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No. 84337-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SEATTLE TRUCK LAW, PLLC, a Washington Professional Limited Liability Company,

Respondent,

v.

JAMES BANKS, an individual,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Table of Authorities..iii-vi

A. INTRODUCTION 1

B. IDENTITY OF PETITIONER... 3

C. COURT OF APPEALS DECISION................................ 3

D. ISSUES PRESENTED FOR REVIEW 4

E. STATEMENT OF THE CASE... 4

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.. 9

(1) The Decision Below Presents an Important Question About Regulating the Legal Profession That This Court Should Decide........... 9

(a) The Court Should Review This Unresolved Issue Under RPC 5.6(a) Because This Court Has Ultimate Authority to Decide Whether Restrictions on Attorney Movement Harm Client Choice and Professional Autonomy............ 9

(b) The Bar and the Public Need Guidance on Whether Division I Correctly Adopted the Minority, Permissive View of Financial Disincentives Against Attorney Movement 18

(2) Division I's Emphasis on a Law Firm's Business Interests Conflicts with This Court's Directives for Interpreting and Applying the RPCs 20

(a) A Broad Interpretation of RPC 5.6(a) Consistent with Its Purposes Prohibited Division I from Weighing Law Firms' Business Interests 21

(b) A Secret 50/50 Fee-Splitting Provision for Unearned Fees Violates the Public Policies Embodied in RPC 5.6(a) by Infringing on Cient Choice and by Allowing Law Firms to Effectively Bind Attorneys from Leaving 24

G. CONCLUSION 29

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Barr v. Day,
124 Wn.2d 318, 879 P.2d 912 (1994) 25
Belli v. Shaw,
98 Wn.2d 569, 657 P.2d 315 (1983) 14
Eriks v. Denver,
118 Wn.2d 451, 824 P.2d 1207 (1992) 12, 21
Gustafson v. City of Seattle,
87 Wn. App. 298, 941 P.2d 701 (1997) 21
Hizey v. Carpenter,
119 Wn.2d 251, 830 P.2d 646 (1992) 11
In re Disciplinary Proceeding Against McGlothlen,
99 Wn.2d 515, 663 P.2d 1330 (1983) 21
In re Disciplinary Proceedings Against Johnson,
118 Wn.2d 693, 826 P.2d 186 (1992) 11
LK Operating, LLC v. Collection Grp., LLC,
181 Wn.2d 48, 331 P.3d 1147 (2014) ....*passim*
Seattle v. Ratliff,
100 Wn.2d 212, 667 P.2d 630 (1983) 11
Short v. Demopolis,
103 Wn.2d 52, 691 P.2d 163 (1984) 11
State v. Kelley,
168 Wash.2d 72, 226 P.3d 773 (2010)................................. 23
Taylor v. Shigaki,
84 Wn. App. 723, 930 P.2d 340 (1997) 26
Valley/50th Ave., LLC v. Stewart,
159 Wn.2d 736, 153 P.3d 186 (2007) 14

Other Cases

Arena v. Schulman, LeRoy & Bennett,
233 S.W.3d 809 (Tenn. Ct. App. 2006) 19
Barna, Guzy & Steffen, Ltd. v. Beens,
541 N.W.2d 354 (Minn. Ct. App. 1995) 19
Cohen v. Lord, Day & Lord,
75 N.Y.2d 95, 550 N.E.2d 410 (1989) 23
Eisenstein v. David G. Conlin, P.C.,
827 N.E.2d 686 (Mass. 2005) 15
Groen, Laveson, Goldberg & Rubenstone v. Kancher,
827 A.2d 1163 (N.J. App. Div. 2003) 19, 20
Howard v. Babcock,
863 P.2d 150 (Cal. 1993) 18, 19, 22
In re Thelen LLP,
24 N.Y.3d 16, 20 N.E.3d 264 (2014) 24, 25
Jacobson Holman, PLLC v. Gentner,
244 A.3d 690 (D.C. 2021) 27
Johnson Family Law, P.C. v. Bursek,
No. No. 22SC497, slip op., 2024 WL 159107
(Colo. Jan. 16, 2024) 18, 29
Meehan v. Shaughnessy,
535 N.E.2d 1255 (Mass. 1989) 15
Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.,
747 A.2d 1017 (Conn. 2000) 22
Spiegel v. Thomas, Mann & Smith, P.C.,
811 S.W.2d 528 (Tenn. 1991) 12, 24
Whiteside v. Griffis & Griffis, P.C.,
902 S.W.2d 739 (Tex. App. 1995) 15

