

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2022-1: LAWYERS' OBLIGATIONS WHEN RECEIVING A
SUBPOENA SEEKING CLIENT INFORMATION**

TOPIC: Obligations of attorney who receives a subpoena, including one issued by an attorney, for documents that contain information learned in the course of representing a client.

DIGEST: Under certain circumstances, a subpoena may constitute “other law” that authorizes the disclosure of confidential information under Rule 1.6. An 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, assert reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections.

RULES: 1.4, 1.6, 1.9, 1.7, 3.1

QUESTION: What are the obligations of an attorney who receives a subpoena, including one issued by an attorney, that calls for the production of documents containing confidential, albeit non-privileged, client information?

OPINION:

I. Introduction

This opinion addresses the ethical obligations of an attorney, law firm, or legal services organization that receives a subpoena calling for the production of confidential information related to the lawyer’s current or former representation of a client. We identify three primary steps when an attorney receives such a subpoena. First, the attorney must communicate, or attempt to communicate, with the client or former client whose confidential information is at issue in the subpoena. Second, the attorney must seek the client’s consent to make the requested disclosure. Third, if the client or former client does not consent or cannot be reached, the attorney must take reasonable steps to limit the disclosure of the client’s confidential information to the disclosure that is required to be provided in response to a legally binding subpoena, including asserting appropriate objections and negotiating to narrow the scope. However, the New York Rules of Professional Conduct (the “Rules”) do not necessarily require the attorney to make a motion to quash or to appeal an order requiring disclosure.

In NYCBA Formal Op. 2005-3 (2005) we addressed the ethical issues that arise when a lawyer gives *voluntary* testimony that involves client confidences. And in NYCBA Formal Op. 2017-6 (2017) we addressed the conflict of interest concerns where a lawyer wishes to issue a subpoena to a current client on behalf of another client. However, we have not previously addressed a lawyer’s ethical obligations under the Rules when the lawyer receives a subpoena compelling production of confidential client information in the lawyer’s possession. The

American Bar Association (ABA) has addressed an attorney’s obligations with respect to subpoenas that seek confidential information under the Model Rules of Professional Conduct, and we largely adopt that analysis here. *See* ABA Formal Opinion 473, Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information (2016). This Opinion builds on the analysis in these earlier opinions and addresses both the practical and ethical considerations for attorneys responding to subpoenas seeking client information.

II. Analysis

A. Exceptions to Rule 1.6 Based on Client Consent or as Required for Compliance with “Other Law”

Under Rule 1.6(a), “confidential information” includes all “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” Confidential information may encompass material that is not protected by the attorney-client privilege (for example, because it was shared with a third-party outside the privilege) nor protected by the work product doctrine (for example, because it was not prepared when litigation was anticipated). *See* Rule 1.6 cmt. [3] (“The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source.”); NYCBA Formal Op. 2005-3 (summarizing differences between attorney-client privileged information and confidential information). An attorney’s duty not to disclose her client’s confidential information survives the termination of the representation. *See* Rule 1.9(c).

Rule 1.6(a) provides that “[a] lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person” except in certain enumerated circumstances. Two exceptions set forth in Rule 1.6 are implicated when an attorney receives a subpoena seeking the production of a client’s or former client’s confidential information:

First, a lawyer shall disclose confidential information if the client gives “informed consent.” Rule 1.6(a)(1).

Second, a lawyer may disclose confidential information to the extent the lawyer reasonably believes it necessary “to comply with other law or court order.” Rule 1.6(b)(6).¹

The comments to Rule 1.6 discuss several aspects of the “other law” exception. While the Rule itself *permits* – but does not require – an attorney to disclose confidential information to

¹ Rule 1.6(b) contains other exceptions that permit an attorney to use a client’s or former client’s confidential information, including to defend the lawyer or the lawyer’s employees or associates from accusations of wrongful conduct. *See* Rule 1.6(b)(1)-(5). While it is possible that some of these other exceptions might be implicated by a subpoena to an attorney, this opinion does not expressly address or opine on specific situations where these other exceptions are at issue.

comply with “other law or court order,” Comment [12] explains that such “other law may require that a lawyer disclose confidential information.” Rule 1.6 cmt. [12] (emphasis added). However, Comment [12] further notes that the question of “[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope” of the Rules. *Id.* Comment [12] continues: “When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.” *Id.*

