



# Ohio Board of Professional Conduct

**OPINION 2023-08**

Issued August 4, 2023

## **Departing Lawyer Reimbursing Firm for Advertising Costs**

**SYLLABUS:** The Rules of Professional Conduct prohibit a law firm from adding a clause to its standard employment contract requiring a departing lawyer to pay the firm the quantum meruit value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs. The addition of 25 percent of the overall recovery of attorney fees is an impermissible restriction on the departing lawyer's right to practice after termination of the employment relationship. The additional fee is also an impermissible division of attorney fees by lawyers not in the same firm.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

[www.bpc.ohio.gov](http://www.bpc.ohio.gov)

HON. D. CHRIS COOK  
CHAIR  
PATRICK M. McLAUGHLIN  
VICE-CHAIR

RICHARD A. DOVE  
DIRECTOR  
D. ALLAN ASBURY  
SENIOR COUNSEL  
KRISTI R. McANAU  
COUNSEL

## OPINION 2023-08

Issued August 4, 2023

### Departing Lawyer Reimbursing Firm for Advertising Costs

**SYLLABUS:** The Rules of Professional Conduct prohibit a law firm from adding a clause to its standard employment contract requiring a departing lawyer to pay the firm the quantum meruit value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs. The addition of 25 percent of the overall recovery of attorney fees is an impermissible restriction on the departing lawyer's right to practice after termination of the employment relationship. The additional fee is also an impermissible division of attorney fees by lawyers not in the same firm.

**APPLICABLE RULES:** Prof.Cond.R. 1.5, 5.6

#### QUESTION PRESENTED:

May a law firm add a clause to its standard employment contract requiring a departing lawyer to pay the firm the quantum meruit value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs?

#### OPINION:

A law firm concentrates its practice on plaintiff personal injury cases and spends a large amount of money each year on advertising to attract new clients. From time to time, lawyers leave the firm and take contingency fee cases of the firm with them ("Transferred Cases".) The Transferred Cases are subsequently settled or tried to verdict

by the departing lawyer. When a settlement or verdict is reached on a Transferred Case, the firm seeks a quantum meruit portion of the settlement or verdict.

The firm wants to add a clause to its standard employment contract that requires a departing lawyer to pay the firm 25 percent of any recovery of attorney fees on a Transferred Case to reimburse the firm for its advertising costs. This charge would be in addition to the firm's quantum meruit claim.

#### *Restriction on right to practice*

Prof.Cond.R. 5.6(a) prohibits a lawyer from offering or making an employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except regarding benefits upon retirement or upon the sale of a law practice. Prof.Cond.R. 5.6(a), cmt. [1], [3]. The rationale behind the rule is that restrictive covenants can limit a lawyer's professional autonomy and a client's freedom to choose a lawyer. *Id.* at. cmt. [1] and Adv. Op. 2021-07. The Supreme Court has recognized that there is a strong public policy interest in permitting a party's continued representation by counsel of his or her choice. *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St.3d 1, 1998-Ohio-439; Adv. Op. 2021-07. Beyond prohibiting restrictions related to competing within a specific geographic area, for a specified period of time, or in certain practice areas, the majority of jurisdictions prohibit agreements that serve as a financial deterrent to competition or as an economic penalty because it could lead to some lawyers declining to represent certain clients. ABA/BNA Lawyer's Manual on Professional Conduct, 51 Conflicts of Interest, 51:1201.40.10 Restrictions of Right to Practice (2022).

Only a few jurisdictions permit an employment agreement to impose a reasonable financial penalty for a departing lawyer to discourage competition. ABA/BNA Lawyer's Manual on Professional Conduct, 91 Types of Practice, Private Firm, 91:701.20.180.30 Withdrawal and Termination (2022). The higher the percentage to be paid to the former firm, the more likely the rule will be violated. *Id.* Courts have found employment agreements requiring a departing lawyer to pay 12.5 to 15 percent of fees received from former clients to the law firm unenforceable. *Id.* (citing *Denburg v. Parker Chapin Flattau & Klimpl*, 604 N.Y.S.2d 900 (N.Y. 1993) and *Eisenstein v. David G. Conlin PC*, 827 N.E.2d 686 (Mass. 2005)). Even in the limited jurisdictions that permit a departing lawyer to share fees from clients who leave with them, the amount "must be reasonable and reflect the actual financial loss or harm to the firm that can be expected from the lawyer's

departure.” ABA/BNA Lawyer’s Manual on Professional Conduct, 51 Conflicts of Interest, 51:1201.40.20 Restrictions of Right to Practice (2022).

