M E M O R A N D U M

November 8, 2021

TO: T. Andrew Brown, NYSBA President

FROM: NYSBA Committee on Standards of Attorney Conduct ("COSAC")

SUBJECT: New and Amended Comments to Rule 5.6

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is comprehensively reviewing the New York Rules of Professional Conduct. On July 20, 2021, COSAC sought public comments on two related sets of proposals – proposed new Comments to existing Rule 5.6, and a proposed new Rule 5.9 and Comments. COSAC received public comments on these proposals from the following individuals and groups:

- Marj Gross
- Robert Hillman
- Leslie Corwin
- Art and Maria Ciampi
- Kevin Szanyi
- NYSBA Committee on Legal Aid ("COLA")

On October 20, 2021, after considering the public comments, COSAC revised the proposed Comments to Rule 5.6 and sent the revised version to the NYSBA Executive Committee for action. (At the same time, COSAC also notified the Executive Committee that it would not be presenting proposed new Rule 5.9 as an action item but would instead present Rule 5.9 for informational purposes only, which would allow COSAC more time to seek additional comments and to consider the issues raised by the public comments.)

On October 29, 2021, the NYSBA Executive Committee approved sending COSAC's Rule 5.6 proposals to the House of Delegates for a vote, and on October 30, 2021 the House of Delegates voted to approve the proposals without any changes, though some remarks from the floor suggested that some points in COSAC's proposals should be clarified.

Below are COSAC's proposals as approved by the House of Delegates (with minor editing to clarify certain points). Changes to the Comments interpretating existing Rules do not require approval from the Administrative Board of the Courts, which adopts the black letter text of the Rules but not the Comments. Accordingly, the new and amended Comments should be effective immediately.

The amended Comments to Rule 5.6 begin on the next page. The first version is the final version and should be added as soon as possible to the online version of the New York Rules of Professional Conduct. The second version is a redline version for the sake of the historical record.

Final Version of Amended Comments to Rule 5.6 Restrictions on Right to Practice

[Note from COSAC: COSAC did not propose any changes to the black letter text of Rule 5.6. COSAC proposed changes only to the Comments to Rule 5.6. But for convenience, we begin by reprinting the black letter text of existing Rule 5.6, which the amended Comments interpret.]

(a) A lawyer shall not:

(1) participate in offering or making a partnership, shareholder, operating, employment or other similar type of agreement, except an agreement concerning benefits upon retirement, that restricts the right of a lawyer to practice after termination of the relationship;

(2) participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] An agreement restricting the right of a lawyer who has left a law firm (a "departed lawyer") to practice after leaving the firm limits the freedom of clients to choose a lawyer and limits the professional autonomy of lawyers. Paragraph (a) prohibits such agreements, except (i) agreements imposing restrictions relating to retirement benefits arising for service with the firm or (ii) restrictions justified by special circumstances described in this Comment. Throughout this Comment, the phrase "law firm" shall have the meaning given in the definition in Rule 1.0(h).

Scope of Rule

[1A] This Rule and this Comment are intended to address the duties of lawyers and law firms solely under the Rules of Professional Conduct. They are not intended to address the obligations of a law firm or a departed lawyer under the law of fiduciary duties, partnership law, contract law, tort law, or other substantive law.

[1B] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern:

(i) the operation of a law firm;
(ii) the terms of partnership, shareholding, or of counsel status at a law firm; and
(iii) the terms of an individual lawyer's full-time or part-time employment at a law firm or other entity.

[1C] Paragraph (a)(1) applies whether the agreement is embodied in a written or oral contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement benefits) that prohibits or limits a departed lawyer from contacting or serving the firm's current, former, or prospective clients, except that:

(i) an agreement may include provisions to protect confidential or proprietary information belonging to the law firm or to the law firm's current, former, or prospective clients; and
(ii) an agreement may include provisions that impose reasonable restrictions or remedies on a departed lawyer in the circumstances described in Comment [1F].

