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## Crossfire:
## Subpoenas of Law Firm Files

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For many law firms, one of the most difficult risk management issues they can face is receipt of a third-party subpoena seeking one of their client files. The ethical issues are nuanced and the procedural elements are not something most lawyers handle routinely. The cases generating subpoenas can vary widely—but typically share the common thread that information contained within the firm's file has allegedly become relevant in another venue where the client is not party.[1] Sometimes the client is available for consultation on the response, but other times not—such as when the client is dead.[2] In this column, we'll first look at the ethical duties involved and then turn to practical approaches to responding.

Before we do, however, four qualifiers are in order.

First, although subpoenas in most scenarios are issued under either Washington Superior Court Civil Rule 45 or Federal Rule of Civil Procedure 45,[3] we will do a light touch on both for procedural context and leave detailed discussions to the many fine treatises analyzing them comprehensively.[4]

Second, while law firms can sometimes receive subpoenas seeking their own information, we'll focus today on subpoenas seeking law firm files for current or former clients.

Third, we'll assume that the law firm recipient has or had an attorney-client relationship with the client involved[5] and that the file contains information generated as legal counsel for the client rather than some other capacity.[6]

Finally, subpoenas sometimes also seek substantive testimony from firm lawyers beyond simply authenticating a file as a records custodian. Although testimonial subpoenas share many common issues with subpoenas seeking documents alone, we'll save that more difficult topic for another day.[7]

***Ethical Duties***

Lawyers have significant duties of confidentiality to current and former clients under, respectively, RPC 1.6(a) and 1.9(c). Both oblige lawyers to protect "information relating to the representation of a client." These rules cloak both attorney-client privilege and work product within the overarching regulatory duty of confidentiality.[8] Comment 21 to RPC 1.6 speaks to the broad sweep of the phrase "information relating to the representation of a client":

> The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the 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), the duty of confidentiality continues beyond the end of an attorney-client relationship. In fact, both the Washington and United States Supreme Courts have held that the attorney-client privilege survives even the death of a client in, respectively, *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945), and *Swidler & Berlin v. United States*, 524 U.S. 399, 403-11, 118 S.Ct. 2081, 141 L. Ed.2d 379 (1998). The United States Supreme Court in *Upjohn 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. WSBA Advisory Opinion 175, originally issued in 1982 and updated in 2009, reaches the same conclusion on the broader duty of confidentiality under RPC 1.6 that embraces both the attorney-client privilege and work product.

These duties, moreover, involve more than simply "remaining silent." RPC 1.6(c) also requires lawyers to make "reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[9] Although the subpoena itself will likely state the specific categories of information sought, it is important to remember that the term “file” today encompasses both paper and electronically stored information (including emails).[10]

***Responding***

The ABA issued an ethics opinion over thirty years ago that memorably characterized the role of a lawyer receiving a subpoena seeking a client’s file: “the lawyer should [not] be a passive bystander to attempts by a governmental agency—or any other person or entity for that matter—to examine her files or records.”[11] Although the older ABA opinion has since been supplemented by a newer one to reflect changes in the confidentiality rule, the newer opinion does not alter that basic approach. While there is no comparable advisory opinion in Washington, our RPC largely reflect the same principles.

For both current and former clients, the newer ABA opinion—Formal Opinion 473—counsels that the recipient law firm “must notify—or attempt to notify—the client” regarding the subpoena.[12] The opinion notes that a firm’s reasonable efforts to contact a former client are gauged by the circumstances and recommends that those efforts be documented in writing.[13] Formal Opinion 473 draws a distinction between clients who the law firm can consult with about the subpoena and those who it cannot. We’ll take that same tack here.

If a client is available for consultation, the firm will ordinarily look to the client to make the decision on how to respond. With current clients, the logistics of consultation are usually straightforward—with either the subpoenaed firm or separately retained counsel taking the lead. Formal Opinion 473 recognizes, however, that former clients may have or wish to retain new counsel to respond. If the former, the subpoenaed law firm would typically coordinate the response with the client's current law firm. If the latter, Formal Opinion 473 advises that the subpoenaed firm "should take reasonable steps to protect the client's interest during the client's search for other counsel."[14]

RPC 1.6(a) and RPC 1.9(c)(2) allow confidential information to be disclosed with, respectively, a current or former client's informed consent. Although consent in this scenario does not technically need to be confirmed in writing, prudent practice suggests carefully documenting client consent. To ensure that a client's consent is "informed," Formal Opinion 473 advises that the law firm discuss the nature of the information sought, the reasonably available options, and the potential consequences of any disclosure:

