speaking of ethics

By Erika Stillabower

A Look at Employment Contracts for Lawyers

Mick Wiggins

Andrew, a recent law school graduate, was offered an associate position with the Washington, D.C., office of a Denver law firm. Frank, a good friend who was about to depart the firm under amicable circumstances, had secured the interview for Andrew and strongly supported his candidacy. Having by sheer coincidence recently waived into the D.C. Bar, Andrew happily accepted the offer and relocated from Florida on the firm's dime. In the madness of moving and starting his first real law job, it was not until a week or so after signing the myriad of agreements, disclaimers, and insurance forms necessary to make him an official employee of the firm that Andrew sat down to actually review the documents he had signed.

In reviewing his employment agreement, Andrew was not surprised to see that, because he was working for a Colorado firm, the contract was to be interpreted in accordance with the substantive law of Colorado and the Colorado Rules of Professional Conduct. He *was* surprised, however, to learn he was subject to a number of post-employment restrictions after leaving the firm, including provisions that limited his ability to work with lawyers or staff previously employed by the firm. Any breach of the contract provisions would subject him to $35,000 in liquidated damages, a not-insignificant amount of money for a recent law school graduate already carrying six figures of debt.

Though Andrew couldn't speak to the Colorado Rules of Professional Conduct, he vaguely recalled from his recent Mandatory Course training[1] that the D.C. Rules prohibited these types of agreements. Andrew assumed the firm's managing attorneys, most of whom were barred in both Colorado and the District of Columbia, were simply following the rules of the jurisdiction in which they were practicing. Regardless, Andrew was certain that he couldn't be held responsible for the ethical errors of the attorneys supervising him. Besides, Andrew felt lucky to have a job, and he understood that firms do invest significant resources in junior associates.

Six months later, when his old friend Frank asked Andrew to join him in his burgeoning practice, Andrew had a sinking feeling that he might have made a big mistake. Finding the offer irresistible, though, he took a leap, switched firms, and soon received a demand letter from his former firm claiming he owed a total of $37,363 for liquidated damages and relocation costs. Andrew quickly found the Rules of Professional Conduct on the D.C. Bar's Web site and concluded he was not the only one in hot water here.

Analysis

The D.C. Rules of Professional Conduct (and the ethics rules of virtually all U.S. jurisdictions) are intensely focused on lawyers' conduct toward clients, courts, and third parties. For that reason, one could understand how a lawyer might fail to remember that the ethics rules also govern lawyers' conduct in connection with private, non-adversarial employment contracts. As such, the Legal Ethics Committee has recently taken the opportunity through Legal Ethics Opinion 368 to remind D.C. Bar members how Rule 5.6 and Rule 8.5 impact employment agreements.

Liquidated Damages

Pursuant to Rule 5.6(a),

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

In Opinion 368, the Legal Ethics Committee concludes that an employment contract that imposes liquidated damages on a lawyer who after departure competes with his or her former firm violates Rule 5.6(a). The committee reaches this conclusion in light of *Neuman v. Akman*,[2] prior committee opinions,[3] and clarifying language added in 2007 to Comment [2] of Rule 5.6.[4]

At the heart of Rule 5.6 is the fundamental premise that limitations on a lawyer's practice (outside of those inherent in the Rules of Professional Conduct) are bad for lawyers and clients alike, since a smaller pool of available attorneys necessarily limits clients' choice of counsel.[5] In a niche area of law, for example, it is not difficult to imagine a situation where clients would be effectively denied representation when the conflicts rules[6] and confidentiality limitations[7] combine with restrictions on the right to practice. Significantly, this rule also protects lawyer mobility, which is of particular importance for less experienced lawyers facing an extraordinarily tight job market and enormous loan obligations.

Does this mean that there are no circumstances in which a firm may impose financial liabilities on a departing lawyer? Probably not. For example, the firm's attempt to recover the costs of relocating Andrew from Florida to the District of Columbia would likely not be construed as a "substantial financial penalty" under Comment [2], and it would certainly be a stretch to view it as a restriction on Andrew's right to practice following his departure from the firm.

Professional Associations

Opinion 368 also addresses the provisions of the hypothetical employment contract which would impose a financial penalty on Andrew for associating with other former firm partners or employees *after* leaving the firm and finds such provisions clearly violate Rule 5.6(a). Here, the committee's reasoning was largely an extension of that set forth in Opinion 181, where the committee found unethical an employment contract that was described as "perpetually prohibit[ing] any interference" by a departed lawyer "with the firm's relationships with its lawyers/employees."

Despite finding restrictions on future associations like the one in Andrew's contract unethical, the committee does note that, based upon the common law of tortious interference and fiduciary obligations,[8] there are well-recognized substantive legal limitations on a lawyer's right to solicit partners and employees of the former employer, and a lawyer's disregard of these limitations could constitute "dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 8.4(c). Accordingly, the substantive law could potentially impact upon Frank's right to solicit Andrew Associate. Since the Rules of Professional Conduct do not affect the applicability of substantive law, lawyers must consider these other authorities as well as the D.C. Rules in determining how to move forward.