[1D] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed ("in-house") attorneys and the clients or entities that employ them, whether in a legal or non-legal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure *non-legal* functions. In every type of law firm, the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. With this in mind, Comment [1E] addresses restrictions that ordinarily violate the Rule, and Comment [1F] addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1E] Agreements that ordinarily violate paragraph (a)(1) (unless they fit within the exception for retirement benefits) include, but are not limited to, agreements that purport to do any of the following:

(i) prohibit or limit a departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm;
(ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (*e.g.,* imposing a mandatory "garden leave");
(iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer has departed from the firm; or
(iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, are suspected of competing, or are presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1F] Agreements that ordinarily do not violate paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or remedies if:

(i) a departed lawyer has approved, within a reasonable time before departing from the firm, a specific, significant financial undertaking with respect to the firm that remains outstanding where the lawyer's departure will have a material effect on the firm's ability to satisfy that undertaking; or
(ii) a departed lawyer has, before leaving the firm, breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm.

Reasonable Management Discretion

[1G] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Redline Version of Amended Comments to Rule 5.6 Restrictions on Right to Practice

[Note from COSAC: For the sake of the historical record, below is a redline version of the amended language to the Comments. New language is reprinted in blue font and underscored (and a few deleted words and phrases in Comment [1] are reprinted ~~in red and stricken through~~).]

Comment

[1] An agreement restricting the right of ~~lawyers~~ a lawyer who has left a law firm (a "departed lawyer") to practice after leaving ~~a~~ the firm ~~not only limits their professional autonomy~~ limits the freedom of clients to choose a lawyer and limits the professional autonomy of lawyers. Paragraph (a) prohibits such agreements, except (i) agreements imposing restrictions relating to retirement benefits arising for service with the firm or (ii) restrictions justified by special circumstances described in this Comment. Throughout this Comment, the phrase "law firm" shall have the meaning given in the definition in Rule 1.0(h).

Scope of Rule

[1A] This Rule and this Comment are intended to address the duties of lawyers and law firms solely under the Rules of Professional Conduct. They are not intended to address the obligations of a law firm or a departed lawyer under the law of fiduciary duties, partnership law, contract law, tort law, or other substantive law.

[1B] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern:

(i) the operation of a law firm;
(ii) the terms of partnership, shareholding, or of counsel status at a law firm; and

(iii) the terms of an individual lawyer's full-time or part-time employment at a law firm or other entity.

[1C] Paragraph (a)(1) applies whether the agreement is embodied in a written or oral contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement benefits) that prohibits or limits a departed lawyer from contacting or serving the firm's current, former, or prospective clients, except that:

(i) an agreement may include provisions to protect confidential or proprietary information belonging to the law firm or to the law firm's current, former, or prospective clients; and
(ii) an agreement may include provisions that impose reasonable restrictions or remedies on a departed lawyer in the circumstances described in Comment [1F].

[1D] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed ("in-house") attorneys and the clients or entities that employ them, whether in a legal or non-legal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure *non-legal* functions. In every type of law firm, the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. With this in mind, Comment [1E] addresses restrictions that ordinarily violate the Rule, and Comment [1F] addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1E] Agreements that ordinarily violate paragraph (a)(1) (unless they fit within the exception for retirement benefits) include, but are not limited to, agreements that purport to do any of the following:

(i) prohibit or limit a departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm;
(ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (*e.g.,* imposing a mandatory "garden leave");
(iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer has departed from the firm; or
(iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, are suspected of competing, or are presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1F] Agreements that ordinarily do not violate paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or remedies if:

(i) a departed lawyer has approved, within a reasonable time before departing from the firm, a specific, significant financial undertaking with respect to the firm that remains

outstanding where the lawyer's departure will have a material effect on the firm's ability to satisfy that undertaking; or

(ii) a departed lawyer has, before leaving the firm, breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm.

Reasonable Management Discretion

[1G] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.