

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 622
January 2013**

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer obtain information regarding a potential new client's payment history from a database containing information supplied by other lawyers on the payment history of their clients, structure an engagement agreement to provide legal services to the potential client based upon such information, and thereafter provide to the database information regarding the new client's payments to the lawyer?

STATEMENT OF FACTS

A lawyer would like to use an internet database service providing information on lawyers' experiences with their clients' payment histories to obtain payment history information on persons that are potential new clients of the lawyer. The lawyer proposes to disclose both verbally and in writing to potential new clients the lawyer's use of the database and to obtain written authorization from each potential client for the lawyer to obtain payment history information on the potential client from the database. The client's authorization would provide that, based on the information obtained from the database concerning the potential new client, the lawyer could reject the potential client or require a special fee arrangement or other terms concerning the client's employment of the lawyer. The potential client's authorization would also provide that the lawyer could later furnish to the database information about the client's payments to the lawyer.

DISCUSSION

Rule 1.02(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." Limitations agreed on with a client on the scope, objectives and general methods of representation have long been recognized. For example, a lawyer and client may agree that representation in a litigation matter will not include representation in any appeal of the case. Rule 1.02(b) applies to communications and agreements between a lawyer and a potential client relating to the potential client's employment of the lawyer. Thus Rule 1.02(b) permits a lawyer and potential client who subsequently becomes an actual client to agree at the outset on limitations with respect to the representation, including agreements that permit the lawyer to check on the client's prior history with respect to payment for legal services and that allow the lawyer to terminate the representation or modify the agreed payment arrangements in light of information obtained from the database on the new client's prior payment history with

other lawyers. Any limitations on a lawyer's representation of a client, including the limitations proposed by the lawyer based on use of the payment history database, are permitted by Rule 1.02(b) only if the client consents to the limitations after appropriate consultation with the lawyer.

The Terminology section of the Texas Disciplinary Rules of Professional Conduct provides that "Consult" or "Consultation" denotes "communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question." In each case, whether a lawyer provides consultation required for a client's particular agreement or consent will be a question of fact based upon all the relevant circumstances.

Under Rule 1.04(b)(8), a factor that may be considered in determining the reasonableness of a fee is uncertainty of collection of the fee before the legal services have been rendered. Rule 1.04(c) requires that the basis or rate of the fee be communicated to a new client, preferably in writing, before or within a reasonable time after the representation begins. Therefore, if the lawyer requires a special fee arrangement based upon a new client's payment history with other lawyers as obtained from the database, the lawyer must communicate that fact to the client.

With regard to the lawyer's provision of information to the database on the client's payments for the lawyer's services, Rule 1.05(b) generally requires that, subject to specified exceptions, a lawyer is prohibited from knowingly revealing confidential information concerning a client. An exception relevant in the circumstances here considered is provided in Rule 1.05(c)(2), which permits a lawyer to reveal confidential information "[w]hen the client consents after consultation." Prior opinions of this Committee have recognized that information concerning a client's legal bills is normally confidential but that, if a client gives effective consent following consultation, it is permissible for a lawyer to disclose such information to third parties. A client's advance consent for disclosure of information, given after appropriate consultation with the lawyer at the outset of the representation, is effective if the advance consent is informed and is not coerced. See Professional Ethics Committee Opinion 464 (August 1989). Thus, in the circumstances considered, it will be permissible for the lawyer to provide information on the client's payment history to the database if, at the time the client hires the lawyer, the client gives written consent for such action in the engagement agreement after consultation with the lawyer that is appropriate in the circumstances. It will be a question of fact whether the lawyer's consultation with the new client on this disclosure matter is "reasonably sufficient to permit the client to appreciate the significance of the matter in question," as specified in the definition of "Consult" and "Consultation" in the Terminology section of the Texas Disciplinary Rules.

It should be noted that a lawyer who enters into agreements with potential clients to access a database on payment history, use information from the database, and provide payment information to the database must, in addition to complying with applicable provisions of the Texas Disciplinary Rules, comply with other applicable laws, including

the federal Fair Credit Reporting Act., 15 U.S.C. § 1681 et seq., to the extent such laws apply.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, it is permissible for a lawyer to obtain information regarding a potential new client's payment history from a database containing information supplied by other lawyers on the payment history of their clients, structure an engagement agreement to provide legal services to the potential client based upon such information, and thereafter provide to the database information regarding the new client's payments to the lawyer, provided that the client has agreed to these actions after consultation with the lawyer sufficient to permit the client to make an informed decision on these matters.