IN THE SUPREME COURT
OF FLORIDA

IN RE: Petition to Amend the Rules Regulating the Florida Bar

Case No. 70,366

RESPONSE OF THE UNITED STATES ATTORNEY
FOR THE MIDDLE DISTRICT OF FLORIDA

The United States Department of Justice respectfully opposes the addition of Rule of Professional Conduct 4-3.8 proposed by the Petition to Amend the Rules Regulating the Florida Bar which was filed by the Board of Governors of the Florida Bar on April 13, 1987. The proposed rule would require major changes from existing Grand Jury practice which would hinder effective law enforcement in a manner contrary to the mandates of the United States Constitution. Further, the rule will serve no valid purpose, and create an unseemly distinction in treatment between attorneys and non-attorney witnesses before the Federal Grand Jury. Finally, promulgation of the proposed rule now would be untimely, because the constitutionality of a virtually identical rule is being tested by the United States Court of Appeals for the First Circuit. This Response sets forth each of these concerns in greater detail.

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Exh I
Exh II

The Proposed Rule Will Require A Major Departure From Existing Grand Jury Practice

The proposed Rule 4-3.8, as set forth in the Petition is as follows:

> 4-3.8 Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall:
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> > (d) Not, without prior judicial approval, subpoena an attorney to a Grand Jury where the prosecutor seeks to compel that attorney to provide evidence concerning a client of that attorney.

This rule, which purports to be an ethical standard governing the conduct of Florida attorneys, in fact would require dramatic change in Federal procedures for issuing of Grand Jury subpoenas. Federal Courts have historically had very limited involvement in the issuance of subpoenas. This historic noninvolvement is reflected in Federal Rule of Criminal Procedure 17, which provides that the Court Clerk "shall issue" subpoenas in blank. No prior approval of grand jury subpoenas is contemplated by the Rules. The Florida Bar's proposed ethical rule clearly engrafts a new procedural requirement on the Federal Rules.

The noninvolvement of the federal judiciary in the decision whether to issue a subpoena is not the result of any oversight or accident. Instead, it is mandated by 180 years of uniform case law which holds that judicial involvement occurs only after a subpoena has been served. Litigating parties historically have been given exclusive discretion to decide who or what to subpoena. "The law is express on the subject. It is that either

party may require the other to produce books or writings in their possession or power which contain evidence pertinent to the issue." United States v. Burr, 25 F.Cas. 187, 191 (CC Va. 1807). Not even the President of the United States can insist upon judicial review prior to the issuance of a subpoena. United States v. Burr, 25 F.Cas. 35; United States v. Nixon, 418 U.S. 683, 713 (1974) ("If a President concludes that compliance with a subpoena would be injurious to the public interest, he may properly, as was done here, invoke a claim of privilege on the return of the subpoena.") These cases reflect the public policy behind the ancient proposition of law that "the public ... has a right to every man's evidence," except for evidence protected by a specific privilege. United States v. Nixon, 418 U.S. 709, quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

The Eleventh Circuit has consistently rejected claims that would place additional requirements on the issuance of grand jury subpoenas. In re Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982); In re Grand Jury Proceedings (Bowe), 694 F.2d 1256, 1258 (11th Cir. 1982); In re Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); In re Grand Jury Investigation (McLean), 565 F.2d 318, 320 (5th Cir. 1977); In re Grand Jury Proceedings (Field), 532 F.2d 404, 409 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Other circuits are in accord. In re Pantojas, 628 F.2d 701, 704-05 (1st Cir. 1980); In re Liberatore,

574 F.2d 78, 83 (2d Cir. 1978); United States v. Oliva, 611 F.2d, 23, 25 (3d Cir. 1979); In re Sinadinos, 760 F.2d, 167, 169-70) (7th Cir. 1985); In re Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977).

In sum, it is clear that the proposed rule is more than merely an ethical regulation. Instead, it will mandate a major departure from existing federal procedure which the courts have consistently refused to make. Even more importantly, however, the imposition of a new procedure on federal courts in the guise of an ethical rule of the Bar of the State of Florida is unconstitutional.

