

Legislative and Campaign Law Section  
State Bar of Texas

Legislative Drafting and Procedure Course

# **Update on Recent Professional Ethics Opinions**

Ross Fisher, Austin  
Ross Fischer Law

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Texas Law Center ~ Austin, Texas



## ROSS FISCHER

Ross Fischer is a leading expert in the areas of campaign finance, professional ethics, board governance, and public integrity matters. He counsels entities, public officials, and candidates in these complex areas of the law.

Prior to joining the Gober Group, Ross served on the Texas Ethics Commission, the agency with jurisdiction over officeholders, campaigns, political committees, and lobbyists in Texas. He served as a Commissioner from 2005 through 2010, including one year as the Commission's Chairman. In 2014, the Speaker of Texas House of Representatives appointed Ross to serve on the Select Interim Committee to Study Ethics Laws. He has also served as a clinical professor at the University of Texas School of Law.

In June 2018, Ross was elected by the Board of Directors of the State Bar of Texas to serve as its General Counsel. The State Bar of Texas is the second largest bar association in the United States, with over 100,000 active members.

Ross's public sector experience includes time as Assistant Chief Disciplinary Counsel for the State Bar of Texas and as an elected prosecutor, serving four years as the Kendall County Attorney. He has since served as outside counsel for cities, counties, state agencies, and other public entities. Ross became well-versed in regulatory issues and matters of corporate governance when he was elected to and served on the Board of Directors for the nation's largest distribution electric cooperative.

### ADMISSIONS

Texas

U.S. District Court for the  
Western District of Texas

United States Supreme Court

### EDUCATION

University of Texas School of  
Law, J.D.

St. Edward's University, B.A.,  
Political Science

### PREVIOUS BOARD/COMMISSION SERVICE

Texas Ethics Commission

Texas Online Authority

Pedernales Electric Cooperative Board of Directors

# RECENT ETHICS OPINIONS

## PROFESSIONAL ETHICS COMMITTEE

### STATE BAR OF TEXAS

Ross Fischer  
The Gober Group  
Austin, Texas | Washington, DC





# CONTINUING THEME: TECHNOLOGY



The opinions we will discuss today all touch on the impact of technological advances in the practice of law...



# CONTINUING THEME: TECHNOLOGY



## OPINION NO. 662

How can a lawyer ethically respond to negative reviews posted online by a former client?

“The internet allows consumers to publish instant reviews and comments about goods or services.”

A lawyer cannot publicly reveal confidential information of a former client unless expressly permitted by an exception in Rule 1.05.

# OPINION NO. 662

1.05(c). May reveal *confidential* information:

- (5) as necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between lawyer and client; or
- (6) to establish a defense to criminal charge, civil claim, or grievance.

1.05(d). May reveal *unprivileged* client information:

- (2) when necessary to do so in order to:
  - Defend against a claim of misconduct;
  - Respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - Prove up reasonable fees in an action against another responsible for paying fees.



# OPINION NO. 662 CONCLUSION

- Each of these exceptions applies only in connection with formal actions, proceedings, or charges. The exceptions cannot be reasonably interpreted to allow public disclosure of former client's confidences on the internet.
- A lawyer may, however, post a response to a former client's negative review so long as the response is proportional, restrained, and does not reveal confidential information.
- Suggested language: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."





# OPINION NO. 671

Question:

May a lawyer, individually or through an agent, contact an alleged online defamer in order to obtain jurisdictional information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure?



## OPINION NO. 671

A lawyer's client has been defamed or harassed online by an anonymous party. In preparing to bring potential claims, the lawyer wishes to conduct pre-suit deposition. May lawyer anonymously reach out to defamer to establish jurisdictional facts?

# OPINION NO. 671

Rule 4.01 (a) prohibits a lawyer from making a material misrepresentation of fact or law to a third party in the course of representing a client.

Rule 4.03 prohibits a lawyer, when dealing with an unrepresented person, from implying that the lawyer is disinterested.

# OPINION NO. 671

Rule 8.04(a)(3) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 5.03 subjects a lawyer to discipline if the lawyer orders, encourages, or permits conduct by an agent that would be a violation if performed by the lawyer.

