January 1987

Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical-Legal Tug of War

Paul Marshall Yoder

Follow this and additional works at: http://scholarship.law.campbell.edu/clr
Part of the Criminal Law Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
I. INTRODUCTION

The adversarial relationship is fundamental to our system of...
justice. One of the assurances of this adversarial system is a defendant’s right to effective assistance of counsel.\(^1\) In turn, the right to effective assistance of counsel relies in large part on an effective attorney-client relationship. In recent years, however, the relationship has come under increasing strain as prosecutors become more aggressive towards defense attorneys and their clients. Specifically, concern is mounting over grand jury subpoenas issued to defense attorneys representing targets\(^2\) under investigation.\(^3\) Defense attorneys claim that prosecutors may subpoena them to discourage zealous representation or to prevent them from representing certain clients,\(^4\) results which undermine the adversarial system of criminal justice.\(^5\) Because of these alleged abuses, some courts and com-

1. Powell v. Alabama, 287 U.S. 45, 68 (1932) (noting that “right to the aid of counsel is of . . . fundamental character”).

2. A grand jury target is defined in the United States Attorneys’ Manual as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” United States Attorneys’ Manual § 9-11.260 (1984).

Regarding grand jury targets, one commentator has noted:
A person in such circumstances needs legal counsel, to present exculpatory evidence to the prosecutors, to advise him on whether to invoke his fifth amendment privilege, to negotiate for immunity, to argue against indictment or to plea bargain . . . . In sum, counsel assists the client in defending against a possible indictment. To interfere with that defense infringes on important interests.


mentators have urged a prior judicial review of grand jury subpoenas before their issuance to defense attorneys representing targets. 6

The practice of issuing subpoenas to defense attorneys who represent grand jury targets has been attacked as infringing on both constitutional protections 7 and the attorney-client privilege. 8 In addition, some courts have used their supervisory powers to prevent abuse of the grand jury process, 9 and the Department of Justice has even promulgated its own internal guidelines to govern this type of subpoena. These approaches have not proved generally successful. Recently, grand jury subpoenas to defense attorneys have come under a new assault in the form of an ethical rule which requires prior judicial approval before the subpoena may be served on a defense attorney. 10

This Comment will first explore the problems associated with grand jury subpoenas to defense attorneys, and then move on to examine the role of the grand jury in the criminal justice system. The Comment will then survey previous approaches to the problem and their deficiencies, following which it will focus on the new ethical rule and its ramifications for the grand jury process. Finally, it will suggest alternatives to the current approaches.

II. THE PROBLEM OF GRAND JURY SUBPOENAS TO DEFENSE ATTORNEYS

The central concern in grand jury subpoenas issued to defense attorneys involves the chilling effect the subpoena may have on the attorney-client relationship. In most jurisdictions, judicial approval

---


7. See infra notes 62-80 and accompanying text.

8. See infra notes 99-110 and accompanying text.

9. See infra notes 130-50 and accompanying text.

is not required prior to issuing grand jury subpoenas to defense attorneys. The present practice under the Federal Rules of Criminal Procedure is that "[t]he 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." Consequently, a district attorney may issue subpoenas unfettered by any judicial review whatsoever.

Calling a lawyer before a grand jury to testify against his client can have numerous ramifications. At worse, the lawyer may give incriminating information to the prosecutor, converting him into to the government’s star witness at trial. At best, the attorney must reveal to the client that he will be appearing, testifying, or producing documents for the grand jury, which in itself may have a chilling effect on the attorney-client relationship.

This gives district attorneys a potentially dangerous weapon

11. Currently, only the Third Circuit, In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973), the Commonwealth of Massachusetts, see supra note 10, and the District Court for the District of Massachusetts, see infra note 205 and accompanying text, require a prior showing before serving grand jury subpoenas.

Although federal prosecutors are not alone in their use of grand jury subpoenas, state prosecutors seldom issue subpoenas to attorneys because of the infrequent use of grand juries in most state systems. Caplow, The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel, 51 BROOKLYN L. REV. 769, 771 n.9. In addition, trial subpoenas are also rarely issued to defense attorneys because of the “obvious interference” with the attorney-client relationship and almost certain attorney disqualification. Id. at 773, n.18.

12. FED. R. CRIM. P. 17(a).

13. “The prosecutor has a block of blank forms in his desk and he decides who is going to be called and when . . . .” Riley, New Rule Set on Lawyer Subpoenas, NAT'L L.J., Nov. 4, 1985, at 42. (quoting Edgar J. Bellefontaine, reporter for the Supreme Judicial Court of Massachusetts). The Justice Department does require compliance with its own internal procedures but these self-imposed restraints have done little to quell the criticism of the practice of issuing subpoenas to attorneys representing grand jury targets. See infra notes 163-71 and accompanying text.

14. It is well-settled that an attorney-witness cannot assert his client’s fifth amendment privilege against self-incrimination. See Fisher v. United States, 425 U.S. 391 (1976). Furthermore, “[i]nformation that incriminates may take any form; depending upon what other information the authorities already know, the most trivial detail may be all that is necessary to decide the question of whether to prosecute. Thus even unprivileged and apparently innocuous information can help trigger an indictment.” Peirce & Colamarino, supra note 3, at 834.

with which to disqualify defense counsel, even if that counsel has already consulted extensively with the client about the subject of the grand jury investigation. Disqualification may occur if there is the possibility that the attorney subpoenaed will be called to testify about information potentially prejudicial to his clients. One court has noted:

[T]he unbridled use of the subpoena potentially allows the Government, in this and future cases, to decide unilaterally that an attorney will not represent his client. Such a power of disqualification can undermine and debilitate our legal system by subjecting the criminal defense bar to the subservience of a governmental agent.

This disqualification power may allow a prosecutor to rid himself of an aggressive defense attorney who may then be replaced by a less vigorous or less experienced opponent.

   (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
      (1) the testimony relates to an uncontested issue;
      (2) the testimony relates to the nature and value of legal services rendered in the case; or
      (3) disqualification of the lawyer would work substantial hardship on the client.

Model Code of Professional Responsibility DR 5-102(B) (1980) provides:
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.

See also In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968 (2d Cir. 1985), vacated, 781 F.2d 238 (2d Cir.) (en banc), cert. denied, 106 S. Ct. 1515 (1986) (“[B]y calling an attorney as a witness against his client, the Government is surely setting the stage for the attorney’s ultimate disqualification.” Id. at 973). 17. Doe, 759 F.2d at 975. See also In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976) where the court stated:
[We are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client, especially where the government does not have good grounds for belief that the lawyer possesses unprivileged, relevant evidence that cannot be obtained elsewhere. . . . The practice permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to the suspect’s being denied his choice of counsel by disqualification.

Id. at 945-46.

18. "Where counsel is inexperienced, inept or compliant, the prosecutor would have little incentive to ‘conflict’ him or her out of the case by issuing a
Even if the subpoena does not require withdrawal of counsel, the effect on the attorney-client relationship can be just as chilling. Consider the following scenario. The attorney holds information which is incriminating, embarrassing, or harmful to his client. The lawyer has acquired this information on the basis of the confidential relationship between himself and the client. The prosecutor serves a grand jury subpoena on the defense attorney, requesting him to testify or produce records for the proceeding. The grand jury proceedings, being secret, fuel the client's suspicions about his attorney's motives for appearing before it. Has his attorney struck a deal with the prosecutor without his knowledge? The attorney may make a motion to quash the subpoena on a belief that it infringes on the attorney-client privilege, but if the motion is denied he faces a possible contempt sanction if he does not comply with the subpoena. Furthermore, the attorney is required to actually enter the grand jury room to assert the attorney-client privilege, at which time he may do so only on an item-by-item basis. The mere presence of the client's attorney in the grand jury room, even to assert valid privileges, can foster "doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests..." In many jurisdictions, if the attorney is ordered to testify, the only way to appeal the order is to disobey it, be held in contempt and then appeal the contempt judgment. "The client

subpoena. Where counsel is particularly aggressive and effective, however, the incentive would be great." Rudolf & Maher, supra note 3, at 16. See also Frank, supra note 3, at 32-33 and infra notes 40-42 and accompanying text.

19. FED. R. CRIM. P. 6(e). See infra note 118.

20. Weinstein, supra note 3, at 96. The "erosion of trust is particularly destructive when the attorney has been responsible for the client's legal matters for many years." Peirce & Colamarino, supra note 3, at 857.

21. Such a motion would come under Rule 17(c) which allows the quashing of a subpoena if compliance would be "unreasonable or oppressive." FED. R. CRIM. P. 17(c). See infra note 194.


24. See In re Oberkoeter, 612 F.2d 15 (1st Cir. 1980); In re Grand Jury Proceedings (Vargas), 723 F.2d 1461 (10th Cir. 1983); and In re Sealed Case, 655 F.2d 1298 (D.C. Cir. 1981). Other circuits follow the rule in Perlman v. United States, 247 U.S. 7 (1918) which holds that when a subpoena is issued to a third party, such as an attorney, the party who claims that the production of the subpoenaed documents would violate his right against self-incrimination may make an imme-
may believe that the trust he vested in his attorney was misplaced. The lesson of such an experience for the client is to keep potentially incriminating information out of his attorney’s knowledge. But without such knowledge, an attorney may not be able to mount an effective defense for his client.

The client is not alone in his bewildered state, for the subpoenaed attorney finds that he faces equally pressing problems. The defense attorney finds himself in the throes of an ethical/legal tug of war because when he receives the grand jury subpoena, he must comply with the subpoena or likely be found in contempt. On the other hand, an attorney, under the Model Code of Professional Responsibility, shall not knowingly:

1. Reveal a confidence or secret of his client.
2. Use a confidence or secret of his client to the disadvantage of the client.
3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Disciplinary Rule 4-101(C)(2) provides some relief to the attorney, since the attorney cannot be expected to risk a contempt sanction. Even in circuits which permit an appeal from an order compelling the attorney to testify without requiring a contempt judgment against him, the district court may still choose to impose the contempt sanction if it desires. See In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) (attorneys immediately held in contempt for refusal to obey subpoenas ordering production of records relating to clients’ fee information and identities); and In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983) (district court found attorney in contempt for failing to disclose the name of his client).


26. “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 or of the court for the district in which it issued if it was issued by a United States magistrate.” Fed. R. Crim. P. 17(g).

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1982). Under DR 4-101(A) “confidence” refers to information protected by the attorney-client privilege and “secret” refers to information outside the privilege that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” The Model Rules expand secrets to include all “information relating to representation of a client” regardless of whether it is privileged, regardless of whether the client asked for it to be kept in confidence, and regardless of whether revealing it might harm or embarrass the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(2) comment (1983).
torney by allowing the attorney to reveal a "secret" or "confidence" if required by law or court order. The problem for the attorney then becomes deciding the point at which the law requires the "secret" or "confidence" to be revealed.

Is it enough for the attorney personally to make this decision or must he first litigate the arguments against disclosure? If litigation is required, which of the various arguments against disclosure need be made and how far must the litigation be pursued? After the lower court has ordered disclosure, must the lawyer go into contempt to obtain an appeal prior to disclosure of arguably privileged information? Further, if the client wants to preserve secrecy to the maximum extent possible, but is unable to afford the cost of such litigation, does the Disciplinary Rule require the attorney to commit his own resources to litigate such issues? 28

In the absence of a court order or requirement of law, the Model Code 29 and Model Rules 30 forbid voluntary disclosure without client consent and would probably not permit it when a prosecutor requested information from the defense attorney that might be used in criminal proceedings against his client. 31 An attorney may voluntarily disclose information only with the client's full knowledge and consent. The attorney may also have a conflict of interest in advising the client about whether to give this consent, since he would avoid a contempt citation by having the client do so. As the First Circuit stated in In re Grand Jury Matters: 32 "[T]he lawyers' interest lies in avoiding potential contempt sanctions by complying with the subpoenas . . . . By contrast, the client's interest in lessening the likelihood of the indictment . . . would require the lawyer to do his utmost, including incurring contempt citations to resist the subpoena." 33
The net effect of the grand jury subpoena to a defense attorney representing a target is that it chills the attorney-client relationship. That the government has simply issued a subpoena on the target's attorney may be enough to chill the relationship; however, the chilling result caused by a grand jury subpoena to a target's attorney does not end with an extant attorney-client relationship—the very fact that an attorney must reveal something as simple as the existence of an attorney-client relationship before a grand jury may dissuade some persons from even seeking legal advice.

Data collected by Professor William J. Genego of the University of Southern California Law Center further demonstrates the extent of the problem. Professor Genego surveyed members of the National Association of Criminal Defense Attorneys in May and June of 1985. The results revealed that since 1980 the use of certain prosecutorial practices aimed at defense attorneys has dramatically increased. Fourteen percent of the respondents reported they had decided not to accept a specific criminal case or cases due to these prosecutorial procedures. Forty-six percent reported that they had made changes in their criminal defense practice because of increased use of various prosecutorial methods. The attorneys were also less open in advising their clients, fearing that the advice might be used by the government if the client later decided to cooperate with the prosecutor. Finally, the lawyers

34. Rudolf & Maher, supra note 3, at 16.
35. See In re Terkelalou, 256 F. Supp. 683, 684 (S.D.N.Y. 1966) (responding to a motion to compel an attorney to testify before the grand jury, court noted “it bears emphasis that while the witness before us is a lawyer, the crucial interests at stake belong to the whole community”).
36. See In re Grand Jury Subpoena Duces Tecum (Shargel), 742 F.2d 61, 63 (2d Cir. 1984) (“We would be less than candid not to concede that the lack of privilege against disclosure of the fact of an attorney-client relationship may discourage some persons from seeking legal advice at all.”).
38. Professor Genego's research indicates that grand jury subpoenas to defense lawyers increased from four percent in 1974 or before to sixty-eight percent in the years 1983-85. Id. at 4.
40. Id. at 5. The “data indicate[s] that defense lawyers are leery of taking notorious clients or don’t use their strongest defense for fear of being subpoenaed or putting their clients—and themselves—at risk.” Frank, Attorney Subpoenas, 72 A.B.A. J., March 1, 1986, at 32.
41. “Some defense lawyers say they are harassed with disqualification motions, confidential informants at meetings, and attempts to ‘entrap’ them through
most likely to be served with grand jury subpoenas were those who had been in practice ten years or more, had won many cases, and earned the most legal fees. Professor Genego states:

As government prosecutors face numbers of well-to-do defendants represented by aggressive and skilled attorneys, prosecutors may well be responding by employing tactics to disarm the adversary. An obvious target is the defendant's most powerful weapon—the attorney in charge of the defense.

