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EXCERPT FROM THE U.S. ATTORNEY'S MANUAL

9-13.410 - Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients

A. Authorization of the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. Such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division before they may issue, unless the circumstances warrant application of one of the exceptions set forth in subsection D below. However, any subpoena to be issued to an attorney in a civil or criminal matter arising principally under the internal revenue laws must be submitted to the Tax Division for authorization pursuant to Tax Division policies and procedures. In instances requiring Department approval in which the matter arises under both the internal revenue and non-tax laws, the submission must be made to the Criminal Division for authorization, which will consult with the Tax Division unless the circumstances warrant application of one of the exceptions set forth in subsection D below.

This policy extends to proposed subpoenas to paralegals, investigators, or other employees or agents of attorneys, if the information sought relates to the attorney's representation of a client, including information that the employee or the agent of the attorney, rather than the attorney personally, acquired.

The authorization requirement applies only to subpoenas for information related to the representation of a client. It does not apply to all subpoenas involving attorneys or their employees or agents. For example, Criminal Division authorization is not required to issue:

- A subpoena to a bank for the records of an attorney's trust account, because trust accounts tend to hold the pooled funds of numerous clients, and records related to such accounts ordinarily do not relate to individual clients, and do not contain or reflect privileged or confidential attorney-client communications.
- A subpoena for internal law office business documents (pay records of law office employees, law firm tax returns, etc.), because it relates to the day-to-day business operations of the law firm, and not to the representation of a client. Subpoenas for billing and payment records related to the representation of a client, however, must be authorized by the Criminal Division.
- A subpoena seeking information regarding the attorney's personal activities, and not regarding his/her representation of a client.
- A subpoena seeking corporate business information, and which is directed to an attorney who serves as a corporate officer. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John Doe, in his capacity as secretary of the XYZ Corporation."

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B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, Department personnel must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division applies the following principles:

1. The information sought shall not be protected by a valid claim of privilege.
2. All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
3. In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
4. In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
5. The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
6. The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

D. Exceptions to Criminal Division Authorization

1. **Friendly Subpoenas for Client-Related Information.** The United States Attorney or Assistant Attorney General responsible for a matter may authorize the issuance of a "friendly subpoena" for client-related information, that is, in a situation in which an attorney witness expressly agrees in writing (including by email) to provide the information, but requests the formality of a subpoena. Before issuing any such subpoena, the responsible United States Attorney or Assistant Attorney General must evaluate the request consistent with subsection C of this policy. If the friendly subpoena seeks testimony, information, or materials identified in Items (D)(2)(a)-(h) below, the federal prosecutor handling the case may authorize the issuance of the subpoena.

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2. Information Not Protected by Privilege or Circumstances Not Offending Attorney-Client Relationship. In addition, authorization by the Criminal Division is not required where the contemplated subpoena is limited to seeking one or more of the following categories of information, since such subpoenas do not raise concerns regarding the potential application of the attorney-client privilege or the potential for negative impact upon the attorney-client relationship:
 - a. Records of property transactions, including real estate closing statements, sales contracts, and payment records.
 - b. Information or materials provided by a client to an attorney for the purpose of disclosure to third parties, including information or materials provided for disclosure in bankruptcy proceedings, tax filings, immigration proceedings, or similar matters and transactions.
 - c. Publicly filed documents not reasonably available from other sources.
 - d. Testimony or materials necessary to respond to a claim of ineffective assistance of counsel, including, but not limited to, petitions filed pursuant to 28 U.S.C. § 2255 and D.C. Code § 23-110.
 - e. Testimony or materials necessary to probe the viability of, or respond to, a formal, written claim or assertion by a civil litigant or a criminal defendant that he or she reasonably relied on the advice of counsel in engaging in the conduct at issue in the specific matter in which the information is sought. This exception does not apply to subpoenas intended to probe the possibility or viability of an advice-of-counsel defense that has not formally been claimed or asserted by a civil litigant or criminal defendant.
 - f. Testimony or materials within the scope of an explicit and unchallenged waiver, or other express form of consent by the attorney's client to disclosure of the subject information.
 - g. Information or materials produced or created in discovery, including deposition testimony, if such information or materials are not subject to a protective order.
 - h. Testimony or materials that the court presiding over the underlying proceeding has ordered a party to produce or provide.
- E. Submitting the Request.** Requests for authorization should be submitted to the Policy and Statutory Enforcement Unit (PSEU), Office of Enforcement Operations, Criminal Division. When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena duces tecum, listing the documents sought, must accompany the submission.
- F. No Rights Created by Guidelines.** These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any

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limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

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Wisconsin SCR 20:3.8(e) Special responsibilities of a prosecutor.

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- (e) A prosecutor shall not subpoena a lawyer in a grand jury or other proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
- (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information.

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Comment

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[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

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