

Texas Bar Journal
July, 2005
Feature Ethic Opinion
Issued by the Professional Ethics Committee
for the State Bar of Texas
OPINION NO. 556
MAY 2005

QUESTION PRESENTED:

May a law firm provide client information to employees of a collection agency who act as borrowed employees of the law firm in assisting it in collection of past due receivables?

Statement of Facts

A law firm proposes to retain an independently owned and operated collection agency to assist the law firm in collecting receivables from clients for whom the firm has provided legal services. The collection agency employees involved in collection work for the law firm will remain on the payroll of the collection agency. Each employee will sign an agreement that the employee will work for the law firm as a borrowed employee, and the law firm will direct the manner and all details of the employees' work. The law firm will compensate the collection agency, and not the borrowed employees, for the employees' services. The law firm will retain ownership of the accounts receivable.

Discussion

Rule 1.05(b) of the Texas Disciplinary Rules of Professional Conduct provides:

Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

- (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
- (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
- (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

This committee has addressed in two prior opinions the application of Rule 1.05 with respect to a law firm's attempts to use outside parties to collect fees from clients. See Professional Ethics Committee Opinion 495 (March 1994) and Opinion 464 (August 1989).

Opinion 495 considered a law firm's use of a collection agency to collect accounts receivable that continued to be owned by the law firm. The opinion concludes that, if the client does not give effective consent, none of the exceptions set forth in Rule 1.05(b) would apply to permit or require a law firm to disclose confidential client information to a collection agency in order to assist the collection agency in collecting amounts due to the law firm.

Opinion 464 dealt with a proposed sale of a law firm's accounts receivable to a factoring company. The committee concluded that the sale of a law firm's accounts receivable necessarily entails disclosure of confidential client information and is not permitted "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."

In the arrangement addressed by this opinion, persons normally employed by the collection agency would be designated "borrowed employees" of the law firm. This designation would not change the fact that such employees are not regular employees of the law firm but instead are employees of the collection agency to which the rules of professional conduct do not apply. Without the safeguards inherent in a law firm environment and the ability to discipline which is a part of the standard employer/employee relationship, a law firm may compromise the requirement and the expectation of confidentiality imposed by Rule 1.05. Hence, the permission granted in Rule 1.05(c)(3) for a lawyer to share client information with "the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client" should not be interpreted to include revealing confidential client information to employees of a collection agency who are temporarily borrowed by the law firm to collect fees.

No other provision of paragraphs (c), (d), (e), and (f) of Rule 1.05 would permit or require a lawyer to reveal confidential information in the circumstances here considered except when the affected clients give informed consent within the scope of Rule 1.05(c)(2), which permits a lawyer to reveal confidential information "[w]hen the client consents after consultation."

The protection of confidential client information is at the heart of Rule 1.05 and Opinions 495 and 464. The protection afforded by Rule 1.05 would be compromised by the use of collection agency employees to work as borrowed employees of the law firm for collection work. Accordingly, absent prior informed consent of each affected client, a lawyer may not reveal confidential client information to collection agency employees even though these employees are designated as borrowed employees of the law firm.

Conclusion

It is not permissible under the Texas Disciplinary Rules of Professional Conduct for a law firm, without the prior consent of each affected client, to provide confidential client information to employees of a collection agency who are treated as borrowed employees of the law firm while assisting the law firm in collection matters.