# Opinion No. 595, February 2010

## QUESTION PRESENTED

*Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer use, for the lawyer's benefit, information in the public record about a former client that the lawyer acquired during the course of representing the former client?*

## Statement of Facts

A lawyer previously represented a client on various matters. The lawyer's fees billed to the client remain unpaid and the lawyer intends to pursue collection efforts. During the course of the lawyer's representation of the client, the lawyer learned that the client was shown to have committed fraud and other offenses in litigation in which the client was a party but for which the lawyer did not represent the client. All of the information known to the lawyer concerning the client's fraud and other offenses is in the public record relating to the litigation.

## Discussion

Rule 1.05(b) of the Texas Disciplinary Rules of Professional Conduct provides that, subject to the exceptions specified in paragraphs (c) through (f) of Rule 1.05, a lawyer is prohibited from knowingly using a former client's confidential information "to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known." Rule 1.05(b)(3). The term "confidential information" is defined in Rule 1.05(a) as follows:

> "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

In the factual situation considered in this opinion, the information of public record about the former client, which the lawyer acquired while representing the client, is "unprivileged client information" as defined in Rule 1.05(a). Thus, if no exception applies and the former client does not consent, use of the information to the former client's disadvantage is prohibited by Rule 1.05(b)(3) unless "the confidential information has become generally known." Information that is a matter of public record may not be information that is "generally known." A matter may be of public record simply by being included in a government record, such as a document filed with a court clerk, whether or not there is any general public awareness of the matter. Information that "has become generally known" is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found. Whether information is "generally known" within the meaning of Rule 1.05(b)(3) is a question of fact.

If the information about the former client has not become generally known, a lawyer in a controversy with his former client may nonetheless be allowed to reveal the information under one of the exceptions stated in paragraphs (c) through (f) of Rule 1.05. Since the factual situation considered in this opinion includes the fact that there is a controversy between the lawyer and the former client concerning the payment of legal fees, the exception stated in Rule 1.05(c)(5) may apply. Rule 1.05(c)(5) permits a lawyer to reveal confidential information "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client." Comment 15 to Rule 1.05 explains that a lawyer entitled to a fee "necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). ... Any disclosure by the lawyer, however, should be as protective of the client's interests as possible." Thus, although the information about the former client is "confidential information" within the meaning of Rule 1.05(a) and may not be within the exception stated in Rule 1.05(b)(3) for information that is "generally known," the lawyer may be permitted under Rule 1.05(c)(5) to use that information to the extent, but only to the extent, such use is reasonably necessary to enforce the lawyer's claim for unpaid legal fees.

## Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is generally prohibited from using to the disadvantage of a former client information of public record concerning the former client that was acquired by the lawyer during the representation and that is not generally known to the public. However, if there exists a controversy between the former client and the lawyer regarding unpaid fees or other matters, the lawyer may use such information to the extent that such use is reasonably necessary to enforce a claim or establish a defense for the lawyer in the controversy with the former client. ✪

# Opinion No. 596, April 2010

## QUESTION PRESENTED

*Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to accept an assignment of the proceeds of an insurance policy in payment of legal fees and expenses?*

## Statement of Facts

A lawyer proposes to enter into an employment agreement with a client who is the beneficiary of a life insurance policy on a decedent. The client will assign to the lawyer a specific dollar amount of the proceeds from the policy in payment of the lawyer's fees agreed upon by the lawyer and client. Under the assignment, the assigned portion of the proceeds will be paid by the insurance company directly to the lawyer.

## Discussion

In general, under Texas law, causes of action may be freely assigned absent a statutory bar. *State Farm Fire and Casualty Company v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996). However, certain types of assignments have been held invalid based on considerations of public policy. See e.g., *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*, 146 S.W.3d 79 (Tex. 2004) (assignments of claims under the Texas Deceptive Trade Practices-Consumer Protection Act invalid); *State Farm Fire and Casualty Company v. Gandy*, 925 S.W.2d 696 (Tex. 1996) (holding invalid defendant's assignment to plaintiff of defendant's claim against liability insurer as part of a settlement arrangement involving an agreed judgment and agreement not to collect judgment from defendant). The committee is aware of no public policy or other grounds that would under Texas law generally require invalidating an assignment of life insurance policy proceeds to pay for services.

If legal services have been completed before an assignment of insurance proceeds in payment of legal fees, such an assignment will be subject only to the generally applicable requirements concerning legal fees of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. The fact that payment is made by an assignment of insurance proceeds rather than by payment of money will not be significant under the Texas Disciplinary Rules.