Comment [13] notes that a “tribunal or governmental entity . . . may order a lawyer to reveal confidential information.” Rule 1.6 cmt. [13]. Even in that circumstance, “[a]bsent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason.” *Id.* Comment [13] further states that when a ruling is issued requiring compliance over objections, the attorney must consult with her client pursuant to Rule 1.4 about the possibility of appeal, but if no appeal is taken or if the appeal is unsuccessful, the attorney may comply with the court order. *Id.*

Finally, Comment [14] states that “[i]f the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.” Rule 1.6 cmt. [14].

“Other law” may require compliance with a subpoena even where the subpoena is signed by an attorney and not a court officer, because the subpoena must be read in conjunction with the statute or rule authorizing an attorney to issue a demand that carries the force of law. *See, e.g.,* Fed. R. Civ. P. 45(a)(1)(D) (“[a] command in a subpoena to produce documents, electronically stored information, or tangible things *requires the responding person* to permit inspection, copying, testing, or sampling of the materials.”) (emphasis added); CPLR § 2301 (“[a] subpoena duces tecum *requires production* of books, papers, and other things.”) (emphasis added). These and similar statutes, which require production in response to a subpoena and do not distinguish between attorney-issued or tribunal-issued subpoenas, constitute “other law” that allows disclosure of confidential information under Rule 1.6(b)(6).² While we conclude that attorney-

² *See SEC v. Sassano*, 274 F.R.D. 495, 496 (S.D.N.Y. 2011) (holding that Federal Rule of Civil Procedure 45 “constitutes a ‘law’ that requires [a subpoenaed law firm] to reveal the allegedly confidential client information sought here absent a valid basis for objection, such as privilege or lack of relevance”); *Owens v. Republic of Sudan*, 333 F.R.D. 291, 296 (D.D.C. 2019) (holding that D.C. Bar Rule 1.6 did not “bar [a law firm] from complying with the instant subpoena, but instead specifically permits the firm to do so” under exception for disclosure “required by law or court order”); *cf. In re Grand Jury Subpoena*, 533 F. Supp. 2d 602, 605 (W.D.N.C. 2007) (North Carolina Rule 1.6 authorizes attorney to reveal confidential client information in response to a grand jury subpoena because it “is *the law* in the United States, thus trumping confidentiality obligations under Rule 1.6”).

issued subpoenas may constitute “other law” that permits disclosure of confidential information, it is a legal question beyond the scope of this opinion to determine whether any particular subpoena, or any particular request within a subpoena, sufficiently complies with such statute or court rule so as to require compliance by the receiving attorney. *See* Rule 1.6 cmt. [12].³

B. A Lawyer’s Duties Under Rule 1.6 and Rule 1.4

Under Rule 1.6, upon receiving a subpoena that seeks confidential client information of a *current* client, the receiving attorney must make a prompt and reasonable effort to communicate with the current client about the subpoena and the attorney’s response to the subpoena.⁴ Unless prohibited by other law, court order, or governmental order or authority, the receiving attorney must also make a reasonable effort to transmit a copy of the subpoena to the current client. What constitutes a prompt and reasonable effort to communicate will depend on the facts and circumstances. For instance, where an attorney has routinely communicated with a client by email, the attorney may conclude that sending an email notifying the client about the subpoena and attaching a copy of the subpoena is the most reasonable means of communication. Barring exceptional circumstances that make it impossible or impracticable, an attorney should commence her effort to communicate with her current client promptly and, if possible, before the deadline for responding to the subpoena has passed.

A subpoena seeking the production of a current client’s confidential information that relates to an ongoing matter in which the attorney is representing the client also implicates Rule 1.4. In that instance, in addition to the requirements imposed by Rule 1.6, the receiving attorney has an independent duty to discuss the subpoena with the client under Rule 1.4’s directive that a client be informed of “material developments in the matter” and be “reasonably informed about the status of the matter.” Rule 1.4(a)(1)(iii), (3). Under Rule 1.4, an attorney must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4(b). Therefore, in all instances where a subpoena seeks information related to a current representation, the attorney should determine whether Rule 1.4 is implicated in addition to Rule 1.6.

