YOU'VE BEEN SERVED: ATTORNEY'S ETHICAL OBLIGATION RESPONDING TO SUBPOENA, BY: DONALD PATRICK ECKLER, ESQ. AND ALICE M. SHERREN, ESQ.

A public defender in a crowded misdemeanor courtroom with dozens of cases to be heard for initial appearance is asked by a generally impatient and temperamental judge, "How does your client plead?"

Meekly, she responded, "The defense stands mute."

Annoyed, and raising her voice, the court asked again, "How does your client plead?"

Again, but a bit louder this time, the lawyer answered, "The defense stands mute."

Now yelling through clenched teeth and leering at the intransigent lawyer, one more time the court asked, "HOW DOES YOUR CLIENT PLEAD?"

With conviction now, the lawyer responded, "THE … DEFENSE … STANDS … MUTE."

Immediately, the court ordered the defendant taken into custody by the sheriff, held as a "John Doe," and fingerprinted.

It took three tries, but the court finally realized the conundrum the lawyer was dealing with: her client was not who he said he was when he was arrested. The lawyer had learned in a confidential communication that the client was being held under a false name, but her ethical obligations would not allow her to disclose that fact to the court, especially because the client was wanted on several serious felonies in another state. ABA Model Rule 1.6. However, the lawyer could not enter a plea for her client under a false name, because this would be a fraud on the court. ABA Model Rule 3.3. Answering that she was "mute" as to the plea both protected her client's confidence and prevented her from lying to the court.

Complying with ethical obligations is often a simple matter of the lawyer knowing and applying the rules. But sometimes a lawyer has to navigate a conflict between obligations to clients and the Rules of Professional Conduct themselves. Much like the circumstance described above, a lawyer may face an ethical conundrum when the lawyer is served with a subpoena for client records. This article addresses a lawyer's responsibility to respond to a subpoena for

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client records, weighing the lawyer's obligations to the client as well as to the court. [1]

ABA Formal Opinion 473

In February of this year, the ABA released Formal Opinion 473, which provides guidance to attorneys faced with responding to a subpoena. This new opinion takes into account the changes to ABA Model Rule 1.6 since the last formal opinion on the topic in 1994. Under ABA Model Rule 1.6(b) (1994) the disclosure of client information was only permitted to prevent certain crimes or to establish certain claims or defenses on behalf of the lawyer. However, under the current version of the rules, ABA Model Rule 1.6(b)(6) provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or court order." Accordingly, a lawyer cannot use ABA Model Rule 1.6(a) to argue that it bars compliance with a court order. This exception is necessary because "a lawyer may not knowingly disobey obligations under the rules of a tribunal." ABA Model Rule 3.4. Further, a lawyer must consider that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." ABA Model Rule 8.4(d).

Given that the universe of documents that are potentially discoverable pursuant to a subpoena includes documents that are protected by attorney-client privilege or other protections, the first obligation of the lawyer is to advise the client, or at least attempt to advise the client, of the subpoena. For former clients, the efforts should include sending a letter to the last known address, a phone call, email, or other electronic communications with the former client, and conducting an internet search if no current address or phone number is known.

If the client (either former or current) is available, then ABA Model Rule 1.4 should guide the communication with the client. Pursuant to ABA Model Rule 1.6 (a), privileged communications can only be disclosed after informed consent, which is defined in ABA Model 1.0(e) as the agreement by the client following "adequate information and explanation about the materials risks of and reasonably available alternative to the proposed course of action." The lawyer should ensure the client understands the issues and can make informed decisions about the manner in which to respond. Specifically, the client must decide whether the privileged communications are to be disclosed or whether the privilege is to be asserted.

At a minimum, the discussion with the client should describe the protections available to the subpoena, advise whether those protections apply, and explore other factors such as pending or potential litigation involving the client or information that may be embarrassing to the client. If there is a disagreement concerning the lawyer's response to the subpoena, ABA Model Rule 1.16 governs whether the attorney withdraws from the representation of a current client, and how the lawyer protects a former client's interests until the client obtains new counsel.

Sometimes a client will engage the lawyer to respond to a subpoena seeking disclosure of that client's file. As was discussed in more depth in a previous article, no work for a client should be undertaken without preparation and execution of a proper engagement letter. If the response to the subpoena is outside the scope of the retention as described in the engagement letter for a current client, then the engagement letter should be updated or a separate engagement letter should be prepared to address the response to the subpoena. For former clients, a new engagement letter should be prepared regarding the lawyer's response to the subpoena.

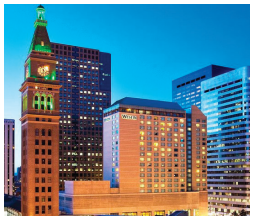
However, even if the client does not engage the lawyer, the lawyer is obligated to protect the client's confidential information independent of any engagement, or even contact, with the client. Comment 15 of ABA Model Rule 1.6 states that "[a]bsent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that … the information sought is protected against disclosure by attorney-client privilege or other applicable law." This comment is especially instructive in situations where a former client cannot be contacted, and thus cannot provide informed consent.

When disclosure is agreed to be appropriate, or if a court has overruled objections to protection of the documents, the lawyer should seek a protective order that precludes disclosure of the client's information beyond the "the tribunal or other persons having a need to know it." See Comment 16 to ABA Model Rule 1.6. ABA Opinion 473 is clear that if a lawyer is required to produce information pursuant to court order, the lawyer is not required to appeal that order, unless the lawyer has an instruction from a client and is being compensated for such work. If the client cannot be contacted by the lawyer then the lawyer has no obligation to appeal an order requiring production of documents.

