table 2.

Among the group whose practice consisted of 50% or more white collar crime cases, 32% reported receiving grand jury subpoenas. \textit{Id.} at 4. Similarly, a higher rate of 26% of those defense attorneys who had been in practice for 10 years or more reported receiving grand jury subpoenas. \textit{Id.} at 6, Table 4.

Genego reported that 80% of his respondents indicated that they believed “the Department of Justice has intentionally adopted a practice of investigating and prosecuting attorneys who represent defendants in a criminal case as a means of inhibiting and discouraging zealous representation of criminal defendants.” \textit{Id.} at 7.

Hoffman, Kelston & Shaughnessy indicate that the increase in subpoenas to attorneys represents a conscious choice by the Department of Justice to employ an effective “new investigative tool.” Hoffman, Kelston & Shaughnessy, \textit{supra} note 3, at 96, (citing W. Landers, Remarks at the Conference on Defending the Right to Counsel, held at New York University Law School (Nov. 15, 1986) (tape recording on file with the \textit{University of Pennsylvania Law Review}).
Hayes, the grand jury's investigatory role contributes to effective law enforcement, one of the fundamental functions of government. Commentators have generally agreed that testimonial privileges, which interfere with the search for truth, should be recognized only when they further a policy that society values. Although the attorney subpoena controversy has roots in the attorney-client privilege, one that has long been recognized at common law, the arguments counselling against establishing new privileges also counsel that existing privileges be maintained within a relatively narrow scope. Additional due process protections at the grand jury stage also imply new procedural steps that would probably cause further delays in the criminal justice system and further strains on judicial resources, an undesirable result.

Changes in substantive law, including the Racketeer Influenced and Corrupt Organization Statute and the Continuing Criminal Enterprise Statute, may account in part for the recent increase in subpoenas to attorneys. For example, In re Grand Jury Subpoena

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45. 408 U.S. 665 (1972).
46. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process." Brandenburg, 408 U.S. at 690.
47. See, e.g., Brandenburg noting that "[t]he creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth." Brandenburg, 408 U.S. at 690 n.29. See generally J. Wigmore, supra note 38, at § 2291; C. McCormick, Evidence 205-06 (3d ed. 1984); E. Morgan, Foreword to Model Code of Evidence (1942).
48. J. Wigmore, supra note 38, at § 2192(3).
49. "The history of this privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned." Id. at § 2290 (footnote omitted).
50. "[Privileges] should be recognized only within the narrowest limits required by principle." Id. at § 2192(3). But see D. Louisell & C. Mueller, supra note 8, at 730-34 (arguing for a more expansive approach to the attorney-client privilege).
51. In Dionisio, the Supreme Court cautioned against impeding grand jury investigations with "minitrials and preliminary showings" on the reasonableness of particular grand jury subpoenas. Dionisio, 410 U.S. at 17.
54. Professor Genego indicated this might be a partial explanation of the rise in subpoenas to attorneys:

The recent use of certain practices might be seen as a consequence of the government's decision to concentrate its prosecutorial resources on certain kinds of offenses. The complex nature of many white collar and drug offenses, which commonly involve the control and transfer of assets and other recorded events—in particular offenses charged under the Racketeer Influenced and Corrupt Organization statute (18 U.S.C. § 1962) and Continuing Criminal Enterprise of-
Served Upon Doe involved a subpoena served on the attorney of an alleged head of an organized crime family. The government’s position was that if the attorney testified that his client had paid the legal fees of other individuals charged as members of the crime family, that would establish existence of “an enterprise” as defined by the RICO statute.

In other cases, attorneys may be a convenient source, or even the only source, for information prosecutors need as evidence that a crime has been committed. Attorney fee information, unprotected by the attorney-client privilege, may be necessary to trace certain transfers of funds in alleged illegal money laundering schemes. Fee information may help establish the extent of a client’s wealth, providing evidence of a Tax Code violation. An attorney may be directly implicated in the client’s criminal activities. If the government is denied access to

56. Id. at 242.
57. United States District Attorney for Massachusetts William Weld explained why his office had issued subpoenas to attorneys:

Such subpoenas have, on many occasions, been essential to obtaining documentary evidence and testimony relating to serious crimes, including violations of the narcotics laws, tax laws, white collar crime and corruption offenses. In many if not most cases, such subpoenas seek routine and uncontroversial information from lawyers who hold financial and legal documents often available from no other source.

58. “Fee arrangements usually fall outside the scope of the [attorney-client] privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client.” In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983).
59. See e.g., Matter of Klein, 776 F.2d 628 (7th Cir. 1985) (grand jury investigating, inter alia, possible income tax evasion, subpoenaed records of attorney fees).
60. The President’s Commission on Organized Crime indicated it found substantial evidence of lawyers using their skills to further the criminal activities of their clients. (Members of the defense bar questioned the Commission’s credibility, on the basis that most of the information came from anonymous, and therefore untrustworthy, sources.) 72 A.B.A. J. 32 (March 1, 1986).

United States District Attorney William Weld indicated that his office “had prosecuted a number of lawyers for insurance fraud, narcotics offenses, public corruption, tax offenses and other violations of federal law . . . [and that it had been necessary in these cases] to obtain documents from the lawyer or associates of the lawyer relating to persons represented by the lawyer.” Affidavit of William F. Weld at 7, United States v. Klubock,
information held by attorneys, there is a risk that certain criminal violations will not be prosecuted. Nonetheless, the government's need must be balanced against the disturbing implications the practice of subpoenaing attorneys has for attorney-client relationships and the adversary system.

B. The Other Interest at Stake: Imperiling the Attorney-Client Relationship

A subpoena to the attorney of a grand jury target may pose one of several distinct threats to the attorney-client relationship. For purposes of this discussion, suppose that A, attorney to B, has been representing her client for two years. B is now the target of a grand jury investigation, and A has been subpoenaed to produce documents and to testify about the fees B has paid her. Imagine further that B's legitimate sources of income are modest, and the fees he has paid to A appear disproportionately high, so that A's evidence has a strong tendency to prove that B has an illicit source of income. A's subpoena poses an immediate threat to the trust between A and B. Because the hearings before a grand jury are secret, if A does testify, B cannot be sure of the nature of his attorney's testimony before that body. If A arranges with a prosecutor not to appear, B may distrust the nature of that arrangement. The secrecy of grand jury proceedings is not the sole reason the subpoena to A may undermine her relationship with B. It is most likely that B consulted A anticipating that A would keep all aspects of their relationship confidential. A probably encouraged B


61. Information about fees paid to an attorney is generally not protected by the attorney-client privilege. See infra notes 116-17 and accompanying text.

62. "The duty of undivided loyalty of counsel to his client, traditionally considered an essential element in according a client his due process rights, is questioned by the client whenever his attorney is summoned before the grand jury—even if only to assert valid privileges—during the course of that representation." In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 260 (2d Cir.), cert. denied, 475 U.S. 1108 (1986) (Cardamone, J., dissenting).

63. Professor David Fried has written of his personal experience with the attorney-client relationship:

The author's experience as a litigator, together with the anecdotal evidence of other attorneys, suggests ... that clients confide freely in their attorneys because they are well aware of the [attorney-client] privilege and entirely unaware of any exceptions to it. When they learn exceptions exist and may be applicable to their cases, they typically are shocked.

to speak freely, so she could give fully informed advice. The practical effect of a loss of trust is that B may no longer feel free to confide to A facts that A should know but which B fears may appear damaging to his interests. As one court noted, absent protection for the attorney-client relationship, "[l]awyers would . . . have to choose between foregoing information indispensable to the provision of . . . competent legal representation or hearing the information and exposing the client to risk of subsequent disclosure to an adversary."

Second, a subpoena in these circumstances may create an ethical dilemma for A whose own best interests may now be in conflict with those of her client. B's interests might be best served if A resists the subpoena and risks contempt charges. A will probably be unwilling to risk the sanctions associated with civil contempt; she will probably comply with the subpoena. In fact, she has a professional responsibility to do so. Even if there exists a legal basis for challenging the subpoena through a Rule 17(c) motion to quash, the attorney's energies may be diverted from the client's case to fighting the subpoena in court. This may impair A's ability to represent B adequately in other

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64. Again, Professor Fried: "It is usual for attorneys, when first interviewing a client, to emphasize that everything the latter says will be kept in confidence." Id.

65. In re Shargel, 742 F.2d 61, 63 (2d Cir. 1984).

66. Criminal defense attorney Nancy Gertner was one of five attorneys subpoenaed to appear before a federal grand jury in a drug case in which the attorneys were preparing to defend the same clients in pending state proceedings. (The subpoenas were quashed; the case is reported as In re Grand Jury Matters, 593 F. Supp. 103 (D.N.H.), aff'd In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984)). She later wrote:

[T]he subpoenas necessarily created a conflict of interest between each lawyer and his or her client. Compliance with the subpoena is in the lawyer's best interest. However, it is in the client's interest for his or her attorney to resist any compliance that would increase the likelihood of conviction in the pending prosecution or of the indictment on additional charges.

Appendices to Memorandum of Defendant-Intervenors in Opposition to Plaintiff's Motion for Preliminary Injunction No. 7 at 3-4, United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), aff'd, 832 F.2d 649 (1st Cir.), aff'd en banc, 832 F.2d 664 (1st Cir. 1987).

67. Rule 1.6 of the Model Rules of Professional Conduct states that "[a] lawyer shall not reveal information relating to representation of a client . . . except for disclosures that are impliedly authorized in order to carry out the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1987).

The commentary to the rule indicates that "[t]he lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, Comment 19. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1980), permitting the attorney to reveal a client's confidences when required to do so by law or court order. A grand jury subpoena is a court order to appear and testify, which can only be challenged on the basis of a constitutional, common law, or statutory privilege.

68. See infra notes 144-70 and accompanying text.
Third, there is the problem of increased cost facing B if he decides to request that A litigate to avoid compliance with the subpoena. In several cases, attorneys moving to quash subpoenas requiring the production of information adverse to the interests of their clients hired additional counsel for consultation and to argue the motions to quash.

Of most concern is the potential disqualification from the client's case of the attorney subpoenaed to testify before the grand jury in a capacity adverse to his client's interests. There are, of course, several obvious reasons why B might have a strong interest in retaining A rather than another attorney. B already has a longstanding relationship with A and has probably relied on A's advice in making decisions that are now the basis of a criminal investigation. Their lengthy association implies a relationship of trust between them and B's belief in A's competence. Nevertheless, in spite of B's strong desire to maintain an attorney-client relationship with his attorney, A might have to disqualify herself from representing B in the criminal prosecution that may result from the grand jury investigation.

The Model Code of Professional Responsibility prohibits A from representing B if A may be called as a witness against B. The attorney's relationship with B may even interfere with her ability to represent him effectively.

69. See e.g., United States v. Klubock, 832 F.2d 649 (1st Cir. 1987) indicating the court's belief that the attorney may not be as effective when he or she has a "difficult 'second front' to deal with." Id. at 653.

70. As the client, B largely controls the decision whether A should engage in litigation to quash the subpoena.

71. When defense attorney Nancy Gertner and four colleagues received subpoenas to testify before the grand jury about clients facing state and federal drug charges, they hired counsel to litigate the motions to quash those subpoenas: "I, along with Mr. Cullen and Mr. Wall had to retain counsel and carve time out of the preparation of our clients' cases to defend ourselves. We retained Professor Charles Ness of the Harvard Law School to seek to quash the subpoenas." Appendices to Memorandum of Defendant-Intervenors in Opposition to Plaintiff's Motion for Preliminary Injunction No. 7 at 3, United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), aff'd, 832 F.2d 649 (1st Cir.), aff'd en banc, 832 F.2d 664 (1st Cir. 1987).

In turn, Attorney Gertner performed the same service for a colleague. See In re Grand Jury Subpoena (John Doe, Attorney), No. 86-665, slip op. (D. Mass. Sept. 9, 1986) (available on Lexis, GenFed Library). Attorney Doe, in-house counsel to a corporation, hired Attorney Gertner to litigate the motion to quash the subpoena he had received requesting information about his employer. Gertner, On Trial! A Disciplinary Rule that Limits Attorney Subpoenas, 1 CRIM. JUST. 2 (Fall, 1986) at 43.

72. See, e.g., United States v. Diozzi, 807 F.2d 10, 11-12 (1st Cir. 1986) (defendants under investigation for income tax evasion desired to be represented at trial by counsel who had represented them before the Internal Revenue Service when the I.R.S. first began its investigation).

73. The A.B.A. Model Code of Professional Responsibility states:
ney who provides evidence prejudicial to a client before a grand jury cannot be sure whether she will be called as a trial witness. However, an attorney should withdraw at the mere possibility of such an outcome. Furthermore, an attorney should withdraw as soon as a possible conflict of interest is apparent, so that his or her successor has as much time as possible to prepare an effective defense. Finally, even if an attorney does not withdraw voluntarily, the government may move to have the attorney disqualified.

The possibility of disqualification raises very serious concerns: First, potential criminal defendants may be routinely disadvantaged if grand jury subpoenas result in the disqualification of effective criminal defense attorneys. A New Hampshire district court has even noted that the prospect of confrontations with prosecutors might discourage attorneys from the choice of a career in criminal defense. Most im-

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If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.


74. "In a close case, an attorney must respect his client’s interests and resolve his doubts in favor of withdrawing as an advocate.” In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 261 (2d Cir.), cert. denied, 475 U.S. 1108 (1986) (Cardamone, J., dissenting) (citation omitted).

75. “[E]arly withdrawal affords defendant an opportunity to secure new counsel early enough to be meaningful.” Id. at 262.

76. See generally, United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (trial court granted government’s pretrial motion to disqualify defendants’ counsel on basis that counsel would be providing evidence against clients; reversed on appeal).

Professor John F. Sutton has criticized the courts’ practice of permitting advocates to use provisions of the Code of Professional Responsibility to disqualify opposing counsel: Many courts have used disciplinary rules as though they were procedural rules. This misuse, or unintended use, has occurred in situations in which the disciplinary rules are ill-suited for use as procedural rules. Thus, the courts have permitted advocates to use DR 5-101(B) and DR 5-102 to disqualify the opposing party’s counsel. That result was never intended; on the contrary, those disciplinary rules were intended to protect a client from overreaching by his own lawyer who might be willing to lessen his value to his client in order to obtain or continue employment in litigation.


77. Professor Genego’s survey of criminal defense attorneys also requested information on motions by prosecutors to disqualify defense attorneys. Of those defense attorneys returning the surveys, 26% reported they had been targets of motions to disqualify them from representing a client. Genego, supra note 3, at 4. The more experienced attorneys and those whose practice consisted predominantly of white collar criminal defense or defense related to drug charges had most frequently been the targets of motions by the government to disqualify them. Id. at 6, Tables 3 and 4.

