

Confidentiality & Attorney Subpoenaed

Confidentiality and attorney subpoenaed to testify or asked to provide information

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Under Rule 4-1.6, confidential information is "information relating to representation of a client." This is a very broad definition. An attorney may not disclose confidential information unless disclosure was impliedly or expressly authorized by the client. The scope of any implied authority to disclose should be determined with caution. For example, in an estate planning context, the attorney may disclose a will or trust, if the attorney believes it to still be valid, to the person or court that will act on the document. However, disclosure of other communications and circumstances would normally not be impliedly authorized. Express consent from a deceased client is sufficient for this purpose.

If an attorney who is representing a client identifies a realistic possibility that there will be reasons to disclose confidential information, the attorney should discuss the extent of the client's consent for the attorney to disclose information without a court order, if the client is unavailable for consultation. Any consent given by the client should be documented.

In a situation where an attorney has been requested or subpoenaed to provide information and the client is unwilling or unable to consent, the attorney may not provide that information without a court order, after the issue of confidentiality has been fully presented to the court. If the attorney has been subpoenaed to a deposition, the attorney may attend the deposition and refuse to answer. Alternatively, the attorney may work with the parties to present the issues to the court short of going through that process. The procedures used in getting to a court order are not important. The important thing is that the court makes the decision after having all of the issues fully presented. The attorney should seek to have the court order as specific and limited as possible. A subpoena, by itself, does not authorize disclosure.