COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT
NO. SUCR2012-11016-20

COMMONWEALTH

V.

DAVID FORLIZZI

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT, DAVID FORLIZZI

INTRODUCTION

This case involves the Commonwealth's decision to use the grand jury investigation of a criminal defendant to subpoena records disclosing sensitive information about the defendant's lawyer. Without providing advance notice to the lawyer and without seeking court approval, the Commonwealth obtained a grand jury subpoena for four years of records, totaling over 1,500 pages, from the lawyer's bank. It claims that this clandestine tactic did not violate Rule 3.8 of the Massachusetts Rules of Professional Conduct—which prohibits "subpoena[ing] a lawyer" in a criminal case without "prior judicial approval after an opportunity for an adversarial" proceeding—because the records were held by the bank rather than by the lawyer himself. As the amicus explains below, that claim is incorrect.

Massachusetts has long been a national leader in addressing the dangers that arise when prosecutors issue subpoenas geared toward defense lawyers. Beginning in the 1980s, prosecutors sharply increased the practice of issuing defense attorney subpoenas. Stern v. United States, 214 F.3d 4, 7 (1st Cir. 2000); see also Whitehouse v. U.S. District Court for the District of Rhode

Island, 53 F.3d 1349, 1352 & n.3 (1st Cir. 1995) (citing Department of Justice statistics); United States v. Klubock, 832 F.3d 649, 657-58 (1st Cir.) , vacated on other grnds by an equally divided court, 832 F.2d 664 (1st Cir. 1987) (en banc)[1] (estimating that attorney subpoenas were present in 10.7% to 32.6% of the District of Massachusetts criminal cases between 1983 and 1986). Recognizing that these subpoenas raised constitutional concerns and threatened the attorney-client relationship, Massachusetts became the first state to adopt an ethical rule to protect against these dangers. See Stern, 214 F.3d at 7-9; see also Grand Jury Law & Practice, §6: 22 (2d ed.) (acknowledging that the ABA and several states ultimately followed Massachusetts' lead).

The rule was first codified as "Prosecutorial Function 15" and now appears, in modified form, as Rule 3.8(f) of the Rules of Professional Conduct. It provides that a prosecutor shall:

> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
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> > (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege, (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and (iii) there is no other feasible alternative to obtain the information, and (2) the prosecutor obtain prior judicial approval after an opportunity for an adversarial proceeding.

MRPC 3.8 (f).[2]

This case presents a new version of the same old problem: the prosecution has inserted itself between a criminal defendant and his lawyer by subpoenaing, without judicial approval,

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[1] Although an equally divided en banc court vacated the original panel decision, the Supreme Judicial Court, the First Circuit and other courts have all continued to cite the original panel decision for its reasoning. See, e.g., In re Grand Jury Investigation, 407 Mass. 916, 918 (1990) (describing and relying upon the original panel's reasoning); Whitehouse, 53 F.3d at 1354-55 (noting that the reasoning of the original panel's decision "remains of potential persuasive authority" and going on to discuss that reasoning at length); Petition of Almond, 603 A.2d 1087, 1089 (R.I. 1991) (citing the original panel's reasoning and determining that it is "persuasive authority").

[2] Under PF 15, it was, "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."

sensitive records about the lawyer. The Commonwealth argues that subpoenaing a lawyer's bank does not amount to "subpoena[ing] a lawyer" under Rule 3.8(f). This argument, which has not been addressed in Massachusetts case law, should be rejected in this case. Properly interpreted, Rule 3.8's command that a prosecutor obtain judicial approval before subpoenaing "a lawyer" governs a prosecutor's dragnet subpoenas of sensitive attorney bank records.

