CLYDE&CO

Lawyers' Risk Management Newsletter

October 2022

Risks and Duties when Lawyers are Served with Subpoenas for Client Documents

In this article we review whether a subpoena for documents with non-privileged client confidential information creates an exception to an attorney's obligations to protect current and former clients' confidences.

ABA Model Rule 1.6(a) provides: "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)." Each of the seven 1.6(b) provisions specifies an exception to the 1.6(a) prohibition, and under each provision disclosure is permitted. Specifically, Model Rule 1.6(b)(6) provides: "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.*" (emphasis added).

On April 5, 2022, the New York City Bar Association issued Ethics Opinion 2022-1 (the "Opinion"), which addressed an attorney's obligations when they receive a subpoena for documents that contain confidential, but non-privileged, client information. In sum and substance, the Opinion states that "[a]n attorney receiving a subpoena seeking confidential information must (1) communicate with the current or former client whose information is requested, (2) seek the client's consent to provide the requested information, and (3) if consent is not received [or the client is not available], assert reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections." See also NYSBA 1198 (2020) (same); IL Adv. Op. 19-03 (2019) (same); ABA Formal Op. 16-473 (2016) (same).

The Opinion explains that if the subpoena is accompanied by a protective order prohibiting the lawyer from communicating with a current or former client about the subpoena, then the lawyer should determine whether the communication is in fact prohibited by law and, if so, the lawyer "should" respond to the subpoena by proceeding as she would if the client refused to consent or could not be located. In that instance, the lawyer must still proceed by asserting reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections.

If the communication is not prohibited, the firm must make "a reasonable attempt to notify the former client that the attorney has received a subpoena seeking confidential information within the lawyer's possession and a reasonable effort to provide a copy of the subpoena to the former client." NYC 2022-1.

Upon informing the client, the lawyer should obtain the client's informed consent to comply with the subpoena by disclosing such confidential information or obtain authority to challenge the subpoena.

If the client does not give consent or cannot be found (or the lawyer is not authorized to communicate with the client about the subpoena), then "the attorney has an ethical obligation to assert objections to the subpoena, including objections to the technical form of the subpoena and the specific requests for client confidential information, that the attorney concludes, in the exercise of her reasonable judgment, are

reasonable and non-frivolous, including objections to the production of privileged information." NYC 2022-1.

Since attorney-client privilege is not applicable, the Opinion advises "[a]n attorney may also conclude that she can assert non-frivolous and reasonable objections to the technical form of the subpoena, the relevance of the materials sought, or the burden and expense imposed by the subpoena." In addition, "[a]n attorney should consider seeking terms that limit dissemination of the client's confidential information to those with a need to know and require the litigants receiving the information to seek to file it under seal and not to reveal it in public court filings or proceedings." NY Eth. Op. 2022-1.

"If the attorney who served the subpoena agrees to limit the scope of the subpoena in response to non-frivolous objections and agrees to appropriate limitations on the use and dissemination of the client's confidential information, the attorney receiving the subpoena has fulfilled her ethical obligations and can produce the agreed-upon information." NYC 2022-1.
"In the less common situation where the issuing party and the attorney are unable to reach an agreement on reasonable objections, and the issuing party continues to insist on the production of confidential client information that the attorney reasonably believes cannot be justified as within the scope of a valid and binding subpoena, the attorney receiving the subpoena should not produce the disputed information." NYC 2022-1.

In that instance, the attorney should seek a court order to limit the production of confidential information based on such non-frivolous arguments. If unsuccessful, an attorney has an obligation to consult about the possibility of appeal with a former client. "However, where the former client cannot be reached, an attorney does not have an ethical obligation to take an appeal where the attorney determines, in the exercise of her reasonable judgment, that an appeal is not likely to succeed or that there are no reasonable non-frivolous arguments for reversal." NYC 2022-1.

The Opinion largely adopts ABA Formal Opinion 16-473 (2016), which has also been adopted by Illinois. See IL Adv. Op. 19-03 (2019). On that note, ABA Opinion 16-473 adds that if the current or former client wishes to seek other counsel to oppose the subpoena, "the lawyer should take reasonable steps to protect the client's interest during the client's search for other counsel." In addition, Illinois Opinion 19-03 states that "[i]f the clients and lawyer disagree as to how to respond . . . , then the lawyer may be required to withdraw pursuant to Rule 1.16." Furthermore, if the lawyer is a party to the underlying suit and disagrees with the client on how to respond, then "the lawyer may have a conflict of interest with his or her clients" (citing Illinois Rule 1.7).

At this time, no other state or local bar associations have issued opinions on this subject. In the meantime, practitioners faced with this issue would be wise to review these opinions for guidance.

Further information

If you would like further information on any issue raised in this update please contact:

Contacts

J. Richard Supple, Jr.
Partner, Clyde & Co LLP
richard.supple@clydeco.us
+1 212 710 3914

Anthony E. Davis
Of Counsel, Clyde & Co LLP
anthony.davis@clydeco.us
+1 212 710 3976

Janis M. Meyer
Of Counsel, Clyde & Co LLP
janis.meyer@clydeco.us
+1 212 710 3942

Aaron Lawson
Associate, Clyde & Co LLP
aaron.lawson@clydeco.us
+1 212 702 6778

Clyde & Co_LRM Newsletter_October 2022