



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rule of Professional Conduct 5.6 and its Comment [1]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 97-09
May 13, 1998

Topic: Restrictive Covenants

Digest: Law firm partnership agreement that provides that former partners who compete after withdrawal forfeit a portion of the departure compensation violates the Illinois Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct, Rule 5.6(a)
ISBA Advisory Opinions on Professional Conduct Nos. 93-13, 91-12, 86-16, 84-15 and 628
ABA Model Rules of Professional Conduct, Rule 5.6(a)
Dowd & Dowd v. Gleason, 181 Ill.2d 460, 230 Ill.Dec. 229, 693 N.E.2d 460 (1998)
Stevens v. Rooks, Pitts & Poust, 289 Ill.App.3d 991, 225 Ill.Dec. 48, 682 N.E.2d 1120 (1st Dist. 1997)
Today's Associate, Tomorrow's Competitor: New Rules Doom Noncompetition Agreements, Melvin B. Lewis, 79 Ill.Bar.J 330 (July 1991)
Enforceability of Agreements Restricting Right of Attorneys to Compete with Former Law Firm, 28 ALR 5th 420

FACTS

A law firm partnership agreement provides that former partners who directly or indirectly compete with the firm during the one year period after withdrawing from the partnership, forfeit 20% of the

amounts payable to them as ex-partners. The agreement does not concern only "retirement" benefits, but all departures from the firm.

QUESTIONS

1. Does the agreement provision violate Rule 5.6 of the Illinois Rules of Professional Conduct?
2. Is such a provision unenforceable?

OPINION

Rule 5.6(a), entitled "Restriction on Right to Practice" states:

A lawyer shall not participate in offering or making:

- (a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of a relationship, except an agreement concerning benefits upon retirement....

It is the opinion of the Committee that such a provision in a law firm partnership agreement violates Rule 5.6(a) and is improper. Such a provision would be an improper restriction upon the right of the lawyer to practice law after the termination of the relationship, and more particularly, serve as a prohibition or restriction on the prospective client's right to be represented by counsel of their own choosing.

It is unethical and a violation of Rule 5.6(a) for a lawyer to make such an agreement or for a law firm, lawyer, or group of lawyers, whether in a partnership, corporation or proprietorship, to make such an agreement. This has been the consistent opinion of the Association. See ISBA Advisory Opinions on Professional Conduct Nos. 93-13, 91-12, 86-16, 84-15 and 628 and Today's Associate, Tomorrow's Competitor: New Rules Doom Noncompetition Agreements, Melvin B. Lewis, 79 Ill.Bar.J 330 (July 1991). This opinion has been confirmed by the Illinois Courts. First, in Stevens v. Rooks, Pitts & Poust, 225 Ill.Dec. 48 (1st Dist. 1997). There the Court held that Rule 5.6(a) was applicable to a pre-existing employment contract/partnership agreement. Further, the Court interpreted the financial disincentive clause therein, which required a departing lawyer to forfeit certain compensation otherwise due upon departure from the firm if the lawyer competed with the firm within a certain geographic area, as a restrictive covenant in violation of Rule 5.6(a). The Court, also citing ISBA Advisory Opinion on Professional Conduct Nos. 91-12 and 93-13, concluded the provision violated public policy and was unenforceable.

While the Illinois Supreme Court denied to hear an appeal from this holding, the Court cited with approval the decision by the First District applying Rule 5.6 to the noncompetition covenants at issue in Dowd & Dowd v. Gleason, 181 Ill.2d 460, 230 Ill.Dec. 229, 693 N.E.2d 358 (1998).

The second question is reserved to our judicial system to determine the enforceability of contractual provisions on a case by case basis. See Stevens, supra, Dowd & Dowd, supra, and Enforceability of Agreements Restricting Right of Attorneys to Compete with Former Law Firm, 28 ALR 5th 420. We therefore express no opinion as to the second question.

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