A subpoena that requests confidential information of a *former* client implicates Rule 1.9(c), which creates a continuing obligation to preserve a client’s confidences, surviving the end of the representation. *See* Rule 1.9(c). Accordingly, an attorney who receives a subpoena

³ An attorney receiving a subpoena may disclose confidential information as necessary “to secure legal advice about compliance with these Rules,” including to determine whether a subpoena is legally binding. *See* R 1.6(b)(4) & cmt. [9].

⁴ In most cases, receipt of a subpoena will not create a conflict between the attorney and a current client. *See* NYCBA 2005-03 (providing testimony in a proceeding in which the lawyer is not serving as counsel does not constitute the sort of “representation” or “employment” that could give rise to a conflict). Nevertheless, an attorney who receives a subpoena directed to the lawyer or law firm (as opposed to the client) should consider the directives of Rule 1.7 – whether responding to the subpoena would require the lawyer to represent differing interests or create a significant risk that the lawyer’s professional judgment on behalf of the client would be adversely affected by the lawyer’s own interests and, if so, whether to seek the client’s informed consent in writing under Rule 1.7(b) before proceeding. *See* Rule 1.7(b)(4).

seeking information about a terminated representation must make a reasonable effort to communicate with her former client in order to determine whether the client consents to release of confidential information. The attorney's efforts must include 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. *See* Rest. (3d) of the Law of Lawyering § 33 cmt. g ("lawyer retains authority to take steps protecting the [former] client's interests" and must "notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody").⁵ Reasonable efforts will vary by the circumstances, but will most often include an attempt to reach the former client at the client's last known address, email, or telephone number.⁶

C. Obtaining Client Consent to Disclose Confidential Information

The receiving attorney must make a reasonable attempt to communicate with her client or former client before she can determine whether she is authorized to disclose confidential information in response to a subpoena based on the client's or former client's informed consent, as permitted by Rule 1.6(a)(1). Where the attorney is unable to communicate with her client or former client, additional efforts are required, as discussed in Part II.D of this Opinion.

Under the Rules, "informed consent" requires agreement by the client or former client "after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j). The scope and detail of the required communication between attorney and client will vary based on the factual circumstances. *See* Rule 1.0 cmt. [6] ("relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent"). For example, where a client or former client declines to take a position on responding to the subpoena or tells the attorney to respond in full (*e.g.*, perhaps because the former client no longer views the information sought as relevant to the former client's present affairs), the attorney should consider whether the duty to obtain informed consent requires the attorney to provide additional explanation concerning the possible implications of waiving the attorney-client privilege and whether the attorney may infer consent from the client's responses during the discussion.

⁵ An attorney's obligation to retain files or documents after a representation ends has been addressed in other opinions. *See* NYCBA Op. 2010-01 (2010), Use of Client Engagement Letters To Authorize the Return or Destruction of Client Files at the Conclusion of a Matter; NYCBA Op. 2008-01 (2008), A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation; NYCLA Op. 725 (1998), Retention of Closed Client Files/Papers.

⁶ There may be instances – such as where a subpoena is accompanied by a protective order – where the lawyer is prohibited from communicating with a current or former client about the subpoena. Determining whether communication is prohibited by court order or other law is a legal question outside the scope of this opinion. If the lawyer determines that communication with the client is prohibited by applicable law, she should respond to the subpoena by proceeding as she would if the client refused to consent or could not be located.

While “[o]btaining informed consent will usually require an affirmative response by the client or other person,” under certain circumstances “[c]onsent may be inferred . . . from the conduct of a client or other person who has reasonably adequate information about the matter.” Rule 1.0 cmt. [7]. An attorney who receives a subpoena for information related to a client or former client may, therefore, consider whether it would be sufficient to inform the client of the subpoena and outline the attorney’s proposed course of action in sufficient detail for the client to understand what information the attorney will disclose unless instructed otherwise by the client. An attorney who chooses to proceed in this manner should include a clear statement that the attorney intends to preserve reasonable objections to the subpoena, but that the attorney will produce the material not subject to such objections by a certain date. However, inferring consent from silence is not reasonable in all circumstances. For example, where an attorney and client communicate several times a day about an ongoing matter, it may not be reasonable for the attorney to resort to such “negative notice” rather than raising the issue directly with the client during one of their frequent daily communications. Likewise, where a former client has been out of contact for years and the attorney is not certain the last address on file is still accurate and cannot obtain proof of delivery, it would not be reasonable to mail a copy of the subpoena with a letter stating that the lawyer will infer consent to disclosure from the client’s failure to respond. By contrast, there may be circumstances where clients have specifically instructed counsel that the use of such “negative notice” to the client is an appropriate means of proceeding. In making the decision about what manner and method of communication is reasonable, the attorney should consider her past course of dealing with the client as well as the sophistication of the client. Other facts may also be appropriate for consideration depending upon the circumstances, such as the age or health of the client.

