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

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.