Statutes

RCW 60.40 26

Rules

RAP 12.3(d) 9
RAP 13.4(b)(1) 3, 21
RAP 13.4(b)(4) .... *passim*
RPC 1.1 16
RPC 1.4 29
RPC 1.5(a) 16, 29
RPC 1.5(b) 16, 29
RPC 1.5(c) 16, 29
RPC 1.5(e) 16
RPC 1.5(f) 16
RPC 1.8 14
RPC 5.6 .... *passim*
RPC 5.6(a) .... *passim*
RPC 7.1 16
RPC 7.3(a) 16
RPC 7.3(b) 16

Other Authorities

D.C. Ethics,
Op. 65 (1979) 20
Fla. Ethics,
Op. 93-84 (1995) 20
Geoffrey C. Hazard, Jr.,W. William Hodes, & Peter R. Jarvis,
The Law of Lawyering (4th ed. 2014) 15, 17, 27
Michigan Bar Ethics,
Op. RI-245 (1995) 20
N.J. Advisory Comm. on Prof'l Ethics,
Op. 708 (2006) 15

Ohio Advisory Ethics,
Op. 2021-7 (2021) 15, 20
Washington's New Rules of Professional Conduct: A Balancing Act,
30 Seattle U. L. Rev. 245 (2006) 14-15
WSBA Rules of Prof'l Conduct Comm.,
Advisory Op. 927 (1985) 10
WSBA Rules of Prof'l Conduct Comm.,
Advisory Op. 1446 (1991) 10
WSBA Rules of Prof'l Conduct Comm.,
Advisory Op. 1998 (2002) 10
WSBA Rules of Prof'l Conduct Comm.,
Advisory Op. 2100 (2005) 15
WSBA Rules of Prof'l Conduct Comm.,
Advisory Op. 2118 (2006) 10

A. INTRODUCTION

This petition calls on this Court, as the state's regulator of the legal profession, to decide the extent to which a law firm may require a departing lawyer to pay money to the firm for each client who terminates the firm and hires that lawyer. In this case, a law firm requires each former client to pay 40-50% of the fees earned by the former lawyer after terminating the relationship with the firm. This issue implicates RPC 5.6(a), which this Court has never interpreted before, as well as the public policies embodied in the rule. The rule prohibits law firms from imposing any partnership and employment agreement that "restricts" a lawyer's ability to practice. This prohibition is designed to protect client choice and to preserve attorneys' professional freedom, especially for early-career lawyers. These policies, if violated, require a court to void any offending contracts. Nationwide, most courts and state bar associations' ethics committees (including Washington's) have broadly construed similar provisions in their rules. On this view, a contractual

clause that does not directly limit a lawyer's ability to compete with their former firm still impermissibly "restricts" client choice and professional autonomy if it creates a financial disincentive. That interpretation would seem to be the one most consistent with this Court's precedents on how to construe the RPCs.

But here, Division I sided with a minority view. In upholding the restriction here, the court cast aside these public policies and instead focused on the law firm's business expectancy interest in its former clients' files. In doing so, the court improperly treated client matters as firm property. The court also misapprehended the law of contingency fees. Because the law firm had not yet substantially performed the contingency (a favorable settlement or verdict), the firm had earned only a quantum meruit claim for services rendered, not a contingency fee. By upholding the firm's fee claim, the court not only prioritized the firm's business interests but also allowed it to collect far more in fees than Washington law otherwise permitted—all without the former clients' consent. The effect of

this secret fee-splitting requirement was to create intolerable risks to client choice and to the departing lawyer's professional freedom. These consequences would have a harmful impact profession-wide and on the public if similar requirements were to proliferate statewide once other law firms adjust their employment contracts to align with Division I's opinion.

