

**Louisiana State Bar Association
Rules of Professional Conduct Committee**

PUBLIC Opinion 05-RPCC-006¹

October 13, 2005

Client Confidentiality vs. Subpoena/Court Order to Testify

*A lawyer **may** disclose confidential information not otherwise permitted to be disclosed under Rule 1.6(b) of the Louisiana Rules of Professional Conduct, if the lawyer is subpoenaed, asserts the “attorney-client privilege”, and is ordered to reveal the information after a contradictory hearing.*

What should a lawyer do when subpoenaed to testify about a client or former client’s case? The Committee considers the ethical concerns arising under Rule 1.6 of the Louisiana Rules of Professional Conduct, as revised and effective March 1, 2004, and which is identical to Rule 1.6 of the ABA Model Rules of Professional Conduct:

...(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 by paragraph (b)...

¹ The comments and opinions of the Committee—public or private—are not binding on any person or tribunal, including—but not limited to—the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published—specifically designated thereon as “PUBLIC”—and may be cited. Private opinions are those that have not been published by the Committee—specifically designated thereon as “NOT FOR PUBLICATION”—and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and opinions expressed in this process.

...(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:...

...(6) to comply with other law or a court order...

This opinion addresses only the question of what the lawyer should do if he is subpoenaed or ordered to testify regarding confidential information which the client or former client does not consent to disclose. It does not address the other exceptions under Rule 1.6.²

Underlying Principles

Before reviewing the situation governed by this Rule, the underlying policy considerations need to be discussed. Confidentiality is the key ingredient in an attorney-client relationship. This is the basis for the trust the client has in the lawyer, and the willingness of the client to make full disclosure to the lawyer to obtain the best legal advice and representation. Further, with full disclosure, the lawyer can advise the client of the legality of proposed conduct and to refrain from unlawful conduct.³ When the lawyer gives the client this advice, the lawyer is helping to preserve the integrity of the laws and legal process. Without the confidentiality rule, the client would not be forthcoming, the lawyer would not be able to give effective legal advice or

² See Rule 1.6(b)(1)-(5) of the Louisiana Rules of Professional Conduct (2004): “...to prevent reasonably certain death or substantial bodily harm...”; “...to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial bodily injury to the financial interests or property of another...”; “...to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud...”; “...to secure legal advice about the lawyer’s compliance with these Rules...”; “...to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client...”

³ See also Rule 1.2(d) and Rule 1.4 of the Louisiana Rules of Professional Conduct (2004).

representation,⁴ and the client may not know what is illegal. Both the client and the legal system would be undermined.

“Confidentiality” vs. “Attorney-Client Privilege”

A lawyer has an obligation to his own client to avoid revealing information relating to the representation unless the client has provided informed consent, the disclosure is impliedly authorized in order for the lawyer to carry out the representation, or one or more of the exceptions listed in Rule 1.6(b) of the Rules of Professional Conduct applies.⁵

There is a distinction between the “attorney-client privilege” and “confidentiality”. While often confused and interchanged, the “attorney-client privilege” is a rule of evidence⁶—i.e., a rule of substantive law—whereas “confidentiality” is an ethics concept and a much broader, all-encompassing principle. However, they are tied together when determining whether to reveal a client confidence in response to a subpoena or court order.

⁴ See also Rule 1.1(a) of the Louisiana Rules of Professional Conduct (2004): “...*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation...*”; and also Rule 2.1: “...*In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation...*”

⁵ Rule 1.6(a) of the Louisiana Rules of Professional Conduct (2004).

Subpoena and Court Orders

What does a lawyer do when he is subpoenaed to testify? First, the lawyer should discuss the subpoena and its ramifications with the client or former client involved. If the client has no objection, the lawyer may disclose the information.⁷

If the client objects, the lawyer's next step is to review Louisiana Code of Evidence Articles 506-508. If the subpoena seeks information protected by the "attorney-client privilege", the lawyer should assert that privilege. In both civil⁸ and criminal⁹ cases, there is a requirement for a contradictory hearing and there is a high standard which must be met before a court can order disclosure of information.¹⁰ The subpoena must state the information sought with particularity, and the issuing party must show that there is no practicable alternative means of obtaining the information.¹¹

⁶ Article 506 of the Louisiana Code of Evidence defines the "Lawyer-client privilege".

⁷ *Id.*, Rule 1.6(a): "...A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." [emphasis added].

⁸ Louisiana Code of Evidence Article 508(A).

⁹ Louisiana Code of Evidence Article 507(A).

¹⁰ *Id.*, LCE Article 507(A) and LCE Article 508(A). Aside from minor inherent differences between criminal practice and civil practice settings, these two Articles are nearly identical in listing the heavy burden that must be carried in order for a court to order a lawyer to appear or testify with respect to representation of a client or former client: "...*(1) the information sought is essential to the successful completion of an ongoing investigation,...*" [507: "...*prosecution or defense...*"; 508: "...*is essential to the case of the party seeking the information, and is not merely peripheral, cumulative, or speculative...*"; "...*(2) the purpose of seeking the information is not to harass the attorney or his client...*"; "...*(3) with respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to the subject matter and period of time, and gives timely notice...*"; and "...*(4) there is no practicable alternative means of obtaining the information...*"

¹¹ *Id.*, LCE Article 507(A) and LCE Article 508(A).

After the contradictory hearing, if the court orders the lawyer to disclose the information, Rule 1.6(b)(6) allows the lawyer to testify.¹² The lawyer can still refuse without violating the ethics rules because Rule 1.6(b) says “...*may reveal*...”, but the lawyer will face contempt for disobeying the court’s order, since the disclosure is permitted pursuant to a court order.¹³ It is not unethical for the lawyer to testify, if ordered to do so by the court.

Conclusion

The Committee believes that, while the general rule prohibits a lawyer from revealing confidential information, if the lawyer is ordered to do so by a court following a contradictory hearing pursuant to the Louisiana Code of Evidence,¹⁴ the lawyer may reveal the confidential information.

¹² Comment [13] to ABA Model Rule 1.6, in part, indicates: “...*Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order...*”

¹³ Rule 1.6(b)(6) of the Louisiana Rules of Professional Conduct (2004). See also Rule 3.4(c): “...*a lawyer shall 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...*”

¹⁴ *Id.*, LCE Article 507(A) and LCE Article 508(A).