... . . .

The question of whether the government intentionally has adopted a policy of using the practices identified to discourage zealous advocacy by criminal defense attorneys is, however, beside the point. What is important is that the practices are in fact used, their use is widespread, and they have already had an effect on the professional behavior of criminal defense attorneys.42

The practice of issuing subpoenas without prior judicial approval can seriously undermine the adversarial nature of criminal proceedings. When a prosecutor is able to discourage or disqualify defense attorneys through the use of a subpoena issued with no prior review, he has gained a tremendous advantage that may prove difficult to overcome.

III. THE ROLE OF THE GRAND JURY

The origin of the grand jury dates from at least 1166," and the fifth amendment mandates its very existence.44 The grand jury serves a dual function. It must first be able to inquire into crimes and, if warranted by the evidence, issue indictments.45 The second and equally important function is to protect the accused from unfounded accusations. This dual function has been likened to the "‘shield and the sword’ of the criminal justice process"46 and com-

bogus 'clients' who are government agents . . . ." Frank, supra note 3, at 32.

42. Genego, supra note 3, at 40-41.


44. The pertinent section of the fifth amendment provides that no person "shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V.

45. 1 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 189, at 414 (12th ed. 1974).

46. W. LAFAYE & J. ISRAEL, supra note 43, § 8.1, at 346. "Its responsibilities . . . include both the determination whether there is probable cause to believe a
missions the grand jury as a unique entity, clothed with considera-
ble independence—a captive of neither the executive nor judicial
branches.46

The Supreme Court on numerous occasions has emphasized
the importance of the grand jury’s power to compel evidence from
witnesses, as well as a citizen’s duty to testify when called.49 In
Branzburg v. Hayes,50 a reporter sought protection under the first
amendment to avoid testifying about his sources before a grand
jury. The Court declined to establish such a privilege, stating: “Al-
though the powers of the grand jury are subject to the supervision
of a judge, the longstanding principle that ‘the public . . . has a
right to every man’s evidence,’ except for those persons protected
by a constitutional, common-law, or statutory privilege, . . . is par-
ticularly applicable to grand jury proceedings.”51

This breadth of power is indispensable, for the grand jury
must be able to investigate alleged wrongdoing on mere suspicin,
follow up on tips and rumors, and examine witnesses.52 These in-
vestigations must be free from technical rules that could be used to
delay and lengthen the proceedings.53 In this vein, the Supreme
Court has held that hearsay is admissible in the grand jury room,54
that the exclusionary rule does not apply to grand jury proceed-
ings,55 and has further indicated that a grand jury target is not
entitled to the assistance of counsel.56

crime has been committed and the protection of citizens against unfounded crim-
Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972)).


48. United States v. Chanen, 549 F.2d 1306, 1312-13 (9th Cir.), cert. denied,

49. “The grand jury is a grand inquest, a body with powers of investigation
and inquisition the scope of whose powers of investigation and inquiries is not to


51. Id. at 688 (citations omitted). “Indeed, no aspect of grand jury power is
more frequently extolled by the courts, particularly in cases rejecting challenges
to subpoenas, than its right to compel the testimony of any person, subject only
to ‘constitutional, common law or statutory privilege.’” W. LAFAVE & J. ISRAEL,
supra note 43, § 8.6, at 369.

52. Wood v. Georgia, 370 U.S. 375, 392 (1962); United States v. Stone, 429
F.2d 138, 140 (2d Cir. 1970).


Although theoretically the grand jury is not a captive of either the executive or judicial branches, critics have assailed grand jury subpoenas as largely instrumentalities of the prosecutor. A prosecutor may issue grand jury subpoenas without any judicial check. In response to this unchecked power of the prosecutor, there has been a move towards requiring judicial review before issuing subpoenas to defense attorneys who represent grand jury targets. The requirement of prior judicial review to protect the attorney-client interests at stake has found its source in several different theories. Specifically, prior judicial review for grand jury subpoenas to defense attorneys has been suggested under a constitutional approach, an attorney-client privilege approach and a supervisory powers of the court approach. As noted earlier, concern about attorney subpoenas has even prompted the Justice Department to issue its own internal reviewing guidelines governing the issuance of these instruments. Because all approaches have proved largely unsatisfactory, judicial review of attorney subpoenas has most recently become the focus of an ethical rule. After an overview of previous attempts to regulate the practice of issuing subpoenas to attorneys representing grand jury targets, this Comment will focus on the new ethical rule.

IV. ATTEMPTS TO REMEDY THE PROBLEM

A. The Constitutional Approach

The constitutional interests at stake in a subpoena issued to an attorney representing a grand jury target arise from the fifth and sixth amendments. The Supreme Court has recognized a constitutional right to counsel at certain pretrial stages under both of these amendments. Under the sixth amendment the right to counsel exists wherever necessary to assure a meaningful defense. Under the sixth as well as the fifth amendment, an accused has the right to effective assistance of counsel.

57. See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85, 90 (3d Cir. 1973); United States v. Mara, 410 U.S. 19, 23 (1973) (noting further that "it is ... common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive").
1. **Sixth Amendment Concerns**

The Supreme Court has stated that sixth amendment rights do not attach until the commencement of judicial proceedings against a defendant.\(^6^2\) Grand jury hearings are not among those proceedings where a target has the right to counsel since they are investigatory in nature;\(^6^3\) however, the Supreme Court has recently reiterated:

> [T]he assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

. . . .

The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek this assistance. We have . . . made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.\(^6^4\)

---

62. “[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—‘whether by way of formal charge, preliminary hearing, indictment, information or arraignment.’” Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)). But see United States v. Gouveia, 104 S. Ct. 2292, 2301 (1984) (Stevens, J., concurring) where Justice Stevens found that this statement “does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings . . . .” In United States v. Mandujano, 425 U.S. 564 (1976), a plurality of the court refused to hold that a person has the right to counsel in the grand jury room. Lower courts have held from this decision that the sixth amendment does not attach at any point in grand jury representation by an attorney. See, e.g., In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 244 (2d Cir.) (en banc), cert. denied, 106 S. Ct. 1515 (1986).


In In re Grand Jury Subpoena Served Upon Doe, the Second Circuit initially found sixth amendment rights sufficiently pressing to require a preliminary showing of need and relevance by the government before issuing a subpoena to the target's attorney. The subpoena duces tecum requested fee records and records of property transfers between the attorney and his client to enable the government to determine if the target had arranged to pay the attorneys' fees for members of his organization. The court quashed the subpoena, finding that the defendant sought to preserve his right to counsel in the event he was indicted. The court found this right would be rendered meaningless if it did not attach during the grand jury stage since the client's choice of counsel might be denied if his attorney turned over the records, testified, and was then subsequently disqualified. The Second Circuit sitting en banc vacated the judgment, finding that the target's concern raised potential sixth amendment rights and that there was no guarantee that counsel would have to withdraw, since there was no certainty defense counsel would even be called and disqualified under DR 5-102(B).

65. 759 F.2d 968, vacated, 781 F.2d 238 (2d Cir.) (en banc), cert. denied, 106 S. Ct. 1515 (1986).

66. The subpoenas requested:

[A]ny and all records of fees, monies, property or other things of value received, accepted, transferred or held by [the attorney] or by any associate of [the attorney] on his behalf, from on account of, or on behalf of [the target]. These records are to include, but not be limited to, records of fees, monies, property or other things of value received, accepted transferred to or held by the [attorney] or by any associate of the [attorney] on his behalf in connection with [the criminal proceedings].

Doe, 781 F.2d at 242.

67. Doe, 759 F.2d at 972-73. ("[B]y calling an attorney as witness against his client, the Government is surely setting the stage for the attorney's ultimate disqualification." Id. at 973.) See also Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) where the Third Circuit found a violation of the effective assistance of counsel where a defense attorney stipulated to facts that were harmful to the defendant's case, yet remained as counsel. "The framers of the [sixth] amendment did not propose it to assure an individual counsel a right to testify against his own client and still participate in the case." Id. at 138. But cf. Davis v. Stamler, 650 F.2d 477, 479 (3d Cir. 1981) ("Although the sixth amendment guarantees criminal defendants an absolute right to the assistance of counsel, it does not guarantee them an absolute right to counsel of their choice.").

68. 781 F.2d 238.

69. Id. at 244-45. "The appropriate time to balance the interests of the government and [the target's] right to counsel is at the pretrial stage, not at the grand jury stage." Id. at 243.
Any holding that would extend the sixth amendment right to counsel to grand jury proceedings and give attorneys an active role in the proceedings would radically alter the grand jury process. As prosecutors become more aggressive, however, the investigatory character of the grand jury changes and it becomes more adversarial in nature. If a prosecutor can unilaterally control the choice of counsel in an arbitrary fashion, then according to the Supreme Court’s words in *Moulton*, sixth amendment rights would be implicated. As noted by Justice Brennan in *United States v. Mandujano*, the Supreme Court has never squarely faced the issue of whether a grand jury target has a right to counsel. Justice Brennan has also found that a “putative defendant” summoned to testify faces the same prosecutorial forces and needs an attorney just as badly as a defendant after indictment.

2. Fifth Amendment Concerns

The fifth amendment due process concerns of issuing grand jury subpoenas to attorneys who represent targets have also centered on the accused’s right to the effective assistance of counsel. Some courts have indicated that the fifth amendment right is essentially the same as the sixth amendment right, but one jurist has pointed out that the fifth amendment may come into play at an earlier stage than the sixth amendment. Therefore, if a grand jury target is

arbitrarily deprived of the right to counsel of his own choice, such that he will be unfairly deprived of the right to the effective assis-

---

70. See Note, *supra* note 59, at 1147.
71. See *supra* text at note 64.
73. *Id.* at 603 (Brennan, J., concurring). The Court did state in dictum in *In re Groban*, 352 U.S. 330 (1957) that a witness “before a grand jury cannot insist as a matter of constitutional right on being represented by his counsel.” *Id.* at 333.
77. *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (Cardomone, J., dissenting). Due process rights “obey no timetable, they neither attach nor cease to apply at any particular moment.” *Id.* at 258.
tance of counsel at the trial itself, the due process clause has been violated, regardless of whether or not an indictment has been returned against the target.\textsuperscript{76}

This argument was also advanced in Doe. To prevent an arbitrary loss of counsel, the argument continues, the government should make a preliminary showing that the government’s need for the information outweighs the loss of counsel.\textsuperscript{79} In this scenario, the fifth amendment would affect the outcome only where the sixth amendment has not yet attached. When the government arbitrarily issues a subpoena to disqualify counsel pursuant to DR 5-102(B), due process will likely have been violated.\textsuperscript{80}

Supreme Court decisions discussing the due process right to counsel, however, have dealt with the actual parties in the litiga-

\textsuperscript{78} Id. \textit{See also} Powell v. Alabama, 287 U.S. 45 (1932) where the Supreme Court found that the right to counsel means a “defendant should be afforded a fair opportunity to secure counsel of his own choice.” \textit{Id.} at 53. Furthermore, due process includes the “right to aid of counsel when desired and provided by the party asserting the right.” \textit{Id.} at 68. In Chandler v. Fretag, 348 U.S. 3 (1954), the Court found that the right of a defendant to be heard through his own counsel is unqualified and that a defendant “must be given a reasonable opportunity to employ and consult with counsel . . . .” \textit{Id.} at 10.

\textsuperscript{79} Id. Where an attorney has represented a particular client for a number of years, a deprivation of counsel could be regarded as a property interest which could not be denied without due process and the balancing test of Matthews v. Eldridge, 425 U.S. 319 (1976) (balance private interest, risk of erroneous deprivation and probable value of additional safeguards against the government’s interest and the burdens the additional safeguards entail). The Second Circuit indicated a similar line of reasoning in \textit{In re Taylor}, 567 F.2d 1183 (2d Cir. 1977) where the court stated: “To impose counsel upon a witness against his will or arbitrarily to forbid him from retaining a particular attorney unnecessarily obstructs his ability to enter private contractual arrangements for representation and would deprive him of his constitutional right to due process of law.” \textit{Id.} at 1186 n.1.

\textsuperscript{80} See Doe, 781 F.2d at 261 (Cardomone, J., dissenting). The Seventh Circuit stated in \textit{In the Matter of Klein}, 776 F.2d 628 (7th Cir. 1985):

An effort by the Government to strip a suspect of a lawyer with unique knowledge or abilities would present constitutional difficulties; the Due Process Clause of the Fifth Amendment might prohibit an effort by the Government to impose on the defendant the expense of paying multiple lawyers to prepare for trial in order to have a single defense. \textit{Id.} at 633. \textit{See also} United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982) (“[a] defendant’s choice of counsel is not to be dealt with lightly or arbitrarily”), \textit{rev’d on other grounds}, 465 U.S. 259 (1984). However, the majority in Doe disagreed that the fifth amendment attaches earlier than the sixth amendment and further found that the fifth amendment neither expanded or contracted existing sixth amendment rights. 781 F.2d at 246.
Mere witnesses are not entitled to fair hearing requirements. Yet the grand jury target and his attorney must be considered more than a mere witness; the target himself is, by definition, a "putative defendant." Nevertheless, the target is not yet a party to the litigation, and under current Supreme Court decisions is not entitled to the rights attendant to a party.

