ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday February 20, 2020

No. 3 Update and possible action regarding Ethics Opinion drafts:

- EO-19-0006

Committee member Hon. John Napper will present information at the meeting.

ETHICS OPINION DRAFT

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-19-0006

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order No. 2018-110.

Though *Fearnow v. Ridenour, Swenson, Cleer & Evans*, 213 Ariz. 24 (2006) made it clear that ER 5.6 does not categorically prohibit all agreements imposing financial disincentives on a departing lawyer who continues to practice in competition with their previous firm, imposing a per-client fee on a departing associate directly interferes with client choice and is prohibited. This Opinion supersedes State Bar of Arizona Ethics Opinion 09-01.

ISSUE PRESENTED

A law firm (Firm) is contemplating using an employment contract that requires an associate lawyer (Associate) to pay Firm $3,500 for each client or prospective client for whom Associate provides legal representation after departing Firm. The contract characterizes this as a "Firm Reimbursement Fee" and explains that it compensates Firm for marketing expenses. Such fees would not be owed, however, where Associate can demonstrate that the client was not obtained through Firm marketing, where a court requires Associate to remain counsel of record, or where Firm elects to have the client continue with Associate. Would such an agreement violate the Rules of Professional Conduct?

RELEVANT ETHICS OPINIONS:

State Bar of Arizona Ethics Opinion 99-14, 01-01, 09-01

ABA Formal Op. 99-414

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT:

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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(2) there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer.

ER 1.16. Declining or Terminating Representation

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(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

ER 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

. . .

b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

. . .

d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See ERs 5.4 and 5.6.

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[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

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[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

ER 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

a) 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, except an agreement concerning benefits upon retirement;

OPINION

Background

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. When the firm refused to repurchase a voluntarily departing shareholder's shares, the lawyer sued, arguing that the forfeiture provision violated ER 5.6 and was therefore unenforceable as against public policy.

The trial court agreed with the plaintiff, and the Court of Appeals affirmed, though with a slightly different analysis. The Supreme Court then took review and reversed, concluding that:

> 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. Such agreements, as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard.

213 Ariz. at 30, ¶ 21. The Court remanded the case to the trial court to make a reasonableness determination. *Id*. at 30-31, ¶ 24.

Three years later, the State Bar of Arizona issued Ethics Opinion 09-01, which 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, for four reasons, "improperly constrain a client's freedom to choose to continue representation by the departing associate": (1) it would discourage the departing lawyer from representing a client that might want to continue with the lawyer; (2) the set amount of the fee would have a disproportionate impact on continuing to represent clients in lower-value cases; (3) it would give the departing lawyer an incentive to charge the client more, in violation of the policy behind ER 1.17(d), which prohibits increasing a client's fees when a practice is sold; and (4) it would create a conflict of interest in violation of ER 1.7(a)(2).

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*. The Committee finds that the per-client fee that was the subject of Opinion 09-01 is distinguishable

from the shareholder agreement in *Fearnow*, which was related to preserving the firm's capital structure. Because the per-client fee directly impinges on client choice, it is prohibited by ER 5.6.

Discussion

Public Policy and ER 5.6

Some commentators have argued that it is problematic to use ER 5.6 to define public policy for purposes of determining the enforceability of a contract. When that approach is taken, and the Rule is interpreted broadly, it allows a lawyer to enter into a contract that violates ER 5.6 and then use the Rule to avoid their obligations under the contract—a clearly inequitable result.

> A rule that a contract or action that violates an ethical rule violates public policy creates a bright line rule that courts would apply regardless of the equities. Under traditional contract law analysis, when contracts are held to violate public policy, courts do not look behind the contract to see if it would be unfair *not* to enforce it. If a contract violates public policy it is void *ab initio*. Such a proposition is problematic in the context of the ethical rules for two reasons. First, invalidating certain contracts could be used by a lawyer to advance their own personal interests, contrary to the purpose of the rules, which is not to protect the interests of the lawyer.
>
> Second, and more significant, unethical agreements may have been fairly negotiated and, as a matter of substantive contract law, are not problematic

