Don't Take Risks with 5.6:

An Analysis of Rule 5.6 of the Louisiana Rules of Professional Conduct and Its Application for Attorneys in Louisiana

By Alex J. Domingue

With 23,241 licensed attorneys in Louisiana,[1] one area of Louisiana law that is particularly regulated is a lawyer's ability and freedom to practice.[2] With such a large number of attorneys, and consequently, many large law firms, the movement of attorneys among firms can raise the issue of practice restrictions between a law firm and an individual attorney. This issue relates to both the business arrangement between the attorney and the firm upon an attorney's departure and the consequences of any financial obligations between the two of them.

Rule 5.6 of Louisiana's Rules of Professional Conduct regulates this area. The Louisiana Supreme Court adopted this rule in its current form on Jan. 20, 2004, and it became effective in March of that year.[3] Rule 5.6 provides:

> A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.[4]

The policy justification behind such an absolute rule is to ensure that lawyers can practice freely and that clients are not restricted in choosing which attorney will represent them.[5] Despite the rule's seemingly clear language, its application can be perplexing due to the exception within the rule, the rule's application alongside other Rules of Professional Conduct and its related jurisprudence. Although Rule 5.6 was drafted with good intent, properly applying the rule can be complex.

Exceptions Within the Rules of Professional Conduct

The Louisiana Rules of Professional Conduct provide two exceptions to Rule 5.6.[6] First, Rule 5.6 specifically provides that it does not apply to restrictions placed on an attorney's ability or freedom to practice law that is incidental to retirement.[7] For example, a solo practitioner close to retirement age and a young attorney may enter into a partnership agreement that gives retirement benefits to the former until his death, in exchange for the latter receiving all of the partnership's assets upon the former's retirement. This first exception is straightforward.

The second exception is that the Rule 5.6's restrictions do not prohibit the sale of a practice permitted under Rule 1.17 of Louisiana's Rules of Professional Conduct.[8] Rule 1.17 allows for the sale of a practice or an area of law practice, including goodwill, as long as the selling lawyer has not been disbarred or permanently resigned from the practice of law in lieu of discipline, has permanently ceased to engage in the practice of law, or has disappeared or died.[9] This exception is complex because it involves many requirements that must be met in order to appropriately sell a practice.[10]

These exceptions to Rule 5.6 cause slight deviations to the application of the rule from the seemingly unambiguous text. However, Louisiana's appellate courts have provided further deviation from Rule 5.6 by allowing attorneys to enter into agreements that go beyond these exceptions. Unfortunately, the jurisprudence in this area is not uniform, further complicating the application of Rule 5.6.

Exceptions from Case Law

Further exceptions to Rule 5.6 arise from Louisiana jurisprudence. In Louisiana, non-competition agreements are generally unenforceable.[11] Despite this prohibition, courts in Louisiana have engaged in a factual analysis to determine whether agreements, provisions or other business arrangements that indirectly restrict an attorney's ability to practice effectively violate Rule 5.6.[12] Before examining the jurisprudence that analyzes which types of "restrictive" contracts could be enforceable and ethical, it is helpful to determine which contracts are indisputably unenforceable.

Unenforceable Agreements

There are two types of agreements that are indisputably unenforceable. The first are clear post-termination agreements and the second are agreements that create a financial barrier for departing attorneys.

Rule 5.6 of the Louisiana Rules of Professional Conduct is identical to Rule 5.6 of the ABA Model Rules of Professional Conduct.[13] Rule 5.6 of the ABA Model Rules of Professional Conduct provides that "a clear post-termination non-compete agreement or other restrictive covenant is prohibited."[14] Louisiana's Rule 5.6 adopted this stance as is evident from the language of the rule. This policy was reinforced through the Louisiana 1st Circuit Court of Appeal's decision in *Nodier v. Ungarino & Eckert, LLC*, which found that a non-competition agreement between a departing attorney and his old firm was "null and void *ab initio*" under Rule 5.6 and under Louisiana statutory law.[15] In other words, there is no question that a post-termination non-compete agreement is unenforceable under Rule 5.6 of the Louisiana Rules of Professional Conduct. Unfortunately, other related jurisprudence is not as straightforward.

