

Opinion No. 622, January 2013

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer obtain information regarding a potential new client's payment history from a database containing information supplied by other lawyers on the payment history of their clients, structure an engagement agreement to provide legal services to the potential client based upon such information, and thereafter provide to the database information regarding the new client's payments to the lawyer?

Statement of Facts

A lawyer would like to use an Internet database service providing information on lawyers' experiences with their clients' payment histories to obtain payment history information on persons that are potential new clients of the lawyer. The lawyer proposes to disclose both verbally and in writing to potential new clients the lawyer's use of the database and to obtain written authorization from each potential client for the lawyer to obtain payment history information on the potential client from the database. The client's authorization would provide that, based on the information obtained from the database concerning the potential new client, the lawyer could reject the potential client or require a special fee arrangement or other terms concerning the client's employment of the lawyer. The potential client's authorization would also provide that the lawyer could later furnish to the database information about the client's payments to the lawyer.

Discussion

Rule 1.02(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer may limit the scope, objectives, and general methods of the representation if the client consents after consultation." Limitations agreed on with a client on the scope, objectives and general methods of representation have long been recognized. For example, a lawyer and client may agree that representation in a litigation matter will not include

representation in any appeal of the case. Rule 1.02(b) applies to communications and agreements between a lawyer and a potential client relating to the potential client's employment of the lawyer. Thus Rule 1.02(b) permits a lawyer and potential client who subsequently becomes an actual client to agree at the outset on limitations with respect to the representation, including agreements that permit the lawyer to check on the client's prior history with respect to payment for legal services and that allow the lawyer to terminate the representation or modify the agreed payment arrangements in light of information obtained from the database on the new client's prior payment history with other lawyers. Any limitations on a lawyer's representation of a client, including the limitations proposed by the lawyer based on use of the payment history database, are permitted by Rule 1.02(b) only if the client consents to the limitations after appropriate consultation with the lawyer.

The Terminology section of the Texas Disciplinary Rules of Professional Conduct provides that "Consult" or "Consultation" denotes "communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question." In each case, whether a lawyer provides consultation required for a client's particular agreement or consent will be a question of fact based upon all the relevant circumstances.

Under Rule 1.04(b)(8), a factor that

may be considered in determining the reasonableness of a fee is uncertainty of collection of the fee before the legal services have been rendered. Rule 1.04(c) requires that the basis or rate of the fee be communicated to a new client, preferably in writing, before or within a reasonable time after the representation begins. Therefore, if the lawyer requires a special fee arrangement based upon a new client's payment history with other lawyers as obtained from the database, the lawyer must communicate that fact to the client.

With regard to the lawyer's provision of information to the database on the client's payments for the lawyer's services, Rule 1.05(b) generally requires that, subject to specified exceptions, a lawyer is prohibited from knowingly revealing confidential information concerning a client. An exception relevant in the circumstances here considered is provided in Rule 1.05(c)(2), which permits a lawyer to reveal confidential information "[w]hen the client consents after consultation." Prior opinions of this Committee have recognized that information concerning a client's legal bills is normally confidential but that, if a client gives effective consent following consultation, it is permissible for a lawyer to disclose such information to third parties. A client's advance consent for disclosure of information, given after appropriate consultation with the lawyer at the outset of the representation, is effective if the advance consent is informed and is not coerced. See Professional Ethics Committee

Opinion 464 (August 1989). Thus, in the circumstances considered, it will be permissible for the lawyer to provide information on the client's payment history to the database if, at the time the client hires the lawyer, the client gives written consent for such action in the engagement agreement after consultation with the lawyer that is appropriate in the circumstances. It will be a question of fact whether the lawyer's consultation with the new client on this disclosure matter is "reasonably sufficient to permit the client to appreciate the significance of the matter in question," as specified in the definition of "Consult" and "Consul-

tation" in the Terminology section of the Texas Disciplinary Rules.

It should be noted that a lawyer who enters into agreements with potential clients to access a database on payment history, use information from the database, and provide payment information to the database must, in addition to complying with applicable provisions of the Texas Disciplinary Rules, comply with other applicable laws, including the federal Fair Credit Reporting Act., 15 U.S.C. § 1681 et seq., to the extent such laws apply.

Conclusion

Under the Texas Disciplinary Rules

of Professional Conduct, it is permissible for a lawyer to obtain information regarding a potential new client's payment history from a database containing information supplied by other lawyers on the payment history of their clients, structure an engagement agreement to provide legal services to the potential client based upon such information, and thereafter provide to the database information regarding the new client's payments to the lawyer, provided that the client has agreed to these actions after consultation with the lawyer sufficient to permit the client to make an informed decision on these matters.

