

**PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS**

**Opinion No. 684  
August 2019**

**QUESTION PRESENTED**

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer, who is departing a law firm, take the firm's only copy of client files in which the lawyer personally represented the clients and delete client files, documents, or data from the firm's electronic document repository and devices without approval of the law firm?

**STATEMENT OF FACTS**

Various clients engaged a law firm, which assigned a lawyer to handle the client representations. Later, the assigned lawyer decided to leave the firm. The legal services agreements provided that the clients engaged the law firm for representation and did not identify the departing lawyer as their sole counsel or grant that lawyer the authority to determine the disposition of the firm's client files, documents, and data.

While departing the firm, the lawyer took various client files upon which the lawyer had worked, including the firm's only copies of its paper files and copies of client files, documents, and data maintained in the firm's electronic document repository and on its devices. The lawyer then deleted all the electronic client files, documents, and data from the law firm's electronic document repository and devices. Thus, the law firm was left without any client files, documents, or data.

The lawyer refused to provide copies of the client's paper files or its electronic files, documents, or data to the law firm and refused to identify the client information that was taken or deleted. The lawyer refused to provide letters from the clients to the law firm authorizing transfer of the files. But the lawyer did indicate that copies of the client files would be provided to the affected clients upon those clients' direct requests to the lawyer.

**DISCUSSION**

Professional Ethics Committee Opinion 670 (March 2018) addressed a similar scenario in which a departing lawyer made electronic and paper copies of client documents regarding matters in which the lawyer personally represented the client, even though the departing lawyer was not going to represent the client at the lawyer's new firm. The departing lawyer's former law firm learned of the copying and retention of its client documents by the lawyer and demanded their return.

The Committee concluded that a lawyer who leaves a law firm may, at the lawyer's expense, make and retain copies of his former clients' documents that were generated in matters in which the lawyer personally represented the clients, subject to the lawyer's confidentiality obligations under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. *Id.* The Committee also concluded that, in the absence of the client's instructions to the contrary, the consent of the lawyer's prior law firm or former client was not required for a departing lawyer to make and retain copies of a client's documents if the lawyer is reasonably responsive to the former client's request for copies of documents retained by the lawyer. *Id.* See also Opinion 657 (May 2016) and Opinion 627 (April 2013).

The question presented here is slightly different from the question in Opinion 670. Here, the departing lawyer took the only copy of certain client files, documents, and data from his former law firm and deleted client files, documents, and data from the firm's electronic document repository and its devices without the firm's permission and with no client directive that authorized the departing lawyer to do so.

Although under Opinion 670 the departing lawyer may make copies of client documents for clients whom the lawyer personally represented at the former firm (and at the lawyer's expense), that option does not authorize the lawyer to take the firm's only copy of tangible client files and delete client files, documents, and data from the firm's electronic document repository and devices. The affected clients had engaged the law firm and not the departing lawyer as their counsel. Therefore, the firm may retain a copy of all client files, including those files, documents, and data stored in the law firm's electronic document repository and on its devices.

Even if the affected clients had authorized the departing lawyer to take the firm's only tangible copy of their client files and delete their electronically stored files, documents, and data from the firm's electronic repositories and devices, the firm may retain a copy of the client files, documents, and data, notwithstanding the client's instructions to the contrary. Although a client has a right to demand its "original" file from its counsel, nothing in the Rules prohibits a firm from retaining a copy of the client's file, at the firm's expense, subject to the firm's continuing duty of confidentiality under Rule 1.05 and its exceptions. Absent an agreement with the law firm consistent with applicable law and rules, a client does not have the right to demand that a firm delete or destroy all of its copies of the client file, documents, or data; therefore, a lawyer departing a law firm cannot rely on any alleged client instruction that the client's current or former law firm retain nothing from the representation.

Furthermore, under Rule 1.14(a), a lawyer is required to retain certain client information, such as complete records of its client trust accounts and other property, for at least five years after the termination of the representation. See Opinion 627 for a discussion of "other property" under Rule 1.14. Additionally, exceptions to confidentiality under Rule 1.05(c) and (d) permit a lawyer to use or disclose client confidential information under certain circumstances after the representation has concluded. For example, the former firm may need to possess a copy of the client file and client data to answer future questions by the client about the representation, to respond to court orders or as required by other law,

and to enforce a claim or establish a defense in a current or subsequent controversy between the law firm and the client. Additionally, Rule 1.15(d) provides:

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.”

A former firm's or former lawyer's retention of a copy of client documents and information is not prejudicial to the client if the client is provided with the same documents and information upon the client's request.

The Committee expresses no opinion on whether the departing lawyer's conduct violated any criminal laws as such a determination is beyond the jurisdiction of this Committee. But, if the departing lawyer has committed theft (or some other serious crime or criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) in taking the firm's only copy of tangible client files or in deleting the files in its electronic document repository and on its devices, those acts are prohibited by Rule 8.04(a)(2). Furthermore, under Rule 8.04(a)(3), a lawyer's actions may indicate dishonesty and deceit in how and why the lawyer removes or deletes the client information from the firm, including an intent to conceal the contents of those former client files, documents, and data (and a possible breach of a legal duty) from the firm or the affected clients.

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer departing a law firm may not remove the firm's only tangible copy of client files or delete client files, documents, and data from the firm's electronic document repositories and devices without the firm's consent.