To begin, the Commonwealth's narrow definition of the phrase "subpoena[ing] a lawyer" overlooks that the Supreme Judicial Court has already interpreted this phrase to reach non-lawyers. The Court has applied PF 15 to a subpoena issued to a lawyer's paid investigator; it reasoned that a contrary holding would undermine the rule's purpose. In re Grand Jury Investigation, 407 Mass. 916, 917-19 (1990); see also In re Grand Jury Investigation, 452 Mass. 1002, 1002 (2008) (prosecutor sought prior judicial approval, under Rule 3.8, for summons of attorney's investigator).[3] Thus, in deciding whether subpoenaing a lawyer's bank amounts to "subpoena[ing] a lawyer" under Rule 3.8(f), it is necessary to inquire into the Rule's purposes.

That inquiry yields a clear answer: subpoenaing a lawyer's bank amounts to subpoenaing the lawyer because a subpoena directed to a bank, just as surely as a subpoena to an attorney's paid investigator, imperils the client's rights and the attorney-client relationship. The Supreme Judicial Court adopted Rule 3.8 because of the serious ethical and constitutional implications that arise when prosecutors subpoena attorneys to compel evidence concerning their clients. In re Grand Jury Investigation, 407 Mass. 916, 917-18 (1990) (addressing PF 15); Klubock, 832 F.2d at 653-54 (1st Cir. 1987) (same). To help address these well-founded concerns, the Court recognized that a judge must serve as a gatekeeper whenever a prosecutor seeks such a subpoena.

[3] In In re Grand Jury Investigation, 452 Mass. 1002, there was no dispute that prior judicial approval was required for a subpoena issued to an investigator. Instead, the petitioner challenged the particular standards the court needed to apply when the prosecutor sought such approval from the court. The case was ultimately dismissed as moot because the investigator invoked his Fifth Amendment right not to testify. Id. at 709.

Klubock, 832 F.2d at 653-54. Because a dragnet subpoena of a defense attorney's bank records similarly triggers the same ethical and constitutional concerns that MRPC 3.8 is meant to ameliorate, the Rule should require prosecutors to obtain prior judicial approval.

What is more, subpoenas for sensitive information about defense lawyers can raise serious constitutional questions about the rights of the lawyers themselves. The Supreme Judicial Court recently held that long-term GPS tracking triggers the need for judicial oversight and probable cause under article 14 of the Massachusetts Declaration of Rights even when the Commonwealth obtains the GPS information without infringing upon any property belonging to the person being tracked. Commonwealth v. Rousseau, 465 Mass. 372, -- N.E.2d --, SJC-11227 & 11228, 2013 WL 2402513 (Mass. June 5, 2013). By that same logic, the long-term collection of sensitive attorney files without prior judicial approval raises serious questions under article 14 even when those files are the business records of third parties.

Thus, to protect the attorney-client relationship, to safeguard the constitutional rights of criminal defendants and to avoid raising serious questions about the rights of defense lawyers, this Court should hold that Rule 3.8(f) governs dragnet subpoenas of a defense lawyer's bank records. A contrary holding would erode Massachusetts' position as a consistent leader in the protection of the attorney-client relationship from such intrusions.

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union of Massachusetts (ACLUM) is a non-profit, statewide membership organization which defends the civil rights and civil liberties established by the United States and Massachusetts Constitutions. ACLUM has a longstanding interest in protecting the attorney-client relationship, preserving the right to counsel enshrined in the Sixth Amendment of the United States Constitution and article 12 of the Massachusetts Declaration of

Rights, and protecting the right against unreasonable searches and seizures enshrined in the Fourth Amendment of the U.S. Constitution and article 14 of the Declaration of Rights. See, e.g., Rousseau, 2013 WL 2402513 (amicus challenging extended GPS tracking as a violation of article 14); In re Grand Jury Subpoena, 454 Mass. 685 (2009) (amicus challenging the use of grand jury subpoenas of prison inmates' telephone calls as a violation of article 14); Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004) (co-counsel challenging the low rate of compensation authorized for court-appointed counsel as a violation of defendants' constitutional right to counsel); Commonwealth v. Manning, 373 Mass. 438 (1977) (amicus challenging government's intentional interference with attorney-client relationship).