78. “Also to be considered [as factors in the court’s decision to quash grand jury subpoenas directed to attorneys] is . . . the reluctance of capable attorneys to continue or to
portant, the adversary system may be undermined if the prosecutor, rather than a neutral umpire, has veto power over a potential defendant’s choice of counsel. 79

In addition, although no court has gone so far as to hold that the United States Constitution forbids the use of attorney subpoenas absent compelling need, several courts have noted that the deprivation of counsel of choice might implicate fifth amendment due process concerns and sixth amendment counsel of choice concerns. For example, three members of the First Circuit Court of Appeals reasoned that “due process is . . . implicated [when attorneys are subpoenaed to appear before the grand jury] because the attorney/prosecutor is potentially given control over who shall be his attorney/adversary.” 80 Judge Cardamone, in dissent in In re Grand Jury Subpoena Served Upon Doe, 81 argued that freely permitting prosecutors to subpoena attorneys infringed upon the guarantee of due process. It is, he stated, unfair to make a defendant pick between “the Scylla of relying on present counsel who has gone before the grand jury and the Chrybdis of finding new, untested counsel.” 82 Fairness and impartiality in the legal system are the essence of the fifth amendment guarantee of due process. 83

With respect to the sixth amendment right to counsel, the Second Circuit Court of Appeals initially held in In re Grand Jury Subpoena Served Upon Doe 84 that, although the sixth amendment right to counsel did not attach at the grand jury stage, 85 the target of a grand jury

consider a full or partial career in the practice of criminal law and the further depletion in the paucity of capable trial lawyers . . . .” In re Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H.), aff’d, 751 F.2d 13 (1st Cir. 1984).

79. Professor William Genego, discussing the problem of fair tactics in an adversary system, concluded that any practice which gives the prosecutor (rather than a neutral member of the judiciary) unilateral control over the “allocation of power” was not a legitimate adversarial tactic. Genego, Prosecutorial Control Over a Defendant’s Choice of Counsel, 27 SANTA CLARA L. REV. 17, 29-30 (1987).

80. United States v. Klubock, 832 F.2d 649, 654 (1st Cir.), aff’d en banc, 832 F.2d 664 (1st Cir. 1987).


82. Id. at 261.

83. Id.

84. 759 F.2d 968 (2d Cir. 1985), rev’d en banc, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986).

85. The United States Supreme Court has never directly addressed whether a grand jury “target” is entitled to counsel at the grand jury stage of criminal proceedings. However, the Court has said that the constitutional right to counsel, embodied in the sixth amendment, only attaches “at or after the time that adversary judicial proceedings have been initiated against [someone] . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Kirby v. Illinois, 406 U.S. 682, 688-89 (1972).
investigation had a right of "constitutional dimensions" to preserve the possibility of hiring the lawyer of his or her choice, in a case in which indictment later occurred.

In response to these defense concerns, prosecutors claim that the features of the present federal system—specifically the attorney-client privilege, the availability of motions to quash subpoenas under Federal Rule of Criminal Procedure 17(c), and the Department of Justice's internal guidelines governing attorney subpoenas—adequately protect the attorney-client relationship. To evaluate whether these protections are sufficient, this comment next examines each of them in the context of grand jury practice.

III. CURRENT FEDERAL PRACTICES PROTECTING THE ATTORNEY-CLIENT RELATIONSHIP

The attorney-client privilege both permits and requires the attorney to protect the confidentiality of information exchanged between attorney and client. The privilege recognizes the attorney's role as confidential advisor and champion in an adversarial system of justice. In the grand jury context, the attorney-client privilege is among those "common law privileges" referred to in Branzburg v. Hayes which shield information from the subpoena power of the grand jury. Federal Rule of Criminal Procedure 17(c) has both procedural and substantive components. Procedurally, the rule provides the only means other than simple defiance of evading the obligation to testify created by a grand jury subpoena. Substantively, the rule authorizes the court to quash grand jury subpoenas that are "unreasonable or oppressive." The Department of Justice, source of the attorney subpoenas issued in the course of grand jury investigations, has implemented internal guidelines limiting the use of this "investigative tool." The extent of protection the attorney-client relationship derives from these sources is examined below.

86. In In re Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, withdrawn on other grounds, 697 F.2d 112 (4th Cir. 1982), the Fourth Circuit Court of Appeals used similarly equivocal language, holding that "this subpoena [to Harvey's attorney] implicates Harvey's constitutional right to counsel of his choice." Id. at 1009 (emphasis added).
88. In re Grand Jury Subpoena Served Upon Doe, 759 F.2d at 975.
89. 408 U.S. 665, 688 (1972).
90. See infra note 144 for the text of Federal Rule of Criminal Procedure 17(c).
A. The Attorney-Client Privilege and the Work Product Doctrine

United States District Court Judge Charles Wyzanski’s often cited definition of the attorney-client privilege,91 articulated in United States v. United Shoe Machinery Corp.,92 sets out these elements:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding . . . and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.93

The privilege belongs to the client in the case, not to the attorney;94 however, the attorney has an obligation to assert the privilege on behalf of his or her client.95 The privilege protects against the disclosure of confidential communications96 made by the client to the attorney. Communications from the attorney to the client are considered privileged if their disclosure would reveal the nature of a confidential com-

91. The other similar and frequently cited definition of the attorney-client privilege was enunciated by Professor Wigmore:

[The party may assert the privilege] (1) [w]here legal advice of any kind is sought (2) from a professional legal advisor 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.

J. WIGMORE, supra note 38, at § 2292.


93. Id. at 358-59.

94. "The privilege thus is one that exists for the benefit of the client and not the attorney." Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956) (citing Chirac v. Reinicker, 11 Wheat. 280, 294 (1826)).

95. "[T]he attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertions of the privilege . . . as a matter of professional responsibility in preventing the policy of the law from being violated." Id.

96. The United States Supreme Court has drawn a distinction between a confidential communication and the actual information communicated:

The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact . . . merely because he incorporated a statement of such fact into his communication to his attorney.

munication from the client to the attorney. The privilege attaches only when an attorney is consulted in his or her capacity as an attorney, and not when an attorney provides non-legal services such as business advice.

In *Fisher v. United States*, the Supreme Court explained that the privilege exists to encourage clients to disclose completely their circumstances to counsel so they will obtain “fully informed legal advice.” The Court went on to note the tension between the privilege and the ideal of providing the factfinder with all relevant evidence, and to state that the privilege applies only “where necessary to achieve its purpose.” Accordingly, “[t]he relationship itself does not create '[a] cloak of protection [which is] draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client.'”

The justification for the attorney-client privilege advanced in *Fisher* has been called the “instrumental justification,” meaning that no more protection should be provided to the attorney-client relationship than is absolutely necessary to encourage individuals to confide in counsel.

The privilege operates to protect an attorney from testifying against a client at trial. It also operates in the grand jury context, excusing an attorney from giving a grand jury information concerning confidential communications—spoken or written—between client and attorney. However, the party asserting the privilege has the burden of proving that the privilege applies, and most federal courts require the party claiming the privilege to appear before the grand jury and assert the privilege with respect to each item of evidence in contention. Thus, even with respect to protected information, the privi-

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97. “Despite occasional suggestions that the lawyer’s words are not protected, it seems that they are and should be protected—certainly whenever their disclosure would tend either directly or indirectly to reveal the client’s confidences, and arguably elsewhere as well.” D. LOUISELL & C. MUELLER, supra note 8, at 738-39.

98. Id.


100. Id. at 403.

101. Id.


105. “[T]here is no privilege to refuse to appear before the grand jury.” Id.

106. “[The attorney] must take the stand [before the grand jury] without previous
lege generally does not excuse an attorney from appearing before a grand jury,\(^\text{107}\) despite claims by the criminal defense bar that the mere fact of such an appearance can jeopardize an attorney-client relationship.\(^\text{108}\)

An attorney may move to quash a grand jury subpoena under Federal Rule of Criminal Procedure 17(c)\(^\text{109}\) in advance of appearing before the grand jury. However, the courts rarely grant such motions, reasoning that it is usually impossible to know in advance of a grand jury appearance whether the questions that will be asked of an attorney will seek information protected by the attorney-client privilege.\(^\text{110}\)

The "work product doctrine," endorsed by the Supreme Court in restrictions. . . . He may, of course, initially refuse to answer questions he believes to be protected by the attorney-client privilege. But a general . . . assertion of the privilege is not enough. . . . [He] must establish the elements of the privilege as to each record sought and each question asked . . . ." Id. (citing Hoffman v. United States, 341 U.S. 479 (1951)) (footnote omitted).

107. Generally, the procedure for asserting the attorney-client privilege before the grand jury is as follows. When, for example, an attorney appears before a grand jury and refuses to provide certain information on the basis that it is protected by the attorney-client privilege, the prosecutor assisting the grand jury may challenge the claim of privilege. In that case, "the party asserting the privilege submits the disputed document to the Court for an in camera inspection along with an explanation as to how each particular document falls within the privilege." In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958, 963 (D. Mass. 1985).

The federal circuits disagree on whether to allow an immediate appeal from a district court ruling against a claim of attorney-client privilege. There is a general rule that a party may not appeal a district court's denial of a motion to quash a subpoena without first resisting the subpoena and being found in contempt. Cobbleck v. United States, 309 U.S. 323 (1940). However, in cases in which the subpoena is directed to a third party (in this case the attorney), some courts have permitted an immediate appeal. The rationale is that the third party, whose interests are not at stake, might turn the documents over rather than risking the consequences of civil contempt. See, e.g. In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, withdrawn on other grounds, 697 F.2d 112 (4th Cir. 1982). But see In re Oberkoetter, 612 F.2d 15 (1st Cir.) (requiring that subpoena recipient be held in contempt of court before permitting appeal of adverse ruling of privilege), app. for stay denied, 444 U.S. 1041 (1980).

108. See supra notes 62-65 and accompanying text.

109. See infra note 144 for the text of Federal Rule of Criminal Procedure 17(c).

110. "[O]ne cannot know precisely what will happen before the Grand Jury when the lawyer appears. Movant may be correct . . . that particular questions will be placed which will offend [the attorney-client] privilege or status. That, we cannot know until the question is voiced." In re Grand Jury Subpoena (John Doe, Attorney), No. 86-665, slip op. at 2-3 (D. Mass. Sept. 9, 1986) (available on Lexis, Genfed Library).

But see In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass 1985). There the court, although acknowledging that " 'blanket assertions of privilege . . . are extremely disfavored,' " quashed grand jury subpoenas served on attorneys without requiring an appearance before the grand jury or an in camera inspection because the material requested in the subpoenas was clearly protected by the attorney-client privilege and the work product doctrine. Id. at 964 (quoting In re Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982)).
Hickman v. Taylor\textsuperscript{111} and applied by the Court to criminal cases in United States v. Nobles,\textsuperscript{112} provides some additional protection to aspects of the attorney-client relationship. The work product doctrine and its concomitant privilege not to disclose relevant information protects an attorney's written statements, private memoranda, personal recollections and impressions generated in the course of preparing legal advice or a defense for a client.\textsuperscript{113}

The privilege not to testify (at trial or before a grand jury\textsuperscript{114}) based on the work product doctrine may be claimed by either the attorney or the attorney's client.\textsuperscript{115} As is the case with respect to the attorney-client privilege, a party generally may not assert the work product privilege in advance of an appearance before the grand jury.

As noted, the attorney-client privilege does not protect all aspects of an attorney-client relationship. Federal courts have generally held that certain basic information, including amounts and origins of fee payments, and client identity, is unprotected.\textsuperscript{116} Courts typically explain this exemption on the grounds that information about fees (or client identity) does not have the character of a confidential communication a client makes to a lawyer to obtain informed legal advice.\textsuperscript{117}

On rare occasions, courts have recognized at least one exception to the general rule that "basic facts" do not fall within the parameters of the attorney-client privilege. Courts have held that the identity of a client or information about fee arrangements was protected when revealing that identity would necessarily reveal the content of confidential communications from the client to the attorney.\textsuperscript{118} In Baird v.

\begin{itemize}
  \item \textsuperscript{111} 329 U.S. 495 (1947).
  \item \textsuperscript{112} 422 U.S. 225 (1975).
  \item \textsuperscript{114} See, e.g., In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798 (3d Cir. 1979).
  \item \textsuperscript{115} "To the extent a client's interest may be affected, he, too, may assert the work product privilege." Id. at 801 (footnote omitted).
  \item \textsuperscript{116} "A wide range of basic facts, including the identity of the client, the fact that he has retained or consulted a lawyer, the fee arrangement, and the general nature and duration of services rendered by the lawyer, are generally not within the privilege." D. Louisell & C. Mueller, supra note 8, at 771.
  \item \textsuperscript{117} "Disclosure of the identity of the client and fee information stand on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice." In re Shargel, 742 F.2d 61, 63 (2d Cir. 1984).
  \item \textsuperscript{118} See, e.g., United States v. Liebman, 742 F.2d 807, 808-09 (3d Cir. 1984); In re Grand Jury Witness (Waxman), 695 F.2d 359, 361-62 (9th Cir. 1982); In re Grand Jury Proceedings (Lawson), 600 F.2d 215, 217-19 (9th Cir. 1979). But see In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983).
\end{itemize}
Koerner, the court held privileged the identity of a client who had retained an attorney to make an anonymous tax payment to the I.R.S. The court reasoned that revealing the client's identity would have revealed the personal financial circumstances he had communicated to his attorney, information that would normally be privileged. Therefore, the client's identity was privileged.

Subsequently, certain federal courts defined an "incrimination rationale" as the basis for the holding in Baird. These courts held client identity and fee information privileged "where revealing that information probably would incriminate a client on the same charges for which the client sought legal assistance." This approach has been criticized and is a minority rule. Generally, the attorney who is asked, "Who paid you and how much?" must provide that information, even if it incriminates a client and results in the attorney's disqualification from the case.

In addition to "gaps" in the attorney-client privilege, in some circumstances an attorney may be required to reveal information that would ordinarily be protected. Confidential communications ordinarily shielded from disclosure by the attorney-client privilege lose their protection when "the lawyer is consulted, not with respect to past wrongdoing but to future illegal activities." According to Louisell and Mueller, "[t]he [crime-fraud] exception [to the attorney-client privilege] comes into play when the client knowingly seeks to advance a criminal or fraudulent endeavor through consultation with counsel." The attorney-client privilege belongs to the client, so the client's intention is the determinative factor: the attorney-client privilege is forfeited even if the attorney has not knowingly participated in an on-going criminal or fraudulent enterprise. In In re Grand Jury Proceedings (FMC), the court held that the crime-fraud exception applies to documents otherwise protected by the work product doctrine as well as those otherwise protected by the attorney-client

119. 279 F.2d 623 (9th Cir. 1960).
120. In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982); In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975).
121. In re Grand Jury Witness (Salas), 695 F.2d at 361 (citing In re Grand Jury Proceedings (Lawson), 600 F.2d 215, 218 (9th Cir. 1979)).
123. See supra notes 72-79 and accompanying text for a discussion of the results of providing incriminating evidence against a client.
125. D. LOUISELL & C. MUELLER, supra note 8, at 822.
127. 604 F.2d 798 (3d Cir. 1979).
privilege.128

The crime-fraud exception comes into play only after the attorney-client privilege has been successfully invoked by the party seeking to avoid disclosure. The government then has the burden of presenting prima facie evidence of on-going criminal activity.129 “[O]nce the privilege is overcome, the attorney must testify about all confidential communications.”130

Professor David Fried and other commentators have argued that the courts’ decisions not to protect client identity and fee information and their expansive treatment of the crime-fraud exception have substantially eroded the protection the attorney-client relationship provides.131 For example, Professor Fried argues that federal courts have expanded the crime-fraud exception by minimizing the government’s burden in making its prima facie showing, and by allowing use of the contested evidence itself to provide proof of an on-going crime or fraud.132 Equally important, Professor Fried points to the host of new federal statutes that criminalize formerly noncriminal behavior. According to Fried, the modern trend has been to consider prima facie evidence of violations of these statutes a sufficient basis for invoking the crime-fraud exception. As an example, Professor Fried cites the RICO statutes, which criminalize the investment of racketeering enterprise profits in legitimate businesses. In this situation, according to Fried, an attorney’s legal advice might not be protected, even though the attorney was not aware of the source of the funds and the client was not aware that his or her actions violated a criminal statute.133 Thus, in Fried’s view, the attorney called to appear before a grand jury to provide evidence against his or her client may now have a dimin-

128. See generally, In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798 (3d Cir. 1979). In FMC, the corporate client claimed the protection of the work product doctrine for documents prepared by its attorney. The court held that the crime-fraud exception applied in these circumstances. However, the court also noted without deciding that the result might be different if an attorney who unknowingly participated in a client’s on-going criminal conduct, claimed the doctrine’s protection. Id. at 802 n.5.

