Tennessee Bar Association
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Practicing Law in "Covidland"

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A brief review of Engagement Letters:
What should be in one, what should be left out, and why you need one.

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Everyone likes a road map. A concise statement of where things are located, and where do you go next. A good engagement letter is a road map of the interaction between a lawyer and their client. This presentation will review the terms that should be in an engagement letter, and discuss a few recent developments in the law surrounding the written agreement between a lawyer and their client.

In Tennessee, a *written* engagement letter setting forth the rules of the legal representation is generally not mandatory for health-law matters. Tennessee Rule of Professional Conduct (TRPC) 1.5(b) states:

> *The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.*

Tennessee requires a written agreement when the attorney's fee is contingent (as do all the States). Otherwise, a writing is suggested but not required. Model Rule of Professional Conduct 1.5 – adopted in some form by every state – requires contingent fee agreements be set forth in writing. Many states also require a written engagement letter with a specific terms document in divorce or family-law representation, and some require a written agreement in criminal representation. But general corporate and litigation representation does not require a written agreement. However, I believe that the better practice is to communicate the terms of engagement in writing.

As of this writing, only New York and Connecticut require a written engagement letter for most attorney-client relationships, and Massachusetts has pretty much followed that lead. New York adopted 22 N.Y.C.R.R. § 1215.1 in 2002, which mandates a written letter of engagement before commencing legal representation. In 2009, a variant of the engagement letter rule was incorporated in the New York Rules of Professional Conduct, Rule I .5(b). In 2016, Connecticut adopted a restrictive version of MRPC 1.5 mandating written agreements in virtually all legal representation. Massachusetts has a broader rule, but the net effect is generally thought to require a written engagement letter (Mass. Rule of Professional Conduct 1.5).

What should a good engagement letter contain?

- Identify the client(s). Specify individuals by name and if appropriate, by role or responsibility. If possible, identify all corporate entities represented.
  - If an entity is involved in the matter but is not represented by the firm, that should be noted in the engagement letter.
  - Engagement letters may need to be modified if new persons or entities are subsequently represented in the engagement, or are not represented.

- Define the matters in which the firm will represent the client(s), the scope of representation and the fees agreed upon.
  - Any specific fee-related requirements (due dates, rolling or replenishing fees, caps, etc.) should be set forth in detail.
  - The scope of representation is critical and should be specifically addressed. Identify those matters the firm has agreed to handle, and if possible, additional legal matters the firm will not handle.

- List the attorneys who will be working on the client's matters and include their respective billing rates.

- If agreed upon, and if allowed under your state's law, set forth provisions requiring disputes arising in connection with the engagement be subject to mediation or arbitration. If required by state law (for instance, as in the District of Columbia), set forth requirements that fee disputes be subject to arbitration/mediation.

- Disclose identified conflicts of interest and if appropriate, include a waiver.
  - Discuss any apparent conflicts which client and counsel believe do not pose a conflict but which may benefit from documentation.
  - The detailed requirements of an informed waiver which the client grants to counsel prior to commencing representation (commonly called an "advance waiver") are beyond the scope of this discussion. In essence, an advance waiver may be included in an engagement letter and later enforced against a claim of conflict of interest if the waiver is specific and the client is fully informed of the consequences of delivering the waiver. The sophistication of the client in dealing with lawyers, the nature of the conflict and the client's ability to make an informed, independent decision all are factors considered by courts in upholding or voiding an advance waiver.

- Specify how the parties will communicate. Which persons at the client will receive communications from the lawyer? Does the client require specific periodic status reports?

- How and when will the engagement end (if foreseeable). What are the parties' respective obligations regarding files? Are there important future obligations the client may have in connection with the matter that will not be performed or monitored by the law firm?

Two areas of some controversy:

- Should the letter specify a client's limiting instructions? If a client tells a lawyer not to do something that the lawyer believes is ethical and could enhance a favorable outcome for the client, the lawyer should document those instructions, preferably in a writing signed by the client.
- Should the lawyer require a statement of "good behavior" from a client? Some lawyers advocate including client responsibilities during the representation in the engagement letter. These are affirmative covenants that the client agrees to at the start of the representation. The client should agree that during the engagement, he or she or it will (1) be truthful and provide all available relevant information, (2) preserve evidence, including electronically stored information, (3) cooperate and be available when needed, (4) update changes in contact information promptly, and (5) inform the lawyer of any changes in circumstances or any newly-discovered information that could affect the representation.
    - While these "covenants" may prove useful to the attorney in defending a subsequent claim of malpractice, remember that the entire attorney-client relationship is governed by the applicable ethics rules. For example, a client's failure to adhere to a covenant of cooperation may not in and of itself be sufficient to terminate the legal representation under the applicable rules.
    - Does this sort of term in an agreement negatively color the engagement?

