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Cross Fire:
Subpoenas of Law Firm Files

By Mark J. Fucile
Fucile & Reising LLP

Law firm files are being subpoenaed more frequently today 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 file subpoenas have expanded to include business disputes involving current and former law firm clients and a broader range of government investigating agencies. In this column, we'll look 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.

Ethical Duties

Under RPC 1.6(a), lawyers have a strict duty of confidentiality covering all "information relating to the representation of a client." RPC 1.0(f), in turn, defines "information relating to the representation of a client" broadly as "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 to be detrimental to the client." Under RPC 1.9(c), our duty of confidentiality continues beyond the end of an attorney-client relationship and, indeed, even continues beyond a client's death. *See* OSB

Formal Ethics Op. 2005-23 (2005); *Swidler & Berlin v. United States*, 524 US 399, 403-411, 118 SCt 2081, 141 LEd2d 379 (1998).

The duty of confidentiality is not simply an obligation to "remain silent." Rather, it also includes an affirmative obligation to protect client confidentiality. In the context of file subpoenas, Comment 13 to ABA Model Rule 1.6 (upon which its Oregon counterpart is patterned) 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." *Accord* ABA Formal Ethics Op. 94-385 (1994). If a trial court orders production notwithstanding the lawyer's good faith defenses, then 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 an appeal would not be frivolous).

Practical Solutions

As noted, RPC 1.6(b)(5) 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. Oregon, for example, recognizes a "testamentary exception" under OEC 503(4)(b) to the attorney-client privilege "[a]s to a communication relevant to an issue between parties who claim through the same deceased client[.]"

Even in that situation, however, a law firm's file may contain 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. If the client affected (current or former) declines to consent and a resolution can't be negotiated, however, then ORCP 55B and FRCP 45(c) provide avenues for seeking court intervention (assuming there is a non-frivolous basis to do so). If it becomes necessary to tender the documents involved into the court under seal for *in camera* inspection to determine questions of privilege and work product protection, the *in camera* inspection does not, in and of itself, waive privilege. *See Frease v. Glazer*, 330 Or 364, 372, 4 P3d 56 (2000); *United States v. Zolin*, 491 US 554, 568-69, 109 SCt 2619, 105 LEd2d 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 an appeal would not be frivolous), then the most effective procedural vehicle available is mandamus. Mandamus, however, is a remedy appellate courts grant sparingly. *See Frease v. Glazer*, 330 Or 364; *Kerr v. U.S. Dist. Court for Northern Dist. of California*, 426 US 394, 96 SCt 2119, 48 LEd2d 725 (1976). As a practical matter, therefore, a trial court's decision on the scope of discovery allowed 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.