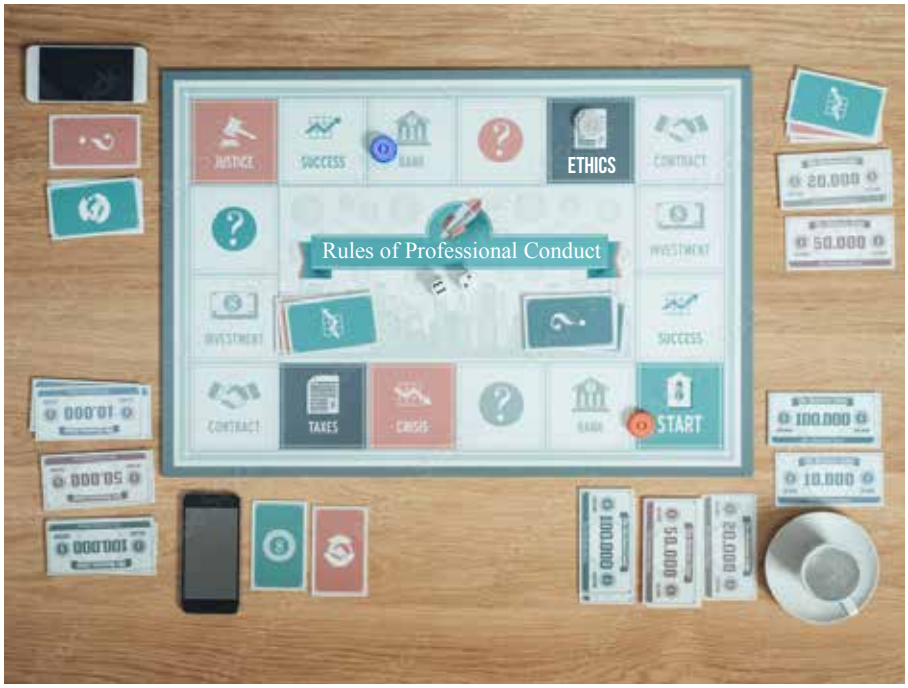
In *Minge v. Weeks*, the Louisiana 4th Circuit Court of Appeal refused to uphold an employment agreement that required a departing attorney to pay his former firm 80% of any attorney's fees derived from clients that he solicited from his former firm.[16] The departing attorney's clients also intervened in the suit, arguing that because the departing attorney could not afford to continue as his attorney due to the employment contract at issue, he was being deprived of his right to counsel.[17] The court found that the fee created a financial disincentive that would restrict the departing attorney's ability to continue practicing law, violating the "spirit of Rule 5.6."[18] Following *Minge*, employment agreements that do not directly restrict competition may violate Rule 5.6 if they impose a financial barrier for a lawyer to continue practicing law after departure from a firm.[19]

Continued next page

Agreements That May be Enforceable

Although determining which type of post-employment agreements may be enforceable under Rule 5.6 of the Louisiana Rules of Professional Conduct is a fact-specific inquiry, there are cases throughout Louisiana's appellate courts that can assist in making this determination.

A partnership agreement, that includes fee-splitting arrangements upon dissolution of a firm, may be enforceable. In *Roy v. Gravel*, a partnership agreement provided that, upon dissolution of the partnership, the attorneys working on a specific case would continue to do so, but all the attorneys at the firm would have a financial interest in each of the matters, even if they were not working on that specific case.[20] The plaintiff in *Roy* did not want to split fees with the other attorneys, as required by the partnership dissolution agreement, and argued that the agreement should be found null and void because it restricted his ability to practice law.[21] The Louisiana 3rd Circuit Court of Appeal disagreed. The court stated, "A partnership retains its juridical personality or 'life' for purposes of liquidation when a partnership is dissolved, and the ongoing case files remain the property of the partnership until the conclusion of the present contracts, which includes contingency fee contracts."[22] Further, because the clients could still discharge the firm despite its dissolution, the court found no public policy reason to find that the arrangement violated Rule 5.6.[23] The 5th Circuit came to a similar holding in *McDonald v. Trans Atlas Marine Corp*.[24] This case involved a partnership agreement which provided that the partners of the firm would share partnership profits and losses on a two-thirds basis, respectively, and did not contain any termination provisions for the allocation of partnership files or fees earned post-termination.[25] The partnership was later dissolved by mutual consent and one of the former partners subsequently performed the majority of the legal work on a specific case. The other partners sued, arguing that the fees remained an asset of the former partnership and should have been allocated pursuant to the partnership agreement.[26] The district court found for the former partners and the 3rd Circuit agreed, holding that the fees were to be split amongst the former partners on a quantum merit basis.[27]



