THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
PO-21-3
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QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer who is employed by a nonprofit agency that provides legal services to clients from requesting that, as part of the client intake process, a client sign a consent authorizing the lawyer to reveal a client's confidential information in response to future requests by third-party grantors or their grant administrators?

STATEMENT OF FACTS

A nonprofit social services agency (the "Agency") provides free legal services to low-income persons. The Agency receives funding from third-party grantors such as foundations, governments, and governmental subcontractors. These third-party grantors frequently retain the services of third-party grant administrators to conduct site visits and audits of the Agency's program administration files, financial records, and client files to ensure that the Agency provides legal services to eligible clients as agreed in the funding contracts.

During a recent site visit, a grant administrator asked to inspect a randomly selected file of a current client. The file contained the client's confidential information including notes made by the Agency's lawyers and staff pertaining to the representation as well as drafts of documents prepared for the client. The Agency removed confidential information from the client file before the grant administrator was allowed to inspect it. The grant administrator was told that confidential information had been removed from the client's file.

After the site visit, the grant administrator sent a report to the grantor stating that the Agency did not satisfy the terms of the grant because the Agency had removed information from the client file before the grant administrator was allowed to review the file. The Agency is considering what steps it might take to avoid future problems. The Agency believes that it would be difficult, and perhaps impossible, to contact randomly selected clients during a site visit to obtain client consent. To preserve its funding and continue providing assistance to clients, the Agency proposes that, during the client intake process, the Agency obtain each client's consent to reveal confidential client information to grantors or their third-party grant administrators if they request such information during future site visits or audits.

DISCUSSION

Rule 1.05(a) of the Texas Disciplinary Rules of Professional Conduct broadly defines "confidential information" as including both "privileged information" and "unprivileged client information." Privileged information is information protected by the attorney-client privilege. Rule 1.05(a). "'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." *Id.* The information that the Agency withheld from the third-party grant administrator was confidential information.

Rule 1.05(b) provides in pertinent part:

> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:
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> (1) Reveal confidential information of a client or a former client to:
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> (i) a person that the client has instructed is not to receive the information; or
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> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
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> (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
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> . . .
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> (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

Rule 1.05(c)(2) provides that a lawyer may reveal confidential information when "the client consents after consultation." Thus, the Agency is not prohibited from revealing or using confidential information if the client consents after consultation.

The Rules outline the significant policy considerations behind the requirement of confidentiality. Paragraph 16 of the Preamble to the Rules states that clients have "a reasonable expectation that information relating to the client will not be voluntarily disclosed . . . ." Comment 1 to Rule 1.05 recognizes that a lawyer's ethical obligation of confidentiality "not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance."

Nevertheless, the Rules also contemplate that legal services are sometimes financed by persons or entities other than the client, carefully defining the lawyer's duty to the client in such circumstances. Rule 1.08(e) prohibits lawyers from accepting compensation from a third party for representing a client unless the client consents, "there is no interference with the lawyer's

independence of professional judgment or with the client-lawyer relationship," and "information relating to the representation of a client is protected as required by Rule 1.05."

The notes made by the Agency's lawyer and staff during the representation as well as drafts of documents are confidential information as defined by Rule 1.05(a). The lawyer was prohibited from revealing the confidential information to the third-party grant administrator because the lawyer did not have the client's consent. Therefore, the lawyer properly withheld confidential information from the grant administrator during the site visit.

To avoid similar problems in the future, the Agency asks whether it may ask a client to sign a consent that authorizes the lawyer to reveal the client's confidential information to third-party grant administrators and their subcontractors if they request that information during future site visits or audits. As mentioned above, Rule 1.05(b) and (c) prevents the Agency from revealing the client's confidential information or using it to the disadvantage of the client unless the client consents after consultation. Although the Rules contain no provision specifically addressing whether the consultation contemplated in Rule 1.05(b) and (c) must occur in conjunction with a known and imminent disclosure or whether a client can effectively consent to prospective disclosure of confidential information after a general consultation at the outset of the representation, the Committee has previously addressed a similar issue.

