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RPC 5.6(a): Restrictive Covenants in Law Firm Employment Agreements

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In some industries, employment agreements include so-called "golden handcuff" provisions that effectively restrict employees from going to work for competitors through direct prohibitions or financial penalties—often known as noncompete clauses. RPC 5.6(a), however, generally prohibits them in law firm employment agreements involving lawyers. LLLT RPC 5.6(a) does the same for limited license legal technicians. In this column, we'll first survey the contours of the rule and then follow with the exceptions. We'll conclude with a discussion of the principal consequences if a law firm employment agreement violates the rule.

Before we do, three qualifiers are in order.

First, we'll focus on lawyers and LLLTs rather than non-license-holder law firm staff. RCW Chapter 49.62 addresses noncompete clauses involving employees and independent contractors.[1]

Second, when lawyers, LLLTs and law firm staff are moving between firms in private practice,[2] many other sensitive issues can arise for all concerned. WSBA Advisory Opinion 201801 (2018) surveys many recurring themes in this context and is available on the WSBA web site.[3] ABA Formal Opinion 99-414 (1999) does the same from a national perspective and is cited by the corresponding Washington opinion.

Third, we'll focus on law firm lawyers and LLLTs rather than in-house corporate counsel. WSBA Advisory Opinions 1953 (2001) and 2100 (2005) apply RPC 5.6(a) to the legal aspects of an in-house counsel's work—but not to any non-legal elements.[4] They generally track ABA Formal Opinion 94-381 (1994) in this regard.[5]

The Rule

Washington RPC 5.6(a) reads:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer or an LLLT to practice after termination of the relationship, except and an agreement concerning benefits upon retirement.

Washington LLLT RPC 5.6(a) mirrors the lawyer version.[6]

The Washington rule is patterned on ABA Model Rule of Professional Conduct 5.6(a).[7] The latter was adopted as part of the original set of Model Rules in 1983.[8] It was amended in 1990 to add a comment excluding restrictions related to law practice sales and then again in 2002 to broaden the scope beyond partnership agreements.[9]

The ABA Model Rule, in turn, was based on a roughly similar provision in the former ABA Model Code of Professional Responsibility that was adopted in

1969 and was replaced by the Model Rules in 1983.[10] The leading national treatise on the law of lawyering describes the shifting rationale for the prohibition over time:

> The rationale for these long-standing provisions has changed over time. Covenants not to compete, the subject of Rule 5.6(a), were once attacked as being "unseemly" or "unprofessional," or even "ungentlemanly"; those arguments are obsolete, however, and carry little or no weight today. A better rationale is that such covenants impinge upon the ability of present and future clients to freely obtain counsel of choice, especially in light of the dramatically increased mobility of lawyers in their practice settings, which has become an increasingly prominent feature of law practice in the United States over the last several decades.[11]

The Washington version followed a roughly similar trajectory.[12] As noted earlier, a companion rule was included in the LLLT RPC when those were adopted in 2015.[13]

When the WSBA's "Ethics 2003" Committee recommended adoption of an amended Washington version of RPC 5.6(a) generally mirroring then-recent changes to the ABA Model Rule, the committee noted that its decision was "uncontroversial."[14] In many situations, the rule is straightforward when the practice limitation or financial penalty is direct. WSBA Advisory Opinion 2118 (2006), for example, found that provisions in a law firm's employment agreement with an associate explicitly barring the associate from competing with the law firm

if the associate left and imposing liquidated damages of $25,000 "per breach" clearly violated RPC 5.6(a).[15] In others, application of the rule is more nuanced. For example, compensation due former partners or shareholders on departure is ordinarily determined by the partnership or shareholder agreement involved or relevant statutory law for the entity concerned.[16] WSBA Advisory Opinion 927 (1985) concluded, however, that a provision in a shareholder agreement that reduced the value of a departing shareholder's stock if the departing lawyer did not sign an agreement that included a noncompete clause was an impermissible penalty under RPC 5.6(a). Similarly, reasonable advance notice is common when a lawyer leaves a firm to ensure continuity in a client's work.[17] ABA Formal Opinion 489 (2019) noted, however, that "'[a]lthough "reasonable" notice provisions may be justified to ensure clients are protected when firm lawyers depart, what is "reasonable" in any given circumstances can turn on whether it is truly the client's interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a).'"[18]

The Exceptions

There are three principal exceptions to the prohibition on noncompete clauses.

