Committee Opinion
December 22, 2003

LEGAL ETHICS OPINION 1787

CAN ATTORNEY PREVENT A 3RD PARTY WHO HAS PRIVILEGED INFORMATION FROM DISCLOSING THAT INFORMATION TO AN OPPOSING PARTY AND CAN ATTORNEY ENTER INTO A PRIOR AGREEMENT WITH 3RD PARTY TO KEEP PRIVILEGED INOFMRATION CONFIDENTIAL.

You have presented a hypothetical situation in which an attorney prepares a document in anticipation of litigation that contains his mental impression and thoughts about the case. The attorney sends the document to an expert witness, who is not represented by counsel. The hypothetical presented rests on an assumption that the transfer of the document to the witness does not waive the attorney-client privilege. After the litigation begins, the attorney claims the privilege for this document as attorney work product and, therefore, does not provide the document to the opposing counsel. Instead, the attorney provides a privilege log identifying the date, author, and recipient of the document. The attorney is concerned that the opposing counsel could use that information to either informally request that the witness provide the document or to obtain the document from the witness via subpoena. If such effort is made by the opposing counsel, the attorney may not learn about the request or the subpoena until after the document has already been provided by the witness to the opposing counsel. To prevent that disclosure, the attorney wishes to enter into a contract with the witness, whereby the witness would agree to inform the attorney of any such request or subpoena and to delay responding until a motion to quash or a motion for a protective order can be heard by the court.

You have asked the committee to render an advisory opinion addressing the following issues:

> 1) May an attorney request an unrepresented person who has received information protected under the attorney work product privilege is to notify the attorney of any requests by an opposing party for that information to delay responding to that request to allow the attorney the time to either have the subpoena quashed or a protective order entered?
>
> 2) May an attorney ever enter into a agreement with a third party to keep privileged information confidential if the purpose of that agreement is to prevent the third party from disclosing that information to an opposing party?

The questions raised in your hypothetical involve the lawyer's duty of confidentiality as outlined by Rule 1.6. [1] Paragraph (a) of that rule carves out from the general duty of nondisclosure those disclosures "that are impliedly authorized in order to carry out the representation." Thus, Rule 1.6 contemplates that an attorney, while working within the parameters of the duty of confidentiality, may need to make disclosures to third parties, such as expert witness. The hypothetical attorney's disclosure of the work product from this case to the expert witness was a proper disclosure.

[1] The hypothetical uses the terms "attorney-client privilege" and "attorney work product privilege" interchangeably. While technically the two terms have separate meanings, the definition of "confidentiality" in Rule 1.6 specifically includes both the attorney-client privilege and the work product doctrine. *See*, Rule 1.6, Comment 5.

When an attorney makes disclosures necessary to carryout the representation, the attorney should be mindful of the continuing duty of confidentiality and, therefore, take necessary steps to prevent disclosure of client information beyond what is needed for the representation. Rule 5.3(a) directs that when an attorney employs, retains or is associated with a nonlawyer, certain precautions must be taken.[2] Comment One to that rule confirms that Rule 5.3(a) applies not only to the employees of the attorney but also to independent contractors. The attorney in the present hypothetical should therefore consider Rule 5.3 applicable to his contracting with the expert witness for the client's matter. That rule directs the attorney to "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." The attorney in the present instance has provided confidential client information to the nonlawyer expert witness. The attorney then needs to make "reasonable efforts" to ensure that the expert witness understands the attorney's duty of confidentiality and to ensure that the expert witness protects the confidentiality of the information received.

In determining what would be "reasonable measures" to ensure that the expert witness acts in a manner compatible with the attorney's duty of confidentiality, a parallel provision in the rules provides guidance. Rule 1.6's provisions regarding the general duty of confidentiality includes paragraph (b)(5), which allows for disclosure of:

> Information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, *advises the agency that the information must be kept confidential* and reasonably believes that the information will be kept confidential. (Emphasis added.)

While an expert witness is not hired for "office management purposes," the precautions outlined for such disclosures in Rule 1.6(b)(5), including advising the third party that the information must be kept confidential, would be appropriate "reasonable measures" for this attorney to take.

The specific questions raised with this hypothetical inquire whether the attorney could 1) request the witness to contact the attorney upon receipt of a request or subpoena for the client information and 2) obtain an agreement from the witness that he will keep the client information confidential, including not disclosing the information to opposing counsel. Each of those steps would be appropriate for this attorney to ensure, as required by Rule 5.3, that the expert witness does nothing to compromise the attorney's duty to protect the confidentiality of information. This committee has consistently declared that protection of client confidences is a "bedrock principle" of legal ethics. See, LEOs 1643, 1702, 1749.

The sort of steps proposed in the hypothetical are both permissible and advisable in the hypothetical situation. The committee notes, however, that with regard to the subpoena

[2] The committee notes that the revision to Rule 5.3 that will go into effect January 1, 2004 in no way changes the conclusions drawn in this opinion regarding the current Rule 5.3.

provision, the attorney must be mindful of applicable court rules which may not in a particular instance provide for a hearing on a motion to quash in time to stay the witness' duty to comply with the subpoena. In such instances, the attorney may need to seek other means of client protection, such as provision of the materials by the witness to the court under seal. While such specific strategies are a matter of civil procedure outside the purview of this committee, the committee notes that it would not be permissible for the attorney to contract with or otherwise encourage the witness to violate a rule of court. A lawyer may not direct another person to violate a rule of court. *See*, Rules 3.4(d) and 8.4(a).

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.