The Proposed Rule Is Contrary To The United States Constitution

The representation of the Federal Government's sovereign interest in a Federal grand jury investigation is solely a federal question. It is respectfully submitted that Federal criminal procedure is not subject to regulation by the State of Florida. "[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the Federal function must be left free of regulation." Hancock v. Train, 426 U.S. 167, 178 (1976), quoting Mayo v. United States, 319 U.S. 441, 447-448 (1943). Under the United States Constitution, a state law which stands as an obstacle to "the accomplishment and execution of the full purposes and objectives of Congress" is impermissible. Jones v. Rath Packing Co., 430 U.S. 519, 526, 543 (1976) quoting Hines v. Davidowitz, 312 U.S. 52, 676 (1940).

Under the doctrine of preemption, even a state law which promotes a valid state interest will fall if it frustrates the operation of federal law. Perez v. Campbell, 402 U.S. 637, 651-652 (1971).

Congress and the Advisory Committee on Rules which drew up the Federal Rules of Criminal Procedure demonstrated an unambiguous intention to occupy the entire field of regulation of criminal procedure without participation by the states. Congress empowered the Supreme Court to prescribe Federal criminal rules with the approval of Congress itself, 18 United States Code 3771, and Rule 1 of the Federal Rules of Criminal Procedure explains that the Rules "govern the procedure in all criminal proceedings in the Courts of the United States as provided in Rule 54(a) . . . ." These provisions dispel any doubt that Congress intended to share the regulation of federal criminal procedure with the State of Florida.

There is no question that Florida has the authority and duty to regulate the ethical conduct of attorneys admitted to practice in its courts. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-793 (1975). However, Florida's regulatory and disciplinary authority is limited by the United States Constitution. A supposed "ethical rule" which imposes a procedural requirement on Federal Courts is simply unconstitutional.

The Proposed Rule Serves No Valid Purpose And Will Frustrate Effective Law Enforcement

The Petition provides little guidance as to why the Bar believes the rule is necessary. Instead, it merely states:

> The Florida Bar submits that this rule is necessary so that an independent review of attempts to subpoena matters, which otherwise would be properly within the scope of an attorney-client relationship, may be performed thereby insuring no abuse of prosecutorial authority. Petition to Amend the Rules Regulating the Florida Bar at 3.

The petition nowhere explains why review prior to issuance of a subpoena is necessary or desirable. This failure to elaborate on the need for a pre-issuance review is surprising considering that there exists a perfectly adequate post-issuance remedy available to attorneys who believe that compliance with a grand jury subpoena would improperly impair their relationship with a client. Rule 17(c) of the Federal Rules of Criminal Procedure provides that "the Court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." This remedy is available to all witnesses who appear before a federal grand jury and to date complaints about its efficacy as a remedy have been few.

Moreover, the rule is not necessary to curb supposed "abuses" by Federal prosecutors because Department of Justice procedures already include a careful screening of subpoenas to attorneys. Under existing policy of the United States Department of Justice, attorney subpoenas must be approved both by the U. S.

Attorney for the District in which the subpoena is issued, and by the Assistant Attorney general for the Criminal Division of the Department of Justice. Statistics compiled by the Department of Justice show that during the 13-month period ending March 31, 1987, 433 grand jury subpoenas of attorneys were approved by the Department of Justice in the entire United States, an average of only 33 per month. Of that number, only 25% sought information related to a current client of the attorney subpoenaed. Of the grand jury subpoenas to attorneys for information relating to current clients, more than half were requests for fee information, which is non-privileged. These statistics, added to the approval requirements and review accorded to attorney subpoenas, suggest strongly that the supposed "abuses" which the proposed rule purports to address are non-existent in the Federal system.

Aside from the fact that the rule is unnecessary, it will hamper the efforts of Federal prosecutors to enforce the laws. One problem is the proposed rule's overbreadth. It is frequently the case when a grand jury subpoena is issued to an attorney that the prosecutor seeking the attorney's testimony or evidence will not know with certainty whether an attorney-client privilege attaches to the information sought. Because of the proposed rule's vagueness, prosecutors would be required to submit attorney subpoenas for approval rather than risk a subsequent claim that the prosecutor violated the Rule. With the threat of disbarment as the punishment for guessing wrong, few prosecutors would be

willing to accept the risk of issuing an attorney subpoena without prior approval. As written, the rule would result in requiring prior judicial approval for virtually every subpoena issued to an attorney.

Another problem of the rule is its lack of any principles by which either prosecutors or the courts can guide their actions. The proposed rule states nothing more than a requirement that prosecutors seek prior approval for attorney subpoenas, and provides neither the procedures by which the prosecutor must seek approval nor standards by which the courts should make their determinations.