Recent case law:

Most of the judicial construction of the law of retainer letters involves the New York mandatory rule, as its been around almost 20 years and has been construed in cases involving alleged lawyer malpractice, fee disputes or both.

Arent Fox LLP v JDN AA, LLC 2018 NY Slip Op 32877(U) November 8, 2018 Supreme Court, New York County Docket Number: 151654/2018 Judge: Joel M. Cohen (retrieved 10-1-2020, https://www.leagle.com/decision/innyco20181120357#)

In this well-reasoned case, the judge grants a dismissal of the law firm's claims for fees against two of the three named defendant corporations, finding that the multiple engagement letters entered into by the parties failed to include the operating subsidiaries as clients of the firms (there are two law firms involved in the case, Arent Fox and a firm which the key partner had been a member of. Only Arent Fox is suing, however). The scope of engagement is not well delineated, and the Court finds that the two subsidiary/affiliate entities are not included in the scope specified in the letter. The case provides a review of the application of the "Mandatory Engagement Letter" rule and whether a law firm's failure to adhere to either the rule or the terms of the engagement letter is a bar to collecting legal fees.

In *Cohen v. Jaffe, Raitt, Heuer and Weiss, P.C.*, 768 F. App 440 (6th Cir. Apr. 5, 2019) (retrieved 10-1-2020, https://law.justia.com/cases/federal/appellate-courts/ca6/18-1395/18-1395-2019-04-05.html), the Sixth Circuit finds that a law firm is liable for malpractice to a related entity in an engagement. At trial, the judge instructed the jury that the law firm could not have

been liable for legal malpractice unless the firm had an attorney-client relationship with an entity related to the firm's acknowledged client. The firm presented evidence that it did not even know the related entity existed. The plaintiffs presented evidence that the "missing entity" was a vital part of the engagement and that the law firm represented – and owed a duty of care – to that entity. The jury sided with the clients. and found the law firm liable for $1.7 million in damages.

On appeal, the Sixth Circuit upheld the verdict, noting as key evidence that the firm had "never sent a written engagement letter setting out exactly whom the firm represented." The reviewing court notes that absent a clear road map of the engagement, the jury rightly decided that the law firm represented the clients and their affiliated entities. The case is a clear statement of the wisdom of lawyers delivering a comprehensive engagement letter even when the relevant ethics rules do not mandate one.

When it's all over: Non-engagement and disengagement letters.

Non-engagement and disengagement letters can also help a lawyer reduce or defend liability claims. A non-engagement letter – a statement by a lawyer to a client that the lawyer is not being retained to handle a specific matter, or a statement by the lawyer to a non-client that he or she is not representing that person or entity - can help eliminate a later claim of an attorney-client relationship. Best practices dictate that a lawyer should send a non-engagement letter when representation is declined.

Similarly, a letter sent by a lawyer at the end of a matter may provide protection against claims of abandonment or malpractice. The letter should state that the matter is concluded and the outcome of the legal representation. If there are follow-up items, responsibility for those matters should be outlined in the letter.

One major attorney malpractice insurer suggests that with the sending of a "non-engagement letter", a careful lawyer should take these steps:

- Enter the matter and prospective client into the law firm database for future conflict searches.
- Send non-engagement letters by Certified Mail, return receipt requested or other proof of delivery
- Tailor the letter specifically to matter being declined
- Reference Statute of limitations dates and other deadlines
- Do not provide an opinion about the case, or the likely result.
- Refer the non-client to other counsel or provide the name and number of the City, County or State Bar Association.

