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May 13, 2025

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Re: Petition for Adoption of Rule Regarding the Separation of a Counselor from a Practice

Dear Gentlemen,

Pursuant to Occupations Code Section 881.21, I formally petition the Texas State Board of Examiners of Professional Counselors (LPC Board) to consider the adoption of a rule that addresses the separation of a counselor from a practice and the ethical protection of a client's interests. There seems to be a great deal of disparity between persons regarding the "ownership" of client files upon the separation of a counselor from a group practice. ***This rule is proposed to create uniform steps for a counseling practice regarding the separation of a counselor from a practice.***

I am a resident of the State of Texas, a business entity in the State of Texas, and a provider licensed by the Texas Behavioral Health Executive Council (BHEC).

Reason for the Rule

Unfortunately, I hear stories of a great deal of tension between owners and departing counselors when the decision of a separation is made. This is, obviously, contrary to the best interest of our professional community, the client, and the statutory obligations of the counselor

regarding their obligation of an appropriate termination and avoidance of abandonment of the client.

Attorneys have ethical guidelines and physicians have statutes that guide them in the separation of a professional from a group practice. These guidelines are created in an effort toward fairness to the parties involved and, above all, in the best interest of the client or patient. Perhaps it is time that counselors also have similar rules or guidelines.

Guidelines for Physicians

The separation of a physician from a group practice by statute emphasizes notice to the affected clients.

TAC Rule 163.4 Physician Responsibilities when Leaving a Practice

(a)Upon retirement, termination of employment, or **leaving a medical practice**, a physician must provide patients reasonable notice to obtain copies of their records or arrange for the transfer of their medical records by:

(1) letter or email to each patient seen in the last two years by the departing physician; and

(2) posting a notice in a conspicuous location in the physician's/practice office and on the practice website at least 30 days prior to the termination, leaving, or sale or relocation of practice.

(b) The **notice must include**:

(1) the date of the termination, retirement, or departure;

(2) instructions as to how patients may obtain or transfer their medical records;

(3) the **name and location of new practice**, if any; and

(4) the name of another licensed physician, practice, or custodian if ownership of records is changing.

(c) If the physician's license is surrendered or revoked, the notice must be provided immediately in accordance with this section.

(d) n/a

(e) Responsibilities of Practice

(1) A physician, physician group, or practice must provide a list of patients seen by the departing physician in the last two years for the purposes of providing notice to patients.

(2) A departing physician's group or practice is not required to provide the requisite notice to patients.

(3) If the departing physician's group or practice agrees to provide the requisite notices to patients, they must do so in accordance with this section.

(4) **No physician remaining at the group or practice may prevent or interfere with the departing physician's duties to provide notices described by this section.** *(See statute at Exhibit A.)*

Guidelines for Attorneys

The employment of and separation of an attorney from a group firm also emphasizes fidelity to clients.

Non-Compete Clauses

The State Bar of Texas has detailed ethical guidelines for the treatment of clients. Texas Disciplinary Rules of Professional Conduct 5.06(a) regarding Restrictions on Right to Practice states the following:

A lawyer shall not participate in offering or making:
(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

The comment included after Rule 5.06 states the following:

1. *An 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.*

Hence, lawyers are not allowed to create or enter into non-compete agreements, as they are considered unethical by the State Bar of Texas in that it does not adequately protect the client. ***This ethical condition should be considered by the LPC Board as it protects the interests of the client.***

According to the Texas State Bar, the ethical obligation of the firm extends whether the lawyer is an independent contractor or an employee of the firm. See Ethics Opinion No. 656, May 2016, *(Exhibit B)* created by the Professional Ethics Committee for the State Bar of Texas. Even if the law firm will treat the lawyer as an independent contractor, it is still considered unethical to include a non-compete clause in their contract.

Future Fees from a Client

I occasionally get questions regarding the separation of a counselor from a practice and the contractual agreement for the payment of a percentage of the future fees earned from the client after the counselor leaves the practice. Opinion 590, December 2009 from the Professional Ethics Committee of the State Bar of Texas addresses the question: May a law firm seek to enter into an agreement with a member of the firm that would require, if the lawyer later

left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm? The answer is no. See *Opinion 590 attached as Exhibit C.*

Copy of Client File

Of particular contention is a copy of the client file when the counselor leaves a practice. Our ethical rules do not describe the disposition of a client file when the counselor leaves a practice, except to say that the client has a right to the file from the counselor that provided services for seven (7) years after termination. However, if the practice will not release the client file to a departing counselor, how is the counselor to have access to the client file for a request from the client?

