



ETHICALLY SPEAKING

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Law Firms Need Volunteers, Not Hostages: Rule 5.6(a) Prohibits Restricting a Departing Attorney's Right to Practice Law

When asked about high-profile players demanding to be traded, former Pittsburgh Steelers head coach Mike Tomlin replied: “We need volunteers, not hostages.” Tomlin’s message was clear. He wanted players who wanted to be part of the program, rather than forcing players to be there due to contractual restrictions. Law firms would be wise to heed Coach Tomlin’s advice. Instead, under the guise of protecting their investment in client development, many law firms require attorneys to sign contracts penalizing them for leaving the firm for another (often better) opportunity. Not only is this bad business, but it may violate the ethical rules.



A recent example comes from Washington, D.C., where the D.C. Court of Appeals Board on Professional Responsibility recommended suspending two law firm partners who used various contractual provisions to restrict the practice of lawyers who left their firm. As a result of two lawyers leaving the firm, Tully Rinckey, PLLC (“Firm”) required employees to sign revised employment agreements obligating them to work for the Firm for a fixed term. The agreements required the employees to pay liquidated damages if an attorney: (i) left the Firm prior to the expiration of the employment agreement; (ii) initiated contact with Firm clients after their departure; or (iii) hired or worked with former employees of the Firm. Standard terms in some of these agreements also required departing lawyers pay the Firm “referral fees,” which was a portion of the amount the departing lawyer billed to the former client at the new firm, if the former Firm client hired the departing lawyer. The “referral fees” amounted to one-third of the total amount of fees billed by the new firm, which was “untethered” to any actual damages the Firm sustained. Further, some agreements prohibited departing lawyers from taking names of clients they represented at the Firm to their new practices, and limited access to client files. An employee who breached these provisions could be obligated to pay hundreds of thousands of dollars in liquidated damages to the Firm.

The Hearing Committee found these contractual provisions restricted the attorney’s ability to represent clients at other law firms in violation of the applicable Rule 5.6(a). As to the Firm’s argument that it was simply trying to protect its trade secrets, the Hearing Committee replied, “[t]he Rule does not excuse otherwise violative conduct simply because a lawyer or law firm seeks to protect information that a lawyer has determined are the firm’s or a lawyer’s trade secrets or other confidential information.” The Hearing Committee found the attorneys also violated Rule 8.4, which, like California’s version of the same rule, prohibited lawyers from violating the Rules of Professional Conduct, or from assisting, soliciting, or inducing others to violate the ethical rules.


While the above example comes from Washington, D.C., the rule in California is in accord. Rule 5.6(a) of the California Rules of Professional Conduct provides, “(a) Unless authorized by law, a lawyer shall not participate in offering or making: (1) a partnership,

shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that concerns benefits upon retirement.” This rule, therefore, limits the ability of law firms to ethically restrict an attorney’s ability to practice law after leaving the firm.

This rule recognizes the restrictions expressly authorized by the Business and Professions Code are an exception. In *Howard v. Babcock*, 6 Cal. 4th 409, 425 (1993), the California Supreme Court, discussing former rule 1-500, held “an agreement among partners imposing a *reasonable cost* on departing partners who compete with the law firm in a limited geographical area is not inconsistent” with the ethical rules. But the court went on to hold: “an absolute ban on competition with the partnership would be per se unreasonable, and inconsistent with the legitimate concerns of assuring client choice of counsel and assuring attorneys of the right to practice their profession.” *Id.* What is reasonable, however, becomes a question of fact.

In addition, contractual provisions requiring departing attorneys to pay a portion of the fees earned from cases moved by the departing partner from the prior to the new firm may violate the rule against unconscionable fees if the payment is not tied to the actual work performed by the prior firm. In *Champion v. Superior Court (Boccardo)*, 201 Cal. App. 3d 777 (1988), the court considered the validity of a partnership agreement that permitted withdrawing partners to take clients with them, but provided, “any fees realized in any such case shall remain the property and asset of the Partnership. The withdrawing partner shall be entitled to receive that percentage of the fees equal to his percentage in the Partnership at the time of his departure.” *Id.* at 780. Without addressing the prior version of Rule 5.6(a), the court found the agreement invalid under former rule 2-107 (current Rule 1.5), which prohibited a lawyer from collecting illegal or unconscionable fees. In striking the agreement, the court noted the fees provided for in the agreement had no relationship whatsoever to the amount of service the partnership provided to the client. Moreover, “[n]o consideration is given to the stage of litigation at the time of departure. . . . A fee of this size, without any relationship to services rendered, must ‘shock the conscience of lawyers of ordinary prudence practicing’ in the community.” *Id.* at 783.

Addressing the impact on a departing partner’s ability to represent former firm clients, the *Champion* court held, “[the agreement] purports to permit a client to elect representation by a withdrawing partner, but in most cases it denies the client such representation by denying the withdrawing partner reasonable compensation for representation.” *Id.* at 783. As such, a departing partner could only take matters with him to a new firm “as a partially paid volunteer. . . . Thus, as a practical matter, the client is deprived of representation by the very lawyer most familiar with the case and most desired by the client.” *Id.* Summarizing the point, the court stated: “When an attorney remains willing and able to represent a client, representation should not be barred by an unconscionable partnership agreement with former partners.” *Id.* at 784; *but see Anderson, McPharlin & Connors v. Yee*, 135 Cal. App. 4th 129, 131 (2005), finding, without discussing *Champion* or Rule 5.6(a), liquidated damages in partnership agreements requiring departing partner to pay 25% of future fees did not violate the rules on splitting fees.

Accordingly, with limited exceptions, the Rules of Professional Conduct prohibit law firms from using contractual restrictions to limit or penalize an attorney for leaving the firm and taking clients with them. The best way for law firms to protect their investment in client development is to create an environment where attorneys can grow and thrive, both professionally and economically. Returning to Coach Tomlin’s advice, law firms should not use onerous contract provisions to hold attorneys hostage in a firm they want to leave. 

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