ARGUMENT

The Commonwealth contends that the plain meaning of Rule 3.8(f) compels the conclusion that an attorney's bank records can be obtained without any judicial approval during a grand jury investigation. That is not so. The plain meaning of Rule 3.8(f) does not compel the Commonwealth's interpretation. Moreover, because this type of subpoena threatens the rights of both the defendant and the lawyer, the Rule's manifest purposes require a contrary approach.

I. The Plain Meaning Of Rule 3.8(f) Does Not Resolve This Issue.

This is not a case that can be resolved without examining the purposes of Rule 3.8. Although the Commonwealth has argued that this matter can be resolved solely by examining the plain meaning of Rule 3.8(f), and in particular the dictionary definition of the word "lawyer," that is not so. See 4/30/2013 Com. Resp. to Mtn. to Dismiss at 8-9.

Just as the object of statutory construction "is to ascertain the true intent of the Legislature," Champigny v. Commonwealth, 422 Mass. 249, 251 (1996), the object of interpreting the Rules of Professional Conduct is presumably to ascertain the true intent of the

Supreme Judicial Court in adopting those Rules. The plain meaning of the relevant text will govern that interpretation "if the meaning of the words used is clear and unambiguous," and if construing the text according to that plain meaning would not "lead to an absurd or unworkable result." Commonwealth v. Millican, 449 Mass. 298, 301 (2007).

As applied here, Rule 3.8(f) does not have a "clear and unambiguous" plain meaning that avoids an "absurd" result. The Supreme Judicial Court long ago interpreted Prosecutorial Function 15, a predecessor to Rule 3.8, to govern a subpoena not strictly directed to "a lawyer." In re Grand Jury, 407 Mass. at 919. The Court held that PF 15 required prior judicial approval of a grand jury subpoena directed to an investigator employed by a lawyer because "[t]he concerns that gave rise to the enactment of PF 15. . .also are implicated if an attorney's agent is subpoenaed." Id. In order to avoid an absurd result, the Court therefore concluded, "that PF 15 must be interpreted to include agents of an attorney." Id. Seven years later, when the Court adopted Rule 3.8, it did so in the context of case law interpreting the term "lawyer" to go beyond the lawyer herself. Cf. In re Grand Jury, 452 Mass. at 1002 (prosecutor sought prior judicial approval, under Rule 3.8(f), to summon defense attorney's investigator).

The Commonwealth now argues that a lawyer's bank is not the lawyer's agent, see 4/30/2013 Com. Resp.to Mtn. to Dismiss at 9, but that argument is not dispositive of the question at issue here. The import of In re Grand Jury is that the Supreme Judicial Court rejected a dictionary-definition approach to the term "lawyer" in PF 15 and Rule 3.8(f). 407 Mass. at 917-19. Indeed, it suggested that those rules would yield impermissibly absurd results—in violation of the plain meaning doctrine—if they were interpreted to govern only subpoenas directed to lawyers themselves. Id. Thus, even if In re Grand Jury does not control this case, it thoroughly undermines the Commonwealth's view that this case can be resolved simply by looking up

"lawyer" in the dictionary. Instead, just as the Supreme Judicial Court looked to the purposes of PF 15 when deciding whether it governed a subpoena to a lawyer's investigator, this Court should look to the purposes of Rule 3.8 when deciding whether it governs a subpoena to a lawyer's bank.

II. The purposes of Rule 3.8(f) confirm that it should be construed to apply to the dragnet collection of bank records concerning a defense lawyer.

The dangers of the prosecutorial practice of subpoenaing defense lawyers "'are great, to the point of threatening the keystone of the attorney-client relationship[.]'" In re Grand Jury, 407 Mass. at 918 (quoting In re Grand Jury Subpoena to Attorney (Under Seal), 679 F. Supp. 1403, 1404 (N.D.W. Va. 1988). In In re Grand Jury, the Court observed that "seek[ing] to compel evidence concerning a client from an agent rather than from the attorney himself does not diminish the danger of" driving "a 'chilling wedge'" between lawyer and client. 407 Mass. at 919. As explained below, those dangers are no weaker when prosecutors subpoena sensitive lawyer records held by third parties, such as banks.

