

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 06-09**

**ETHICAL ISSUES**

IS IT ETHICAL FOR A LAW FIRM TO INCLUDE A PROVISION IN AN ATTORNEY'S EMPLOYMENT OR OTHER AGREEMENT WHICH PROVIDES FOR LIQUIDATED DAMAGES IF THE ATTORNEY LEAVES THE FIRM AND THEN COMPETES WITH THE LAW FIRM?

**STATEMENT OF FACTS**

A law firm intends to hire an associate. It expects to make a significant financial investment in this associate and would like to have a liquidated damages clause in the associate's employment contract. The clause would require the associate to pay damages to the firm if the associate left the firm and continued to practice in the same county.

**NEBRASKA RULES OF PROFESSIONAL CONDUCT**

**RULE 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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

**DISCUSSION**

It is clear from Rule 5.6 that a practice agreement among lawyers cannot restrict a departing lawyer's right to compete except as provided for specifically in that Rule. The issue then is whether a provision which provides for liquidated damages upon termination of employment or association also violates Rule 5.6. According to the *ABA Manual on Lawyer's Professional Conduct* (p. 51:1205), the answer in most jurisdictions is that a law firm cannot condition the payment of or demand for money on whether a withdrawing lawyer competes with the firm.

“Contractual provisions that impose a financial disincentive on withdrawing lawyers if they choose to go into competition with the firm do not, strictly

speaking, prohibit the lawyers from such competition. But indirectly they may have much the same effect as a restrictive covenant because, facing forfeiture of compensation that otherwise would rightfully be theirs, the lawyers may feel financially obligated to decline representation of any of the firm's clients who want to leave with them." *ABA Manual on Lawyer's Professional Conduct*, p 51:1205

Typical of the rulings or opinions of most states is that of *Jacob v Norris, McLaughlin & Marcus*, 307 A2d 142 (NJ SupCt 1992):

"By forcing lawyers to choose between compensation, and continued service to their clients, financial-disincentive provisions may encourage lawyers to give up their clients, thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel. Those provisions thus cause indirectly the same objectionable restraints on the free practice of law as more direct restrictive covenants.

With the exception of Maine (which did not adopt Rule 5.6) and California (where the Supreme Court has allowed a reasonable financial disincentive provision), all states which have considered the matter have rejected the imposition of financial penalties in the case of a withdrawing lawyer's competition. As an example, see South Dakota Ethics Opinion 94-2. The Advisory Committee believes, like the overwhelming majority of states, that Rule 5.6 applies not only to specific restrictions on non-competition, but also to provisions which provide for financial penalties for competition.

## **CONCLUSION**

Except as expressly permitted by Rule 5.6, it is not ethical for a law firm to include a provision in an attorney's employment or other agreement which provides for liquidated damages if the attorney leaves the firm and then competes with the law firm.