This Court should accept review under RAP 13.4(b)(4) and (b)(1).

B. IDENTITY OF PETITIONER

The petitioner is James Banks, an attorney and former employee of respondent Seattle Truck Law, PLLC ("STL").

C. COURT OF APPEALS DECISION

Banks seeks review of Division I's opinion issued on November 27, 2023. That court entered an order on December 29, 2023, denying reconsideration and denying STL's and Banks's motions to publish. These decisions are reproduced in the Appendix.

D. ISSUES PRESENTED FOR REVIEW

RPC 5.6 provides that:

> 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 or an LLLT to practice after termination of the relationship, except an agreement concerning benefits upon retirement ….

This Court has never interpreted RPC 5.6(a). The question presented is whether this rule prohibits law firms from imposing financial disincentives on attorneys leaving and taking firm clients with them, and if so, what is the test for whether an indirect restraint on professional movement violates RPC 5.6(a) and its underlying public policies.

E. STATEMENT OF THE CASE

STL employed Banks, an early-career attorney, to work on the firm's personal-injury cases. CP 88, 95-97, 193, 275-76. The firm specialized in trucking accidents. CP 2, 10, 88, 151. As a condition of employment, STL required Banks to sign a contract

that STL drafted. CP 89, 95-97. STL amended it a year later to pay Banks 35-40% of the gross contingency fees from every STL case. CP 90, 99-100, 194-95. The supplemental agreement left intact the original agreement's provision for splitting fees if Banks left STL and any firm clients chose to terminate the firm and hire him. CP 96. This fee-splitting clause required Banks "to remit fifty percent (50%) of any attorney fees received on those files to the firm for the first year from the date you leave and forty percent (40%) the second year, and thereafter." CP 96.

Invoking this provision, STL sued Banks when he left the firm three years after starting there. CP 1-6, 91, 134-36, 195. Although STL's owner had discouraged Banks from taking cases "unless the attorney fee had the potential to be at least $100,000," Banks had decided to accept some smaller cases while he worked at STL. CP 284. Mostly through referrals from his friends and family members, he built up a core of eight clients' cases for personal injuries from car accidents and premises liability, rather than truck wrecks. CP 195. STL "strongly discouraged" Banks

from tracking these eight clients, telling Banks that their cases' values were too low or they were too risky because of bad facts. CP 92. Banks decided to accept their cases at STL anyway, and he is the only STL attorney who communicated with these clients or did any work for them. CP 92, 195. Banks gave written notification of his resignation to these clients, and they decided to terminate STL's representation and engage Banks. CP 92, 138, 177-79. At the time of these clients' discharging STL, the firm had done very little, if any, work on most these clients' cases. CP 92.

Banks engaged a Washington legal-ethics expert, Arthur Lachman, to review STL's this fee-splitting requirement. CP 71-73; App. An attorney for 33 years, Lachman is a co-author of the treatise *The Law of Lawyering in Washington*; he wrote the chapter on fees and trust accounts. CP 72. He was chair of the WSBA's Rules of Professional Conduct Committee, and he served as President of the Association of Professional Responsibility Lawyers. CP 72. Lachman concluded that STL's

"'one-size fits all' percentage fee allocation applying to all matters ... did not come close to complying with the requirements of RPC 5.6(a)." CP 77. Surveying several WSBA ethics opinions, Lachman explained that "indirect restrictions on competition, including financial disincentives for taking 'firm' clients, violate RPC 5.6(a)." CP 73. Washington's RPC 5.6(a) duplicates ABA Model Rule 5.6, and Lachman noted a broad national consensus that ABA Model Rule 5.6 bars "an employment agreement that requires a lawyer to pay a former employer a flat percentage of fees received in all cases in which the client elects to move representation to the departing lawyer's firm." CP 74. A law firm might comply with RPC 5.6(a), Lachman explained, by crafting an employment agreement tailored to recover "fees from departing lawyers that reflect the value of the firm's contribution to specific cases in quantum meruit or other reasonable basis." CP 76. But, Lachman found, STL's across-the-board demand for a percentage cut did not comply with RPC 5.6(a). CP 77. Banks argued that STL's fee-

splitting provision was therefore void as against public policy.