Responding to a subpoena can create situations where a lawyer feels obligations conflict. The Model ABA Rules, and the recent ABA Formal Opinion 473, are a great place to look for direction. When particularly tough ethical questions arise, the ethics board for your jurisdiction or your malpractice carrier may be able to advise you or point you to resources to solve the dilemma.

Decision *Eizenga v. Unity Christian School*

In a recent Illinois decision, *Eizenga v. Unity Christian*



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> "However, even if the client does not engage the lawyer, the lawyer is obligated to protect the client's confidential information … ."

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SUBPOENA RESPONSE ETHICS, CONT'D

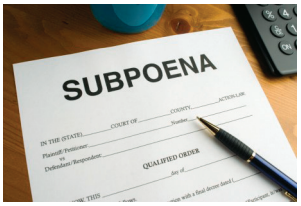
School of Fulton, Illinois, et. al., 2016 IL App (3d) 150519, the Court overruled objections based upon attorney-client privilege and work product doctrine. In that case, a subpoena had been issued for records related to the attorney's preparation of a trust for his now deceased client. An interpleader action was filed by the trustee, Dale Eizenga, against numerous entities with claims on the trust based upon an argument that the attorney, Russell Holesinger, had exerted undue influence on the testator, Walter Westendorf, in securing a gift of nearly the entirety of the trust estate to Unity Christian School. *Eizenga*, 2016 IL App (3d) 150519, ¶ 1. The initial trust was created in 1997, and Westendorf made several changes to the trust over the years, with the last several amendments slowly transferring all of the trust assets to Unity Christian School to the exclusion of all other potential beneficiaries. *Id*. at ¶¶ 4-13.

Eizenga was named trustee upon Westendorf's death. *Id.* at ¶ 4. After Westendorf died and Eizenga became trustee, Eizenga filed an interpleader action alleging that he did not believe that Westendorf was religious, that he had no connection to Unity Christian School, that Holesinger was an active booster of the school, and that he believed that Holesinger had exercised undue influence in effectuating the changes to the trust to favor the school. *Id*. at ¶ 14. A subpoena was issued to Holesinger for his records related to the interpleader suit. *Id*. at ¶ 17. Holesinger refused to produce certain documents, asserting attorney-client privilege and work product doctrine. *Id*. A privilege log was provided wherein Holesinger asserted protection for notes on estate planning matters, notes from calls, notes regarding communications about potential beneficiaries, notes on calculations and valuations, and timesheets. *Id*. Holesinger filed a motion to quash which the trial court denied. *Id*. The trial court found that though this dispute was not a will contest, it nonetheless fell into the exception to the survival of the attorney-client privilege applicable to will contests. *Id*. at ¶ 18. The trial court also denied the applicability of the work product doctrine because the material was not prepared in relation to pending or threatened litigation.[2] *Id*. To facilitate the appeal of this order, the court found Holesinger in contempt and assessed a penalty of $1 per day. *Id*. ¶ 19.

Holesinger appealed the ruling to the Illinois Appellate Court, Third District, which upheld the trial court's ruling as the applicability of the attorney-client privilege and work product doctrine, but vacated the contempt citation. *Id*. at ¶¶ 33-35. In reaching its decision, after first observing that the attorney-client privilege survives death, the court determined that even though this case did not involve a will contest, the testamentary exception to the privilege nonetheless applied based upon the weight of Illinois authority and based upon § 81 of the Restatement (Third) of the Law Governing Lawyers which applies the exception to *inter vivos* transactions. *Id*. at ¶¶ 24-28. Citing *DeHart v. DeHart*, 2013 IL 114137, ¶¶ 69, the court stated that "a decedent would (if one could ask him) forego the privilege so that the distribution scheme he actually intended can be given effect." Applying this reasoning, the court ruled that a will contest is not the only circumstance in which the testamentary exception to the attorney-client privilege could apply. *Id*. at ¶ 29.

Turning to the work product doctrine, the court also held that it did not apply to protect the documents. *Id*. at ¶ 30. Relying on long established Illinois Supreme Court precedents and Illinois Supreme Court Rule 201(b)(2), as most of the documents sought to be protected were prepared before the trust dispute litigation was filed, the court held that the documents could not have been prepared in anticipation or in preparation for litigation. *Id*. at ¶¶ 30-33.

The clear suggestion from the *Eizinga* case was that Holesinger was attempting to use the attorney-client privilege and work product protection to his advantage to preclude discovery of his alleged act of undue influence. Notwithstanding this potential improper purpose, the steps taken by Holesinger to assert the privilege and protection of the work product doctrine complied with the requirements of the Model Rules of Professional Conduct to protect his communications with the deceased testator, and, indeed, went beyond them in litigating the appeal.



> "Notwithstanding this potential improper purpose, the steps taken by [counsel] to assert the privilege … complied with the … Rules."

Endnotes

1. It is important to note that this article is focused on the ABA Model Rules and not the rules of any particular state. As rules may be different, careful consultation with the governing rules is advised.

2. Pursuant to *Monier v. Chamberlin*, 35 Ill.2d 351 (1966) and Illinois Supreme Court Rule 201(b)(2), under Illinois law, material not in preparation for pending or threatened litigation is generally not considered work product protected from disclosure.

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