Donald E. Campbell, *The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules As Substantive Law*, 8 St. Mary's J. Legal Mal. & Ethics 252, 303 (2018). *See also Feldman v. Minars*, 230 A.D.2d 356, 361, 658 N.Y.S.2d 614, 617 (1997) (concluding that it would be "unseemly" to allow an attorney to "us[e] their *own* ethical violations as a basis for avoiding obligations undertaken by them" and noting that a violation of the ethical rule regarding restrictions on the right to practice could be "addressed by the appropriate disciplinary authorities"); *Lee v. Florida Dept. of Ins. & Treasurer*, 586 So. 2d 1185, 1188 (Fla. Dist. Ct. App. 1991) ("We first would note that the application of rule 4-5.6 to invalidate or render void a provision in a private contract between two parties is beyond the scope and purpose of the Rules and constitutes error."); *Potter v. Peirce*, 688 A.2d 894, 895 (Del. 1997) (concluding that a lawyer could not enter into an agreement in violation of the ethics rules and then "use those Rules as a shield to avoid a contractual duty").

The Arizona Supreme Court in *Fearnow* adopted ER 5.6 as a statement of public policy without any discussion. Perhaps concerned about creating the inequities discussed above by reading ER 5.6 broadly, the Court—though acknowledging that ER 5.6 is grounded in concerns about preserving "lawyer autonomy and client choice" (213 Ariz. at 27, ¶ 12)— was unwilling to "condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment" (*id*. at 31, ¶ 21). Instead, "[s]uch agreements, as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard." *Id*.

The Scope of the Fearnow Decision

Justice Bales, in his dissent, says the majority interpreted ER 5.6 narrowly, as applicable *only* to outright prohibitions on a lawyer's right to practice in a particular area, for a particular period of time, or for certain clients. *Id*. at 32 and 35, ¶¶ 35 and 46. Others appear to have interpreted the case similarly. S*ee* Karen E. Komrada, *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.: Encouraging Firms to Punish Departing Attorneys?*, 48 Ariz. L. Rev. 677, 677 (2006); Betsy Lamm, *Ethics and the Arizona Bar: A Discussion of the Arizona Supreme Court's 2005-06 Decisions*, 39 Ariz. St. L.J. 613, 624 (2007).

As Justice Bales's dissent points out, such a narrow reading of the rule means that an agreement can comply with the Rule—be ethically permissible—while, as a practical matter, achieving the same result as an outright prohibition by imposing significant financial disincentives. Because that ethical conclusion is as counterintuitive as the legal conundrums that result from a broad reading of the Rule, it invites a closer reading of exactly what the Court in *Fearnow* said.

In that regard, it is worth noting two things the Court did *not* say. First, although the Court explicitly rejected a categorical interpretation of ER 5.6 that would prohibit all financial disincentives, it did not *explicitly* adopt a categorical interpretation that would permit all such disincentives. In fact, by saying that ER 5.6 shouldn't be read to "categorically" condemn "all" agreements imposing "disincentives" on a departing lawyer—instead of simply saying that the Rule doesn't apply to such disincentives—the majority opinion implies that the rule *does*—or at least *might*—condemn *some* disincentives.

Second, the Court did *not* say that only unreasonable agreements violate ER 5.6. Although the Court in *Fearnow* ultimately held that the shareholder agreement at issue in that case did *not* violate ER 5.6 (213 Ariz. at 25, ¶ 1), it *also* remanded the case to the trial court for an analysis of the agreement's reasonableness. That necessarily means that the agreement could comply with ER 5.6 but still be unreasonable and therefore legally unenforceable. In other words, despite the Court's insistence that it was interpreting ER 5.6, it did not adopt "reasonableness," the legal standard, as the ethical standard.

Application of Fearnow to the Question Addressed in Opinion 09-01

So, if ER 5.6 does not categorically permit all financial disincentives, and does not prohibit only unreasonable disincentives, what distinguishes unethical financial disincentives from those that are ethically permissible?

