



U.S. Department of Justice

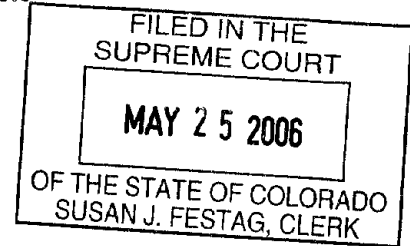
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May 25, 2006

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203



Re: Proposed Rule 3.8(e) of the Colorado Rules of Professional Conduct

Dear Madam Chief Justice and Associate Justices of the Colorado Supreme Court,

I would like to comment on Rule 3.8, Special Responsibilities of a Prosecutor. Specifically, I request that the new Rules of Professional Conduct make it clear that Rule 3.8(e) does not apply to federal prosecutors practicing before federal grand juries.

Rule 3.8 provides that: "A prosecutor in a criminal case shall: . . .

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

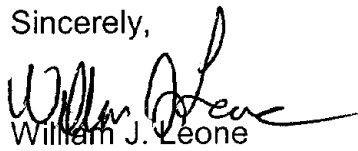
- (1) the information sought is not protected from disclosure by any applicable privilege;
- (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
- (3) there is no other feasible alternative to obtain the information.

In 1993, the United States challenged application of this Rule as it applied to federal prosecutors appearing before federal grand juries and trial juries. The federal district court held that the Rule could not be applied to federal prosecutors practicing before the grand jury, but could be applied to federal prosecutors appearing before trial juries. *United States v. Colorado Supreme Court*, 988 F.Supp. 1368 (D.Colo. 1998). The Colorado Supreme Court did not appeal the district court's ruling as to grand jury practice. The United States appealed the ruling as to trial practice, and the district court's judgment was affirmed by the Tenth Circuit. *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999).

The new Rules should make explicit this limitation on the application of proposed Rule 3.8(e). There are many attorneys licensed by the Colorado Supreme Court practicing in Colorado and all around the country. They look to the Court's Rules of Professional Conduct for guidance. Many new prosecutors in Colorado as well as prosecutors in other jurisdictions are not familiar with the federal court rulings. By including some language in proposed Rule 3.8(e) or in the comment to Rule 3.8(f) addressing the limits of Rule 3.8(e), the Court would provide clear guidance to prosecutors.

Thank you for this opportunity to comment on the proposed Rules.

Sincerely,

A handwritten signature in black ink, appearing to read "William J. Leone". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William J. Leone
United States Attorney
District of Colorado