> The content of the consultation will depend on the circumstances. It should include, at a minimum, (i) a description of the protections afforded by Rule 1.6(a) and (b), (ii) whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply, and (iii) any other relevant matter. Other relevant matters include, for

> example, "to the extent that the disclosure of confidential client information in a civil proceeding may raise potential criminal liability for the client, the consequences should be explained to the client during the consultation process." The lawyer also may need to discuss whether the subpoena or other demand is valid and whether the requested document contains self-incriminatory information that might form the basis of a Fifth Amendment privilege claim against disclosure.[15]

If the client is not available for consultation and the subpoena seeks client confidential information, Formal Opinion 473 draws on Comment 15 to ABA Model Rule 1.6 (which is echoed in the corresponding Washington comment) and counsels that "the lawyer '*should* assert on behalf of the client all non-frivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege or other applicable law."[16]

In either scenario, the procedural tools to oppose or narrow a subpoena typically include (a) serving a written objection on the issuer and then responding to a motion to compel if the issuer moves forward or (b) filing a motion to quash or for a protective order with the court concerned to block or limit the subpoena.[17] Each path is often accompanied by negotiations with the issuer over the scope and related questions of timing and form. If the dispute proceeds into litigation, the court concerned may direct that the file materials over which the responder asserts confidentiality be submitted for *in camera* review—which, in and of itself, does not waive privilege.[18] Under RPC 1.6(b)(6), a lawyer is permitted to reveal confidential information in response to a court order.[19] Although Comment 15 to RPC 1.6 advises that a lawyer must consult with the client (if available) regarding an appeal in the event of an adverse ruling, the comment does not require an appeal. As a practical matter, interlocutory appeals in this context are discretionary with the appellate court concerned and are granted sparingly.[20]

When producing information, lawyers are also subject to the qualifier in RPC 1.6(b) that any confidential information disclosed should be limited to what the lawyer reasonably believes is necessary. ABA Formal Opinion 473, therefore, counsels that a lawyer producing information "should seek appropriate protective orders and similar arrangements 'to the fullest extent practicable'" so that any disclosure is limited to the specific proceeding involved.[21]

Given the substantive and procedural complexity typically in play, law firms on the receiving end of a subpoena may wish to consider retaining outside counsel to interface with the issuer and handle any court proceedings.[22] Some malpractice carriers provide counsel to their insureds to help navigate these difficult issues regardless of whether they are related to a potential claim or not—sometimes as part of basic coverage and others through supplemental riders.[23] An early stop in the process, therefore, is often to contact your firm's carrier to determine whether help is available.

**ABOUT THE AUTHOR**

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[1] If the client is a party, then the most typical procedural path to obtaining the information involved (subject to objections depending on its content and relevance) is a document production request under, respectively, Washington Civil Rule 34 or Federal Rule of Civil Procedure 34. *See, e.g. In re Subpoena to Records Custodian for Rossi Cox Vucinovich Flaskamp PC*, 2009 WL 10676364 at *2 (W.D. Wash. June 19, 2009) (unpublished) (noting that information sought could have been requested directly from client as a document production request).

[2] If a former client is deceased but their estate is still open, typically the personal representative controls assertion or waiver of the decedent's privilege. *See generally* Mark J. Fucile, *Memorial Day: Duties to Deceased Clients*, 78, No. 4 Washington St. B. News 24 (Apr./May 2024).

[3] Subpoenas or the functional equivalent can also involve law firms in criminal practice or other regulatory contexts. *See, e.g., In re Grand Jury Subpoena*, 127 F.4th 139 (9th Cir. 2025) (grand jury subpoena to law firm seeking information about law firm client); *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995) (IRS summons to law firm seeking identities of clients who had paid law firm in cash transactions over $10,000). Although not necessarily involving

subpoenas, requests by prosecutors to criminal defense counsel for their files in response to ineffective assistance claims by former clients present many similar issues. *See generally* ABA Formal Op. 10-456 (2010).

[4] *See, e.g.,* Elizabeth A. Turner, 4 Wash. Prac. Rules Practice CR 45 (rev. 7th ed. 2025).

[5] *See generally Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (outlining standard for attorney-client relationship).

[6] *See generally* Robert H. Aronson, Maureen A. Howard, and Jennifer Marie Aronson, *The Law of Evidence in Washington* at 9-18 (rev. 5th ed. 2024) ("The attorney-client privilege prohibits unauthorized attorney testimony only when the attorney is consulted in a capacity as a legal advisor. Consultations with an attorney who is functioning as a business advisor, banker, negotiator, accountant, or friend are not protected."). *See, e.g., Cedell v. Farmers Ins. Co.*, 176 Wn.2d 686, 700, 295 P.3d 239 (2013) (addressing privilege in the context of attorney-claims adjusters).

