Ethics: Responding to a Subpoena for Confidential Client Information

by Sandra J. Colhour[1]

Trust is the hallmark of the client-lawyer relationship.[2] Foundational to this trust is the assurance that a lawyer will not reveal information related to the representation of a client without the informed consent of the client or unless the confidentiality rule authorizes disclosure.

Missouri Supreme Court Rule 4-1.6, Confidentiality of Information, prohibits a lawyer from revealing information related to the representation of a client without a client's informed consent or implied authorization, or unless disclosure is made to the extent necessary to accomplish one of the purposes identified in the Rule. Rule 4-1.6(b)(4) permits a lawyer to reveal information related to the representation of a client to the extent reasonably necessary to comply with other law or a court order. When a lawyer is subpoenaed to testify about or produce confidential information, questions

emerge as to whether applicable law authorizes compliance with the subpoena and whether the subpoena, issued under authority of a court, constitutes a court order per Rule 4-1.6(b)(4). Because failure to comply with a subpoena can result in penalties at law outside the scope of the Rules of Professional Conduct, and improper disclosure of confidential information can expose a lawyer to discipline, the stakes are high. The lawyer may lack facts about why the subpoena was issued, and legal research into whether applicable law protects the information or requires disclosure may yield indeterminate results.

A lawyer faced with a subpoena for confidential client information can chart a clear path by considering four questions: (1) Is the information the subpoena seeks protected by Rule 4-1.6?; (2) Has the client given informed consent to disclosure?; (3) Is disclosure impliedly authorized to carry out the representation?; and (4) Is disclosure of the information required by "other law or a court order"?

Is the Information Protected by Rule 4-1.6?

The confidentiality rule protects all information "relating to the representation of a client."[3] Prior to the effective date of the Rules of Professional Conduct in 1986, Missouri's Code of Professional Responsibility protected, with certain exceptions, a client's "confidence[s]" (information protected at law by the attorney-client privilege) and "secret[s]" (other information gained in the professional relationship that the client had requested be held inviolate or that would be embarrassing or detrimental to the client if revealed).[4] The current confidentiality rule is much broader. It prohibits unauthorized disclosure of "not only matters communicated in confidence by the client, but also … all other information relating to the representation, whatever its source."[5] In fact, the rule's prohibition extends to information that is not itself protected by the confidentiality rule but could, if disclosed, reasonably lead a third person to discover confidential information.[6] When information is sought through compulsion of law, the principle of confidentiality is given effect by the related legal doctrines of attorney-client privilege and work-product,[7] but confidentiality encompasses a broader category of information.[8] Examples of confidential information include, but are not limited to: client identity;[9] information about a client's fee;[10] a client's mental competency during the representation;[11] and matters related to the representation that have become part of the public record.[12]

When a lawyer no longer represents a client, Rule 4-1.6 still provides the ultimate criteria for permissible disclosure. The duty of confidentiality continues after the client-lawyer relationship has ended, in that a lawyer may not reveal confidential information about a former client except as the Rules of Professional Conduct "would permit or require with respect to a client."[13]

Has the Client Given Informed Consent to Disclosure?

If a subpoena demands information protected by the confidentiality rule, a lawyer may reveal the information if the client grants informed consent. "Informed consent" is defined in Rule 4-1.0, Terminology, as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[14] To give informed consent, a client ordinarily must be informed about the facts and circumstances giving rise to the request for

information, the material advantages and disadvantages of disclosure, and other options and alternatives available to the client.[15]

When a subpoena seeks information from a lawyer about a former client, a lawyer may seek, if practical, informed consent from the former client. It may be appropriate in some circumstances to advise a client to seek the advice of other counsel as to whether to grant consent.[16] Generally, when a former client has granted consent to disclosure based on advice of other counsel, the lawyer seeking the consent can assume the former client's consent is "informed."[17]

If a former client is deceased, informed consent on behalf of the client cannot be granted by the personal representative of the client's estate,[18] nor may any person waive the lawyer's duty of confidentiality owed to a deceased former client.[19] Only if a client gave express informed consent, while alive, to the disclosure of confidential information to the individual(s) and under the circumstances covered in the subpoena may a lawyer rely on informed consent as the basis for disclosure of information relating to a now-deceased client.[20]

Particularly in the estate planning context, a lawyer may wish to secure a current client's explicit informed consent for future disclosure of specific documents after the client's death or incompetence in order to carry out the client's goals.[21] After a client's death or incapacity, a lawyer may be contacted or subpoenaed by a trustee, personal representative, beneficiary, or attorney in fact. The practitioner who retains documentation of a deceased or incapacitated client's prior grant of specific informed consent may be able to serve the client more comprehensively, circumvent the time and expense of opposing a subpoena, or escape the need to hold to the slender thread of the implied authorization exception, discussed below.