The trial court disagreed, granting STL's motion for summary judgment, and the court entered judgment in STL's favor for $200,197.80 of the contingency fees that its former clients had paid to Banks. CP 292-98, 375-79. Division I affirmed. Op. 5-13. Even though those cases had not met STL's case-acceptance standards and STL had not wanted them, the court concluded that "STL placed economic significance on the value of the files." Op. 12. The court found no infringement on RPC 5.6(a)'s interests in client choice and professional autonomy, reasoning that the clients had all hired Banks and that he would have earned about the same percentage share had he stayed. Op. 13. For the court, STL's demand was legitimate because it was protecting its "rights" in its former clients' cases. Op. 12-13.

Even though the court acknowledged that "Washington courts have not considered RPC 5.6," Op. 7, Division I rejected separate motions from both STL and Banks to publish the

opinion. App. Division I also denied reconsideration. *Id.*

This petition followed.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) The Decision Below Presents an Important Question About Regulating the Legal Profession That This Court Should Decide

STL was right in its motion to publish: "[p]roviding a clear understanding of the application of RPC 5.6 to fee-splitting provisions will serve the public interest." Resp't Mot. to Publish at 3. This issue turns on policy considerations that this Court, as the constitutionally vested regulator of the practice of law, can and should resolve. RAP 13.4(b)(4).

(a) The Court Should Review This Unresolved Issue Under RPC 5.6(a) Because This Court Has Ultimate Authority to Decide Whether Restrictions on Attorney Movement Harm Client Choice and Professional Autonomy

This case cries out for this Court's review because "[t]o date, Washington courts have not considered RPC 5.6." Op. 7. Division I inexplicably decided that its opinion did not warrant publication even though the "decision determines an unsettled or

new question of law." RAP 12.3(d). The lower courts, the WSBA Committee on Professional Ethics,[1] and experts like Lachman can provide only persuasive insight in this vacuum. Until this Court speaks, the bar and the public will lack definitive guidance. And in the meanwhile, Division I's opinion will embolden law firms to refashion their partnership and employment contracts to limit attorney movement and to claim entitlements to fees paid by former clients to departed lawyers.

This Court has the authority and responsibility to provide

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[1] The WSBA has issued four advisory opinions on RPC 5.6(a) or its predecessor rule, although none address a fee-splitting provision, and all addressed more facial, explicit limitations on competition. *See* WSBA Rules of Prof'l Conduct Comm., Advisory Op. 2118 (2006) (restriction on a departing attorney soliciting firm's clients in certain geographical areas); WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1998 (2002) (provision limiting a terminated lawyer's right to hire lawyers from the former firm); WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1446 (1991) (law firm agreed to buy departing shareholder's ownership interest only if a noncompete covenant was executed); WSBA Rules of Pro. Conduct Comm., Advisory Op. Advisory Opinion 927 (1985) (departing shareholder's stock price tied to whether the lawyer signed a noncompete covenant).

clarity. RAP 13.4(b)(4). All the RPCs derive from this Court's constitutional power to regulate the practice of law. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). This Court "has an exclusive, inherent power to admit, enroll, discipline, and disbar attorneys." *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984). With this power comes "ultimate responsibility" for regulating the legal profession. *In re Disciplinary Proceedings Against Johnson*, 118 Wn.2d 693, 703, 826 P.2d 186 (1992). Exercising this Court's regulatory power here is, as in other cases involving the RPCs, "necessary for … the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients." *Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630 (1983) (quotation omitted).

This case presents an issue primed for this Court's review in part because it turns purely on law. Applying the same principles that govern statutory interpretation, this Court interprets the RPCs *de novo*. *E.g.*, *LK Operating, LLC v.*

Collection Grp., LLC, 181 Wn.2d 48, 75, 331 P.3d 1147 (2014). To "give effect to the intent behind the rule," the Court roots its interpretation in "the plain language of the rule at issue in the context of the RPCs as a whole." *Id.* (citation omitted). "[W]hether an attorney's conduct violates the relevant rules of professional conduct is a question of law." *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992) (citations omitted).

