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THE PRACTICAL EFFECT OF NEW ETHICS RULES: RESPONDING TO SUBPOENAS AND DOCUMENT REQUESTS ABOUT CLIENT INFORMATION

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INFORMATION

*Steven L. Lovett**

ABSTRACT

This article is a comparative overview of the American Bar Association's Model Rule 1.6(b) before and after the issuance of the ABA's Formal Opinion 473, issued on February 17, 2016, which was an attempt to restate and revise the rule's ethical expectations and to help settle several questions that had plagued the rule's practical application. A lawyer's duty of confidentiality to his or her client, and the public policy favoring judicial efficiency and fair disclosure during the discovery phase of litigation, often places lawyers in precarious ethical positions. This article attempts to provide guidance on this issue through an analysis of the rule and the context in which a lawyer's overarching duty to keep his or her client's information confidential can be precluded by the lawful compulsion to disclose such information without incurring malpractice liability.

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EXAMPLE 1.1—SAMPLE WITHDRAWAL LETTER

“Every lawyer is bound by a duty of professional secrecy. Professional secrecy is not only a duty but also a right, to ensure that everyone receives the best legal advice and, consequently, the best legal representation, be it before or outside a court of law.”¹ This is an essential standard which has also been posited by the American Bar Association. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”²

For centuries, the maxim contained in the statements above described the basis for the near-sacrosanct duty³ a lawyer owed a client—to vigorously protect information shared with the lawyer by the client, and the confidential information produced on the client’s behalf. “To ensure the best advice or defense, a client must be able to speak freely to his or her lawyer, which will only be possible if the lawyer can, under no circumstances, disclose the information received from the client to the authorities or to other parties to the proceedings.”⁴ This concern over protecting confidential information was historically balanced with the equally important need to protect human life from imminent harm, prevent a client from committing (present or future) a crime (or mitigating a past crime’s harm), establish a defense on the lawyer’s behalf against allegations of complicity in a crime or malpractice, collect a fee justly owed, have an open and fair discovery process, provide an accurate set of facts before the trier of fact, and administer justice in as objective and evenhanded manner as possible.⁵

¹ James R. Silkenat & Dirk Van Gerven, *Preface to ATTORNEY-CLIENT PRIVILEGE IN THE AMERICAS: PROFESSIONAL SECRECY OF LAWYERS* (James R. Silkenat & Dirk Van Gerven eds., 2016).

² MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. [3] (AM. BAR ASS’N 2015).

³ Duty is distinguishable from privilege—the attorney-client and work product privileges. The duty of confidentiality is broad and may extend to situations, persons, and interests far outside the courtroom. The concept of “privilege” is one which is defined as an exception to the disclosure and introduction of evidence during judicial proceedings. FED. R. EVID. 502.

⁴ ATTORNEY-CLIENT PRIVILEGE IN THE AMERICAS: PROFESSIONAL SECRECY OF LAWYERS, at xiii (James R. Silkenat & Dirk Van Gerven eds., 2016).

⁵ MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. [4-11] (AM. BAR ASS’N 2015). “As vital as it may be, however, the attorney-client privilege is narrowly construed, laden with exceptions, and easily waived. On the theory that the attorney-client privilege is intended for use as a shield and not as a sword, it may be lost if a litigant asserts a claim or defense that requires inquiry into the litigant’s privileged communications with its lawyer to fairly rebut or refute. This principle is commonly described as the ‘at-issue exception’ to the attorney-client privilege. The at-issue exception represents the most frightening

However, less than a year ago, the American Bar Association (ABA) revisited the extent to which these ethical exceptions apply, as they are provided for in Model Rule 1.6(b), in instances where a lawyer receives a subpoena “or some other compulsory process for documents or information relating to the representation of a client[.]”⁶ Specifically, this issue focuses on Model Rule 1.6(b)(6) which permits disclosure when “[o]ther law may require that a lawyer disclose information about a client.”⁷

I. GENERAL DUTY OF CONFIDENTIALITY VS. MODEL RULE 1.6(B)(6)

As with any rule interpretation, it always best to begin with the pertinent parts of what the rule actually says:

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

(6) to comply with other law or a court order[.]⁸

When the ABA issued its Formal Opinion 94-385 on July 5, 1994, it opined that a lawyer had the ethical responsibility to attempt to limit the scope of a subpoena, or other order, on any legitimate grounds available so as to protect confidentiality of documents coming within the scope of Model Rule 1.6. Only if such efforts were unsuccessful could the lawyer turn over

type of privilege forfeiture because the law does not clearly warn clients of its risk and because lawyers may not realize its effect in time to avoid calamity.” Douglas R. Richmond, *The Frightening At-Issue Exception to the Attorney-Client Privilege*, 121 PENN ST. L. REV. 1, 1 (2016).