The question presented in Ethics Opinion 670 (March 2018) was *"may a lawyer copy and retain client documents when departing a law firm?"* The answer is yes, a departing lawyer *"make and retain copies of former clients' documents generated in matters in which the lawyer personally represented the clients." See Opinion 670 at Exhibit D.*

Notice to Clients of the Separation

Ethics Opinion No. 699, February 2024 goes into great detail regarding the welfare of clients. *Clients generally have the right to decide who will represent them. They are not chattel owned by lawyers and law firms.*

Counselors leaving a group practice understandably want to let their clients know that they are leaving and the contact information for their new practice. Counseling practices have different policies on the contact with clients and former clients when departing a practice. In Ethics Opinion No. 699, February 2024 *(Exhibit E)* the responsibility of a lawyer is outlined in the following ways:

1. 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.
2. That the clients are timely, accurately, and adequately informed of a change in their representation.
3. Both the departing lawyer and the firm have ethical obligations not to mislead clients about the lawyer's departure or the clients' options regarding current or future representations.

Post-Departure Contact/Solicitation of Clients

Opinion No. 699, February 2024 makes clear that it is unethical to make it a condition of joining a firm that the lawyer agrees not to solicit the firm's clients after the lawyer's departure. By establishing these ethical guidelines, the State Bar of Texas makes clear that the welfare of the client is the paramount consideration when a lawyer leaves a practice.

Request for Rule Regarding Separation of Counselor from Practice

I am petitioning BHEC and the LPC Board to adopt rules regarding the ethical separation of a counselor from a practice and the ethical protection of a client's interests for future situations in which one counselor separates from a counseling practice. I request that the following additions be made to the Rules regarding the Texas State Board of Examiners of Professional Counselors:

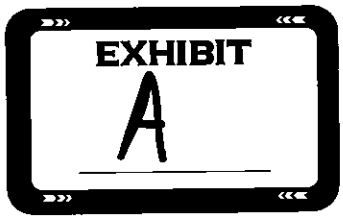
1. Following the effective date, entering into a non-compete clause with another counselor or associate will be unethical.
2. Entering into an agreement with a departing counselor for the payment of future fees from an existing client will be unethical.
3. It will be unethical to refuse provide the client file to the counselor who provided services to the client after they have departed the counseling practice.
4. That clients shall be informed regarding the separation of a client from a practice and given the option to either continue counseling with the departing counselor or the practice.
5. That it is unethical to make it a condition of joining a practice that the counselor agrees not to solicit the counselor's clients after the counselor's departure.

Thank you for your assistance and consideration in this matter.

Sincerely,

Laurel Clement

Attachments:
Exhibit A: 22 Texas Administrative Code 163.4
Exhibit B: Ethics Opinion No. 656, State Bar of Texas
Exhibit C: Ethics Opinion No. 590, State Bar of Texas
Exhibit D: Ethics Opinion No. 670, State Bar of Texas
Exhibit E: Ethics Opinion No. 699, State Bar of Texas



TEXAS ADMINISTRATIVE CODE: As in effect on 5/13/2025.

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 163. MEDICAL RECORDS

SUBCHAPTER A. GENERAL DOCUMENTATION PROVISIONS

§163.4. Physician Responsibilities when Leaving a Practice.

(a) Upon retirement, termination of employment, or leaving a medical practice, a physician must provide patients reasonable notice to obtain copies of their records or arrange for the transfer of their medical records by:

(1) letter or email to each patient seen in the last two years by the departing physician; and

(2) posting a notice in a conspicuous location in the physician's/practice office and on the practice website at least 30 days prior to the termination, leaving, or sale or relocation of practice.

(b) The notice must include:

(1) the date of the termination, retirement, or departure;

(2) instructions as to how patients may obtain or transfer their medical records;

(3) the name and location of new practice, if any; and

(4) the name of another licensed physician, practice, or custodian if ownership of records is changing.

(c) If the physician's license is surrendered or revoked, the notice must be provided immediately in accordance with this section.

(d) The following physicians are exempt from providing notice to patients:

(1) a locum tenens physician at a practice location for less than six months;

(2) a physician who only treated the patient in the following settings:

(A) a hospital, as defined under §157.051(6) of the Act;

(B) an emergency room;

(C) a birthing center; or

(D) an ambulatory surgery center; or

(3) a physician who only provided the following service:

(A) anesthesia;

(B) radiology; or

(C) pathology.

(e) Responsibilities of Practice

(1) A physician, physician group, or practice must provide a list of patients seen by the departing physician in the last two years for the purposes of providing notice to patients.

(2) A departing physician's group or practice is not required to provide the requisite notice to patients.

(3) If the departing physician's group or practice agrees to provide the requisite notices to patients, they must do so in accordance with this section.