Finally, in addition to informed consent as defined in Rule 1.0(j), the Rules also permit an attorney to disclose a client’s confidential information where disclosure is “impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community.” Rule 1.6(a)(2). This concept of implied authorization applies only to current clients, Rule 1.6 cmt. [5], and a receiving attorney therefore may not rely upon this provision in the case of a subpoena that seeks the confidential information of a former client. While it is possible that some circumstances exist where a current client has impliedly authorized the disclosure of confidential information in response to a subpoena,⁷ the receiving attorney would still be required by Rule 1.6, and possibly by Rule 1.4 as well, to make an effort to communicate with the client about the subpoena and the attorney’s intended response.

⁷ For example, if an attorney represents a plaintiff in a civil suit against a defendant who is also the subject of a regulatory investigation and the attorney receives a “friendly” subpoena from the regulator, compliance with the subpoena may be impliedly authorized by the client as part of fulfilling the client’s strategic goals. Nevertheless, consultation with the client about the subpoena may still be required under Rule 1.4.

D. A Lawyer's Duties Where A Client Does Not Consent to Disclosure of Confidential Information In Response To A Subpoena

If an attorney does not obtain her client's or former client's informed consent to produce the client's confidential information – whether because the client refused or because the attorney could not reach the client – the attorney may still be permitted to provide confidential information in response to a subpoena under Rule 1.6's exception for compliance with other law.⁸ However, the attorney must take additional steps to comply with the duties imposed by Rule 1.6.

The attorney must first determine whether she may disclose confidential information absent the client's informed consent as “necessary to comply with court order or other law.” Rule 1.6(b)(6). Disclosure of client confidential information without client consent is permitted only “to the extent that the lawyer reasonably believes necessary” to comply with other law. *See* Rule 1.6(b). Therefore, after an attorney determines that other law mandates disclosure, the attorney must still address the ethical question of what confidential information the attorney may disclose. *See* Rule 1.6 cmt. [12]. To ensure that disclosure is limited to that which is required by law, 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. *See* Rule 1.6 cmt. [13]; *see* Rule 3.1(a) (a lawyer shall not assert an argument “unless there is a basis in law and fact for doing so that is not frivolous”); *see also* ABA Op. 473 (2016); Rest. (3d) of the Law Governing Lawyers § 63 cmt. b (lawyer should raise “any reasonably tenable objection to another's attempt to obtain confidential client information”). In the context of voluntary testimony by an attorney, we similarly concluded that “if in the course of voluntarily testifying, a lawyer is ordered by the court, or otherwise required, to respond to a question calling for disclosure of a confidence or secret, the lawyer may do so without fear of violating the Code [*i.e.*, the predecessor to the current Rules],” but advised that the attorney should “assert any non-frivolous objection or evidentiary privilege or protection.” NYCBA Op. 2005-3 (2005).

An objection is non-frivolous if it has a basis in existing law or if there is a good-faith argument for an extension, modification, or reversal of existing law. Rule 3.1(b)(1). An objection would be frivolous if it were interposed solely to delay or prolong proceedings, to harass the issuing party, or if it were based on misstatement of material fact. Rule 3.1(b)(2), (3); Rule 3.2. Non-frivolous objections to a subpoena may include assertions that material is protected by the attorney-client privilege, the work product doctrine, or other evidentiary privileges. *See* Rule 1.6 cmt. [3]; Rest. § 63 cmt. b. An 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. An attorney may consult with others in her firm to determine whether non-frivolous objections are available. *See* Rule 1.6 cmt. [9].

