

## ADVISORY ETHICS OPINION 2003-03

### SYNOPSIS:

A lawyer may engage an outside contractor as a computer consultant to recover a lost data-base file, which contains confidential client information so long as: The lawyer clearly communicates the confidentiality rules to the outside contractor; the contractor fully understands the confidentiality rules and embraces the obligation to maintain the confidentiality of any information obtained in the course of assisting the lawyer; and the lawyer determines that the contractor has instituted adequate safeguards to preserve and protect confidential information.

If a significant breach of confidentiality should occur by the outside contractor, the law firm would be obligated to disclose such a breach to the client.

### QUESTION:

1. Is the use of outside technical experts to retrieve computer files permissible and not a violation of a lawyer's duty of confidentiality to the client?
2. What precautions with the outside contractor are expected to be utilized and what measures are to be taken should a breach occur by the contractor?

### FACTS:

The requesting lawyer wishes to engage the services of technical support personnel outside the firm to assist the lawyer with a computer-related issue which allows access to confidential information on the client.

### ANALYSIS:

The Vermont Rules of Professional Conduct define confidentiality of information in RPC 1.6, which reads as follows:

#### **Rule 1.6 CONFIDENTIALITY OF INFORMATION**

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, **except for disclosures that are impliedly authorized in order to carry out the representation**, and except as stated in paragraphs (b) and (c). (Emphasis added.)

Client electronic files usually contain most of the significant information relating to representation and therefore are covered by the confidentiality rules contained in Rules of Professional Conduct 1.6. The rule goes on to state that disclosures that are impliedly authorized

in order to carry out the representation are not covered by the prohibition. This inquiry is distinguished from *Opinion 91-06* and *Opinion 98-07* which prohibited disclosure in cases where the disclosure was not for the purposes of carrying out representation. It should also be noted that the Rule 1.6 has the clause explicitly allowing disclosure for purposes of serving the client and that exception was not in the previous section of the Code.

Nonetheless, another section of the rules provides further elaboration on how such disclosures should be handled.

Rules of Professional Conduct 5.3 reads in part:

**Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

The comments to our Rules do not specifically address this area of the use of outside service providers to deal with technological concerns, but generally RPC 5.3 requires that the lawyer has in effect measures giving reasonable assurance that client confidentiality will be protected.

In ABA Formal Opinion 95-398, the American Bar Association concluded that it is not a violation of the confidentiality rules to allow nonlawyers to come into contact with client file information, but that the lawyer "must ensure that the service provider has in place, or will establish reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard." See also, Michigan the Op. RI-328 (1/25/2002) in which a law department of a governmental unit could ethically utilize the services of the technical support department with the recommendation that the law department secure a written acknowledgment from the technical support personnel that they have been advised of the confidentiality requirements.

For purposes of the Vermont Rules and in response to the pending inquiry, we believe that the requesting lawyer should follow a three-step process:

1. The lawyer must clearly explain the confidentiality rules to the contractor;
2. The contractor must fully understand the confidentiality rules and embrace the obligation to maintain the confidentiality of all information obtained in the course of assisting the lawyer.

3. The lawyer must determine that the contractor has instituted adequate safeguards to preserve and protect confidential information.

How a lawyer is to assure that a nonlawyer understands the obligation of confidentiality is not specifically spelled out in the Vermont Rules. Nonetheless, we believe that a lawyer would satisfy the reasonableness requirements of Rule 5.3 if the lawyer obtained a written acknowledgment from an outside contractor that the contractor understands the confidential nature of the material and understands his or her duty not to keep any information gained in strictest confidence.

If a breach of confidentiality were to occur, RPC 1.4 requires a lawyer to explain a matter reasonably necessary to permit the client to make informed decision regarding representation. Thus, if the breach would affect the outcome of the client legal matter in any fashion, the lawyer would be obligated to tell the client of the breach by the nonlawyer.

### **CONCLUSION:**

It is appropriate for a lawyer to use outside technological support in managing case files when it is done in furtherance of carrying out the representation of the client. It is the expectation of the Rules that the lawyer will actively manage the nonlawyer to protect the confidentiality of the client's information and should a significant breach occur, the lawyer would need to disclose such a breach to the client.