129. “If . . . the crime was a continuing one, or one that occurred after the firm was consulted, then the prima facie showing made by the government would suffice to allow inspection by the grand jury.” Id. at 803.

130. Fried, supra note 63, at 474.

131. See, e.g., Fried, supra note 63; Stern & Hoffman, supra note 3, at 1796-1804; Silbert, The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, the Lawyer’s Obligations of Disclosure, and the Lawyer’s Response to Accusation of Wrongful Conduct, 23 AM. CRIM. L. REV. 351 (1986).

132. Fried, supra note 63, at 469.

133. Id. at 471-72.
lished ability to raise the most significant traditional defense shielding their private communications.

As Fried notes, the narrow view the federal courts have taken of the attorney-client privilege flows logically from the instrumental justification for the privilege. He advances an alternative justification for the privilege which he calls the "intrinsic value" justification. He argues that the attorney-client privilege protects the relationship of trust between a client and his or her attorney and that an attorney is morally obligated to protect the client's confidences. "There is little moral difference between convicting a client by testimony compelled from his or her own mouth and convicting a client by testimony compelled from his or her attorney's mouth. This view . . . is probably the view held by most working attorneys." While Fried ties the "intrinsic value" justification for the privilege primarily to moral values and to the constitutional privilege against self-incrimination, other commentators have advanced instrumental justifications for a more generous approach to the attorney-client privilege on the basis of the lawyer's role in an adversarial criminal justice system.

These commentators urge that for lawyers to represent their clients effectively, full and frank communication between lawyer and client is necessary. The increasing complexity of federal statutory law and the tendency to criminalize behavior which would formerly have merited only civil penalties makes the advice of counsel a necessity rather than a luxury.

It is also argued that protecting the attorney-client relationship will advance the truth-finding process performed by courts. In an ad-

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134. See supra notes 100-103 and accompanying text.
135. Fried, supra note 63, at 490-92.
137. Fried, supra note 63, at 492.
138. See Fried, supra note 63, at 490-92.
139. See, e.g., M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975); D. LOUISELL & C. MUELLER, supra note 8, at 730-34; Sterk, supra note 135; Stern & Hoffman, supra note 3, at 1826-27.
140. See, e.g., D. LOUISELL & C. MUELLER, supra note 8, at 731.
141. Fried, supra note 63, at 475; Stern & Hoffman, supra note 3, at 1826. The RICO statute is the best known example of a statute which sweeps a wide variety of formerly noncriminal behavior into its net. The unpredictable nature of RICO liability suggests why it may be impossible for an attorney to confidently advise a client ahead of time which information imparted by the client can or cannot be kept confidential.
versary proceeding, a defense attorney must vigorously advance his or her client's position, and the ability to do so will often depend on access to all the facts.142

Finally, the unregulated use of attorney subpoenas carries with it the risk that their use will not be restricted to situations in which essential information can only be obtained from an attorney. Attorney subpoenas may be used in litigation in part because there is a chance that opposing counsel will be rendered less effective or even disqualified.143 Undermining the effectiveness of a criminal defendant's defense by attacking the opposing attorney does not seem an appropriate tactic in a process which has as its goal the discovery of truth.

The debate between the defense bar and the government concerning attorney subpoenas is in part a second debate about the scope of and justification for the attorney-client privilege. The "intrinsic value" approach to the privilege, which elevates the obligation to protect one's client over the obligation as an officer of the court to reveal potentially incriminating information, is probably a fair description of the position most members of the defense bar take in response to the government's increased use of attorney subpoenas.

B. Federal Rule of Criminal Procedure 17(c)

Federal Rule of Criminal Procedure 17(c)144 provides a procedure for challenging subpoenas requiring the recipient to provide evidence at trial or before a grand jury.145 By its terms, the rule applies

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142. Stern & Hoffman, supra note 3, at 1826-27.
143. "The 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." American Bar Association Criminal Justice Section, Report to the House of Delegates 13 (Feb. 1988) [hereinafter 1988 A.B.A. Report].
144. Federal Rule of Criminal Procedure 17(c) reads:
   For Production of Documentary Evidence and of Objects. A subpoena ... may quash or modify the subpoena if compliance would be unreasonable or oppressive.
FED. R. CRIM. P. 17(c).
145. Alternatively, an attorney might simply ignore the subpoena, in which case the government must resort to contempt proceedings to enforce it. Under Federal Rule of Criminal Procedure 17(g) and 28 U.S.C. § 1826, federal district courts have the responsibility for enforcing grand jury subpoenas.
   Federal Rule of Criminal Procedure 17(g) reads in part:
   Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.
FED. R. CRIM. P. 17(g).
to subpoenas *duces tecum*; however, courts have on occasion adapted the rule and applied it to subpoenas *ad testificandum*.146 An attorney

Section 1826 reads in part:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information . . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement . . . until such time as the witness is willing to give such testimony or provide such information . . .

(b) Any appeal from an order of confinement . . . shall be disposed of as soon as practicable . . .


The court in *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973), *cert. denied*, 421 U.S. 1015 (1975), interpreted these provisions together, along with the relevant legislative history, to mean that Congress had codified existing civil contempt procedure and that a subpoena was not, for contempt purposes, self-executing. In other words, the statutes require an adversarial hearing at which the potential witness has the opportunity to present defenses against enforcement of the subpoena before the witness is found in civil contempt of court. *Id.* at 88.

A witness's defenses to the grand jury subpoena at a contempt proceeding are essentially the same as the substantive bases for motions to quash subpoenas under Federal Rule of Criminal Procedure 17(c). Thus, among the defenses available to a recalcitrant witness are that the subpoena is unduly broad or that it seeks irrelevant material. *Id.* at 91. Generally, in contempt proceedings, the defendant has the burden of proving why the subpoena at issue should not be enforced. *See generally, In re Grand Jury Proceedings (Hill)*, 786 F.2d 3 (1st Cir. 1986); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980).

However, in *Schofield*, the Third Circuit Court of Appeals established what has been termed "the *Schofield* rule": when the government seeks enforcement of a subpoena by the court, it must make a preliminary showing that "each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Schofield*, 486 F.2d at 93. The court shifted the burden to the government because, given the secrecy of grand jury proceedings, all relevant information regarding the purpose of the subpoena is in the government's hands. The court reasoned that a potential witness could almost never meet the burden of proving the irregularity of a subpoena. *Id.* at 92. The court based its decision on its supervisory power over grand juries, and on "the federal courts' supervisory power over civil proceedings brought in the district court pursuant to 28 U.S.C. § 1826(a)." *Id.* at 93.

No other circuit has adopted the *Schofield* rule, although the First Circuit considered it favorably in 1980. *See In re Pantojas*, 628 F.2d 701 (1st Cir. 1980). However, because the issues raised in a motion to quash a grand jury subpoena are similar to those raised when a potential witness defends him- or herself in a contempt proceeding against enforcement of a grand jury subpoena, several courts of appeals have considered or adopted the *Schofield* rule in the context of motions under Federal Rule of Criminal Procedure 17(c) to quash grand jury subpoenas. *See In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985), *rev'd en banc*, 781 F.2d 238 (2d Cir.), *cert. denied*, 475 U.S. 1108 (1986); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, *withdrawn on other grounds*, 697 F.2d 112 (4th Cir. 1982).

146. Although the rule explicitly refers to "production of documentary evidence and objects," courts have considered motions under Rule 17(c) challenging subpoenas requiring testimony. "Although commentators have indicated that the better practice is to require the witness to appear and claim any privilege or immunity he or she may have, courts have repeatedly, when the interests of justice have so warranted, heard and granted (and denied)
who receives a subpoena to testify before a grand jury about a client's confidential communications—whether committed to paper or not—can attempt a Rule 17(c) challenge to the subpoena, based on the attorney-client privilege, in advance of appearing before the grand jury. However, as previously indicated, courts typically require the party claiming the privilege to appear before the grand jury.147

Rule 17(c) authorizes a court to quash a subpoena that is "unreasonable or oppressive." In theory, at least, the rule appears to offer an attorney faced with a grand jury subpoena some substantive protection from testifying in addition to the protection provided by the attorney-client privilege. In practice, however, the federal courts' interpretation of "unreasonable or oppressive" results in very little protection.

As the moving party, an attorney has the burden of proving the subpoena unreasonable or oppressive,148 and the burden is extremely difficult to meet.149 Orfield's Criminal Procedure Under the Federal Rules150 describes as follows the limitations on grand jury subpoenas: "[A grand jury subpoena] must not be too broad ... the documents sought must have some materiality to the investigation, it must be limited to a reasonable time ... A subpoena may not be used to secure privileged documents. ..."151

Grand jury subpoenas have been quashed as "too broad" only when an extremely large volume of material was subpoenaed152 and a subpoena covering any period of time up to ten years has generally motions to quash subpoenas to compel testimony." United States v. Klubock, 639 F. Supp. 117, 123 (D. Mass. 1986) (citing Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); Matter of Archuleta, 432 F. Supp. 583 (S.D.N.Y. 1977); United States v. Pack, 150 F. Supp. 262 (D. Del. 1957); In re National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922)).

147. See supra notes 109-10 and accompanying text.

148. See, e.g., In re Grand Jury Proceedings: Subpoenas Duces Tecum, 827 F.2d 301 (8th Cir. 1987). "The grand jury's proceedings are entitled to a presumption of regularity, and one challenging a grand jury subpoena has the burden of showing irregularity." Id. at 304 (citation omitted).

149. "[T]he overwhelming majority of witnesses comply [with grand jury subpoenas] without much trouble, for in reality they have few legal defenses." M. FRANKEL & G. NAFTALIS, supra note 21, at 20.

150. 2 ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES (M. Rhodes 2d ed. 1985).

151. Id. at 754-55.

152. See In re Grand Jury Proceedings: Subpoenas Duces Tecum, 827 F.2d 301 (8th Cir. 1987) (court refused to quash subpoena on the basis of overbreadth that asked for records of all money orders totalling more than $1,000 sent from a particular Western Union office between January, 1984 and February, 1986). The court suggested that a challenge for overbreadth on the basis of the fourth amendment would succeed only if it threatened the operations of the subpoenaed business. Id. at 304.
been considered reasonable.\textsuperscript{153} It is apparent that these two limitations on grand jury subpoenas are rarely pertinent when an attorney receives a grand jury subpoena. Attorneys' objections to these subpoenas are not based on the volume of material sought by the government, but on their destructive effect on the attorney-client relationship.\textsuperscript{154}

Similarly, the lower federal courts have not applied a stringent standard of relevancy and materiality to grand jury subpoenas. "Relevance and materiality necessarily are terms of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial. . . . [The grand jury] obviously has a right . . . to a fair margin of reach . . . . Some exploration or fishing necessarily is inherent and entitled to exist in all . . . productions sought by a grand jury."\textsuperscript{155} In \textit{United States v. Dionisio},\textsuperscript{156} the Supreme Court reasoned that it may be impossible to know in advance whether particular evidence is relevant to a grand jury investigation in progress, and that the grand jury must be left free to pursue all leads.\textsuperscript{157}

Although some federal courts were initially responsive, appeals made during the 1980's by attorneys seeking to expand the protection offered by Rule 17(c) were generally unsuccessful. In \textit{In re Special Grand Jury No. 81-1 (Harvey)},\textsuperscript{158} the Fourth Circuit Court of Appeals held that when an attorney is subpoenaed to provide information about his client, "attorney-client privilege considerations and sixth amendment interests arise automatically and a preliminary showing [of need and relevance] must be made by the government before the attorney can be forced to appear before the grand jury."\textsuperscript{159} In effect, the court created a standard that limited the investigatory powers of the grand jury and placed the burden of proof for justifying use of an attorney subpoena on the government.\textsuperscript{160} The basis for the court's power to impose this requirement on the government was the court's

\textsuperscript{153} In Schwimmer v. United States, 232 F.2d 855 (8th Cir.), \textit{cert. denied}, 352 U.S. 833 (1956), the court quashed a subpoena calling for all an attorney's files, records and correspondence during a ten-year period. However, in Matter of Berry, 521 F.2d 179 (10th Cir.), \textit{cert. denied}, 423 U.S. 928 (1975), the court upheld a subpoena covering all a law firm's financial records during a 5-year period.

\textsuperscript{154} \textit{See supra} notes 61-88 and accompanying text.

\textsuperscript{155} Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir. 1956).

\textsuperscript{156} 410 U.S. 1 (1972).

\textsuperscript{157} \textit{Dionisio}, 410 U.S. at 15-16. Quoting Blair v. United States, 250 U.S. 273, 282 (1919), the Court reiterated that "[n]o grand jury witness is ‘entitled to set limits to the investigation that the grand jury may conduct.’" \textit{Id.} at 15.

\textsuperscript{158} 676 F.2d 1005, \textit{withdrawn on other grounds}, 697 F.2d 112 (4th Cir. 1982).

\textsuperscript{159} \textit{Id.} at 1010.

\textsuperscript{160} \textit{Id.} (quoting \textit{In re Grand Jury Proceedings (Schofield)}, 486 F.2d 85 (3d Cir. 1973), \textit{cert. denied}, 421 U.S. 1015 (1975)).
"exercise of [its] supervisory power over federal grand jury proceedings in this circuit." The Second Circuit Court of Appeals initially followed Harvey in In re Grand Jury Subpoena Served Upon Doe. Subsequently, however, the Second Circuit Court of Appeals, sitting en banc, reversed the panel decision. Because the Harvey decision was withdrawn, the opinion is not controlling in the Fourth Circuit. Other circuits have considered the issue and declined to follow Harvey.

Defense attorneys faced with grand jury subpoenas made one gain: in the substantive protection provided by Rule 17(c). In In re Grand Jury Matters, the district court quashed federal grand jury subpoenas issued to five criminal defense attorneys whose clients were under grand jury investigation for drug and tax offenses. The First Circuit Court of Appeals affirmed the district court on the basis that the timing of the subpoenas interfered unreasonably with the attorneys' ability to prepare their clients' defense before the state court. In doing so, the court affirmed that the district court's power under 17(c) to quash "unreasonable and oppressive" subpoenas was not limited to considerations of breadth, relevance, and privilege. Courts in other circuits appear prepared to follow In re Grand Jury Matters, although with considerable caution.

