

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 651**

November 2015

QUESTIONS PRESENTED

1. If a law firm's web site provides email links for prospective clients to use to contact the firm or its lawyers, is the law firm required to include a warning notice informing persons who use the email link that, unless the sender ultimately becomes a client of the law firm, any confidential information transmitted in the email will not be treated as confidential by the law firm and may be used against the person sending the information?

2. If the law firm's web site does not contain a warning notice concerning the absence of confidentiality with respect to information transmitted by prospective clients who use an email link provided on the law firm's web site, are the law firm and its lawyers required to treat the information received in such transmissions as confidential and not available for use against the person transmitting the information?

3. If a law firm's web site contains an effective warning notice that must be accepted before an email link can be used by a prospective client to transmit information to a law firm or its lawyers, may the law firm and its lawyers use the information received in such email communications for the benefit of current and future clients of the firm and adversely to the person transmitting the information?

STATEMENT OF FACTS

A law firm maintains a web site that is intended to be accessed by persons who could become clients of the law firm. The web site provides information about the law firm, its practice areas, and the lawyers who work in the firm. The web site provides email links so that prospective clients may email lawyers who work in the law firm. The web site is arranged so that the person seeking to email the firm or one of its lawyers receives the following prominently displayed warning notice and must affirmatively accept its terms before sending information:

Warning: Do not send or include any information in any email generated through this web site if you consider the information confidential or privileged. By submitting information by email or other communication in response to this web site, you agree that the communication does not create a lawyer-client relationship between you and the law firm and its lawyers and that any information submitted is not confidential and is not

privileged. You further acknowledge that, unless the law firm subsequently enters into a lawyer-client relationship with you, any information you provide will not be treated as confidential and any such information may be used adversely to you and for the benefit of current or future clients of the law firm.

A prospective client locates the law firm's web site, accepts the warning notice quoted above, and transmits through an email link on the web site a request that a lawyer in the law firm represent the prospective client in a matter. In the request, the prospective client transmits confidential information concerning the matter. The lawyer receiving the email determines that the law firm already represents a client in the matter and that the current client is adverse to the prospective client. The lawyer communicates to the prospective client that the law firm will not be able to represent the prospective client. Information contained in the email transmission from the prospective client would be helpful in the law firm's representation of the current client. The law firm proposes to use this information from the prospective client adversely to the prospective client in representing its current client.

DISCUSSION

This opinion addresses situations in which the law firm web site expressly invites prospective clients to send information to the law firm or its lawyers. The opinion does not address unsolicited communications from potential clients. The questions presented must be considered in connection with Rule 1.05 (Confidentiality of Information) of the Texas Disciplinary Rules of Professional Conduct.

Rule 1.05 defines confidential information and, subject to exceptions not involved here, prohibits a lawyer from knowingly revealing confidential information of a client or using such information to the disadvantage of the client unless the client consents after consultation. Under the facts presented, the prospective client does not actually become a client; however, the duty of confidentiality may arise before the formation of a lawyer-client relationship.

“Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.”

Texas Disciplinary Rules of Professional Conduct, Preamble: Scope, paragraph 12.

In addition, Comment 1 to Rule 1.05 notes that a lawyer may be required to protect the confidences of one who seeks to employ the lawyer:

“Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.”

Thus, a lawyer’s duty to protect confidential information of potential clients may exist even if the lawyer ultimately declines the representation. When a lawyer’s web site solicits potential clients to submit information, a prospective client may have a reasonable expectation that the lawyer will maintain the confidentiality of the information submitted. Even if a lawyer-client relationship is never created, it may be reasonable for a prospective client to expect that the information provided to a lawyer will be maintained as confidential. See Professional Ethics Committee Opinion 494 (February 1994) (a lawyer may not represent a wife in a divorce action where the husband had consulted briefly with the lawyer on domestic relations matters several years earlier). If a lawyer has an obligation to protect confidential information of a person who consulted with the lawyer concerning representation even when a lawyer-client relationship is not ultimately created, the receipt of confidential information from the potential client may create a conflict of interest for the lawyer with respect to an existing client of the lawyer that would have to be dealt with appropriately under the Rules.

In view of the above, there is no requirement under the Texas Disciplinary Rules that the law firm or any of its lawyers provide a warning notice on the law firm’s web site concerning confidential information that may be sent to the law firm or its lawyers by means of email links provided by the firm’s web site. However, if an effective warning notice is not provided to prospective clients who use email links to communicate with the law firm or its lawyers, lawyers who receive communications from a prospective client that contain the prospective client’s confidential information may have obligations to protect and not adversely use the confidential information provided by the prospective client. As a result, for the reasons described above, conflicts of interest may arise that would have to be appropriately dealt with under the Rules by the law firm and its lawyers with respect to their representation of a current client who is adverse to a prospective client who communicates confidential information to the law firm or its lawyers through the law firm’s web site email links.

In the circumstances here considered, the law firm web site contains an effective warning statement to the effect that any information provided in an email communication generated through the web site will not be treated as confidential and may be used against the person sending the information, and this warning must be affirmatively accepted by any person using an email link on the web site. In such circumstances, it is the opinion of the Committee that the law firm and its lawyers will not have an obligation to protect or

refrain from using information received through an email generated by the web site's email link.

CONCLUSIONS

1. Under the Texas Disciplinary Rules of Professional Conduct, a law firm is not required to include in the law firm's web site a notice warning persons who use the web site's email links that any confidential information transmitted to the law firm or one of its lawyers in such an email will not be treated as confidential and may be used against the person sending the information.

2. If a web site solicits email communications from potential clients and does not contain an effective warning notice concerning the absence of confidentiality with respect to information transmitted to a law firm or one of its lawyers by prospective clients who use an email link provided on the law firm's web site, the law firm's lawyers may be required to treat the information received in such emails from prospective clients as confidential and therefore not available for use against the person transmitting the information. Such limitations on the disclosure and use of confidential information received in emails from prospective clients may result in a conflict of interest for the law firm and its lawyers that would have to be addressed appropriately under the Texas Disciplinary Rules.

3. If a law firm's web site contains a warning notice substantially similar to that described in this opinion that must be affirmatively accepted before an email link on the law firm's web site is used to send an email to the firm or one of its lawyers, the law firm and its lawyers may use any information received in such email communications from persons who do not become clients of the law firm for the benefit of current and future clients of the firm and adversely to the person transmitting the information.