Under the agreement at issue in *Fearnow*, the firm agreed to repurchase a departing shareholder's stock in the event of disability, retirement, withdrawal or expulsion from the firm. But a lawyer voluntarily leaving the firm and continuing to practice law in the firm's geographic area for more than 10 hours per week forfeited this benefit. Similarly, the agreement at issue in *Howard*, a California case heavily relied upon by the *Fearnow* majority, provided that a departing lawyer would be paid for their capital interest in the firm plus a share in the firm's net profits for a year after departure. Those benefits were forfeit, however, if the lawyer thereafter competed with the firm. Another California case cited by the *Fearnow* majority, *Haight, Brown & Bonesteel v.*

Superior Court, 234 Cal. App. 3d 963 (Ct. App. 1991), also involved forfeiture of a departing partner's interest in the firm's capital and accounts receivable. In both cases, the California Court of Appeal found that the agreements did not violate California's version of ER 5.6.

Thus, *Fearnow* and the California cases on which it relied each involved the forfeiture of capital interests and accounts-receivable for which a departing partner or shareholder would otherwise be compensated under the terms of the partnership or shareholder agreement, based on the lawyer's competition with the firm. Such agreements have certain characteristics in common. They typically are entered into by lawyers with more or less equal bargaining authority; each lawyer who is a party to the agreement could potentially be benefitted *or* penalized by the financial disincentives, depending on who ultimately leaves and who stays; they involve the forfeiture of rights that would not exist but for the partnership or shareholder relationship defined in the contract, rather than imposition of a fee or penalty; and they are related to the capital structure of the firm, and the firm's legitimate concern with maintaining the stability of that structure, rather than to continued representation of *particular clients*. Such an agreement could, depending on the circumstances, be unreasonable, and hence legally unenforceable, but it does not raise the type of concerns that would trigger ER 5.6.

In contrast, the agreement examined by Opinion 09-01 imposes on a departing associate a flat $3,500 penalty for each firm client the lawyer continues to represent. It is not an agreement among partners or shareholders on an equal footing, but rather an agreement imposed on a newly hired associate who obviously is not in the same bargaining position. And the agreement is one-sided in that it protects the firm but will never benefit the associate. It also involves an affirmative obligation to pay the firm, rather than the forfeiture of benefits to which the associate would otherwise be contractually or legally entitled. Finally, unlike the *Fearnow* agreement, it is directly tied to continued representation of particular clients.

In the opinion of the Committee, these are material differences. Such a penalty does not just discourage the lawyer from leaving the firm, or protect the firm's capital structure. As Opinion 09-01 explains, such a penalty acts as a substantial disincentive for the departing lawyer to agree to continue representing a client who wants to continue working with that lawyer. That is particularly true for clients with lower-value cases. It also incentivizes charging those clients higher fees and creates a potential conflict between the lawyer's interests and the interests of a particular client. More than the agreements at issue in *Fearnow* and the California cases on which *Fearnow* relied, the agreement appears on its face to be an attempt to prevent the associate from representing specific clients. As such, the Committee has concluded that such a per-client fee is distinguishable from *Fearnow* and falls within the scope of ER 5.6's prohibition.

ETHICS OPINION REQUEST

Sent: Tuesday, March 28, 2017 9:12 AM
To: Patricia Seguin <patricia.seguin@staff.azbar.org>
Subject: Reconsideration of Ethics Op. 09-01

Hi Patricia,

I am just following up on our telephone conversation early last month regarding reconsideration of Ethics Op. 09-01, in light of the Supreme Court case, *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 213 Ariz. 24, 138 P.3d 723 (2006). As I mentioned during our call, *Fearnow* held that provisions like the one at issue in the ethics opinion must be reviewed under a reasonableness standard. The Ethics Op. makes no mention of *Fearnow* and does not analyze the provision under that standard, and thus, in my opinion, its reasoning is flawed.

I am not certain if the Ethics Committee is still on "hiatus." I would appreciate if you could pass my concerns about Ethics Op. 09-01 to Becky Albrecht, Lisa Panahi and Ann Ching (if you did not do so after we spoke). If there is anything else that I might need to do regarding this issue, please let me know.