The same source recommends that a disengagement (or termination) letter should always be sent to a client when attempting to remove yourself from a case after it has been accepted. Reasons to disengage from a case range from a potential conflict to unpaid legal bills. The letter should:

- Be sent by Certified Mail, return receipt requested or with other proof of delivery
- Strongly point out the firm no longer represents the client in the matter as of that particular time.
- Set forth in detail any upcoming deadlines, statute of limitation dates or other future obligations (this is clearly required in discontinuing a litigation matter, but corporate matters too should be reviewed and key dates pointed out to the client).
- Recommend that the client seek advice of other counsel and refer the client to another lawyer or to referral services.
- Address unpaid fees and expenses
- Address the preservation/retention of evidence (including electronic media)
- Address the disposition of the attorney's file.

UPDATES IN ETHICS: What do you need to know from the past year?

1. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Opinion 2020-300, Ethics Obligations for Lawyers Working Remotely (Apr. 10, 2020).

"When Pennsylvania Governor Tom Wolf ordered all 'non-essential businesses,' including law firms to close their offices during the COVID-19 pandemic, and also ordered all persons residing in the state to stay at home and leave only under limited circumstances, many attorneys and their staff were forced to work from home for the first time. In many cases, attorneys and their staff were not prepared to work remotely from a home office, and numerous questions arose concerning their ethical obligations."

"Attorneys and staff working remotely must consider the security and confidentiality of their client data, including the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged."

"This Opinion . . . affirms and adopts the conclusions of the American Bar Association Standing Committee on Ethics and Professional Responsibility in Formal Opinion 477R (May 22, 2017) that:

> A lawyer generally may transmit information relating to the representation of a client over the [I]nternet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."

"At a minimum, when working remotely, attorneys and their staff have an obligation under the Rules of Professional Conduct to take reasonable precautions to assure that:

- All communications, including telephone calls, text messages, email, and video conferencing are conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information;
- Information transmitted through the Internet is done in a manner that ensures the confidentiality of client communications and other sensitive data;
- Their remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form;
- Proper procedures are used to secure and backup confidential data stored on electronic devices and in the cloud;
- Any remotely working staff are educated about and have the resources to make their work compliant with the Rules of Professional Conduct; and,
- Appropriate forms of data security are used."

"While it is beyond the scope of this Opinion to make specific recommendations, the Rules and applicable Comments highlight that the need to maintain confidentiality is crucial to preservation of the attorney-client relationship, and that attorneys working remotely must take appropriate measures to protect confidential electronic communications. While the measures necessary to do so will vary, common considerations include:

- Specifying how and where data created remotely will be stored and, if remotely, how the data will be backed up;
- Requiring the encryption or use of other security to assure that information sent by electronic mail are protected from unauthorized disclosure;
- Using firewalls, anti-virus and anti-malware software, and other similar products to prevent the loss or corruption of data;
- Limiting the information that may be handled remotely, as well as specifying which persons may use the information;
- Verifying the identity of individuals who access a firm's data from remote locations;
- Implementing a written work-from-home protocol to specify how to safeguard confidential business and personal information;
- Requiring the use of a Virtual Private Network or similar connection to access a firm's data;
- Requiring the use of two-factor authentication or similar safeguards;
- Supplying or requiring employees to use secure and encrypted laptops;
- Saving data permanently only on the office network, not personal devices, and if saved on personal devices, taking reasonable precautions to protect such information;
- Obtaining a written agreement from every employee that they will comply with the firm's data privacy, security, and confidentiality policies;
- Encrypting electronic records containing confidential data, including backups;
- Prohibiting the use of smart devices such as those offered by Amazon Alexa and Google voice assistants in locations where client-related conversations may occur;
- Requiring employees to have client-related conversations in locations where they cannot be overheard by other persons who are not authorized to hear this information; and,
- Taking other reasonable measures to assure that all confidential data are protected."

2. Lawyers Should Be Cognizant of Their Obligation to Act with Civility

"In 2000, the Pennsylvania Supreme Court adopted the Code of Civility, which applies to all judges and lawyers in Pennsylvania. The Code is intended to remind lawyers of their obligation to treat the courts and their adversaries with courtesy and respect. During crises, the importance of the Code of Civility, and the need to comply with it, are of paramount importance.

"During the COVID-19 pandemic, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a statement, which this Opinion adopts, including: In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. Accordingly, we remind lawyers that the Guidelines for Civility in Litigation ... require that lawyers grant reasonable requests for extensions and other accommodations.

"Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations. Consistent with California Rule of Professional Conduct 1.2(a), lawyers should also consult with their clients to seek authorization to extend such extensions or to stipulate to continuances in instances where the clients' authorization or consent may be required.

