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Uncomfortable Position: You've Just Been Subpoenaed

By Mark J. Fucile
Fucile & Reising LLP

One of the most professionally uncomfortable positions a lawyer can encounter is being on the receiving end of a subpoena seeking testimony about past work, the related file or both. The reasons lawyers are subpoenaed are many and varied. In some instances, a lawyer may have done work for a client that is now relevant to a dispute between the client and a third party.[1] In others, a firm lawyer may have participated in negotiations over a contract at issue in a subsequent lawsuit.[2] In still others, the actions of the lawyers themselves may have become relevant in an ongoing proceeding.[3]

Whatever the trigger, being served with a testimonial or file subpoena isn't likely to be an everyday occurrence for most lawyers or their firms.[4] In this column, we'll first survey the closely associated duties of confidentiality and privilege involved. We'll then turn to the potential impact of having a firm lawyer testify in an ongoing proceeding in which the lawyer's firm is representing the client concerned.

Both because the duties invoked are central to the attorney-client relationship and receiving a subpoena is out of the ordinary, lawyers should not respond without getting seasoned advice. The Professional Liability Fund in

particular counsels lawyers to contact it if they receive a subpoena seeking either their file or their testimony.[5]

Confidentiality and Privilege

Under RPC 1.6(a), lawyers have a broad duty of confidentiality extending to "information relating to the representation of a client[.]"[6] RPC 1.0(f) defines that phrase to include "both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely detrimental to the client." Under RPC 1.9(c), the duty of confidentiality continues beyond the end of an attorney-client relationship and transcends even the death of a client.[7]

Under OEC 503(2), lawyers have a corresponding duty to protect communications falling within the attorney-client privilege.[8] OEC 503(1)(b) defines "confidential communication" as "a communication not intended to be disclosed to third persons[.]" Under OEC 503(3), the privilege extends beyond the end of the attorney-client relationship and the death of a client.[9]

Other law, too, may come into play. The work product rule, codified in Oregon state and federal proceedings at, respectively, ORCP 36(B)(3) and FRCP 26(b)(3), generally provides protection for a lawyer's notes, research and

mental impressions prepared in conjunction with anticipated or ongoing litigation.[10] Confidentiality agreements may trigger obligations to at least notify parties that materials covered by those agreements are being sought by subpoena.[11] Statutory law, such as ORS 36.220(1)(a) governing mediation communications, may also restrict disclosure.[12]

Both Comment 15 to ABA Model Rule 1.6 on which Oregon's confidentiality rule is now patterned and OEC 503(3) counsel that a lawyer's duty is to assert privilege pending further instructions from the client. If the client directs the lawyer to contest or otherwise limit the subpoena, Comment 15 also suggests that "the lawyer should assert on behalf of the client all nonfrivolous claims that . . . [the discovery sought] . . . is not authorized by . . . law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."[13] If a trial court orders production of a file or permits a deposition to go forward, RPC 1.6(b)(5) generally allows a lawyer to comply unless, after consulting with the client, the client directs the lawyer to appeal (and the appeal would not be frivolous).[14]

If negotiations with the issuer fail to resolve privilege concerns satisfactorily, motions for a protective order or to quash are the most common avenues to seek intervention by the court handling the case involved.[15] In that

event, privileged documents may be tendered under seal to the court for *in camera* inspection without waiving privilege.[16] Mandamus is the only practical avenue for appellate review.[17] Because mandamus is both discretionary and granted sparingly, a trial court's decision on the scope of permitted discovery will usually control.

Lawyer-Witness Considerations

Two additional considerations can surface if the subpoena seeks a deposition of a firm lawyer in a case where the firm is handling the matter concerned.

