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Cross-Fire:
Subpoenas of Law Firm Files

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For a variety of reasons, law firm client files are being subpoenaed by third parties more often than in years past. The rare occasions when files were subpoenaed in the past usually involved will contests or tax matters. That's still true, but the areas in which files are subpoenaed have expanded to include business disputes involving current and former law firm clients and a broader range of government investigating agencies. Sometimes the firm is still doing work for the client involved, but often it is not. In this column, we'll look at both the ethical duties and practical solutions available to a law firm when confronted with a third party subpoena seeking the firm's file relating to work performed for a current or former client. Although our focus will be on subpoenas for file materials, the same general considerations apply to associated testimony.

Ethical Duties

Under RPC 1.6(a), lawyers have a strict duty of confidentiality covering "information relating to the representation of a client[.]" Comment 19 to RPC 1.6 emphasizes the broad sweep of this phrase:

> "The phrase 'information relating to the representation' should be interpreted broadly. The 'information' protected by this Rule includes, but is not necessarily limited to, confidences and secrets. 'Confidence' refers to information protected by the attorney client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship 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."

Our duty of confidentiality continues beyond the end of an attorney-client relationship. In fact, both the Washington and United States Supreme Courts have held that the attorney-client privilege survives even the death of a client in, respectively, *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945), and *Swidler & Berlin v. United States*, 524 U.S. 399, 403-11, 118 S.Ct. 2081, 141 L. Ed.2d 379 (1998). The United State Supreme Court in *Upjohn v. United States*, 449 U.S. 383, 397-402, 101 S.Ct. 677, 66 L. Ed.2d 584 (1981), also found that work product—particularly an attorney's mental impressions—is accorded very broad protection in the face of a third party subpoena and transcends the particular matter for which the work product was generated. WSBA Advisory Opinion 175, originally issued in 1982 and updated in 2009, reaches the same conclusion on the broader duty of confidentiality under RPC 1.6 that embraces both the attorney-client privilege and work product.

The duty of confidentiality is not simply an obligation to "remain silent." Rather, it also includes an affirmative duty to protect client confidentiality, or, as the leading ABA formal ethics opinion on file subpoenas (94-385) puts it (at 2), a lawyer should not be a "passive bystander to attempts . . . to examine her files or records." In the context of file subpoenas, Comment 13 to RPC 1.6 counsels that a lawyer has a duty (absent the client's consent to release the information, which, if given, should be confirmed in writing) to "assert on behalf of the client all

nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law." If a trial court orders production notwithstanding the lawyer's good faith assertion of privilege, then RPC 1.6(b)(6) generally allows the lawyer to comply unless, after consulting with the client, the client directs the lawyer to appeal (and an appeal would not be frivolous).

Because Washington's federal district courts use the Washington RPCs as their professional rules (under, respectively, LCR 83.3(a)(2) in the Western District and LR 83.3(a) in the Eastern District), the Washington RPCs govern the ethical component of file subpoenas in either state or federal court.

Practical Solutions

In many situations, it may be possible to negotiate with the third party who issued the subpoena to narrow its scope so the law firm can comply short of a court order. For example, it may be possible to produce information that has become "public" since a representation was concluded while preserving information that remains confidential. Any solution should be discussed thoroughly with the client and the client's approval should be documented in writing.

If the client affected (current or former) declines to consent (or can't, such as a deceased client) and a resolution can't be negotiated with the party who issued the subpoena, however, then CR 45(c) and FRCP 45(c) provide avenues

for seeking court intervention (again, assuming a non-frivolous basis to do so). CR 45(c) and its federal counterpart both permit an informal written objection to a document subpoena (which then requires the issuing party to file a motion to compel if the issuer wishes to pursue the documents notwithstanding the objection) and a more formal motion to quash. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004), discusses the state rule and *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829 (9th Cir. 2011), summarizes the federal rule. If the court is not able to resolve the application of privilege on the basis of a log or other description in the briefing, both Washington law (*see, e.g.*, *VersusLaw, Inc. v. Stoel Rives LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006)), and federal procedure (*see, e.g., Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 569 (W.D. Wash. 2003)), permit *in camera* review (without the *in camera* review itself constituting a waiver of privilege).

As noted, a lawyer or firm is generally allowed to reveal otherwise confidential information in response to a court order. If the client directs an appeal (and an appeal would not be frivolous), then Comment 13 to RPC 1.6 again counsels that an appeal should be pursued. The most practical appellate avenues are discretionary review in state court (*see Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013)) and mandamus in federal court (*see Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.3d2d 458

(2009)). Both remedies are granted sparingly by the appellate courts. As a practical matter, therefore, a trial court's decision on the scope of discovery allowed on a file subpoena will usually be the last word.

With either a negotiated or litigated resolution, it is common for the lawyer or law firm subpoenaed to work with the client's current counsel in the matter that generated the subpoena. The ultimate responsibility for protecting the confidentiality of the information sought, however, remains with the firm whose file is subject to the subpoena.

On a final note for lawyers seeking files in other jurisdictions or advising out-of-state counsel in Washington matters, Washington's version of RPC 1.6(b)(6) differs in a principal respect from its ABA Model Rule counterpart. Washington only allows disclosure in response to a court order while many other jurisdictions allow production in response either to a court order or "other law." When Washington's RPCs last underwent major amendment in 2006, the Supreme Court opted *not* to include the "other law" exception. As Comment 24 to RPC 1.6 explains, the Supreme Court found that in light of the central role confidentiality plays in our duties as lawyers, decisions in this regard should be made by courts: "Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court." This approach has the practical benefit to lawyers of taking

discretion out of the range of options and leaving it with either the client or the courts. In either event, lawyers will not usually be "second guessed" later—as long as they have fully advised their clients who granted consent and appropriately briefed the issues if the matter is litigated.

Summing Up

A file subpoena almost always puts a law firm in a very uncomfortable position. Most lawyers have a visceral understanding of the duty of confidentiality and are keenly aware of our responsibility for meeting that duty. At the same time, both the RPCs and the accompanying procedural rules offer clear guidance in how to handle those times we may find ourselves in the cross-fire of a file subpoena.

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