

Reconsideration of Ethics Opinion 09-01

Introduction

The committee has been asked to opine if it is ethical for a firm to require a departing attorney to pay a \$3,500 fee for every client choosing to leave the firm and continue representation with the departing attorney. In Ethic Opinion 09-01, a prior ethics committee concluded a per client fee for a departing attorney violates the Rules of Professional Responsibility. This committee agrees with the Opinion 09-01 and determines requiring a departing attorney to pay a per client fee violates the Rules of Professional Responsibility.

Applicable Ethical Rules

As pointed out in Ethics Opinion 09-01, several rules are implicated by a per client fee for a departing attorney.

E.R. 1.5 addresses fees charged by attorneys. The rule prevents an attorney from making, “an arrangement for, charge or collect an unreasonable fee.”

E.R. 1.7 addresses conflicts of interest with current clients. The comment points out an attorney cannot “allow related business interests to affect representation.” *E.R. 1.7 (b)(2) cmt. 10*.

E.R. 1.16 addresses terminating representation and outlines a lawyer may only withdraw from representing a client if “withdrawal can be accomplished without material adverse effect on the interests of the client.” *E.R. 1.16(b)(1)*.

ER 5.6(a) prohibits a lawyer from offering or making “a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship.” The rule is intended to prevent limitations on, “the freedom of clients to choose a lawyer.” *E.R. 5.6 cmt 1*.

Application of Rules and Law

The ethical problems created by these agreements is illuminated by the question, who pays the fee?

The Client

Passing along the per client fee to the client is not reasonable under the Ethical Rules. Nothing in the E.R. 1.5 or its comments suggests it is reasonable for a client to bear the costs of the breakup between a firm and its attorneys. Further, such a fee has no rational relationship to the actual costs of litigation or the value of the representation. Passing along this fee to the client violates the rule requiring the fee charged to a client be reasonable.

The Departing Attorney

An attorney cannot allow a business relationship with a third party to affect their representation of client. *E.R. 1.7*. In this scenario, an attorney will have to consider whether to discontinue representing clients due to the tax imposed by the prior firm (now a third party to the attorney client relationship). The attorney’s decision to sever the attorney client relationship due a

financial obligation to a third party certainly affects the representation as described in *E.R. 1.7*. Withdrawing from continued representation also based on these financial considerations also materially and adversely affects the “interest of client” in violation of *E.R. 1.16*. It’s worth noting, a per client tax will result in the attorneys opting not to continue representing less affluent clients with lower value cases. The weight of the per client tax will primarily affect those least likely to afford it.

E.R. 5.6

This untenable result is also addressed by the language of *E.R. 5.6*. This rule has two functions. The first is to prevent restricting an attorney from practicing in an entire area of law. The comment to the rule defines this as “professional autonomy.” See, *E.R. 5.6 cmt [1]*. The second function of the rule is to protect individual clients. Specifically, Rule 5.6 is intended to prevent limits on, “the freedom of clients to choose a lawyer.” *Id.*

This rule was addressed in [*Fearnow v. Ridenour, Swenson, Cleer & Evans, 213 Ariz. 24 \(2006\)*](#). In *Fearnow*, the Arizona Supreme Court addressed the issue of agreements intended to create a disincentive for attorneys leaving firms and working at a competing firm. Under the terms of the first firm’s shareholder agreement, the firm would repurchase the capital interest of a lawyer who chose to retire or was involuntarily expelled from the firm. However, a lawyer who chose to leave the firm and continue practicing in the firm’s geographic area forfeited this right to repayment.

Under these facts, the Supreme Court concluded this agreement did not violate *E.R. 5.6*. The Court held, “although the rule prohibits—and we will hold unenforceable—agreements that forbid a lawyer to represent certain clients or engage in practice in certain areas or at certain times, its language should not be stretched to condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment.” The Court continued, “such agreements, as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard.” 213 Ariz. at 30, ¶ 21.

This holding specifically addresses the professional autonomy function of 5.6. Any agreement which forbids an attorney from practicing in certain areas or forbids an attorney from representing certain clients is unenforceable. *Fearnow*, does not address agreements impacting the client choice function of 5.6. However, it certainly suggests that an agreement limiting client choice is unenforceable under 5.6. In a footnote, the court stated it reached its conclusion, in part, because the agreement in the case did not have any impact on client choice. The Court wrote, “the client is of course free to remain with the lawyer, whether or not the lawyer chooses to stay at his original firm or go elsewhere.” Unlike the facts in *Fearnow*, a per client tax has a direct impact on the client’s choice to remain with the lawyer or stay with the original firm. *Fearnow* does not address a per client tax. However, it certainly suggests such an agreement violates the public policy underlying *E.R. 5.6*.

Conclusion

It is the determination of this committee that the Rules of Professional Responsibility prevent a firm requiring a departing attorney to pay a fee for each client that chooses to remain with the departing attorney. In operation, this type of agreement violates multiple ethical rules, including the public policy underlying *E.R. 5.6*. Therefore, the Committee determines a firm may not require the departing attorney to pay a \$3,500 fee for every client that wishes to continue representation with the departing attorney.