"While we expect further guidance from the court system will be forthcoming, lawyers must do their best to help mitigate stress and health risk to litigants, counsel and court personnel. Any sharp practices that increase risk or which seek to take advantage of the current health crisis must be avoided in every instance.

"This Opinion agrees with the Los Angeles County Bar Association's statement and urges lawyers to comply with Pennsylvania's Code of Civility, and not take unfair advantage of any public health and safety crises."

Full opinion available at http://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2020-300.pdf.

3. ABA Formal Opinion 492, Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information (June 9, 2020).

A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship. Model Rule 1.18 governs whether the consultation limits the lawyer or the lawyer's firm from accepting a new client whose interests are materially adverse to the prospective client in a matter that is the same or substantially related to the subject of the consultation, even when no client-lawyer relationship results from the consultation. Under Model Rule 1.18 a lawyer is prohibited from accepting a new matter if the lawyer received information from the prospective client that could be significantly harmful to the prior prospective client in the new matter. Whether information learned by the lawyer could be significantly harmful is a fact-based inquiry depending on a variety of circumstances including the length of the consultation and the nature of the topics discussed. The inquiry does not require the prior prospective client to reveal confidential information. Further, even if the lawyer learned information that could be significantly harmful to the prior prospective client in the new matter, the lawyer's firm can accept the new matter if the lawyer is screened from the new matter or the prospective client provides informed consent, as set forth in Model Rule 1.18(d)(1) and (2).

4. Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 531, In Litigation What Are a Lawyer's Ethical Obligations When Offered Evidence Retained by a Former Employee of the Opposing Party Who Reveals That Relevant Documents Have Been Concealed From Production? (July 24, 2019).

"When a lawyer ('Lawyer') is offered access, by a witness who is an unrepresented former employee of the opposing party ('Witness'), to potential documentary evidence and is informed that it will show the adverse party's failure to comply with discovery obligations, the lawyer is faced with competing public policy considerations and difficult ethical and legal issues.

"The first question the lawyer must address is whether Witness is lawfully in possession of the data. Lawyer must carefully evaluate the facts and determine not only whether possession of the data is proper, but also whether lawyer may lawfully and ethically review it. Lawyer is prohibited from facilitating, taking advantage of, engaging in, advising or assisting others to engage in criminal conduct. If Lawyer is not competent to make this evaluation, Lawyer should consult with a practitioner who is competent in criminal law. If Lawyer concludes that Witness's acquisition or possession of the evidence was a crime and Lawyer has taken possession of it, Lawyer may be ethically required to turn the evidence over to the court or the appropriate authorities.

"The second question the lawyer must address is whether the data includes writings the lawyer knows or reasonably should know are privileged or subject to a claim of work product. Lawyer is prohibited from accessing the content of privileged communications between the adverse party and opposing counsel. Analogizing to the rule and applicable case law governing inadvertently produced documents subject to the attorney-client privilege or work product protection, once it is reasonably apparent to the Lawyer that privileged documents of another party or documents entitled to work product protection have been obtained, Lawyer will be ethically obligated to give notice to the privilege holder, the owner of the work product or their counsel, and discontinue review of the material beyond the extent necessary to ascertain that they are entitled to such protections as provided by the rules.

"Because Witness is an unrepresented person and not a current employee of the adverse party, Lawyer is not prohibited from communicating with Witness, but may not state or imply that Lawyer is disinterested. Lawyer also may not seek to obtain privileged or other confidential information from Witness that Lawyer knows or reasonably should know Witness is not entitled to reveal without violating a duty to another, or which Lawyer is not otherwise entitled to receive.

"If receiving access to the evidence from Witness is a significant development or leads to any relevant limitation on actions the client expects Lawyer to take, Lawyer must reasonably consult with the client regarding the means by which to accomplish the client's objectives, including keeping the client reasonably informed and advising the client regarding any limitations imposed on Lawyer's conduct by the Rules of Professional Conduct and the State Bar Act. Such communication should include discussion of the significance of this development and the potential consequences of the client's proposed course of action. Lawyer may not participate in, advise or assist Employee or the client to gain unlawful access of information that is confidential, privileged or subject to work product protection."

