



Ohio Board of Professional Conduct

OPINION 2023-04

Issued June 9, 2023

Compliance with Subpoena *Duces Tecum* for Former Client's File

SYLLABUS: A lawyer in receipt of a subpoena *duces tecum* for a former client's file must promptly notify the former client of the request and seek the client's informed consent to the disclosure of client information contained in the file.

If the former client gives consent to comply with a subpoena *duces tecum* for the client's file, the lawyer's disclosure of the client's information should be made only to the extent that the lawyer believes is reasonably necessary to comply with the subpoena. If the former client chooses to challenge a subpoena, the lawyer must assert all reasonable claims to limit the disclosure of client information related to the former representation, including, but not limited to, the serving of written objections on the issuing party, the filing of a motion to quash, and the appeal of an adverse court ruling.

If the former client cannot be timely located, the lawyer must assert all reasonable claims to limit the disclosure of client information related to the former representation in response to the subpoena, including, but not limited to, serving objections on the issuing party and filing a motion to quash.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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If the former client cannot be timely located, the lawyer must assert all reasonable claims to limit the disclosure of client information related to the former representation in response to the subpoena, including, but not limited to, serving objections on the issuing party and filing a motion to quash.

QUESTION PRESENTED:

What are a lawyer's ethical duties when served with a subpoena *duces tecum* to produce a former client's file in its entirety?

APPLICABLE RULES: Prof.Cond.R. 1.0, 1.2, 1.4, 1.5, 1.6, 1.9

OPINION:

The requesting lawyer has received a subpoena *duces tecum* from a prosecuting attorney seeking the production of the file of a former client. The former client is not a party to the matter in question. The requesting lawyer seeks guidance about his ethical duties and obligations to the former client in responding to the subpoena.

Lawyer's Obligations Under Prof.Cond.R. 1.6

A lawyer has a professional duty to protect the confidentiality of client information. Prof.Cond.R. 1.6. To the extent that a lawyer is in possession of a former client's file after termination of representation, the lawyer must continue to comply with the obligation to not reveal information relating to the representation of the former client including information protected by the attorney-client privilege. Prof.Cond.R. 1.6; cmt.[20]. A lawyer cannot reveal any information relating to the representation of a former client unless it is impliedly authorized, the former client gives informed consent, or an exception under Prof.Cond.R. 1.6 permits the disclosure. Prof.Cond.R. 1.6(a),(b),(d).

Notice and Communication with Former Client

Upon receipt of a subpoena *duces tecum* for a former client's file, a lawyer should promptly provide notice of the fact to the former client before the deadline to respond to the subpoena has passed. If the former client is available, the lawyer must "inform the client of any decision or circumstance with respect to which the client's informed consent is required" which would include whether the client wishes to comply with or challenge the subpoena. Prof.Cond.R. 1.4(a)(1).

Obtaining the former client's informed consent requires the lawyer to give the client adequate information and explain the matter to the extent that the client may make an informed decision. Prof.Cond.R. 1.4(b). The consultation with the former client should include an explanation of the scope and application of Prof.Cond.R. 1.6, the attorney-client privilege, the work-product doctrine, and any other protections or immunities that may serve as the basis for challenging the subpoena. A lawyer's explanation to the former client should also include the material risks and any alternatives to the disclosure of the client's confidential information. *See* Prof.Cond.R. 1.0(f) (definition of *informed consent*.) Although not required by Prof. Cond. R. 1.6(a), the Board believes a prudent lawyer

should obtain written documentation of the client's consent to avoid any dispute about the nature and scope of the authorization.¹

Compliance with Subpoena or Court Order

If the former client gives informed consent to the lawyer to comply with a subpoena *duces tecum* for the client's file, the lawyer's disclosure of the client's information should be made only "to the extent that the lawyer believes is reasonably necessary in order to comply" with the subpoena. Prof.Cond.R. 1.6(b), cmt.[16]; ABA Formal Opinion 473 (2016).

If the former client decides to challenge a subpoena, the Board recommends that the lawyer take reasonable steps to object to the disclosure of client information in the former client's file through written objections served on the issuing party or by filing a motion to quash. If the court grants the issuing party's subsequent motion to compel or overrules the former client's motion to quash and orders the disclosure of the client file, the lawyer may comply with the court order, unless the lawyer's client decides to appeal. Prof.Cond.R. 1.6(b)(6).

Opportunity for Appeal

In the event of an adverse ruling or order by a court directing the disclosure of the former client's file, a lawyer should discuss the grounds for an appeal with the former client. Prof.Cond.R. 1.6, cmt.[15]. If an immediate right of appeal is available, and the client wishes to pursue it, the Board recommends that the lawyer clearly identify the scope and terms of the engagement, including any fee to be paid, in order to comply with Prof.Cond.R. 1.2 and 1.5. Whether and under what circumstances a lawyer may appeal a court's adverse ruling concerning compliance with a subpoena of a nonparty is a question of law that the Board is without authority to address.

If the former client decides to forego an appeal and comply with the court's order, the Board advises the lawyer to consider additional measures including, but not limited

¹ In counseling a recalcitrant client, a lawyer must be mindful of Prof. Cond. R. 3.1, which prohibits the assertion of a position with no basis in law and fact, is frivolous, or is not a good faith argument for an extension, modification, or reversal of existing law; nor may a lawyer unlawfully obstruct another party's access to evidence, regardless of a client's instruction to do so. *See* Prof. Cond. R. 3.4(a).

to, seeking appropriate protective orders, requesting an *in-camera* review, or other arrangements so that access to the client's information is limited to the court or persons the court deems entitled to the information. Prof.Cond.R. 1.6, cmt. [16].

When the Former Client Cannot Be Timely Located

If the former client cannot be timely located, the lawyer should use reasonable efforts to find the former client. If the lawyer's continuing efforts to locate the client are unsuccessful, the Board advises the lawyer to assert all reasonable claims on behalf of the unavailable former client, through written objections served on the issuing party or the filing a motion to quash, on the basis that the information sought by the subpoena is protected from disclosure by privilege or other grounds. In the court filing, the lawyer should notify the court that the lawyer has been unable to locate the client and reference any attempts undertaken to find the client. In the event of an adverse ruling or order by the court, the lawyer is not required to undertake an appeal on behalf of the former and absent client. ABA Formal Opinion 473 (2016).

Fees for Legal Services

In most situations, the request for a former client's file will fall outside the scope of the lawyer's prior representation. When giving the former client notice of the subpoena *duces tecum*, the lawyer should discuss any fee arrangement for providing the legal services necessary to respond to the subpoena and enter into a new agreement that addresses any fees and expenses and the scope of representation. As a best practice, a lawyer may consider including in all client fee agreements a provision that anticipates payment for the lawyer's services and any costs associated with a demand for client information protected by Prof.Cond.R. 1.6 that is received after termination of the representation. See ABA Formal Opinion 473 (2016).