

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. ____ (PO 2023-6)**

Posted for Comment November 27, 2023

QUESTIONS PRESENTED

With respect to a lawyer who has departed a firm:

1. Must the lawyer enter into a new legal services agreement with clients who followed the departed lawyer to a new firm, or may the lawyer rely on the former law firm's legal services agreement as continuing to serve as the contract with those clients?
2. What disclosure obligations does that lawyer have in advising clients who propose to follow the lawyer to the new practice regarding the clients' financial obligations under the prior firm's legal services agreement?

STATEMENT OF FACTS

A lawyer has departed a law firm for a new practice. Some clients chose to leave the lawyer's former firm and follow the lawyer to the new practice. The lawyer believes that the prior firm's legal services agreement forms the basis for a client's relationship with the lawyer's new practice. Therefore, the lawyer does not ask these clients to enter into new legal services agreements with the new firm. Further, the lawyer concludes that there is no ethical obligation to advise the clients regarding their potential financial obligations under the prior firm's legal services agreement before the lawyer begins representing them in the lawyer's new practice.

DISCUSSION

The Need for a New Legal Services Agreement

Lawyer-client relationships are contractual in nature. Under Texas law, such contracts may be express or may be implied from the parties' actions. *See, e.g., Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 721 (Tex. App.—Eastland 2019, pet. denied) (holding there must be objective evidence that both parties intended to create an attorney–client relationship). Contingent fee agreements must be in writing and must be signed by both the client and the lawyer. Rule 1.04(d) of the Texas Disciplinary Rules of Professional Conduct; Tex. Gov't Code § 82.065(a). Preferably, other legal services agreements should be in writing as well, because “a written statement concerning the fee reduces the possibility of misunderstanding.” Rule 1.04, comment 2. Informing a client of

the basis or rate of the fee at the outset of the matter is “one facet of a lawyer's duty to the client.” *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 96 (Tex. 2001).

When a lawyer departs a firm for a new practice and a client chooses to terminate the prior firm and follow the lawyer to the new firm, the lawyer must enter into a new agreement with that client, consistent with the Rules and other Texas law. A departing lawyer may agree to represent a client on the same or similar terms as those in the client's agreement with the prior firm; however, the lawyer should make clear that the client is entering into a new agreement with a new practice and that any previous agreement is with the prior firm only. The lawyer should also make clear to the client that acceptance of the new agreement does not relieve the client from any obligations owed to the prior firm under the prior agreement.

There may also be instances where the client prefers that both the departed lawyer and the departed lawyer's prior firm jointly continue their representation of the client; however, that scenario does not relieve the departed lawyer of the obligation to reach an agreement with the client regarding the terms of their new contractual relationship.

The Committee cautions that if the departed lawyer proposes terms that differ from the terms of the client's agreement with the lawyer's prior firm, those differences may receive stricter scrutiny under common law. As the Committee noted in Opinion 688 (May 2020):

A lawyer should be mindful that courts “scrutinize with jealousy” all modifications to a client fee agreement during the representation. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). “There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney.” *Id.* See also Opinion 679 (September 2018) (renegotiating fee during representation) and ABA Formal Opinion 11-458 (2011) (“Changing Fee Arrangements During Representation”).

Although the proposed new agreement is a separate contract with a new firm, the client may consider the modifications to be changes made “during the representation” by the departing lawyer. If a court were to rule that the new agreement is tantamount to a mid-representation modification, *Archer v. Griffith's* presumption of unfairness would apply, and a lawyer seeking to enforce the agreement would have the burden of proving that the new agreement was “fair and reasonable” to the client.

Disclosure Obligations Regarding Ramifications of a Prior Legal Services Agreement

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. Opinion ____ (2023) [Referring to PO 2023-5, posted for comment November 27, 2023].

Thus, before contracting with clients who have proposed to follow the departed lawyer to a new firm, the lawyer must alert such clients to any continuing financial or other contractual obligations, known to the lawyer, that the clients may have to the prior law firm. See Opinion 546 (December 2002) ("In this connection, the associate would have to explain that the contingent fee agreement may be enforceable, depending on the circumstances, in which case the client would be obligated to the lawyer under that agreement in addition to whatever amount the departed associate might charge the client"); see *generally* Rule 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). Therefore, in contingent fee matters, this disclosure should include the possibility that, under Texas law, a client's termination of the prior firm without "cause" may obligate the client to the payment of separate contingent fees to two or more law firms in the event of a recovery. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 411 S.W.2d 841, 847 (Tex. 1969)). Although in many contingent fee matters the departing lawyer and the previous firm may be able to negotiate a contingent fee-sharing arrangement that is acceptable to the client and complies with Rule 1.04(f) and (g), if the parties cannot reach such an agreement, the departing lawyer should consider whether the proposed fee is unconscionable under Rule 1.04(a) due to the possibility that the client may be liable for two full contingent fees.

A departed lawyer who knows that the client may face double contingent fee liability, but who *knowingly* withholds that information in order to induce the client to transfer a matter from the prior firm to the lawyer's new firm, may also violate Rule 8.04(a)(3) ("A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who has departed from a law firm must enter into a new legal services agreement with a client who terminates the lawyer's prior firm and follows the lawyer to a new practice.

Before contracting with clients who propose to follow the departed lawyer to a new practice, the lawyer must alert the clients to any continuing financial or other contractual obligations known to the lawyer that the clients may have to the prior law firm.