5. In re Byrd, Board Release of Information. (Unauthorized Practice of Law, Rule 5.5)

On December 26, 2019, Eric Jason Byrd, an attorney whose admission to practice law in Tennessee is pending, was publicly censured.

"Mr. Byrd began working remotely for a Tennessee law firm in late 2018. In January 2019, Mr. Byrd moved to Nashville and began working in the law firm's Nashville office. Mr. Byrd did not file an application for comity admission to Tennessee until May 16, 2019. Mr. Byrd's biographical information on his law firm's web page did not indicate that he was not yet licensed to practice

law in Tennessee. The letterhead used by the firm also did not accurately reflect that Mr. Byrd was not yet licensed in Tennessee from January until June 2019."

By these acts, Mr. Byrd has violated Rules of Professional Conduct 5.5 (unauthorized practice of law) and 7.1 (communication concerning a lawyer's services).

6. ABA Formal Opinion 489, Obligations Related to Notice When Lawyers Change Firms (Dec. 4, 2019).

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure. The period of time should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be so rigid that they restrict or interfere with a client's choice of counsel or the client's choice of when to transition a matter. Firms also cannot restrict a lawyer's ability to represent a client competently during such notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. The departing lawyer may be required, pre- or post-departure, to assist the firm in assembling files, transitioning matters that remain with the firm, or in the billings of pre-departure matters.

7. California State Bar Ethics Opinion 2020-201, What Ethical Obligations Arise When a Lawyer Departs From Her Law Firm? (2020).

"A lawyer is leaving her law firm ('Law Firm') and transitioning her practice to a new firm ('New Firm'). Prior to making this transition, the lawyer ('Lawyer' or 'Departing Lawyer') wants to know what ethical obligations arise for her and the Law Firm as a result of her departure."

"The guiding ethical principles governing any attorney departure are the protection of the client's best interests and the client's right to the counsel of its choice. (See Cal. State Bar Formal Opn. No. 1985-86 ['the interests of the clients must prevail over all competing considerations ... if the practitioner's withdrawal from the firm is to be accomplished in a manner consistent with professional responsibility']; ABA Formal Opn. No. 99-414 [' A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him.'].) Thus, the ethical obligations triggered when a lawyer leaves her law firm should be viewed through the lens of these client-centered directives."

"Because clients have the freedom to discharge their lawyer at will and hire another one, they do not 'belong' either to the law firm or the lawyers that are providing the legal services. . . . As the California Supreme Court has made clear, however, clients are not the property of any law firm or

lawyer. In a competitive legal marketplace, law firms and lawyers must earn each client's continued loyalty through outstanding service, quality of representation and an agreement regarding the value and cost of legal services."

"Departing Lawyer and Law Firm each have ethical obligations to all clients who will be materially affected by the departure and/or whose active matters on which Departing Lawyer is currently working. The ethical obligations are the same whether Departing Lawyer is a partner or shareholder, a non-equity partner, an associate, or some other category of lawyer such as one designated as 'Of Counsel.' 'All attorneys in a law firm owe duties - including ethical duties - to each of the firm's clients.' (See, Cal. State Bar Formal Opn. No. 2014-190 ['When a client retains a law firm, the client's relationship generally extends to all attorneys in the firm']. . . ."

"During the transition process, Departing Lawyer and Law Firm also may have legal obligations to one another, which could include fiduciary duties and contractual obligations. To the extent possible, when there is a conflict between a lawyer's and a law firm's ethical obligations to a client and a lawyer's and a law firm's obligations to each other, the former should prevail. For example, Law Firm should not attempt to enforce contractual obligations on Departing Lawyer that would prevent Departing Lawyer from complying with ethical obligations to clients or interfere with the client's right to choice of counsel."

"California Rule of Professional Conduct, rule 1.4(a)(3), states:

> A lawyer shall ... keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed ...

"The departure of a lawyer is a 'significant development' with respect to current clients of the law firm for whom the lawyer is providing meaningful legal services, as discussed below in subsection A. Thus, under rule 1.4(a)(3), Departing Lawyer and Law Firm must inform certain clients about Lawyer's departure as soon as reasonably practical to allow clients to make an informed choice in counsel and to provide for a smooth transition to avoid prejudice to clients. . . . (citing to *Jewel v. Boxer, supra,* (1984) 156 Cal.App.3d 171 [203 Cal.Rptr. 13] and *Little v. Caldwell, supra*, (1894) 101 Cal. 553. . . ."

