

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. ____ (PO 2023-5)**

Posted for Comment November 27, 2023

QUESTIONS PRESENTED

Through an employment agreement between a law firm and its lawyers:

1. May the law firm impose a minimum departure notice period for lawyers who wish to depart the law firm?
2. May the law firm prohibit a departing lawyer from accessing and copying client information and files?
3. May the law firm prohibit a departing lawyer from notifying clients of the impending departure?
4. May the law firm prevent a lawyer from soliciting the law firm's clients after the lawyer has departed from the firm?

STATEMENT OF FACTS

A lawyer employed by a law firm plans to leave the firm. When the lawyer joined the firm, the firm insisted on a written employment agreement, to which the lawyer agreed. That contract contained provisions (1) requiring that the lawyer give at least 90 days' notice of departure; (2) prohibiting the lawyer, post-departure, from soliciting the firm's clients; and (3) prohibiting the lawyer from retaining client information or files upon departure, absent written direction of the client.

When the lawyer informed the firm of the impending departure, the firm did not agree to the lawyer's proposed departure announcement to clients whom the lawyer currently represents. Further, the firm directed the lawyer not to communicate with the firm's clients about the lawyer's departure. The firm refused to provide any written announcement to the lawyer's clients about the lawyer's impending departure.

The lawyer has given 30 days' notice of departure and disagrees with the employment agreement's 90-day minimum departure notice provision. The lawyer also plans to make copies of client files and retain client information regarding matters on which the lawyer has actively worked, including information relating to schedules and deadlines. Further, the lawyer disagrees that the firm may ethically prohibit the lawyer from soliciting clients of the firm after the lawyer has departed. The firm has invoked its employment agreement with the lawyer to prevent these actions.

DISCUSSION

Disputes between lawyers and law firms regarding lawyer departure have become more common in recent decades. Some law firms have attempted to address these issues by including restrictions in employment or partnership agreements. This opinion addresses the extent to which some of these contractual restrictions may run afoul of the Texas Disciplinary Rules of Professional Conduct.

Clients generally have the right to decide who will represent them. They are not chattel owned by lawyers and law firms. Clients are free to terminate lawyers and their law firms with or without cause, although a client's financial obligations concerning fees and the reimbursement of expenses may not be extinguished by termination. *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969); *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561, 563-65 (Tex. 2006). Rules 1.02 and 1.15 confirm the client's ultimate decision-making authority, both with respect to the conduct of the representation and the termination of the lawyer-client relationship.

Because the client's right to choose counsel is fundamental to our legal system, lawyers are typically free to leave law firms without some of the standard contractual restrictions, such as non-compete restrictions, that often constrain the subsequent employment of non-lawyer employees of private organizations. Thus, Rule 5.06(a) states, in pertinent part, that "[a] lawyer shall not participate in offering or making ... a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement conferring benefits upon retirement...". Comment 1 to Rule 5.06 notes that "[a]n agreement restricting the rights of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." Rule 5.06(a)'s prohibition applies both to direct covenants not to compete and indirect financial disincentives to competition. *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 743 (Tex. App.—Austin 1995, writ denied) (addressing similar provision in the former Texas Code of Professional Responsibility). Rule 5.06(a) and its supporting principles inform much of the following discussion.

When referring to "law firms" here, the Committee acknowledges that the Rules do not directly regulate the conduct of law firm entities. But the Rules do regulate the conduct of the lawyers who act on behalf of law firm entities, including lawyers who manage firms. A lawyer remains subject to the Rules whether acting individually or on behalf of the lawyer's firm.

Minimum Departure Notice Periods

Law firms have a legitimate basis for requiring reasonable notice of a lawyer's planned departure. Firms have an obligation to ensure that client matters transition smoothly. They may therefore require reasonable notice of departure to assure that files are organized and staffing adjusted to meet client needs. Nevertheless, contractual minimum-notice requirements must not conflict with Rule 5.06(a)'s prohibition against

restrictions on a lawyer's right to practice law. An excessive minimum notice period would have the effect of denying a lawyer's right to leave and establish a new practice on a timely basis. Further, excessive minimum notice periods may have the effect of forcing clients to remain with the firm longer than the clients prefer, especially where the clients plan to move their representation to the departing lawyer's new practice or do not wish to continue the current firm's representation.

