

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 95-398

October 27, 1995

## Access of Nonlawyers to a Lawyer's Data Base

*A lawyer who gives a computer maintenance company access to information in client files must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information. Should a significant breach of confidentiality occur, the lawyer may be obligated to disclose it to the client.*

The Committee has been asked to consider the ethical implications of an arrangement between a law firm and a computer maintenance company whereby the maintenance company would have access to the firm's clients' files. The law firm has all of its client files stored in a central computer, or network, and the maintenance company, in order to reduce maintenance costs, would be able to gain access to the network computer through a terminal located at the company's offices. This would enable the maintenance company to handle many computer problems without having to travel to the firm to make repairs and adjustments. As a consequence, when effecting repairs or correcting problems the computer maintenance company employees would be able to view all or portions of the files of the law firm's clients.

Rule 1.6 ("Confidentiality of Information") of the Model Rules of Professional Conduct (1983, as amended) states, in pertinent part, that a lawyer "shall not reveal information relating to the representation of a client unless the client consents after consultation...." Because client files inevitably contain the bulk of the information relating to most representations, their contents must be protected from disclosure under the confidentiality requirement imposed by Rule 1.6. Moreover, according to the terms of Model Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants"), a lawyer's obligation to maintain the confidentiality of client files extends to the activities of nonlawyers who are permitted by the lawyer to come into contact with client file information. Rule 5.3 enforces the lawyer's obligation of confidentiality by requiring oversight of nonlawyers by the lawyers with whom they work. Rule 5.3 reads as follows:

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;

- (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 subject situation--like many that arise in this era of rapidly developing technology--is not specifically mentioned in the Model Rules. The Committee is nevertheless aware that lawyers now use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing, and paper disposal. Such use of outside service providers that inevitably entails giving them access to client files involves a retention of nonlawyers that triggers the application of Rule 5.3.

Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he 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, e.g., Oregon State Bar Formal Opinion No. 1995-141 (Law firm contracting with recycling firm for disposal of office files must instruct firm about duties of confidentiality and secrecy.) In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.

The Committee also notes that, should a significant breach of confidentiality occur within a computer maintenance company, accounting firm, or the like, a lawyer may be obligated to disclose such breach to the client or clients whose information has been revealed. See Rule 1.4(b) ("Communication") ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.") Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).