A. The Supreme Judicial Court adopted PF 15 and Rule 3.8(f) based on grave concerns about defendants' constitutional rights and the attorney-client relationship.

Six interrelated issues animated the SJC's decision to require prior judicial approval before a prosecutor may "subpoena a lawyer."

First, such subpoenas may create conflicting interests between the lawyer and her client. In re Grand Jury, 407 Mass. at 918. "As a witness, the attorney/witness has separate legal and practical interests apart from those of his client. These interests may or may not coincide with those of the attorney/witness and his client." Kublock, 832 F.2d at 653. [4]

[4] The Commonwealth asserts that Kublock has been "overturned" by Stern, 4/30/2013 Com. Resp. to Mtn. to Dismiss at 11, but any overturning hinged on grounds that are irrelevant here. Kublock described the purposes of PF 15, held that district courts have the authority to supervise the conduct of attorneys, and determined that PF 15

Second, the lawyer's response to the subpoena might entail diverting time and resources away from her client. That diversion, in turn, may reduce her effectiveness as counsel. Id.

Third, the mere possibility that a lawyer will be subpoenaed "will tend to discourage attorneys from providing representation in controversial criminal cases." Id.

Fourth, the possibility that a lawyer will be subpoenaed will likely chill the relationship between clients and their attorneys. In re Grand Jury, 407 Mass. at 918. The bedrock of this relationship is "free and unfettered communication between attorney and client." Whitehouse, 53 F.3d at 1361. Such communication will be hindered when a defense attorney may be subpoenaed to provide evidence against her client. Kublock, 832 F.3d at 654. A client may, for example, withhold certain information based on legitimate doubts regarding whether her attorney will be able to maintain her confidences.

Fifth, these subpoenas threaten a defendant's constitutional right to have the counsel of her choice and for that counsel to be free from state control. In re Grand Jury, 407 Mass. at 918; Kublock, 832 F.3d at 654. Receipt of a subpoena might compel a defense lawyer to withdraw from the case, due to ethical rules prohibiting a lawyer from being a witness in a case in which she is also counsel. Kublock, 832 F.3d at 654. Consequently, "[n]ot only the right to counsel of choice under the Sixth Amendment but also due process is thus implicated, because the attorney/prosecutor is potentially given control over who shall be his attorney/adversary" and how they shall proceed with their case. In re Grand Jury, 407 Mass. at 919.

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applied to federal prosecutors in federal court. Thirteen years later, Stern simply held that the federal district court in Massachusetts could not adopt Rule 3.8(f). That holding neither changed the Rule's application in state court—where Rule 3.8 indisputably does apply—nor undermined Kublock's account of the Rule's purposes. In fact, the First Circuit and other courts have continued to cite Kublock. See, e.g., US v. Overseas Shipholding, 625 F.3d 1, 8 (1st Cir. 2010) (citing Kublock for the proposition that district courts have the inherent authority to supervise the conduct of attorneys); State v. Gonzalez, 290 Kan 747, 762 (2010) (citing Kublock for its analysis regarding why the Supreme Judicial Court requires prior judicial approval for subpoenas of attorneys' records).

Sixth, subpoenas to defense lawyers are subject to "the potential for abuse" by prosecutors. Kublock, 832 F.2d at 654; see In re Grand Jury, 407 Mass. at 918; Whitehouse, 53 F.3d at 1354 & n.8; United States v. Perry, 857 F.2d 1346, 1347 (9th Cir. 1988).

Given these concerns, the Supreme Judicial Court adopted a rule that requires judicial approval before a defense lawyer can be subpoenaed to present evidence against her client. By inserting an impartial gatekeeper, Rule 3.8(f) helps to ensure that this drastic measure is used only rarely and narrowly. Kublock, 832 F.2d at 653-54.