"Departing Lawyer does not violate rule 7.3 by notifying current clients of her departure from Law Firm. Such notification does not constitute an impermissible solicitation and, as discussed above, Departing Lawyer is ethically obligated to communicate this information to current clients."

"Notice is only required as to clients whose matter(s) Departing Lawyer is responsible for, for whom she plays a principal role in Law Firm's delivery of legal services, and any client Departing Lawyer reasonably believes may wish to transfer its files to Departing Lawyer at New Firm. (ABA Formal Opn. No. 99-414)"

"The general test of whether a client should be informed of a lawyer's departure is to consider it from the client's point of view, since communications should always be 'governed by the overall principle of what is in the best interest of the client.' (See *Jewel* and Cal. State Bar Formal Opn.

No. 1985-86.) If the client was asked who its attorney is, or attorneys are, Departing Lawyer would be one of the principal attorneys identified by the client. . . ."

"On the other hand, if Departing Lawyer had limited involvement in the client's matter, or the client has had little to no communication with Departing Lawyer, it is unlikely the client would consider Lawyer's departure as a 'significant development' in its case. In those circumstances, notice to the client is not required. However, whether Departing Lawyer played a principal role in the client's matter should be weighed from the client's perspective with any doubts being resolved in favor of informing the client."

"With respect to Law Firm, any directive to Departing Lawyer not to contact a client, whether from management, other partners or Law Firm's executive committee, should be viewed skeptically and as potentially violating rule 1.4(a)(3). As a preliminary matter, any suggestion that Departing Lawyer should not be permitted to communicate the fact of departure until after Departing Lawyer has left the Law Firm has been widely rejected. (See, e.g., ABA Formal Opn. No. 99-414 at 5 n.11 ['We reject any implication of Informal Opinions 1457 or 1466 that notices to current clients as a matter of ethics must await departure from the firm.'])"

"Law firms also should be cautious in attempting to enforce firm policies or contractual provisions that expressly limit Departing Lawyer's contact with a client after Law Firm has been given notice of Lawyer's departure. For example, if the policy or provision called for a short delay in contacting clients so that Law Firm and Departing Lawyer could agree on an approach and joint message to send to clients about Lawyer's departure, this would likely be acceptable because it has a client-centered objective. However, if Law Firm's policy or provision were used to prevent or to delay Departing Lawyer from contacting clients, all the while Law Firm was using this delay to talk to the clients first and make their own case for keeping the clients at the firm, such actions conflict with Law Firm's ethical obligations to prioritize its clients' interest in making an informed choice of counsel above their own competing interests during the transition.

"With respect to Departing Lawyer, absent circumstances where a delay in doing so would prejudice the client's interests or interfere with its right to choice of counsel, Departing Lawyer should not tell clients she is leaving until she tells her Law Firm. This allows both Departing Lawyer and Law Firm the opportunity to communicate with the client about the departure so that each can present options to the client about future representation and allow the client to make an informed choice regarding counsel.

"This is an area where there is a potential for overlap with other legal issues. For example, any notification by Departing Lawyer to the client that she is leaving Law Firm prior to the time that she provides notice to Law Firm may be construed as a breach of Departing Lawyer's fiduciary duties or contractual obligations to Law Firm and its partners. However, such an analysis would be fact-specific and goes beyond the scope of this opinion.

"Prompt notice to the client is also very important when Departing Lawyer does not intend to continue her representation of the client in her post-departure affiliation and/or Law Firm is unable or unwilling to continue on with the representation."

“To the extent practical, Law Firm and Departing Lawyer should attempt to agree upon and provide joint written notice to all clients on whose matter(s) Departing Lawyer is responsible or for whom she plays a principal role in Law Firm's delivery of legal services. (Cal. State Bar Formal Opn. No. 1985-86.) Joint notice, if it is truly the result of a cooperative endeavor between the parties, is preferable to unilateral notice because it is a better way in which to protect clients' interests. (ABA Formal Opn. No. 99-414.)

“However, since not all departures are amicable, if the parties cannot agree on joint notice, or drafting the joint notice is being used by a party to delay formal client notification while informal notice talks have already begun, unilateral notice is ethically permissible and may be required in some circumstances. ‘When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services ...’ (See, ABA Formal Opn. No. 99-414 at p. 5.) It is not imperative that both Departing Lawyer and Law Firm notify the client of an impending departure, although both are permitted to if they so choose. However, if one fails to notify a client, or refuses to do so, the other one must.