Whichever constitutional right might be implicated by a grand jury subpoena to a defense attorney, providing a blanket right to counsel at the grand jury stage would significantly impair the grand jury's investigatory function. Under current law the target is not allowed to cross-examine witnesses, make objections, or question witnesses favorable to his position. Any expansion of the sixth amendment to cover grand jury proceedings should only apply in the narrowest of circumstances; but where an ongoing attorney-client relationship exists and the client is a target of the grand jury, arguably the constitutional right to effective assistance of counsel might be expanded to include the target, especially where later trial rights might be adversely affected.

B. The Attorney-Client Privilege

Another approach for remedying the problem of grand jury subpoenas to attorneys representing targets has come through the attorney-client privilege. The privilege ensures that information passed in the relationship will remain confidential to "encourage full and frank communication between attorneys and their clients and thereby promote a broader public interest in the observance of law and the administration of justice." The privilege protects communications made in confidence which concern legal advice from client to attorney. Confidentiality is essential for the attor-
ney to properly perform his role; however, it is not only confidentiality but prior assurance of confidentiality to the client that is necessary for an effective attorney-client relationship.

The privilege does not protect all communications and it is construed strictly. In order for the privilege to attach, either the attorney or the client must demonstrate that:

(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 a member of the 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 stranger (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.

The privilege does not cover certain areas that are considered non-confidential or noncommunicative in nature. For instance, the identity of the client, the fee arrangement, the location of the client, and nonlegal advice are all outside the scope of the

90. The privilege does not apply where communications are made for the intent of committing a crime. In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028 (5th Cir. 1982). The privilege may also be waived where a voluntary disclosure is made by the client to a third party about communications made to the attorney. The waiver applies not only to the specific communication but may also apply to all communications on the subject. See Weil v. Investment Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981).
91. See, e.g., United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984); In re Grand Jury Investigation No. 82-2-35, 723 F.2d 447, 451 (6th Cir. 1983).
92. See, e.g., In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 247 (2d Cir. 1985) (en banc), cert. denied, 106 S. Ct 1515 (1986); In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984); In re Witness Before Special March 1980 Grand Jury, 729 F.2d 489, 491 (7th Cir. 1984); In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983); In re Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); In re Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352 (11th Cir. 1982); In re Walsh, 623 F.2d 489, 494 (7th Cir.), cert. denied, Walsh v. United States, 449 U.S. 994 (1980).
GRAND JURY SUBPOENAS

privilege.

Even these nonprivileged areas, however, are subject to exceptions. In the area of client identity and fee arrangements, the breadth of the exception depends on whether the court subscribes to a "legal advice," "last link," or communication rationale. 95 Under the "legal advice" theory, the communication is privileged when a strong possibility exists that disclosure would implicate the client in the very matter for which he sought legal advice in the first place. 96 The "last link" exception provides that the fee information or identity of the client is privileged if the information would provide the "last link" in a chain of incriminating evidence likely to result in the client's indictment. 97 The communication rationale classifies information about fees or client identity as privileged, if disclosure would connect the client to an already privileged exchange. 98

95. The exceptions grew out of the Ninth Circuit's decision in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) where an attorney mailed payment of a taxpayer's back taxes which the taxpayer had underpaid. The IRS subpoenaed the attorney and demanded to know the taxpayer's identity and the attorney claimed the attorney-client privilege. The court created an exception for the client's identity since the disclosure was for the sole purpose of demonstrating an acknowledgement of guilt. Id. at 632-33. For an extensive analysis of the exceptions, see Note, Benefactor Payments Before the Grand Jury: The Legal Advice and Incrimination Theories of the Attorney-Client Privilege, 6 CARDOZO L. REV. 537 (1985). See also Developments in the Law—Privileged Communications, 95 HARV. L. REV. 1450, 1514-24 (1985); Comment, The Attorney-Client Privilege and the Federal Grand Jury: Client's Identity and Fee Arrangements, 13 AM. J. CRIM. L. 67 (1985).

96. In re Grand Jury Subpoena (Harvey), 676 F.2d 1005, 1013 (4th Cir.), vacated when target fled, 697 F.2d 112 (1982) (en banc); In re Grand Jury Proceedings (Fine), 641 F.2d 199, 204 (5th Cir. 1981); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).

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

98. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); In re Subpoena Duces Tecum (Shargel), 742 F.2d 61, 64 (2d Cir. 1984) (stating that the information protected where it would "amount to the prejudicial disclosure of a confidential communication"). Of the three theories, the confidential communications exception is the most commonly accepted. See Comment, supra note 95, at 75. All three rationales have been criticized: The "last link" and communication exception because they do not consider the client's intent about the exchange, and the "legal advice" exception because it may protect a client's effort to violate the law. See Developments, supra note 95, at 1523-24.
In *In re Special Grand Jury No. 81-1 (Harvey)*, the Fourth Circuit found that under the legal advice exception, the government should make a preliminary showing of relevance and need before subpoenaing an attorney for a grand jury target. This showing would allow the court to determine the nature of the documents sought and thereby determine whether disclosure "would implicate that client in the very criminal act for which legal advice was sought." Requiring a preliminary showing by the government is a significant departure from the standard method of invoking the attorney-client privilege, since the burden of establishing the existence of the privilege lies with the party asserting it, and therefore, in the case of subpoenaed attorneys, requires them to enter the grand jury room in order to do so. The decision in *Harvey* was vacated when the target became a fugitive, and subsequent decisions have steered away from requiring a preliminary showing under the attorney-client privilege.

Client identity and fee arrangements are important in the investigation of certain crimes. For example, the amount of fees paid by the client to the attorney may establish proof of "substantial income" in a continuing criminal enterprise, or establish that the client's expenditures exceed his reported income in a criminal tax investigation. Identity information may be used to show a conspiracy where an anonymous client or donor pays the attorney's fee for another person.

Yet clients with legitimate pursuits benefit from the protection of identity or fee arrangement information as well. *United States v. Liebman* involved a group of attorneys who specialized in tax law and evaluated real estate partnerships for clients who

---

99. 676 F.2d 1005, 1013 (4th Cir.), vacated when subject fled, 697 F.2d 112 (1982).
100. *Id.* at 1011.
101. *Id.* at 1009 (quoting *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977)).
103. See supra note 22.
104. 697 F.2d 112 (4th Cir. 1982).
105. See *In the Matter of Klein*, 776 F.2d 628 (7th Cir. 1985); *In re Schofield*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983); *In re Osterhoudt*, 722 F.2d 591, 594-95 (9th Cir. 1983); *In re Freeman*, 708 F.2d 1571, 1575 (11th Cir. 1983).
106. *Developments*, supra note 95, at 1522.
107. *Id.*
108. 742 F.2d 807 (3d Cir. 1984).
wanted investments for tax purposes. The attorneys charged fees for the service only if clients actually invested. When the Internal Revenue Service discovered that some investors were deducting the fees paid to the attorneys, it sought by summons to obtain the names of others who might have done the same. The Third Circuit reversed the lower court\textsuperscript{109} and held the information was protected under the communication rationale exception.\textsuperscript{110}

The current scope of the attorney-client privilege does not solve the problem of attorney subpoenas. It cannot be asserted until after an appearance before the grand jury.\textsuperscript{111} It is also easily waived and may be unwittingly done so by the client.\textsuperscript{112} Since the privilege belongs to the client, the grand jury can compel an attorney to testify about confidential information in the event of a client’s waiver.\textsuperscript{113} The current privilege makes it difficult for the attorney to determine what information might incriminate his client, because whether the information is incriminatory turns on what information the prosecutor and grand jury already hold. Further, what exactly is included in the privilege varies from jurisdiction to jurisdiction.\textsuperscript{114} Since the attorney must assert the privilege before

\begin{itemize}
  \item \textsuperscript{109} 569 F. Supp. 761 (D.N.J. 1983).
  \item \textsuperscript{110} 742 F.2d at 810. The work product doctrine has also been used at the grand jury level even though it is structured more specifically towards trial preparation. See Hickman v. Taylor, 329 U.S. 495 (1947); \textit{In re} Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973); \textit{In re} Terkeltoob, 256 F. Supp. 683 (S.D.N.Y. 1966); \textit{but see} United States v. McKay, 372 F.2d 174 (5th Cir. 1967); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), \textit{cert. denied}, 352 U.S. 833 (1956). The doctrine prevents discovery of material prepared in anticipation of litigation and is codified in one form in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The opposing party can obtain the information requested if it can demonstrate substantial need and an inability to obtain the information from other sources. The courts, however, differ greatly on the definition of “in anticipation of litigation.” Peirce & Colamarino, \textit{supra} note 3, at 844-45.
  \item \textsuperscript{111} Peirce & Colamarino, \textit{supra} note 3, at 848; \textit{see also} cases cited at \textit{supra} note 22. Many courts have allowed an in camera inspection of the information where a dispute arises as to whether the information is privileged. The party asserting the privilege is then given the opportunity to explain how the subpoenaed material fits within the privilege. The court may then issue a protective order over the privileged portions before turning the materials over to the grand jury. \textit{See In re} Grand Jury Proceedings (Schofield), 721 F.2d 1221, 1223 (9th Cir. 1983); \textit{In re} Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982).
  \item \textsuperscript{112} \textit{See In re} Grand Jury Subpoena (Horowitz), 482 F.2d 72 (2d Cir.), \textit{cert. denied}, 414 U.S. 867 (1973).
  \item \textsuperscript{113} \textit{In re} Grand Jury Proceedings, 73 F.R.D. 647, 652 (M.D. Fla. 1977).
  \item \textsuperscript{114} Peirce & Colamarino, \textit{supra} note 3, at 849.
\end{itemize}
the grand jury, the client still remains uncertain about his attorney's loyalty. Expanding the privilege to cover fee arrangements and identity information, however, would incur the danger of an absolute bar to the information, effectively denying the government potentially valuable evidence no matter how great its need.

C. The Supervisory Powers Approach

As another approach to the subpoena problem, a few courts have exercised their supervisory powers over the grand jury by requiring that prosecutors obtain judicial approval before issuing subpoenas to defense attorneys representing grand jury targets. This approach comes about, in part, because although courts recognize that a party seeking to demonstrate an abuse of the subpoena process may use discovery, Federal Rule of Criminal Procedure 6(e) mandates absolute secrecy in matters before the grand jury, making it difficult for the defense attorney to determine what information prosecutors hold against his client. In addition, the approach recognizes the various interests at stake in attorney subpoenas and does not require an overly expansive reading of either constitutional or attorney-client privilege protections since it is an outgrowth of both. The Supreme Court first formulated its supervisory power over the administration of criminal justice in McNabb v. United States. There, the Court reversed the defendants' murder convictions because arresting officers failed to follow proper detention and interrogation procedures. Authorities

115. Id. at 862.
116. Note, supra note 81, at 161-62. Expanding the privilege to allow it to incorporate the client's right against self-incrimination has been criticized as allowing a third party benefactor who pays for the legal services of a client to hide his identity even though the benefactor does not seek legal advice. Id. But see Note, supra note 95, at 561 ("benefactor, who makes himself criminally vulnerable by payment of his co-conspirator's legal fees, should be able to claim the privilege"). Another factor militating against the use of the privilege is that courts have not been receptive to using a balancing test on a case-by-case basis when the attorney-client privilege is found to apply. See Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 468-69 (1977).
118. "Records, orders, and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." Fed. R. CRIM. P. 6(e)(6).
119. 318 U.S. 332 (1943).
obtained confessions from several unsophisticated and poorly educated young men when the men made incriminatory statements after two days of intensive questioning. In reaching its decision, the Court stated, “Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.”120

The Court ruled that the confessions should have been excluded at trial and admission of the evidence would make “the courts themselves accomplices in willful disobedience of law.”121 Although McNabb did not indicate whether similar authority existed in the lower federal courts, subsequent decisions have held that the district courts do indeed possess supervisory powers over criminal proceedings.122 This supervisory power has been used to curtail improper practices by federal attorneys in several instances.123

In the context of the grand jury, Federal Rule of Criminal Procedure 6(a)124 and 18 U.S.C. section 3331125 give district courts the power to call grand juries into being. Rule 17126 of the Federal Rules of Criminal Procedure and 28 U.S.C. section 1826127 give the

120. Id. at 340.
121. Id at 345. The decision was, of course, some years before the exclusionary rule of Miranda v. Arizona, 384 U.S. 436 (1966), was created by the Court.
122. United States v. Hasting, 461 U.S. 499 (1983) (“[I]n the exercise of supervisory powers, federal courts may . . . formulate procedural rules not specifically required by the Constitution or the Congress.” Id. at 505). See also In re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 970 (3d Cir. 1975) (Aldisert, J., dissenting) (“Deciding a case in the exercise of a court’s supervisory power means little more than ruling on a basis not specifically set forth in the Constitution, or by statute, procedural rule, or precedent.”).
123. See United States v. Serubo, 604 F.2d 807 (3d Cir. 1979) (abusive language and improper remarks); United States v. Doss, 545 F.2d 548 (6th Cir. 1976) (using grand jury to gather evidence for another trial); Ingram v. United States, 541 F.2d 166 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977) (using grand jury to prepare a civil case). For a discussion of courts’ supervisory powers to dismiss a grand jury indictment in the face of prosecutorial misconduct, see Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct, 45 Ohio St. L.J. 1077 (1984).
124. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.
126. See supra text accompanying note 12.
district courts the power and the duty to enforce subpoenas. One court has stated that this "supervisory duty not only exists, but 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." "

The first case to require prosecutors to obtain prior judicial approval before issuing subpoenas was In re Grand Jury Proceedings (Schofield I). In Schofield I, the Third Circuit Court of Appeals exercised its supervisory powers and imposed a broad requirement that the government make a preliminary showing of relevance and proper purpose for each item requested before a grand jury subpoena would issue. The prosecutor in the case issued a subpoena to the defendant requesting her to appear before the grand jury and testify. When she arrived at the designated time and place, instead of testifying, she was requested to furnish handwriting exemplars and allow the taking of her fingerprints and photograph. The district court issued an order compelling her to comply with the request without making any findings. When she refused, the district court held her in contempt. On appeal, as she had done below, the defendant argued that the government should state the purpose and need of the requested subpoena information before she should have to comply. The Third Circuit agreed and established three requirements the government had to meet in satisfying a preliminary showing for a subpoena. The government must demonstrate that: (1) the item was relevant to the grand jury


129. In re National Window Glass Workers, 287 F. 219, 225 (N.D. Ohio 1922). See also In re Pantojas, 628 F.2d 701, 705 (1st Cir. 1980) (district courts are primarily responsible for preventing grand jury abuse); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976) (supervisory powers necessarily extend beyond constitutional and statutory limits and extend to granting relief from any type of grand jury abuse). Courts may even invoke their supervisory powers without stating that the power is the basis for their decision. For example, in United States v. Hastig, 461 U.S. 499 (1983), the Court reviewed a case where the prosecutor made comments about the defendant's failure to rebut the prosecution's evidence. The Court of Appeals for the Seventh Circuit reversed the convictions but failed to state its basis for ignoring the harmless error doctrine. The Supreme Court on review stated that, "[W]e proceed on the assumption that, without so stating, the court was exercising its supervisory powers to discipline the prosecutors of its jurisdiction." Id. at 505.