B. The same concerns are triggered by dragnet subpoenas of bank records.

Dragnet subpoenas of a lawyer's bank records held by the third party bank equally implicate the concerns that motivated the Supreme Judicial Court to adopt PF 15 and Rule 3.8(f). Consequently, this Court should hold that Rule 3.8(f) applies to those subpoenas as well.

First, an attorney's personal interests are implicated as soon as her bank records are subpoenaed, and these interests may conflict with those of her client. The potential for conflict is particularly acute when the subpoena amounts to a dragnet, requesting not simply the records pertaining to a particular client over a short period of time, but instead all records over a period of several years.

Second, addressing the subpoena may require the lawyer to divert resources away from the client. Again, the broader the subpoena, the more resources it might consume.

Third, it is logical to presume that attorneys will avoid taking on certain types of criminal cases, such as RICO cases, that are more likely to expose them to such broad ranging subpoenas. Kublock, 832 F.2d at 653-54.

Fourth, subpoenaing a lawyer's bank records—including who is paying the lawyer, how much, and when—will necessarily "drive a chilling wedge" between the attorney and the client.

Kublock, 832 F.2d at 653. Information of this sort is extremely sensitive; indeed, when and how a client retained an attorney at a specific time may in and of itself reveal important confidences. For example, perhaps the client retained the attorney immediately after the bank robbery he was accused of committing. A prosecutor's uninhibited authority to issue such subpoenas may therefore dissuade individuals from seeking legal representation in the first place.

Fifth, given their potential for creating conflicts of interests, dragnet subpoenas of attorneys' bank records could violate defendants' constitutional rights by giving prosecutors the ability to disqualify their lawyers. This is more than a hypothetical danger, as the Commonwealth has argued that the records it received from attorney Grossberg's bank are grounds to inquire whether the defendant wishes to waive his right to an attorney with undivided loyalty.[5] This power threatens the defendant's constitutional rights to counsel and due process. See In re Grand Jury, 407 Mass. at 919; cf. United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (government's pretrial motion to disqualify defense counsel on the ground that the government intended to call counsel as witnesses violated defendant's Sixth Amendment rights and necessitated that the verdict be set aside). Moreover, subpoenas of bank records may control and limit an attorney's preparation of a client's case. This too constitutes a constitutional violation, because the right to counsel encompasses "the assumption that counsel will be free of state control." Polk v. Dodson, 454 U.S. 312, 321 (1981).

Finally, enabling prosecutors to issue dragnet subpoenas of defense attorneys' financial records without impartial oversight fosters an environment that is ripe for abuse. See, e.g., Perry, 857 F.2d at 1347 (noting that the government's increasing use of grand jury subpoenas on a defendant's counsel "has been almost universally criticized by courts, commentators and the

[5] The Commonwealth's motion also cites grand jury testimony in support of this argument. Amicus is not privy to that testimony and expresses no opinion on whether it raises a potential conflict of interest.

defense bar because it is viewed as a tool of prosecutorial abuse"); In re Grand Jury Matters (Hodes and Gordon), 593 F. Supp. 103, 106 (D.N.H.) aff'd 751 F.2d 13 (1st Cir. 1984) (characterizing subpoenas to uncover fee arrangements between attorneys and their clients pending trial in state court and under investigation in the district court as "without doubt harassing"). Such subpoenas could reveal lawyers' personal finances, uncover potentially embarrassing information, or unearth an attorneys' entire list of clients. Applying Rule 3.8(f) to these subpoenas would protect against abuse by inserting judges as gatekeepers.

