

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 673**

August 2018

QUESTIONS PRESENTED

1. Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by seeking advice for the benefit of the lawyer's client from other lawyers in an online discussion group?
2. Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by seeking advice for the benefit of the lawyer's client through informal, direct consultation with another lawyer in a different firm?

STATEMENT OF FACTS

Lawyer A is a member of an online discussion group consisting of Texas lawyers. The purpose of the group is to provide a private and active forum in which lawyers may exchange ideas and information about various issues that Texas lawyers encounter in their practices.

Lawyer A has encountered a challenging issue in connection with the representation of Client X. In furtherance of that representation and to benefit Client X, Lawyer A posts a request for comments from members of the online discussion group. Lawyer A's post describes the issue but does not identify Client X by name. Lawyer B responds to Lawyer A's post and suggests several possible approaches to the issue.

Alternatively, Lawyer A opts to consult directly with a colleague, Lawyer C. Lawyer A describes the issue to Lawyer C but does not identify Client X by name. The discussion is informal and there is no intent to retain Lawyer C to provide services to Client X.

Neither Lawyer B nor Lawyer C is in the same law firm as Lawyer A. In the following discussion, Lawyer A is referred to as the "inquiring lawyer" and Lawyers B and C are referred to as the "responding lawyers."

DISCUSSION

It is common for lawyers to have informal lawyer-to-lawyer consultations touching on client-related issues. Informal consultations may occur in a variety of situations, such as when a lawyer poses questions to a speaker at a CLE seminar, when a lawyer seeks advice from members of an online discussion group, or when a lawyer solicits the insight of a trusted mentor. Informal consultations allow lawyers to test their knowledge, exchange ideas, and broaden their

understanding of the law, with the realistic goal of benefiting their clients. Nevertheless, lawyers who engage in informal lawyer-to-lawyer consultation regarding issues arising in particular client matters must be careful not to violate their professional obligations under the Texas Disciplinary Rules of Professional Conduct.

The professional obligation most clearly implicated by informal consultation is the inquiring lawyer's duty of confidentiality. In general, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from knowingly revealing confidential information of a client unless permitted or required by the provisions of that Rule. Rule 1.05(a) broadly defines the term "confidential information" so as 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").

Not every lawyer-to-lawyer consultation involves the revelation of confidential information. For example, confidential information is not revealed merely by asking general questions about a particular statute, rule or legal procedure. A general or abstract inquiry that does not identify the client and does not disclose information relating to the representation does not implicate Rule 1.05 and does not require client consent.

In some cases, however, the inquiring lawyer may consider it necessary to provide a certain amount of factual context in order to frame the issue and obtain useful feedback. Providing factual context will implicate Rule 1.05 if doing so reveals "information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client." Such information is confidential under Rule 1.05, and a lawyer may not knowingly reveal it unless permitted or required by a provision in that Rule.

Rule 1.05 includes several exceptions to the general requirement that lawyers protect the confidential information of clients. The exceptions of particular relevance to the circumstances considered in this opinion are those in Rules 1.05(d)(1) and (2). Rule 1.05(d)(1) provides that a lawyer may reveal unprivileged confidential information "[w]hen impliedly authorized to do so in order to carry out the representation." Rule 1.05(d)(2) provides, in relevant part, that a lawyer may reveal unprivileged confidential information when the lawyer has reason to believe it is necessary to do so in order to "carry out the representation effectively."

It is the opinion of the Committee that Rules 1.05(d)(1) and (2) allow a lawyer to reveal a limited amount of unprivileged confidential information to lawyers outside the inquiring lawyer's law firm, without the client's express consent, when the inquiring lawyer reasonably believes that the revelation will further the representation by obtaining the responding lawyers' experience or expertise for the benefit of the client, and when it is not reasonably foreseeable that revelation will prejudice the client. In determining the amount and type of permissible disclosure, a lawyer should be guided by the following considerations.

- (1) An inquiring lawyer may reveal unprivileged confidential information only to the extent the lawyer believes necessary for effective consultation for the

client's benefit regarding the issue in question. Revealing unprivileged confidential information, however, should not be greater than the lawyer believes necessary to accomplish the intended purpose. Accordingly, the inquiring lawyer should not reveal any unprivileged confidential information if it is possible to conduct an effective consultation without doing so.

(2) To the extent the lawyer believes it is necessary to reveal some unprivileged confidential information to conduct an effective lawyer-to-lawyer consultation for the client's benefit, the inquiring lawyer should employ a hypothetical that does not identify the client. In most instances the use of an inquiry presented in purely hypothetical terms, which does not disclose the identity of the client or information identifiable to the client, will not violate Rule 1.05. However, if under the circumstances a responding lawyer might match the hypothetical facts to a specific person or entity, or if there is an apparent risk that disclosure of the information in hypothetical form could harm, prejudice or embarrass the client, the discussion of hypothetical facts without the client's consent may violate Rule 1.05. The lawyer should evaluate the risk of prejudice to the client by assuming that the inquiry might be disclosed to counsel for an adverse party or to the public.