Some appellate courts in Louisiana have held that agreements requiring repayment of fees by a departing attorney leaving a law practice may be permissible. For example, in *Warner v. Carimi Law Firm*, a 5th Circuit case, an employment contract provided that, upon leaving the firm and taking clients with him, an existing attorney must repay any expenses that the firm had paid in respect to that client and his litigation prior to the attorney's departure.[28] The departing attorney argued that the financial demands imposed by this employment agreement made it impossible for him to continue handling his cases. Additionally, some of the departing attorney's clients attempted, unsuccessfully, to intervene in the suit arguing that the departing attorney could not handle their cases because of the financial demands from the employment agreement.[29] The Louisiana 5th Circuit Court of Appeal upheld the firm's contract under the reasoning that attorneys must consider the financial consequences of their actions.[30] Specifically, the court stated, "If any financial consequence to an attorney is enough to render all agreements with the law firm that he worked for null as against public policy, then that would mean lawyers could not enter into valid agreements amongst themselves regarding business aspects of the practice of law . . . ." The court also stated that a client's former attorney should not be shouldered with the burden of financing litigation, but rather the current attorney should take that responsibility.[31]

Finally, agreements in which a departing attorney participated in the drafting or negotiation of may be permissible even if it seemingly violates Rule 5.6. In drafting partnership agreements, courts have generally allowed leniency and deferred to the intentions of the parties when it comes to the "payouts" for an attorney when the attorney leaves.[32] For example, in *Hoffman v. Lemle & Kelleher*, the partnership agreement entered into by the firm and the departing attorney contained a clause which specified the exact amount of profits that a departing attorney would be entitled to upon his departure from the firm.[33] The departing attorney objected to the agreement for several reasons, one of which was that the agreement contained a non-compete clause that infringed on his ability to practice law.[34] The court disagreed with the departing attorney's contention, holding that since he had participated in the agreement and had the intellect and experience attributable

to a lawyer, the court could presume that the former firm member understood the terms and significance of the contract's provisions.[35]

Louisiana jurisprudence shows a conflict among the courts on this issue. Consequently, it is hard to predict how a Louisiana appellate court might rule on agreements that arguably violate Rule 5.6 of the Louisiana Rules of Professional Conduct, despite the unambiguous language within the rule. To further complicate this issue, to date, the Louisiana Supreme Court has never issued any applicable decision on the application of Rule 5.6 of the Louisiana Rules of Professional Conduct.

Overall, despite the uncertainty, there are some consistencies between the appellate courts. The first is that Louisiana's appellate courts give great deference, when determining whether a post-termination agreement violates Rule 5.6, based on how it affects a client's representation. Second, Louisiana's appellate courts will likely uphold post-termination agreements in which a departing attorney had a substantial involvement in creating. Finally, even if Louisiana's appellate courts uphold a post-termination agreement, they may alter its application, depending on the facts of the matter.

Conclusion

Some narrowly tailored contractual financial provisions that protect a law firm's interests and/or that of its client may be permissible. However, such provisions and contracts may not violate the public policy created by the non-competition statute generally and more specifically by Rule 5.6 of the Louisiana Rules of Professional Conduct. Any such agreements may not make it difficult for existing clients to exit the attorney-client relationship and find other representation and they may not create a financial burden for an attorney to continue practicing law. The case law is limited on this issue, but the most important rule that can be derived from the jurisprudence is that the drafting attorney must pay attention to the actual practical effects of the agreement to ensure it does not violate the policies mentioned above and to ensure a client has ample opportunity to obtain adequate subsequent representation.

FOOTNOTES

1. Email from Member Records Coordinator, Louisiana State Bar Association, to author (Dec. 9, 2021) (on file with author).

2. *See* Louisiana Rules of Professional Conduct, Rule 5.6.

3. Prof. Dane S. Ciolino, "Rule 5.6. Restrictions on Right to Practice, Louisiana Legal Ethics," Feb. 25, 2019, *https://lalegalethics.org/louisiana-rules-of-professional-conduct/article-5-law-firms-and-associations/rule-5-6-restrictions-on-right-to-practice/.*

4. *See* Louisiana Rules of Professional Conduct, Rule 5.6.