130. 486 F.2d 85 (3d Cir. 1973).
investigation, (2) the request was within the grand jury's jurisdiction, and (3) the items were not sought primarily for another purpose.\(^\text{131}\)

In reaching its decision, the Third Circuit distinguished *United States v. Dionisio*\(^\text{132}\) and *United States v. Mara*,\(^\text{133}\) which had held that the fourth amendment did not require any preliminary showing for the issuance of a grand jury subpoena to compel production of voice or handwriting exemplars. Neither case, the Third Circuit pointed out, concerned a *nonconstitutional* objection to the grand jury enforcement of subpoenas.\(^\text{134}\) Furthermore, in both *Mara* and *Dionisio* the government had made a showing of proper purpose.\(^\text{135}\) Thus, the *Schofield* rule requires the government to make a preliminary showing of relevance and need for all matters subpoenaed by the grand jury before a district court will enforce the subpoena. This preliminary showing is necessary because the party objecting to the subpoena (who has the burden of showing some irregularity)\(^\text{136}\) often finds it difficult to discover factual information regarding the enforceability of a subpoena because that information rests in the prosecutor's hands. Furthermore, grand jury proceedings are conducted in secret which complicates the discovery procedure for the party opposing the subpoena.\(^\text{137}\) The *Schofield* requirements are still the rule in the Third Circuit.\(^\text{138}\)

---

131. *Id.* at 93.
132. 410 U.S. 1 (1973)
134. *Schofield I*, 486 F.2d at 89.
135. *Id.* at 94 (Seitz, C.J., concurring).
137. *See supra* note 118.
138. *See In re Grand Jury Matter*, 770 F.2d 36, 38-39 (3d Cir. 1985) and *In re Grand Jury Matter* (Gronowicz), 764 F.2d 983, 986 (3d Cir. 1985). However, the burden the government must shoulder is so minimal under *Schofield*, that it nearly renders the showing illusory. The showing must be made by affidavit and as modified in *In re Grand Jury Proceedings* (Schofield II), 507 F.2d 963, 966 (3d Cir. 1975), does not “require a showing of reasonableness, . . . [does not] require any determination of probable cause and clearly [does] not require a hearing in every case.” This minimal showing is probably why one House of Representatives Subcommittee found that the rule “has not caused any serious disruption of grand jury proceedings” in the Third Circuit. *Grand Jury Reform: Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 1589 (1977).

A majority of circuit courts have rejected the *Schofield* rule as unduly bur-
In *In re Special Grand Jury No. 81-1 (Harvey)*, the Fourth Circuit Court of Appeals took the Schofield rule and modified it to fit the limited situation where the subpoenaed party is an attorney who represents a grand jury target in an ongoing attorney-client relationship. The subpoena in *Harvey* requested records from the attorney of all money and property received on behalf of the client, Harvey. In this situation, the court found that the “attorney-client privilege considerations and sixth amendment interests arise automatically and a preliminary showing must be made by the government before the attorney can be forced to appear before the grand jury.” This preliminary showing must demonstrate “that the information sought is relevant to and needed for an investigation being conducted by the grand jury.” In reaching its holding, the Fourth Circuit again pointed out that *Dionisio* and *Mara* were based on constitutional challenges and that courts had the “power to fashion rules to further the administration of justice when such rules are necessary.” Although *Harvey* was subsequently vacated, the en banc holding to vacate gave no other reason for the decision other than the target’s fugitive status. A later unpublished opinion suggested that the decision to vacate raised a “serious question” about the correctness of the original opinion. Although the decision in *Harvey* continues to be cited with favor and has been posited with a few modifications as the best alternative to prevent prosecutorial abuses of attorney subpoenas, the

denning the grand jury with preliminary showings. *See In re Berry*, 521 F.2d 179 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975); *In re Walsh*, 623 F.2d 489 (7th Cir.), *cert. denied*, Walsh v. United States, 449 U.S. 994 (1980); *In re Grand Jury Investigation* (McLean), 565 F.2d 318 (5th Cir. 1977); Universal Manufacturing Co. v. United States, 508 F.2d 684 (8th Cir. 1975); *In re Grand Jury Proceedings* (Hergenroeder), 555 F.2d 686 (9th Cir. 1977).

139. 676 F.2d 1005, vacated when target fled, 697 F.2d 112 (4th Cir. 1982) (en banc) (also discussed at *supra* notes 99-105 and accompanying text).
140. *Id.* at 1010.
141. *Id.* at 1011 (emphasis in original).
142. *Id.* at 1012.
143. *Harvey*, 697 F.2d at 113.
146. Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 Hastings L.J. 821, 865 (1985) (“By imposing a need requirement, the *Harvey* rule strikes the proper balance between preserving the
decision to require a preliminary showing has been rejected in a significant number of instances.\textsuperscript{147}

In \textit{In re Grand Jury Subpoena (Legal Services Center)},\textsuperscript{148} a district court quashed a subpoena that requested a legal service clinic to turn over all records relating to the clinic’s representation of Nigerian nationals in pending proceedings before the Immigration and Naturalization Service. The court quashed the subpoenas on the basis of the attorney-client privilege and, adopting the reasoning of \textit{Harvey}, required that “the government demonstrate, as a preliminary matter, that the information sought by the subpoenas is necessary to the grand jury investigation and that there is no other reasonably available source for that information other than the attorneys’ files.”\textsuperscript{149} The reason for such a showing was that the subpoenas would have a “significant chilling effect on the ability of attorneys . . . to represent their clients zealously within the bounds of the law.”\textsuperscript{150}

The supervisory approach, however, is not without its defects. The Schofield rule is unnecessarily broad and is not tailored to the special circumstances surrounding the attorney-client relationship. In addition, its minimal requirements of relevance and proper purpose do not provide the protection the relationship deserves. The Harvey rule, while more narrowly adapted to the attorney-client relationship and with its “need” showing when a target’s attorney is subpoenaed, fails to state exactly what requirements are necessary to demonstrate this need.\textsuperscript{151} Furthermore, the Harvey opinion

\textsuperscript{147} In \textit{re Grand Jury Subpoena 84-1-24 (Battle)}, 748 F.2d 327 (6th Cir. 1984); \textit{In re Klein, 776 F.2d 628 (7th Cir. 1985); In re Grand Jury Proceedings (Freeman), 708 F.2d 1571 (11th Cir. 1983).}

\textsuperscript{148} 615 F. Supp. 958 (D. Mass. 1985)

\textsuperscript{149} 615 F. Supp. at 964. After quashing the subpoenas under the attorney-client privilege, the district court also indicated it would have reached the same decision on nonprivileged grounds because the subpoenas were “unreasonable and oppressive in the context of the ongoing representation of a client before the INS” and could properly be quashed under \textit{Fed. R. CRIM. P. 17(c). Id. at 970.} The court reached this conclusion in spite of the fact that deportation proceedings are not criminal proceedings.

\textsuperscript{150} \textit{Id. at 970.}

\textsuperscript{151} The Fourth Circuit did state that the prosecution should address two questions in seeking to demonstrate need: “First, is the information sought necessary or important to the grand jury investigation? Second, is the subpoenaed attorney the best source for the information? A showing that the information cannot be obtained from another source would, of course, be important to, but not
is ambiguous on whether the preliminary showing must occur before issuance of the subpoena or whether the showing is necessary only for enforcement of the subpoena. Finally, critics have attacked the supervisory approach under a separation of powers argument because it allows judicial interference in an area of executive discretion.

D. The Justice Department Guidelines

In response to the growing concern over subpoenas to defense attorneys representing grand jury targets, the Department of Justice instituted its own internal guidelines governing the issuance of attorney subpoenas. The guidelines, which were added to the United States Attorneys' Manual on July 18, 1985, and apply to both grand jury and trial subpoenas, require that all "reasonable attempts" be made "to voluntarily obtain information from an attorney before issuing a subpoena." The guidelines require the approval of the Assistant Attorney General for the Criminal Division before issuing a subpoena. In order for the subpoena to issue: (1) the information must be reasonably needed for the successful completion of the investigation; (2) the government must have made reasonable but unsuccessful attempts to obtain the information from other sources; (3) the government must have made reasonable attempts to voluntarily obtain information from the attorney; (4) the need for the information must outweigh the risk that the attorney will be disqualified; (5) the information necessarily conclusive for, the second inquiry." Harvey, 697 F.2d at 1011 n.6

152. Peirce & Colamarino, supra note 3, at 865.

153. Note, supra note 81, at 155. See also Beale, supra note 128, at 1516 ("contrary to the suggestion in several lower court decisions, neither supervisory power nor federal common law may be used to limit the constitutionally permissible exercise of prosecutorial discretion"). But see Krieger & Van Dusen, supra note 5, at 739 (use of prosecutorial discretion to effect defense attorney's disqualification through grand jury subpoenas and fee forfeiture amounts to a government control of the right to counsel and therefore subject to judicial overview).


156. Id. § 9-2.161(a)(D).


158. Id. § 9-2.161(a)(B).

159. Id. § 9-2.161(a)(C).

GRAND JURY SUBPOENAS

must not be covered by a valid privilege;\textsuperscript{161} and (6) the subpoena must be directed at material information regarding a limited subject matter.\textsuperscript{162}

The guidelines are a significant attempt to bring attorney subpoenas under control. The provision requiring reasonable attempts to first obtain the information from the attorney, however, may create ethical problems. This results because DR 4-101 requires preserving the confidentiality of "secrets."\textsuperscript{163} "Secrets" could, of course, include unprivileged fee or client identity information. The guidelines encourage the prosecutor to negotiate with the defense attorney and the negotiations may include these "secrets."\textsuperscript{164} The rules do permit disclosure upon court order,\textsuperscript{165} but limit strictly the information that can be disclosed without client consent.\textsuperscript{166} As noted recently, the ethical rules

would seldom permit [voluntary disclosure] when an Assistant United States Attorney requests information that may be used in a criminal proceeding against a client. Any voluntary disclosure must be done only with the full knowledge and consent of the client. The lawyer, however, may have a conflict in advising the client about whether to give this consent, since it would be in the attorney's interest generally to provide the factual information requested to avoid a grand jury subpoena.\textsuperscript{167}

Furthermore, "personal considerations—such as a desire to avoid becoming personally implicated in the criminal activity—may induce the attorney to make inappropriate disclosures in order to avoid a professionally damaging appearance before the grand jury."\textsuperscript{168} This action may deprive the client of his sixth amendment right to effective assistance of counsel.\textsuperscript{169}

\textsuperscript{161}. Id. § 9-2.161(a)(F)(6).
\textsuperscript{162}. Id. § 9-2.161(a)(F)(5).
\textsuperscript{163}. See supra note 27 and accompanying text.
\textsuperscript{164}. Note, supra note 81, at 173 ("bothersome ethical questions may arise from the very fact that negotiations take place at all") (citing ABA GRAND JURY COMMITTEE, PROPOSED STANDARDS FOR CALLING OF LAWYERS AS GRAND JURY WITNESSES 3 n.1 (1985)).
\textsuperscript{165}. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1979).
\textsuperscript{166}. See supra notes 27-30 and accompanying text.
\textsuperscript{167}. Rudolf & Maher, supra note 3, at 19.
\textsuperscript{168}. Note, supra note 81, at 173.
\textsuperscript{169}. See Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) (conviction reversed where defense counsel responded to trial subpoena with a stipulation which eliminated the need for his testimony but clearly incriminated his client). See also Note, supra note 81, at 173 (suggesting that guidelines be revised so that
Perhaps the most critical defect is the fact that the guidelines are self-imposed and self-governing. The guidelines state that they do not “create any rights, substantive or procedural, enforceable at law by any party, in any manner, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.” The individuals determining whether the guidelines have been satisfied are neither neutral nor detached. Furthermore, recent statistics released by the Department of Justice reveal that the guidelines have done little to stem the flow of attorney subpoenas.

V. THE ETHICAL RULE

In reaction to the increasing number of grand jury subpoenas served on defense attorneys by prosecutors, the Massachusetts Bar Association initiated a proposal for a new rule which made it an ethical violation for a prosecutor to issue grand jury subpoenas to defense attorneys without prior judicial approval, where the prosecutor sought to compel the defense attorney to provide information about the attorney's client. The rule was later endorsed by

all negotiations take place in the client's presence).


171. In the first seven months after enactment of the guidelines, 169 subpoenas were issued, an average of better than one per day. Rudolf & Maher, A Subpoena a Day Keeps the Clients Away, CRIM. JUST., Fall 1986, at 5.


In In re Grand Jury Matters, the First Circuit affirmed a district court's quashing of subpoenas issued to five attorneys. The United States Attorney in the case candidly admitted in the motion opposing the quashing that the grand jury
the Boston Bar Association, and on October 1, 1985, the Supreme Judicial Court of Massachusetts adopted the rule as Supreme Judicial Court Rule 3:08, Prosecution Function 15. The rule provides:

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.

