RELATED ETHICAL OPINIONS

ELLEN E. PITLUK
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
Local: 512.427.1350 Toll: 800.204.2222 ext. 1350
epitluk@texasbar.com

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ELLEN E. PITLUK

Ellen Eidelbach Pitluk is an ethics attorney with the State Bar of Texas Office of Chief Disciplinary Counsel. She advises attorneys on the Texas Disciplinary Rules of Professional Conduct, Texas Rules of Disciplinary Procedure and ethics opinions issued by the Professional Ethics Committee for the State Bar of Texas. Ms. Pitluk served as an administrative attorney and classification attorney for the Office of Chief Disciplinary Counsel prior to her current position. She has written numerous CLE papers and law journal articles on ethics issues and speaks frequently at CLE seminars. Ms. Pitluk received a Presidential Citation from the State Bar of Texas in 2013 for her ethics advice to thousands of attorneys annually. She graduated from St. Mary's University School of Law in December 2002 and became licensed in Texas in May 2003. Prior to joining the Office of the Chief Disciplinary Counsel, Ms. Pitluk represented clients in private practice. She is a member of the State Bar of Texas, San Antonio Bar Association, Bexar County Women's Bar Association, American Bar Association, and a Fellow in the College of the State Bar of Texas.

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THE PROFESSIONAL ETHICS COMMITTEE FOR THE STATE BAR OF TEXAS Opinion No. 648

April 2015

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer communicate confidential information by email?

STATEMENT OF FACTS

Lawyers in a Texas law firm represent clients in family law, employment law, personal injury, and criminal law matters. When they started practicing law, the lawyers typically delivered written communication by facsimile or the U.S. Postal Service. Now, most of their written communication is delivered by web-based email, such as unencrypted Gmail.

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, the lawyers are concerned about whether it is proper for them to continue using email to communicate confidential information.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not specifically address the use of email in the practice of law, but they do provide for the protection of confidential information, defined broadly by Rule 1.05(a) to include both privileged and unprivileged client information, which might be transmitted by email.

Rule 1.05(b) provides that, except as permitted by paragraphs (c) and (d) of the Rule:

> "a lawyer shall not knowingly:
> (1) Reveal confidential information of a client or 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."

A lawyer violates Rule 1.05 if the lawyer knowingly reveals confidential information to any person other than those persons who are permitted or required to receive the information under paragraphs (b), (c), (d), (e), or (f) of the Rule.

The Terminology section of the Rules states that "'[k]nowingly' . . . denotes actual knowledge of the fact in question" and that a "person's knowledge may be inferred from circumstances." A determination of whether a lawyer violates the Disciplinary Rules, as opposed to fiduciary obligations, the law, or best practices, by sending an email containing confidential information, requires a case-by-case evaluation of whether that lawyer knowingly revealed confidential information to a person who was not permitted to receive that information under Rule 1.05.

The concern about sending confidential information by email is the risk that an unauthorized person will gain access to the confidential information. While this Committee has not addressed the propriety of communicating confidential information by email, many other ethics committees have, concluding that, in general, and except in special circumstances, the use of email, including unencrypted email, is a proper method of communicating confidential information. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999)*;* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011)*;* State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. No. 195 (2008)*;* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 820 (2008); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

Those ethics opinions often make two points in support of the conclusion that email communication is proper. First, the risk an unauthorized person will gain access to confidential information is inherent in the delivery of any written communication including delivery by the U.S. Postal Service, a private mail service, a courier, or facsimile. Second, persons who use email have a reasonable expectation of privacy based, in part, upon statutes that make it a crime to intercept emails. See, e.g., Alaska Bar Ass'n Ethics Comm. Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998). The statute cited in those opinions is the Electronic Communication Privacy Act (ECPA), which makes it a crime to

intercept electronic communication, to use the contents of the intercepted email, or to disclose the contents of intercepted email. 18 U.S.C. § 2510 *et seq.* Importantly, the statute provides that "[n]o otherwise privileged . . . electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4).

The ethics opinions from other jurisdictions are instructive, as is Texas Professional Ethics Committee Opinion 572 (June 2006). The issue in Opinion 572 was whether a lawyer may, without the client's express consent, deliver the client's privileged information to a copy service hired by the lawyer to perform services in connection with the client's representation. Opinion 572 concluded that a lawyer may disclose privileged information to an independent contractor if 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 general, considering the present state of technology and email usage, a lawyer may communicate confidential information by email. In some circumstances, however, a lawyer should consider whether the confidentiality of the information will be protected if communicated by email and whether it is prudent to use encrypted email or another form of communication. Examples of such circumstances are:

1. communicating highly sensitive or confidential information via email or unencrypted email connections;
2. sending an email to or from an account that the email sender or recipient shares with others;
3. sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer (see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011));
4. sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
5. sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
6. sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

In the event circumstances such as those identified above are present, to prevent the unauthorized or inadvertent disclosure of confidential information, it may be appropriate for a lawyer to advise and caution a client as to the dangers inherent in sending or accessing emails from computers accessible to persons other than the client. A lawyer should also consider whether circumstances are present that would make it advisable to obtain the client's informed consent to the use of email communication, including the use of unencrypted email. See Texas Rule 1.03(b) and ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011). Additionally, a lawyer's evaluation of the lawyer's email technology and practices should be ongoing as there may be changes in the risk of interception of email communication over time that would indicate that certain or perhaps all communications should be sent by other means.

Under Rule 1.05, the issue in each case is whether a lawyer who sent an email containing confidential information knowingly revealed confidential information to a person who was not authorized to receive the information. The answer to that question depends on the facts of each case. Since a "knowing" disclosure can be based on actual knowledge or can be inferred, each lawyer must decide whether he or she has a reasonable expectation that the confidential character of the information will be maintained if the lawyer transmits the information by email.

This opinion discusses a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct, but it does not address other issues such as a lawyer's fiduciary obligations or best practices with respect to email communications. Furthermore, it does not address a lawyer's obligations under various statutes, such as the Health Insurance Portability and Accountability Act (HIPAA), which may impose other duties.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.

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.