The American Bar Association's Committee on Ethics and Professional Responsibility discussed the issue of minimum departure notices in Formal Opinion 489. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 489 (2019) ("Obligations Related to Notice When Lawyers Change Firms"). That opinion stated that such "[f]irm notification requirements, however, cannot be fixed or pre-determined in every instance, cannot restrict or interfere with a client's choice of counsel, and cannot hinder or unreasonably delay the diligent representation of a client." *Id.* at 7. While recognizing that law firms have an interest in the orderly transition of client matters, the opinion also noted that law firms must not use minimum departure notice requirements to restrict the departing lawyer's ability to represent a client during the notice period by displacing the departing lawyer by assigning a client's matter to other lawyers, "absent client direction or exigent circumstances requiring protection of clients' interests." *Id.* Further, the opinion stated that law firms may not deny a departing lawyer's access to firm resources, including email, voicemail, client files, and electronic court filing systems, when those resources are necessary for the lawyer to continue a client representation before departure. *Id.*

The Committee agrees with ABA Formal Opinion 489 concerning the prohibition of inflexible minimum departure notice requirements. Although a law firm may require a reasonable minimum departure notice, such requirements must not be set in stone. Departure notice requirements must be justifiable on a case-by-case basis and may not be enforced beyond the period necessary to ensure an orderly transition. Enforcement of a minimum departure notice requirement beyond a reasonable period serves only to prevent the departing lawyer from competing and unduly interferes with the rights of clients to join that lawyer at a new practice if they decide to do so. The circumstances will dictate whether a departure notice period is reasonable, but a period of two to four weeks is ordinarily defensible.

Prohibiting a Departing Lawyer from Copying Client Files and Information.

In Professional Ethics Committee Opinion 670 (March 2018), the Committee addressed whether a departing lawyer violated Rule 1.05 by copying the files of the lawyer's present and former clients who were not following the lawyer to the new firm. The Committee opined that the departing lawyer would not violate Rule 1.05 by making and retaining copies of these files:

Although the client's file belongs to the client, the Rules do not prohibit a lawyer from making and retaining a copy of some or all of a client's file, at a lawyer's expense, subject to a lawyer's obligations under Rule 1.05 to protect the client or former client's confidential information.

Opinion 670 only addressed a departing lawyer's obligations under Rule 1.05. The present question is whether and to what extent a law firm's partnership or employment agreement may prohibit or restrict a departing lawyer from copying client files or information.

The Committee believes a blanket prohibition against copying files or information regarding a departing lawyer's personal representation of clients violates Rule 5.06(a) ("[a] lawyer shall not participate in offering or making a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship ... "). A departing lawyer must be allowed to retain sufficient former client information to avoid conflicts of interests involving the lawyer's new practice (or subsequent practices with future firms or in various co-counsel arrangements) and, if no conflict exists, serve clients who have sought the lawyer's services. A primary aim of Rule 5.06 is to reduce barriers limiting the freedom of clients to choose a lawyer. Rule 5.06, comment 1. A contractual restriction that materially impedes a departing lawyer's ability to practice in compliance with the Rules is an impermissible restriction within the meaning of Rule 5.06(a).

Further, apart from Rule 5.06 concerns, departing lawyers may wish to retain a copy of a client's file if they face claims or allegations relating to the departing lawyer's representation of the client. Lawyers are permitted to reveal privileged and unprivileged client information under Rule 1.05(c)(6) and (7) and unprivileged client information under Rule 1.05(d)(2)(i) and (ii) to defend against certain claims and allegations. Lawyers may also wish to retain copies of a file if they have reason to believe it is necessary to do so to ensure appropriate maintenance of client materials. See Opinion 627 (April 2013) (discussing responsibilities of a law firm for preserving or disposing a former client's files after the lawyer who represented the former client leaves the firm).

The amount of client information that a departing lawyer must be allowed to copy and retain depends on the circumstances, including the nature and complexity of the matters. In some cases, "sufficient former client information" may simply be basic information about the parties, facts, and issues. In other cases, effective conflict avoidance may require more, including copying selected portions of a file. But a blanket prohibition on copying and retaining any client information or documents goes too far.

The Committee notes that other circumstances may prevent a law firm from allowing a departing lawyer to copy client files and information. For example, a court may restrict a departing lawyer's ability to access and retain copies of client files. But a law firm's employment agreement may not contain a blanket prohibition that prevents a departing lawyer from making and retaining copies of any client files or information on matters in which the lawyer has personally represented the client.

A departing lawyer who takes copies of client documents or information must continue to protect that confidential information from unauthorized disclosure or use. As the Committee stated in Opinion 670:

The lawyer must not share those client documents with anyone at the new firm who has not also personally represented the same client in the same matter unless expressly authorized by the client or permitted under the provisions of Rule 1.05. For example, paper copies of client documents must be stored in a secure fashion accessible by the departed lawyer only. Similarly, electronic copies must be accessible by the departed lawyer only and not stored in a manner accessible by others within the new firm, absent express client consent.

A Departing Lawyer's Notice Obligation to Clients

In the assumed facts, the departing lawyer seeks to notify clients that the lawyer will be departing the firm. The law firm refused to agree to a joint or unilateral client notification and directed the lawyer not to communicate with the firm's clients about the lawyer's impending departure.

