

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion:202504

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RPC: 5.6

Subject: Fee Division Contracts with Departing Lawyers

Summary: *This opinion discusses the potential application of Washington RPC 5.6(a) to agreements between a law firm and a lawyer that require payments by a departing lawyer to the firm when the departing lawyer takes along one or more client matters on which the departing lawyer had begun to work while at the firm. As explained below, the answer is difficult because of by the significant differences among other jurisdictions regarding how to approach such issues and because of the lack of definitive Washington State authority. At present, the only pertinent Washington authority is an unpublished Washington Court of Appeals opinion which does not address all the relevant questions. Nevertheless, one can reasonably conclude that while Washington RPC 5.6(a) may not prevent all such agreements, the required division of fees between the firm and the departing lawyer should bear a reasonable relationship to the law firm's financial investment in the departing client matters and the amount of work that has been or remains to be done on those client matters.*

QUESTIONS:

Lawyer L works at a law firm (the "Firm"). Both L and the Firm have read *Seattle Truck Law, PLLC v. Banks*, 28 Wn.App.2d 1044 (Div. 1, 2023) (unpublished), rev. den., 2 Wn.3d 1035 (2024). L and the Firm either have signed or propose to sign an agreement which provides that if L leaves the Firm and continues to work on one or more client matters on which L had begun at the Firm, L must compensate the Firm by paying the Firm a stated amount or percentage of fees received by L for work on that client matter in subsequent years.

1. Is such an agreement consistent with RPC 5.6(a)?
2. If such an agreement is not consistent with RPC 5.6(a), is it nonetheless enforceable as a matter of contract law?

BRIEF ANSWERS:

1. There is presently no definitive Washington authority on the relevant issues pertaining to RPC 5.6(a), and the decisions reached in other jurisdictions are inconsistent. The answer thus depends primarily on how the Washington courts might interpret RPC 5.6(a) in the future. The answer may also depend on the facts and circumstances giving rise to the

agreement between a lawyer and the lawyer's firm, and the potential effects of that agreement. In our opinion, and absent definitive Washington State authority, an agreement which appears to be punitive towards the departing lawyer and does more than provide reasonable compensation to the Firm for its past efforts, is unlikely to be consistent with RPC 5.6(a).

2. If the agreement does violate RPC 5.6(a), the question of its enforceability as a matter of contract law will depend, among other things, on whether, considering the RPC violation, the resulting contract violates the underlying public policy of the rule. See, e.g., *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 85 (2014) (business transaction entered into with client in violation of RPC 1.8(a) rendered contract unenforceable because contrary to public policy). The Committee focuses solely on interpretations of the RPCs and does not issue opinions on other questions of law.

DISCUSSION:

Comment [1] to RPC 1.17 states: "Clients are not commodities that can be purchased and sold at will." In other words, a firm cannot prohibit a lawyer who chooses to leave a firm from continuing to represent a client on any matters—even those on which the lawyer began work before departing from the firm. [n.1] The question here is whether or to what extent the firm can require payment to the firm by a departing lawyer who takes client matters with them. [n.2]

RPC 5.6 states in pertinent part:

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 an agreement concerning benefits upon retirement

Comment [1] to RPC 5.6 states:

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. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm. [n.3]

Washington RPC 5.6(a) is identical to ABA Model Rule 5.6(a). All courts that have interpreted Model Rule 5.6(a) have held that it prohibits every type of noncompete agreements apart from retirement and sale-of-practice agreements. However, courts have taken two distinct approaches on when and to what extent firms may impose economic consequences or financial disincentives on departing lawyers who take one or more client matters with them.

One approach has its origins in *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 550 N.E. 2d 410 (1989). See also ABA Formal Op. 489 (2019), 06-444 (2006), 94-381 (1994). Under *Cohen* and

its progeny, all adverse economic consequences or financial disincentives against lawyers who leave firms with client matters are prohibited. [n.4]

The other approach has its origins in *Howard v. Babcock*, 18 Cal. App. 4th 107, 7 Cal. Rptr. 2d 687 (1992). That court held that it would enforce what it described as a reasonable economic toll on competition when a lawyer changes firms. The court analogized such provisions to permissible liquidated damage provisions and noted that both can be upheld if reasonable under the circumstances. [n.5]

The only appellate decision in Washington that addresses this subject is *Seattle Truck Law, PLLC v. Banks*, 28 Wn.App.2d 1044 (Div. 1, 2023) (rev. den., 2 Wn.3d 1035 (2024)) (unpublished). In *Seattle Truck Law*, a lawyer signed an employment agreement with a law firm, providing that if lawyer separated from firm taking contingent fee matters: (1) the lawyer would repay the firm for all costs and expenses owed to the firm within three months of the lawyer's departure; (2) the lawyer would remit 50% of attorney fees received on those files for the first year after the lawyer left; and (3) the lawyer would remit 40% of attorney fees received the second year and thereafter.