161. Id. at 1012.

162. 759 F.2d 968 (2d Cir. 1985). The holding may have been somewhat narrower than the holding in Harvey, in that the burden apparently would have been shifted only if the subpoenaed attorney would be disqualified from representing his or her client if he or she testified before the grand jury. Id. at 975.


164. The panel decision was withdrawn when Leon Harvey became a fugitive. See In re Special Grand Jury 81-1 (Harvey), 697 F.2d 112 (4th Cir. 1982). In In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986), the court noted that prior to withdrawal of the Harvey opinion, the Fourth Circuit Court of Appeals had ordered a rehearing en banc of the case. In an unpublished opinion by Judge Murnaghan, United States v. Morchower, No. 83-1816 (4th Cir. Sept. 28, 1983), he declined to follow Harvey, stating that in his opinion, the Fourth Circuit grant of a rehearing en banc meant that the Harvey opinion would have been reversed. See In re Grand Jury Subpoena Served Upon Doe, 781 F.2d at 247 n.4.

165. See supra note 10 for circuits declining to follow Harvey.

166. 593 F. Supp. 103 (D.N.H.), aff'd, 751 F.2d 13 (1st Cir. 1984).


168. In re Grand Jury Matters, 751 F.2d at 17.

169. Id. at 18-19.

170. See United States v. Perry, 857 F.2d 1346, 1349-50 (9th Cir. 1988) (court refused to adopt per se rule that post-indictment grand jury subpoena was "unreasonable or oppressive"); In re Grand Jury Investigation, John Doe 1078, 690 F. Supp. 489, 493 n.9 (E.D. Va. 1988) (In re Grand Jury Matters cited as authority for the proposition that courts must inquire whether compliance with a subpoena is too burdensome); In re Grand Jury...
In sum, during the last decade, the courts have generally rejected defense attorneys' attempts to establish broad protection for their relationships with their clients. Heeding Professor Wigmore, the courts have retained a traditional, narrow interpretation of the attorney-client privilege. Following the Supreme Court, the lower federal courts have been reluctant to use their supervisory power over the grand jury to expand the legal defenses available to a subpoena recipient under Federal Rule of Criminal Procedure 17(c). Yet despite the refusal to adopt broad reform by judicial fiat, there is in the legal community a general consensus that, "except in narrowly defined circumstances, it is improper for a prosecutor to subpoena a lawyer in order to investigate the lawyer's client."171

C. The Department of Justice’s Internal Attorney Subpoena Guidelines

The Justice Department itself stated, in its 1985 guidelines on subpoenas to attorneys, that attorney subpoenas should be used sparingly.172 The Department of Justice guidelines restrict the use of attorney subpoenas if such information is available from another source.173 The guidelines appear to limit the use of subpoenas for

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Subpoena Misc. No. 86-027, 626 F. Supp. 1319, 1332 (M.D. Pa. 1986) (citing In re Grand Jury Matters for proposition that court has the power to quash, subpoenas that are unreasonable or oppressive); In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Robert M. Simels, Esq.), 605 F. Supp. 839, 848 (S.D.N.Y. 1985) (court held that the subpoena being contested would not interfere unduly with attorney's preparation of his client's case).

171. United States v. Klubock, 832 F.2d 664, 672 (1st Cir. 1987) (Breyer, J. dissenting).

172. The United States Attorneys' Manual contains extensive guidelines concerning the issuance of such subpoenas. For instance, before issuing a subpoena for an attorney to appear before a grand jury, a federal prosecutor must determine, inter alia, that the 'information sought is reasonably needed for the successful completion of the investigation or prosecution' (§ 9-2.161(a)(F)(1)); that 'all reasonable attempts' were made 'to obtain the information from alternative sources' (§ 9-2.161(a)(B)); that the 'need for the information . . . outweigh[s] the potential adverse effects upon the attorney-client relationship,' including the 'risk that the attorney will be disqualified' (§ 9-2.161(a)(F)(4)); and that '[t]he information sought [is] not protected by a valid claim of privilege' (§ 9-2.161(a)(F)(6)). Before issuing a subpoena to an attorney, a federal prosecutor must also first obtain approval from the Assistant Attorney General in charge of the Justice Department's Criminal Division.

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173. However, the provision is qualified: there is no obligation to use the alternate source if the effort to do so would inhibit the investigation or compromise later attempts to obtain the information from the attorney. D.O.J. GUIDELINES, supra note 11, at § 9-2.161(a).
“fishing expeditions,”174 and they flatly prohibit subpoenas directed at information “protected by a valid claim of privilege.”175 Finally, in a provision that raises ethical concerns for both parties to the transaction, the guidelines require a prosecutor to make “[a]ll reasonable attempts . . . to voluntarily obtain information from an attorney before issuing a subpoena to an attorney for information relating to the representation of a client.”176

In an article published before the guidelines were issued,177 one commentator argued that the best (or at least the most feasible) solution to the attorney subpoena problem was the adoption of voluntary guidelines modelled on those the Department of Justice promulgated in 1970 to govern subpoenas issued to journalists.178 However, other commentators have criticized as ineffective an approach that relies on prosecutors to police themselves.179 The principle criticism directed at the attorney subpoena guidelines is their unenforceability: “These guidelines . . . do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party.”180 The decision whether to issue an attorney subpoena remains with the government and no “neutral” party has the power to review that decision.181 Stern and Hoffman, authors of a 1988 article on attorney subpoenas,182 noted several additional problems with the Justice Department guidelines: (1) the guidelines contain no disclosure provision so that it is impossible to know whether they are being complied with; (2) the guidelines distinguish between privileged and nonprivileged in-

174. “[T]here must be reasonable grounds to believe a crime has been or is being committed . . . . Subpoenas shall be narrowly drawn and directed at material information and shall cover a reasonable period of time.” Id. at §§ 9-2.161(a)(F)(1); 9-2.161(a)(F)(5).
175. Id. at § 9-2.161(a)(F)(6).
176. Id. at § 9-2.161(a)(C). The anticipation of a grand jury subpoena clearly places an attorney in an ethical dilemma similar to the one caused by receipt of a subpoena. If the attorney voluntarily furnishes information antithetical to a client’s interests, he or she may have to withdraw from representation. See supra notes 73-76 and accompanying text. When a defense attorney is asked to voluntarily provide information that may be damaging to a client, the attorney’s interests are placed in conflict with those of the client’s. An attorney’s interests would be best served by furnishing information and avoiding a grand jury subpoena; the client’s would be best served by the attorney’s resistance.
177. Weiner, supra note 3.
178. Id. at 125. The journalist subpoena guidelines are codified at 28 C.F.R. § 50.10 (1984).
179. See Stern & Hoffman, supra note 3, at 1819; Comment, An Ethical/Legal Tug of War, supra note 3, at 376.
181. See supra note 79 for a summary of Professor Genego’s discussion of the effect on the adversary system of giving the government unilateral control over the identity of its opponent.
182. Stern & Hoffman, supra note 3.
formation, permitting prosecutors to take advantage of the Department of Justices's restrictive view of the attorney-client privilege; and (3) the guidelines give prosecutors too much flexibility in determining whether it is feasible to seek the information from a source other than an attorney. 183 The Department of Justice's own statistics indicate that even after implementation of the guidelines, a substantial number of attorney subpoenas continue to be issued. 184

D. An Alternative Approach: An Ethical Rule Governing Prosecutorial Conduct

In 1985, the Massachusetts Supreme Judicial Court, at the urging of the Massachusetts Bar Association, adopted Rule 3:08, Prosecution Function 15 (PF 15) into its rules concerning the ethics and practice of law. The rule reads:

It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness. 185

Even before the rule took effect, federal prosecutors filed suit in Massachusetts District Court "seeking both a declaratory judgment that the rule [wa]s invalid as applied to them and an injunction against its enforcement." 186 The challenge did not succeed. In United States v.

183. Id. at 1819-20.
184. In the 1988 Report accompanying a resolution on attorney subpoenas presented to the A.B.A.'s House of Delegates, the A.B.A. reported that "[u]nfortunately, despite [the A.B.A.'s 1986] resolution [on attorney subpoenas], the problem has grown substantially worse. In the 7 months preceding the existing resolution, according to Department of Justice statistics, approximately 170 federal grand jury subpoenas were issued to attorneys for information about a client . . . . In the 13 months immediately after the existing resolution was approved (March 1, 1986-March 31, 1987), approximately 525 federal grand jury and trial subpoenas were issued to attorneys for information about a client." 1988 A.B.A. Report, supra note 143, at 3.


The rule, which took effect in the Massachusetts court system on January 1, 1986, was the first of its kind passed by any state. Stern & Hoffman, supra note 3, at 1821-22 note that two states have since followed suit: in 1987, the Supreme Courts in Virginia and Tennessee adopted rules similar to PF 15. However, these rules have not been adopted by the federal district courts sitting in Virginia and Tennessee. Six other states and the District of Columbia have considered the adoption of a similar rule.

186. United States v. Klubock, 639 F. Supp. 117, 118 (D. Mass. 1986). In most cases, a court rule adopted by a state court would not affect the operation of the federal courts sitting in that state. However, in Massachusetts, as in many states, the federal district court has used its local rulemaking power to adopt for its own use the ethical rules of the Supreme Judicial Court. Arguably, when the Supreme Judicial Court adopted PF 15,
Klubock,\textsuperscript{187} the district court and subsequently the First Circuit Court of Appeals affirmed PF 15 as a valid local court rule.

1. The District Court Opinion\textsuperscript{188}

In its challenge to PF 15, the government contended that the rule was invalid\textsuperscript{189} because it conflicted directly with the provisions of Federal Rule of Criminal Procedure 17(a)\textsuperscript{190} governing the issuance of subpoenas. The government also contended that the rule frustrated a federal policy, which the government argued was embodied generally in Rule 17, of restricting judicial oversight of the grand jury’s subpoena power.

In rejecting these arguments, the court began by ascribing a supervisory power of considerable breadth over grand jury process and procedure to the federal district courts.\textsuperscript{191} The limit on this power, the court explained, was that it must not be exercised arbitrarily, nor could the district courts interfere with the grand jury’s subpoena

\textsuperscript{187}639 F. Supp. 117 (D. Mass. 1986), aff’d, 832 F.2d 649 (1st Cir.), aff’d en banc, 832 F.2d 664 (1st Cir. 1987).


\textsuperscript{189}Federal prosecutors argued that PF 15 was either invalid under Federal Rule of Criminal Procedure 57, or alternatively that it violated the supremacy clause of the United States Constitution. Federal Rule of Criminal Procedure 57 permits district courts to promulgate local court rules of procedure as long as those local rules are consistent with the federal rules of procedure. See infra note 216 for the text of Rule 57. The supremacy clause of the Constitution provides that federal law takes precedence over state law in the event of direct conflict between the two.

In either case, the argument remains essentially that PF 15 conflicts with existing federal law and is therefore invalid.

\textsuperscript{190}Federal Rule of Criminal Procedure 17(a) reads in part:

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.

\textsuperscript{191}The court quoted In re National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922): “A supervisory duty ... is imposed upon the court to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice.” Id. at 225. Also cited was Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976) in which the court stated that “the District Court’s supervisory power over the grand jury is not limited to granting relief from unreasonable and oppressive grand jury process. Rather, it extends ... to granting relief from any type of grand jury abuse.” Id. at 1115 (footnote omitted).
power by expanding the scope of existing testimonial privileges or by creating new ones.\textsuperscript{192} PF 15 did not expand the attorney-client privilege by creating new substantive grounds for quashing grand jury subpoenas. Therefore, the judicial review mandated by the rule was a justifiable exercise of a court's supervisory power over grand jury process as long as the rule did not conflict with federal rules of procedure or violate federal policy.

The court quickly disposed of the argument that PF 15 conflicted with Rule 17(a)'s provisions for issuance of grand jury subpoenas. Rule 17(a),\textsuperscript{193} the court pointed out, governs the issuance of subpoenas, while PF 15 governs their service. The rule permits a subpoena to be issued; it simply prohibits service of an attorney subpoena prior to judicial approval. Thus, the two rules "peacefully" co-exist.\textsuperscript{194}

More significant was the government's contention that the absence of provisions in the Federal Rules of Criminal Procedure mandating judicial supervision of grand jury subpoenas represented a policy choice on the part of the rulemakers and Congress. Relying on analogous provisions of the Federal Rules of Civil Procedure, the government argued there was a conscious policy choice to minimize, or at least to regulate, judicial involvement in the subpoena process.\textsuperscript{195} The government argued further that rulemakers intended Federal Rule of Criminal Procedure 17(c),\textsuperscript{196} governing motions to quash subpoenas, to be the sole means of quashing a grand jury subpoena.\textsuperscript{197}

In response, the court reasoned that Rule 17, which governs subpoenas at all stages of a criminal prosecution, is too general and minis-

\textsuperscript{192} Klubock, 639 F. Supp. at 120 (quoting In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984)).
\textsuperscript{193} See supra note 190.
\textsuperscript{194} Klubock, 639 F. Supp. at 122.
\textsuperscript{195} The government argued that the history of Civil Rule of Procedure 45, which governs the issuance of subpoenas in civil cases, revealed an intent by the drafters of Federal Rule of Criminal Procedure 17 to minimize judicial involvement in the subpoena process. Specifically, the government pointed to Civil Rule 45(d), which governs the issuance of subpoenas for taking depositions. The civil rule originally required court approval before the use of such a subpoena. The requirement was deliberately deleted from Rule 45(d) and does not appear in Federal Rule of Criminal Procedure 17. On the basis of this omission, the government argued that there existed a general policy to minimize or to regulate judicial involvement in the subpoena process. Klubock, 639 F. Supp. at 122.

In response, the court pointed out that taking into account all the provisions of Rule 17, courts exercise greater control of depositions in criminal cases than in civil cases. Because judicial approval was required for issuance of all depositions in criminal cases, it was unnecessary to have an additional requirement for judicial approval of deposition subpoenas requesting documents. \textit{Id.} at 123.

\textsuperscript{196} See supra note 144 for the text of Federal Rule of Criminal Procedure 17(c).
\textsuperscript{197} Klubock, 639 F. Supp. at 123.
terial in nature to define the entire extent of a district court's supervisory power over grand jury subpoenas. As proof that Rule 17(c) is subject to adaptation by the courts, the court noted that although the rule by its terms applies only to subpoenas ducès tecum, courts have "repeatedly, when the interests of justice have so warranted, heard and granted (and denied) motions to quash subpoenas to compel testimony."198

In conclusion, the court considered whether PF 15 frustrated general federal policies promoted by Rule 17. Looking to decisional rather than statutory law as the source of federal policy, the court reasoned that PF 15 would not "deprive the grand jury of any person's evidence to an extent not previously permitted under federal law"199 because it did not create or distort existing testimonial privileges. Nor had the government carried its burden of persuading the court that PF 15 would delay grand jury work, given the constraints on attorney subpoenas imposed by the Department of Justice's own guidelines.200

2. The First Circuit Court of Appeals Opinions201

The government appealed the district court's refusal to grant a declaratory injunction that PF 15 should not apply to federal prosecutors. Judge Torruella, writing for a majority of the First Circuit Court of Appeals, initially affirmed the district court's decision. On rehearing en banc, the court divided three-to-three. The procedural effect was affirmance of the district court decision. In theoretical terms, the split revealed differing assumptions about PF 15's reach.