⁸ We note that in some cases a subpoena may seek documents that are not part of the client file, such as the attorney's time records. Such documents may still reflect confidential client information, however, and the attorney may need to assert objections accordingly.

Rule 1.6 also imposes an obligation on the receiving attorney to take steps to limit the dissemination of her client's confidential information even where disclosure is required under other law. Thus, the attorney should ensure that a confidentiality or protective order has been issued by the relevant court or seek to condition production upon entry of an order or an equivalent agreement. An 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. *See* Rule 1.6 cmt. [14].

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. In the ordinary course, the issuing and receiving parties would discuss objections to the subpoena before reaching an impasse, which may affect whether non-frivolous objections continue to exist. For example, an attorney receiving a subpoena may object on the basis of relevance but, after discussing the nature of the proceeding with the issuing party, conclude that no non-frivolous relevance objection can be maintained. Once an attorney has concluded that there are no reasonable remaining objections to a subpoena, she may provide the requested information consistent with Rule 1.6's exception for compliance with other law.

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. What aspects of a subpoena are and are not subject to reasonable and non-frivolous objections will not always be clear-cut, and in those instances an attorney can and should exercise judgment to draw conclusions based on her informed and reasonable assessment of the governing law. For example, if the subpoena requests information that the receiving attorney reasonably concludes is privileged under the jurisdiction's governing law and is therefore not discoverable and is subject to a reasonable and non-frivolous objection, the attorney cannot turn over that information consistent with Rule 1.6, even in the face of an unreasonable and intransigent issuing party. An attorney must exercise independent and reasonably informed judgment about whether a subpoena is valid: she should not assume all information must be produced merely because the issuing party insists, nor is she required to withhold information on the basis of a theoretical argument for its protection. In most instances, an attorney is not required to seek court intervention to determine the scope of a subpoena before responding, even where there is an arguable question of law involved.⁹ If the issuing party initiates court proceedings to enforce compliance with the subpoena, the attorney should appear and make arguments sufficient to maintain non-frivolous objections to the subpoena.¹⁰ While a

⁹ An attorney may be required to initiate motion practice if she concludes that, under the relevant procedural rules, precedent and custom and practice, failing to take affirmative action will risk waiving otherwise reasonable and non-frivolous objections to the subpoena.

¹⁰ An attorney may consider including a provision in an engagement letter requiring the client to indemnify or reimburse the attorney for reasonable expenses incurred in connection with responding to a

court appearance is generally not required, an attorney *may* seek a court order clarifying the attorney's obligations with respect to the subpoena, which will similarly clarify the attorney's obligations under Rule 1.6.

Finally, if the attorney seeks a court order limiting production and is unsuccessful, Comment [13] to Rule 1.6 counsels that the lawyer opposing the disclosure "must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order." Rule 1.6 cmt. [13]. Although the comments do not address the situation where the subpoena relates to confidential information of a former client, we conclude that an attorney has the same obligation to consult about the possibility of appeal with a former client that can be reached. 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. *See* Rule 3.1. In that circumstance, the attorney may respond to the subpoena as reasonably necessary to comply with the lower court's order.

III. Conclusion

An attorney who receives a subpoena seeking confidential information relating to a current or former client must communicate with the client concerning the subpoena and make reasonable efforts to obtain the client's consent to respond to the subpoena. If the attorney cannot obtain consent from the client – either because the client refuses or the attorney cannot make contact with the client – the attorney is permitted to rely on the "authorized by other law or court order" exception on Rule 1.6(b)(6) in order to respond to the subpoena. However, even when relying on that exception, the attorney must assert reasonable and non-frivolous objections to the subpoena and should only provide information to the extent reasonably necessary to comply with the attorney's obligations. In addition, while the attorney must take reasonable steps to limit the disclosure, the Rules do not require a lawyer to make a motion to quash or appeal any order requiring disclosure.

subpoena related to the representation. In the absence of agreement about payment, we do not opine on whether the attorney has a right to seek payment from her client or former client for the cost of responding to the subpoena. *Cf.* ABA 473 (addressing fee arrangements); NYSBA Op. 1142 (2018) (noting it is well-established that a lawyer may charge a client reasonable fees and expenses of assembling and delivering the client file). We opine only that the scope of the attorney's obligations under the Rules is not varied by the attorney's likelihood or expectation of receiving such compensation.