Opinion No. 623, February 2013

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted to telephone a real estate agent's client concerning possible legal employment after the real estate agent informs the lawyer that the client has requested the lawyer to call? Is this contact permitted if the real estate agent is included in a group of business acquaintances of the lawyer to whom the lawyer regularly provides entertainment and small holiday gifts that are consistent with customary community standards and that are not related to recommendation or employment of the lawyer?

Statement of Facts

Lawyer represents a real estate title insurance company in real estate transactions. A real estate agent works frequently with Lawyer on title insurance matters. While working with a client in a real estate transaction, the real estate agent is asked by the agent's client to help the client find a lawyer to work on a matter unrelated to the real estate transaction. After the real estate agent suggests Lawyer as someone who might be able to handle the transaction, the client asks the real estate agent to contact Lawyer and ask Lawyer to call the client. The real estate agent contacts Lawyer as requested by the client, and in response Lawyer calls the agent's client. As a result of the call made by Lawyer the real estate agent's client hires Lawyer

to represent him in the matter.

In accord with customary practice in the community and to build personal goodwill with business acquaintances, Lawyer from time to time entertains and makes small holiday gifts to real estate agents and other persons with whom Lawyer has business dealings. The real estate agent who suggested Lawyer's name to the agent's client is among those receiving such entertainment and holiday gifts from Lawyer.

Discussion

The issues under the Texas Disciplinary Rules of Professional Conduct raised by the facts presented are whether Lawyer's conduct involves prohibited contacts with potential clients to seek legal employment or prohibited payments to another per-

son for soliciting legal employment. Rule 7.03 of the Texas Disciplinary Rules prohibits in the following terms, with exceptions not relevant in these circumstances, certain contacts by a lawyer with potential clients and payments by a lawyer for the purpose of soliciting legal employment:

"(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family

or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . .

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person

(f) As used in paragraph (a), 'regulated telephone or other electronic contact' means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. . . ."

In addition, Rule 8.04(a)(9) provides that a lawyer shall not "engage in conduct that constitutes barratry as defined by the law of this state[.]" The term "barratry" is defined in section 38.12 of the Texas Penal Code, entitled "Barratry and Solicitation of Professional Employment," as follows:

"(a) A person commits an offense if, with intent to obtain an economic benefit the person:

- (1) knowingly institutes a suit or claim that the person has not been authorized to pursue;
- (2) solicits employment, either in person or by telephone, for himself or for another;
- (3) pays, gives, or advances or offers to pay, give, or advance to a

prospective client money or anything of value to obtain employment as a professional from the prospective client;

(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;

(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or

(6) accepts or agrees to accept money or anything of value to solicit employment."

In addition, section 38.12(b)(3) of the Texas Penal Code provides that it is a violation of section 38.12 if a licensed person knowingly accepts professional employment that results from solicitation prohibited by section 38.12(a). Section 38.12(d) provides further that it is an offense for a lawyer to communicate in writing, in person or by telephone for the purpose of soliciting legal employment from someone who has not sought to employ the lawyer if the communication relates to certain specified circumstances or involves certain types of coercive or deceptive conduct. Section 38.12(c) provides that "[i]t is an exception to prosecution under Subsection (a) or (b) that the person's conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court."

As relevant to the factual situation here considered, the actions that are prohibited by Rule 7.03 and Rule 8.04(a)(9) of the Texas Disciplinary Rules are (1) a lawyer's personal contact for the purpose of obtaining legal employment with a potential client who has not requested the contact and (2) payment of anything of value by a lawyer to any person for the purpose of soliciting employment of the lawyer. In the opinion of the Committee, nothing in the circumstances considered constitutes either unsought contact by a lawyer for the purpose of

obtaining employment or payment for solicitation of legal employment.

In the situation considered, the client asks the real estate agent to contact Lawyer and to request that Lawyer call the client. Since Lawyer's call to the real estate agent's client is requested by the real estate agent acting on behalf of the client, Lawyer is not calling to seek employment from a person who has not sought Lawyer's services.

The fact that the real estate agent is among the recipients of entertainment or small holiday gifts from Lawyer does not result in a violation of Rules 7.03 and 8.04(a)(9) provided that the entertainment and gifts to the real estate agent are not excessive by community standards and are not related to recommendation or employment of Lawyer. In these circumstances it would not be possible to conclude that Lawyer had transferred anything of value to any person, including the real estate agent, for the purpose of soliciting legal employment.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is permitted to telephone a real estate agent's client concerning possible legal employment after the real estate agent informs the lawyer that the client has requested the lawyer to call. This conclusion would not change if the real estate agent is included in a group of business acquaintances of the lawyer to whom the lawyer regularly provides entertainment and small holiday gifts that are consistent with customary community standards and that are not related to recommendation or employment of the lawyer.

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from members of the bar and the judiciary. The Court also appoints the committee's chair. According to Section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the supreme court."