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:
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> (1) the division is:
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> (i) in proportion to the professional services performed by each lawyer; or
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> (ii) made between lawyers who assume joint responsibility for the representation; and
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> (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:
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> (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
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> (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
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> (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.