Reconsideration of Ethics Opinion 09-01

Introduction

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 Arizona Supreme Court addressed the meaning of this rule in a 2006 opinion, *Fearnow v. Ridenour, Swenson, Cleer & Evans*, 213 Ariz. 24 (2006). The *Fearnow* opinion was not issued in a disciplinary proceeding. The case arose from a dispute between a law firm and a lawyer who had left the firm to join another 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. But a lawyer who chose to leave the firm and continue practicing in the firm's geographic area forfeited this right to repayment. The departing lawyer in *Fearnow* sued, arguing that the forfeiture provision violated ER 5.6 and was therefore unenforceable as against public policy.

The Supreme Court noted that ER 5.6 is violated by "agreements that forbid a lawyer to represent certain clients or engage in practice in certain areas or at certain times." 213 Ariz. at 30, ¶ 21. But it refused to extend the rule to an agreement that, instead of prohibiting a departing lawyer from practicing law, "provides only a financial disincentive that may discourage the departing lawyer from doing so." *Id*. at 28, ¶ 16. "We hold that such an agreement does not violate ER 5.6(a), but rather should be evaluated under the well-established law governing similar restrictive covenants in agreements between non-lawyers." *Id*. at 25, ¶ 1. After determining that the agreement did not violate ER 5.6 and therefore was not unenforceable as against public policy, the Court remanded for a determination of reasonableness.

Three years later, the State Bar of Arizona issued Ethics Opinion 09-01 in which it addressed the following question: "May Firm require, as a condition of employment, that in the event Associate departs from Firm, Associate must pay a $3,500 fee for each former Firm client that Associate continues to represent after departing?" The opinion concluded that such an agreement would violate ER 5.6 because it "would improperly constrain a client's freedom to choose to continue representation by the departing associate." The Arizona Supreme Court's Attorney Ethics Advisory Committee elected to reconsider Opinion 09-01 in order to address the impact of the Supreme Court's earlier decision in *Fearnow*.

Discussion

Though acknowledging that ER5.6 is grounded in concerns about preserving "lawyer autonomy and client choice" (213 Ariz. at 27, ¶ 12)—the concerns on which the subsequent Opinion 09-01 was based—the Supreme Court in *Fearnow* was nevertheless unwilling to "condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment" (*id*. at 31, ¶ 21). Because the Court held that the shareholder agreement at issue did not violate ER 5.6, *but also* remanded for a determination of whether it was reasonable, it is clear that the Court did not adopt a reasonableness standard under ER 5.6. Instead, it appears to have

taken a categorical approach that distinguishes between monetary penalties or forfeitures and outright prohibitions on the practice of law; only the latter violate ER 5.6. Because the agreement addressed in Opinion 09-01 did not involve an outright prohibition on the practice of law, but merely imposed a financial disincentive for doing so in competition with the firm, it does not violate ER 5.6.