On appeal, the government opposed the validity of PF 15 on three grounds: first, that PF 15 was beyond the rulemaking power of the district court; second, that the supremacy clause barred enforcement of the rule against federal prosecutors, and third, that PF 15 was so lacking in sound policy that the appellate court should use its supervisory power to invalidate the rule.

The court dismissed as moot the argument that PF 15 was a state law in conflict with federal law. When the Judicial Council of Massachusetts explicitly adopted Supreme Judicial Court Rule 3:08 in its entirety,202 PF 15 became "as much federal law as if enacted initially

198. Id.
199. Id. at 124.
200. Id. at 125. See supra notes 172-84 and accompanying text for a discussion of the Department of Justice guidelines on attorney subpoenas.
201. United States v. Klubock, 832 F.2d 649 (1st Cir.), aff'd en banc, 832 F.2d 664 (1st Cir. 1987).
202. Before the case reached appellate review, the Judicial Council of the Massachu-
Turning to the rulemaking power of the district court, Judge Torruella described it as limited to promulgating procedural (rather than substantive) rules that do not conflict with existing federal rules of procedure or with federal statutes. More important, the power of district courts to promulgate ethical rules governing the conduct of their members could not be doubted. Judge Torruella then noted the ethical problems an attorney subpoena creates: (1) the subpoena immediately chills an attorney-client relationship; (2) the subpoena creates a conflict of interest for the attorney; (3) the attorney's energies are diverted from the client's case to litigating a motion to quash the subpoena; (4) the attorney, as a possible witness, may be disqualified from representing his or her client; and (5) use of an attorney subpoena gives a prosecutor potential control over the identity of opposing counsel. Reasoning that these problems were fundamentally ethical, Judge Torruella stated that the district courts, rather than Congress or the Supreme Court, were the appropriate parties to redress the problem.

Turning to the alleged conflict with federal law, Judge Torruella adopted the district court's two findings. First, because PF 15 governed the service rather than the issuance of subpoenas, it did not conflict with existing federal law. Second, the fact that courts had adapted Rule 17(c)'s procedures governing subpoenas duces tecum to cases involving subpoenas ad testificandum proved that Rule 17 did not conflict with federal law.

sets District Court amended Local Rule 5(d)(4)(B) to explicitly incorporate Supreme Judicial Court Rule 3:08, PF 15.

203. Klubock, 832 F.2d 649 at 651.

204. Klubock, 832 F.2d 649 at 652 (citing Colgrove v. Battin, 413 U.S. 149 (1973); Hawes v. Club Equestre El Comandante, 535 F.2d 140 (1st Cir. 1976); Johnson v. Manhattan Ry., 289 U.S. 479 (1933)).

205. Klubock, 832 F.2d 664 at 652-53.

206. Noting that PF 15 would operate in the context of established attorney-client relationships and that attorney testimony before a grand jury could irreparably damage an attorney-client relationship, Judge Torruella indicated that the sixth amendment right to choice of counsel was implicated in these situations. That a prosecutor could to some extent control the identity of an accused's attorney also implicated the fifth amendment's due process requirement. Klubock, 832 F.2d 649 at 653-54.

207. Id.

208. "The ethical relationships between courts, attorneys and their clients, although obviously of interest to Congress and the Supreme Court, have been left traditionally to the primary regulation of the courts before whom those problems [sic] arise." Id. at 654-55. In addition, "[w]e believe that district courts are in a better position to judge, in the first instance and absent abuse of discretion, what is the appropriate response to this problem." Id. at 657.

209. Id. at 655-56.
not define the limits of a court's power with respect to grand jury subpoenas.\textsuperscript{210}

In closing, Judge Torruella refused the government's request to use its supervisory power to strike PF 15 down as an unwise example of local rulemaking. He stated that "[i]n our view PF 15, rather than constituting an abuse of discretion, is a limited, reasonable response to what appears to be a mounting professional problem."\textsuperscript{211}

The two opinions dissenting from the district court's affirmance of PF 15 did so on analytically distinct grounds. Chief Judge Campbell expressed the view that the rule, which operated in a highly sensitive context, exceeded the rulemaking power of a district court.\textsuperscript{212}

Finding both a conflict with Federal Rule of Criminal Procedure 17(a) and a procedural change that verged on the substantive,\textsuperscript{213} Judge Campbell would have invalidated PF 15. The Chief Judge described the supervisory power of the federal courts over the grand jury as "historically" too limited to encompass the function prescribed by PF 15, absent authorization from Congress or the Supreme Court.\textsuperscript{214} He

\textsuperscript{210} Id.

\textsuperscript{211} Id. at 657.

\textsuperscript{212} In Judge Campbell's view, the inquiry concerning a conflict with PF 15 and Federal Rule of Criminal Procedure 17 could not be limited to finding that there was no literal conflict between the two provisions. He cited Supreme Court decisions in Branzburg v. Hayes, 408 U.S. 665 (1972) (identity of journalists' sources not protected from grand jury investigation by first amendment); United States v. Dionisio, 410 U.S. 1 (1973) (because the grand jury's requirement of voice exemplars did not violate fourth or fifth amendment privileges, no showing of need by government was required before subpoenas were enforced); Blair v. United States, 250 U.S. 273 (1919) (grand jury witness not entitled to refuse testimony on grounds that grand jury lacks jurisdiction over the offense under investigation); United States v. Mandujano, 425 U.S. 564 (1976) (no requirement to give witness Miranda warning before grand jury sought testimony about crime in which witness may have been involved). Because these cases established the broad scope of grand jury investigations and prerogatives, Judge Campbell found that the absence of explicit provisions in Federal Rule of Criminal Procedure 17 for judicial supervision of the issuance of grand jury subpoenas implicitly prohibited such supervision. Klubock, 832 F.2d 649 at 661-62.

In his view, a rule which "sought" to strike a new balance between the grand jury's and the prosecutor's right of access to evidence and a defendant's right to the full protection of his counsel" was beyond the scope of the rulemaking power granted to district courts. Id. at 659 n.23. That power was, according to the Advisory Committee, granted to the courts to regulate "matters of detail" such as the mode of impaneling a jury or selecting a foreman for a jury. Id. at 659.

Judge Campbell stated that, in procedural terms, PF 15 would be a major innovation, given the clearly established proposition that no one is entitled to the quashing of a grand jury subpoena on the grounds of privilege in advance of appearing before the grand jury and claiming the privilege. Id. at 659-60.

\textsuperscript{213} See Miner v. Atlass, 363 U.S. 641, 649-50 (1960) (local court rules should be limited to matters that are procedural rather than substantive).

\textsuperscript{214} Klubock, 832 F.2d 649 at 663.
found PF 15's lack of standards for judicial approval of subpoenas particularly disturbing. "Here, in PF 15, the district court has vested completely uncanalized power to individual judges to 'approv[e]' attorney subpoenas. The rule contains no principle, intelligible or otherwise, to guide these judges."215

Judge Breyer, in dissent, raised \textit{sua sponte} the issue of a conflict with Federal Rule of Criminal Procedure 57. In Judge Breyer's view, the history of the rule's promulgation and adoption by the district court did not satisfy Rule 57's requirements of notice and opportunity to comment for those affected by changes in local rules. Therefore, PF 15 was invalid.

215. Klubock, 832 F.2d 664 at 669 (footnote omitted).
216. Federal Rule of Criminal Procedure 57 reads in part:

Each district court . . . may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Rule 57 was amended in 1985 to require public notice and an opportunity to comment for parties affected by rule changes.

217. Judge Breyer gave the following account of PF 15's promulgation:

On October 1, 1985, the Massachusetts Supreme Judicial Court added PF 15 to . . . its Rule 3:08 . . . [T]he federal district court was in the process of revising . . . its local rules, including Rule 5(d)(4)(B). On October 7, the district court circulated proposed revised rules for comment, including a revised Rule 5(d)(4)(B) that was ambiguous as to whether or not it incorporated S.J.C. Rule 3:08 . . . . The only commenter to discuss Rule 5(d)(4)(B) was the United States Attorney, who asked the court to make clear that Rule 5(d)(4)(B) did not incorporate S.J.C. Rule 3:08 . . . . [T]he Massachusetts Association of Criminal Defense Lawyers . . . ask[ed] 'that the Government's request for an exemption be made public and that the Court establish a period of time to receive comments' . . . . [T]he chief judge of the district court said that the court would not issue any public notice because the U.S. Attorney's filing of [the Klubock case] . . . 'effectively mooted any need for consideration of Local Rule 5(d)(4)(B)' until after a ruling . . . .

On March 19, 1986, the U.S. Attorney again asked the court to clarify Rule 5(d)(4)(B) by specifically excluding PF 15 . . . .

. . . [T]he court issued no further notice and set no additional period for comment on Rule 5(d)(4)(B). Rather, the court issued its final revised rules on June 27, 1986 . . . explicitly incorporat[ing] Rule 3:08 and hence PF 15.

\textit{Klubock}, 832 F.2d 664 at 674-75.

Judge Torruella responded to Judge Breyer by arguing that the initial version of Local Court Rule 5(d)(4)(B) had not been ambiguous with respect to incorporation of S.J.C. Rule 3:08 and PF 15. In Judge Torruella's view, United States District Attorney Weld's actions proved that Weld understood Rule 5(d)(4)(B) to incorporate S.J.C. Rule 3:08. Rather than commenting on Rule 5(d)(4)(B), Weld sought an exemption from PF 15. "The United States Attorney and his colleagues . . . had notice and an opportunity to comment, but rather than submit a detailed, substantive critique of PF 15, they sought a blanket exemption from the rule." \textit{Id.} at 666 (footnote omitted).
Judge Breyer's objection was not simply procedural. Amended Rule 57 was intended to enhance local rulemaking by giving those affected an opportunity to suggest alternatives or improvements to proposed rules. Judge Breyer raised numerous questions about the operation of PF 15 which, he stated, could not be answered because the merits and operation of PF 15 had not been properly discussed. Among the questions he raised were: 1) what standard would a judge use to review a proposed subpoena, 2) would the initial approval for application take place ex parte, 3) would there be an avenue of appeal from a refusal to grant initial approval for a subpoena, and 4) would a subpoena served without prior judicial approval be invalid?218

In terms of the extent of a federal court's rulemaking power, Judge Breyer expressed some agreement with Judge Campbell's view. Citing Miner v. Atlass219 for the proposition that district courts do not have the power to effect "basic changes" through local rules, Judge Breyer stated that if PF 15 were interpreted to require that a prosecutor make some preliminary showing of "need" or "relevance" before a judge approved an attorney subpoena, promulgation of the rule might be beyond the district court's power.220

The litigation surrounding PF 15's debut in the Massachusetts district courts left unanswered an intriguing question: what exactly had been affirmed as a valid local court rule? Perhaps because the case lacked the clarifying focus of a particular factual dispute, the discussion of PF 15's operation was vague and even contradictory. As Judge Breyer noted, among the issues that remain to be settled with respect to the rule are important procedural questions, such as whether the initial application for judicial approval will always take place ex parte and what sanctions will be applied if a prosecutor violates PF 15. The most significant question left unanswered is the extent to which district court judges will screen prosecutorial applications for subpoenas, and, if the scrutiny is significant, what criteria they will use to decide whether a subpoena should be served.

To determine how PF 15 has affected existing federal procedure, this comment next compares existing procedures for resisting a grand jury subpoena under Federal Rule of Criminal Procedure 17(c) with PF 15's procedural implications. It then examines possible criteria for judicial approval of attorney subpoenas to determine which would be helpful in achieving the rule's goal of increased protection for the at-

218. Id. at 673.
220. Klubock, 832 F.2d 664 at 673.
torney-client relationship. Finally, it examines the reach of district court rulemaking power to determine whether that power can encompass the introduction of stringent standards of judicial oversight for attorney subpoenas.

V. A Comparison of Rule 17(c) and PF 15

To compare the service of grand jury subpoenas to attorneys before and after PF 15's enactment, suppose again that B has been A's client for two years. A and B have recently spoken over the phone some twenty times on a variety of subjects, including advice from A to B on tax matters and on the disposition of property. B is now the target of a grand jury investigation. At the government's request, a federal court has issued a grand jury subpoena requiring A to produce her records of the telephone conversations and to testify to the content of those conversations. The subject matter of most of the telephone conversations and A's notes recording her impressions of them might be protected by the attorney-client privilege and the work-product doctrine respectively, depending on whether A was providing legal advice on all occasions. A does not want to comply with the subpoenas because she both desires and feels duty-bound to protect her professional relationship with B from the range of threats her appearance before the grand jury might pose to that relationship. Furthermore, assuming compliance with the subpoena would be against B's interests, A has a professional obligation to resist.

Prior to PF 15's enactment, the course of litigation to quash A's subpoena in the Massachusetts federal district courts was easy to predict. On these facts, once the subpoena was served, A's 17(c) motion to quash it for irrelevance or overbreadth would have been unsuccessful. If A's defense to the subpoena was based on the attorney-client privilege and/or the work-product doctrine, she would almost certainly have had to appear before the grand jury to assert her right not

221. Federal Rule of Criminal Procedure 17(a) reads in part: "The clerk [of court] shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." FED. R. CRIM. P. 17(a).
222. See supra notes 91-130 for a description of the parameters of the attorney-client and the work-product privileges.
223. See supra notes 61-72 and accompanying text.
224. The attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the [attorney-client] privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated. Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956).
225. See supra notes 155-57 and accompanying text.
to testify. If the prosecutor disputed the claim of privilege, A would have had the burden of proof. Her claim would have succeeded if she convinced the court, through argument and in camera inspection, that all the material sought fell within the privileges' parameters. The government would have had the opportunity to argue that the material was not privileged. If the district court denied A's claim of privilege, she would have had a right of appeal.

A. PF 15 in its Present Form

The course of this litigation under PF 15 is less predictable, although certain aspects are clear and certain assumptions seem reasonable.

PF 15 is an ethical rule governing the conduct of prosecutors. If the government served a subpoena on A without obtaining the prior judicial approval PF 15 requires, A would not have grounds for disobeying the subpoena, nor would she have new substantive grounds

226. See supra notes 109-10 and accompanying text.
227. See supra notes 116-30 and accompanying text for a description of the exceptions to the attorney-client and work-product privileges.
228. PF 15 does not distinguish between subpoenas duces tecum (requiring the production of documents) and subpoenas ad testificandum (requiring testimony) (“It is unprofessional conduct for a prosecutor to subpoena an attorney . . . where the prosecutor seeks to compel the attorney/witness to provide evidence. . . .” MASS. SUP. JUD. CT. R. 3:08, PF 15) and should probably be presumed to apply to both.

