Leaving the Firm and the Ties That Bind

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To the Forum:

I have been an attorney with a prominent New York law firm for the past several years. During my tenure, I have gained a vast client base and a lot of experience, for which I am grateful. However, I feel that I am ready to move on and open my own private practice and thought the partners that have mentored me would be happy for me. However, that was not the case when I told them the news and put in my two-weeks' notice. Instead, they were less than impressed and warned that my leaving is a breach of my employment agreement, which I signed before I was even admitted as an attorney, when I first received the job upon graduation. The partners threatened to hold me accountable for my breach of contract when I leave.

After my meeting with the partners, I took another look at the employment agreement. It contains several clauses that seem to me now – as an experienced attorney – to be completely unfair and make leaving the firm impossible without some sort of consequence. The employment agreement included restrictions and penalties that the firm would impose if lawyers leave the firm without "good reason." This phrase was undefined and completely up to the partners' discretion to decide what constitutes "good reason" for leaving. There were also restrictions placed on contacting clients to let them know of lawyers leaving firms, working with other lawyers and employees who have left the firm and participating in any sort of investigations against the firm.

Clearly, there is a contract issue and many of these terms can't possibly be enforced; however, my question for the forum is whether the firm's conduct violates any ethical rules?

Sincerely,
Owen Schingel

Dear Mr. Schingel:

Your firm certainly seems to be making it difficult for you to grow your career and your own practice. You are right in suspecting that the firm's conduct may run afoul of certain ethical rules, and as discussed below, there are American Bar Association opinions addressing the issue you raise as well as court decisions that have held that such provisions are unenforceable. Courts have repeatedly found that attorneys' rights to practice freely are essential to protecting clients' rights to choose their representation without restriction.

Provisions Restricting a Lawyer's Right To Practice Law

In 2019, the ABA issued Formal Opinion 489,[1] which states that "lawyers have the right to leave a firm and practice at another firm." The ABA goes on to explain that "the ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements," which allows clients to choose their representation and follow their lawyer from firm to firm if they prefer. Firms are not allowed in employment contracts to restrict lawyers from leaving firms. While they "may require some period of advance notice of an intended departure," this period of time should be the minimum necessary for the clients to make a decision as to whether they prefer to follow the leaving attorney or remain with the firm.

A similar situation occurred between Quinn Emanuel Urquhart & Sullivan and some of its lawyers who decided to leave the firm to start their own.[2] The Quinn Emanuel partnership agreement provided that when a partner leaves the firm and takes her book of business with her, she must pay 10% back to Quinn Emanuel

for legal fees that were collected from clients who followed her from Quinn Emanuel to the new firm. This sort of contract violated New York Rules of Professional Conduct 5.6(a), which prohibits a lawyer from "offering or making: (1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship. . . . " The only exception to this rule is when the agreement concerns benefits upon retirement. Section (a)(2) also prohibits agreements "in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy."

The employment agreement you entered with your firm seems to fall squarely within the type of conduct prohibited by New York Rule 5.6(a)(1) and ABA Model Rule 5.6, as it punishes you for leaving the firm and tries to limit who you may work with in the future, thereby restricting your right to practice law apart from the firm. In Formal Opinion 489, the ABA notes that courts have repeatedly held that "financial disincentives to a competitive departure" are unethical and not enforceable.[3] While your firm may not directly be restricting your right to practice outside of the firm, imposing any sort of penalties for leaving the firm is a sneaky way to do so. The ABA highlights New York Court of Appeals decision in *Cohen v. Lord, Day & Lord*,[4] which held that a contract "provision that imposes a 'significant monetary penalty' on an attorney who remains in private practice is the functional equivalent of a restriction on the practice of law, even though there is no express prohibition on competitive activities imposed on the withdrawing partner."[5] Such provisions, which finically disincentivize lawyers from competing against the firm from which it is leaving, are unenforceable as against public policy.[6] The court in *Cohen* further explained that such provisions "interfere with the client's choice of counsel" in that "a clause that penalizes a competing attorney by requiring forfeiture of income could 'functionally and realistically discourage' a withdrawing partner from serving clients who might wish to be represented by that lawyer."[7]

Many New York courts have cited the *Cohen* decision in similar situations and have built upon it. The court in *Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Falicher Associes* brings up many public policy reasons for such rules that prohibit restriction on a lawyer's right to practice, noting that courts should protect "attorney autonomy" and promote "attorney mobility."[8] Provisions that restrict attorney autonomy and mobility ultimately "limits the freedom of clients to choose a lawyer."[9] The court also mentions another reason for such rules is to protect younger lawyers from signing away their ability to work for other law firms or open their own practice later on.

Clients Are Not Firm Property

We also question the validity of the provision in your employment agreement that purports to place restrictions on contacting clients to let them know of your departure. This is an issue we have dealt with in prior Forums that have addressed a client's right to choose who represents them and the obligation of lawyers to keep clients informed so that they can have an opportunity to make such a choice.[10]

ABA Formal Opinion 489 discusses law firms' obligations "to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms." The ABA cites Rule 1.1 of the Model Rules of Professional Conduct, which requires lawyers to "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[11] The ABA explained that this may come into play in a situation where the lawyer seeking to leave the firm is the only one with the appropriate expertise to represent that client.

