

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 595**

**February 2010**

**QUESTION PRESENTED**

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer use, for the lawyer's benefit, information in the public record about a former client that the lawyer acquired during the course of representing the former client?

**STATEMENT OF FACTS**

A lawyer previously represented a client on various matters. The lawyer's fees billed to the client remain unpaid and the lawyer intends to pursue collection efforts. During the course of the lawyer's representation of the client, the lawyer learned that the client was shown to have committed fraud and other offenses in litigation in which the client was a party but for which the lawyer did not represent the client. All of the information known to the lawyer concerning the client's fraud and other offenses is in the public record relating to the litigation.

**DISCUSSION**

Rule 1.05(b) of the Texas Disciplinary Rules of Professional Conduct provides that, subject to the exceptions specified in paragraphs (c) through (f) of Rule 1.05, a lawyer is prohibited from knowingly using a former client's confidential information "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." Rule 1.05(b)(3). The term "confidential information" is defined in Rule 1.05(a) as follows:

"‘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 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 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.”

In the factual situation considered in this opinion, the information of public record about the former client, which the lawyer acquired while representing the client, is “unprivileged client information” as defined in Rule 1.05(a). Thus, if no exception applies and the former client does not consent, use of the information to the former client’s disadvantage is prohibited by Rule 1.05(b)(3) unless “the confidential information has become generally known.” Information that is a matter of public record may not be information that is “generally known.” A matter may be of public record simply by being included in a government record, such as a document filed with a court clerk, whether or not there is any general public awareness of the matter. Information that “has become generally known” is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found. Whether information is “generally known” within the meaning of Rule 1.05(b)(3) is a question of fact.

If the information about the former client has not become generally known, a lawyer in a controversy with his former client may nonetheless be allowed to reveal the information under one of the exceptions stated in paragraphs (c) through (f) of Rule 1.05. Since the factual situation considered in this opinion includes the fact that there is a controversy between the lawyer and the former client concerning the payment of legal fees, the exception stated in Rule 1.05(c)(5) may apply. Rule 1.05(c)(5) permits a lawyer to reveal confidential information “[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.” Comment 15 to Rule 1.05 explains that a lawyer entitled to a fee “necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). . . . Any disclosure by the lawyer, however, should be as protective of the client’s interests as possible.” Thus, although the information about the former client is “confidential information” within the meaning of Rule 1.05(a) and may not be within the exception stated in Rule 1.05(b)(3) for information that is “generally known,” the lawyer may be permitted under Rule 1.05(c)(5) to use that information to the extent, but only to the extent, such use is reasonably necessary to enforce the lawyer’s claim for unpaid legal fees.

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct a lawyer is generally prohibited from using to the disadvantage of a former client information of public record concerning the former client that was acquired by the lawyer during the representation and that is not generally known to the public. However, if there exists a controversy between the former

client and the lawyer regarding unpaid fees or other matters, the lawyer may use such information to the extent that such use is reasonably necessary to enforce a claim or establish a defense for the lawyer in the controversy with the former client.