The Commonwealth's submissions do not address, let alone rebut, any of these concerns. Instead, they focus on whether bank records are privileged. See 4/30/2013 Com. Resp. to Mtn. to dismiss at 2-8. But none of the concerns that motivated the Supreme Judicial Court to adopt Rule 3.8(f) turn on whether the sought-after information is privileged. In fact, the Rule's text requires prosecutors to seek judicial review even after satisfying themselves that the information they seek "is not protected from disclosure by any applicable privilege." MRPC 3.8(f) (emphasis added); cf. State v. Gonzalez, 290 Kan. 747, 764 (2010) (interpreting a similar ethical rule and holding that "the existence of a privilege under K.S.A. 60-426 acts as a threshold consideration" as it would automatically prohibit the requested subpoena). Moreover, there are instances where the attorney-client privilege does protect the source of payment for legal fees, including "'the legal advice exception, the last link exception, and the confidential communication exception.'" United States v. Gertner, 873 F. Supp. 729, 735 (D. Mass. 1995) (quoting In re Grand Jury Subpoenas, 906 F.2d 1485 (10th Cir. 1990).[6] A dragnet subpoena of several years' worth of financial records could easily sweep up information covered by one of these exceptions. Thus, even if the judicial-determination provision of Rule 3.8(f) did turn on questions of privilege—

[6] These exceptions have been held to apply even when a third-party, such as a bank, has been involved in such transactions. See, e.g., Comcast of Illinois X v. Multivision Electronics, No. 4:06MC675-DJS, 2007 WL 1527849, *1 n.2 (E.D. Mo. May 23, 2007) (unpub. op.).

which it does not—it would still be implicated by a dragnet subpoena of all of an attorney's financial records.

C. This case perfectly illustrates why courts should review subpoenas seeking a lawyer's bank records.

This case exemplifies why judicial involvement is necessary whenever a prosecutor wishes to subpoena a defense attorney's financial records. In the absence of this impartial oversight, all of the Supreme Judicial Court's fears were realized.

The Attorney General's subpoena to Sovereign Bank demanded all of the documents and records, during a span of over four years, associated with any accounts belonging to attorney Bernard Grossberg. The request expressly encompassed a wide range of documents including account opening forms, change of address requests, suspicious activity reports, internal memoranda concerning action taken on the account by the bank, loan files, credit card account records, and safety deposit box records. 4/4/2012 Duces-Tecum Subpoena from Com. to Sovereign Bank, Attachment A. Collectively, these records could provide a detailed composite of Mr. Grossberg's residential history, investment plans, credit history and client list. This information is largely irrelevant to the underlying investigation, but hugely invasive of Mr. Grossberg's personal and professional life.

Indeed, the Attorney General admits that of the more than 1,500 pages that Sovereign Bank produced, the Commonwealth regards only one document as potentially relevant to its allegation that Grossberg's client suborned perjury in a previous trial. See 4/30/2013 Com. Resp. to Mtn. to Dismiss at 6; 4/23/2013 Mtn. to Dismiss at 2 ¶ 5. The relevant document, according to the Attorney General, is a November 4, 2011 check for $4,000 paid by Joseph Kehoe, the defendant's supervisor, to attorney Grossberg. The Attorney General hypothesizes that (1) the check was meant to cover part of the defendant's legal bills, (2) this proves that Kehoe was

financially invested in the defendant's criminal defense, and (3) because Kehoe was willing to cover legitimate expenditures, such as the defendant's legal representation, he would also be willing to provide the defendant with money to suborn perjury from key witnesses in the trial. 4/30/2013 Com. Resp. to Mtn. to Dismiss at 9-10.

This proffered relevancy is tenuous at best. Without the moderating influence of the court, the Attorney General engaged in a mere fishing expedition that yielded very little useful evidence while risking significant harm to the attorney-client relationship and the rights of Grossberg's client. Cf. Commonwealth v. Debose, No. SUCR2007-10019, 2008 WL 6153600, *6 (Mass. Super. Feb 25, 2008) (unpub. op.) ("Use of the subpoena power to conduct a fishing expedition is also a concern."). Compounding this error, the Attorney General has relied in part on these financial records to suggest that attorney Grossberg may need to withdraw from the case.[7]

A more narrowly crafted subpoena may have identified the same "relevant" evidence without imposing such a serious threat to the attorney-client relationship. Because it did not seek prior judicial approval, however, it is hardly surprising that the Attorney General's office crafted a subpoena with an extraordinarily broad scope. Applying Rule 3.8(f) to dragnet subpoenas of defense attorney's financial records will appropriately fulfill the purposes of the Rule and help prevent such harmful, and fruitless, fishing expeditions.