⁶ STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, OBLIGATIONS UPON RECEIVING A SUBPOENA OR OTHER COMPULSORY PROCESS FOR CLIENT DOCUMENTS OR INFORMATION (AM. BAR ASS'N 2016) [hereinafter Formal Opinion 473], http://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion_473.pdf.

⁷ MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. [12] (AM. BAR ASS'N 2015).

⁸ MODEL RULES OF PROF'L CONDUCT r. 1.6(a) and (b)(6) (AM. BAR ASS'N 2015).

the documents in response to a specific “final” court order. Where available, the lawyer was to undertake an interlocutory appeal if his/her efforts were unsuccessful at the trial court.⁹ Twenty-one years later, on February 17, 2016, the ABA issued a new opinion on this matter in an attempt to restate and revise the rule’s ethical expectations and to help settle several questions which had plagued the rule’s application. Although Formal Opinion 94-385 acknowledged an attorney’s obligation to take measures to protect the confidentiality of a client, Formal Opinion 473 addresses concerns that have arisen over the past 21 years and provides guidance regarding the disclosure of client information pursuant to a court order.¹⁰

The ABA’s new opinion is underscored by its assertion that a “lawyer must balance obligations inherent in the lawyer’s dual role as an advocate for the client and an officer of the court.”¹¹ Formal Opinion 473’s reconsideration of the general duty of confidentiality—a duty which is briefly discussed above—in situations in which a lawyer has received a subpoena, or some other “compulsory process,”¹² significantly relaxes the previously held view that a lawyer should fight—even through the use of an interlocutory appeal—to limit the request and then only produce confidential documents in response to a “final” and specific court order.

In lieu of this fight-first-fight-hard ethical approach, Formal Opinion 473 provides the following steps (for clarity, I have divided the steps into “Phase I,” “Phase II,” and “Phase III”):

Phase I:

If the client is *available*,

1. Consult the client about whether to produce the information or to appeal.
2. If instructed to do so by the client, “assert all reasonable claims against disclosure,” and

⁹ Formal Opinion 473, *supra* note 6 (“ABA Clarifies a Lawyer’s Obligations in Response to a Subpoena for Client Files Insights |.” *Insights | Devine Millimet*, Feb. 24, 2016.) (contact author for digital copy).

¹⁰ Alexandra Lavelanet, *An Attorney’s Duty of Confidentiality: Responding to a Subpoena for Client Files*, LEGAL ETHICS IN MOTION (Mar. 28, 2016), <http://www.legaethicsinmotion.com/2016/03/an-attorneys-duty-of-confidentiality-responding-to-a-subpoena-for-client-files/>.

¹¹ Formal Opinion 473, *supra* note 6, at 1.

¹² *Id.* at 1 n.1 (“Throughout [Formal Opinion 473], ‘subpoena,’ ‘demand,’ ‘compulsory process,’ and similar terms are used interchangeably to refer to any initial demand by an entity or person or government agency seeking information protected by Model Rule 1.6(a) that is or may be enforced by compulsory process.”).

3. Seek to limit the request “on any reasonable ground.”
- If the client is *unavailable*,
1. “Assert all reasonable claims against disclosure,” and
 2. Seek to limit the request “on any reasonable ground.” (An appeal is *not* ethically required.)

Phase II:

If ordered to disclose the information, or if the client and the lawyer “disagree about how to respond to the initial demand,”

1. Consider withdrawing from the representation, pursuant to Model Rule 1.16.

Phase III:

When disclosing information and documents,

1. Only reveal what is “reasonably necessary.”
2. See appropriate protections “so that access . . . is limited to the court or other tribunal . . . and to persons having a need to know.”

The rule commentary provided by the ABA’s Standing Committee on Ethics and Professional Responsibility summarizes a few key points that differ from previous expectations. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, *the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4*. Unless review is sought, however, *paragraph (b)(6) permits the lawyer to comply with the court’s order*.¹³