[7]RPC 3.8(e) addresses grand jury subpoenas to criminal defense counsel seeking testimony about current or former clients of the lawyer. In a similar vein, we'll focus today on subpoenas issued during discovery rather than those compelling attendance at trial.

[8] *See generally* RPC 1.6, cmt. 3.

[9] As noted, RPC 1.6 addresses duties to current clients. RPC 1.9(c)(2), however, effectively incorporates the nub of RPC 1.6 by only permitting information about former clients to be revealed as "these Rules would permit or require with respect to a client." *See also* RPC 1.6, cmt. 20 ("The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2).").

[10] *See generally* WSBA Advisory Ops. 181 (rev. 2009) and 202401 (2024) (both addressing what constitutes a lawyer's "file").

[11] ABA Formal Op. 94-393 at 2 (1994). The newer opinion includes that point from its predecessor. *See* ABA Formal Op. 473 at 2 (2016).

[12] ABA Formal Op. 473, *supra*, at 4.

[13] *Id*. If the firm has been replaced by another firm in the same matter for the former client concerned, the contact should be channeled through the client's new lawyer in keeping with RPC 4.2 (the "no contact" rule).

[14] *Id*. at 5 (footnote omitted). *See also* ABA Formal Op. 520 (2026) (working with successor counsel). If a firm is responding to a subpoena seeking a former client's file, the firm may conceivably treat the response as a firm risk management matter, a limited reopening of the earlier matter, or a new matter.

[15] ABA Formal Op. 473, *supra*, at 5 (citation omitted). For an extended discussion of Fifth Amendment considerations in the discovery context, *see* Douglas J. Ende, 15A Wash. Prac. Handbook on Civil Procedure § 53.4 (rev. ed. 2025).

[16] *Id*. at 6 (emphasis added by ABA Formal Op. 473 to ABA Model Rule 1.6, cmt. 15).

[17] *See, e.g.,* Washinton Sup. Ct. Civ. R. 45(c); Fed. R. Civ. P. 45(d).

[18] *See generally Magney v. Truc Pham*, 195 Wn.2d 795, 815-16, 466 P.3d 1077 (2020) (discussing *in camera* review of privileged material); *United States v. Zolin*, 491 U.S. 554, 565-74, 109 S. Ct. 2619, 105 L. Ed.2d 2619 (1989) (same); *see, e.g., Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567 (W.D. Wash. 2003) (*in camera* review of privileged material). *See also Taylor v. Ebenger*, 34 Wn. App.2d 497, 569 P.3d 340 (2025) (addressing non-party right

to appear in an action to assert privilege and related issues surrounding a trial court's discretion to grant or deny a request for *in camera* review).

[19] Washington did not adopt the portion of the ABA Model Rule exception also allowing disclosure under "other law." *See* ABA Model Rule 1.6(b)(6); WSBA Advisory Op. 194 (rev. 2009) (explaining that Washington did not adopt "other law" exception). This distinction might become relevant if, for example, a law firm was simply served with a regulatory request citing "other law" rather than a court order. On a related point, although subpoenas are issued in court proceedings, they are not "court orders" themselves. *See generally* WSBA Advisory Op. 2022 (2003) (noting that subpoenas are issued in the context of court proceedings); Douglas J. Ende, 15A Wash. Prac. Handbook Civil Procedure, *supra*, CR 45, App. (subpoena form).

[20] *See generally Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013) (discussing discretionary review of trial court orders requiring production of privileged information); *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 509, 175 L. Ed.2d 458 (2009) (same in the context of mandamus).

[21] ABA Formal Op. 473, *supra*, at 8 (citation omitted). *See also* WSBA Advisory Op. 1754 (1997) (discussing the "reasonably believes necessary" predicate to disclosure under RPC 1.6).

[22] ABA Formal Opinion 473 also addresses the often-delicate issue of who pays for a subpoena response. It notes that in some circumstances, the response may be within the scope of an existing fee arrangement while in others it may constitute a new matter. Regardless, the opinion also concludes that the lack of a fee agreement does not excuse a lawyer's duty to take reasonable steps to protect client confidentiality. *Id*. at 5-6.

[23] *See generally* Nik Chourey and Pam Stendahl, *Client Information Subpoenas*, 85 Or. St. B. Bull. 9, 11-12 (Jan. 2025) (discussing counsel provided by insurance carriers to assist with subpoena responses); Suzanne Lever, *You've Been Served*, 15 No. 1 N.C. State B. J. 37 (March 2010) (same).