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February 1, 2007

The Honorable Peter G. McCabe
Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the U.S. Courts.
Washington, DC 20054

RE: Proposed amendment to Rule 17 of the Rules of Criminal Procedure

Dear Mr. McCabe:

I write on behalf of the American Bar Association (ABA) to present our views to the Committee on Rules and Procedure of the Judicial Conference of the United States regarding the proposed amendment to Rule 17 of the Rules of Criminal Procedure. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. I serve as the Chair of the ABA Criminal Justice Section, representing the largest national membership of prosecutors, defense counsel, legal scholars and judges.

There are a number of ABA policies relevant to the proposed revision to Criminal Rule 17. Those policies (black letter) are included verbatim in the Appendixes. They are extracted below and referenced to the proposed language of the Rule. The effort to provide greater protection for the privacy interests of victims is supported by existing ABA policy. We ask that the Rules Committee review the following policy and modify the proposal consistent with the ABA policy to protect victims' interests as intended.

1. Obtaining evidence in violation of the legal rights of victims

ABA Model Rules of Professional Conduct, Rule 4.4 (a) and ABA Criminal Justice Standard 4-4.3 both provide in pertinent part, "In representing a client, a lawyer shall not ... use methods of obtaining evidence that violates the legal rights of such a [third] person."

Comment 1 of Rule 4.4(a) rule explains that a lawyer's responsibility to a client does not imply that a lawyer may disregard the rights of third persons. The comment adds that while it is impractical to catalogue all such rights it

includes disregarding legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

Under 18 U.S.C. Section 3771(a), crime victims have the right to be treated with fairness and with respect for the victim's dignity and privacy under federal law. Moreover, under federal and state law, victims have privileged relationships not only with attorneys but also with others include psychiatrists. Many other statutes and regulations provide confidentiality to other communications as a matter of law.

While the proposed amendment to Rule 17 is intended to protect the interests of crime victims, the ABA urges the Committee to carefully examine the proposal to determine if the proposed amendment would actually violate the legal rights of victims contrary to the intent of Rule 4.4 of the ABA Model Rules of Professional Conduct. The ABA urges any final rule be made to conform to Rule 4.4 to prevent an attorney from violating an attorney's ethical obligation.

2. Not allowing a victim or victim's attorney the right to be heard

ABA Model Code of Judicial Conduct Canon 3 B (7) provides in pertinent part, "A judge shall accord to every person who has a legal interest in the proceeding, or that person's lawyer, the right to be heard according to law. ABA Criminal Justice Standard 6-1.1 (c) provides "The trial judge should be sensitive to the functions of the prosecutor, defense counsel, witnesses, and jury, and the interests of the defendant, victim and public; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness."

Under 18 U.S.C., Section 3771, several provisions are applicable:

18 U.S.C. Section 3771(a) - crime victims have the right to be treated with fairness and with respect for the victim's dignity and privacy under federal law.

18 U.S.C. Section 3771(c)(2) - the prosecutor shall advise the crime victim that he or she can seek the advice of an attorney with respect to their rights.

18 U.S.C. Section 3771(d)(1) - crime victims, a crime victim's lawful representative, and the attorney for the government may assert the rights of the victim.

Under the proposed Rule, the court may require notice to the victim so that the victim has an opportunity to move to quash or modify the subpoena. While the proposed amendment to Rule 17 is intended to protect the interests of crime victims, the ABA urges the Committee to carefully examine the proposal to determine if the proposed amendment would be contrary to the Court's responsibility under Canon 3 B (7) in that the victim may never be notified at all. Even if notice were to be provided under the proposal to the victim, the victim might not be notified until after the personal or

confidential information was obtained. Finally, we are concerned that issuing the order and/or allowing the records to be obtained without knowledge of victim would be contrary to the ABA Criminal Justice Standard 6-1.1 (c). The ABA urges any final rule

to conform to Canon 3 B (7) and Criminal Justice Standard 6-1.1 (c) to provide appropriate consideration and right to be heard by a victim who has an interest in the proceeding.