PF 15 became effective January 1, 1986, and immediately met was conducting an investigation of federal drug and tax offenses committed by the attorneys' clients. At the time the subpoenas were issued, the defendants had already been indicted on state drug charges in New Hampshire. The New Hampshire Bar Association, National Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers and the Civil Liberties Union of Massachusetts and New Hampshire all filed as intervenors in the action. The district court found that

the actions of the U.S. Attorney are without doubt harassing, show miniscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law . . . .

To permit [the subpoenas] would have an arctic effect with the nonsalutary purpose of freezing criminal defense attorneys into inanimate ice floes, bereft of the succor of constitutional safeguards. In re Grand Jury Matters, 593 F. Supp. at 107.

In affirming the lower court's determination, the First Circuit said that it was clear that the lower court "quashed the subpoenas because of the effect the timing of the subpoenas could have on the attorneys' ability to prepare and present their clients' defenses in the pending state criminal action." In re Grand Jury Matters, 751 F.2d at 17. The court then held that the district court could properly quash the subpoenas without reference to a specific privilege in the exercise of its Rule 17(c) supervisory powers because the subpoenas were "unreasonable and oppressive." Id. at 18.

173. Id. at 3. The rule was also endorsed by an ABA resolution at its annual midyear meeting in 1986. Falsgraf, A Dangerous Wedge Between Attorney and Client, 72 A.B.A. J., July 1, 1986, at 8.

174. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986). The New Hampshire Bar Association is currently considering a disciplinary rule identical to the one adopted by the Supreme Judicial Court of Massachusetts. Frank, Are Federal Subpoenas Subject to State Rules?, 72 A.B.A. J., Mar. 1, 1986, at 33. The rule is also under consideration in Rhode Island, the District of Columbia and Illinois. The Illinois proposal also calls for an amendment to the state's criminal code to include the requirement of prior judicial approval. 2 Law. Man. on Prof. Conduct (ABA/BNA) 247 (July 9, 1986).

CAMPBELL LAW REVIEW

with controversy. Defense attorneys hailed the rule as a much needed remedy to the problem of attorney subpoenas, while prosecutors were doubtful of the rule’s validity as applied to federal actions.\textsuperscript{176} Federal prosecutors, aware that the rule could well impede the investigative functions of their offices, filed suit contesting the rule’s application to them and seeking an injunction against its enforcement.\textsuperscript{177} Because the decision in this case raises critical issues concerning the propriety of using a state ethical rule to control federal grand jury practice, the rule will first be considered in the context of \textit{United States v. Klubock}.\textsuperscript{178}

\section*{A. \textit{PF 15 and the Klubock Decision}}

\subsection*{1. The District Court Decision}

The United States District Court for Massachusetts first heard the government’s complaints in \textit{Klubock}. Prosecutors charged that PF 15 conflicted with the current federal practice of issuing grand jury subpoenas. A preliminary issue facing the court, however, was whether PF 15 was a rule of the district court, much less a valid one. This issue arose because the district court did not have its own specific rules of ethical conduct to govern the actions of attorneys practicing before it. Rather, a local court rule\textsuperscript{179} incorporated

\textsuperscript{176} Riley, \textit{supra} note 172, at 3, 42.

\textsuperscript{177} United States \textit{v. Klubock}, 639 F. Supp. 117 (D. Mass. 1986), \textit{aff'd}, No. 86-1413 (1st Cir. Mar. 25, 1987) (available on LEXIS, Genfed library, USApp file). The defendants in the action were members of the Board of Bar Overseers of the Supreme Judicial Court and Bar Counsel for the Board, the persons charged with enforcing the disciplinary rules issued by the Supreme Judicial Court. The Massachusetts Bar Association, Boston Bar Association, and Massachusetts Association of Criminal Defense Lawyers were allowed to intervene as defendants.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} The rule provided:
Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility, either of the state in which the attorney is acting at the time of the alleged misconduct or of the state in which the attorney maintains his principal office 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 Code of Professional Responsibility means that code adopted by the highest court of the state, or commonwealth, as amended from time to time by that court, except as otherwise provided by specific rule of this Court after consideration of comments by representatives of bar associations within the state or commonwealth.
the disciplinary rules for the Commonwealth of Massachusetts into the rules of the district court. Prosecutors argued that a rule as far-reaching as PF 15 should not be automatically incorporated into the local rules. Judge Zobel of the district court declined to decide whether PF 15 was incorporated and instead held, that in either case, the issue was whether the rule conflicted with federal law.180

The prosecutors then argued that PF 15 was inconsistent with the procedure of issuing subpoenas under Rule 17181 of the Federal Rules of Criminal Procedure. This inconsistency was not allowed by Rule 57 of those same rules,182 if the rule was adopted by the incorporation provision. If, however, the rule was not incorporated, and existed solely as a state ethical rule, the prosecutors argued in the alternative that the rule still conflicted with the supremacy clause.183 The prosecutors argued that the Federal Rules were "a


180. Klubock, 639 F. Supp. at 119. But see United States v. Kelly, 550 F. Supp. 901 (D. Mass. 1982), where the district court followed a recommendation of the Massachusetts Board of Bar Overseers that a federal prosecutor not be disciplined for violating the Supreme Judicial Court Rules of Massachusetts even though the state rules were "the standard for professional conduct adopted in Rule 5 [the incorporation rule] of the District Court." Id. at 903.

181. 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. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

FED. R. CRIM. P. 17.

182. 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 . . . . 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.

FED. R. CRIM. P. 57.

183. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,
complete and comprehensive procedure governing grand jury subpoenas" which precluded district courts from infringing on the rules' exclusive mandates. The defendants countered that Rule 17 was "little more than a housekeeping rule" to guide the court in the exercise of its supervisory power. Judge Zobel found that Rule 17 was merely mechanical and "was not tailored to the special concerns raised when it is invoked by the uniquely powerful grand jury."

Though Judge Zobel found that Rule 17 was merely mechanical, the prosecutors attacked PF 15 because it differed from Rule 17(a)'s requirements that the clerk of the court issue subpoenas that are signed, sealed and stamped but otherwise issued in blank. A prosecutor under PF 15 would now have to obtain prior judicial approval before having a subpoena issue, a definite change in the current practice under Rule 17(a). The court, however, read PF 15 to require prior judicial approval only at some point before service of the subpoena on the defense attorney, and not its issuance from the clerk. Under this reading there would be no change in actually obtaining the subpoena, only in serving it. Judge Zobel found that a prosecutor obeying PF 15 could still get the subpoena issued in blank from the clerk, fill it out as allowed under Rule 17(a), and then seek court approval without conflict with the current procedure.

The prosecutors then compared Criminal Rule 17(f), which requires a court order before taking a deposition, with the corre-

any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. IV, cl. 2.


185. Id. at 121-22. The district court emphasized its supervisory powers over the grand jury in the opinion. The court found these grants in 18 U.S.C. § 3331 (1982) and FED. R. CRIM. P. 6(a) which give district courts the power to call grand juries into existence. In addition, 28 U.S.C. § 1826(a) (1982) and FED. R. CRIM. P. 17(a) give district courts the power to issue and enforce grand jury subpoenas. As well, the district court pointed out a court's duty to prevent the grand jury from becoming an instrument of oppression. Klubock, 639 F. Supp. at 119-120 (citing Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976)).


187. See supra text accompanying note 12.

188. Klubock, 639 F. Supp. at 120 n.8.

189. "An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein." FED. R. CRIM. P. 17(f)(1).
Responding Civil Rule 45(d) which is absent a similar requirement. Criminal Rule 17(f) is the only subsection of Rule 17 to require prior judicial approval before acting. The prosecutors argued the omission of a prior approval requirement in the rest of Rule 17 signaled an intent to limit judicial involvement in the subpoena process. The corresponding Civil Rule 45(d) had originally mandated court approval before a party could issue a subpoena to compel production of documents at depositions. This requirement was later deleted because it was "'unnecessary and oppressive on both counsel and court, and it had been criticized by district judges.'" The Klubock court rebutted this argument, noting that the deposition was the norm in civil proceedings but was an "'exceptional circumstance' in criminal actions." Such a deletion in a limited circumstance did not signal an intent to prevent judicial involvement in the subpoena process, especially as it related to grand jury subpoenas.

The prosecutors also argued that Rule 17(c) was the only means (besides a contempt proceeding) by which a party could challenge the validity of a subpoena. The court pointed out that by its terms, Rule 17(c) applied only to a subpoena duces tecum and that the rule contained no provision for quashing a subpoena ad testificandum, but courts had repeatedly quashed subpoenas compelling testimony "when the interests of justice so warranted." That courts could quash testimonial subpoenas without an express statutory grant demonstrated that Rule 17(c) harbored no silent prohibitions.

190. "Proof of service to take a deposition . . . constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein." FED. R. CIV. P. 45(d)(1).

191. Klubock, 639 F. Supp. at 122 (quoting FED. R. CIV. P. 45(d) advisory committee note (1946 amendment)).

192. Klubock, 639 F. Supp. at 123. "[T]he deletion merely reflected the frequency with which depositions were taken, and the sufficiency of the motion to quash remedy." Id.

193. Id.

194. "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other object designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c).


196. Id. In reaching this conclusion, the district court distinguished United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Weinstein, 452 F.2d
The district court next stated the test of whether a conflict existed between PF 15 and Rule 17: "A local rule is inconsistent with federal rules and statutes if it alters those aspects of the litigation process which bear upon the ultimate outcome of the litigation, thereby frustrating federal policies." Applying this test to the case at bar, the district court again emphasized that while the grand jury holds broad powers of investigation, courts still had the duty to prevent abuse of grand jury subpoenas. The crucial issues were whether PF 15 deprived the grand jury of evidence previously permitted under federal law, and whether PF 15 would burden the grand jury with preliminary showings.

The court answered in the negative to both issues. PF 15 provided neither new testimonial privileges nor did it create new grounds to shield a citizen from testifying. In addition, the prior judicial showing would create little change in grand jury proceedings since federal prosecutors were already required by the Department of Justice guidelines to demonstrate many of the things they would be required to show in a prior hearing. The prior hearing would operate, though, to exclude evidence which previously might have gone before the grand jury—evidence which had it come to the attention of the court, however, would have been properly suppressed in the first instance.

As a final question, the court considered whether PF 15 violated the supremacy clause. Under the Supreme Court's ruling in *Sperry v. Florida*, a state ethical rule which conflicts with federal law is invalid. The district court relied on its previous discussion of the Federal Rules of Criminal Procedure to find that there was indeed no conflict. Additionally, PF 15 did not interfere with

704 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); and Williams v. United States District Court, 658 F.2d 430 (6th Cir.), cert. denied, 454 U.S. 1128 (1981), which the plaintiffs cited for support that silence in the federal rules has a preclusive effect.

197. Id. at 124 (quoting Williams v. United States District Court, 658 F.2d 430 (6th Cir.), cert. denied, 454 U.S. 1128 (1981)).
199. See supra notes 154-62 and accompanying text.
201. See supra note 183.
202. 373 U.S. 379 (1963). In *Sperry*, a state ethical rule forbade the practice of law by nonattorneys, including persons practicing before the United States Patent Office. A federal statute as well as Patent Office regulations allowed nonattorneys to practice before the agency. The Supreme Court struck down a court order which had allowed the state rule to remain in effect.
federal officers in the execution of their duties since regulation of the legal profession, including federal prosecutors, was a proper exercise of state power.\textsuperscript{203} Therefore PF 15 did not violate the supremacy clause and was a valid local rule.

2. The Court of Appeals Decision

The government appealed the \textit{Klubock} decision to the First Circuit Court of Appeals, which recently affirmed the district court’s decision.\textsuperscript{204} The First Circuit first found that the government’s arguments concerning the supremacy clause issue were either moot or nonjusticiable. The court ruled the issue moot because in June 1986, after the lower court decision, the district court specifically incorporated PF 15 into its local rules.\textsuperscript{205} By its specific incorporation, PF 15 could no longer be considered state law, but rather, had now become federal law. The prosecutors argued, however, that PF 15 created the possibility that a federal prosecutor could be charged in a state disciplinary proceeding if the prosecutor disobeyed PF 15 in a federal district other than Massachusetts.\textsuperscript{206} The court rejected this contention, relying on assurances by the Massachusetts Board of Bar Overseers, who indi-

\begin{itemize}
\item \textsuperscript{203} Klubock, 639 F. Supp. at 126 (citing Sperry, 373 U.S. at 383 n.2 and United States v. Kepreos, 759 F.2d 961, 968 n.5 (1st Cir.), cert. denied, 106 S. Ct. 227 (1985)).
\item \textsuperscript{204} No. 86-1413 (1st Cir. Mar. 25, 1987) (available on LEXIS, Genfed library, USApp file).
\item \textsuperscript{205} This action came about in response to the government’s attempt to have the district court except the Massachusetts’ rules dealing with prosecution functions out of the local district court rules. See Gertner, \textit{On Trial: A Disciplinary Rule That Limits Attorney Subpoenas}, CRIM. JUST., Fall 1986, at 6, 42. Local Rule 5(d)(4)(B) now states:
\begin{quote}
Acts or omissions by an attorney admitted to practice before this Court . . . 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 . . . . 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 3:03 of said court.
\end{quote}
\item \textsuperscript{206} D. MASS. R. 5(d)(4)(B), \textit{reprinted in 2 Federal Court Local Rules 45-46} (Callaghan 1986).
\end{itemize}

\begin{itemize}
\item For example, if District Attorney X, a member of the Massachusetts bar, served a subpoena in Vermont, where he was a district attorney, and failed to comply with PF 15, he could be charged in Massachusetts state court, since by its terms PF 15 applies to any attorney admitted to practice before the Supreme Judicial Court of Massachusetts.
\end{itemize}
cated that the rule would not apply to any actions taken outside Massachusetts and that any enforcement proceedings would be brought in federal court in Massachusetts. The court concluded that while such a policy remained in effect, there was no case or controversy present and therefore no supremacy clause issue.

The opinion then shifted to the district court’s rulemaking power to adopt PF 15. Rather than focusing first on possible conflicts with the Federal Rules, the court’s opinion shifted the emphasis to the “latent ethical issues” involved in serving a grand jury subpoena on a defense attorney representing a target. Because of these ethical issues, courts were charged with getting an “ethical handle” on the situation as soon as possible. This power to control the issuance of subpoenas through an ethical rule came from the courts’ regulatory power over not only the “dealings of counsel and the courts and of counsel and their clients, but equally important, . . . counsel versus counsel in their adversarial roles.” Because the regulation of ethical relationships between courts, lawyers and clients had been traditionally left to the courts, PF 15 properly placed the control in the district courts where the problems arose.

The court then briefly looked to any potential conflicts PF 15 had with the Federal Rules of Criminal Procedure. Like the district court, the First Circuit found no specific conflict with the Federal Rules in requiring prior judicial approval, stating, “silence in the Federal rules of procedure does not necessarily mean that the courts are powerless to correct perceived problems as they arise, either by decision, or by local rule, where appropriate.”

In a change in tack, the government argued that the court of appeals should use its supervisory authority to proscribe the district court’s regulation of members of the bar. The First Circuit found that if such supervisory authority did exist, review consisted of abuse of discretion since the regulation of members of the bar

207. *But see infra* note 270.
208. *Klubock*, No. 86-1413 (1st Cir. Mar. 25, 1987) (available on LEXIS, Genfed library, USApp file). “We, of course, cannot predict any changes in the stated policy, or what would be the outcome of any legal situation created thereby—we should not cross that proverbial bridge until required to do so by the constitutional circumstances.” *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
rested with each individual district court. Echoing the district court, the First Circuit found that PF 15 was closely worded and "highly unobtrusive" because of the existing requirements in the Department of Justice guidelines. Finally, the court pointed out the growing seriousness of grand jury subpoenas to defense attorneys representing targets. All of these factors led to a conclusion that PF 15 was a limited, reasonable response to a mounting problem rather than an abuse of discretion, and that district courts were in a better position to judge the appropriate response to the problem. In answer to arguments that PF 15 would burden the grand jury's investigative function, the court concluded its opinion by stating that PF 15 was not aimed at grand jury action, but dealt instead with prosecutorial conduct. If a grand jury issued a subpoena independently, PF 15 would not apply and therefore would have no effect on the grand jury's function as an independent investigatory body.

The dissent by Chief Judge Campbell questioned the use of the district court's rulemaking authority to adopt a rule that produced so fundamental a change in issuing grand jury subpoenas. Judge Campbell argued that "local rules were never conceived to be a means for changing policies properly regulated at the federal level." Furthermore, he found the service/issuance interpretation of PF 15 "far too fine a distinction to provide a convincing rationale" to resolve any inconsistency, and instead pointed out that a "local rule may be inconsistent if it is discordant with the policies implicit as well as explicit in the federal rules." Judge Campbell stated:

Were we writing on a clean slate, perhaps a different view would be in order. But we are not writing on a clean slate; the Supreme Court and other courts . . . have made it clear that any prior ju-

---

213. The First Circuit found the district court's control over members of its bar specifically vested by 28 U.S.C. § 1654 (1982) which states: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."
215. Id.
216. "PF 15 operates in a policy area too sensitive, important and controversial to be regulated at a local district court level." Id. (Campbell, C.J., dissenting).
217. Id.
218. Id.
219. Id.
dicial screening of subpoenas impacts seriously and questionably upon the protected information-gathering powers of the grand jury.220

Instead of allowing the district court to adopt this controversial alteration in issuing grand jury subpoenas, Judge Campbell found that the proper forum for change was through Congress or the Supreme Court.221

B. The Rule Examined

In spite of two court opinions on the subject, some critical questions about PF 15 remain unresolved. First, there still exists the issue of whether a rule such as PF 15 can be incorporated into the local rules for a district court by a catchall incorporation provision such as the one originally used by the District Court of Massachusetts. Second, whether a district court may adopt by its rulemaking power, a rule such as PF 15, which produces fundamental changes in issuing grand jury subpoenas, is subject to question. Third, there still remain potential conflicts with federal law. Finally, and most critically, because PF 15, as adopted, lacks any stated standards concerning the prior judicial approval necessary, it may have exacerbated the problem of grand jury subpoenas to defense attorneys rather than providing a remedy for abuses.

1. Ethical Rules and the Incorporation Issue

One issue neither court resolved in Klubock was whether a state ethical rule such as PF 15 can be incorporated into the local rules for a federal district court by a broad local rule which incorporates all the disciplinary rules for a state into the district court’s local rules.222 A substantial number of districts have local incorporation rules similar to the one in force when PF 15 was originally issued.223 These incorporation rules are approved by a majority of

220. Id.
221. Id. The First Circuit has recently agreed to rehear the Klubock case en banc. Whether this signals disagreement with the majority opinion remains to be seen. Moss, Attorney Fees Exempt, 73 A.B.A. J., June 1, 1987, at 35.
222. See supra note 179.
223. See, e.g., S.D. ALA. R. 1(A)(4), reprinted in 1 Federal Local Court Rules 53 (Callaghan 1984) (“Any attorney who is admitted to the bar of this court or who appears in this court . . . shall be deemed to be familiar with and governed by . . . the ethical limitations and requirements governing the behavior of members of the Alabama State Bar . . .”); E.D.N.C. R. 2.10, reprinted in 2
judges in the district as required by Rule 57 of the Federal Rules. Presumably, when these incorporation provisions were adopted, the disciplinary rules for the particular state were fairly standard.

PF 15, however, is anything but the standard ethical rule. While the regulation of the legal profession is a proper exercise of state power, a rule which changes the procedure of issuing federal grand jury subpoenas is outside the scope of ethical codes. Ethical codes were intended to be used only as regulatory rules governing lawyers, and not as procedural rules governing civil and criminal cases. PF 15 is inconsistent with this particular

FEDERAL COURT LOCAL RULES 77 (Callaghan 1984) ("The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court."); D. Or. R. 110-2, reprinted in 2 FEDERAL COURT LOCAL RULES 7 (Callaghan 1984) ("[A]ny attorney permitted to practice in this court shall be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar . . .").

There exists no obligation for district courts to adopt or apply the Code of Professional Conduct of any particular state or of the American Bar Association. Greenebaum-Mountain Mortgage Co. v. Pioneer Nat’l Title Ins. Co., 421 F. Supp. 1348, 1351 (D. Colo. 1976). See also Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964) ("[W]e do not think that the rule of Erie . . . compels the federal courts to permit, in proceedings before those courts, whatever action by an attorney-at-law may be sanctioned by the courts of the state."); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) ("[A] court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend.").


226. Sutton, How Vulnerable is the Code of Professional Responsibility?, 57 N.C.L. REV. 497, 514 (1979). However, because this is not stated specifically in either the Model Code or the Model Rules, some courts have used disciplinary rules as if they are procedural rules. Id. The Preamble to the Model Rules does state that “the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). See also Comden v. Superior Court of Los Angeles County, 20 Cal. 3d 906, 917, 576 P.2d 971, 978, 145 Cal. Rptr. 9, 14 (Manuel, J., dissenting) (noting that Rules of Professional Conduct “are not rules of practice promulgated by the Judicial Council to insure the integrity and efficiency of judicial process”), cert. denied, 99 S. Ct. 568 (1978).

One of the examples of misuse Professor Sutton gives is that of using DR 5-101(B) and DR 5-102 to disqualify opposing counsel:

That result was never intended; on the contrary, those disciplinary rules were intended to protect a client from overreaching by his own lawyer
purpose, since, in seeking to remedy the ethical problems, PF 15 changes the procedure involved in serving grand jury subpoenas, even though attorney subpoenas do raise ethical issues of defense attorney disqualification.

2. District Court Rulemaking

If followed, PF 15 alters the process of issuing subpoenas to defense attorneys with its requirement of a prior judicial showing—a showing which has been rejected by a significant majority of courts facing the issue. Such a radical change, propounded by state officials and grafted onto federal court procedure, should require discussion among federal district court judges and notice to the public according to Rule 57. A state ethical rule which is incorporated into the local rules by an incorporation provision avoids this process. Although disciplinary rules may be regularly added and amended, it hardly seems consonant that an ethical rule which produces so fundamental a change in the procedure of serving grand jury subpoenas should be adopted with minimal involvement by the federal courts, the public, and Congress. Once incorporated, the ethical rule must be regarded as wielding the same force as the Federal Rules since local rules have the force and eff-

who might be willing to lessen his value to his client in order to obtain or continue employment in litigation. . . . [The disqualification] issue should be resolved only in a disciplinary proceeding brought when there is reasonable cause for charging that the lawyer did not serve his client's best interests by being both witness and advocate.

Sutton, 57 N.C. L. Rev. at 515.

Nor does PF 15 avoid one of the major criticisms leveled at ethical rules—that of uncertainty as to the bounds of the law. See Patterson, A Preliminary Rationalization of the Law of Legal Ethics, 57 N.C.L. Rev. 519, 525 n.20 (1979). See infra notes 275-86 and accompanying text for a discussion of the problems with the ethical rule's lack of standards. Dean Patterson notes: "To treat ethical rules of conduct as legal rules denies [the lawyer] the choice the former gives, and so constitutes a threat to his exercise of discretion and hence to his independence and authority." Id. at 522.

227. See supra note 147.

228. See supra note 182. Rule 57 was amended in 1985 to correspond to Fed. R. Civ. P. 83 to emphasize that the procedures to promulgate local rules are the same under either the civil or criminal rules. The major purpose of the restructuring, however, was "to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them." Fed. R. Crim. P. 57 advisory committee note, reprinted in 3A C. Wright, Federal Practice and Procedure: Criminal 92 (Supp. 1986).
fect of law. Even if PF 15 is the proper subject of an ethical rule, because it was adopted in a district court with minimal legislative involvement and because it significantly alters grand jury practice, the rule as enforced may be an improper usurpation of the legislative function. The Federal Rules of Criminal Procedure for example, were established by an express Congressional delegation of authority. This delegation "authorized the Supreme Court, not Congress, to identify the relevant policies and to balance competing interests." In the case of PF 15, the only grant of authority to promulgate the rule came from the Rule 57 grant, a grant that arguably does not encompass the power to issue a rule as far-reaching as PF 15.

Rule 57 was intended to end any requirement of conformity to state procedure by federal courts. The rule allows local federal

229. United States v. Hvass, 355 U.S. 570 (1958). Because they do have the force of law, "local rules should be held to be binding upon the parties and court that promulgated them until they are changed by a majority of the judges of the district." 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3153, at 224 (1973). Rule 57 provides that individual judges may regulate their practice in "any manner not inconsistent with these rules or those of the district in which they act." The district court in Klubock used this clause to decide that even if PF 15 were not incorporated, judges could "regulate their practice in order to assist federal prosecutors to comply with the ethical rule . . . . Klubock, 639 F. Supp. at 121 n.12. See also Beale, supra note 128, at 1457 ("The lower federal courts have also employed their supervisory authority to control the conduct of the prosecutor in order to enforce ethical and professional standards"); and 28 U.S.C. § 2071 (1982) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court"). Rule 57 also allows the judicial council for the circuit to abrogate local rules if it desires.

230. 18 U.S.C § 3771 (1982). Under this section the Supreme Court is authorized to prescribe rules of "pleading, practice and procedure" but must submit each proposed rule before Congress. Furthermore, the rule does not become effective until ninety days after the submission.

231. Beale, supra note 128, at 1505.

232. PF 15 "is not the sort of task for which individual district courts were granted their limited rulemaking powers." United States v. Klubock, No. 86-1413 (1st Cir. March 23, 1987) (Campbell, C.J., dissenting) (available on LEXIS, Genfed library. USApp file). If a district were to apply the rule because of a broad catchall provision of the local rules (as the district court did initially) the ethical rule would even avoid the normal Rule 57 procedure. Moreover, the separation of powers doctrine limits judicial interference with prosecutorial functions pursued by the executive branch. See Beale, supra note 128, at 1494.

233. "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever." FED. R. CRIM. P. 57(b)
courts to tailor their practices to specific local details of criminal cases. Though the draftsmen of the Criminal Rules discouraged the making of local rules, the effort has met with little success and a large number of local rules have been adopted. Local rules, however, are not subject to the pre-adoption scrutiny given the Federal Rules and as a result, are often hastily adopted with a minimum of study by scholars and practicing lawyers.

Although Rule 57 requires that "copies of the local rules and amendments are to be furnished to the judicial council and the Administrative Office of the United States Courts and also made available to the public," one commentator has stated concerning such requirements:

This reporting system provides no control at all. Filing does not imply approval by the Supreme Court or by the Administrative Office. . . . While there is an unofficial service collecting all civil, general and admiralty rules, it does not include the local advisory committee note to original rule (amended 1985), reprinted in 3A C. Wright, Federal Practice and Procedure: Criminal § 581 (1982).

Wright, supra note 233, § 902, at 374.

"There was no desire to suggest or encourage the multiplication of detailed local rules . . . . [L]ocal rules should be as few as absolutely necessary, and that minutiae of practice should be left to judicial discretion in conformity with the tradition of the powers of a Federal judge." Comment of Judge Alexander Holtzoff in N.Y.U. Institute on Federal Rules of Criminal Procedure 123 (1946), reprinted in Wright, supra note 233, § 901, at 371.

This power, though hedged with limitations, has been the imprima- tur for a plethora of individualized rules which have generally remained unchallenged and untested by subjection to the comprehensive scrutiny of judicial decision or scholarly inquiry. Indeed, one legal scholar has characterized the fruits of the power as the "soft underbelly" of federal procedure.


This lack of a democratic system involving the bar and law schools is a particular defect of local rule making. There often is no public notice, no public hearings, and no way to oppose adoption. There is no real opportunity even to challenge the rules in litigation since the judges who will decide the case are often the ones who adopted the rules.