For example, the ethical rule does not state whether the approval should be sought ex parte, or whether there must be notice and opportunity to reply by the attorney to be subpoenaed. 1/ If ex parte, the reviewing court would often be required to decide on the propriety of the subpoena on the basis of a record which is inadequate to determine whether an attorney-client relationship exists, the nature of the evidence to be produced, and whether the evidence is subject to the privilege. Such issues are better joined after the issuance of a subpoena, upon a motion to quash by the attorney receiving the subpoena setting forth the

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1/ Of course, the suggestion that a supposed "ethical rule" must necessarily deal with such issues shows its true nature: it is, in effect, a new Federal Rule of Criminal Procedure in disguise.

reasons why he believes that the information sought is privileged. Moreover, it is difficult to see what standard of review could be applied by the court based on an ex parte review aside, perhaps, from a determination that the prosecutor seeking the subpoena believed in good faith that some information sought was not protected by an attorney-client privilege.

If the review is not to be ex parte, but is to require notice to the attorney subpoenaed and an opportunity to respond, the review process will be more cumbersome and time-consuming, all too often requiring extended briefing and hearings prior to issuance of the subpoena. The Supreme Court of the United States has refused to impose such requirements: "Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v. Dionisio, 410 U.S. 1, 17 (1973). See also United States v. Calandra, 414 U.S. 338, 349-350 (1984) (declining to extend exclusionary rule to grand jury proceedings for fear that it would delay proceedings and "interfere with the effective and expeditious discharge of the grand jury's duties").

The imposition of this additional obstacle to grand jury proceedings would be exacerbated by the fact that under Rule 17(c) of the Federal Rules of Criminal Procedure, a second review would be available upon a motion to quash after the subpoena was issued.

Nothing in this proposed "ethical rule" relieves Federal Courts of this obligation to conduct a second review upon the filing of a motion to quash.

In addition to the problems already noted, the rule is flawed by the overbreadth of its geographic reach. It is clear that Florida's authority to regulate reaches beyond state boundaries, and that it may discipline members of its bar residing in other states. Supreme Court of New Hampshire v. Piper, 105 S.Ct. 1272, 1279-1280 (1985). As a result, a Federal prosecutor belonging to the Florida Bar, but residing in Georgia, which does not require prior approval of attorney's subpoenas, would have to seek such approval from Georgia courts or risk disbarment in Florida. Georgia courts would doubtless consider the imposition of a procedure not contemplated by the Federal Rules as an unwelcome addition to their responsibilities. It is respectfully submitted that the imposition of such a procedural requirement on the Federal system by Florida is not a proper exercise of Florida's power to regulate the conduct of attorneys.

Finally, in those cases in which the attorney subpoenaed is himself a target, or is prepared to defend his client unscrupulously, such delays will give the subpoena's recipient more time to destroy, conceal or alter evidence, or to attempt to alter the testimony of others. A rule that promotes a defense

attorney's ability to withhold potentially valuable and unprivileged evidence is hardly a salutary addition to the Bar's standards of conduct. As the Second Circuit has noted in an analogous situation:

> a broad privilege against disclosure . . . might easily become an immunity for corrupt or criminal acts . . . Such a shield would create unnecessary but considerable temptations to use lawyers as conduits for information or of commodities necessary to criminal schemes . . . The bar and the system of justice will suffer little if all involved are aware that assured safety from disclosure does not exist. In re Shargel, 742 F.2d 61, 64 (2d Cir. 1984).

The Proposed Rule Creates an Unseemly Distinction Between Attorney and Non-Attorney Grand Jury Witnesses

If the proposed rule were imposed upon the Federal Courts, it would create, for the first time, a special class of attorney-witnesses enjoying a status possessed by no other class of witnesses subpoenaed by the government. Under Rule 17 of Federal Rules of Criminal Procedure, prior approval of the issuance of grand jury subpoenas is not required for any other witness. The elevation of attorneys by the Florida Supreme Court to the status of a preferred class of witness would be unseemly at best.

