



D I S T R I C T O F C O L U M B I A B A R

July 31, 2015

PERSONAL & CONFIDENTIAL

John P. Grygiel, Shareholder
Zimmerman, Kiser & Sutcliffe, P.A.
315 East Robinson Street, Suite 600
Orlando, FL 32801

Sent via email and regular mail
JGrygiel@zksfirm.com

Re: Request for Legal Ethics Opinion on CreditLex, LLC

Dear Mr. Grygiel:

I write in response to your May 14, 2015, inquiry requesting a D.C. Bar Legal Ethics Committee Opinion on whether a lawyer or law firm may consistent with the D.C. Rules of Professional Conduct ("D.C. Rules") participate in CreditLex, LLC ("CreditLex"), a proprietary clearinghouse of legal fee payment information relating to corporate client creditworthiness, by obtaining the advance informed consent of clients/prospective clients whose otherwise confidential payment information will be submitted to CreditLex.

At the outset, it should be noted that the purpose of the D.C. Bar Legal Ethics Committee is to provide informal guidance to members of the Bar on the interpretation and application of the D.C. Rules of Professional Conduct. Opinions whether formal or informal are advisory in nature and exist to assist lawyers in prospectively evaluating contemplated conduct. They do not constitute legal advice and are not binding on courts or the Office of Bar Counsel. Pursuant to Rule F-5 of the D.C. Bar Legal Ethics Committee Rules, I am authorized as Chair of the Committee to provide an informal opinion letter when an inquiry "can be answered by a reference to a Rule of Professional Conduct, an existing Committee opinion, a court or other ethics committee opinion or an answer reasonably can be inferred from the above sources." In my judgment, your request meets this condition. The opinions expressed in this letter are mine only and do not reflect the views of the larger Committee. Further, having made no independent investigation of the facts, I am relying exclusively on information that you have provided.

Background

As described, CreditLex is a for-profit business offering a secure database containing financial information about commercial clients and prospective commercial clients accessible only to lawyers, law firms, and their staff who pay a subscription fee. The stated purpose of CreditLex is to allow subscribers to both file reports on the payment histories of their consenting clients and review the reports filed on the system by other subscribers. Those who provide legal services will

thus be able to determine the payment history of a new or prospective client, to assess the likelihood of repayment, and to incentivize a client to comply with the fee agreement. During the commencement of the attorney-client relationship, a subscribing lawyer will ask the client, as part of the engagement letter, to waive voluntarily any duty of confidentiality with respect to the timeliness of payment of legal fees to the subscriber, which will be disclosed to other subscribers through CreditLex. Importantly, adverse reports indicating late or nonpayment will be limited to the subscribing lawyer's former clients and will include a notation if the former client is disputing fees owed. Subscribers will only solicit the consent of commercial clients to waive confidentiality of payment information. Information about individual consumer clients are not part of the credit clearinghouse, and no waivers will be sought from them.

Analysis

Based on the facts submitted, I believe that your inquiry is best framed as whether lawyer-subscribers of CreditLex may, consistent with the D.C. Rules of Professional Conduct, obtain advanced waivers of confidentiality from commercial clients as to specific financial information that would otherwise be considered client confidences or secrets subject to the protections of Rule 1.6.

Rule 1.6 sets forth a lawyer's duty of confidentiality. Rule 1.6(a) provides that except when permitted under a specifically enumerated exception,

a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client;(2) use a confidence or secret of the lawyer's client to the disadvantage of the client; or (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

Rule 1.6(b) defines client confidences and secrets very broadly.

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

As noted in your inquiry, whether and when a client pays his, her or its legal bills would certainly fall within the definition of “secret” and in some instances, may constitute a confidence as well. Among the exceptions to Rule 1.6, only one is relevant to your inquiry: Rule 1.6(e)(1), which permits a lawyer to reveal or use client confidences or secrets with the client's informed consent.

