

FORMAL OPINION NO. 2005-29

Law Partnerships: Covenants Not to Compete

Facts:

Lawyers *A*, *B*, and *C* are law partners who employ Lawyer *D* as an associate. Lawyers *A*, *B*, and *C* would like to restrict the ability of Lawyer *D* to perform legal work for clients of the partnership if Lawyer *D* leaves their employ. Lawyers *A*, *B*, and *C* would also like to prohibit any one of the three of them who may leave the partnership from working for partnership clients.

Questions:

1. May Lawyers *A*, *B*, and *C* require Lawyer *D* to execute a covenant against competition?
2. May they place such a restriction in their partnership agreement?
3. May the partnership agreement place any other conditions on the departure of a partner?

Conclusions:

1. No.
2. No.
3. Yes, qualified.

Discussion:

The first two questions are answered by Oregon RPC 5.6(a):

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.

Oregon RPC 5.6(a) is essentially the same as *former* DR 2-108(A), which has been interpreted in *Hagen v. O'Connell, Goyak & Ball*, 68 Or App 700, 683 P2d 563 (1984), and *Gray v. Martin*, 63 Or App 173, 663 P2d 1285 (1983). *See also Cohen v. Lord, Day & Lord*, 75 NY2d 95, 550 NE2d 410, 551 NYS2d 157 (1989). Oregon RPC 5.6(a) is arguably

broader than *former* DR 2-108 because it makes reference to more than just partnership and employment agreements. The language of Oregon RPC 5.6(a) compels the conclusion that lawyer covenants against competition are impermissible and that lawyers may not provide in any agreements between them that a withdrawing lawyer pay any sort of penalty as a precondition to engaging in competition.

Nevertheless, partnership agreements may provide for reimbursement to the partnership for harm actually caused to the partnership by the withdrawal or for a diminution in value caused by the withdrawal. As noted in *Hagen, supra*, 68 Or App at 704, for example,

[E]ven though the penalty provision cannot be enforced, a professional corporation [or law partnership] must have the right to adjust the value of its stock [or relative percentage shares] according to the effect created when a withdrawing shareholder takes clients from the firm. . . . The adjustment in the stock's value can be determined by the formula in the rest of the paragraph [i.e., not including the "penalty" portion], which we conclude would result in a valuation that bears a reasonable relationship to the probable loss to the firm.

Approved by Board of Governors, August 2005.

COMMENT: For more information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §12.31 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §13 (2003); and ABA Model Rule 5.6. For information on Oregon RPC 5.6(b) (prohibiting lawyer from agreeing not to represent other person in connection with settling claim on behalf of client), see *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000); OSB Formal Ethics Op No 2005-47 (neither plaintiff's counsel nor defense counsel may offer or agree to settle litigation on condition that plaintiff's counsel agree not to sue defendant again).