(4) No physician remaining at the group or practice may prevent or interfere with the departing physician's duties to provide notices described by this section.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 656

May 2016

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct may a lawyer, as a part of becoming a member of a law firm, enter into an agreement with the law firm that provides that the lawyer is restricted or prohibited from providing legal services to clients of the law firm after the lawyer's work with the law firm ends?

STATEMENT OF FACTS

A Texas lawyer proposes to become a member of a Texas law firm by entering into an agreement with the law firm under the terms of which the lawyer will not be a partner or employee, for federal tax law purposes, of the law firm but will regularly work with lawyers in the firm to provide legal services to law firm clients in return for compensation paid by the firm to the lawyer. In all public communications, the law firm will refer to the lawyer as "of counsel" to the law firm, and the law firm will treat the lawyer as an independent contractor in the law firm's accounting and tax reporting with respect to the law firm's relationship with the lawyer. The proposed agreement between the law firm and the lawyer includes a provision that prohibits the lawyer, for a specified period after the termination of the relationship between the lawyer and the law firm, from providing legal services to law firm clients for whom the lawyer worked while he was of counsel to the law firm. The proposed agreement includes no provision concerning retirement benefits for the lawyer.

DISCUSSION

Professional Ethics Committee Opinion 577 (March 2007) addresses the circumstances under which a lawyer is considered to be in a law firm or a member of a law firm and the circumstances in which a lawyer is considered not to be in a law firm or not a member of a law firm. Pursuant to Opinion 577 and the fact that the lawyer in this case will be referred to by the law firm as "of counsel" to the firm, the proposed agreement between the firm and the lawyer is a contract pursuant to which the lawyer will become a member of the firm. Although the lawyer will not be an "employee" of the firm for federal tax law purposes, the relationship is a contract between the firm and the lawyer for the lawyer's "employment" as that term is used in Rule 5.06 of the Texas Disciplinary Rules of Professional Conduct. Accordingly, the proposed agreed limitation on the lawyer's law practice after the relationship terminates is contrary to the provision of Rule 5.06(a), which prohibits "a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement

concerning benefits upon retirement . . . ." *See* Opinion 590 (December 2009). Because the introductory language of Rule 5.06 provides that "[a] lawyer shall not participate in offering or making" an agreement prohibited by paragraph (a) of the Rule, both the law firm lawyers involved in offering or making the agreement and the lawyer proposing to enter into the agreement will be in violation of Rule 5.06(a) if the proposed agreement includes a restriction limiting the lawyer's law practice after the termination of the relationship between the lawyer and the law firm.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct a lawyer and a law firm may not enter into an agreement for the lawyer to serve as a member of the law firm if the agreement provides that the lawyer is restricted or prohibited from providing legal services to clients of the law firm after the lawyer's work with the law firm ends.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 590

December 2009

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a law firm seek to enter into an agreement with a member of the firm that would require, if the lawyer later left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm?

STATEMENT OF FACTS

A law firm offers membership in the firm to a lawyer conditioned upon the lawyer's signing an agreement providing that: (1) if the lawyer leaves the firm, the lawyer will not solicit the firm's clients to become the lawyer's clients; and (2) after the termination of the lawyer's membership in the firm, the lawyer will pay to the firm a percentage of all fees collected by the lawyer for services after the lawyer leaves the firm to clients that had been clients of the firm.

DISCUSSION

Rule 5.06(a) of the Texas Disciplinary Rules of Professional Conduct provides:

> "A lawyer shall not participate in offering or making:
> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . ."

Professional Ethics Committee Opinion 422 (November 1984) and Opinion 459 (October 1988), interpreting the disciplinary rules applicable to Texas lawyers before 1990, concluded that agreements very much like the agreement considered in this opinion violated the explicit prohibition of what is now Rule 5.06(a) against agreements that restrict an attorney's right to practice law. Opinion 422 specifically addressed an agreement prohibiting a lawyer, after leaving a firm, from soliciting clients of the firm for a period of time and held that such a prohibition was in violation of the predecessor of Rule 5.06(a). The conclusion that solicitation of clients, to the extent permitted by applicable disciplinary rules and other law, is an appropriate part of the practice of law was affirmed in Opinion 505 (August 1994) (prohibition of Rule 5.06(b) against agreements restricting a lawyer's right to practice law as part of the settlement of a suit or controversy applies to agreements limiting future solicitation of clients). With respect to agreements requiring a lawyer to pay to an employing law firm a portion of fees earned by a lawyer after leaving the firm, Opinion 459 (October 1988) specifically held that such an

agreement violated the predecessor of Rule 5.06(a) as a prohibited agreement restricting the right of a lawyer to practice law.

Thus, under the plain language of Rule 5.06(a) and under opinions interpreting the prior version of this Rule, the proposed agreement limiting solicitation of clients and requiring a sharing of fees with the former law firm is prohibited.