Is the Disclosure Impliedly Authorized to Carry Out the Representation?

A lawyer may comply with a subpoena's demand for confidential information without explicit informed consent from a client if the disclosure is "impliedly authorized in order to carry out the representation."[22] In the context of confidential document disclosure, the implied authorization exception in Missouri occupies only a small patch of solid ground. That ground is in the estate planning context. A lawyer for a deceased client may disclose an original or copy of a will, testamentary trust, or recorded deed, prepared by the lawyer, in response to a subpoena duces tecum or other demand for documents if the lawyer believes the documents are still valid and disclosure would be consistent with the goals of the deceased.[23] The lawyer should not rely on the implied authorization exception to disclose other information relating to the representation, including, but not limited to, information about the wishes of the now-deceased client.[24]

Is Disclosure of the Information Required by "Other Law or Court Order"?

If the client has not given express or implied authorization for a lawyer to disclose confidential information, a lawyer may disclose such information "to the extent the lawyer reasonably believes necessary … to comply with other law or a court order."[25] For purposes of Rule 4-1.6(b)(4), a subpoena demanding testimony or documents, issued by or under the authority of a tribunal[26] at

the behest of an attorney or party, should be viewed as a court order.

However, because disclosure is permitted only "to the extent the lawyer reasonably believes necessary ... to comply,"[27] a bare subpoena demanding information related to a lawyer's representation of a client does not authorize disclosure. A lawyer who receives a subpoena for confidential client information is compelled to reconcile the lawyer's confidentiality obligations under Rule 4-1.6, including the related legal doctrines that give it effect in the compulsory process context, [28] with the lawyer's obligation as an officer of the legal system[29] exemplified in the prohibition in Rule 4-3.4(c) that a lawyer not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."[30]

To address these dual responsibilities, a lawyer must first consult with the client about the demand for information to the extent required by Rule 4-1.4, Communication.[31] Because the duty of confidentiality continues after termination of the client-lawyer relationship, a lawyer subpoenaed for information related to the lawyer's representation of a former client has a duty to notify the former client of the demand.[32] During that communication, a lawyer may, if appropriate, seek the informed consent of the client or former client to disclosure.[33]

Absent informed consent for disclosure granted by the client or former client, a lawyer should oppose the subpoena, making all available good faith arguments[34] that disclosure of the information is not authorized by other law or is protected by the attorney-client privilege or other applicable law.[35] A lawyer whose client or former client is unavailable for consultation about the subpoena, including a lawyer for a now-deceased former client, also must assert on behalf of the client or former client all nonfrivolous arguments in opposition to disclosure.[36] A lawyer should advocate that any order for disclosure be as specific and limited as possible.[37]

If the challenge to the subpoena's demand is denied, a lawyer must consult with a client about the possibility of appeal to the extent required by Rule 4-1.4, Communication.[38] If appellate review of the order is not sought, a lawyer is permitted by Rule 4-1.6(b)(4) to comply with a court order for disclosure issued under those circumstances.[39] If the disclosure is made in the context of a judicial proceeding, a lawyer has a duty to seek appropriate protective orders or attempt to make other arrangements limiting access to the tribunal or other persons with a need to know.[40]

A lawyer who must respond to a subpoena demanding confidential client information is obliged to make precise judgments and act prudently to reconcile the lawyer's sweeping duty of confidentiality with his or her role as an officer of the legal system. Even after conscientious review of the Rules of Professional Conduct and Comments, Missouri Informal Advisory Opinions,[41] and substantive legal research, questions may persist. Any lawyer licensed in Missouri may contact the Office of Legal Ethics Counsel (www.Mo-Legal-Ethics.org (http://www.Mo-Legal-Ethics.org)) to request an informal advisory opinion about his or her own prospective conduct related to the Rules of Professional Conduct.[42]

Endnotes

1 Sandra J. Colhour is Assistant Legal Ethics Counsel for the Advisory Committee of the Supreme Court of Missouri.

2 Rule 4-1.6, Comment [2].

3 Rule 4-1.6.

4 DR 4-101 (1984).

5 Rule 4-1.6, Comment [3].

6 Rule 4-1.6, Comment [4].

7 Rule 4-1.6, Comment [3].

8 Mo. Informal Advisory Opinion 2015-02, *available at* http://www.mobar.org/ethics/informalopinions.htm (http://www.mobar.org/ethics/informalopinions.htm); *see also infra* note 41; *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 120 (Mo. Ct. App. W.D. 2012) (emphasizing distinction between an attorney's duties under the Rules of Professional Conduct and the attorney-client privilege).