Subpoenas duces tecum and ad testificandum raise the same concerns in PF 15 situations. Whether an attorney testifies or turns over documents, the process is likely to "chill" the attorney-client relationship. Disqualification from a client's case could result from verbal testimony tending to prove the elements of an offense as easily as it could from documents tending to prove the same thing. In either case, the attorney might find him- or herself in the position of not being able to continue representing a client because his or her testimony "[w]as or m[ight] be prejudicial to his client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1981).

With respect to subpoenas duces tecum and ad testificandum, PF 15 may actually be less ambiguous than Rule 17(c), which is sometimes applied by the courts to subpoenas ad testificandum although its text seems limited to subpoenas duces tecum. See supra note 198 and accompanying text.

229. In Massachusetts, the Supreme Judicial Court has adopted in its court rules Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer. See generally, MASS. SUP. JUD. CT. R. 3:08 (Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer).

"The rules . . . regulate only such conduct of lawyers engaged in prosecution or defense activities as is designated 'unprofessional conduct,' that is, conduct which by these rules is made subject to disciplinary sanctions." MASS. SUP. JUD. CT. R. 3:08.

230. The First Circuit Court of Appeals writing to affirm PF 15 stated: Attorneys are not, by virtue of such status, exempt from answering to subpoenas when properly served, including even when compliance has not been made with provisions such as PF 15. The consequence of non-compliance with PF 15 is to be
for a motion to quash under Rule 17(c).\textsuperscript{231} The only means of enforcement the rule provides is through disciplinary proceedings initiated by the Massachusetts Board of Bar Overseers (on its own initiative or in response to a complaint from A) and brought in a federal forum.\textsuperscript{232} While disciplinary proceedings may have a deterrent effect,\textsuperscript{233} they are \textit{a post facto} remedy offering no additional protection to A and B's relationship once a prosecutor decides to issue a subpoena.

However, since the \textit{Klubock} litigation established that PF 15 applies to federal prosecutors in Massachusetts, A is most likely to face a situation in which the government complies with PF 15's provisions. The most important questions, then, are what the rule requires of prosecutors and of the courts.

PF 15 requires that federal district courts\textsuperscript{234} create a procedure for prior judicial approval of attorney subpoenas.\textsuperscript{235} The rule's language does not specify whether the proceeding should be adversarial or \textit{ex parte}. Although PF 15 was enacted to protect the attorney-client relationship, the rule does not contain standards to aid a court in determining whether an attorney subpoena infringes impermissibly on an attorney-client relationship, nor does it define the nature or extent of the information a prosecutor must submit to a court to obtain the requisite judicial approval.\textsuperscript{236}
The district court, the majority and the dissent, all noted in *Klubock* that PF 15 does not define for the district courts any legal standards for deciding whether to approve service of an attorney subpoena.\(^{237}\) Chief Judge Campbell refused to affirm PF 15's validity because he considered its lack of standards a grant of power to district court judges to "impose substantive limitations of [their] . . . own devising"\(^{238}\) on the government's use of grand jury subpoenas.

In fact, it appears that federal district courts will proceed very cautiously. The district court in *Klubock* stated that PF 15's requirement of prior judicial approval "[d]id not create a new right to judicial review,"\(^{239}\) indicating that PF 15 did not create a duty in the district court to question the propriety of a prosecutor's decision to subpoena an attorney. The court's view of the very limited nature of judicial review required by PF 15 was confirmed by its statement that "the Schofield rule [requiring a prosecutor to demonstrate need and relevance before the court enforces a grand jury subpoena] . . . plainly imposes a heavier burden than does PF 15."\(^{240}\) While explicitly rejecting the need and relevance showing *Schofield* imposed on the government, the court did not suggest an alternative inquiry a district court might conduct to fulfill a supervisory duty of preventing abuse of grand jury process.\(^{241}\)

*In re Grand Jury Subpoena (John Doe, Attorney)*\(^{242}\) provides additional insight into the district courts' probable treatment of PF 15. John Doe was in-house counsel to a business under investigation by a federal grand jury. Doe received a subpoena served in compliance on prosecutors prior to the issuance of subpoenas . . . [T]he rule['s language] . . . left open the rule's actual content." Gertner, *supra* note 71, at 43.

\(^{237}\) See *Klubock*, 639 F. Supp. at 120 n.7; *Klubock*, 832 F.2d 649 at 661 n.26; *Klubock*, 832 F.2d 664 at 667-69, 675.

\(^{238}\) *Klubock*, 832 F.2d 649 at 661.

\(^{239}\) *Klubock*, 639 F. Supp. at 120.

\(^{240}\) *Id.* at 125 n.14. See *supra* note 145.

\(^{241}\) Even United States District Attorney William Weld was uneasy with the district court's interpretation of PF 15:

> Given that PF 15 itself identifies neither the standards to be applied nor the procedures to be followed in obtaining judicial approval, the Court's assumptions about what PF 15 does or does not create in the way of new substantive or procedural rights are indeed nothing more than assumptions. There is no basis on which to determine that this amorphous rule actually means as little as the Court's opinion assumes.


with PF 15, requiring him to testify before the grand jury. The district court approved the subpoena ex parte on the basis of a prosecutor's affidavits indicating that no information protected by the attorney-client privilege was sought and that the line of inquiry contemplated "would . . . [not] interfere with relationship [sic] between the proposed witness and his employer-client."243

In a subsequent motion to quash the subpoena, the potential witness argued that the probable line of questioning would seek information protected by the attorney-client privilege and urged the court to balance the prosecution's need for information against the possible damage to his relationship with his employer. The court did not place any additional burden on the prosecutor to justify use of the subpoena. In addition, presumably out of concern for the secrecy of grand jury proceedings, the court denied the potential witness access to the information the prosecutor had submitted to obtain judicial approval of the subpoena. Because John Doe could not find out what line of questioning the prosecutor planned to pursue, he lacked the factual basis for his argument that the information the prosecutor planned to seek was protected by the attorney-client privilege.244 PF 15 thus gave the potential attorney/witness no more protection from the undesired grand jury appearance than he would have had before its enactment.245

Judge Breyer, dissenting in Klubock, correctly noted that PF 15 can provide the additional protection to the attorney-client relationship envisioned by its sponsors only if the courts fashion new substantive standards to be applied to prosecutorial applications for attorney subpoenas.246 In the absence of explicit language in the rule establishing new protection for the attorney-client relationship, the district courts have not fashioned any criteria on their own.

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243. Id. at 1.
244. Id. at 2-3.
245. It has even been suggested that PF 15 may have done a disservice to attorney Doe and his employer. Doe's counsel in the case subsequently wrote about the litigation:

[T]he situation may well have been worse than pre-PF 15, when a court's perception of the facts on a motion to quash was shaped by both sides, simultaneously, in an adversary setting. In [this case], the prosecutor had an opportunity to paint a picture virtually without rebuttal and was then asked to defend his actions before the judge who had approved them in the first instance. Gertner, supra note 71, at 2.

246. "To what extent can the Bar Association achieve its objective (stopping certain perceived abuses) without a change in standards? And, without such a change, is the game worth the candle?" Klubock, 832 F.2d 664 at 674 (Breyer, J., dissenting). Similarly, Chief Judge Campbell stated that "it is difficult to imagine how PF 15 can operate meaningfully except as a substantive modification of the existing rules." Id. at 670 (Campbell, C.J., dissenting).
Consequently, if PF 15 is to have any effect on the attorney-subpoena problem, the rule should probably be amended to incorporate substantive standards protecting the attorney-client relationship.\footnote{247} However, if PF 15 is amended along the lines originally proposed by the Massachusetts Bar Association,\footnote{248} the issue of its validity will be raised anew. The differences between existing and proposed procedures must be clearly understood, and it must be determined whether those changes can be effectuated by a local court rule.

B. An Examination of Standards Proposed to Increase Protection of the Attorney-Client Relationship

The Criminal Justice divisions of the American Bar Association (A.B.A.) and the Massachusetts Bar Association (M.B.A.) both drafted proposals for addressing the attorney-subpoena problem. The proposals are similar in format; both envision that the judges granting "prior judicial approval" of attorney subpoenas will only do so if the government has demonstrated a need for the information sought and its relevance to a grand jury investigation in progress.

The proposal presented to the Massachusetts Supreme Judicial Court by the M.B.A. contained standards, excluded from the promulgated rule, by which a judge would have determined whether a particular subpoena should be served.\footnote{249} In 1986, the A.B.A.'s House of Delegates approved a resolution calling for judicial supervision of attorney subpoenas, also including a list of standards for judicial review when approval for such subpoenas was sought.\footnote{250} A revision of the resolution, strengthening the recommended protections for attorneys,

\footnote{247} Federal Rule of Criminal Procedure 57, which requires notice and comment before local court rules are promulgated or changed significantly would require an opportunity for the legal community to comment before changes to the Massachusetts ethical rule was adopted by the Massachusetts federal district courts. See supra note 216 for the text of Federal Rule of Criminal Procedure 57.

\footnote{248} See infra note 249.

\footnote{249} As proposed by the M.B.A., PF 15 would have required a court to determine, before approving a subpoena, that

- the information sought is not protected from disclosure by the attorney-client privilege or the work product doctrine;

- the evidence sought is relevant to an investigation within the jurisdiction of the grand jury;

- compliance with the subpoena would not be unreasonable or oppressive;

- the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client;

- and there is no other feasible alternative to obtain the information sought.

was approved by the A.B.A.'s House of Delegates in February, 1988. The 1988 A.B.A. standards are as follows:

1. the information sought is not protected from disclosure by any applicable privilege;
2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative;
3. the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives reasonable and timely notice;
4. the purpose of the subpoena is not to harass the attorney or his or her client; and
5. the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.

The M.B.A. proposal specified that the proceeding at which approval for a subpoena was sought should be "conducted with due regard for the secrecy of grand jury proceedings," apparently leaving to the courts' discretion the choice between an ex parte or adversarial proceeding. The A.B.A., having opted in 1986 for an ex parte proceeding, revised its resolution in 1988 to call for "an opportunity for an adversarial proceeding." Both the A.B.A. and the M.B.A. proposals contain detailed "need and relevance" standards, requiring prosecutors to prove that they seek essential information which cannot be obtained from any other source.

1. Ex parte versus adversarial proceedings and the burden of proof

A rule like PF 15 creates a rebuttable presumption that an attor-
ney subpoena is improper. Thus, the rule inevitably changes current federal practice, which places with A and B the burden of proving that their relationship should be protected. Three questions are raised by such a presumption: 1) what substantive information must a prosecutor provide in rebuttal; 2) to what degree will the prosecutor be required to prove that the substantive information he or she provides is true (burden of proof); 3) will the decision whether the subpoena should be served be made in an ex parte or an adversarial hearing?

An ex parte proceeding is almost certainly the least burdensome alternative for the prosecutor seeking permission to serve A's subpoena. As the First Circuit Court of Appeals noted, the Department of Justice Guidelines on attorney subpoenas already require a prosecutor to compile substantial information for internal purposes before subpoenaing an attorney. With some exceptions, the Guidelines mandate protection for the attorney/witness similar to the protection envisioned by the A.B.A.

In practical terms, requiring a prosecutor to submit information he or she had already gathered to a district court, ex parte, would not

256. Judge Murnaghan, in dissent in In re Grand Jury Subpoena No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir. 1982), withdrawn on other grounds, 697 F.2d 112 (1982), wrote of the need and relevance test endorsed by the majority: "It all comes down to the choice as to which way the presumption should run. I cannot accept a blanket presumption of irregularity, and the resulting rule that proof of probable cause must precede production of any evidence subpoenaed by the grand jury." Id. at 1013.

257. See supra note 104 and accompanying text; note 148 and accompanying text.

258. An ex parte proceeding is the current practice under PF 15. See supra note 243 and accompanying text.

259. "[T]he interference [caused by PF 15], if any, with the prosecutorial function, is highly unobtrusive. As contemplated, the judicial approval is sought in an ex parte manner." Klubock, 832 F.2d 649 at 657.

260. Id.


The D.O.J. Guidelines differ from the A.B.A.'s standards in explicitly permitting a prosecutor to take into account the dangers of seeking information from a source other than A. The Guidelines do not prohibit harassing subpoenas, but the Justice Department would certainly not condone a subpoena issued to harass a defense attorney.

As noted in the A.B.A. Report, the D.O.J. Guidelines prohibit subpoenas to attorneys unless the information sought is "reasonably needed for the successful completion of the investigation or prosecution." D.O.J. GUIDELINES, supra note 11, at § 9-2.161(a)(F)(1). The A.B.A. Report uses slightly stronger language, requiring that the information sought be "essential to the successful completion of an ongoing investigation or prosecution." The Report notes, however, that there is probably no significant practical difference between the two standards. 1988 A.B.A. Report, supra note 143, at 16.

See Comment, An Ethical/Legal Tug of War, supra note 3, at 401 (recommending a federal rule based on the D.O.J. Guidelines as the solution to the attorney subpoena problem).
significantly burden a prosecutor, nor would it imperil an ongoing grand jury investigation, as long as the submission was kept confidential. While a rule interpreted to require *ex parte* proceedings places some burden of proof on a prosecutor, the court might require nothing more than a plausible showing on the substantive provisions of the rule. In addition, an *ex parte* proceeding is more protective of the secrecy of grand jury proceedings and guards against the possibility that a target or an attorney, alerted to the precise nature of the information sought by the prosecutor, might conceal or destroy tangible evidence.

The A.B.A. proposal recognizes that A's interests would be better served by an adversarial proceeding. Suppose the government desires to prosecute B for tax evasion and serves a subpoena requiring A to testify concerning amounts and dates of fee payments. The government is seeking to prove B's net worth. A might take the position that other sources existed for information on B's assets. The prosecutor's position, presented by affidavit to the court, might be that there was no alternative source from which to obtain the information or that use of an alternative source would imperil the investigation. In an *ex parte* proceeding, the court would rely on the prosecutor's perception of circumstances and would have no independent information to serve as a basis for questioning that perception. In an adversarial proceeding both sides would have a role in providing information and shaping the court's view of the case.

Assuming an adversarial hearing, there are, broadly speaking, two possible options with respect to allocating the burden of proof. A prosecutor, responding to the presumption created by PF 15, would have to provide some information with respect to all of the substantive provisions incorporated into a revised PF 15. However, even in an

262. According to Hoffman, Kelston & Shaughnessy, "[t]he practice of the U.S. Attorney's Office in Massachusetts has been to submit the application [for an attorney subpoena] *ex parte* and under seal (in camera), and to incorporate the information submitted in compliance with the DOJ approval procedure." Hoffman, Kelston & Shaughnessy, supra note 3, at 105 (quoting an anonymous source in the United States Attorney's office in Boston).

263. In In re Grand Jury Subpoena (John Doe), No. 86-665, slip op. (D. Mass. Sept. 9, 1986) (available on Lexis, Genfed Library) the court impounded the prosecutor's submission and declined to reveal its contents to the party seeking to quash the subpoena. *Id.* at 3.

