

The Supreme Court of Texas
Professional Ethics Committee

Opinion Number 546
December 2002

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer and an associate employed by the lawyer to enter into an employment agreement providing for the continued representation of, and a division of fees collected from, a contingent fee client following the termination of the associate's employment?

STATEMENT OF FACTS

A lawyer engages in a trial practice that typically involves arrangements, reduced to written agreements, providing for the payment of fees contingent on the outcome of the matter. In the typical case, this contingent fee practice requires the lawyer to bear the cost of handling the particular case until its ultimate resolution. These contingent fee agreements are intended to create rights and obligations as between the lawyer and the clients.

To assist with the handling of contingent fee matters over the years, the lawyer has hired other lawyers as associates, none of whom has ever become the employing lawyer's partner. In the past, when such associates left the employ of the lawyer, issues have arisen concerning the rights of the employing lawyer's clients to select counsel of their own choosing, the rights of the employing lawyer to enforce contingent fee agreements with those clients, and the rights of departing associate lawyers to request, or respond to client requests, that cases be transferred to them.

In the past there have been circumstances in which the associate lawyer has developed a closer professional relationship with the client than the employing lawyer has developed. Under these circumstances, it is reasonable to expect that some clients might want their cases transferred to the departing associate if that associate has been handling their cases for a period of time. If a case is transferred to a departing associate, in the absence of an agreement with the employing lawyer, the employing lawyer believes that he has the right to seek enforcement of the contingent fee agreement if he has not been discharged by a particular client for good cause. The employing lawyer could seek to have the agreement enforced, but the employing lawyer would like to avoid the necessity of trying to enforce a contingent fee agreement under the circumstances here described if there is a permissible alternative. In this connection, the employing lawyer would like to develop a form of employment contract to be executed by associate lawyers upon their employment which acknowledges the possibility that a client may want a departing associate to continue handling the client's case upon termination of the associate's employment and which provides for an appropriate division of fees between the departing associate and the employing lawyer and for reimbursement of expenses theretofore incurred by the employing lawyer.

DISCUSSION

A written employment agreement attempting to define the relationship between the lawyer and the associate in these circumstances raises several issues under the Texas Disciplinary Rules of Professional Conduct (the "Rules").

An agreement that purports to prescribe which clients a lawyer may and may not represent could easily

violate Rule 5.06(a), which prohibits a lawyer's participation 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 concerning benefits upon retirement"

The predecessor to Rule 5.06(a), Disciplinary Rule 2-108(A) of the Texas Code of Professional Responsibility as in effect prior to 1990 (which contained similar but not identical language to the present Rule), is the subject of two prior ethics opinions, Opinion 422 (November 1984) and Opinion 459 (October 1988), which discuss prohibitions in agreements following termination of a lawyer's employment.

Opinion 422 concludes (correctly, the Committee believes) that it is not proper for an employment agreement to prohibit a departed associate from soliciting the law firm's current clients, provided the solicitation comports with other applicable rules, nor is it proper for such an agreement to prohibit a departed associate from accepting employment by any such clients. Nevertheless, as discussed below, the departed associate will have a significant disclosure obligation in connection with any such solicitation or employment.

Opinion 459 confirms (correctly, the Committee believes) that it is not proper for a law firm to have an employment agreement with an associate which provides that upon termination, the associate would be required to pay to the law firm a percentage of fees earned thereafter by the departed associate and paid by former clients of the law firm who engage the departed associate. Therefore, in the circumstances here described, if the departed associate continued to represent the lawyer's contingent fee client, the employment agreement could not contain a provision obligating the departed associate to pay the employing lawyer some or all of a fee earned by the departed associate after he left the firm of the employing lawyer.

On the other hand, the qualified prohibition in current Rule 1.04(f) against dividing fees between lawyers of different firms does not apply to payments to formerly associated lawyers pursuant to a separation agreement. See Rule 1.04(g), which provides that Rule 1.04(f) "does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement." In the circumstances here presented, therefore, an employment agreement could provide that the employing lawyer would pay to the departed associate a portion, calculated by a formula set forth in the employment agreement, of a contingent fee that was collected after the associate departed.

If the departing associate solicits clients who have contingent fee agreements with the lawyer, the departing associate is obligated to comply with the Rules applicable to the solicitation of clients and should explain to the client the entirety of the circumstances and the implications of the courses of action available to the client. See generally Rules 7.01-7.07 and Rule 1.03(b). With respect to the requirement that full disclosure must be made, Opinion 523 (October 1997) observed that "the relationship between an attorney and client is a fiduciary relationship that obligates an attorney to 'render a full and fair disclosure of facts material to the client's representation.' (Willis v. Maverick, 760 S.W. 2d 642, 645 (Tex. 1988))." 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. Whether a particular contingent fee contract is enforceable or can be terminated by the client depends on the circumstances there presented, all of which should be disclosed. See Rule 2.01. All legal fees charged to the client, however, must meet the requirements of Rule 1.04, including the requirement of Rule 1.04(a) that fees not be unconscionable.

An employment agreement should contemplate that any disputes over distribution of settlement or other funds might be subject to the requirement that disputed funds be held in trust by the lawyer or lawyers

receiving such funds pending the outcome of the dispute. See Rule 1.14. Disclosure of this circumstance should also be made.

This opinion does not address the propriety under the Rules of an agreement that includes, instead of a prohibition against solicitation of the employing lawyer's clients, a financial disincentive to competition by a departing lawyer with the employing lawyer. Nor does this opinion address the applicability to the circumstances presented of a number of other legal principles, including principles generally applicable to employer-employee relations.

CONCLUSION

It is permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer and an associate employed by the lawyer to enter into an employment agreement addressing the representation of clients and the treatment of fees collected after the employed associate lawyer leaves the employ of the employing lawyer. Such an agreement may not restrict, in any manner, a departed associate's right to practice law, for example, by restricting the departed associate's right to solicit the employing lawyer's clients or by requiring the departed associate to pay to the employing lawyer a portion of fees earned by the departed associate after departure.

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