First, the text of the rule includes an exception for retirement benefit agreements. ABA Formal Opinion 06-444 (2006) counsels that to qualify "the benefit must be one that is available only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers."[19] The ABA opinion continues: "In contrast, restrictions on the receipt of benefits payable during the prime of a lawyer's career and after only a relatively modest period of service with the firm would clearly be targeting, in most cases, lawyers who are withdrawing for competitive reasons, not to 'wind down.'"[20]

Second, Comment 3 to Washington RPC 5.6 also exempts "restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17." Washington RPC 1.17(b) allows the sale of either an entire law firm or an entire practice area.

Third, Comment 3 to Washington RPC 5.6 clarifies that it does not involve law practice restrictions that may be included in "a lawyer's plea agreement in a criminal matter, or a stipulation under the Rules for Enforcement of Lawyer Conduct."

The Consequences

RPC 5.6(a) potentially exposes both the lawyers "offering or making" a prohibited restriction to the risk of regulatory discipline. The ABA's

comprehensive *Annotated Model Rules of Professional Conduct*, however, reports relatively few disciplinary cases nationally for violations of state equivalents of Model Rule 5.6(a).[21]

By contrast, that same publication includes a wide selection of cases between law firms and their former lawyers litigating the enforceability of various kinds of restrictions. Most revolve around the argument that restrictions and related financial penalties should not be enforced as a matter of public policy because they violate state versions of Model Rule 5.6(a).[22]

Washington law suggests the same general approach.

Washington has long held that contract provisions prohibited by the RPC may be unenforceable on public policy grounds.[23] The Supreme Court in *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 87, 331 P.3d 1147 (2014), summarized the appropriate analytical lens: "The underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the public." Comment 1 to RPC 5.6 frames the basis for the rule in terms that suggest—depending on the facts—a straightforward legal path for a court to reach that conclusion: "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."

Cohen v. Graham, 44 Wn. App. 712, 722 P.2d 1388 (1986), offers an example. Two lawyers were going their separate ways after a 15-year partnership. As a part of the dissolution, one partner agreed to pay $70,000 over time to the other on the condition that the departing partner leave nearly all client files at the old firm and not contact the clients involved.[24] Nonetheless, several clients moved their work to the departed lawyer. The remaining lawyer then stopped paying on the agreement. Litigation followed. An arbitrator found that the practice restriction was void on public policy grounds under RPC 5.6's predecessor, CPR DR 2-108.[25] Rather than void the entire agreement, however, the arbitrator severed the practice restriction and essentially enforced the balance of the agreement. The Court of Appeals affirmed.

Summing Up

The prohibition under RPC 5.6(a) is straightforward when a practice restriction is direct. Black can fade to gray, however, when a restriction is indirect. In those instances, litigation often results. Law firms, therefore, should carefully evaluate whether a provision that might be construed as a practice restriction or a financial penalty is worth the litigation cost.

ABOUT THE AUTHOR

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[1] RCW 49.62.010(2) defines "employees" through a cross-reference to the definition of that term in RCW 49.17.020. RCW 49.62.030 addresses independent contractors. As I write this, the Federal Trade Commission is also considering a rule prohibiting noncompete clauses for various classes of employees. More information about the proposed federal rule is available on the FTC's web site at www.ftc.gov.

[2] RPC 1.11 addresses movement between governmental and private practice. RPC 1.12, in turn, governs movement from judicial and other neutral positions to private practice. Due to the nature of governmental and judicial positions, issues under RPC 5.6(a) do not typically arise.