In Adv. Op. 2019-04, the Board addressed Prof.Cond.R. 5.6 in the context of settlement provisions. The Board observed that even when a provision may not directly bar future representation by a lawyer, it may have the practical effect of limiting the lawyer’s right to practice and thus violate the rule. *Id.* The Board further reasoned, “[a]n analysis of less obvious restrictions under Prof.Cond.R. 5.6 requires a determination of whether the lawyer is given significantly less discretion in pursuing future claims than a lawyer not subject to the agreement. In those instances, the provision constitutes an impermissible restriction on the practice of the lawyer.” *Id.*

In *Cincinnati Bar Assn. v. Hackett*, 129 Ohio St.3d 186, 2011-Ohio-3096, the Supreme Court addressed an employment agreement wherein the departing associate was required to pay the firm 95 percent of the attorney fees generated on cases in which the clients followed the departing lawyer, regardless of the proportion of work each attorney performed. The Court observed that a client’s absolute right to discharge a lawyer or law firm, at any time with or without cause, subject to compensation for services rendered, would be meaningless if the discharged attorney could prevent other attorneys from representing the client. *Id.* at ¶8. The Court concluded that if the employment agreement were enforced, it would create an “economic deterrent for the departing attorney that would adversely affect the clients’ right to retain an attorney of their own choosing.” *Id.* at ¶9.

In the Board’s view, the proposed additional 25 percent of attorney fees recovered here is a financial disincentive disguised as the repayment of operating expenses of the law firm. First, this Board has already opined that a law firm cannot require a departing associate to pay the firm a percentage of fees generated from work occurring subsequent to departure. Adv. Op. 2021-7. By seeking 25 percent of the total attorney fees recovery on top of any quantum meruit claim, the law firm will receive a percentage of the legal fees earned for work completed after the lawyer departs the law firm.

Second, the percentage requested by the law firm to purportedly reimburse the firm for advertising costs appears to be arbitrary. While the law firm indicates that it spends a “large amount of money” each year on advertising, the firm makes no attempt

to demonstrate the reasonableness of the percentage or tie the amount to any actual financial loss to the firm. For example, there is no indication that the suggested percentage reflects a prorated amount of per client advertising costs. If one or two clients with the potential for a large recovery on a contingent fee case follow the departing lawyer, the law firm could receive a windfall that may surpass the law firm's actual annual expenditure for advertising.

The departing lawyer has significantly less discretion in agreeing to continue to represent the client than a lawyer not subject to the agreement. The percentage places a burden on the departing lawyer in a way that may impair the client's right to choose counsel if the departing lawyer is not willing to continue representing the client knowing his or her fee will be reduced by the 25 percent owed to the former firm. This is an impermissible restriction on the lawyer's right to practice after termination of the employment relationship.

#### *Fee Splitting*

The proposed employment agreement also implicates Prof.Cond.R. 1.5(e), which provides that lawyers not in the same firm may only divide fees if: 1) the fees are divided in proportion to the services performed or both lawyers agree to be jointly responsible for the representation; 2) the client gives written consent to the division of fees; 3) in the event the fee agreement is contingent, both lawyers and the client sign the closing statement; and 4) the total fees are reasonable. Comment [8] to the rule indicates that it does not prohibit or regulate the division of fees to be received in the future *for work done when lawyers were previously associated* in a law firm. The rule and comments are silent as to payment for work done after departure or of reimbursement for any additional or "costs" associated with a lawyer's employment and then departure from a firm. This additional proposed fee to reimburse the firm for advertising costs cannot be considered an attorney fee for "work done" when the lawyer was previously associated with the law firm given that the firm will receive a quantum meruit payment for that same work. If the employment agreement were enforced, it would operate to impose the division of attorney fees paid by the client without input from the client. The client would not be required to consent to the disposition of his or her fees and the law firm would have no requirement to maintain joint responsibility for a matter which was ongoing and from which the firm may ultimately benefit financially.