264. "If notice must be given to the attorney, what would prevent the attorney from transferring or destroying documents or other evidence?" Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 15 n.6, United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F.2d 649 (1st Cir.), *aff'd en banc*, 832 F.2d 664 (1st Cir. 1987).
adversary proceeding, a court might hold the prosecutor’s burden satisfied by a conclusory submission responding to the rule’s substantive provisions. A might then be required to prove that the prosecutor’s submission was inaccurate.\footnote{This is similar to the pattern that has emerged in the Third Circuit with respect to the Schofield rule (see supra note 145). The Third Circuit Court of Appeals announced in In re Grand Jury Proceedings (Schofield), 507 F.2d 963 (3d Cir. 1975) (Schofield II), that the Schofield rule was satisfied as a matter of law if the government provided “scant” information on need and relevance. Id. at 967. The court also held that the government did not have to “rebut each colorable contention raised by a witness.” Id. at 967 n.3a. The burden placed on the government was a matter for the discretion of the district court which could require additional hearings and proof from the government as it saw fit. Id. at 966-68. See Weiner, supra note 3, at 121, noting that “even the Third Circuit has whittled away at the Schofield test.”} For example, the government might claim there was no source other than A for information about B’s payment of her legal fees and that the information was relevant to a grand jury investigation into tax evasion because the government had to establish the extent of B’s wealth and his expenses. Again, A’s position might be that other sources, such as bank deposit records, were available to prove B’s wealth and expenses. Requiring A to prove that the records would be sufficient for the government’s purpose would impose a burden difficult for A to meet in light of the secrecy of grand jury proceedings. The A.B.A. proposal resolves this question by placing the burden of justifying the attorney subpoena squarely with the government.\footnote{“This procedure . . . will insure that the burden of going forward with specific facts to justify the subpoena sought will rest squarely on the party seeking the subpoena.” 1988 A.B.A. Report, supra note 143, at 15.}

Amending PF 15 to require an adversarial proceeding raises potential conflicts with existing federal case law. In United States v. Dionisio,\footnote{410 U.S. 1 (1972).} the Supreme Court prohibited “saddl[ing the] grand jury with minitrials and preliminary showings [that] would . . . impede its investigation.”\footnote{Id. at 17.} In addition, an adversarial proceeding prior to service of a subpoena might reasonably be presumed to replace an attorney’s right to a motion to quash the subpoena under Rule 17(c).\footnote{The A.B.A. proposal explicitly advocates replacing an attorney’s Rule 17(c) motion to quash with an earlier adversarial hearing:

[T]he current resolution contemplates, in essence, moving the post-issuance motion to quash to the pre-issuance stage by requiring an in camera adversarial proceeding prior to judicial approval for the subpoena being granted. . . . [I]t is intended that the issues normally resolved at the motion to quash would be resolved at the pre-issuance stage.

1988 A.B.A. Report, supra note 143, at 4.}
Arguably, a district court cannot effect such a change in federal procedure on the basis of its local rulemaking power. Perhaps most important, shifting a significant burden of proof to the government on questions of attorney-client privilege or 17(c) motions to quash subpoenas would stand in sharp contrast to current federal practice.

2. Proposed Substantive Standards

a. Attorney-Client and Work Product Privilege

The A.B.A.'s first proposed standard would require the court to determine whether the material sought by the prosecutor is protected by the attorney-client privilege or the work product doctrine on the basis that such material is absolutely shielded from grand jury examination. Thus, in theory, if A's telephone conversations had all been to provide B with legal advice, the judge would refuse to approve the subpoena and it would not be served. The advantage to A and B is that their relationship would be spared the strain of a possible appearance by A in front of the grand jury.

There are problems with a rigorous implementation of this standard in an ex parte proceeding: the parameters of the attorney-client privilege are not clearly defined, and A would not have an opportunity to argue for her interpretation. A prosecutor would probably be required to allege only that he or she believed that the information sought was not privileged or that it should be accessible on the basis of the crime-fraud exception to the attorney-client privilege. Only in the case of a clear violation of the attorney-client privilege, surely a rare occurrence, might a judge reasonably quash a subpoena on the

270. Both the district court and the members of the First Circuit Court of Appeals who affirmed PF 15 did so in part on the basis that its provisions and the provisions in Rule 17(a) were compatible. Klubock, 639 F. Supp. at 122; Klubock, 832 F.2d 649 at 655. Extending the courts' reasoning, a local rule which replaced a provision of the Federal Rules of Criminal Procedure would probably be held to contradict the federal rule. A local rule that contradicts the provisions of a federal procedural rule is invalid. Frazier v. Heebe, 482 U.S. 641, 654 (1987) (Rehnquist, C.J., dissenting).

271. See supra note 104 and accompanying text for a description of the burden of proof with respect to claiming the benefit of the attorney-client privilege. See supra note 148 for a description of the burden of proof with respect to subpoena defenses under Rule 17(c).

272. See supra notes 91-115 and accompanying text.

273. See supra notes 62-65 and accompanying text for a discussion of the impact of an attorney's grand jury appearance; see supra note 147 and accompanying text for assertion of the attorney-client and work product privileges under Rule 17(c). See supra notes 66-67 and accompanying text for a discussion of the conflict of interest created for an attorney by receipt of a grand jury subpoena.

274. See supra notes 124-30 and accompanying text.
basis of an ex parte hearing.275

Information protected by the attorney-client privilege is currently shielded from disclosure to the grand jury, so the first substantive provision of the A.B.A. resolution proposes only a procedural change:276 the hearing to determine whether particular material is protected should take place before issuance of the subpoena, replacing an attorney's 17(c) motion to quash.277

If a subpoena requests the production of documents, the fact that a review takes place before the subpoena is issued should not affect the grand jury's access to evidence. However, if the subpoena requests testimony, a pre-issuance hearing might require a prosecutor to describe—and therefore to limit—the evidence he or she plans to seek from an attorney. In some cases, this might limit the scope of the testimony sought from an attorney.

b. Relevance

Second, the A.B.A. would require that "the evidence sought [be] essential to the successful completion of an ongoing investigation or prosecution and . . . not merely peripheral, cumulative or speculative."278 The potential gain to A and B is that A may be able to avoid testifying altogether if it is judged that her evidence is not relevant or essential to the investigation in progress. The federal courts define rel-

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275. Even in the case of In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985), where the court quashed grand jury subpoenas on the basis of privilege without an in camera inspection because the material clearly fell within the attorney-client and work product privileges, the court probably needed the evidence provided by the attorneys who brought the motion to quash. They were able to respond to the government's argument that the information should be accessible on the basis of the crime-fraud exception to the privilege. Id. at 967-69.


277. "[T]he current resolution contemplates . . . moving the post-issuance motion to quash to the pre-issuance stage by requiring an in camera adversarial proceeding prior to judicial approval for the subpoena being granted." Id. at 4.

278. Id. at 1.

The analogous M.B.A. provision simply requires that the evidence sought be relevant to an investigation within the jurisdiction of a grand jury. Mass. L. Weekly, Oct. 14, 1985, at 36, col. 3. A federal grand jury's jurisdiction extends to investigating all offenses indictable under a federal criminal statute. W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE 377 n.1 (1985). Given the breadth of the grand jury's jurisdiction, the M.B.A. standard does not limit the government's ability to subpoena information from an attorney in any significant fashion.

See 1988 A.B.A. Report, supra note 143, at 16, noting that virtually any evidence can be argued to be relevant in some way to a grand jury investigation, and concluding that the relevancy standard is "too low a threshold of need."
evancy broadly with respect to the evidence sought by a grand jury, placing few limits on the scope of grand jury investigations. Thus, a standard that requires a prosecutor to prove the essential nature of the information sought from an attorney, placing limits on the grand jury’s subpoena power, departs from current federal practice.

The degree of protection provided to A and B by this standard may depend more on how stringent a burden of proof is imposed on the government than on the availability of an adversarial hearing. Given the secrecy of grand jury proceedings, a judge’s ability to evaluate the relevance of the information sought would depend on a submission by the government describing the scope of the grand jury’s investigation. A defense attorney usually could not contribute to a judge’s ability to evaluate relevance.

c. Unreasonableness

Third, the A.B.A. would require a judge to find that “the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives a reasonable and timely notice.” The A.B.A. standard reflects the accurate notion that most grand jury investigations are focused quite specifically on an incident or an individual. The evidence a prosecutor seeks can often be identified with some specificity. Furthermore, there is reason to believe that federal

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279. See supra notes 155-57 and accompanying text.

280. The Second Circuit Court of Appeals placed the burden of proving relevance in an attorney subpoena case on the government. The court articulated as the rationale for shifting the burden in this context the fact that the party seeking to quash a subpoena does “not know the scope or nature of the grand jury investigation” and cannot know it because of the secrecy surrounding grand jury proceedings. In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, 976 (2d Cir. 1985), rev’d en banc, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986).


282. See, e.g., In re Grand Jury Proceedings: Subpoenas Duces Tecum (Danbom), 827 F.2d 301 (8th Cir. 1987). The subpoena being challenged had been issued to a particular Western Union office and required the production of all telegraphic money orders for more than $1,000 for a two-year period. Id. at 302. Although the court refused to quash the subpoenas for overbreadth, it suggested that on remand the district court might modify the subpoena. Specifically, the court suggested that the government be asked to identify characteristics that made certain wire transfers suspect, such as transfers to individuals
prosecutors often issue overly broad subpoenas to defense attorneys. This standard, too, is a departure from current federal practice, which places few limits on the breadth of the grand jury's subpoena power.

Unlike the first two standards proposed by the A.B.A., a standard requiring reasonableness in a subpoena does not relieve A of her obligation to testify before a grand jury in ways that may be somewhat damaging to B. However, if the subpoena is narrowly drawn, A can confidently explain to her client that she will have to reveal this much and no more. The trust between attorney and client may not be compromised.

As is the case with respect to the A.B.A.'s standard on relevance, the degree of protection afforded to A and B may depend more on how stringent the government's burden of proof is than on the availability of an adversarial hearing. Because A might not know the nature of the offense the grand jury was investigating, she probably could not plausibly suggest means of narrowing a subpoena.

d. Harassment

As a fourth standard, the A.B.A. proposes requiring the court to find a subpoena was not issued primarily to harass the attorney or the client. Unlike the proposed standards concerning relevance, unreasonableness, and alternative sources, the requirement that a subpoena not be issued to harass a defense attorney does not conflict with existing federal practice. The Supreme Court has repeatedly affirmed the federal courts' supervisory power to protect against any misuse of the

under suspicion or to certain areas of the country, and that the subpoena be modified to cover only those wire transfers meeting the criteria specified by the government. Id. at 305.

283. See, e.g., Hoffman, Kelston & Shaughnessy, supra note 3, at 105 (describing a case in which prosecutors subpoenaed an attorney's entire file on a client, and describing other cases in which, after negotiations between the subpoena recipient and the prosecutor, the subpoena was narrowed); In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985) (subpoena requested entire legal files of attorneys representing clients appearing before the Immigration and Naturalization Service).

Attorney subpoenas requesting fee information usually request information about any and all occasions on which the attorney has handled funds or property of value for the client who is the target of a grand jury investigation. The subpoenas are not limited as to time or the nature of the information requested. See, e.g., In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); In re Grand Jury Matters, 593 F. Supp. 103 (D.N.H.), aff'd, 751 F.2d 13 (1st Cir. 1984); In re Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982).

284. See supra notes 36-42 and accompanying text.

285. This standard is probably unnecessary. In the event a subpoena was deliberately harassing, it would probably fail under the A.B.A.'s other substantive criteria.
grand jury's powers.286

e. Alternative Sources

Finally, the A.B.A. proposes that a judge find there was no other feasible source from which to obtain the information sought before approving an attorney subpoena.287 So, for example, if A’s subpoena requested information about fees and property transfers as evidence of B’s wealth, a prosecutor might be required to show there was no other way to establish the extent of B’s wealth. And if the information sought might be available from another potential witness, the prosecutor might be required to call the other witness before subpoenaing A. If the other source was able to provide the information sought, A might avoid testifying altogether.

Since the fact that the evidence could be obtained elsewhere has not traditionally been a defense under 17(c) or a feature of the attorney-client privilege, a standard requiring the government to make an initial showing of this nature would be a significant innovation.288 In an ex parte proceeding, the required showing would not impose a rigorous burden. The prosecutor would probably simply allege the information sought could not be obtained from another source. In an adversarial proceeding, however, A could probably suggest feasible alternative sources for the information in many if not most situations and thus avoid the subpoena.

Requiring the government to first seek non-privileged information from a source other than an attorney creates a qualified extension of the attorney-client privilege,289 directly challenging the federal judiciary’s instrumental view of the privilege.290 Obviously this represents a substantial change from the federal courts’ present position with respect to the attorney-client privilege.

The standards discussed above have been proposed by their spon-

286. See supra note 40 and accompanying text.

287. Similarly, a panel of the Second Circuit Court of Appeals, adopting the “need and relevance standard,” explained that the government had not shown need because it had not shown that “there [wa]s no other reasonably available source for that information than the attorney.” In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, 976-77 (2d Cir. 1985), rev’d en banc, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986).

288. The exception is the Third Circuit, which, since 1973, has required showings of need when faced with proceedings to enforce any grand jury subpoena. See In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973), cert. denied, 421 U.S. 1015 (1975).

289. “[PF 15] is most akin to an expanded rule of attorney-client privilege, placing a new and significant limitation upon a grand jury’s power to seek information from certain attorneys.” Klubock, 832 F.2d 664 at 669 (Campbell, C.J., dissenting).

290. See supra notes 99-103 and accompanying text.
sors as a means of balancing the government’s need for information in criminal prosecutions against the possible damage to attorney-client relationships and defendants’ need for effective counsel. To varying degrees, all represent departures from accepted federal practice with respect to the scope of the grand jury’s investigative powers, the scope of the attorney-client privilege and defenses to subpoenas under Rule 17(c). They reverse the presumption with respect to the regularity of grand jury proceedings. It is at least debatable that a local court rule can validly effectuate these substantive changes.

C. The Rulemaking Power of the Federal District Courts

The federal district courts, through their judicial councils, have the power to make rules governing civil and criminal procedure. The statutory basis for the power is in Rule 83291 of the Federal Rules of Civil Procedure and Rule 57292 of the Federal Rules of Criminal Procedure. The courts’ rulemaking power under the civil and the criminal rules is the same in scope.293 Local rules, if valid, have the force of federal law.294

Initially, the lower courts’ rulemaking power was expected to be confined to matters of detail295 and rarely used.296 However, as com-

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291. Federal Rule of Civil Procedure 83 reads in part:
Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local district rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the administrative office of the United States Court and be made available to the public.

FED. R. CIV. P. 83.

292. See supra note 216 for the text of Federal Rule of Criminal Procedure 57.

293. The 1985 Advisory Committee Note to Rule 57 states: “Rule 57 has been reformulated to correspond to Fed.R.Civ.P. 83, including the proposed amendments thereto. The purpose of the reformulation is to emphasize that the procedures for adoption of local rules by a district court are the same under both the civil and the criminal rules.” 1985 Amendments to Federal Rule of Criminal Procedure 57, 105 F.R.D. 179, 201 (1985).


295. In Klubock, Chief Judge Campbell quoted the comments of the Advisory Committee to the original Rule 57 of the Rules of Criminal Procedure:

Nevertheless it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or by usage. Among such matters are the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting a foreman of a trial jury . . . and other similar details. (emphasis added).
mentators have noted, court practices belied that expectation; local rules have proliferated, and they are not always confined to matters of detail. In response, in 1985, when Rules 83 and 57 were amended, the aim was to enhance the process of local rulemaking by "assur[ing] that the expert advice of practitioners and scholars" would be available to the district courts.