Choice of Law

Finally, the Legal Ethics Committee turned to the difficult question of which jurisdiction's rules apply to the conduct at issue. Choice of law questions are notoriously complex, particularly with respect to problems similar to our hypothetical, where the conduct of D.C. lawyers[9] who are admitted to and practice in foreign jurisdictions is being evaluated.[10]

In accordance with Rule 8.5(b), when a D.C. lawyer who is also barred in another jurisdiction is *not* practicing before a tribunal, the relevant rules are those of the jurisdiction in which the lawyer primarily practices, *unless* the conduct at issue "has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." For our purposes, the million-dollar question is whether the offering and signing of an employment contract in violation of Rule 5.6 can be considered conduct that has its predominant effect outside of a jurisdiction in which the offering or signing lawyer primarily practices.

In Opinion 368 the committee answers this question by focusing on the substantive rule proscribing the conduct at issue. Because Rule 5.6(a) aims to preserve both the lawyer's professional autonomy and the client's right to the counsel of his or her choice, the predominant effect of any Rule 5.6(a) violation restricting a D.C.-based lawyer's right to practice is in the District of Columbia.

Thus, to the extent that any of the Denver attorneys responsible for offering the employment contract to Andrew are also barred in the District, they could be liable for a violation of Rule 5.6, despite the fact that they are also barred in Colorado and practice only in Colorado.

The analysis of Andrew's conduct is more straightforward, since both prongs of Rule 8.5(b)(2)(ii) point to the applicability of the D.C. Rules to his conduct. The only remaining question is whether Andrew can claim to be absolved by virtue of the fact that he was acting at the direction of a supervisory attorney. Unfortunately for Andrew, he is likely out of luck. While Rule 5.2(b) provides a limited safe harbor for a subordinate lawyer's reliance on a supervisory lawyer's "reasonable resolution of an arguable question of professional duty," post-LEO 368, such safe harbor would likely be unavailable, since contracts such as the one he signed are a clear violation of Rule 5.6(a).

In the final analysis, the lesson for D.C. lawyers is to read and parse the fine print of their own employment contracts as closely as they would read those of their clients.

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Notes

1 New members of the District of Columbia Bar have 12 months from the date of admission to complete the required course on the D.C. Rules of Professional Conduct and District of Columbia practice.

2 715 A.2d 127, 130–31 (D.C. 1998) (quoting numerous authorities in support of the proposition that restrictive agreements are harmful to lawyers, clients, and the legal profession).

3 LEO 194 (1988) (Departing lawyers cannot be denied unrealized fees for restarting practice within 12 months); LEO 65 (1979) (Employment contract requiring departed lawyers to share a portion of their fees earned from firm clients following termination is inconsistent with the Code of Professional Conduct).

4 "Restrictions . . . that impose a substantial financial penalty on a lawyer who competes after leaving the firm may violate paragraph (a) of Rule 5.6." Comment [2]. Apart from the D.C. Rules and case law interpreting the D.C. Rules, there are many circumstances in which contract law disfavors liquidated damages clauses. *See, e.g., District Cablevision Limited Partnership v. Bassin*, 828 A.2d 714, 723 (D.C. 2003).

5 *See* Rule 5.6 Comment [1] ("An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.").

6 *See* Rule 1.7; Rule 1.9; Rule 1.10.

7 *See* Rule 1.6(g).

8 Laws external to the D.C. Rules also govern the solicitation of firm clients by former partners and employees. The Legal Ethics Committee has provided specific guidance to attorneys who seek to balance their Rule 1.4 obligation to keep their clients informed of plans to change firms with their concerns about not being subjected to claims of tortious interference. See LEO 273.

9 In this article the phrase "D.C. lawyers" means lawyers who are D.C. Bar members duly licensed to practice law in the District of Columbia.

10 Note that while the D.C. Rules strive to hold lawyers accountable to only one set of rules for any given action, other Bars may apply their own, separate rules to such conduct. *See* Rule 8.5 Comments [2], [3], & [5].

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE CHARLES P. MURDTER. Bar No. 375905. February 24, 2015. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Murdter for a period of six months, with all but 60 days of the suspension stayed, and that he be placed on probation for a period of one year, subject to conditions. Murdter failed to file appellate briefs, following his appointment by the D.C. Court of Appeals to represent defendants under the Criminal Justice Act, and pleaded guilty to criminal contempt for failing to obey the court's orders in two of those five matters. Murdter violated Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(b)(1) (intentional failure to seek client's lawful objectives), 1.3(c) (reasonable promptness), 3.4(c) (knowingly disobeying the obligations under the rules of a tribunal), and 8.4(d) (serious interference with the administration of justice).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE KAREN G. LOULAKIS. Bar No. 334904. February 12, 2015. The D.C. Court of Appeals disbarred Loulakis by consent, effective immediately.

IN RE TODD L. TREADWAY. Bar No. 479233. February 12, 2015. The D.C. Court of Appeals disbarred Treadway by consent, effective immediately.