For example, the subject of an investigation has no right to prior judicial approval of subpoenas to the Federal Grand Jury, even where testimony which the prosecutor seeks is subject

to his Fifth Amendment right against self-incrimination under the United States Constitution. Instead, it is well settled that witnesses must comply with subpoenas to appear and are required to testify, asserting the Fifth Amendment privilege on a question by question basis where appropriate:

> If specific questions call for privileged material or answers which might tend to incriminate, Mr. Bowe may assert his objections and refuse to answer. The trial court can then rule on those specifics if they arise. In Re Grand Jury Proceedings (Bowe), 694 F.2d 1256, 1258 (11th Cir. 1982).

See also Hoffman v. United States, 341 U.S. 479, 486 (1950); United States v. Reis, 765 F.2d 1094, 1096 (11th Cir. 1985); United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980). This procedure has the salutary effect of creating a record of specific questions and specific assertions of privilege which provides a basis for a determination whether the privilege was properly invoked. Indeed, a contrary procedure, under which no such record is created, can necessitate repeated trips between the grand jury room and the district court to litigate the propriety of a claim of privilege.

The Bar of the State of Florida now proposes that the Supreme Court impose a rule creating a separate class of attorney-witnesses as to whom special procedures will now apply. The Bar's implied assertion that such special status is necessary to protect attorney-witnesses boggles the imagination. Is the attorney-client privilege more cherished by our legal system than

the fundamental Fifth Amendment right against self-incrimination? Is there any class of witnesses more capable of availing itself of the protection of the courts than attorneys? The proposed rule arrogates to attorneys a special status which is unseemly and unworthy of the Florida Bar.

The Supreme Court Should Defer Decision On The Proposed Rule Until Its Constitutionality Is Tested In The Federal Courts.

A rule virtually identical to the rule proposed by the Florida Bar was adopted by the Supreme Judicial Court of Massachusetts on October 1, 1985. The Massachusetts rule provided:

> 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.

Violation of the Massachusetts rule, like the rule proposed by the Florida Bar, would constitute misconduct and could be grounds for disciplinary action.

On December 31, 1985, the United States filed an action seeking an injunction and declaratory relief against the Massachusetts Bar and its counsel, Daniel Klubock. The complaint requested that the District Court enjoin application of the rule to federal prosecutors and issue a declaratory judgment that the United States Constitution barred application of the rule to federal prosecutors.

The injunction and declaratory relief sought by the United States were denied by the District Court, which was initially upheld by the United States Court of Appeals for the First Circuit. United States v. Klubock, No. 86-1413 (March 25, 1987). However, the appellate court's opinion was withdrawn and judgment vacated on May 1, 1987. See Order of United States Court of Appeals for the First Circuit [Exhibit I]. As of this writing, the case is scheduled for oral argument on Wednesday, June 3, 1987.

Some of the reasons for the First Circuit's decision to vacate its judgment upholding the District Court can doubtless be found in Chief Judge Campbell's dissent from the panel's decision. Judge Campbell explained:

> Neither Federal Rule of Criminal Procedure 17 nor any other provision in the Federal Criminal Rules or Statutes provides for judicial approval of a grand jury subpoena before it may be served, while history and the case law, as hereinafter discussed, make it clear that the grand jury's uninhibited ability to call the witnesses it chooses is a right entitled to the utmost respect. In such circumstances, the rules' silence is most reasonably interpreted as forbidding further regulation by any body other than the Supreme Court or Congress. United States of America v. Klubock, No. 86-1413 at 29 (March 25, 1987) [Exhibit 2].

Given the posture of this challenge to a Massachusetts rule virtually identical to the one proposed by the Florida Bar, it would be imprudent of the Supreme Court of Florida to impose

the proposed ethical rule prior to the conclusion of the litigation in Klubock. Even in the event that the First Circuit, sitting en banc, again refuses to enjoin the Massachusetts ethical rule, it is very likely that the Massachusetts rule will be appealed to the United States Supreme Court. It is the view of the undersigned that the lower court's decision in Klubock will almost certainly be reversed, if not by the First Circuit Court of Appeals, then by the United States Supreme Court, and that the application of the rule to attorneys in Federal proceedings will ultimately be enjoined.

Conclusion

Because the proposed rule constitutes a major departure from existing Grand Jury practice and procedure which will serve no valid purpose, hinder law enforcement, violate the United States Constitution, and create an unseemly distinction in treatment between attorneys and non-attorney witnesses, the United States urges that this Honorable Court deny the petition of the Florida Bar to Amend the Rules of Professional Conduct by the addition of Rule 4-3.8.

Respectfully submitted,

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