In the circumstances here considered, the employment agreement is entered into and the insurance policy proceeds are assigned before the legal services have been completed. If the fee arrangement complies with the requirements of Rule 1.04 and the insurance policy is not the subject of the litigation for which the lawyer has been retained, such a fee arrangement will be permissible provided that the assignment and any payment relating thereto when received by the lawyer are held and accounted for separately in compliance with Rule 1.14 until the completion of the legal services for which the assignment is compensation. See Professional Ethics Committee Opinion 391 (Feb. 1978).

However, the proposed assignment will be prohibited if the insurance policy in question is also the subject of litigation for which the lawyer will be compensated by means of the assignment. Rule 1.08(h) provides in pertinent part as follows:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
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> . . .
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> (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

The exception in subparagraph (2) of Rule 1.08(h) for contingent fees would apply if the insurance policy were the subject of the litigation and the amount payable to the lawyer was dependent on the outcome of the litigation. However, in the circumstances presented, the proposed assignment is for an amount that does not depend on the litigation outcome. Hence the proposed assignment, if it were in payment for the lawyer's services in litigation concerning a claim under the insurance policy, would be prohibited as a lawyer's acquisition of a proprietary interest in a claim where the proprietary interest is not a permitted contingent fee.

## Conclusion

Under the Texas Disciplinary Rule of Professional Conduct, a lawyer may receive an assignment of insurance proceeds as compensation for legal services already completed at the time of the assignment, subject only to the generally applicable requirements concerning legal fees as set forth in Rule 1.04. If a proposed assignment of insurance proceeds to a lawyer is compensation for legal services that have not been completed at the time of the assignment, the lawyer may receive such assignment provided the insurance recovery is not the subject of the legal services and provided the assignment and any payment relating thereto are held and accounted for in compliance with Rule 1.14 until the completion of the services. A lawyer may not receive an assignment of proceeds of an insurance policy if the assignment is compensation for legal services in litigation that has not been completed with respect to a claim on the insurance policy and the assignment to the lawyer is not a permissible contingent fee for the representation. ✪

# Opinion No. 597, May 2010

## QUESTION PRESENTED

*Under the Texas Disciplinary Rules of Professional Conduct, may a Texas lawyer practice law as a partner or shareholder in a Texas office of a law firm that includes partners or shareholders who are licensed to practice law only in jurisdictions other than Texas and who work principally in offices of the law firm outside of Texas but who from time to time perform legal services in the law firm's Texas office?*

## Statement of Facts

Partnership XYZ is a law firm composed of three partners – X, Y, and Z. The partnership has three offices – one in Texas, one in New Mexico, and one in Mexico. X, who is a Texas resident and a member of the State Bar of Texas, has his office in Texas and most of his work is done in that office. Y, a lawyer licensed to practice law in New Mexico, has his office in New Mexico and conducts most of his law practice in the New Mexico office. Z is a citizen and resident of Mexico who is licensed to practice law in Mexico and has his office in Mexico, where he carries out most of his legal work. Y and Z are not licensed to practice law in Texas.

In their law practice as partners in XYZ, X, Y, and Z are in contact daily by telephone and e-mail. In addition, from time to time each of the lawyers participates by telephone or electronically in work for XYZ clients who are located out of the state or country in which the particular lawyer has his office. Also, from time to time Y and Z travel to Texas to work on legal matters for clients of XYZ. The work done by Y or Z in Texas is normally for brief periods of a week or less but occasionally the work on a particular project may require Y or Z to work primarily in Texas for a longer period of up to several months. If Y or Z participates in representation of clients before courts or administrative bodies in Texas, he complies with all applicable local rules of the court or administrative body concerned, including any requirements with respect to admission to practice *pro hac vice*. Similarly, from time to time X travels to New Mexico or Mexico and performs legal services related to a particular project for a temporary period that may extend up to several months in unusual cases.

## Discussion

The Texas Disciplinary Rules of Professional Conduct govern the conduct of lawyers licensed in Texas. See Rule 8.05. Thus X is subject to the Texas Disciplinary Rules, but Y and Z are not themselves generally subject to these Rules.