(3) An inquiring lawyer should never disclose privileged confidential information specific to an identifiable client, or information that foreseeably might prejudice the client, without the client's express consent. To the extent the exceptions in Rules 1.05(d)(1) and (2) apply, those exceptions allow only the limited disclosure of unprivileged confidential information. When the inquiring lawyer determines that consultation requires disclosure of privileged confidential information, or unprivileged confidential information that foreseeably might prejudice the client if disclosed, the lawyer must ensure that the client is made aware of the potential consequences of the disclosure and consents to the consultation despite those risks, including the risk of a privilege waiver.

(4) If the client has expressly instructed the lawyer not to reveal confidential information, the lawyer may not do so even if the exceptions set forth in Rules 1.05(d)(1) and (2) would otherwise apply. *See* Rule 1.05, Comments 6 and 7.

(5) An inquiring lawyer who intends to reveal unprivileged confidential information to a responding lawyer may wish to consider seeking the agreement of the responding lawyer to maintain the confidentiality of any such information. Absent such an agreement a responding lawyer with no expectation of an attorney-client engagement has no obligation to maintain the confidentiality of the information. When it is not reasonably feasible to secure an agreement regarding confidentiality (as may be the case with posts on an online discussion forum), or if for any other reason the inquiring lawyer does not secure such an agreement, the inquiring lawyer should take the lack of a confidentiality commitment into

consideration when determining whether and to what extent disclosure is in the client's best interest.

Accord American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 98-411 (Aug. 30, 1998). *See also* American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 480 (March 6, 2018).

A responding lawyer does not enter into an attorney-client relationship with the inquiring lawyer's client merely by virtue of an informal consultation of the type described in this opinion. Absent an agreement to the contrary, a responding lawyer has no duties of care, loyalty or confidentiality to the inquiring lawyer's client. Nevertheless, responding lawyers must consider their professional obligations to their own clients. Responding lawyers must take care not to reveal confidential information of their own clients in responding to a request for advice or guidance. Responding lawyers should take reasonable steps to insure that consultation with an inquiring lawyer on a given subject will not adversely affect a present or former client in the subject of the present or former representation.

The above discussion applies only to consultations between an inquiring lawyer and another lawyer who is not in the inquiring lawyer's law firm or formally associated as co-counsel on the client's matter. A lawyer may reveal confidential client information to other lawyers in the lawyer's law firm or to the client's representatives (including other lawyers retained by the client in the same matter), except when otherwise instructed by the client. Rule 1.05(c)(3).

Finally, the above discussion pertains only to informal lawyer-to-lawyer consultations for the principal purpose of benefiting a client in the subject of the representation. Additional exceptions to Rule 1.05 may apply to consultations for other purposes. For example, pursuant to Rule 1.05(c)(4) "[a] lawyer may reveal confidential information" in a consultation with a private ethics lawyer or in a call to the State Bar of Texas Ethics Helpline "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with ... a Texas Disciplinary Rules [sic] of Professional Conduct"

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not categorically prohibit informal lawyer-to-lawyer consultation for the benefit of a client, whether the consultation occurs in an online discussion group, an in-person meeting, or otherwise. However, inquiring lawyers must honor their duty of confidentiality under the Texas Disciplinary Rules of Professional Conduct.

If possible, the inquiring lawyer should limit such consultation to general or abstract inquiries that do not disclose confidential information relating to the representation. If it is not reasonably possible to address the issues in question using a general or abstract inquiry, a lawyer may reveal a limited amount unprivileged client information in a lawyer-to-lawyer consultation, without the client's express consent, when and to the extent that the inquiring lawyer reasonably

believes that the revelation will benefit the inquiring lawyer's client in the subject of the representation. The inquiring lawyer should do so using a hypothetical that does not identify the client. If under the circumstances a responding lawyer might match the hypothetical facts to a specific person or entity, or if it is reasonably foreseeable that the disclosure of the information will harm, prejudice or embarrass the client, the discussion of hypothetical facts without the client's consent may violate the Texas Disciplinary Rules of Professional Conduct.

An inquiring lawyer may not reveal confidential information protected by the lawyer-client privilege without the client's express, informed consent. An inquiring lawyer may not reveal unprivileged confidential information for the benefit of the client if the client has expressly instructed the lawyer not to do so. In deciding whether and to what extent disclosure of unprivileged client information would be in the client's best interest, the inquiring lawyer should take into account whether the responding lawyer has agreed to maintain the confidentiality of the consultation.

The responding lawyer must take reasonable steps to avoid providing information that could impair any obligations to the responding lawyer's clients.