

The Supreme Court of Texas
Professional Ethics Committee
Opinion Number 572
June 2006

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer, without the express consent of a client, deliver material containing privileged information of the client to an independent contractor, such as a copy service, hired by the lawyer to perform services in connection with the lawyer's representation of the client?

STATEMENT OF FACTS

In connection with a lawyer's representation of a client, the lawyer hires an independently owned and operated copy service to copy documents, some of which contain information of the client protected by the lawyer-client privilege.

DISCUSSION

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct governs the disclosure of confidential information of a client. The following portions of Rule 1.05 apply to the situation here considered:

"(a) 'Confidential information' includes both 'privileged information' and 'unprivileged client information.' 'Privileged information' refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. '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.

(b) 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.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

...."

Rule 1.05(d) also allows a lawyer to disclose unprivileged information when impliedly authorized by the client or when the lawyer has reason to believe that disclosure of such information is necessary to carry out the representation effectively.

The Committee is of the opinion that a lawyer's delivery of materials containing privileged information to an independent contractor providing a service, such as copying, to facilitate the lawyer's representation of a client (and not for the purpose of disclosing

information to others) does not constitute "revealing" such privileged information within the meaning of Rule 1.05, provided that the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information. In these circumstances, the independent contractor owes a duty of confidentiality both to the lawyer and to the lawyer's client. See generally Restatement (Second) of Agency sections 5, 395, 428 (American Law Institute 1958).

The Committee's view is based in part on the general law of privilege, which recognizes that more than physical delivery of items containing privileged information is required before such information is deemed to have been "revealed" or "disclosed" and the privilege is deemed to have been waived. See *Compulit v. Bantec, Inc.*, 177 F.R.D. 410 (W.D. Mich. 1997) (lawyer-client privilege is not lost if a law firm hires an independent contractor to provide a necessary service that the law firm believes it needs in order to effectively represent its clients).

The Committee's view is also consistent with Comment f to Section 60 of the Restatement (Third) of the Law Governing Lawyers (American Law Institute 2000), which provides that a lawyer has authority to disclose confidential client information to "independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf"

The Committee therefore concludes that, unless the client has instructed otherwise, a lawyer may deliver materials containing information subject to the lawyer-client privilege to an independent contractor hired by the lawyer to provide a service to the lawyer in furtherance of the lawyer's representation of the client without the express consent of the client if the lawyer reasonably expects that the independent contractor will not disclose or use materials or their contents except as directed by the lawyer. Although the lawyer's expectations as to the independent contractor's confidential treatment of the materials could be based on the reputation of, or the lawyer's prior experiences in dealing with, the independent contractor, a good basis for such expectations would normally be a written agreement between the lawyer and the independent contractor as to the confidential treatment required for materials provided by the lawyer to the independent contractor.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, unless the client has instructed otherwise, a lawyer may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the lawyer in the furtherance of the lawyer's representation of the client if the lawyer reasonably expects that the confidential character of the information will be respected by the independent contractor.