9 Mo. Informal Advisory Opinion 2015-09.

10 *Id.*

11 Mo. Informal Advisory Opinion 20040028.

12 Mo. Informal Advisory Opinion 2015-02.

13 Rule 4-1.9(c)(2); Rule 4-1.6, Comment [17]. Even if no confidential information is disclosed, Rule 4-1.9(c)(1) prohibits a lawyer from using confidential information to the disadvantage of a former client, except as the Rules of Professional Conduct would allow or require regarding a client, or where the information has become "generally known."

14 Rule 4-1.0(e).

15 Rule 4-1.0, Comment [6].

16 *Id.*

17 *Id*.

18 Mo. Informal Advisory Opinion 20050021.

19 Mo. Informal Advisory Opinion 20040028.

20 Mo. Informal Advisory Opinion 20010154.

21 *See* Rule 4-1.0, Comment [6] (providing guidance about informed consent); *see also* Mo. Informal Advisory Opinion 20010154 (advising that an attorney may produce a durable power of attorney, prepared by the lawyer, in response to a subpoena if the client granted specific consent, while alive, to disclosure under the current circumstances.)

22 Rule 4-1.6(a).

23 Mo. Informal Advisory Opinion 20000165. *See also* Mo. Informal Advisory Opinion 2010-0052; Mo. Informal Advisory Opinion 20050021.

24 Mo. Informal Advisory Opinion 20040004.

25 Rule 4-1.6(b)(4).

26 *See* Rule 4-1.0(m) (defining "tribunal").

27 Rule 4-1.6(b) and Comment [12].

28 Rule 4-1.6, Comment [3].

29 Preamble to Rule 4 at [1] and [9].

30 Comment [10] to Rule 4-1.6 acknowledges that other law may require disclosure of confidential client information, and whether other law supersedes Rule 4-1.6 is a question of law beyond the scope of the Rules of Professional Conduct. If other law supersedes Rule 4-1.6 and requires disclosure, Rule 4-1.6(b)(4) permits the lawyer, after discussion with the client per Rule 4-1.4, to comply with the law. In determining whether other law in fact supersedes Rule 4-1.6 and requires disclosure, a lawyer may note that Comment [11] to Rule 4-1.6 provides guidance that a lawyer faced with an order from a court, other tribunal, or governmental entity claiming authority pursuant to other law to compel the disclosure first follow the procedure for opposing the order, described in more detail as it relates to court orders in the text accompanying notes 31-39, *infra.*

31 Rule 4-1.6, Comment [10]. Rule 4-1.4 requires keeping a client "reasonably informed about the

status of the matter" and explaining a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

32 *See* Rule 4-1.6, Comment [17] (citing Rule 4-1.9(c) governing a lawyer's duty to protect confidential information of a former client.)

33 *See supra* text accompanying notes 14-20, regarding informed consent; *see also* Rule 4-1.0, Comment [6] (providing guidance that "[i]n some circumstances, it may be appropriate for a lawyer" seeking informed consent "to advise a client or other person to seek the advice of other counsel.")

34 Rule 4-3.1 (prohibiting the assertion of an issue in a proceeding "unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law").

35 Rule 4-1.6, Comment [11]; Mo. Informal Advisory Opinion 2017-04.

36 Rule 4-1.6, Comment [11]; Mo. Informal Advisory Opinion 20010154 (opining that a lawyer subpoenaed to produce confidential information of a deceased client fully present to the court the issue of confidentiality before complying with a resulting order); *see also* Rule 4-1.9(c) (governing protection of confidential information of former clients).

37 Mo. Informal Advisory Opinion 20010154; Mo. Informal Advisory Opinion 20000165; *see also* Rule 4-1.6, Comment [12].

38 Rule 4-1.6, Comment [11].

39 *Id.*;Mo. Informal Advisory Opinion 2017-04.

40 Rule 4-1.6, Comment [12] (guiding a lawyer to take protective measures "to the fullest extent practicable").

41 Missouri Informal Advisory opinions are available on The Missouri Bar's website at http://www.mobar.org/ethics/informalopinions.htm (http://www.mobar.org/ethics/informalopinions.htm) and may be searched by keyword, opinion number, or topical index.

42 Rule 5.30(c).

PO Box 119 326 Monroe Jefferson City, MO 65102-0119 | P: (573) 635-4128 | F: (573) 635-2811

Questions? Click here to contact us (/aboutus/contact.htm)

Paid for by The Missouri Bar Sebrina Barrett, Executive Director PO Box 119 Jefferson City, MO 65102