

**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.