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Cross Fire:
Third Party Subpoenas of Law Firm Files

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In many practice settings today, law firm files are being subpoenaed more frequently by third parties than in years past. The reasons are many. 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 more often business disputes involving current and former law firm clients and a broader range of government investigating agencies. This article looks at both the ethical duties and practical solutions available to a law firm when confronted with a subpoena seeking the firm's file relating to work performed for a current or former client. We'll focus primarily on those duties and solutions from the perspective of the American Bar Association's influential Model Rules of Professional Conduct which now form the template for the professional rules in most jurisdictions and federal decisions on associated attorney-client privilege and work product issues.

Ethical Duties

Under ABA Model Rule 1.6(a), lawyers have a strict duty of confidentiality covering all "information relating to the representation of a client." Comment 3 to Model Rule 1.6 emphasizes that the duty of confidentiality embraces the attorney-client privilege and work product protection but is also broader than

either standing alone. As such, the duty of confidentiality can extend to information that although technically "public," is not widely known and the dissemination of which would be detrimental to the client. Comment 18 to Model Rule 1.6 notes that the duty of confidentiality continues even after an attorney-client relationship has ended. The United States Supreme Court in *Swidler & Berlin v. United States*, 524 U.S. 399, 403-411, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998), held that the attorney-client privilege survives even after the death of the client. The Supreme Court in *Upjohn Co. 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.

The duty of confidentiality is not simply an obligation to "remain silent." Rather, it also includes an affirmative obligation to protect client confidentiality against intrusion by third parties. In the context of file subpoenas, Comment 13 to Model Rule 1.6, echoing an earlier ABA formal ethics opinion, 94-385 (1994), 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 discovery] . . . is not authorized by . . . law or 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 defenses, then RPC 1.6(b)(6) generally allows a lawyer to comply unless, after consulting with the client, the client directs the lawyer to appeal (and an appeal would not be frivolous).

Practical Solutions

As noted, RPC 1.6(b)(6) allows lawyers to reveal information otherwise protected by the confidentiality rule if necessary "to comply with other law or a court order." In some instances, "other law" will supply direct practical guidance. Many states and federal common law, for example, recognize a "testamentary exception" to the attorney-client privilege that allows (or effectively directs) a personal representative of a decedent to waive the privilege as to communications over estate planning when a will contest follows. *See generally Swidler & Berlin v. United States*, 524 U.S. at 404-05 (discussing this exception). Even in that situation, however, the law firm's file may still contain many other materials that do not fall within the exception and remain subject to the confidentiality rule.

In other contexts, it may be possible to negotiate with the third party who issued the subpoena to narrow its scope so the law firm can comply without seeking a court's intervention. If the client affected (current or former) declines to consent to the release of the information involved and a resolution can't be negotiated with the party who issued the subpoena, then RPC 1.6 and the decisional law noted above counsel seeking court protection (assuming there is a

non-frivolous basis to do so). The particular form of the protection sought will vary depending on the nature of the proceeding and whether the client is a party or not. The law firm should also coordinate with the client's current or in-house counsel if the client is no longer a firm client. In some cases, it may be necessary to tender the documents involved into the court under seal for *in camera* inspection to determine questions of privilege and work product protection. Importantly, an *in camera* inspection does not, in and of itself, waive privilege. *See United States v. Zolin*, 491 U.S. 554, 568-69, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

As noted, a lawyer is allowed to reveal otherwise confidential information in response to a court order. If the client directs an appeal (and again, an appeal would not be frivolous), then the most effective procedural avenue available is mandamus or similar interlocutory appeal depending on the forum involved. Mandamus, however, is a remedy appellate courts typically grant sparingly. *See Kerr v. U.S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976) (discussing mandamus relief in the discovery context). As a practical matter, therefore, a trial court's decision on the scope of discovery allowed on a file subpoena will likely be dispositive in most instances.

ABOUT THE AUTHOR

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