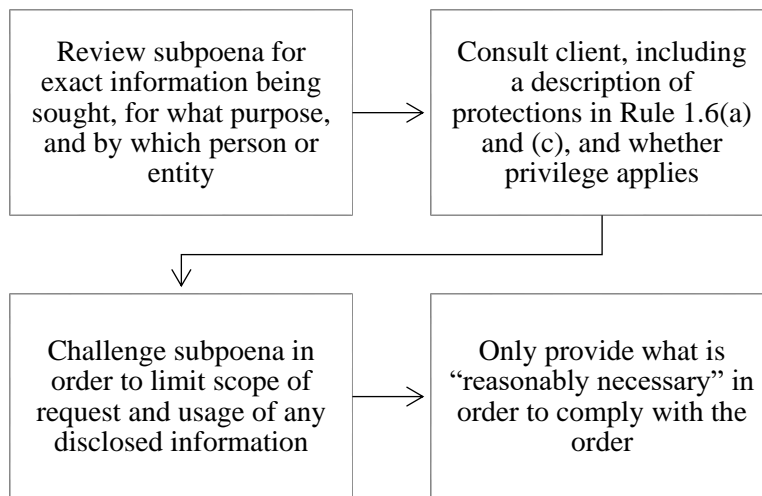
II. NEW ABA GUIDANCE ON SUBPOENAS FOR CLIENT DOCUMENTS

A significant omission from Model Rule 1.6(b)(6) is the word “final,” as it relates to the type of order a lawyer might receive which would permit him/her to comply with the request for information or documents. “The text thus suggests that omitting the reference to ‘final’ orders was meant to relieve the lawyer from the added burden of pursuing an appeal or other ‘final’

¹³ MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. [15] (AM. BAR ASS’N 2015) (*emphasis added*).

disposition, unless appropriate arrangements are made with an available client.”¹⁴ This represents an important departure from previous practice. However, several crucial questions remain as to how, and to what extent, a lawyer should comply with a subpoena request. Therefore, when a lawyer receives a subpoena for documents pertaining to a current or former client many questions may arise such as how extensive should the disclosures be? What protective measures should a lawyer seek? Or even what to do if the client and the lawyer disagree about how to respond?¹⁵

The key to avoiding a malpractice claim, and to providing the appropriate and ethical level of advocacy for your client, is to adhere to a predictable, process-driven procedure. A flowchart, borrowing in part from the outline of steps traced earlier, might act as a useful tool when facing a subpoena for confidential information and documents.



It is also possible to consult with the client about whether he/she desires that an interlocutory appeal be filed in the event a court upholds the subpoena

¹⁴ Formal Opinion 473, *supra* note 6, at 7.

¹⁵ Seth L. Laver & Jennifer M. Mannion, *Subpoenas and Ethical Duties to Clients*, PROF. LIABILITY MATTERS (Feb. 24, 2016), <http://professionalliabilitymatters.com/2016/02/24/subpoenas-and-ethical-duties-to-clients/>.

request in whole or in part. “[I]f ordered to produce any information, the lawyer should consult with the client on whether to appeal the ruling.”¹⁶

III. CLIENT COMMUNICATION REGARDING DOCUMENT REQUESTS

After receiving the initial demand, an attorney should first consult with his client to discuss possible courses of action. During this consultation the attorney should advise on the potential claims that may be asserted against disclosure, as well as the possible consequences disclosure may have for the client.¹⁷

Keeping in mind the Committee’s comments regarding client communication, and the mandate to provide clients with enough information to make “informed decisions,”¹⁸ the key to the question of consultation is three-part:

1. Thoroughly describe the protections afforded by Rule 1.6(a) and (c), discussing the meaning of “consent” (advisably recording the client’s consent in some written format) and the lawyer’s obligation to make “reasonable efforts” to prevent the disclosure of confidential information.
2. Discuss whether attorney-client privilege, and/or work product doctrine, may apply to the request. Make sure the client understands the distinction between these privileges and the narrow limits of their application. Discuss what might need to be provided in a privilege log and/or an *in camera* inspection by the court.
3. Discuss any other issues relevant to the request, such as documents which might contain information about another person, strategic implications of disclosure, public implications of disclosure (if any disclosure might become part of the public record), the process by which the requested documents and information will be transmitted to the intended person or entity, and whether a “claw-back”

¹⁶ Peter Joy, *New ABA Opinion on Ethical Duty When Client Documents Are Subpoenaed*, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH (Feb. 19, 2016), <https://contemporaryprofessionalresponsibility.com/2016/02/19/new-aba-opinion-on-ethical-duty-when-client-documents-are-subpoenaed/>.

¹⁷ Lavelanet, *supra* note 10.

¹⁸ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2015).

agreement might be a good idea for information which is inadvertently disclosed.