GRAND JURY SUBPOENAS

rules which affect criminal matters. . . . [A]n attack on a local rule on the ground that a copy was not sent to the Supreme Court or to the Administrative Office would seem to have little chance of success. As a result of these deficiencies, lack of familiarity with local rules may become a trap for unwary lawyers from other districts. 239

In In re Grand Jury Proceedings (No. 83-M-25-R), 240 a district court considered a request to promulgate a local rule under Rule 57, restricting the right of attorneys to contact and interview grand jury witnesses during an ongoing tax fraud investigation. The government alleged that the practice by a law firm amounted to a systematic "debriefing" of witnesses appearing before the grand jury and that this conduct produced a chilling effect on the witnesses' willingness to testify fully. 241 The court declined to issue the rule, finding that it would be more substantive than procedural even though several other districts had enacted a similar rule. 242

Rulemaking was a departure from the courts' traditional role and was legislatively delegated from Congress because of courts' expertise in litigation. 243 Because it was a deviation from traditional court practice and therefore raised separation of powers issues, "[c]ourts ought not to adopt rules relating to important matters requiring deliberation and factfinding." 244 This was even more the case when local rules were issued without the safeguards inherent

239. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM. L. REV. 905 (1976). See also Blair, supra note 236, at 519 (requirement that copies of local rules be provided to Supreme Court does not imply an absolute power of review). The Supreme Court does, of course, have the limited power of review to determine if local rules are consistent with the Federal Rules. Nevertheless, some courts have held that the failure of the Supreme Court to object to a local rule signals implicit approval of the rule so as to preclude review by an appellate court. See Cooley v. Strickland Transp. Co., 459 F.2d 779, 785 (5th Cir. 1972). The function of filing the rules, however, is essentially a housekeeping measure. See WRIGHT & MILLER, supra note 229, § 3153, at 226.


241. Id. at 535.

242. See also Blair, supra note 236, at 518 (local rule-making is limited to matters of practice and procedure which may not effect or create any substantive right).

243. The rulemaking power found in Rule 57, 28 U.S.C. § 2071 and other provisions of law, represents a departure from the basic rule that federal courts only decide cases and controversies and do not render advisory opinions. In re Grand Jury Proceedings, 558 F. Supp. at 535.

244. Id. at 536.
The nadir of local court rulemaking was reached in *Gamble v. Pope & Talbot, Inc.*,\(^{246}\) where the Third Circuit rejected a local rule which provided for fines to attorneys who delayed court proceedings. The district court fined an offending attorney under the local rule and the attorney appealed. In reversing the district court, the Third Circuit found that such a fine was in effect a contempt action. There was no indication that the district court invoked either of the federal statutes which granted contempt powers,\(^{247}\) and since the conduct of the attorney did not fall within the purview of either statute, the Third Circuit found “the local rule making power, while not limited to the trivial, cannot extend to basic disciplinary innovations requiring a uniform approach.”\(^{248}\)

A more liberal approach to local rulemaking is exemplified in *In re Sutter*\(^{249}\) where the Second Circuit upheld a $1500 fine against an attorney for violating a local rule that forbade the obstruction of the “‘effective administration of the court’s business.’”\(^{250}\) Local bar associations submitted an amicus brief arguing that the standards under the local rule should be the same as those provided in the federal contempt rule of 18 U.S.C. section 401.\(^{251}\) The Second Circuit rejected the argument, pointing out that such a holding would make the local rule superfluous and, relying on the grant of authority from Federal Rule of Civil Procedure 83\(^{252}\) that authorized district courts to promulgate local rules, upheld the local rule’s validity. Such a rule was necessary to reduce court congestion and further, as the court stated,

> [w]hether grounded upon the inherent power of the court or upon the rule-making power conferred by 28 U.S.C. § 2071, the opera-

\(^{245}\) The court found that adopting a rule such as the one requested would require “fundamental policy decisions of a kind not amenable to consideration by this court.” *Id.*

\(^{246}\) 307 F.2d 729 (3d Cir. 1962).


\(^{248}\) *Gamble*, 307 F.2d at 732. *Gamble* was subsequently overruled in Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) where the Third Circuit found the *Gamble* court’s reasoning ran counter to the Supreme Court’s observations that contempt sanctions were significantly different from a court’s broad power to discipline attorneys as officers of the court and that the result in *Gamble* was “excessively restrictive in practice.” *Id.* at 565-66.

\(^{249}\) 543 F.2d 1030 (2d Cir. 1976).

\(^{250}\) *Id.* at 1034.

\(^{251}\) *Id.* at 1035.

\(^{252}\) Fed. R. Civ. P. 83 is identical to Fed. R. Crim. P. 57.
tive principle is the same: if the local rule is related to the management of the court’s business and it is not inconsistent with a statute or other rule or the Constitution, then it is valid. 253

A test such as the one stated in *In re Sutter*, that validates a local rule which is “related to management” is obviously broadly based. Were PF 15 simply related to management of the court’s business, it might qualify as a proper exercise of rulemaking power. However, PF 15 is not restricted to merely “court management” but changes the entire procedure for issuing grand jury subpoenas to defense attorneys. As detailed in the next section, in changing this procedure it shifts the burden between the parties in demonstrating the propriety of grand jury subpoenas. Because of this shift, PF 15 is inconsistent with federal law and is therefore an improper exercise of district courts’ rulemaking power under Rule 57.

3. Inconsistency With Federal Practice

A critical factor upon which the test for inconsistency hinges is the extent of the preclusiveness of the Federal Rules of Criminal Procedure. In *United States v. Ferretti*, 254 the Third Circuit faced a challenge to a local rule which provided that if the defense produced no evidence to rebut a charge, the prosecution should make its closing argument first and the defense should then make its final argument following the prosecution. Federal Rule 29.1 provided that the prosecution should argue first, followed by the defense and then the prosecution would be allowed to rebut. In holding the two rules compatible, the court stated, “Rule 29.1 only provides the norm for the general situation. It does not deal with the specific circumstance of a defendant who presents no evidence. Thus we do not read the provisions of [Local] Rule 13(a) as being inconsistent or incompatible with Rule 29.1.” 255

Taking this general-specific test and applying it to the issuance of subpoenas, Rule 17 deals with the general situation in

---

253. *Sutter*, 543 F.2d at 1037. The local rule as well must be consistent with the policies contained within the federal rules. See Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir. 1975) (local rule restricting contact among putative class action representatives in Rule 23 action was inconsistent with the policies under Rule 23 of having common interests of fact and law disposed of in a single lawsuit).

254. 543 F.2d 1030 (2d Cir. 1976).

255. *Id.* at 1092-93.
which a prosecutor calls an ordinary person to testify. As the Klubock district court pointed out, Rule 17 does not differentiate between subpoenas issued for trial and subpoenas issued for a grand jury.\footnote{256} Rule 17 does not speak to the limited situation of a subpoena that is served on an attorney in an ongoing attorney-client relationship who is requested to testify or produce documents for the grand jury.\footnote{257} PF 15, however, does provide a procedure for dealing with this special circumstance. Yet PF 15 still has case history which militates against its procedure in the grand jury arena.

The Supreme Court on two occasions has spoken to the rulemaking powers of the lower courts. In Miner v. Atlass,\footnote{258} the Court faced a local admiralty rule\footnote{259} that allowed the district court to order oral depositions for the purpose of discovery only. The district court was given the power to promulgate local admiralty rules by a General Admiralty Rule\footnote{260} similar to Rule 57. In spite of the absence of a direct conflict with any General Admiralty Rule, the Court found the local rule inconsistent with the history and policies behind the Federal Rules.\footnote{261} The Court stated:

\begin{quote}
[T]he matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine . . . .

. . . .

[B]asic procedural innovations [should] be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords. . . . [W]e . . .
\end{quote}

\footnote{256} "The rule simply was not tailored to the special concerns raised when it is invoked by the uniquely powerful grand jury." Klubock, 639 F. Supp. at 122. The district court also pointed out that Rule 17(c) applied only to subpoenas duces tecum and contained no provision for quashing a subpoena ad testificandum. Id. at 123 (citing 2A Wright, supra note 233, § 273, at 149).

\footnote{257} The Federal Rules may also be read expansively in the Rule 17 area. Cf. 8 J. Moore, Moore's Federal Practice ¶ 17.06 (2d ed. 1986) (By the language of Rule 17(c), the procedure to quash only applies to a subpoena duces tecum but in an appropriate case, the motion to quash a subpoena ad testificandum may be entertained).

\footnote{258} 363 U.S. 641 (1960).

\footnote{259} N.D. Ill. Adm. R. 32.

\footnote{260} Gen. Adm. R. 44 provided: "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

\footnote{261} Miner, 363 U.S. at 649-50 (footnote omitted).
hesitate to [permit] a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress . . . .262

In Colgrove v. Battin,263 however, the Supreme Court upheld a local rule264 providing for six-person juries in civil trials in the face of a challenge that the rule conflicted with Federal Rule of Civil Procedure 48265 which allows juries of less than twelve only by stipulation of the parties. While recognizing the holding in Miner that "basic procedural innovations" were beyond local rulemaking power, the Court noted there was no "‘discernible difference between the results reached by the different-sized juries’"266 and therefore concluded, in allowing the rule to stand, that it produced no significant change in the ultimate outcome of the litigation.267

Rules like PF 15, however, could produce significant changes in the outcome of a case, especially if the grand jury is unable to obtain information from alternate sources to issue an indictment. While this information may have been protected in any instance, and the prior hearing requirement is important in protecting the

262. Miner makes clear that “literal conflict is not the sole ground for inconsistency under” FED. R. CRIM. P. 57. Klubock, No. 86-1413 (available on LEXIS, Genfed library, USApp file) (Campbell, C.J., dissenting).

263. 413 U.S. 149 (1973).

264. D. MONT. R. 13(d)(1) provides: “A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.”

265. FED. R. CIV. P. 48 states: “The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.”

266. Colgrove, 413 U.S. at 163-64 n.23 (quoting Williams v. Florida, 399 U.S. 78, 101 (1970)). See also United States v. Richter, 488 F.2d 170 (9th Cir. 1973) (“the rules . . . do not purport to set outer limits of the power of the court”).

267. Colgrove, 413 U.S. at 163-64. The majority in Klubock pointed out that it was “difficult to imagine changes more ‘fundamental’ in nature” than altering the number of jurors on federal juries and if such a rule passed muster in Colgrove, it “fail[ed] to see any reason why the ethical concerns espoused by PF 15 should be invalidated.” Klubock, No. 86-1413 (available on LEXIS, Genfed library, USApp file). Chief Judge Campbell, in his dissent, distinguished Colgrove, pointing out that there was a tradition of local control over jury arrangements and furthermore, there was no history of questioning the innovation as was the case with the procedure enacted by PF 15. Id. (Campbell, C.J., dissenting).

The decision in Colegrove has been criticized as a radical change in federal jury composition brought about by local rulemaking. “The matter was certainly worthy of a more effective debate than it was accorded when it was attacked as a fait accompli in litigation that culminated in the Supreme Court . . . .” Weinsten, supra note 239, at 954.
attorney-client relationship, the fact that the change is brought about by a state ethical rule which was subsequently adopted by a federal court, produces a conflict with the Federal Rules. As noted earlier, the Federal Rules do not require a prior hearing before the issuance of a subpoena. The procedure under Rule 17(a) is to obtain the subpoena issued in blank from the clerk of court and then serve it on the subpoenaed party. Most courts have rejected a similar requirement of a preliminary showing in the exercise of their supervisory powers. Moreover, the Supreme Court in United States v. Dionisio ruled against burdening the grand jury with minitrials. Aggravating the conflict is the fact that PF 15 originates from a state ethical rule and may be an improper attempt to engraft state procedure onto federal practice.

268. See supra note 147.
270. The First Circuit in Klubock relied on assurances by the Massachusetts Board of Bar Overseers that any enforcement proceedings dealing with violations of PF 15 would be brought in federal court in Massachusetts, rather than before state authorities. Because no proceedings had been instituted in the state forum, the First Circuit found no case or controversy concerning this aspect of the supremacy clause issue. A few months prior to the First Circuit’s affirmance in Klubock, however, in In re Grand Jury Subpoena No. 86-738 (D. Mass. Nov. 26, 1986) (available on LEXIS, Genfed library, Dist file), the district court faced a motion to quash a subpoena on the basis that the Assistant United States Attorney had failed to obtain prior judicial approval before subpoenaing an attorney requesting him to produce evidence about a former client. The court declined to quash the subpoena on the basis of the prosecutor’s noncompliance with PF 15, but then turned to the issue of whether the prosecutor had committed an ethical violation. The court stated: “It is quite clear . . . that the Overseers believe that the Assistant United States Attorney has acted improperly in the premises and no doubt they believe that I ought [to] refer him to them or to some other appropriate ‘counsel’ for such investigation and disciplinary action as may be appropriate.” Id. The court found no violation of PF 15, holding that the rule simply did not apply where the attorney did not currently represent his former clients, but pointed out that the Overseers believed differently. Therefore, “it is open to them to initiate disciplinary proceedings for whatever they believe are the violations of the Massachusetts Code of Professional Responsibility as promulgated by the Supreme Judicial Court.” Id. Any attempt by state authorities to apply the ethical rule to former clients, however, would have triggered a supremacy clause issue, since there then would have existed a direct conflict between the interpretation urged by the state authorities and that held by the federal court. It therefore remains unclear exactly what the role of state authorities is in the enforcement of PF 15.