The Rules define “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to a proposed course of conduct.” Rule 1.0(e). Comments [2] and [3] to Rule 1.0 further clarify the meaning of “informed consent.” Significantly, what is considered “adequate information and explanation” varies depending on a number of factors, including

whether the client or other person is experienced in legal matters generally and in making decision of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

Rule 1.0 Cmt. [2].

In Opinion 366, the Committee extensively explored the conditions of obtaining clients' informed consent in the context of lawyers seeking conflict of interest waivers in private adoptions. The Committee emphasized that the level of disclosure required by lawyers to obtain informed consent varied from client to client and with the facts and circumstances of each representation.¹

This is no less true when a lawyer seeks to obtain a client's informed consent to use or reveal a client's confidences or secrets. Comment [2] to Rule 1.0 explains that

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

Ultimately, the validity of informed consent under Rule 1.6(e)(1) can only be determined by an analysis of the adequacy of information provided to a specific client to secure the waiver.

By definition, obtaining a client's *informed consent* to use or reveal information protected by Rule 1.6 may be particularly difficult far in advance of the circumstances giving rise to the information's use or revelation, because the material risks of future use or revelation of the information by the lawyer may not be fully known and/or the adverse consequences reasonably foreseeable at the time the waiver is obtained. This temporal aspect of the adequacy of information necessary to secure informed consent means that a future waiver of confidentiality would be more likely to be rendered invalid in those circumstances where a material change that formed the basis of the client's consent has occurred. Thus, the possibility of a client's future revocation of an earlier waiver of confidentiality is one that will, again, depend on the facts and circumstances of a specific representation.

You should be aware that the Committee cautioned lawyers in footnote 10 of Opinion 309 (addressing advanced waivers of conflicts of interest), that "[b]ecause of their considerable potential for mischief, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver." In citing case law to support this proposition, however, it also cited authority to support the contrary notion that lawyers should have greater flexibility in seeking such waivers.

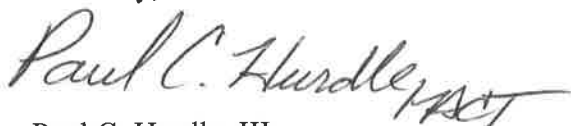
¹ See D.C. Legal Ethics Opinion 366 (Ethical Issues that Commonly Arise in Private Adoptions) (2014).

Certainly, Rule 1.6 contemplates a client's ability to waive a lawyer's duty of confidentiality after the client has been adequately informed of the material advantages and disadvantages of the waiver and any reasonably available alternatives. Thus, here, to the extent a CreditLex lawyer-subscriber is able to adequately counsel a specific client/prospective client on the material risks associated with the future use or revelation of a then-to-be former commercial client's legal fee payment history and/or delinquencies to CreditLex, and no subsequent material change in circumstances that formed the basis of the client's consent occurs prior to such use or revelation, the lawyer-subscriber may obtain an advance waiver of confidentiality to use or reveal this specific information to CreditLex.

Conclusion

A lawyer-subscriber to CreditLex may use or reveal the confidences and secrets of former clients to the extent the lawyer-subscriber has obtained the informed consent of a former client to the information's use or revelation to the clearinghouse. The D.C. Rules permit a lawyer to use or reveal client confidences or secrets "with the client's informed consent." Rule 1.6(e)(1). However, as defined by Rule 1.0 and further clarified by Comments [2] and [3], the disclosure of information necessary to obtain a specific client's informed consent will vary depending on a number of factors including the sophistication of the client and the facts and circumstances of each representation. Advanced waivers of confidentiality under Rule 1.6 require particular scrutiny. Future circumstances giving rise to material risks or benefits of a proposed course of conduct and/or available alternatives may change overtime, rendering the initial disclosures inadequate. However, to the extent materials risks are known and clearly explained to a client who is capable of appreciating the likely consequences of the use and revelation of the information, such informed consent may be sought.

Sincerely,

A handwritten signature in cursive script that reads "Paul C. Hurdle, III". The signature is written in dark ink and is positioned above the typed name.

Paul C. Hurdle, III

Chair, D.C. Bar Legal Ethics Committee

cc: Hope C. Todd, Esq.