Reciprocal Matters

IN RE BRIAN J. BENNER. Bar No. 446757. February 5, 2015. In a reciprocal matter from Michigan, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Benner. At the time that he consented to disbarment in Michigan, Benner faced charges alleging misappropriation of settlement proceeds in a personal injury matter.

IN RE SCOTT J. BLOCH. Bar No. 984264. February 5, 2015. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Bloch for

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a period of one year, stayed in favor of a 30-day suspension, nunc pro tunc to December 15, 2014, to be followed by a two-year probationary period. The California discipline was based upon Bloch's misdemeanor criminal conviction for depredation of government property.

IN RE EMERSON V. BRIGGS III. Bar No. 446158. February 5, 2015. In a reciprocal matter from New York, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Briggs, nunc pro tunc to December 28, 2012. The New York discipline was based upon Briggs's felony conviction for receipt of child pornography.

IN RE ALLEN BRUFSKY. Bar No. 64956. February 5, 2015. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Brufsky. In Florida, Brufsky was found to have made knowing false statements in efforts to practice law in violation of a prior order suspending his license to practice law.

IN RE DALE E. DUNCAN. Bar No. 370591. February 5, 2015. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed functionally identical reciprocal discipline and disbarred Duncan. In Virginia, Duncan was found to have engaged in conduct involving conflicts of interest and dishonesty through concurrent representation of a financial institution and a borrower in proceedings that resulted in a nonprofit corporation having its property foreclosed upon.

IN RE JARED E. STOLZ. Bar No. 489626. February 5, 2015. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and suspend Stolz for three months, with fitness. In New Jersey, Stolz was found to have violated Rules relating to making false statements to a tribunal and making false statements to a third party.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE CHARLES J. BROIDA. Bar No. 178954. February 10, 2015. Broida was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE OSCAR J. ESTEVEZ. Bar No. 460593. February 10, 2015. Estevez was suspended on an interim basis based upon discipline imposed in Florida.

IN RE MARK R. GALBRAITH. Bar No. 475507. February 26, 2015. Galbraith was suspended on an interim basis based upon discipline imposed in Virginia.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE BRIAN W. SHAUGHNESSY. Bar No. 89946. January 16, 2015. Bar Counsel issued Shaughnessy an informal admonition for failing to maintain complete records of entrusted funds deposited in and withdrawn from his trust account, and for failing to provide one of his clients a writing setting forth the basis or rate of the fee that he actually charged, as well as the scope of the representation. Rules 1.15(a) and 1.5(b).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*

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tion-related exhibits, and mock trials.

During one session, Judge Robert L. Wilkins of the U.S. Court of Appeals for the District of Columbia Circuit spoke about a 1992 incident where the Maryland State Police pulled over a car he was riding in for a traffic stop. (It had been a common practice for police to racially profile black motorists driving rental cars.) The police insisted on searching the car for illegal drugs, despite the fact that Wilkins and the other occupants did not give permission for the search. Wilkins later filed suit. The case *Wilkins v. Maryland State Police* brought national attention to racial profiling and led to law enforcement reforms dealing with traffic stops throughout the United States.

D.C. Bar President Brigida Benitez, D.C. Superior Court Chief Judge Lee F. Satterfield, and D.C. Superior Court Associate Judge Melvin R. Wright also took part in the event, speaking to the audience and offering advice.

As part of the program, students filled seven courtrooms to participate in mock trials. The students litigated a profiling case, which was facilitated by D.C. Superior Court judges, lawyers, court and D.C. Bar staff, and law enforcement officials. The program also featured performances from members of Split This Rock's 2015 D.C. Youth Poetry Slam Team.—*M.S.*

American University Team Wins 2015 D.C. Cup Moot Court Clash

On March 6 American University Washington College of Law students Luke Karamyalil and Ronny Valdes outdueled a team from Georgetown University Law Center in the final round of oral arguments to win the 2015 D.C. Moot Court Competition.

During the competition, created by the D.C. Bar District of Columbia Affairs Section, students from area law schools argued cases through three rounds over two separate days before volunteer judges. The cases involved the District of Columbia Family and Medical Leave Act of 1990.

During the final round of the competition, teams from American and Georgetown argued their cases before D.C. Court of Appeals Associate Judge Vanessa Ruiz, D.C. Court of Appeals Senior Judge John M. Steadman, and D.C. Bar President Brigida Benitez.

Making oral arguments in front of all three was "unbelievable," Karamyalil said. "The final round was so much more fun because we were going up in front of two judges and [a] D.C. Bar president."

Awards also were presented to Karamyalil and Valdes for Best Brief and to Georgetown's Logan Dwyer for Best Oral Argument.

Valdes joined the Moot Court Honor Society at American and competed in the D.C. Cup because of his desire to make "high-level arguments and take a lot of the skills that [he has] learned so far in law school and apply them," he said.

In addition to American and Georgetown, teams from The Catholic University of America Columbus School of Law, The George Washington University Law School, Howard University School of Law, and the University of the District of Columbia David A. Clarke School of Law took part in the competition.—*D.O.*

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