Final

Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2003-07 Request No. 862
Issued November 18, 2003

Facts:

An associate in the inquiring attorney's law firm has decided to leave the firm. Prior to the associate's departure, the associate was out on leave for several weeks during which time other lawyers in the firm handled the associate's caseload. When the decision was made to sever the employment relationship, the law firm advised the associate's clients that the associate would not be returning to the firm. Any client who expressed a desire to speak with the departing associate was promptly given the associate's telephone number.

The departing lawyer and the law firm have entered into a post-employment agreement. They propose to include a non-solicitation provision in which the law firm agrees to pay severance compensation to the associate when he/she leaves the firm in exchange for the associate's agreement not to solicit the firm's clients or employees.

The proposal reads:

> Non-solicitation. The Employee understands and agrees that as a condition for payment to the Employee of the monetary consideration herein, for a period of twenty-four (24) months from the date of this Agreement, the Employee shall not solicit the Firm's clients or employees either for his own purposes or on behalf of a new employer. As used herein, "solicit" shall mean a written, oral or electronic communication initiated by the Employee and directed specifically to the Firm's clients or employees in which the Employee offers to provide legal services to the client or employment to the employee. This provision shall not be construed to restrict or prevent the Employee from providing legal representation to XYZ Corp. (a client originated by the Employee) or to any client or former client of the Firm who contacts the Employee in order to retain Employee as counsel. The Firm and Employee acknowledge and agree that the client has the choice of deciding whether to remain with the Firm or to have the Employee continue representing the client following the Employee's departure from the firm.

Issues Presented:

Does the proposed provision violate Rule 5.6 of the Rules of Professional Conduct?

Opinion:

A provision in a post-employment agreement in which a law firm agrees to pay severance compensation to a departing associate in exchange for the associate's promise not to solicit the firm's clients violates Rule 5.6 of the Rules of Professional Conduct. A provision which restricts the associate from soliciting the law firm's employees is beyond the scope of Rule 5.6 and is permissible.

Reasoning:

Rule 5.6 of the Rules of Professional Conduct prohibits lawyers from participating in agreements that restrict the right of a lawyer to practice law after a relationship between a lawyer and a law firm has ended, except for agreements concerning retirement benefits. The Rule states:

> Rule 5.6 Restrictions on right to practice. – A lawyer shall not participate in offering or making:
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> (a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

In the majority of jurisdictions, restrictive covenants in employment or partnership agreements involving lawyers are considered violative of Rule 5.6 and have been held to be unenforceable as against public policy. See, e.g., Dowd & Dowd, Ltd. V. Gleason, 693 N.E. 2d 358 (Ill. 1998) (noncompetition provisions in employment agreement between law firm and lawyer, violated Rule 5.6 and were unenforceable); Stevens v. Rooks, Pitts & Poust, 682 N.E. 2d 1125 (Ill. App. Ct. 1997) (financial disincentive in partnership agreement requiring departing partner to forfeit compensation due to him or her was unenforceable); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142 (N.J. 1992) (provision of service termination agreement baring termination compensation to departing lawyers if they represented firm's clients, and provision discouraging them from hiring paraprofessionals and lawyers of firm violated Rule 5.6); Cohen v. Lord, Day & Lord, 550 N.E. 2d 410 (N.Y. 1989) (forfeiture of departing partner's earned revenues if he continues to practice law in geographic area is impermissible restriction.) "The rule is designed both to afford clients greater freedom

in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility." Dowd & Dowd, Ltd., 693 N.E. 2d at 369. Rule 5.6 also protects lawyers and clients from "illegitimate anti-competitive practices" that distort the market and drive up the cost of legal services. G. Hazard and W. Hodes, The Law of Lawyering, §47.2, at 47-4 (2003 Supp.)

Direct restrictions such as geographical restrictions, limitations on communication with law firm clients, or limitations on areas of practice, are clearly violative of Rule 5.6. Courts and ethics committees have concluded further that indirect restrictions such as forfeiture provisions have the same effect as blanket restrictive covenants, and also violate Rule 5.6. See Ind. State Bar Ass'n. Legal Ethics Comm. Op. 1 (1998) (intent of forfeiture provision is to defer competition between departing lawyer and law firm); Jacob, 607 A.2d at 148 (financial disincentives force departing lawyers to choose between compensation and continued service to their clients). See also Stevens, 682 N.E. 2d at 1132 (financial disincentive of forfeiting certain compensation if departing lawyer competes with firm after departure hinders lawyer's ability to take on clients and the client's choice of counsel); Pettingell v. Morrigan, Mahoney & Miller, 687 N.E. 2d 1237, 1239 (Mass. 1997) (provision in partnership agreement that required departing lawyers to forfeit law firm's cash profits and annual partnership credits if lawyers competed with firm after departure was unenforceable); Cohen, 550 N.E. 2d at 412 (forfeiture-for-competition provision effectively discourages and forecloses departing lawyer from serving clients and interferes with client's choice of counsel). But see Howard v. Babcock, 863 P.2d 150 (Cal. 1994) (agreement that assesses a reasonable cost against partner who competes with former firm does not restrict practice of law, but rather attaches an economic consequence to departing partner's choice to compete with firm).