Client consultation and the above-described points of discussion apply to former clients and to clients who are “unavailable.”¹⁹ Lawyers should make *reasonable* efforts (and record those efforts) to locate and communicate with former and/or unavailable clients if the need arises. “[T]hese efforts must be reasonable within the meaning of Model Rule 1.0(h), and should be documented in the lawyer’s files.”²⁰

IV. CHALLENGING THE DEMAND FOR DOCUMENTS

If the client is unavailable for consultation, or if the client consents to disclosure, an attorney must nonetheless “assert all reasonable claims against disclosure and seek to limit the subpoena.”²¹ “[D]isclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it[.]”²² Typically, a challenge for the requested documents and information will come in one or more forms: a motion for a protective order, a motion for a restraining order (usually temporary until a substantive hearing can take place), and/or an interlocutory appeal. Each method has its appropriate application and appropriate timing, but no one method is compulsory.²³ Clients should understand the additional cost, time, and variety of potential outcomes which will result in pursuing any of these prophylactic measures.

Be sure to check your local, and appellate, rules before preparing or filing any of these! They usually require supporting affidavits, or have very rigid timetables, or notification requirements, etc.

¹⁹ See MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 2015) (prohibiting a lawyer from revealing confidential information unless the client gives “informed consent”).

²⁰ Formal Opinion 473, *supra* note 6, at 4.

²¹ Lavelanet, *supra* note 10.

²² MODEL RULES OF PROF’L CONDUCT r. 1.16 cmt. [16] (AM. BAR ASS’N 2015).

²³ Formal Opinion 473, *supra* note 6, at 8 (“If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal.”).

V. WITHDRAWING REPRESENTATION

“If the client and the lawyer disagree about how to respond—either to the initial demand or after disclosure is ordered—what are the lawyer’s obligations?”²⁴ “The lawyer has several options and some obligations if the lawyer and client disagree about how to respond to the initial demand or to an adverse ruling, or if the client wishes to retain new counsel.”²⁵ The first place a lawyer should look if faced with this situation is Model Rule 1.16.

Client-Lawyer Relationship

Rule 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . . .

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: . . .

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement[.]²⁶

Remember, the attorney-client relationship is a fiduciary one, and the client’s interest comes ahead of yours. Make sure that you do not damage the client’s case by the manner of the withdrawal. You are obligated to continue taking reasonable steps to protect your client’s interests during the pendency of a motion to withdraw and after the motion has been granted, while your client is searching for new legal representation.²⁷ If other motions are pending before the withdrawal is effective, you need to respond to those motions. You need to appear in court when necessary and preserve your client’s interest, even if you are not being paid, and even if you have a fundamental disagreement with the client. The exception is if the client intends to preserve perjured testimony or expects you to participate in a fraud on the court. In

²⁴ *Id.* at 2.

²⁵ *Id.* at 5.

²⁶ MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) and (b)(4) (AM. BAR ASS’N 2015).

²⁷ *Id.* at 1.16(d).

these instances, the matter may need to be continued by a call to opposing counsel, or having other lawyers involved.

Once you have decided to leave, however, you have a new client: *you*. Your purpose now is to get out of the case with the least exposure possible.²⁸

²⁸ Marc S. Stern, *How to Withdraw From a Case*, GPSOLO (July/Aug. 2010), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_withdraw_case_client_ethics.html.

Example 1.1—Sample Withdrawal Letter²⁹

Dear Client:

Over the past several weeks, I have been reevaluating our attorney-client relationship. It is apparent we are not functioning as a team. When this is impossible, it is best that we terminate our attorney-client relationship. It is our intention to terminate our relationship effective on _____. Until that time, we will continue to represent you. We will respond to motions and appear as your counsel in court. We will not, however, initiate any new actions except as we reasonably believe necessary to preserve the status quo.

Trial in this case is scheduled for _____. In addition, there are the following deadlines: _____.

The statute of limitations for your claims against _____ will toll on _____. The statute of limitations provides that actions need to be filed, or otherwise formally initiated, before it runs. This means that you must file your lawsuit before that date.

Our decision to terminate the relationship is not negotiable, and under no circumstances will we continue to represent you after _____. If you have not secured new counsel by that date, you will need to represent yourself. You will need to file a written appearance with the court, and you will need to respond to opposing counsel and appear for hearings.

We have (have not) given opposing counsel permission to contact you directly. As you know, the Rules of Professional Conduct preclude an attorney from contacting a represented client without permission.

Once again, thank you for this opportunity to be of service. We are sorry it did not work out. In the event that we can be of further service, please consider us.

Sincerely yours,

[Withdrawing firm]

²⁹ Adapted and excerpted from Marc S. Stern, *How to Withdraw From a Case*, GPSOLO (July/Aug. 2010), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_withdraw_case_client_ethics.html.