[3] Comment 11 to Washington RPC 1.10 addresses imputation of conflicts from nonlawyer staff and associated screening.

[4] *See generally Karstetter v. King County Corrections Guild*, 193 Wn.2d 672, 444 P.3d 1185 (2019) (discussing employment claims by former in-house counsel); Washington RPC 1.16, cmt. 4 (noting *Karstetter*). On subsequent appeal after remand in *Karstetter*, the Court of Appeals discussed the employment law criteria for determining whether a lawyer functioning as general

counsel is an employee or an outside lawyer for the organization involved. *Karstetter v. King County Corrections Guild*, 23 Wn. App.2d 361, 516 P.3d 415 (2022). *Chism v. Tri-State Const., Inc*., 193 Wn. App. 818, 374 P.3d 193 (2016), deals with the related area of in-house counsel compensation owing on departure.

[5] ABA Formal Op. 94-381 at 3 n.1 (1994).

[6] Because LLLT 5.6(a) is substantively identical to the lawyer rule, we'll generally focus on the lawyer version unless otherwise noted.

[7] The ABA Model Rule is similar to Section 13(1) of the Restatement (Third) of the Law Governing Lawyers (2000).

[8] *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 667-70 (2013) (ABA Legislative History) (compiling history of the rule).

[9] *Id*.

[10] *Id*. at 668. *See* ABA DR 2-108(A).

[11] Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering* at 50-3 (rev. 4th ed. 2020). *See also* ABA Model Rule 5.6, cmt. 1 (discussing basis for the rule).

[12] *See generally* WSBA, *Code of Professional Responsibility* 24, No. 9 Washington State Bar News at 34-37 (Sept. 1970) (describing the Code as proposed in Washington); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 885 (1985) (discussing Washington's adoption of regulations based on the ABA Model Rules); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 197 (2004) (Ethics 2003 Committee Report) (on file with author) (summarizing amendments proposed by the WSBA "Ethics 2003" Committee).

[13] *See generally* Elizabeth A. Turner, 2 Wash. Prac. Rules Practice RPC 5.6 (rev. 9th ed. 2022) (discussing history of the parallel rules). Comment 4 cross-referencing the LLLT rule was added at the same time to the lawyer rule. *Id*.

[14] Ethics 2003 Committee Report, *supra*, at 197.

[15] *See also* WSBA Advisory Op. 1998 (2002) (noncompete clause restricting practice of partners and shareholders on departure violated RPC 5.6(a)).

[16] *See generally Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 564 P.2d 1175 (1977) (examining partnership agreement for allocation of fee revenue on dissolution); *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 262 P.3d 108 (2011) (looking to statutory law for calculation of good will on withdrawal from law firm).

[17] *See generally* WSBA Advisory Op. 201801 at 1-3 (2018) (discussing predeparture notice).

[18] ABA Formal Op. 489 at 6 (2019) (citation omitted).

[19] ABA Formal Op. 06-444 at 2-3 (2006).

[20] *Id*. at 3.

[21] ABA, *Annotated Model Rules of Professional Conduct* at 559-567 (9th ed. 2019) (ABA Annotated Model Rules). A search for Washington regulatory cases using the disciplinary notice search engine on the WSBA web site produces a similar result.

[22] ABA Annotated Model Rules, *supra*, at 560-66.

[23] *See, e.g., Belli v. Shaw*, 98 Wn.2d 569, 577-78, 657 P.2d 315 (1983).

[24] To the extent that this might today be construed as a law practice sale, there was no rule permitting law practice sales at the time.

[25] Because the restriction arose as a part of an agreement resolving their dispute over partnership assets, the arbitrator and the Court of Appeals analyzed the restriction under CPR DR 2-108(B), which governs practice restrictions in connection with settlements. In this instance, however, the restriction was functionally the same as those now prohibited by RPC 5.6(a).