Assuming that the departing lawyer is responsible for a client's representation or currently plays a principal role in the law firm's delivery of legal services to that client, the departing lawyer has a duty to ensure that a client is timely informed (a) that the lawyer is leaving the firm, (b) that the client has the ultimate right to decide who will continue the representation, and (c) whether there are any contractual or financial ramifications of the client's decision. See Rule 1.03 ("A lawyer shall keep a client reasonably informed about the status of a matter and . . . shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). A departing lawyer who participated minimally in a client's representation or in a secondary role has no such obligation, at least where one or more remaining lawyers in the firm have also "personally represented" the clients and have had principal responsibility for those matters. A departing lawyer also has no obligation to ensure that the lawyer's former clients are notified of the lawyer's departure (*i.e.*, where the client representations have been completed before the lawyer's departure).

Preferably, such pre-departure notices to clients should be sent as a joint communication by the departing lawyer and the law firm; however, the key is not the identity of the sending party or parties, but rather that the clients are timely, accurately, and adequately informed of a change in their representation. A departing lawyer who is aware that the law firm has properly notified the lawyer's clients about the departure has no obligation to provide a separate and redundant client notice.

If a departing lawyer knows that the firm refuses to provide a joint or unilateral notice to the lawyer's clients, then the lawyer must give a timely, accurate, and adequate notice to the client, regardless of contrary instructions from the law firm.

The departing lawyer and the firm have equal ethical obligations under Rule 8.04(a)(3) not to mislead clients about the lawyer's departure or the clients' options regarding current or future representations. Both the departing lawyer and the firm may have an obligation to correct any material misstatements or omissions in a notice sent by

the other. Given a departing lawyer's fiduciary duties to the law firm, a unilateral pre-departure client notice by a departing lawyer should not urge a client to terminate the relationship between the client and the law firm. See *Brewer & Prichard, P.C. v. Johnson*, 7 S.W.3d 862 (Tex. App.—Houston [1st Dist.] 1999), *rev'd*, 73 S.W.3d 193 (Tex. 2002) (associates, as agents of a firm, owe a fiduciary duty to the firm not to self-deal). A departure notice may, however, indicate whether the lawyer is willing to continue representation on current matters after the lawyer's departure.

Post-Departure Contact or Solicitation of Law Firm's Clients

In Opinion 505 (August 1994), the Committee examined a related provision of Rule 5.06 and found that "solicitation is part of the practice of law and therefore cannot be more restricted in a settlement agreement than it is restricted in the Rules and applicable law." Further, in Opinion 590 (December 2009), the Committee determined that a law firm offering membership in the firm to lawyers on the condition that they agree not to solicit the firm's clients after the lawyers' departure violates Rule 5.06.

In accordance with Opinions 505 and 590, a lawyer may not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to contact or solicit clients after termination of the relationship between the lawyer and the law firm, except an agreement concerning benefits upon retirement. A lawyer who does so, individually or on behalf of a law firm, violates Rule 5.06(a).

The Committee does not address whether a law firm agreement may prohibit *pre-departure* client solicitation by the departing lawyer. That question implicates partnership and agency law and is beyond the scope of the Rules.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct and notwithstanding any agreement to the contrary, a lawyer may not attempt to impose or enforce an unreasonable minimum departure notice period upon a departing lawyer, reassign a client matter to new attorneys (absent client direction or exigent circumstances required for the protection of the client's interest) in a way that prevents a departing lawyer from fulfilling ethical obligations owed to the client before departure, or deny a departing lawyer access to firm resources necessary to continue to represent clients competently and efficiently during the pre-departure period.

A law firm's employment agreement may not contain a blanket prohibition that prevents a departing lawyer from making and retaining copies of any client files or information on matters in which the lawyer has personally represented the client. A departing lawyer must be allowed to retain sufficient former client information to avoid conflicts of interests involving the lawyer's new practice (or subsequent practices with future firms or in various co-counsel arrangements) and, therefore, be available to serve clients where no conflict exists.

Assuming that a departing lawyer is responsible for a client's representation or currently plays a principal role in the law firm's delivery of legal services to that client, the departing lawyer has a duty to ensure that a client is timely informed (a) that the lawyer is leaving the firm, (b) that the client has the ultimate right to decide who will continue the representation, and (c) whether there are any contractual or financial ramifications of the client's decision. Preferably, the law firm and the lawyer will agree on a joint announcement regarding the lawyer's departure. When the firm and the lawyer have provided a joint notification, or when the firm has made a timely, accurate, and adequate unilateral announcement regarding the lawyer's departure, the lawyer is not obligated to provide a redundant announcement. A lawyer must provide notice of departure to a client, notwithstanding contrary instructions from the law firm, if the lawyer knows the law firm has not provided timely, accurate, and adequate notice. There may be instances in which both the firm and the lawyer make separate announcements, consistent with the clients' best interests and any legal and ethical obligations that the firm and the lawyer may have to the clients and to each other.

Finally, a lawyer may not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to solicit clients after termination of the relationship between the lawyer and the law firm, except an agreement concerning benefits upon retirement.