



## Newsletters

### The Lawyers' Lawyer Newsletter - Recent Developments in Risk Management - November 2021

November 17, 2021

Welcome to the Thanksgiving edition of the *Lawyers' Lawyer Newsletter*. In this edition, we consider an attorney's ethical obligations when facing a subpoena—whether issued by the court or an individual attorney—seeking privileged information or documents related directly to the representation of a current or former client.

[What Does a Lawyer Need to Know about Responding to a Subpoena for Production of Client Materials?](#)

[What do Ethics Opinions Have to Say About a Lawyer's Duty in Responding to a Subpoena or Court Order for Production of Client Materials?](#)

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### What Does a Lawyer Need to Know about Responding to a Subpoena for Production of Client Materials?

We can all give thanks that the [ABA Formal Opinion 473](#) offers guidance about how to handle this situation.

[ABA 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." But how does this Model Rule work in practice?

As Formal Opinion 473 explains, a lawyer has several obligations to satisfy before disclosing confidential client information in response to a subpoena or court order. First, the lawyer must consult with the current or former client. If instructed by the client or if the client is unavailable, the lawyer should assert all reasonable claims against disclosure and seek to limit the subpoena or initial demand based on any reasonable grounds to do so.

If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult the client before producing any such information and determine if the client elects to appeal the order. If the lawyer and current client disagree about how to respond to the initial demand or order requiring disclosure, the lawyer must consider withdrawing from the representation pursuant to [Model Rule 1.16](#).

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If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal. Such a requirement would place an undue burden on the lawyer in terms of both time and expense.

When disclosing documents and information—whether in response to an initial demand or a court order, and whether or not the client is available—the lawyer may reveal information only to the extent reasonably necessary in order to comply. The lawyer should also seek appropriate protective orders or other protective arrangements so that access to the information is limited to the court or other tribunal that has ordered its disclosure and to the person(s) having a need to know.

As a practical tip, Formal Opinion 473 advises the lawyer to consider inserting language into retainer agreements as it relates to this issue. For example:

- Language that the client will keep the lawyer informed on how to reach the client, even after the representation has ended,
- Language that, in the event the lawyer receives a subpoena or other demand for information protected by Model Rule 1.6, the client will promptly respond to the lawyer's request for instructions, and
- Language that the client agrees to pay all reasonable fees and costs associated with any production or judicial proceedings in response to a subpoena or other demand.

In closing, be mindful that the [Model Rules of Professional Conduct](#) and ABA Ethics Opinions serve only as a guide for ethical lawyering. Always consult the professional conduct rules of your state to determine whether and to what extent your rules differ from the model rules.

## What do Ethics Opinions Have to Say About a Lawyer's Duty in Responding to a Subpoena or Court Order for Production of Client Materials?

- [ABA Formal Opinion 473](#) – Obligations upon receiving a subpoena or other compulsory process for client documents or information
- [Alaska Ethics Opinion 96-3](#) – Disclosure of client files
- [C. Bar Ethics Opinion 381](#) – Responding to third-party subpoena
- [Florida Ethics Opinion 10-3](#) – Ethical obligations when responding to request for deceased client's confidential information
- [Illinois Professional Conduct Advisory Opinion 21-02](#) – Will or trust lawyer's obligations when responding to subpoena
- [Missouri Informal Advisory Opinion 2015-02](#) – Duties to former clients/confidentiality of information
- [Nassau County Bar Association 2011-01](#) - The duties of an attorney who is subpoenaed to produce records and to testify concerning a prior engagement.