Restricting Restrictions: When Attorney Employment Agreements Run Afoul of the Rules of Professional Conduct

Law firm managers need to take care in drafting employment agreements to avoid restrictions that may violate the Rules of Professional Conduct.

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Law firm breakups are consistently fodder for articles about the salacious details of alleged attorney misconduct. Attorneys who determine they can no longer work together will often take the additional step of accusing one another of inappropriate conduct. More often than not, we hear about attorneys taking law firm files in the dead of night, or allegations that compensation was at least improperly, if not fraudulently determined. However, the violations of the Rules of Professional Conduct implicated in these breakups occasionally have an antecedent that long precedes the actual implosion of the relationship.

Recently, after a seven-day hearing, in a 87-page opinion, an ad hoc hearing committee of the District of Columbia Bar recommended that the founders of the firm Tully Rinckey each be suspended from the practice of law for 90 days as a result of their repeated use of employment agreements that included "a host of restrictions and penalties they imposed or sought to impose on departing lawyers," including liquidated damages for leaving the firm without "good reason." The employment agreements also included restrictions on contacting firm clients, working with other former firm attorneys and hiring firm employees.

When separating from employment, some former employees were required to execute separation agreements that prohibited them from assisting in investigations into Tully Rinckey. Former employees were told not to contact clients, and no joint letters were proposed or sent to clients regarding the attorneys' moves. Some of the attorneys had difficulty in getting client files from the firm.

As the report and recommendations noted, there were a number of violations of the Rules of Professional Conduct implicated by the firm's conduct. Importantly, an attorney for a number of attorneys who left the firm asked the D.C. Bar's ethics committee for an advisory opinion on the restrictions included in the firm's contracts. In February 2015, the legal ethics committee issued LEO 368. The opinion focused largely on D.C.'s Rule 5.6(a), which mirrors the ABA Model Rule 5.6(a) (and is very similar to Pennsylvania's Rule 5.6(a)). Rule 5.6(a) prohibits a lawyer from participating in offering or making a partnership, shareholders, operating, employment, or other similar type of agree-

ment that restricts the right of a lawyer to practice after termination of the relationship.

Unsurprisingly, the opinion from the D.C. Bar stated Rule 5.6(a) prohibits agreements imposing liquidated damages on lawyers who, after departure, compete with their former law firm. It further stated that a firm may not restrict lawyers' subsequent professional association with partners or employees of the firm. The opinion, which cited D.C. case law and ethics opinions stretching back decades, as well as authority from other U.S. jurisdictions and the American Bar Association, was favorably cited to by the ad hoc committee in its report and recommendation.

Interestingly, while, New York's Rule 5.6(a) contains identical language, the firm asserted that New York had previously determined that its restrictions were appropriate and that New York law should apply. The report and recommendation does not identify any factual basis for the firm's contention that the restrictions were acceptable under New York law. The D.C. Bar's advisory opinion also addressed the choice of law issue, holding that the rules to apply were those of the jurisdiction where the relevant lawyers were admitted to practice and where the "predominant effect" of the conduct occurred. The report and recommendation agreed that the "predominant effect" of the conduct at issue was in D.C., and the D.C. rules should be applied.

Although the firm changed it's employment agreement template after the D.C. Bar issued its opinion in 2015, it continued to add in terms forbidding working with other firm employees and liquidated damages for early departure into agreements. The firm attempted to sue or enforce the arbitration clause against a number former employees both before and after the advisory ethics opinion was issued.

Before and at the disciplinary hearing, the respondents "expended considerable time and effort attempting to justify the liquidated damages clauses for misappropriating or misusing a broad range of information that the Firm claimed was confidential or constituted trade secrets." This included a number of firm standard operating procedures and client email addresses. The report and recommendation noted that respondents "presented no evidence, and have made no claim, that District of Columbia law permits a lawyer to violate the Rules of Professional Conduct in order to protect trade secrets" The report and recommendation found that these claims of trade secrets did not insulate respondents from discipline.

The ad hoc committee noted that similar provisions to D.C.'s Rule 5.6 "appear in the ABA Model Rules of Professional Conduct and the rules of all 51 U.S. jurisdictions, including New York." The report and recommendation notes these rules are designed to prohibit "conditions whose effect is to limit the access of future clients to lawyers of their choosing—particularly to lawyers, who by virtue of their background and experience, might be the very best available talent to represent [such] individuals." (Internal quotes omitted.) The report and recommendation noted there is a tension between allowing clients the ability to freely choose the counsel they want and allowing law firms to protect their investment in attorneys. However, the committee continued, D.C. (and New York), "long- and emphatically" has taken the position that client choice is the more important value.

