

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-3

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Withdrawn by Adv. 2021-07

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A law firm's proposed employment agreement is unethical when it contains a separation provision requiring a departing associate to pay the firm a percentage of fees earned thereafter from former firm clients who have chosen to become clients of the departing associate. The separation provision violates DR 2-108 (A) by restricting a lawyer's right to practice law after termination of a relationship created by agreement. The separation provision violates DR 2-107 (A) by improperly dividing fees among lawyers not in the same firm. The separation provision is also against public policy as it interferes with a client's freedom to choose counsel.

OPINION: Your law office has proposed an employment agreement to be signed by associates covering a variety of topics. You inquire whether it is ethical for the employment agreement to contain a separation provision requiring a departing associate to pay the firm a percentage of fees earned thereafter from former firm clients who have chosen to become clients of the departing associate. You describe the separation provision as follows: 1) when an associate decides to depart, the clients' files would be interim billed; 2) the associate could then leave with the files of the clients who choose to depart with the associate; 3) if the departing client was generated by the departing attorney, then no follow-up payment to the law office is required; 4) if the departing client was a firm client, not generated by the departing associate, then the departing attorney is required to make payments to the firm for portions of the fees generated for the next two years.

DR 2-108 of the Code of Professional Responsibility clearly proscribes agreements restricting the practice of lawyers. DR 2-108 (A) states the following:

A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits. CPR, DR 2-108 (A).

The language of ABA Model Code DR 2-108 (A) is identical to Ohio's DR 2-108 (A). The language of ABA Model Rule 5.6 (a) is substantially similar to DR 2-108 (A). The Comment to Model Rule 5.6 states that agreements restricting the right to practice limit the attorney's professional autonomy and a client's freedom to choose a lawyer. The rule also prevents lawyers from bartering in clients.

Restrictive covenants in employment contracts among lawyers are generally considered unethical. The Board of Commissioners on Grievances and Discipline has previously stated that restrictive covenants unduly limit a client's freedom to choose a lawyer. Ohio Sup.Ct., Op. 90-14 (1990). Restrictive covenants pertaining to limitations on practice within a geographic area have long been considered unethical. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1072 (1968), ABA Comm. on Professional Ethics, Formal Op. 300 (1961).

In recent years, committees in many states have expressed the opinion that provisions in employment agreements that serve as economic disincentives to departing attorneys are unethical. See State Bar of Texas, Op. 459 (1988); Philadelphia Bar Ass'n, Op. 89-3 (1989); Kentucky Bar Ass'n, Op. 326 (1987); Virginia State Bar, Op. 1232 (1989); Connecticut Bar Ass'n, Op. 89-26 (1989); Pennsylvania Bar Ass'n, 88-249 (undated); District of Columbia Bar, Op. 194 (1988); State Bar of Michigan, Op. CI-1145 (1986). But see Maryland State Bar Ass'n, Op. 89-22 (1989). The Texas, Pennsylvania and Virginia opinions directly address whether payment provisions similar to the suggested provision in this hypothetical question are ethical. The opinion of these committees is that it is unethical to require a departing attorney to pay law firm fees or a percentage of fees earned thereafter from former clients of the law firm.

An employment agreement with a financial disincentive to serving clients improperly places a burden on the departing attorney and impairs clients' freedom to choose counsel. The financial burden placed on the attorney results from a client's valid choice to choose counsel. The client's freedom is impaired because the financial disincentive to the attorney may interfere with the attorney-client relationship by discouraging or preventing the departing associate from serving clients who wish to continue being represented by him. Although such agreements may not facially appear to limit professional autonomy or a client's freedom to choose, the practical effect may limit both. Such payment provisions which penalize the attorney and ultimately his clients for exercising valid choices are prohibited by DR 2-108 (A). Under the rule, professional autonomy and a client's freedom to choose are not outweighed by a law firm's interest in protecting itself from competition.

Further, any agreement that requires fees to be divided by lawyers who are not in the same firm must comply with DR 2-107. The payments suggested by this hypothetical agreement would appear to be neither a division in proportion to the services performed by each lawyer nor an agreement with the client where all lawyers assume responsibility for the representation as required by DR 2-107 (A).

Therefore, this Board is of the opinion that an employment agreement is unethical when it contains a separation provision requiring a departing associate to pay a law firm a percentage of fees earned thereafter from former firm clients who have chosen to become clients of the departing associate. The separation provision violates DR 2-108 (A) by restricting a lawyer's right to practice law after termination of a relationship created by agreement. The separation agreement also violates DR 2-107 (A) by improperly dividing fees among lawyers not in the same firm. The separation provision is also against public policy as it interferes with a client's freedom to choose counsel.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.