5. *See,* Minge v. Weeks, 629 So.2d 545, 547 (La. App. 4 Cir. 12/21/1993); *see also,* Regional Urology, LLC v. Price, 42789 (La. App. 2 Cir. 9/26/2007), 966 So.2d 1087, 1095 (Brown, C.J., dissenting) (noting that the rule is a matter of public policy, which facilitates a client's trust in the client's lawyer), *writ denied*, 976 So.2d 176 (La. 2008).

6. *See,* La. Rules of Prof'l Conduct.

7. *Id.*

8. *See,* La. Rules of Prof'l Conduct.

9. La. Rules of Prof'l Conduct, r. 1.17.

10. These requirements include the following: (a) The selling lawyer has not been disbarred or permanently resigned from the practice of law in lieu of discipline, and permanently ceases to engage in the practice of law, or has disappeared or died; (b) The entire law practice, or area of law practice, is sold to another lawyer admitted and currently eligible to practice in this jurisdiction;

(c) At least ninety (90) days in advance of the sale, actual notice, either by in-person consultation confirmed in writing, or by U.S. mail, is given to each of the clients of the law practice being sold, indicating:

(1) the proposed sale of the law practice;

(2) the identity and background of the lawyer or law firm that proposes to acquire the law practice, including principal office address, number of years in practice in Louisiana, and disclosure of any prior formal discipline for professional misconduct, as well as the status of any disciplinary proceeding currently pending in which the lawyer or law firm is a named respondent;

(3) the client's right to choose and retain other counsel and/or take possession of the client's files(s); and

(4) the fact that the client's consent to the transfer of the client's file(s) will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the notice.

(d) In addition to the advance notice to each client described above, at least thirty (30) days in advance of the sale, an announcement or notice of the sale of the law practice, including the proposed date of the sale, the name of the selling lawyer, the name(s) of the purchasing lawyer(s) or law firm(s), and the address and telephone number where any person entitled to do so may object to the proposed sale and/or take possession of a client file, shall also be published: 1) in the *Louisiana Bar Journal*; and 2) once a week for at least two (2) consecutive weeks in a newspaper of general circulation in the city or town (or parish if located outside a city or town) in which the principal office of the law practice is located.

11. La. R.S. 23:921 (2021).

12. *See,* Kops v. Lee, 2003-1407 (La. App. 4 Cir. 3/31/04), 871 So.2d 1187.

13. Prof. Dane S. Ciolino, "Rule 5.6. Restrictions on Right to Practice, Louisiana Legal Ethics," Feb. 25, 2019, *https://lalegalethics.org/louisiana-rules-of-professional-conduct/article-5-law-firms-and-associations/rule-5-6-restrictions-on-right-to-practice/.*

14. *Rule 5.6: Restrictions on Rights to Practice,* American Bar Association, *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_6_restrictions_on_rights_to_practice/.*

15. Nodier v. Ungarino & Eckert, LLC, No. 2006-1461, 2007 WL 1300805, at *1 (La. App. 1 Cir. 5/4/2007).

16. Minge v. Weeks, 629 So.2d 545, 546-47 (La. App. 4 Cir. 1993).

17. *Id.*

18. *Id.* at 547.

19. *See id.*

20. Roy v. Gravel, 570 So.2d 1175, 1178-79 (La. App. 3 Cir. 1991).

21. *Id.* at 1183.

22. *Id.* at 1184.

23. *See id.*

24. McDonald v. Trans Atlas Marine Corp., 1993 U.S. App. LEXIS 38356, 38356 (5 Cir. 12/17/1993).

25. *Id.*

26. *Id.*

27. *Id.*

28. Warner v. Carimi Law Firm, 96-55 (La. App. 5 Cir. 6/25/1996), 678 So.2d 561.

29. *Id.*

30. *Id.*

31. *Id.*

32. Hoffman v. Lemle & Kelleher, 2001-1633 (La. App. 4 Cir. 7/31/2002), 824 So.2d 1253.

33. *Id.*

34. *Id.* at 1258.

35. *Id.* at 1259.

Alex J. Domingue is an associate attorney at Mouledoux, Bland, Legrand & Brackett, LLC, in New Orleans. He received his JD degree from Louisiana State University Paul M. Hebert Law Center. (adomingue@mblb.com; Ste. 600, 701 Poydras St., New Orleans, LA 70139)