Thanks!

State Bar of Arizona Ethics Opinions

09-01: Restrictions on Right to Practice; Departing Lawyer 5/2009

A law firm may not employ associate lawyers using a contract that requires a departing associate to pay $3,500 to the law firm for each instance in which the departing associate continued to represent a law firm client. This requirement would violate the policy underlying ER 5.6 that puts the commercial interests of law firms secondary to the need to preserve client choice.

FACTS

A law firm (Firm) is contemplating using an employment contract that requires an associate lawyer (Associate) to pay Firm $3,500 for each client or prospective client for whom Associate provides legal representation after departing Firm. The contract characterizes this as a "Firm Reimbursement Fee" and explains that it compensates Firm for marketing expenses. Such fees would not be owed, however, where Associate can demonstrate that the client was not obtained through Firm marketing, where a court requires Associate to remain counsel of record, or where Firm elects to have the client continue with Associate.

QUESTION PRESENTED

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?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.7. Conflict of Interest: Current Clients

> a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > . . .
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> . . . .

Comment

[10] . . . a lawyer may not allow related business interests to affect representation.

ER 1.16. Declining or Terminating Representation

> . . .
>
> b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> > (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> >
> > . . . .

ER 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

> . . .
>
> b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
>
> . . .
>
> d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See ERs 5.4 and 5.6.

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

ER 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

> a) 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, except an agreement concerning benefits upon retirement;
>
> . . . .

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 99-14, 01-01

OTHER RELEVANT ETHICS OPINIONS

ABA Formal Op. 99-414

OPINION

With few exceptions, courts have consistently recognized that American Bar Association Model Rule 5.6 [1] "prohibit[s] agreements that impose financial disincentives, as opposed to explicit restrictions, on a withdrawing partner's competition with the former firm." *Shuttleworth, Ruloff and Giordano, P.C. v. Nutter*, 493 S.E.2d 364, 367 (Va. 1997) (collecting cases). For example, in *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992), the court explained the purpose of Model Rule 5.6:

> The history behind the [rule] and its precursors reveals that the [rule's] underlying purpose is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice. The [rule] is thus designed to serve the public interest in maximum access to lawyers and to preclude commercial arrangements that interfere with that goal.

Id. at 146. The same court identified the underlying policy that controls the resolution of this inquiry, as follows: "[T]he practice of law must be carefully governed by ethical considerations rather than by the economic concerns that guide strictly commercial enterprises." *Id*. at 147.

Based on such principles, this Committee has explained that "[w]here the departing lawyer has had significant personal contact with a client in connection with the provision of legal services to that client by the firm, . . . the client must be provided with the opportunity to choose between going with the departing lawyer or remaining with the firm." Ariz. Ethics Op. 99-14; *see also* Ariz. Ethics Op. 01-01 (opining that a lawyer cannot enter a contract that would preclude representing certain clients); ABA Formal Op. 99-414 ("[E]ach client has the right to choose the departing lawyer or the firm, or another lawyer to represent him."). We agree, therefore, that "[t]he commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice." *Jacob*, 607 A.2d at 151. *See also* Phil. Bar Assn. Op. 87-24 ("Although law firms have a right to protect their legitimate business interests, including their client base, they may not do so to the exclusion of the client's preference."). The need to preserve client choice is no less when the departing lawyer is an associate.

The primary question raised here, therefore, is whether Associate's obligation to pay a $3,500 fee would improperly constrain a client's freedom to choose to continue representation by the departing associate. *See* ER 5.6 & cmt [1]. We conclude, that it does.

There are four related reasons why the fee would improperly constrain a client's freedom to choose to continue representation by the departing associate.

