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Court of Appeals Upholds Fee Allocation in Law Firm Separation Clause

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In a case of first impression in Washington, Division I of the Court of Appeals recently found that a separation clause in a law firm employment agreement allocating fees in cases handled at the firm but collected after a lawyer-employee left did not constitute an impermissible non-compete under RPC 5.6(a).

In *Seattle Truck Law, PLLC v. Banks*, 2023 WL 7130561 (Wn. App. Oct. 30, 2023) (unpublished), the defendant had worked as a lawyer at the plaintiff law firm. The law firm focused on contingent fee work and included a separation clause in the lawyer’s employment agreement allocating fees for cases handled while the lawyer was at the firm but collected after the lawyer left. The lawyer later left the firm with several cases he had worked on at the law firm. When he declined to pay the law firm under the separation clause for settlements in the cases involved after he left, the law firm sued to enforce the contract. The lawyer argued that the separation clause constituted an impermissible non-compete under RPC 5.6(a)—which generally prohibits any employment “agreement that restricts the rights of a lawyer . . . to practice after termination of the relationship[.]”

Under Comment 8 to the “fee rule”—RPC 1.5—post-employment fee allocation is not considered a fee “division” or “split” under RPC 1.5(e) but instead is generally controlled by the contract between the firm and the departing lawyer. The trial court in *Seattle Truck*, therefore, focused on whether the separation clause was enforceable. It concluded on summary judgment that the clause did not restrict the lawyer’s ability to practice and instead simply governed fee revenue on cases handled while the lawyer was at the firm. Accordingly, the trial court entered summary judgment for the law firm.

The Court of Appeals affirmed. In doing so, the Court of Appeals first noted that there was no dispositive appellate decision on this point in Washington. It then surveyed WSBA advisory opinions addressing RPC 5.6, but concluded that those instead focused on direct restrictions on post-employment practice such as geographic limits. Surveying decisional law nationally, the Court of Appeals concluded that allocating fees under the separation clause before it did not constitute a restriction of the kind RPC 5.6(a) was intended to prohibit and, therefore, enforced the contract.

At least at this point, *Seattle Truck* is an “unpublished” decision and is limited to its facts. For lawyers and law firms drafting law firm employment or partnership agreements involving this issue, however, *Seattle Truck* contains a

very useful review of authorities in this somewhat obscure but financially significant area.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.