3. Allowing *ex parte* contact by counsel

ABA Model Code of Judicial Conduct, Canon 3 B (7) provides in pertinent part,

“A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.”

Under 18 U.S.C., Section 3771, several provisions are applicable including, 18 U.S.C., Sections 3771(a) and 3777(d)(1), noted previously.

Under the proposed Rule, the court order could be granted *ex parte*. While the proposed amendment to Rule 17 is intended to protect the interests of crime victims, the ABA urges the Committee to carefully examine the proposal to determine if the proposal regarding Rule 17 would be contrary to the Court’s responsibility under Canon 3 B (7) in allowing *ex parte* contact on a substantive matter. Even if the Committee decides that it is not a substantive matter, the Committee should consider whether the proposed rule would allow a tactical advantage as a result of the *ex parte* communication and the judge is required to promptly notify the other party of the substance of the *ex parte* communication and allow an opportunity to respond. The Committee should also consider whether ABA Criminal Justice Standard 11-3.1 (b) requiring a motion provides justification for an *ex parte* motion. The ABA urges any final rule to conform to Canon 3 B (7) and not violate the judges’ obligation not to have improper *ex parte* contact.

4. Scope of Material Subject to Protection

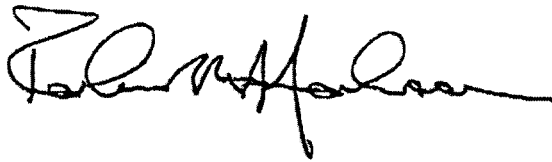
Under the proposed rule, material deemed to be “personal” would be protected from subpoena along with material which is confidential. ABA Criminal Justice Standard 11-

3.1 (c) indicates that the scope of what is protected from improper disclosure is what “would require the disclosure of material that is privileged or otherwise protected from disclosure or would otherwise be unreasonable.” We ask that the Committee consider whether it is appropriate for the proposed amendment to Rule 17 to go beyond existing ABA policy by offering to protect from disclosure material that is not shielded from

disclosure by law. Moreover, the term “personal” is ambiguous. The ABA urges any final rule to conform to ABA Criminal Justice Standard 11-1.3 (c) with clear language so that practitioners know what material may be properly sought and what should not be sought.

Thank you for the opportunity to present the views of the ABA for the Rules Committee for its consideration. The ABA believes that its model codes and rules for judges and counsel as well as the applicable ABA Criminal Justice Standards promote justice, professional excellence, and respect for the law. In support of its mission and goals, the ABA urges the Rules Committee to adopt changes to Rule 17 in conformance with the applicable ABA policy as presented in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert M. A. Johnson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert M. A. Johnson

Chair, Criminal Justice Section

APPENDIX A

RESPECT FOR RIGHTS OF THIRD PERSONS

February 5, 2002, Amended

RULE 4.4 n37 ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002)

n37 Amended February 5th, 2002, American Bar Association House of Delegates, Philadelphia, Pennsylvania, per Report No. 401.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

APPENDIX B

Criminal Justice Section Standards

DEFENSE FUNCTION

PART I.

GENERAL STANDARDS

Standard 4-4.3 Relations With Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

APPENDIX C

August 10, 1999, Amended

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

August 10, 1999, Amended

CANON 3 n1 MODEL CODE OF JUDICIAL CONDUCT (1999)

n1 Amended August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia per Report No. 123.

B. Adjudicative Responsibilities.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law *. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law * applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel * whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law * to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

APPENDIX D

SPECIAL FUNCTIONS OF THE TRIAL JUDGE STANDARDS

Standard 6-1.1. General responsibility of the trial judge

...
(c) The trial judge should be sensitive to the functions of the prosecutor, defense counsel, witnesses, and jury, and the interests of the defendant, victim and public; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness.