

**SUPREME COURT OF ARIZONA
ETHICS ADVISORY COMMITTEE
ETHICS OPINION FILE NO. EO-21-0004**

This opinion was originally issued by the State Bar of Arizona's Rules of Professional Conduct Committee in 2000. The Arizona Supreme Court's Ethics Advisory Committee ("EAC") has updated the opinion but its conclusions remain unchanged.

This opinion reviews the ethical duty of confidentiality when a lawyer is requested, by subpoena, to disclose information related to the representation of a current client¹, when the client does not authorize the disclosure. The EAC concludes that the Arizona Rules of Professional Conduct, under the modified facts presented, provide that the attorney shall raise all nonfrivolous claims against disclosing the information and shall disclose the information upon final order compelling the disclosure.

FACTS²:

¹ This opinion does not concern an attorney's ethical duties in the course of criminal proceedings. Other substantive law addresses confidentiality and the attorney-client privilege when a lawyer is requested to disclose information related to his or her representation of a client in a criminal proceeding. *See e.g.* Ariz. R. Crim. P. 32.6(f) (defendant waives confidentiality and the attorney-client privilege by raising ineffective assistance of counsel claim) (citing Ariz. R. Sup. Ct. 42, E.R. 1.6(d)(4)).

² The original facts presented in the State Bar's 2000 opinion were specific and arguably addressed a small practice area. The EAC made the facts at issue more general to encompass more practice areas to provide advice to more attorneys. The facts presented in the previous ethics opinion were:

A lawyer regularly represents claimants and their dependents in social security benefits cases. Federal law precludes attachment or assignment of social security benefits (42 U.S.C. § 407), except where the benefit or assignment of benefits involves child support (or alimony). 20 C.F.R. § 404.1820(b). The inquiring attorney anticipates that, based on past history, he may receive a subpoena or court order, in a child support proceeding, to provide information about social security benefits payable to dependent children arising from the lawyer's representation of the client in a previous social security

A lawyer represents a client in a noncriminal matter. The attorney anticipates he may receive a subpoena or court order in a separate and unrelated noncriminal matter to provide information he learned in the current representation. The inquiring attorney has consulted with the client and the client has not authorized the disclosure.

QUESTIONS PRESENTED³:

1. May a lawyer ethically disclose, pursuant to a subpoena issued in the separate and unrelated noncriminal matter, information about the current

benefits case. The inquiring attorney expects that his client will either not authorize the lawyer to disclose, or may explicitly prohibit the lawyer from disclosing, privileged or confidential information to third parties or to a court, in the separate child support proceeding.

State Bar of Ariz. Ethics Op. No. 00–11 (2000).

³ As with the facts presented the EAC modified the questions presented and made them more generalized to better provide guidance to a larger swath of practice areas and attorneys. The questions presented in the previous ethics opinion were:

1. Whether a lawyer ethically may disclose, pursuant to a subpoena issued in a separate child support proceeding, information about a social security case from which benefits would be payable to dependent children, where the client does not expressly authorize (or specifically prohibits) the disclosure of otherwise privileged information to third parties or to the court.
2. Whether a lawyer ethically may invoke ER 1.6(a), without regard to the so-called "attorney-client" evidentiary privilege rule, and decline to disclose, pursuant to a subpoena issued in a separate child support proceeding, information about a social security case upon which benefits would be payable to dependent children, where the client does not expressly authorize or specifically prohibits the disclosure of confidential information to third parties or to the court.

State Bar of Ariz. Ethics Op. No. 00–11.

representation where the client does not expressly authorize the disclosure of otherwise privileged information to third parties or to the court?

2. What if anything may a lawyer invoke and object to the disclosure pursuant to the subpoena in the separate and unrelated noncriminal matter in information from the current representation?

RELEVANT ETHICAL RULES:

ER 1.6 Confidentiality

- (a) 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 or required by paragraphs (b), (c) or (d). or ER 3.3(a)(3).

ER 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not: ...

- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

ER 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

Rule 54 Grounds for Discipline

Grounds for discipline of members, including affiliate members, non-members, and alternative business structures include the following: ...

- (c) Knowing violation of any rule or any order of the court.** This includes court orders issuing from a state, tribe, territory or district of the United States, including child support orders.

RELEVANT ARIZONA ETHICS OPINIONS:

State Bar of Ariz. Ethics Op. Nos.: 00–11, 98–05, 97–05, 91–02.

