

PO 2023-2

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. ____**

Posted for Comment February 14, 2023

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted or required to turn over a closed litigation file of a deceased client to the executor of the decedent's estate when the file is not related to matters affecting the estate or its administration?

STATEMENT OF FACTS

Lawyer represented Client, the sole trustee of an irrevocable trust. The beneficiaries of the trust are Adult Son from Client's first marriage and Minor Son from his second marriage. Adult Son sued Client in his individual capacity alleging breach of fiduciary duty. Lawyer represented Client in that lawsuit, which settled after a year of litigation.

Client died two years after the settlement. Client's Widow and Adult Son become co-trustees of the trust. A new dispute has now arisen between Widow and Adult Son regarding the validity and terms of the settlement agreement. The new dispute may affect the trust distributions and the respective powers of the trustees. Lawyer is not representing any party to the new dispute.

Client's Widow is the executor of Client's estate. In her capacity as executor, Widow requests Lawyer's file from the original trust litigation with Adult Son. The file includes confidential attorney-client communications and work product relating to the original trust dispute and its settlement. The file does not include intrinsically valuable documents (such as deeds or negotiable instruments).

The parties do not dispute the deceased Client's will or the administration of the Client's estate. Lawyer's representation did not concern the will or any personal assets of the Client, and none of the confidential information in Lawyer's possession is pertinent to the Client's will or estate. The dispute regarding the settlement agreement does not involve a claim for relief by or against the Client's estate.

During his life, Client neither authorized Lawyer to disclose confidential information to his wife nor forbid such disclosure.

DISCUSSION

A lawyer's obligation of confidentiality under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct continues after the client-lawyer relationship ends. *See, e.g.*, Comment 8 to Rule 1.05 ("The duty not to misuse client information continues after the client-lawyer relationship has terminated"). Thus, the ethical duty of confidentiality survives the client's death. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 60, cmt. e. (2000) (stating the duty of confidentiality "extends beyond the end of the representation and beyond the death of the client").

In general, Rule 1.05 prohibits a lawyer from knowingly revealing confidential information of a client unless permitted or required by the Rule. Rule 1.05(a) broadly defines the term "confidential information" to include not only information protected by the lawyer-client privilege ("privileged confidential information") but also "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" ("unprivileged confidential information"). In short, Lawyer may not reveal any confidential information relating to Lawyer's representation of Client unless allowed to do so by Rule 1.05.

Rule 1.05(c) permits a lawyer to reveal confidential information in the following circumstances:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
- (5) To 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.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(9) To secure legal advice about the lawyer's compliance with these Rules.

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

Under these facts, Lawyer may reveal Client's confidential information to Widow under Rule 1.05(c)(3), which allows a lawyer to reveal confidential information to the client's "representatives" unless otherwise instructed by the client. In the Committee's opinion, a client-designated executor qualifies as a representative upon appointment following the client's death. *Cf.* Tex. Estates Code § 22.031(a) (defining the term "representative" as including an executor). Because Client had not instructed otherwise, Lawyer may reveal the Client's confidential information to the executor of Client's Estate.

Disclosure under Rule 1.05(c) is permissive, not mandatory. *See* Preamble to the Rules, Scope, ¶ 10 ("shall" and "shall not" are imperatives, while "may" and "should" are permissive). A lawyer should exercise discretion and independent professional judgment in deciding whether to reveal confidential information under the permissive exceptions to Rule 1.05. A lawyer should decline an executor's request for a decedent's confidential information when there is reason to believe that the decedent would have opposed the disclosure. For example, had the prior representation involved Client's secret child from an extra-marital relationship, Lawyer might properly presume that Client would oppose disclosure of related information to Client's executor (Widow).

Disclosure under Rule 1.05(c) is only permitted if the client did not give the lawyer contrary instructions. Thus, if Client instructed Lawyer *not* to reveal confidential information to his wife/executor, Lawyer may not comply with Widow's request and should assert non-frivolous objections if subpoenaed. In such a case, Lawyer should produce the confidential information to Widow only if ordered to do so by a court. *See* Rule 1.05(c)(4) (allowing lawyer to reveal confidential information to comply with court order).

This opinion assumes that the confidential information from the prior representation does not affect the estate or its administration. Whether a lawyer has an independent legal duty to comply with an executor's request for confidential information of the decedent that affects the estate or its administration is a question of substantive law outside the purview of the Committee.

CONCLUSION

A lawyer shall not reveal a deceased client's confidential information unless permitted by Rule 1.05. When the confidential information does not relate to a matter that

affects the estate or its administration, a lawyer has discretion to reveal client confidences to the executor unless the client instructed otherwise. A lawyer should not make a discretionary disclosure to an executor if the lawyer reasonably believes the client would have opposed the disclosure under the circumstances.

PROPOSED OPINION