Although the process of enacting local rules has changed, the Advisory Committee Notes do not suggest any change in the purpose of the local rulemaking power. "Local regulations are promulgated by district courts primarily to promote efficiency of the court." Professor Wright's treatise on federal procedure notes these examples of local court rules affecting criminal procedure: rules governing the admission and disciplining of attorneys, rules governing the use of stipulations and continuances, rules governing the protection of exhibits, records and files, and rules governing the empaneling and instructing of jurors. Generally speaking, these are all rules aimed at improving the efficiency of the federal courts.

The limits on the courts' local rulemaking power have been described in several United States Supreme Court cases. In Miner v. Atlasm, the Supreme Court declared invalid a federal district court rule that added a discovery provision to the General Admiralty Rules.

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296. "The expectation of the draftsmen of Rule 83 was that the power to make local rules would be used only on rare occasions . . . ." 12 C. Wright & A. Miller, Federal Practice and Procedure 218 (1973).


298. "[M]any . . . sensitive matters[] have been thought the proper subject for local rules in many districts." C. Wright & A. Miller, supra note 296, at 220.

299. Prior to 1983, Federal Rule of Civil Procedure 83 read in part:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States.


The language of Federal Rule of Criminal Procedure 57 was similar.


303. This use of local court rules has been applauded by one commentator: "[L]ocal rules have been essential tools in implementing court policy in administrative matters." Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A.L. Rev. 213, 218 (1981).

The Court held that because the rule, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine . . . [the procedures for national rulemaking by the Supreme Court should be followed so] that basic procedural innovations [are] introduced only after mature consideration of informed opinion from all relevant quarters." \(^{305}\) In *Colgrove v. Battin*, \(^{306}\) the Court upheld a local court rule that limited the size of juries in civil cases to six people on the same basis: controlling the size of juries was a procedural rather than a substantive innovation \(^{307}\) because doing so would be unlikely to change the outcome of a case. \(^{308}\)

More recently, in *Frazier v. Heebe*, \(^{309}\) Chief Justice Rehnquist described the limitations on the lower courts' rulemaking powers: "the rule [must not] conflict[] with an Act of Congress . . . the rule [must not] conflict[] with the rules of procedure promulgated by [the Supreme] Court . . . the rule [must not be] constitutionally infirm . . . the subject matter governed by the rule [must be] within the power of a lower federal court to regulate." \(^{310}\) In PF 15's case, the question raised is whether the subject matter governed by the rule is within the power of a lower federal court to regulate.

### D. An Amended PF 15 - Valid as a Local Rule?

In *Klubock*, the district court, affirming the validity of PF 15 as a local court rule, interpreted it as affecting "a narrowly defined class of subpoenas." \(^{311}\) In the district court's view, the only subpoenas affected would be those served in violation of the attorney-client privilege as interpreted by the federal courts and those served in violation

\(^{305}\) Id. at 650.

\(^{306}\) 413 U.S. 149 (1973).

\(^{307}\) Id. at 164.

\(^{308}\) Steven Flanders, author of an article which argues that local court rulemaking is an essentially positive phenomenon, criticizes the *Colgrove* decision:

As a matter of law interpreting rule 83, the *Colgrove* decision now seems impossible to sustain. Surely the six-member jury is a "basic procedural innovation" at least of equal consequence as depositions in admiralty cases, discussed in *Miner v. Atlass* . . . *Colgrove* could only be valid if it is read as a shift away from the *Miner* standard that would permit innovation and experimentation within the local rulemaking power on a larger scale than the Court previously thought permissible.

Flanders, *supra* note 303, at 238.


\(^{310}\) Id. at 654 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist dissented in *Frazier* because he disagreed with the majority's position that the Supreme Court, exercising a supervisory power over the lower courts, could invalidate a local court rule solely because the Court thought it unwise or unjust.

\(^{311}\) *Klubock*, 639 F. Supp. at 120.
of substantive law developed under Federal Rule of Criminal Procedure 17(c).\textsuperscript{312} Members of the First Circuit Court of Appeals who affirmed PF 15's validity as a local court rule also assumed that the rule's provisions would be harmonized with existing case law on the scope of the attorney-client privilege and the breadth of the grand jury's powers.\textsuperscript{313} PF 15 was viewed as providing only "a minimal overview by an impartial observer."\textsuperscript{314}

In contrast, Chief Judge Campbell, in dissent in Klubock, assumed that the rule gave the district courts license to "impose substantive limitations of [their] own devising"\textsuperscript{315} on the power of federal grand juries to subpoena attorneys. These two opinions can in fact be reconciled with respect to the scope of the district courts' rulemaking power. The disagreement is over the content of PF 15 as it was promulgated.

A rule incorporating the standards proposed by the A.B.A. would accomplish what Chief Judge Campbell interpreted PF 15 as doing: it would strike a "new balance" between the government's access to information and a potential defendant's right to rely on a confidential relationship with his or her lawyer. It would do so by reversing the presumption of regularity attaching to the grand jury's process.

To accomplish this aim, a rule amended in accordance with the A.B.A. proposal would restrict the breadth of grand jury investigations in which attorneys were potential sources of information, challenging the sweeping language with which the Supreme Court has described the power of the grand jury.\textsuperscript{316} It would expand the attorney-client privilege, albeit in a qualified fashion, by making an attorney the source of last resort for the government, contradicting the instrumental view of the privilege adopted by the federal courts.\textsuperscript{317} The A.B.A. proposal "clearly involves the creation of new substantive privilege law of . . . significant consequence."\textsuperscript{318} The power given to

\textsuperscript{312} "[PF 15] does [not] create new substantive grounds for quashing subpoenas." \textit{Id.}

\textsuperscript{313} "Even if we accept the dissent's premise that PF 15 would, in some cases, limit a grand jury's subpoena power, this would not invalidate the rule. . . . [If] PF 15 does limit a grand jury's subpoena power, it does so for a reason sanctioned by the Supreme Court and this Circuit." \textit{Klubock,} 832 F.2d 649 at 658 n.22.

\textsuperscript{314} \textit{Id.} at 653.

\textsuperscript{315} \textit{Id.} at 661.

\textsuperscript{316} \textit{See, e.g.}, Blair v. United States, 250 U.S. 273 (1919): "[The witness] is not entitled to set limits to the investigation that the grand jury may conduct. . . . [The grand jury] is a grand . . . inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety . . . ." \textit{Id.} at 282.

\textsuperscript{317} \textit{See supra} notes 100-03 and accompanying text.

\textsuperscript{318} \textit{Klubock,} 832 F.2d 664 at 671.
district courts to develop their own rules of procedure is not a grant of
power to reshape substantive federal law as defined by the appellate
courts. In Chief Judge Campbell's words, "a special screening pro-
cedure [for attorney subpoenas] can [only] be properly established ... by an amendment to the federal criminal rules or by legislation." E. The Rationale for Reform

For several reasons, the A.B.A. resolution on attorney subpoenas
is an appropriate starting point for discussion of a solution to the at-
torney subpoena dispute. To a surprising degree, those on both sides
of the issue agree about the risk attorney subpoenas pose to the attor-
ney-client relationship and about appropriate limitations on the use of
these "investigative tools." In theory, the Department of Justice
Guidelines, like the A.B.A. proposal, impose a significant burden on
the government to prove "need and relevance" with respect to an attor-
ney subpoena before service occurs.

The principle difference in the positions taken by the government
and the A.B.A. is over who determines whether service of an attorney
subpoena is justified. The D.O.J. Guidelines retain responsibility for
that decision squarely with Department of Justice officials. The
A.B.A. resolution places with federal district court judges (or magis-
trates) the responsibility for deciding whether an attorney subpoena is
justified on the facts of a particular case. This is a role the judiciary
has generally declined to assume when asked to do so on the basis of
its supervisory power over the grand jury on the basis of Rule
179(c).

319. Steven Flanders, discussing the appropriate use of local court rules noted that
"[c]ourts should be especially meticulous in avoiding local rules that reverse an existing
burden or presumption. Several questionable local rules, that otherwise only define a
court's usual practice, are suspect on this ground." Flanders, supra note 303, at 275 (em-
phasis deleted).

It may also be noted that Professor Wright, in his discussion of proposed Federal Rule
of Evidence 501, which was never enacted, concluded that the rules of privilege would quite
likely be classified as "clearly substantive." 23 C. WRIGHT & K. GRAHAM, FEDERAL
PRACTICE AND PROCEDURE 682 (1980).

322. The A.B.A. resolution calls for "an in camera adversarial proceeding prior to
judicial approval for the subpoena being granted." 1988 A.B.A. Report, supra note 143, at
4, 15.
323. See supra notes 158-65 and accompanying text.
324. One commentator noted: "The broader the judicial sway under rule 17(c), the
more courts must substitute their views for the prosecutors', and the more likely they will
be called upon to do so. Judges generally have proven unwilling to undertake such a role." Wiener, supra note 3, at 122.
Yet there are compelling reasons for imposing oversight by a neutral party on the use of attorney subpoenas. Attorneys cannot be completely off limits as sources of information about their clients. If an attorney is directly implicated in a client's criminal activities or if an attorney is the only source for information that is essential to a grand jury investigation, that information should be accessible to the government. An unqualified, expanded attorney-client privilege is not an acceptable solution to the attorney-subpoena dispute.

Nor, given the adversarial character of litigation, can the Department of Justice effectively regulate use of attorney subpoenas. A prosecutor unsure of the precise nature of the information in a defense attorney's hands must draft a subpoena broadly or risk nonproduction of relevant evidence. Defense attorneys have proved to be sources of relevant information in certain types of cases, such as drug cases involving groups of suspects or tax evasion cases. It might be termed irresponsible for a prosecutor to neglect a possible source of relevant information in a criminal investigation. Finally, given the frequency of government motions to disqualify opposing counsel, it seems inescapable that prosecutors do not make it a high priority to preserve defense attorneys' relationships with their clients.

Judicial reluctance to define limits in the use of attorney subpoenas can be traced, at least in part, to United States Supreme Court decisions which describe the grand jury's powers in very expansive

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325. Members of the First Circuit Court of Appeals affirming PF 15 linked use of attorney subpoenas to the nature of the adversary process: "Last, but not necessarily least, is the potential for abuse that underlies the natural tendencies promoted by adversarial postures." Klubock, 832 F.2d 649 at 654.

326. See, e.g., In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir.) (en banc) (government sought fee information from counsel to establish existence of conspiracy), cert. denied, 475 U.S. 1108 (1986); In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984) (government sought fee information from counsel to establish existence of conspiracy); Osterhoudt v. United States, 722 F.2d 591 (9th Cir. 1983) (defendant being investigated as major distributor of marijuana and for income tax evasion).

327. See, e.g., United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (government brought motion to disqualify opposing counsel on grounds they would be called as witnesses in trial prosecuting their clients for income tax evasion); Matter of Klein, 776 F.2d 628 (7th Cir. 1985) (grand jury investigating, inter alia, possible income tax evasion charge); In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (grand jury investigating possible income tax violations of suspected drug dealer), withdrawn on other grounds, 697 F.2d 112 (4th Cir. 1982); In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) (grand jury investigating tax protestors).

328. Of the 1,103 defense attorneys who responded to Professor William Genego's survey of the criminal defense bar, 430, or 26% of the respondents, reported being the target of at least one disqualification motion. Genego, supra note 3, at 4, Table 1.
In *Klubock*, Chief Judge Campbell read them to preclude significant judicial control of attorney subpoenas in the absence of a valid statutory basis for such control. An amendment to the Federal Rules of Criminal Procedure or congressional legislation could limit the effect of these decisions.

However, the A.B.A. resolution should only be a starting point for discussion. It purports to strike a balance between the need for a grand jury with effective investigative powers and the need for "full protection of the attorney-client relationship from the threat posed by subpoenas directed to attorneys." It can be criticized for treating all attorney subpoenas as posing equally serious threats to the attorney-client relationship. In fact, a subpoena that "chills" the relationship between A and B is a much less serious intrusion than the subpoena that results in A's disqualification (or voluntary withdrawal) from her representation of B. If it is demonstrated (in a two-party proceeding) that a subpoena will not seriously impair an attorney-client relationship, probably the government's burden of proof in seeking judicial approval of that subpoena should be lessened accordingly.

In other cases, an appropriate resolution to a dispute over an attorney subpoena may be a compromise in which a prosecutor narrows his or her request for information or delays an attorney subpoena until the final stages of a grand jury investigation, when it can be really determined whether the information is necessary or merely cumulative. There is some evidence that compromise under judicial supervision has solved some attorney subpoena disputes.

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331. In 1988, Senator Paul Simon introduced as S. 2713 legislation addressing the attorney subpoena issue. *See Cong. Rec.* S11,438 (Aug. 10, 1988). The bill was never acted upon, nor has new legislation been introduced in the 101st Congress.
333. Hoffman, Kelston & Shaughnessy note a Massachusetts case in which an attorney was subpoenaed to appear before the grand jury, challenged the subpoena under Rule 17(c) and lost. He then appeared in the grand jury room and claimed the attorney-client privilege with respect to each item of evidence sought. Eventually, the judge rejected most of these claims of privilege and ordered the attorney to testify. However, the grand jury had proceeded sufficiently with its investigation that it no longer needed the attorney's evidence. Hoffman, Kelston & Shaughnessy, *supra* note 3, at 105.
334. See Hoffman, Kelston & Shaughnessy, *supra* note 3, at 105 (describing several cases after PF 15's enactment in which attorneys and federal prosecutors have reached a compromise concerning the information to be provided).
CONCLUSION

The government's increasing reliance on attorney subpoenas as "investigative tools" raises concerns in a legal system where compliance with the law depends on access to informed, effective legal advice. As long ago as 1947, the United States Supreme Court recognized that privacy is essential to the attorney's role in society:

In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, shift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within . . . our system of jurisprudence to promote justice and to protect their clients' interests.335

Attorney subpoenas pose a range of threats to the attorney-client relationship ranging from strain and disruption to complete destruction. Given the importance of the attorney's role in our legal system, the ability to subpoena an attorney should not rest unchecked with opposing counsel. A subpoena to an attorney demanding evidence damaging to his or her client should be the unusual exception to a general rule discouraging this form of discovery. Although the nature of the concerns raised by attorney subpoenas has been recognized by a number of federal courts,336 current federal practices and procedures do not sufficiently protect the attorney-client relationship.

PF 15 was an attempt to address this perceived deficiency. The attempt, although perhaps of symbolic value,337 is not a viable solution. The rule can only be truly effective if it is amended to require that the government assume the burden of demonstrating its need for and the relevance of the information it seeks from the subpoenaed attorney. Such a substantive change in the law of privilege is beyond the power of district court rulemaking. Action at the national level—legislation or an amendment to the Federal Rules of Criminal Procedure—is needed to ensure that attorney-client relationships are not sacrificed unnecessarily in the name of effective law enforcement.

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336. See supra notes 158-69 and accompanying text.
337. "PF 15 will make a difference. . . . It unquestionably has a symbolic importance." Gertner, supra note 71, at 44.