OPINION:

In State Bar of Ariz. Ethics Op. No. 00–11, the State Bar opined the lawyer must object to a subpoena or other request by the third party and assert all nonfrivolous arguments against disclosure. The Bar further concluded that the attorney-client privilege and confidentiality under ER 1.6 are separate and distinct and should be asserted against disclosure when applicable. *Id.*

The Arizona Supreme Court has amended ER 1.6 and its comments several times since 2000 when the Bar promulgated Ethics Op. No. 00–11. Currently Comment 15 to ER 1.6 holds:

[15] Paragraph (d)(5) also permits compliance with a court order requiring a lawyer to disclose information relating to a client’s representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client’s representation, however, the lawyer must, absent informed consent of the client to do otherwise and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. *See* [ER 1.4](#). Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court’s order.

In 2016, the ABA promulgated Formal Op. No. 473. In Formal Op. No. 473, the ABA stated lawyers must consult with the client when he or she receives the demand for information or make reasonable attempts to notify and consult with the client. *Id.* at 3–4. If, after the consultation, the client objects to the disclosure, the lawyer must challenge the demand on any reasonable ground. ELLEN J. BENNETT, ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 123 (8th ed. 2015) (“Typically, a lawyer is requested to provide information as a result of a discovery request or subpoena; the lawyer must make all nonfrivolous arguments that the information is protected from disclosure and, unless the client has otherwise directed, must resist disclosure until a court or other tribunal orders it.”). If the lawyer is unable to contact and consult with the client, the lawyer should assert all nonfrivolous objections against the disclosure. ABA Formal Op. No. 473, at 6–7.

Other jurisdictions have also so advised their lawyers. In D.C. Ethics Op. No. 288 (1999), Congress issued a subpoena duces tecum requiring a law firm to produce, “all records that relate to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided” to one of the firm’s clients.” The D.C. Bar opined, the lawyer is required to make every reasonable effort to quash or limit the subpoena. *Id.* at 5–6. The opinion described reasonable efforts to quash or limit the subpoena include negotiations with Congress to rescind or limit the scope of the information sought and potential judicial action. *Id.* at 5–6.; *see also* Neb. Ethics Op. No. 11–05 (2011) (attorney for minor must object on all nonfrivolous means to disclose confidential information sought by the legislature).

The EAC agrees. When a lawyer receives a demand, either from a subpoena or other request, from a third party for information concerning the representation of a client, the lawyer must first confirm the request’s authenticity. Unfortunately, we practice in an age where fraudulent subpoenas and other demands are not uncommon. *See* Eugene Volokh, *Shenanigans (Internet Takedown Edition)*, 2021 Utah L. Rev. 238, 244–52 (2021) (listing examples of fraudulent subpoenas and orders). Once the demand is confirmed, the lawyer must then consult with the client about the demand. If the client wishes to oppose the demand, or if the attorney cannot consult with the client after making reasonable attempts, the lawyer shall assert all nonfrivolous objections. The nonfrivolous objections that can be made will depend on the specific nature of the matter. Common objections could entail: confidentiality, attorney-client privilege, and work product privilege. There are other potential privileges and objections, and the attorney is advised to research and determine their reasonableness.

Depending on the circumstances, asserting the nonfrivolous objections could involve discussing the demand with the requestor in the hopes of ending the demand or otherwise limiting the disclosure’s scope to the client’s approval. The circumstances could also require motion practice before a court or adjudicative body of competent jurisdiction. If a court or tribunal orders disclosure, the lawyer must consult with the client about the order and the possibility of an appeal. Comment 15 to ER 1.6. There is no need to appeal the order if the client is still unavailable. ABA Formal Op. No. 473, at 7–8.

Once a court has issued a final order and either the client does not wish to appeal or the appellate process has been exhausted, the lawyer must comply with the order and disclose the information at issue. Failure to comply with a court’s order is itself a violation of the ethical rules. *See* ER 3.4(c); and Rule 54(c).

CONCLUSION:

A lawyer may not ethically disclose, pursuant to a subpoena issued in a separate and unrelated noncriminal matter, information about the current representation where the client does not expressly authorize the disclosure of otherwise privileged information to third parties or to the court. Instead, the lawyer must invoke all nonfrivolous objections to the disclosure. After asserting all nonfrivolous objections, the lawyer must comply with a final order to disclose the material at issue.

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