“The notice, whether joint or unilateral, should provide the client with enough information for the client to understand both the significance of the departure on the representation and to permit the client to make an informed decision regarding the representation going forward. Rule 1.4(a)(3) and (b). As such, any notice should inform the client:

- Departing Lawyer is leaving;
  - The timing of the departure;
  - Where Departing Lawyer is going and related contact information, both currently and after the lawyer's actual departure;
  - Departing Lawyer’s and Law Firm's ability and willingness or inability and unwillingness to continue to represent the client;
  - The client may choose to stay with Law Firm, go with Departing Lawyer or choose another lawyer or law firm entirely; and
  - Where the client's file will be and who will be handling the client's matter until the client expresses a choice.”

“In conjunction with providing notice to the client, both Departing Lawyer or any lawyer from Law Firm may, and in some instances, should, provide the client with additional information about Lawyer's departure. In fact, as discussed, rule 1.4(b) requires the lawyer to ‘explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.’ Rule 1.4(a)(3) also requires prompt compliance with reasonable client requests for information related to the future representation. For example, Departing Lawyer should provide the client with additional information reasonably necessary for the client to make an informed decision about future representation.”

“In some circumstances, Departing Lawyer may move on to New Firm prior to the time that the client has been given notice of the Lawyer's departure or chosen counsel. These circumstances do not change each lawyers' ethical obligations to provide notice to the client of the departure along with relevant information to allow the client to make an informed choice in counsel.”

"Beyond notification and providing follow up information that is required to be communicated to the client by rule 1.4, the question often arises as to whether it is proper for Departing Lawyer to solicit any client to come with her to New Firm. For any client with whom Departing Lawyer has a 'prior professional relationship,' she is ethically permitted to solicit those clients in accordance with California's Rules of Professional Conduct and related statutes governing solicitation. (See rules 7.1-7.3.) Specifically, any lawyer is ethically permitted to solicit in person, by telephone or by email any client with whom the lawyer 'has a family, close personal, or prior professional relationship,' provided that in the course of said solicitation the lawyer does not make any false or misleading communications to the client.

"In addition, neither Departing Lawyer nor Law Firm should solicit, or continue to solicit, any client that has made it known that they do not want to be solicited, or in any 'manner which involves intrusion, coercion, duress or harassment.' (Rule 7.3(b).)"

"Furthermore, once a client has chosen his or her counsel as to the particular legal matter at issue, neither Law Firm nor Departing Lawyer should engage in further conduct which could be viewed as violating rule 7.3(b) in an effort to get the client to change their mind about their stated choice for representation.

"Finally, questions often arise about whether solicitation is permissible after Departing Lawyer provides notice to Law Firm of her departure, but before she actually leaves the firm. The same rules that permit a lawyer in certain circumstances to solicit clients (rules 7.1-7.3) would apply here. However, this situation involves a decided intersection between the ethical rules requiring notice and permitting solicitation, the scope of the fiduciary duties among partners and potential contractual obligations between the parties. Thus, the question of whether such conduct would violate fiduciary duties between partners or amount to unfair competition is an open question that is likely to be a very fact-specific inquiry. It could be argued, however, that prohibiting lawyers who have already given notice to the law firm of their departure from properly soliciting clients and competing for clients on equal footing as the law firm undermines client choice."

"When a client wants to transfer its matter to a departing lawyer at her new firm, the lawyer must ensure that she is competent to handle the representation. (Rule 1.1.) Specifically, Departing Lawyer would need to be sure that she has the skill, support and resources necessary to handle the matter at New Firm. Similarly, if the client elects to stay at Law Firm, it must ensure that there are other lawyers in the firm with the experience and ability to handle the client's matters once Departing Lawyer leaves Law Firm. If neither Departing Lawyer nor Law Firm has the ability to handle any client matter with competence, rule 1.1(c) describes circumstances in which the representation may continue. These options include consulting with a competent lawyer, acquiring sufficient knowledge before performance is required, or referring the matter to a competent lawyer. (Rule 1.1(c).) However, there is an obligation to withdraw if continued representation would result in violation of the rules. (Rule 1.16(a)(2).)"

