THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 695
October 2022

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer employed at a nonprofit agency that provides pro bono or low-cost legal services obtain client consent during the intake process that allows the disclosure of some of the client's confidential information to third-party organizations that fund the agency?

STATEMENT OF FACTS

A nonprofit social services agency (Agency) employs lawyers and provides free or low-cost legal services to low-income persons. The Agency receives funding from third-party organizations such as foundations, governments, and governmental subcontractors. Directly or through third-party monitors, these organizations conduct site visits and audits to evaluate the Agency's performance and to ensure that the Agency is using the funding to provide grant-eligible legal services to grant-eligible clients.

During a recent site visit, a funding organization's monitor asked to inspect a randomly selected file of a current client. The file included notes made by the Agency's lawyers and staff during the representation, as well as drafts of documents prepared for the client. The Agency refused to allow the monitor to inspect confidential contents of the file.

After the site visit, the monitor reported to the funding organization that the Agency violated the terms of the grant by removing information from the client's file before allowing the monitor to review the file.

The Agency asks how it can balance the funding organization's need for information with the clients' rights to confidentiality. The Agency believes that it would be difficult or impossible to contact randomly selected clients during a site visit to obtain the clients' permission to share information in the clients' files. The Agency therefore proposes obtaining each client's advance consent, during the client intake process, to allow the Agency to reveal confidential information to the funding organization or its monitor during future site visits or audits.

DISCUSSION

Organizations that provide grants to legal services agencies have a legitimate need to verify compliance with the organization's grant and to ensure that the limited funds available for legal services to low-income clients are not wasted or purloined. To that end, legal services agencies are generally required to collect and maintain records of information establishing client eligibility, among other things. Comment 8 to Rule 6.05 of the Texas Disciplinary Rules of Professional Conduct recognizes "the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide" and observes:

> Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive.

But the Rules do not exempt legal services agencies from confidentiality obligations owed to agency clients. To the contrary, "Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview." Comment 10 to Rule 6.05.

The duty of confidentiality applies to all lawyers, whether publicly funded or privately retained. Rule 1.05 applies to all Texas lawyers, including lawyers for legal services agencies. Rule 1.05(a) broadly defines "confidential information" to include both "privileged information" and "unprivileged client information." "Privileged information" is information protected by the attorney-client privilege. Rule 1.05(a). "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." *Id*. Subject to specific exceptions, Rule 1.05(b)(1) prohibits a lawyer from knowingly revealing a client's confidential information to anyone "other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm." Third-party funding organizations and monitors are not listed in Rule 1.05(b)(1).

A legal services agency therefore may not reveal eligibility information or any other confidential client information to funding organizations or monitors in the absence of an applicable exception to Rule 1.05(b)(1). *See* Professional Ethics Committee Opinion 559 (July 2005) (lawyer appointed to represent criminal defendant may not provide detailed description of services in support of fee application); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1394 (1977) ("Revelation of Client Communications by Legal Services Agency to Inspectors from Funding Source") (legal services agency may not allow inspectors from outside the agency to review files relating to client matters in the absence of the clients' understanding consent and waiver after full disclosure); Va. Bar Assoc. Legal Ethics Opinion 1300 (1989) (without client consent, lawyer for legal services agency may not reveal identity of clients or adverse parties to government agency); Wash. State Bar Assoc. Advisory Opinion 183 (1990) (legal services office may not disclose to third parties, including the Legal Services Corporation, original records or other information that includes or would lead to disclosure of client-identifying information, without the consent of each client); *see generally In re Advisory Opinion No. 544 of the New Jersey Supreme Court Advisory Committee on Professional Ethics,* 511 A.2d 609, 614 (N.J. 1986) ("client-identity may not be disclosed to any private or public funding agency in the absence of appropriate consent or other legal justification").

Legal services agencies may disclose general information to funding organizations and monitors if the information does not reveal the identity of clients or other information that might harm or disadvantage a client if disclosed. For example, an agency may provide basic eligibility information in an anonymous format (*e.g.*, linked to unique client identification codes rather than client names), on an aggregated basis, or by some other method that does not disclose client identity or associate a specific client with specific eligibility information. Likewise, the legal agency's staff may serve as intermediaries to review client files and answer the funding organization's questions without disclosing client identities or sensitive information. As the Professional Ethics Committee for the State Bar of Michigan observed in Mich. Ethics Opinion RI-210 (1994):

> The tension here is then between the governing bodies['] "need to know" and the lawyer's duty of confidentiality. An appropriate balance between these competing concerns is obtained by granting access to certain kinds of basic statistical data concerning the operations of the program. For example, statistical data may be compiled regarding matters such as numbers of clients served, numbers of cases processed, kinds of cases processed, time spent on cases, etc. In addition, limited information regarding the handling of specific matters may be disclosed, provided that the client is in no way identified or identifiable from such limited disclosure.

Advance client consent after consultation. In this case, the Agency asks whether it may nevertheless comply with a funding organization's request to inspect confidential information if it obtains advance client consent from every client during the intake process.

Rule 1.05(c)(2) provides that a lawyer may reveal confidential information if the client consents "after consultation." Such consultation must include advising the client whether and to what extent the disclosure of the confidential information may adversely affect the client's legal position, including disadvantages to the client's legal position that may arise should the confidential information lose its protected status through the lawyer's disclosure. *See* Opinion 559 (July 2005) (discussion of need for informed consent before disclosure of confidential information in court application for payment of fees); Opinion 552 (August 2004) (addressing need for consultation and consent before disclosure of fee statements to third-party auditor). Any consultation should also explain the reasons for the disclosure and identify the information that might be disclosed. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1287 (1974) ("OEO Legal Services Client Survey Proposal") (informed consent to disclose client secrets to researchers employed by funding organization requires that the attorney establish that the client fully understands the scope of the impact of consent, that consent is totally voluntary, and that client can deny consent without any sense of guilt or embarrassment).

Although the issue of effective consent normally presents a fact question that depends on the circumstances, consent obtained during an intake process is likely ineffective because a lawyer cannot provide meaningful consultation regarding the consequences of consent before knowing the particular facts and legal issues involved in the proposed representation of the client. *See* Opinion 559 (July 2005) (consent to disclosure of future fee statements, given at the time a lawyer is appointed, would not normally constitute informed consent because the facts detailed in the fee statements and the possible consequences of disclosure of that information could not possibly be

known and discussed with the client at the time of consent); Opinion 522 (August 2004) (concluding that advance consent at the time an insured purchases a policy is not effective to allow disclosure of fee statements to third-party fee auditor).

It may be that under some circumstances, for some clients, a lawyer might obtain effective advance consent to the disclosure of confidential information to a funding organization or monitor. But the Committee understands that the Agency proposes to secure advance consent from all clients by using a standard form or checklist to be presented and signed during the intake process. Such a "one-size-fits-all" consent form cannot satisfy the requirement of pre-consent consultation.

Disclosure required by law. The Committee notes that Rule 1.05(c)(4) provides that a lawyer may reveal confidential information "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, *or other law*" (emphasis added). Whether a particular disclosure is necessary to comply with a law governing the legal services agency is a question of law that depends on the language of the applicable law and the confidential information at issue.

CONCLUSION

A lawyer employed by a nonprofit agency that provides legal services to low-income clients may not allow a funding organization or its monitor to review a client's confidential information unless the client provides effective consent after consultation or another exception to the lawyer's duty of confidentiality applies. A blanket consent obtained during the intake process is unlikely to be effective.