Furthermore, an agreement requiring a lawyer to pay to a law firm a percentage of fees received by the lawyer from former firm clients for the lawyer's legal services after the lawyer leaves the firm would also violate Rule 1.04(f), which provides in relevant part:

> "(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is:
>
> (i) in proportion to the professional services performed by each lawyer; or
>
> (ii) made between lawyers who assume joint responsibility for the representation; and
>
> (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:
>
> (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
>
> (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
>
> (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made . . . ."

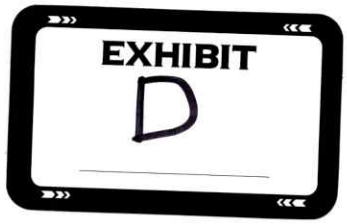
Because the proposed agreement between the lawyer and the law firm provides for payment by the lawyer to the firm of a specified percentage of fees collected from former firm clients without any requirement that the law firm perform any services or assume joint responsibility and without any requirement for client consent, the proposed agreement would clearly be in violation of Rule 1.04(f).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm may not seek to enter into an agreement with a member of the firm that would require, if the lawyer later left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 670

March 2018



QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer copy and retain client documents when departing a law firm?

STATEMENT OF FACTS

Just before leaving one law firm for another firm, a lawyer makes electronic and paper copies of client documents regarding matters in which the lawyer personally represented the client. The lawyer takes these copies to his new firm. The lawyer's former law firm later learns of the copying and retention of its client documents by the lawyer and demands their return from the lawyer and his new firm. The client whose documents were copied is not following the lawyer to the new firm and no continuing representation of the now former client by the lawyer or the new firm is contemplated. The lawyer wants to keep copies of his former client's documents for use as "forms" in his continuing practice.

DISCUSSION

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct requires that a lawyer protect a client's "confidential information," as broadly defined in subsection (a) of the Rule. Generally speaking, documents in a client's file, whether in paper form or stored electronically, belong to the client and are part of the client's confidential information. *See* Professional Ethics Committee Opinions 657 (May 2016) and 627 (April 2013). A lawyer's ability to use or reveal a client's confidential information is subject to the limited exceptions set out in Rule 1.05. Upon departing a firm, a lawyer who authored or had access to documents during his personal representation of a client may, at the lawyer's expense, make and retain copies of those documents, subject, however, to important obligations under the Rules.

Subject to the exceptions in Rule 1.05, the departing lawyer is obligated to protect the client's copied documents from unauthorized disclosure and use for as long as those copied documents exist in any form. 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.

There are reasons for permitting a lawyer to copy and retain a client's documents. For example, a lawyer may wish to be able to review a former client's documents in order to be able to answer questions posed to him after the conclusion of the representation.

A prior law firm's or former client's consent is not required for a lawyer to make and retain copies of a client's documents as long as the lawyer is reasonably responsive to the former client's requests for copies of documents retained by the lawyer. 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. *See* Opinions 657 (May 2016) and 627 (April 2013).

As for using a former client's documents as a form, a lawyer must delete all of the former client's confidential information before sharing such forms with anyone who is not authorized by the former client or the Rules to have access to the former client's confidential information. Furthermore, if a former client's documents were so customized that any use of them as a form, even after deleting client-specific information, would reveal the former client's confidential information, then such use would be improper.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who leaves a law firm may, at the lawyer's expense, make and retain copies of former clients' documents generated in matters in which the lawyer personally represented the clients. The lawyer must, however, comply with his obligation under the Rules to preserve the confidentiality of such documents by preventing the former clients' confidential information from being improperly used or revealed to others.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 699
February 2024

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 to 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 and the clients' interests are protected. Law firms may therefore require reasonable notice of departure to assure that files are organized, impending deadlines met, and staffing adjusted to meet client needs.

Similarly, lawyers voluntarily leaving a firm abruptly may jeopardize client interests; therefore, they have an ethical obligation to attempt to avoid materially jeopardizing or disadvantaging those client matters for which they are personally responsible by the timing or manner of their departure. *See, e.g.,* Rule 1.01(b) ("neglect" of legal matters). Although a legal services agreement is typically between a client and a law firm and not an individual lawyer in that firm, a lawyer handling a client matter has a lawyer-client relationship with that client and owes legal and ethical obligations to that client, including during the period leading up to the lawyer's voluntary departure.

Nevertheless, a law firm's contractual minimum departure 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 departure notice periods, beyond a period reasonably necessary to safeguard client interests, 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 fact-specific 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 specific circumstances will dictate whether a minimum 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. Similarly, with respect to client matters for which a departing lawyer is personally responsible, the lawyer must make reasonable efforts to avoid materially jeopardizing or disadvantaging those client matters by the timing or manner of their voluntary departure.

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.