While the Divisions of the Court of Appeals are just as capable at parsing the rule's text, this Court is uniquely suited to decide the question here because it demands a look behind the text, to the rule's underlying purposes. On its face, RPC 5.6(a) applies only if a contract "*restricts* the rights of a lawyer … to practice." (emphasis added). One reading of this term is that it prohibits only explicit bans on competition. But courts around the country agree that a contract between a firm and departing lawyer need not include a direct prohibition on competition with the firm for it to violate a rule like RPC 5.6(a). A financial disincentive may be enough. *See, e.g.*, *Spiegel v. Thomas, Mann*

& Smith, P.C., 811 S.W.2d 528, 531 (Tenn. 1991) (collecting cases); N.C. Ethics Op. 2008-8; CP 73 (Lachman opinion). What constitutes an impermissible indirect "restrict[ion]," RPC 5.6(a), is less of an interpretive question and more of a judgment call—one that this Court, as the legal profession's regulator, is best positioned to make.

Public policy is on center stage here especially because of the nature of this dispute. If this were an attorney-discipline case, this Court would be asked only whether this contract violates RPC 5.6(a). But this case hinges on Banks's defense that STL's employment contract is void as against public policy. So the analysis deepens into the waters of policymaking—this Court's purview. While not all contracts that violate an RPC are necessarily void, those that violate the policies embodied in the RPC are void. *LK Operating*, 181 Wn.2d at 88. "The underlying inquiry when determining whether a contract violates public policy is whether the contract has a tendency to be against the public good, or to be injurious to the public." *Id.* at 86. An RPC

violation means the contract is "presumptively" void. *Id.* at 89. Agreements involving fees that violate a rule of professional conduct are among the contracts that may be voided. *See, e.g.*, *Valley/50th Ave., LLC v. Stewart,* 159 Wn.2d 736, 743, 153 P.3d 186 (2007) (RPC 1.8); *Belli v. Shaw*, 98 Wn.2d 569, 578, 657 P.2d 315 (1983) (DR 2-107). There is no reason why contracts violating RPC 5.6(a) should be exempted from this analysis.

RPC 5.6(a) embodies two public policies, both qualifying as "substantial," RAP 13.4(b)(4), elements of this Court's regulatory infrastructure. First, while RPC 5.6(a)'s text does not expressly mention it, the rule's comments confirm that it protects "the freedom of clients to choose a lawyer." RPC 5.6(a) cmt. 1. The history behind RPC 5.6 confirms it. Our Supreme Court enacted the current version of the RPCs, including the official comments, in 2006. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 76 n.13, 331 P.3d 1147 (2014). The 2006 rules were adapted from the American Bar Association Model Rules, promulgated in 2003. Johanna M. Ogdon, *Washington's New*

Rules of Professional Conduct: A Balancing Act, 30 Seattle U. L. Rev. 245 (2006). The ABA based Model Rule 5.6 on former canon DR 2-108, and "client choice" was "the premise underlying DR 2-108." *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 744 (Tex. App. 1995). This central concern appears in WSBA advisory opinions pre-dating 2006 too. *See, e.g.*, WSBA Comm. on Prof'l Ethics, Advisory Op. 2100 (2005) (recognizing that noncompete agreements "limit the freedom of clients to choose a lawyer"). Authorities from states applying their version of Model Rule 5.6 are in accord. *See, e.g.*, Ohio Advisory Ethics Op. 2021-7 (2021); N.J. Advisory Comm. on Prof'l Ethics, Op. 708 (2006); *Eisenstein v. David G. Conlin, P.C.*, 827 N.E.2d 686, 690 (Mass. 2005); *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1262 (Mass. 1989). The leading treatise agrees too. *See* 1 Geoffrey C. Hazard, Jr., W. William Hodes, & Peter R. Jarvis, *The Law of Lawyering*, at 50-12 (4th ed. 2014).