First, the fee "acts as a disincentive to representing the client" and, thereby, "limits the client's ability to retain counsel of choice." Phil. Bar Assn. Op. 89-3. [2] *Cf. Stevens v. Rooks Pitts & Poust*, 682 N.E.2d 1125, 1132 (Ill. App. 1997) (holding that "no law partnership agreement should restrict a departing partner's ability to practice law"). "Financial disincentives may involve either forfeiting compensation that is due to the departing lawyer or requiring that the departing lawyer remit to the firm a part of profits earned from representing former clients of the firm." *Legal Ethics, Law. Deskbk. Prof. Resp*. § 5.6-1 (2008-09 ed.) See *ABA/BNA Lawyer's Manual on Professional Conduct* 51:1205 (2004) (examining financial disincentives involved in Rule 5.6). The fee here surely has such an effect because it must be paid each time that the departing associate continues the representation of a Firm client.

Second, because the fee is fixed at $3,500, it places a disproportionate disincentive on continuing the representation of less lucrative matters. [3] Although ER 1.17 itself only applies to the sale of a law practice, *id*. at cmt [15], it recognizes a more general policy concern that "protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel." *Id*. at cmt [6]. The proposed contract here would improperly place a heightened disincentive on a departing associate continuing the representation of such clients. It would appear decidedly improper if clients whose matters are less lucrative had any additional barriers to securing representation of their choice. [4]

Third, the fee improperly gives a departing associate incentive to charge larger fees to clients represented at the former firm. This is contrary to the policy disfavoring arrangements that create an incentive to charge clients greater fees. *See, e.g.*, ER 1.17(d) (providing that "[t]he fees charged clients shall not be increased by reason of the sale [of a practice]").

Fourth, the fee creates a conflict of interest. The Ethical Rules proscribe conflicts between the lawyer's personal interests and those of the client. *See* ER 1.7(a)(2); *id*. at cmt [10] (explaining that "a lawyer may not allow related business interests to affect representation"). Formation and termination of the lawyer-client relationship is part of representation. The fee creates a conflict to the extent that it deters the associate from taking the representation.

In closing, because in matters of professional responsibility, "justice and the law must rest upon the complete confidence of the public and to do so they must avoid even the appearance of impropriety," *State v. Hursey*, 176 Ariz. 330, 334, 861 P.2d 615, 619 (1993) (alteration and quotation marks omitted), we note that we would evaluate the fee no differently in the context of a law firm that had unusually high marketing expenses.

CONCLUSION

A client's right to choose counsel must have precedence over the lawyer's commercial interests. The fee proposed here improperly violates that policy because it puts the firm's commercial interests ahead of the client's right to choose. Given the substantial amount of this fee, that it would directly discourage a departing associate from agreeing to continue the representation of clients, and that it would encourage the associate to charge former firm clients higher fees, the proposed fee is unethical and cannot be part of an employment agreement.

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[1] Model Rule 5.6(a) is identical to our Ethical Rule (ER) 5.6(a).

[2] In this opinion, the Philadelphia Bar Association addressed a contract provision that required a departing lawyer to pay all sums due on the account of a departing client. The opinion recognized that "to the extent that the required personal liability of the attorney acts as a disincentive to representing the client, the proposed clause limits the client's ability to retain counsel of choice." *Id*. The Philadelphia Bar Association held that such agreements were unethical because "[i]n view of the possible magnitude of post-termination payments, the proposed contract clause operates as a restriction on the right to practice." We agree and disapprove as well for the other reasons offered in this opinion.

[3] The $3,500 per matter fee is a very substantial disincentive for any size matter. Assuming the associate is starting a new practice, he or she might only earn about $60,000 the first year. *Natl. Assoc. for Law Placement* http://www.nalp.org/ (last visited May 2009, reporting that the mean income for new lawyers is $60,000 per year).

[4] *But see* Phil. Bar Assoc. Op. 87-24 ("liquidated damages" clause not necessarily unethical that required payment of a set percent of fees earned during first year from clients taken by departing associate). We disagree with this opinion. A liquidated damages provision defined as a percentage of fees earned would either require the associate to share responsibility with the former law firm or would allow a division of fees without sharing of responsibility. We disapprove of the former because it would compel the client to continue representation by Firm as a condition of going with Associate. We disapprove of the latter because our ER 1.5(e)(1) requires that "each lawyer receiving any portion of the fee assumes joint responsibility for the representation." The Pennsylvania rule 1.5(e) did not (and does not) have this requirement.