Other states have addressed a lawyer “friending” a potential witness of adverse party.

# OPINION NO. 671

## Conclusion:

Texas lawyers, and their agents, may not anonymously contact an online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a pre-suit deposition.

# OPINION NO. 673

## Questions presented:

1. May a lawyer seek advice for the benefit of the lawyer's client from other lawyers in an online discussion group?
2. May the lawyer seek advice for the benefit of the lawyer's client through informal, direct consultation with a lawyer in a different firm?

# OPINION NO. 673

“The professional obligation most clearly implicated by informal consultation is the inquiring lawyer’s duty of confidentiality.”

# OPINION NO. 673

Rule 5.03. Two kinds of confidential client information:

“Privileged confidential information”

Protected by the lawyer-client privilege

“Unprivileged confidential information”

All other information relating to or furnished by a client acquired during the course of the representation

Generally, a lawyer may not reveal confidential client information without the client’s consent.



# OPINION NO. 673

Rule 1.05 contains some exceptions. For example, a lawyer may reveal unprivileged confidential information when:

“...impliedly authorized to do so in order to carry out the representation. [(d)(1)]

...the lawyer has reason to believe that it is necessary to do so in order to “carry out the representation effectively.” [(d)(2)]

# OPINION NO. 673

A lawyer may reveal a limited amount of unprivileged confidential information to other lawyers, without the client's consent, if the lawyer believes doing so will further the representation for the benefit of the client.

Reveal only the amount necessary

Use hypotheticals

Never reveal privileged information of identifiable client

Client can limit all disclosures

Consider a confidentiality agreement with responding lawyer

# OPINION NO. 673

## Conclusions:

The Rules do not categorically prohibit informal lawyer-to-lawyer consultation for the benefit of a client, whether on-line or in person.

Consultations should be limited to general or abstract inquiries. Hypotheticals should not identify, harm, embarrass, or prejudice the client.

Privileged information cannot be revealed absent client consent.

# OPINION NO. 680

Question presented:

May a lawyer use cloud-based systems for the creation of client-specific documents where confidential client information is stored or submitted to the cloud-based system?

# OPINION NO. 680

Cloud-based storage services are privately owned, stored on servers that may be located in other countries and accessed by employees of the storage company.

Again, the issue is one of confidentiality.

Rule 1.05 allows for disclosure of information to a lawyer's employees or agents.

# OPINION NO. 680

“Considering the present state of technology...a lawyer may use cloud-based electronic data systems and document preparation software for client confidential information.”

But, a lawyer must take reasonable precautions when using cloud-based technologies...

# OPINION NO. 680

## REASONABLE PRECAUTIONS

- Understand how cloud technology works;
- Review the terms of service;
- Learn about existing protections;
- Consider additional protections, including encryption;
- Track hacks; and
- Train staff about protections and considerations.

# OPINION NO. 680

But, beware Rule 1.01(a), which requires that a lawyer exhibit “competence” in representing clients.

“Competency” includes protecting client information – whether meta-data in emailed documents or confidential information stored in the cloud – from inadvertent disclosure.



D.C. BAR  
ETHICS OPINION  
NO. 375

What are the ethical issues involved when a client uses crowdfunding to pay for his or her legal fees?

It depends on whether the client or the lawyer controls the crowdfunding efforts...

If the client controls the crowdfunding and the lawyer is merely aware of it, the lawyer incurs no specific ethical obligations, but should counsel the client about the dangers of sharing confidential information.

# D.C. BAR ETHICS OPINION NO. 375

When the lawyer directs the crowdfunding, the lawyer must comply with the Rules governing a lawyer's receipt of money from third parties.

To accept payment of fees from a third party, a lawyer must:

- \* Have the client's consent;
- \* Ensure that there is no interference with the lawyer's professional judgment; and
- \* Maintain client confidences.

Further, a lawyer who directs the crowdfunding should be cognizant of ethical obligations regarding fee agreements, communications with donors, and the management of the funds raised.



# I STILL LOVE TECHNOLOGY...