III. The Commonwealth's approach also threatens the rights of defense lawyers.

In addition to imperiling the rights of criminal defendants, subpoenas of records containing sensitive information about defense lawyers can threaten the rights of the lawyers themselves.

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[7] See n.5.

Article 14 of the Massachusetts Constitution protects an individual's reasonable expectation of privacy against government intrusion without judicial oversight. Rousseau, 2013 WL 2402513,*4-6. As the Supreme Judicial Court recently clarified, this reasonable expectation of privacy is not limited to property interests. Id. at *6. At the very least, it also protects against extended electronic surveillance of an individual's movements without judicial oversight. Id. This is necessary because "pervasive monitoring 'chills associational and expressive freedom' and allows the government 'to assemble data that reveal private aspects of identity,' potentially 'alter[ing] the relationship between citizen and government in a way that is inimical to democratic society.'" Id. (quoting United States v. Jones, 132 S.Ct. 945, 955-56 (2012) (Sotomayor, J. concurring)). Notably, this logic may require applying constitutional protection to the collection of other types of metadata, such as from internet service providers or cell phone providers, which can reveal equally private aspects of an individual's identity. Cf. United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (noting that aggregate data can reveal information not revealed by each individual part, "such as what a person does repeatedly, what he does not do, and what he does ensemble"); see also Jones, 132 S.Ct. at 954-57.(Sotomayor, J. concurring).

Under this analysis, a broad dragnet subpoena of financial records poses a serious threat to a defense attorney's article 14 rights. The subpoena at issue asked for deposit and withdrawal records, change of address requests, correspondence and wire transfer records. This information presumably included ATM locations. A composite of this data could provide a sufficiently detailed picture of attorney Grossberg's "comings and goings in public places" to trigger article

14 protections. Rousseau, 2013 WL 2402513, *4.[8] Consequently, prior judicial approval is necessary.

Finally, it is important to note the potential breadth of the Attorney General's argument. The Attorney General's briefing seems to depict a position that judicial involvement is never required to subpoena unprivileged documents from third party providers, regardless of the potential privacy interests that this may implicate. Presumably the Commonwealth would take the same view of subpoenas directed to a lawyer's cell phone carrier, internet service provider, or legal research service such as Westlaw. As Rousseau demonstrates, that position is both incorrect and a serious threat to article 14. 2013 WL 2402513, *6; Cf. Jones, 132 S.Ct. at 957 (Sotomayor, J. concurring).

CONCLUSION

Although it is important to pursue all legitimate means to fight against crime, this "does not mean that society can afford a 'no holds barred' approach to law enforcement, lest the 'solution' engender faults of an equally serious nature." Kublock, 832 F.3d at 658. Rule 3.8(f) strikes the appropriate balance between these two goals, inserting the court as a critical gatekeeper against potential abuse. Allowing prosecutors to issue dragnet subpoenas of an attorney's bank records triggers serious ethical and constitutional questions, and is just the type of flawed approach that the Supreme Judicial Court sought to avoid with the adoption of Rule 3.8(f). Consequently, this Court should hold that the Rule's command to obtain prior judicial approval must apply here.

[8] Critically, as an attorney's personal constitutional concerns increase, so too does the potential for a constitutionally significant conflict of interests that threatens his client's Sixth Amendment and article 12 rights.

July 15, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jessie J. Rossman, certify that I caused a true and correct copy of the foregoing document and any attachments to be served on the following by first-class mail on this 15th day of July 2013.

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July 15, 2013

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