In Professional Ethics Committee Opinion 464 (August 1989), the Committee considered the circumstances under which a lawyer may sell delinquent accounts receivable to a third-party factoring company. The Committee concluded: "A lawyer may not sell accounts receivable to a third party factoring company unless each client involved has previously given consent, after consultation with the lawyer, to the disclosure of confidential information incident to such sale of accounts receivable." *Id.* Importantly, the Committee also stated: "A client's consent to the disclosure of confidential information is effective only if such consent is informed and uncoerced." *Id.* The Committee revisited and confirmed this conclusion in Opinion 655 (May 2016). The Committee determined that a lawyer's sale of accounts receivable would necessarily include the transfer of information that is confidential under Rule 1.05. Any such sale would violate the Rules unless each client had previously given consent, after consultation with the lawyer, to the disclosure of confidential information incident to such a sale.

In Opinion 464, the Committee found that consent "after consultation" as required by Rule 1.05(c)(2) could occur at the outset of the lawyer-client relationship, and it was not necessary for the lawyer to wait to obtain consent after an account receivable had arisen or become delinquent. *Id.* Regardless of whether such consent was obtained at the outset of representation or at a later time, "to be effective the consent would have to be obtained after the lawyer had consulted with the client as to the consequences for the client's interests of the disclosure of confidential information involved in the sale of the accounts receivable to a factor." *Id.* The Committee also concluded that the lawyer could make the client's consent a condition of the lawyer's accepting employment, but "after commencing representation the lawyer could not try to coerce a client's consent by threatening to withdraw from representation or to take some other action adverse to the client's interest if the consent was not given." *Id.* Furthermore, "the consent would have to be based on an affirmative communication with the client and could not be based merely on a client's inaction in response to a request sent to the client." *Id.*

Thus, the Committee has previously concluded that the Rules allow a lawyer to obtain a client's consent to possible future disclosures. For the consent to be effective, "the lawyer must consult with and obtain the client's informed consent." Opinion 532 (September 2000). Opinion 532 addressed the issue of whether a lawyer retained by an insurance company may submit fee statements to a third-party auditor when the fee statements described legal services rendered by the lawyer on behalf of his client. After concluding that the lawyer could do so after consulting with and obtaining the client's informed consent, the Committee stated: "Consultation in this context involves informing the client of the implications or possible adverse consequences of disclosure, including the possibility that revealing a fee statement to a third-party auditor may result in a loss or waiver of the attorney-client privilege with respect to information described in such fee statement. *Id*.

In the situation described in this opinion, the consultation with the client should include explaining to the client that the Agency's funding and ability to represent low-income clients could depend upon the client's consent. Moreover, during the consultation, the lawyer should discuss confidential information, including the distinction between information made confidential by the Rules and information that is privileged under the Texas and Federal Rules of Evidence, and explain the risk that consenting to disclosure of confidential information may cause the client to lose or waive the attorney-client privilege or other privileges as to all third parties, including the third-party grant administrator.

Even if the client consents to the disclosure of information to the third-party grant administrator, the lawyer should review the client's file to determine whether disclosure is appropriate in a particular case. *See* Opinion 648 (April 2015) (a lawyer may generally communicate confidential information by email but in some circumstances the lawyer should consider whether it is prudent to do so). Finally, the lawyer should narrow the scope of the consent to avoid providing more confidential information than necessary.

CONCLUSION

Under the Rules, a lawyer employed by a nonprofit agency that provides legal services to low-income clients may allow third persons such as grantors, grant administrators, and their subcontractors to review a client's confidential information if the lawyer obtains the client's informed consent after consultation. The client's informed consent may be obtained at the outset of the representation as long as the consent was obtained after the lawyer consulted with the client about the implications and possible adverse consequences of the disclosure. In any such consultation, the lawyer should explain to the client how the consent might affect the interests of all parties involved.