In *Seattle Truck Law*, Division One of the Court of Appeals cited several cases, including *Cohen*; but it rejected the *Cohen* approach and relied instead on cases including *Groen, Barna, and Warner*, 827 A.2d 1163 (2003), a case that falls in the *Howard v. Babcock* line of analysis. The *Seattle Truck Law* court held that on the record before it, the agreement did not place a restraint on the departing lawyer's ability to practice law under RPC 5.6. The court reasoned that the law firm had economic rights in the files which the firm was entitled to enforce, and that the claim for fees did not place a geographic restraint on the departing lawyer's ability to practice law. The court also found that the agreement did not restrain the departing lawyer's ability to compete with the prior law firm because it allowed the lawyer to keep a higher percentage of fees earned on a case than the lawyer would have received if the lawyer had stayed at the firm.

The unpublished Washington Court of Appeals decision in *Seattle Truck Law*, and the subsequent denial of review by the Washington Supreme Court, do not commit Washington to either the *Cohen* (New York) camp or the *Howard v. Babcock* (California) camp. If presented with these facts, other Washington courts might choose a different approach. If the Supreme Court chooses in the future to adopt the full *Cohen* approach, then the *Seattle Truck Law* decision could not stand. If other Washington courts were to reject that approach and instead adopts one more like *Howard v. Babcock* in following *Groen*, a further analysis would be required before any statements of a general nature about the application of RPC 5.6(a) to such agreements in Washington can be made.

As *Seattle Truck Law*, *Groen*, and many other cases adopting the *Howard v. Babcock* approach make clear, the application of RPC 5.6(a) depends not only on the amounts or percentages of any payments the departing lawyer may be called upon to make, but also upon the particular circumstances in which the agreement between the firm and the departing lawyer were made and the actual or theoretical effects of imposing the terms in the agreement on the departing lawyer and the relevant clients. Solely by way of example, a court might consider questions including but not limited to:

- Whether the agreement made by the firm was with an experienced lawyer or a relatively new lawyer who signed something akin to a contract of adhesion imposed by the firm.
- Whether the firm can document that the amount it seeks reflects its actual investment in cases or its likely actual loss from the departure of those cases.
- Whether enforcement of the agreement as written would be likely to place the departing lawyer at a disadvantage in serving client needs.
- Whether the client matters that the lawyer is taking are contingent fee matters rather than hourly matters, since such agreements are far less likely, if ever, to be upheld in hourly fee situations.

In other words, the specific percentage amounts upheld in *Seattle Truck Law* might or might not be upheld in other situations or based on a different record.

The second question asked at the outset is whether, assuming that a particular agreement violates RPC 5.6(a), it might be enforceable between the departing lawyer and the firm as a matter of contract law. The *Seattle Truck Law* court did not rule on this issue in that case, but observed that under *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 85 (2014), the answer to this question would depend on whether the agreement in question is injurious to the public. Although we believe it likely that the Washington Supreme Court would decline to enforce an agreement it found violative of RPC 5.6(a), that is a question which could also turn on the specific facts and circumstances before the court.

Endnotes

1. On contingent fee matters, the firm may have a post-departure *quantum meruit* claim against departing clients. See *Ross v. Scannell*, 97 Wash.2d 598, 647 P.2d 1004 (1982); *Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1983). This Advisory Opinion does not address such claims and is limited to agreements that a firm may reach with a departing lawyer about claims between them.
2. RPC 1.5(e), which generally addresses fee divisions between lawyers who are not in the same firm, states in pertinent part:

A division of a fee between lawyers who are not in the same firm may be made only if:

- (i) the division is in proportion to the services provided by each lawyer, or each lawyer assumes joint responsibility for the representation;
- (ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (iii) the total fee is reasonable

Comment [8] to RPC 1.5 states: “Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.” Consequently, RPC 1.5(e) does not apply to the division of fees between a departing lawyer and the former law firm, and any such division of fees need not be

disclosed to relevant clients unless the division would prohibit the lawyer continuing with the matter to provide competent and diligent representation to a client.

3. Comment [1] to RPC 5.6, with respect to the freedom of clients to choose a lawyer, is also applicable to the sale of a law practice under RPC 1.17.
4. As stated in note 1, a firm is not prohibited from pursuing a quantum meruit claim for pre-departure work performed on a contingent fee matter. The question here is whether or to what extent a firm can demand more than that from a departing lawyer.
5. A detailed discussion of both approaches is contained in Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis & Trisha T. Hedges, *The Law of Lawyering* §§50.03-.04 (Fourth Ed. 2024 Supp).