Model Rule 1.16 addresses how lawyers are to handle instances of declining or terminating representation and offers guidance in situations where lawyers leave a firm and consequently terminate representation of a client if the client chooses to stay with the firm and not the lawyer. Rule 1.16(d) requires lawyers who terminate representation to "take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel. . . . "[12] Law firms have this same obligation if the client chooses instead to follow the lawyer and end its representation with the firm. New York Rule 1.16(e) mirrors the Model Rules of Professional Conduct in that it also requires lawyers to provide reasonable notice to clients of any termination of representation "to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client."

In your situation, the provision restricting you from informing your client of your departure is in direct violation of both the ABA's and New York's Rules of Professional Conduct. Such a provision restricts your ability to comply with the rules, which is directly prohibited by Rule 5.1 of the New York RPC: "A firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules."[13] It is also against the clients' interests, which ABA Formal Opinion 489 states, "the departed lawyer and firm should endeavor to coordinate after the departure, if necessary" to protect.[14]

In *Graubard Mollen Dannett & Horowitz v. Moskovitz*,[15] the Court of Appeals found that partners leaving a firm are "permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind

the client of its freedom to retain counsel of its choice." The court also noted that, while it is ideal that this occurs after the partner has notified the firm of its departure, it is not necessarily required. Partnership or employment agreements may require some sort of reasonable notification period to provide both parties with enough time to meet client needs that might be affected by the lawyer's departure; however, "lawyers cannot be held to a fixed notice period and required to work at a firm through the termination of that period."[16]

A situation that might raise questions as to a partner's fiduciary duties to the firm – and an ethical violation – is if a partner were to secretly lure firm clients to its new firm without ensuring the client is aware of its freedom to choose whether to stay with the firm or follow the departing partner.[17] However, this is certainly not what is occurring in your situation. Your firm is directly attempting to prohibit you from informing clients of your departure and letting them know of their right to choose whether to stay or leave.

Based on ethical rules and opinions, as well as case law, the firm's conduct in enforcing such agreements, limiting your ability to practice law and hindering client's rights, constitutes several ethical violations. Moreover, we doubt that the firm would be successful in attempting to enforce such an agreement upon your departure.

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Question for the Next Attorney Professionalism Forum

To the Forum:

I am a senior associate at Jones & Smith, a 30-lawyer firm on Long Island. One of the two founding partners, Tom Smith, came to me yesterday with astonishing news: he had just told his co-founder, Elbert Jones, that he (Tom) was leaving to go to a rival firm, Young & Zachary. He told me he had asked Elbert for permission to speak to me about coming with him, and Elbert – with whom I rarely work – had agreed. Tom has offered me a partnership at Y&Z, and I'm excited about the possibility. Tom is also hoping another J&S associate, Alan Able, will come with us.

There are, however, two major problems. First, Tom, Alan and I have for years been representing MegaManu, Inc., a large, closely held manufacturing company, in an antitrust dispute with its rival Cartels-R-Us, Inc. Cartels-R-Us is represented in that action by Y&Z. Over the years, I have had limited involvement in the case. I have taken a couple of depositions of mid-level witnesses and been at occasional meetings with client representatives discussing case strategy. Tom is the main interface with the client and has principal responsibility for the case; when a major tactical decision has to be made in the case, or a principal needs to be deposed, Tom handles that. Alan's involvement in the case has mainly been limited to conducting legal research.

Second, Alan comes from a wealthy family, and he is the beneficiary of a family trust that owns 33% of MegaManu's stock. The value of that stock would be adversely affected if MegaManu loses the lawsuit.

I have expressed concern about all of this creating a conflict if we move to Y&Z. Tom has spoken to Y&Z about it and they say there is no problem – all we have to do is create an ethical screen. I heard that a recent change in the ethics rules might impact our response, but I don't know what that change is and how it could help us.

May all three of us move to Y&Z? Will an ethical screen work to avoid a disqualification motion in the MegaManu/Cartels-R-Us case?

Sincerely,
W. E. Moving

Endnotes

1. *ABA Issues New Ethical Guidance for When Lawyers Leave* American Bar Association, https://www.americanbar.org/news/abanews/aba-news-archives/2019/12/formal-opinion-489.
2. Andrew Denney, *Forfeiture Contract Complicates Quinn Emanuel Spat With Breakaway Partners*, N.Y. Law J., Oct. 31, 2018, https://www.law.com/newyorklawjournal/2018/10/31/forfeiture-contract-complicates-quinn-emanuel-spat-with-breakaway-partners.
3. *Supra* note 1.
4. 75 N.Y.2d 95 (1989).
5. ABA Formal Opinion 489 (2019).
6. *Denburg v. Parker Chapin Flattau & Klimpl,* 82 N.Y.2d 375, 380-81 (1993).
7. *Cohen,* 75 N.Y.2d at 98.
8. *See Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Falicher, Associes*, 20 Misc.3d 1145(A), 873 N.Y.S.2d 235 (2008), citing ABA Model Rule 5.6, Comment 1: "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."
9. *Id.*
10. *See* Vincent J. Syracuse et al, Attorney Professionalism Forum, NYSBA Journal, November 2020, p. 61; Vincent J. Syracuse et al, Attorney Professionalism Forum. NYSBA Journal, November/December 2018, p. 54.
11. Rule 1.1: Competence, American Bar Association Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/.
12. Rule 1.16: Declining or Terminating Representation, April 14, 2020, American Bar Association Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/.
13. Part 1200: Rules of Professional Conduct, New York State Unified Court System, Jan. 1, 2017, https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf. See also ABA MRPC 5.1(a): "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses a comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."
14. *Supra* note 1.
15. 86 N.Y.2d 112 (1995).
16. *Supra* note 1.
17. *Id.*