In Stevens v. Rooks, Pitts and Poust, supra, a Chicago law firm's partnership agreement provided that a partner who voluntarily or involuntarily withdrew from the firm, retired, or became disabled was entitled to the net balance of his or her capital account plus his or her share of collections. Stevens, 682 N.E. 2d at 1128. The agreement further provided that the departing partner would be entitled to four-fifths of his or her share and that the law firm would pay the remaining one-fifth share if the departing lawyer is not engaged, directly or indirectly, in the practice of law in the Chicago area for one year. Id. When Stevens voluntarily withdrew from the firm and joined another Chicago law firm, the law firm refused to pay him the remaining one-fifth of his departure benefit. Id. Stevens sued, claiming that the forfeiture provision of the agreement was unenforceable under Rule 5.6. The appellate court agreed, stating:

> By requiring the departing lawyer to give up certain compensation due to him if he competes with the firm in certain geographic area within one year after his departure, this financial disincentive provision hinders both the departing lawyer's ability to take on clients and the clients' choice of counsel. We conclude that [the forfeiture provision] is in

> contravention to the public policy underlying Rule 5.6 and is unenforceable. Id. at 1132.

The New Jersey Supreme Court in Jacob v. Norris, McLaughlin and Marcus, supra, also refused to enforce a clause in an employment agreement which indirectly restricted the practice of law through financial disincentives. In Jacob, lawyers who left the defendant law firm to establish their own law firm sued the firm for compensation owing under a service termination agreement. Jacob, 607 A.2d at 145. The service termination agreement barred lawyers in the firm from collecting termination compensation if they continued to represent the firm's clients or solicited the firm's attorneys or paraprofessionals within a year of their departure. Id. at 144. The termination compensation provision provided departing lawyers with compensation above their equity interest in the firm. Id. The court noted the distinctions between financial disincentives and direct restrictive covenants, but reasoned that "[b]y selectively withholding compensation, …[financial disincentives] strongly discourage 'competitive' activities." Id. at 148. The court stated:

> We believe that indirect restrictions on the practice of law, such as the financial disincentives at issue in this case, likewise violate both the language and the spirit of RPC 5.6. Any provision penalizing an attorney for undertaking certain representation "restricts the right of a lawyer to practice law" within the meaning of the RPC. By forcing lawyers to choose between compensation and continued service to their clients, financial-disincentive provisions may encourage lawyers to give up their clients, thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel. Those provisions thus cause indirectly the same objectionable restraints on the free practice of law as more direct restrictive covenants. As one commentator has stated, [f]aced with a choice of taking a share of the firm's profits or some of its clients, a partner may well choose the former if it yields a net economic benefit. In that case the client's freedom of choice has been bargained away just as effectively as if the partnership agreement contained a bald restrictive covenant. (citation omitted) Because the client's freedom of choice is the paramount interest to be served by the RPC, a disincentive provision is as detrimental to the public interest as an outright prohibition. Moreover, if we were to prohibit direct restraints on practice but permit indirect restraints, law firms would quickly move to undermine RPC 5.6 through indirect means. Id. at 148.

The defendant law firm in Jacob urged the court to distinguish between provisions that require departing lawyers to forfeit their equity interest, and those such as the one

before it that merely deprive the lawyers of additional compensation. Jacob, 607 A.2d at 149-150. The court declined to recognize the distinction:

> Regardless of whether the compensation in question represents 'earned' or 'additional' compensation, to condition payment on refraining from practice violates the Rules of Professional Conduct. The operative question is not what income the departing partner has a 'right' to receive, it is the effect of the terms of payment on the lawyer's decision to decline or accept those clients who wish to choose him or her as counsel. If the agreement creates a disincentive to accept representation, it violates the RPC regardless of the lawyer's 'right' to the compensation. As the Chancery Division aptly found, '[m]oney is money and the effect of [the] denial of money' has a chilling effect on a lawyer's willingness to represent clients. Id. at 150.

The Jacob court further concluded "that the unrestricted 'practice of law' includes the right to solicit both attorneys and those members of the paraprofessional staff that attorneys believe are necessary to provide the best legal service for their clients." Id. at 153. Thus the Jacob court held that both the provision barring termination compensation to departing lawyers who competed with the firm, and the provision discouraging them from soliciting the law firm's professional and paraprofessional employees violated Rule 5.6 and were unenforceable. Id. at 154.

The Panel believes that the provision in the instant inquiry which makes the receipt of severance pay contingent upon the departing lawyer's nonsolicitation of the law firm's clients is a financial disincentive, and serves as an indirect restriction on the practice of law. It forces the departing lawyer to choose between compensation and continued service to his or her clients, and thereby interferes with both the attorney-client relationship and the client's free choice of counsel. Id. at 148. The provision causes indirectly the same objectionable restraints on the practice of law as do direct restrictive covenants. Id.

The Panel has noted (a) language in the provision submitted by the inquirer which states that the provision shall not be construed to restrict the law firm's clients from choosing the departing associate as their counsel; and (b) language acknowledging that it is the client's choice whether to remain with the law firm or to follow the departing associate. The Panel does not believe that these statements, however well intentioned, sufficiently neutralize the limiting and detrimental effects that the overall provision has on the professional autonomy of the lawyer to practice law, and on the client's freedom of choice of counsel which the Rules of Professional Conduct require. See Pettingell v. Morrison, Mahoney and Miller, 687 N.E. 2d 1237 Mass. 1997) (even though clients were given notice and election as to which lawyers would continue to represent them,

provisions requiring departing lawyers to forfeit their share of firm's profits if they competed with firm were unenforceable as against public policy.)

The Panel therefore concludes that a provision in a post-employment agreement in which the inquiring attorney's law firm agrees to pay severance compensation to a departing associate in exchange for the associate's promise not to solicit the firm's clients or employees violates Rule 5.6 of the Rules of Professional Conduct. The Panel is of the opinion, however, that the portion of the provision which restricts the associate from soliciting the law firm's employees is beyond the scope of Rule 5.6 and is permissible.