Rule 5.04(a) prohibits the sharing of legal fees with a non-lawyer in most circumstances. Rule 5.04(b) prohibits a Texas lawyer from practicing law in a law partnership with a non-lawyer. Rule 5.04(d) applies essentially the same prohibition to the practice of law in a professional corporation or association if a non-lawyer owns any interest in, or has a control position in, the corporation or association. For purposes of these Rules, the term "lawyer" must include lawyers licensed in jurisdictions other than Texas; a contrary interpretation would require the obviously erroneous conclusion that Texas attorneys are barred from practicing in any law firm having a partner or member who is licensed in another state but who is not licensed in Texas. Thus, for purposes of Rules 5.04(a), (b) and (d), the term "non-lawyer" does not include a lawyer licensed in any state of the United States, in Mexico, or in any other country that licenses lawyers under a system that is similar to the licensing system used in Texas. This conclusion is consistent with American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 01-423 (September 22, 2001), which concluded that it is permissible under similar provisions of the Model Rules of Professional Conduct for U.S. lawyers to form law partnerships with foreign lawyers, so long as the foreign lawyers are members of a recognized legal profession in a foreign jurisdiction and the arrangement is in compliance with the laws of jurisdictions where the firm practices. The conclusion reached here also finds support in Rule 7.01 of the Texas Disciplinary Rules concerning permissible law firm names and letterhead. Rule 7.01(b) requires in the case of a law firm with offices in more than one jurisdiction only that "identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located."

Although a lawyer licensed under the laws of jurisdictions other than Texas is a "lawyer" rather than a "non-lawyer" for purposes of the requirements of Rule 5.04, the provisions of Texas law prohibiting persons who are not lawyers licensed in Texas from engaging in the unauthorized practice of law in Texas, section 81.101 et seq. of the Texas Government Code, are applicable to such non-Texas lawyers. Under Rule 5.05(b) of the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer is prohibited from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Thus, under Rule 5.05(b), X would be prohibited from assisting lawyers not licensed in Texas, including Y and Z, in the unauthorized practice of law in Texas. Y and Z would be subject to legal action if they engaged in unauthorized practice of law in Texas contrary of the prohibitions of Texas law. As noted in Comment 3 to Rule 5.05,

the question of what constitutes "the unauthorized practice of law" is not addressed in the Texas Disciplinary Rules of Professional Conduct and instead the definition is left to judicial development. Comment 3 adds:

> Judicial development of the concept of 'law practice' should emphasize that the concept is broad enough – but only broad enough – to cover all situations where there is rendition of services for others that call for the professional judgment of a lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession.

Comment 5 to Rule 5.05 sets forth general principles that may guide in the application of the concept of unauthorized practice of law in the case of lawyers licensed in other jurisdictions:

> Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

In 2002, the American Bar Association House of Delegates adopted recommendations of the American Bar Association Commission on Multijurisdictional Practice. A principal recommendation adopted was an amended version of American Bar Association Model Rule of Professional Conduct 5.5, the prior version of which was essentially the same as the current version of Rule 5.05 of the Texas Disciplinary Rules. The amended Model Rule 5.5(b)(1) generally prohibits a lawyer who is not admitted to practice in a jurisdiction from establishing "an office or other systematic and continuous presence" in that jurisdiction for the practice of law. Model Rule 5.5(c) specifies several circumstances in which a lawyer licensed in another state is permitted to provide legal services in a jurisdiction on a temporary basis. Although a number of states have adopted a form of the current version of Model Rule 5.5, the Texas Disciplinary Rules of Professional Conduct have not been amended on the subject of multijurisdictional practice.

In the absence of a specific rule or substantial case-law development on this subject, the contours of the term "unauthorized practice of law" in Texas Disciplinary Rule 5.05(b) as applied to multijurisdictional practice are not currently well defined. In spite of the present uncertainty as to exactly what conduct would constitute unauthorized practice of law in Texas in the case of multijurisdictional practice, it is the opinion of this Committee with respect to the circumstances here considered that the activities of Y and Z in Texas do not constitute the unauthorized practice of law in Texas and consequently that X is not in violation of Rule 5.05(b). Thus, in cases where a Texas lawyer is a partner or member of a law firm that also includes duly licensed non-Texas lawyers who normally practice in offices of the firm outside of Texas, the Texas lawyer does not violate Rule 5.05(b)'s prohibition on assisting in the unauthorized practice of law when non-Texas lawyers who are members of the firm from time to time provide, in compliance with any applicable local rules and without themselves establishing a systematic and continuous presence in Texas, legal services in Texas.

## Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may practice law as a member of a law firm with lawyers who are licensed only in jurisdictions other than Texas and who practice law in offices of the law firm located outside of Texas. The Texas lawyer does not improperly assist in the unauthorized practice of law when non-Texas lawyers, who are members of the law firm duly licensed in another jurisdiction and who normally practice in offices of the law firm outside of Texas, from time to time provide, in compliance with any applicable local rules and without themselves establishing a systematic and continuous presence in Texas, legal services in Texas as members of the law firm. ✪