The first is RPC 3.7, the "lawyer-witness rule." RPC 3.7 is not a rule of either automatic or absolute disqualification. Under RPC 3.7(a), a lawyer-witness is personally prohibited from acting as trial counsel.[18] In that instance, the lawyer concerned may continue to assist with other aspects of the case short of trial and another firm lawyer can try the case.[19] Under RPC 3.7(c), however, if the lawyer-witness' testimony will be adverse to the firm's client, then the prohibition ripens into disqualification of the firm as a whole. In this situation, if the firm does not withdraw, it is subject to a motion to disqualify by a party opponent.[20]

The second is RPC 1.7(a)(2), which governs conflicts between the financial interests of a lawyer or firm and the client. If, for example, the testimony

of the lawyer may suggest potential negligence on the part of the firm, then the firm would need to evaluate whether it should continue as litigation counsel and, if so, obtain a conflict waiver.[21] The PLF can provide advice on the former and a tailored template on the latter.[22]

Summing Up

Being subpoenaed both triggers key duties and puts most lawyers in unfamiliar territory. Lawyers are wise to seek experienced help in navigating both the legal and procedural aspects of this uncomfortable position.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

[1] *See, e.g., Atkeson v. T&K Lands, LLC*, 258 Or App 373, 309 P3d 188 (2013) (lawyer deposed on due diligence performed for client preceding a real estate transaction the client was attempting to rescind).

[2] *See, e.g., Riedel Intern., Inc. v. St. Helens Investments, Inc.*, 633 F Supp 117 (D Or 1985) (firm lawyer participated in meeting with client and contract counterparty concerning the contract).

[3] *See, e.g., Kaiser Foundation Health Plan of the Northwest v. Doe*, 136 Or App 566, 903 P2d 375 (1995), *modified*, 138 Or App 428, 908 P2d 850 (1996) (lawyers testified in settlement enforcement proceeding).

[4] Under ORCP 55B and FRCP 45(a)(1), a subpoena can command the recipient to produce documents, appear to provide testimony or both.

[5] *See* https://www.osbplf.org/claims/reporting.html ("You should contact the PLF if . . . [y]ou receive a subpoena, or someone requests information, documentation, and/or testimony about your representation of a client.").

[6] ORS 9.460(3) codifies this duty.

[7] *See* OSB Formal Ethics Op 2005-23.

[8] OEC 503 is codified at ORS 40.225.

[9] *See also Swidler & Berlin v. United States*, 524 US 399, 118 S Ct 2081, 141 L Ed2d 379 (1998) (discussing continuation of privilege after death of client). OEC 503(4)(b) exempts communications relevant to parties who claim through the same deceased client.

[10] *See also* Edna S. Epstein, II *The Attorney-Client Privilege and the Work Product Doctrine* 907 (5th ed 2007) (discussing post-litigation work product application).

[11] *See generally Pfizer, Inc. v. Oregon Dept. of Justice*, 254 Or App 144, 294 P3d 496 (2012) (analyzing interplay between confidentiality agreements and public records law).

[12] *See Alfieri v. Solomon*, 358 Or 383, ___ P3d ___ (2015) (outlining boundaries of mediation communications).

[13] ABA Formal Ethics Opinions 94-385 and 473 contain similar guidance.

[14] In the ABA Model Rules, this exception is found at Model Rule 1.6(b)(6).

[15] Motions for protective orders are governed by ORCP 36C and FRCP 26(c) and motions to quash are governed by ORCP 55B and FRCP 45(d)(3). *See, e.g., Richmark Corp. v. Timber Falling Consultants, Inc.*, 767 F Supp 213 (D Or 1991) (law firm moved to quash subpoena duces tecum and for a related protective order). If the issuer has served a document subpoena only, ORCP 36B and FRCP 45(d)(2) both permit the receiver to serve a written objection within 14 days and that then shifts the burden to the issuer to seek a motion to compel.

[16] *See Frease v. Glazer*, 330 Or 364, 372-73, 4 P3d 56 (2000); *United States v. Zolin*, 491 US 554, 568-69, 109 S Ct 2619, 105 L Ed2d 469 (1989).

[17] *See Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 484-85, 326 P3d 1181 (2014); *Hernandez v. Tanninen*, 604 F3d 1095, 1099 (9th Cir 2010).

[18] RPC 3.7(a)(1)-(4) include limited exceptions.

[19] *See* OSB Formal Ethics Op. 2005-8 at 16.

[20] *See Brooks v. Caswell*, 2015 WL 1137416 at *5-*10 (D Or Mar 15, 2015) (unpublished) (discussing RPC 3.7 in the disqualification context).

[21] *See* OSB Formal Ethics Op. 2005-61 (evaluating conflicts in legal malpractice context).
[22] *See* https://www.osbplf.org/assets/forms/pdfs/Malpractice%20Disclosure%20Letter.pdf.