fucile & reising | LLP

July-August 2021 *Multnomah Lawyer Ethics Focus*

Judicial Guidance: When a Court Order Is Your Friend

By Mark J. Fucile
Fucile & Reising LLP

Lawyers often reflexively associate the term "court order" with a "bad" outcome. In several areas of law firm risk management, however, court orders can actually serve important protective functions. The reason is simple: acting consistent with guidance from a court makes it far less likely that the conduct involved will be "second guessed" if a bar complaint or malpractice claim follows later from a disappointed former client or litigation opponent. In this column, we'll look at three areas in particular where court orders can serve this useful protective function: determining privilege when a law firm client file is subpoenaed; guidance on whether witnesses are represented for purposes of the "no contact" rule; and seeking court permission to withdraw.

Subpoenas

Subpoenas directed to a law firm's files put the firm in a difficult position. As a matter of both privilege under OEC 503 and professional responsibility under RPC 1.6, a firm ordinarily has a duty to assert privilege and seek instructions from the client involved when the firm receives a subpoena for the client's file. Professor Kirkpatrick in his leading treatise, *Oregon Evidence*, notes (at 346) that although the lawyer may assert privilege on behalf of the client, the client actually holds the privilege. When the client has died, disappeared or gone

out of business without any obvious successor—like a personal representative or a bankruptcy trustee—a law firm is effectively left with a duty to assert privilege but no client to decide whether a file (in whole or in part) should be produced.

In that uncomfortable situation, a law firm can turn to the court in the case involved to seek guidance. Under *Frease v. Glazer*, 330 Or 364, 4 P3d 56 (2000), a client's file can be submitted to a court under seal for *in camera* review without waiving privilege. The local rules of the court concerned should be consulted for the latest procedures for both sealed filings and *in camera* review. Multnomah County Circuit Court SLRs 5.165 and 5.036, for example, address, respectively, filings under seal and *in camera* review. Having the court—rather than the law firm—decide privilege respects the firm's duty to the client involved while also protecting it against later assertions that it "guessed wrong."

"No Contact" Rule

The "no contact" rule—RPC 4.2—generally prohibits direct contact with a person represented by counsel on the matter involved. The prohibition is broad and the exceptions have generally been construed narrowly. This combination can present very real practical problems if a lawyer on the other side claims to represent an important set of potential witnesses but you have a nagging suspicion that the lawyer has overstated that authority. For example, a corporate

counsel may claim to represent "all of the company's employees" or a plaintiff's lawyer may claim to represent "all of the family witnesses." In theory, a lawyer in that position could notice depositions of all of the witnesses involved and then request sanctions if the witnesses disavowed opposing counsel's representation.

Another path, however, is to seek the court's intervention in advance. ORS 9.350 allows an opposing party to challenge another attorney's claimed authority to represent a person. At the same time, RPC 4.2(b) allows direct contact if permitted "by court order[.]" Read in tandem, these provisions would allow the lawyer in our examples to file a motion seeking a determination of opposing counsel's authority and an associated order permitting direct contact with the witnesses involved.

The "no contact" rule can be a particularly difficult rule in application and can result in discipline even in the absence of "injury." In *In re Newell*, 348 Or 396, 234 P3d 967 (2010), for example, a lawyer was disciplined under RPC 4.2 for taking the deposition of an occurrence witness who was represented in a separate criminal matter that shared some common facts. Evidence obtained in violation of RPC 4.2 is also subject to potential exclusion. A far safer course when in doubt about whether a witness is represented, therefore, is to raise the issue with the court.

Withdrawal

RPC 1.16(c) obliges lawyers to obtain "permission of a tribunal when terminating a representation" if required by the rules of the court concerned. In addition to meeting that requirement to avoid regulatory discipline and potential court sanctions, a relatively recent Washington Supreme Court decision illustrates another practical benefit of court permission: a defense to a malpractice claim stemming from the withdrawal.

Schibel v. Eymann, 399 P3d 1129 (Wash 2017), involved a legal malpractice claim by former clients against a law firm contending the clients had been harmed by the firm's withdrawal as trial approached. The law firm, however, had received court permission to withdraw in the underlying matter involved following a hearing at which the former clients raised the same objections that formed the core of their later malpractice claim. In the subsequent legal malpractice case, the Washington Supreme Court held that the court's order in the underlying matter allowing the firm to withdraw precluded the later malpractice claim as a matter of law. Even if not rising to the level of formal issue preclusion, the fact that a court reviewed a client's objection and allowed a firm to withdraw nonetheless can produce an important practical barrier to a later claim or bar complaint.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* 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.