

Ethics :

The Cost of Confidentiality

State Bar of Texas, Labor & Employment Law Section
Houston, TX · August 2018

A Very Old Question

“[S]uppose, for example, a time of dearth and famine at Rhodes, with provisions at fabulous prices; and suppose that an honest man has imported a large cargo of grain from Alexandria and that to his certain knowledge also several other importers have set sail from Alexandria, and that on the voyage he has sighted their vessels laden with grain and bound for Rhodes; is he to report the fact to the Rhodians or is he to keep his own counsel and sell his own stock at the highest market price? ”

The Famine at Rhodes, Cicero, De OFFICIIS, BOOK III. xi.-xii

That Is Still Relevant

Spaulding v. Zimmerman

01/03/57 – Plaintiff's 1st doctor examines Plaintiff

02/22/57 – Defendants' doctor examines Plaintiff

03/01/57 – Plaintiff's 2nd doctor examines Plaintiff

03/04/57 – Case called for trial

03/05/57 – Parties inform Court of settlement

05/08/57 – Settlement approved

Spaulding v. Zimmerman, 116 N.W.2d 704, 706 (Minn. 1962)

That Is Still Relevant

Spaulding v. Zimmerman

Except for the character of the concealment in the light of plaintiff's minority, the Court would, I believe, be justified in denying plaintiff's motion to vacate, leaving him to whatever questionable remedy he may have against his doctor and against his lawyer. ...

There is no doubt that during the course of the negotiations, when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge.

Spaulding v. Zimmerman, 116 N.W.2d 704, 706 (Minn. 1962)

That Is Still Relevant

Alton Logan

1982 – Murder at McDonald's

1982 – Alton Logan and Edgar Hope arrested

1982 – Andrew Wilson arrested for murdering two officers

1982 – Hope informs his counsel Wilson was the 2nd gunman

1982 – Wilson confesses to his counsel

1982 – Logan convicted

2007 – Wilson dies in prison and his counsel come forward

2008 – Logan freed

Aspiration

Texas Rules Preamble

“Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.”

Tex. Disciplinary R. Prof. Conduct, Preamble, n. 9

Prohibition

Texas Rules Preamble

“Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall. ... ”

Tex. Disciplinary R. Prof. Conduct, Preamble, n. 7

Rules Overview

1. 4.01 – Truthfulness in Dealings
2. 1.05 – Disclosure of Client Information
3. 1.02 – Client Objectives
4. 1.15 – Withdrawal

No “False” Statements

Rule 4.01

“In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.”

Tex. Disciplinary R. Prof. Conduct 4.01

No “False” Statements

Rule 4.01, Comment 1

“Paragraph (a) of this Rule refers to statements of material fact. ... [C]ertain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact.”

Tex. Disciplinary R. Prof. Conduct 4.01, cmt. 1

Limits on Disclosure

Rule 1.05(b)

“[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.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

Tex. Disciplinary R. Prof. Conduct 1.05(b)

Limits on Disclosure

Rule 1.05(a)

“(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. ... 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.

Tex. Disciplinary R. Prof. Conduct 1.05(a)

Limits on Disclosure

Rule 1.05(b)

“(b) ... [A] lawyer shall not knowingly:

(3) Use confidential information of a former client 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.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.”

Tex. Disciplinary R. Prof. Conduct 1.05(b)

Limits on Disclosure

Nona Byington

Jan. 21, 1994 – Brandon Baugh dies in care of Cathy Lynn Henderson

Feb. 1, 1994 – Henderson arrested by FBI in Missouri

Feb. 2, 1994– Henderson draws map for PD Ronald Hall

Feb. 3, 1994 – Grand jury subpoenas Attorney Nona Byington

Feb. 4, 1994 – Sheriff executes search warrant on Byington

Feb. 7, 1994 – 2nd grand jury subpoena; judge orders disclosure

Permissive Disclosure

Rule 1.05(c)

“(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.

(2) When the client consents after consultation.

(4) When 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.”

Tex. Disciplinary R. Prof. Conduct 1.05(c)

Permissive Disclosure

Rule 1.05(c)

“(c) A lawyer may reveal confidential information: ...

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act;

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.”

Tex. Disciplinary R. Prof. Conduct 1.05(c)

Mandatory Disclosure

Rule 1.05(e), (f)

“(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).”

Tex. Disciplinary R. Prof. Conduct 1.05(e), (f)

Occupational Hazard

Rule 1.05, Comment 9

“In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s information-usually unprivileged information-even though the client’s purpose is wrongful. ...”

Tex. Disciplinary R. Prof. Conduct 1.05, cmt. 9

Client Objectives

Rule 1.02(f)

“(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.”

Tex. Disciplinary R. Prof. Conduct 1.02(f)

Client Objectives

Rule 1.02(c)

“(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.”

Tex. Disciplinary R. Prof. Conduct 1.02(c)

Client Objectives

Rule 1.02(d)

“(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.”

Tex. Disciplinary R. Prof. Conduct 1.02(d)

Client Objectives

Rule 1.02(e)

“(e) When a lawyer has confidential information clearly establishing that the lawyer’s client has committed a criminal or fraudulent act in the commission of which the lawyer’s services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.”

Tex. Disciplinary R. Prof. Conduct 1.02(e)

Withdrawal

Rule 1.15(a)

“(a) A lawyer ... shall withdraw ... if:

- (1) the representation will violate ... applicable rules of professional conduct or law;
- (2) the lawyer’s physical, mental or psychological condition materially impairs the lawyer’s fitness to represent the client
- (3) the lawyer is discharged, with or without good cause.”

Tex. Disciplinary R. Prof. Conduct 1.15

Withdrawal

Rule 1.15(b)

“(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless: ...

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud; [or]

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement; ...

Tex. Disciplinary R. Prof. Conduct 1.15(b)

Withdrawal

Rule 1.15(d)

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a clients interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.”

Tex. Disciplinary R. Prof. Conduct 1.15(d)

Withdrawal

Rule 1.05, Comment 21

“After withdrawal, a lawyer’s conduct continues to be governed by Rule 1.05. However, the lawyer’s duties of disclosure under paragraph (e) of the Rule, insofar as such duties are mandatory, do not survive the end of the relationship even though disclosure remains permissible under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.”

Tex. Disciplinary R. Prof. Conduct 1.05, cmt. 21

Represented Parties

Rule 4.02(b)

“In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Tex. Disciplinary R. Prof. Conduct 4.02(b)

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