"During all phases of any transition or departure, Departing Lawyer should be mindful of her obligations to protect client confidences. This duty often is implicated when a departing lawyer

must check for conflicts with a potential new law firm; however, it can also arise in the context of communicating with a new firm before, during and after the departure."

"Both Departing Lawyer and Law Firm must protect the interests of clients during the period of transition and must take reasonable steps to assure that the withdrawal of Departing Lawyer, Law Firm, or both, is accomplished in a way that does not prejudice the rights of clients. (Rule 1.16(d).) In addition, both Departing Lawyer and Law Firm have ethical obligations during the transition period to ensure that active client matters continue to be handled diligently and with competence. (Rule 1.1.) Thus, Departing Lawyer and Law Firm have a duty to cooperate with each other during the transition process to protect clients' interests. Law Firm should also 'make reasonable efforts' to ensure that the Law Firm has measures in effect 'giving reasonable assurance' that all lawyers in the firm comply with these rules and the State Bar Act. Rule 5.1.

"Departing Lawyer, for example, may not delay or postpone work that must be done on a matter she expects to follow her to New Firm until after her departure in the hopes of generating more fees for New Firm. (PA Joint Formal Opn. No. 2007-300.) Prior to her departure, Departing Lawyer also should cooperate with any reasonable Law Firm protocols and requests for information from Law Firm where the goal is to evaluate Law Firm's capacity to continue to service any client, facilitate the transition or comply with Law Firm's ethical obligations to clients.

"Law Firm may not, after being notified of Departing Lawyer's intent to leave, render Departing Lawyer's continued representation of any client unreasonably difficult or impossible. For example, Law Firm should not deprive Departing Lawyer access to documents or information needed to carry out the continued representation; nor should Law Firm take Departing Lawyer off of an ongoing matter that she is principally handling before she has actually left Law Firm, unless the client has already made the choice to stay with Law Firm notwithstanding Lawyer's departure."

8. Amendments to Rule 9 (Rules of Professional Conduct), Sections 8, 12, & 30, Rules of the Tennessee Supreme Court, eff. Jan. 23, 2020.

Permanent disbarment: Attorneys disbarred on or after July 1, 2020, are not eligible for reinstatement. Attorneys disbarred prior to July 1, 2020 may still apply for reinstatement after the expiration of five years from the date of their disbarment. (Section 30)

Maximum suspension period extended: The maximum length of time an attorney may be suspended is now 10 years, rather than 5 years. (Section 12)

9. Amendments to Rule 9 (Rules for Disciplinary Procedure), Section 10, Rules of the Tennessee Supreme Court, eff. Apr. 20, 2020.

Updates to attorney contact information on file with the Board of Professional Responsibility must now be submitted electronically through the Attorney Portal at www.tbpr.org.

Annual registration fee payments made by check (rather than online) will now include a $5 processing charge.

10. Amendments to Rule 43 (IOLTA Accounts), Rules of the Tennessee Supreme Court, eff. Apr. 20, 2020.

New provisions allow email notice to attorneys of noncompliance or proposed suspension for noncompliance with trust accounting provisions of Rule 43 and amend reinstatement provisions for attorneys suspended for these violations.

11. Supreme Court COVID-19 Orders

Beginning on March 13, 2020, the Supreme Court issued a number of orders arising from the COVID-19 pandemic. These included a number relating to ethics and professional responsibility issues, including Orders that:

- Allow all Tennessee lawyers to earn all or any portion of their required continuing legal education (CLE) hours for 2019 and 2020 through online or distance learning (March 13 and 27, 2020). This also applies to CLE requirements for lawyers seeking reactivation or reinstatement.

- Address a number of procedural and operational issues concerning the operation of the Board of Professional Responsibility and proceedings before the Board (April 27 and May 11, 2020).

- Adopt certain temporary modifications to Rule 7 concerning bar admission, including changes in deadlines, allowing transfer or refunds of fees (April 2, 2020).

- Extend the availability of supervised practice to law graduates who are unable to take the July 2020 bar examination in the event that administration of the examination is canceled or postponed (April 2, 2020).

- Cancel the July administration of the Tennessee bar exam (July 2, 2020).

These Orders and other Supreme Court Orders arising from the COVID-19 pandemic are available at: https://www.tncourts.gov/Coronavirus.