The court also pointed out in No. 86-738 that “the position taken by the Overseers cannot help but have an effect on the conduct of the Massachusetts Attorney General, the Massachusetts District Attorneys, and their assistants, thus
Furthermore, PF 15 shifts the burden of proof in challenging a grand jury subpoena. Prior to PF 15, a subpoena was presumed regular, and a subpoenaed attorney had to demonstrate that compliance with the subpoena was “unreasonable or oppressive,” or that the attorney-client privilege, work product rule, Constitution or statute protected the information. With the adoption of a rule like PF 15, however, the burden has shifted to the prosecutor to make a preliminary showing that the subpoena is proper—that is, the presumption has changed so that the subpoena to the defense attorney is presumed invalid until the government makes a preliminary showing. This change in the presumptive validity of a subpoena which shifts the burden to the government is arguably substantive as well as procedural. This shift in demonstrating the invalidity of a subpoena not only conflicts with current practice under Rule 17 but exceeds district courts’ rulemaking authority.

introducing an unfortunate dichotomy in the ethical obligations of those attorneys from that of their federal counterparts.” Id. The case demonstrates the need for a uniform procedural rule, rather than an ethical rule that attempts to masquerade as one.


272. See In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1013 (4th Cir.) (Murnaghan, J., dissenting), vacated when target fled, 697 F.2d 112 (1982).

See also Caplow, The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel, 51 BROOKLYN L. REV. 769, 801 (1985), where the author suggests a preliminary burden of production on the prosecutor during the motion to quash hearing.

273. See Roberts, The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers, 8 U. PUGET SOUND L. REV. 537, 549 (1984) (“If . . . a local rule reverses a fundamental presumption in the federal rules, it should be open to a successful challenge”); cf. Note, Estate of Younger: Violation of an Ethical Consideration Equals a Legal Presumption, 45 U. PITT. L. REV. 719, 731 (1984) (“[R]ules of conduct, regardless of their form, are not allowed to change the substantive rights of litigants . . . . [T]he creation of a rebuttable presumption that shifts the burden of production from the challenger of a will can be said to abridge the substantive rights of the proponent.”).

274. It legislates in an area far beyond Congress’s and the Supreme
4. The Lack of Standards

Perhaps the most critical defect of PF 15 is that it provides no standards\(^{276}\) to guide judges or parties in the required prior judicial showing before the grand jury subpoena can be served on the defense attorney. The Klubock decisions left unstated the standards to apply in the showing, which subjects PF 15 to the same criticisms of vagueness as the Harvey rule.\(^{276}\) Requiring a mere statement of justification in an affidavit by the prosecutor makes the showing meaningless, yet requiring a full adversarial hearing would seem to violate the Supreme Court’s prohibition against saddling grand juries with minitrials under United States v. Dionisio.\(^{277}\) In addition, an adversarial hearing would potentially violate the veil of secrecy surrounding the grand jury as required by Criminal Rule 6(e),\(^{278}\) by allowing counsel for the subpoenaed party to discover what kind of information a prosecutor had against his client at a very early stage of the proceedings. The lack of any standards could also lead to disparate results depending upon the federal dis-
district adopting the rule. For example, one federal district might merely require a showing by affidavit of justification for the information from the prosecutor. Another district, however, might require a full adversarial hearing in order to hear from the subpoenaed defense attorney. The result is that in one district the subpoenas would be issued almost as a matter of right, while in the other district a preliminary hearing would occur on just the issue of whether the information was required by the prosecutor. In an area as sensitive as subpoenaing attorneys, a uniform rule is needed, rather than one that allows for diffuse and diverse standards.279

Moreover, in the PF 15 scenario, where the court has already subjected the subpoena to some judicial review, the defense attorney’s challenge in the later Rule 17(c) motion to quash hearing may be limited. This could be especially true where the same judge who rules in the PF 15 hearing also rules on the 17(c) motion.280 Compounding this problem is that, to date, the prior judicial review has consisted of only an ex parte hearing, the contents of which have been denied to the defense attorney seeking to quash the subpoena in the later Rule 17(c) hearing.281 Potentially, this creates a more dangerous situation than that prior to the PF 15 showing requirement because the prosecutor has an opportunity to argue ex parte for the issuance of the subpoena in the PF 15 hearing, and then again before the very same judge who allowed the subpoena’s issuance in the first instance.282 Although not specifi-

279. In fact, the Federal Rules of Criminal Procedure were established to provide such a uniform procedure. However, since the grand jury is still subject to courts’ supervisory powers, some courts might add other criteria as they deem necessary, a practice which certainly does not promote uniformity. Caplow, supra note 272, at 801.

280. This is exactly what has happened in the case of PF 15. See Gertner, supra note 205, at 43.

281. See In re Grand Jury Subpoena (John Doe, Attorney), No. 86-665 (D. Mass. Sep. 9, 1986) (available on LEXIS, Genfed library, Dist file), where the court refused an in-house counsel’s request to examine the submission made by a prosecutor to support the prosecutor’s request for permission to subpoena the in-house counsel. The prosecutor in the case was merely required to show that the subject matter would not offend the attorney-client privilege or “constitute an unwarranted intrusion into the relationship between the lawyer and his client-employer.” Id. The court found that the attorney should first appear before the grand jury and then it could be determined more exactly whether the requested information would infringe on the privilege.

282. Gertner, supra note 205, at 44.
cally resolved in the PF 15 area, there probably exists no right of appeal from the prior judicial hearing.\footnote{283}

PF 15 does hold one advantage over the other alternatives in that the remedy for violation of the ethical rule is professional discipline of the prosecutor.\footnote{284} This allows the grand jury to proceed relatively unimpaired,\footnote{285} while at the same time punishing the offending party. Any holding, however, that would grant new grounds for quashing subpoenas or created new testimonial privileges would clearly conflict with Rule 17 and current federal law in the area of grand jury procedure.\footnote{286}

**VI. A Proposal for Reform**

All of the approaches discussed as remedies to the attorney subpoena problem have their defects. The common characteristic of all (with the exception of the Department of Justice guidelines), is their failure to adequately define exactly what is protected and what kind of prior showing is required. The grand jury’s important investigative function must be given substantial weight in arriving at any alternative. A rule that requires the government to demonstrate need and that the attorney is the only source of the information could, in the words of the *Doe* court, stop the grand jury “‘dead in its tracks.’”\footnote{287} Yet, as prosecutors become more aggressive, the grand jury subpoena becomes fraught with greater unchecked potential for abuse. A procedure which adopts those showings already made under the Department of Justice guidelines would hardly work an excessive burden on the prosecutor.

Rather than attempting to attack the problem through ethical rules, the Federal Rules of Criminal Procedure should be amended to accommodate the narrow circumstance of a subpoenaed attorney who represents a grand jury target. Such a rule should be promulgated by Congress or the Supreme Court, which is given

\footnotesize

\footnote{283. Appeal might be gained if the district judge certified the matter under 28 U.S.C § 1292 (1982), but more likely, the defense attorney would have to disobey the subpoena, be held in contempt, and then appeal from the contempt proceeding if the subpoena was not quashed under Rule 17(c).}

\footnote{284. \textit{But see supra} note 270. Where state and federal interpretations of PF 15 conflict, the prosecutor may also be uncertain about what activities are covered under the rule.}

\footnote{285. \textit{See Note, supra} note 81, at 157.}

\footnote{286. \textit{See Klubock}, 639 F. Supp. at 124.}

\footnote{287. 781 F.2d at 248 (citing \textit{In the Matter of Klein}, 776 F.2d 628 (7th Cir. 1985)).}
Congressional delegation to promulgate the Federal Rules. The new rule would thereby avoid those objections that judicially-fashioned rules have met: that requiring prior judicial showings in the grand jury arena is outside the scope of courts’ supervisory power. The rule would allow the Federal Rules of Criminal Procedure to remain internally consistent, while at the same time allowing the Court or Congress to resolve the conflict with the Dionisiro holding against minitrials.

The new rule should require a prior ex parte hearing—something more than a mere statement of justification by the government, but something less than full-blown adversarial hearing which could significantly burden the grand jury process. A more exact framework for the showing necessary is already present in the Department of Justice guidelines. The rule should, however, omit the guidelines’ requirement of negotiation with the defense attorney, thereby avoiding any potential conflict of interest of the defense attorney; or, alternatively, the new rule could require any negotiations to take place only in the presence of the client. As noted above, it would hardly constitute a burden on the grand jury or prosecutor by requiring the same information currently submitted to the Assistant United States Attorney General for the Crimi-

288. See 28 U.S.C. § 2071 (1982). Professor David Roberts once noted that one of the keys in deciding whether a rule is better enacted locally or nationally is whether the cause of the problem is local or national in scope. Roberts, supra note 273, at 553-554. Given Professor Genego’s statistics about attorney subpoenas, (discussed supra at notes 37-42 and accompanying text); the fact that most circuits have faced the preliminary showing requirements concerning grand jury subpoenas; and that several states are considering rules similar to PF 15, it is apparent that the problem is national in scope and therefore more appropriately addressed through the Federal Rules of Criminal Procedure.

Regarding which branch should enact the new rule, Judge Weinstein has posited that the issue is whether the rule establishes a basic policy formulation or whether the rule deals with mere detail. In this vein, Judge Weinstein suggests three guidelines for determining whether a matter is properly the subject of court rulemaking rather than Congressional review. First, “only where new amendments depart sharply from already approved policies does congressional scrutiny seem desirable.” Second, Congress should scrutinize those “rules and amendments that may have a substantive effect more carefully than those that will probably have a technical or procedural effect.” Finally, “while many rules have substantive effect, some such rules seem more fitting for review than others.” In particular, Judge Weinstein cites the area of privileges in the Federal Rules of Evidence as one which warrants Congressional review. Weinstein, supra note 239, at 929-30 & n.167 (1976) (footnotes omitted).

289. See Note, supra note 81, at 173.
nal Division and presenting it instead to a judge. In addition, the rule should be carefully drafted so that it is clear in exactly what circumstances the rule would apply.290

The hearing would allow the court to balance the interests present: The grand jury's right to every man's evidence, versus the attorney-client interests at stake. Such a balancing process would prevent a prosecutor from arbitrarily issuing subpoenas to attorneys representing grand jury targets in order to disqualify them, yet would not unduly slow the grand jury's investigation. The court should also consider whether the subpoena would require the defense attorney to actually appear before the grand jury to assert any privileges.291 The court could require less intrusive measures of obtaining the sought-after information, such as allowing compliance by affidavit which might help avoid the conflict in the attorney over whether to testify, or disobey the subpoena and face the contempt powers of the court.292 The process would also allow the client to see exactly what information was requested and avoid the image of his attorney sitting behind closed doors testifying against him. Finally, if the subpoenas were allowed, the prior hearing should in no way effect a motion to quash under Rule 17(c).

VII. CONCLUSION

The adversarial model of advocacy is fundamental to our system of justice. Because grand jury subpoenas to defense attorneys potentially infringe on this model, a change is needed in the practice of how they are issued. Simply providing a blanket privilege for attorneys to avoid grand jury subpoenas would result in potentially valuable information being denied the grand jury, and would encourage hiding behind the cloak of the privilege. As pointed out by the Supreme Court in Branzburg v. Hayes,293 it is undesirable to exclude an entire class of persons from every citizen's obligation to provide evidence when requested by the grand jury. But with increasing numbers of subpoenas being served on defense attor-

290. See supra notes 275-86 and accompanying text. "[A] formless rule would properly be considered little more than a special privilege accorded lawyers and no others. Such a result is manifestly improper." In re Grand Jury Subpoena, No. 86-738 (D. Mass. Nov. 26, 1986) (available on LEXIS, Genfed library, Dist file).

291. Under PF 15, the defense attorney is still required to appear before the grand jury and take the stand to assert the attorney-client privilege. See id.

292. See Caplow, supra note 272, at 801.

293. 408 U.S. 665 (1972).
neys, some procedure is necessary to prevent infringement of the attorney-client relationship.

PF 15 is a defective solution to this need for three reasons: it conflicts with current federal law, its adoption exceeds district courts' rulemaking authority, and it lacks specific standards of application. Allowing state rules of ethics to engraft themselves upon the federal courts is normally innocuous, but when the rules change basic procedures of federal grand jury practice, one of the primary reasons for the Federal Rules is defeated. Concerning local rules, one commentator has noted:

[A]lthough the web woven [by the federal rules] may not be quite seamless, its parts are strongly interdependent, and poorly drawn local rules merely aggravate this problem. Conversely, even the best-formulated local rules cannot solve the problem since by nature their effect is purely local. Worse, they can mask the gravity of the problems and divert attention from the need to address them nationally. 294

To avoid potential conflicts between state and federal law as well as to protect the attorney-client relationship, an amendment to the Federal Rules of Criminal Procedure is needed—an amendment which will help resolve the defense attorney’s ethical/legal tug of war.

Paul Marshall Yoder

Appendix

DEPARTMENT OF JUSTICE GUIDELINES FOR GRAND JURY SUBPOENAS
ISSUED TO DEFENSE ATTORNEYS UNITED STATES ATTORNEYS’
MANUAL (SECTION 9-2.161(A) (1985))

Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client, it is important that the Department exercise close control over the issuance of such subpoenas. Therefore, the following guidelines shall be adhered to by all members of the Department in any matter involving a grand jury or trial subpoena.

A. In determining whether to issue a subpoena in any matter to an attorney for information relating to the representation of a client, the approach must be to strike the proper balance between the public’s interest in the fair administration of justice and effective law enforcement and individual’s right to the effective assistance of counsel.

B. All reasonable attempts shall be made to obtain information from alternative sources before issuing a subpoena to an attorney for information relating to the representation of a client, unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from an attorney if such attempts prove unsuccessful.

C. All reasonable attempts shall be made to voluntarily obtain information from an attorney before issuing a subpoena to an attorney for information relating to the representation of a client, unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to subpoena such information from the attorney if such attempts prove unsuccessful.

D. No subpoena may be issued in any matter to an attorney for information relating to the representation of a client without the express authorization of the Assistant Attorney General of the Criminal Division.

F.[sic] In approving the issuance of a subpoena in any matter to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division shall apply the following principles:

(1) In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution.
The subpoena must not be used to obtain peripheral or speculative information;

(2) In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation;

(3) All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful;

(4) The reasonable need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client;

(5) Subpoenas shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonably limited period of time; and

(6) The information sought shall not be protected by a valid claim of privilege.

These guidelines on the issuance of grand jury or trial subpoenas to attorneys for information relating to the representation of clients are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.