The report and recommendation concluded:

> "The liquidated damages provisions in this case regarding early departure, contacting clients, hiring firm employees, and working with firm alumni, violate D.C. Rule 5.6(a) insofar as they were imposed upon lawyers who practiced in the D.C. office. They also violate Rule 8.4(a) insofar as they constituted violations or attempts to violate the Rules of Professional Conduct. Whether those lawyer employees were members of the D.C. Bar is irrelevant. For purposes of this matter, it is the respondents' offering or making the agreements in question that violated the rule."

In addition to violating Rule 5.6(a), the ad hoc committee also determined the respondents violated Rules 5.1(b), 5.1(c)(1), 5.1(c)(2), 5.3(b), 5.6(b), 8.4(a), and 8.4(d). The violations arose not only from the restrictions in the contracts on communicating with clients and working with other former attorneys of the firm, but from attempts in the contracts to deter witnesses from cooperating with the Office of Disciplinary Counsel.

In determining that 90-day suspensions were appropriate, the ad hoc committee recognized that there is very little precedent for discipline arising largely out of violations of Rule 5.6(a). The committee noted that this was the first D.C. disciplinary prosecution for a violation of Rule 5.6(a), but also noted that the respondents had explicit warning in the form of the advisory opinion that their conduct violated the Rules of Professional Conduct. The committee noted that the parties only identified one case that was "somewhat comparable" from Arizona that found violations by the owner of a firm of Rules 5.1 and 5.3 "because the firm had policies that led to rule violations by subordinates." That matter led to a six month suspension, but also included a prior disciplinary history by the respondent.

In assessing the sanction, the lack of any previous disciplinary history was weighed against the failure to acknowledge wrongdoing. The ad hoc committee included as an appendix a chart which found 28 violations of the rules by Tully and 34 violations by Rinckey. The committee wrote:

> "The record in this matter reflects dozens of violations—by each of the respondents and, at their direction, by lawyer and nonlawyer subordinates whom they closely supervised. That their actions were violations of the D.C. Rules of Professional Conduct was—or should have been—apparent well before the issuance of LEO 368. Moreover, some violations occurred even after the issuance of that opinion."

The committee recommended a 90-day suspension for both of the respondents.

Although there is very little information on discipline imposed in Pennsylvania for violations of Rule 5.6(a), the Pennsylvania Bar Association's legal ethics and professional responsibility committee has issued several informal ethic's opinions related to restrictions in employment agreements for attorneys. See e.g., Informal Opinion 2017-040, Informal Opinion 2016-024, Informal Opinion 2012-006, Joint Opinion (with Philadel-

phia Bar Association) 99-100 "Considerations for Departing Lawyers." All of these opinions are consistent with the determination that engagement agreements for attorneys cannot restrict the rights of the attorney to practice and cannot restrict attorneys from associating with law firm employees. See also, ABA Informal Opinion 1417 (a law firm may not require that a withdrawing partner agree not to hire or be associated with for a period of years any of the firm's associates who are working for the firm at the time of the withdrawal); Philadelphia Bar Association Professional Guidance Committee, Formal Opinion 96-5 (provision in letter of employment that provides that a former employee may not directly or indirectly solicit or retain current or former employees, restricts right of a lawyer to practice by restricting the right of association).

While actual discipline arising primarily from violations of Rule 5.6(a) is rare, the Tully Rinckey matter emphasizes the seriousness with which law firms need to treat potential restrictions in employment contracts. Disciplinary matters arising from these issues have occurred in Pennsylvania. According to the Pennsylvania Disciplinary Board's website, in 2019, an attorney received an informal admonition as a result of an employment agreement that included a provision that required departing attorneys to pay reimbursements in connection with departing client matters, including future related matters. The agreement also required departing attorneys to provide copies of client bills that evidenced the legal fees incurred, which included confidential and privileged information in violation of RPC 1.6(a). Law firm managers need to take care in drafting employment agreements to avoid restrictions that may violate the Rules of Professional Conduct.

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