RPC 5.6(a) must be read "in the context of the RPCs as a

whole," *LK Operating*, 181 Wn.2d at 76, and the rest of the RPCs reinforce this conclusion that RPC 5.6(a) protects clients. For example, RPC 1.1 tells us that attorneys must invest unpaid time to become competent in a practice area before accepting clients. Elsewhere, RPC 1.5(a) makes clear that no lawyer may collect a fee that is unreasonable—even if the lawyer finds clients who say they will pay an outlandish rate. To take other examples, RPC 1.5(f) and RPC 1.15A(b) stop attorneys from lending themselves money from clients' advance payments. RPC 1.15A. Next, RPC 1.5(b) and (c) warn that an attorney's fee agreements with the client must be transparent about the basis for calculating fees. RPC 1.5(e) forbids attorneys from different law firms from agreeing among themselves to share a client's fee payments unless the client knows and consents in writing to the precise arrangement. And RPC 7.3(b) imposes limits on kickback schemes for referrals. When lawyers market their practices, RPC 7.1 and RPC 7.3(a) bar "false or misleading" statements. These scattered provisions of the RPCs thus serve a unified goal—

putting clients first and empowering them to make informed decisions about their own legal representation without the constraints of attorney self-dealing.

The second public policy embodied in RPC 5.6(a) is its protection of "professional autonomy." RPC 5.6(a) cmt. 1. That concern is very acute for lawyers at the beginning of their careers who are at greater risk of economic exploitation. *See* 1 Hazard & Hodes, *supra*, at 50-5 ("The Rule is also designed in part to protect lawyers—particularly younger lawyers—from bargaining away their right to move to another firm or to open their own offices after they end an association with a firm or other legal employer."). In the early stages of their career, younger attorneys have much less leverage than law firms, especially in recent years: they carry much higher debt burdens than in the past and must find employment to meet their monthly payments. They do not have the luxury of declining available positions. RPC 5.6(a) fights against the dangers of law firms restraining attorneys from leaving to improve their careers.

In short, RPC 5.6(a) implicates "issue[s] of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

(b) The Bar and the Public Need Guidance on Whether Division I Correctly Adopted the Minority, Permissive View of Financial Disincentives Against Attorney Movement

Nationwide, "courts are divided on how to apply their states' version of Rule 5.6(a)." *Johnson Family Law, P.C. v. Bursek*, No. No. 22SC497, slip op., 2024 WL 159107, at *3 (Colo. Jan. 16, 2024) (citation omitted). This division breaks down into roughly two views. The first, which is the majority, "holds that *any* contractually imposed financial burden on an attorney's professional autonomy violates the rule." *Id.* (collecting cases). The second, the minority approach, "seek[s] to achieve a balance between the interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment." *Howard v. Babcock*, 863 P.2d 150, 160 (Cal. 1993). Even if it creates a financial disincentive deterring a lawyer from leaving or accepting former clients, a law firm may

exact a "reasonable" economic "toll" on the departing lawyer that "protects the reasonable interests of the business." *Id.*

That Division I tacitly adopted the minority view is evident from two features of its opinion. First, Division I embraced the minority view's desire to protect "the legitimate business interest of law firms." *Howard*, 863 P.2d at 160. Op. 12-13 (approving STL's effort to protect its business expectancy in its former clients' cases). That is why the court relied on cases such as *Groen, Laveson, Goldberg & Rubenstone v. Kancher*, 827 A.2d 1163 (N.J. App. Div. 2003), and *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 355 (Minn. Ct. App. 1995), while rejecting *Arena v. Schulman, LeRoy & Bennett*, 233 S.W.3d 809, 814 (Tenn. Ct. App. 2006). Op. 10-13. Second, Division I adopted a pro-restriction approach by treating clients' cases as property of the firm. The court believed that STL had permissibly "protected the firm's rights in case the parties terminated their relationship after cases were initiated at the firm." Op. 13.

Bar associations around the country have frowned on percentage splits of contingency fees like the employment contract's provision here. *See, e.g.*, Ohio Advisory Ethics Op. 2021-7, at 1, 3 (warning against firms claiming *any* percentage-based share); Fla. Ethics Op. 93-4, at 3 (Feb. 17, 1995) (50%); D.C. Ethics Op. 65 (1979) (40%); Michigan Bar Ethics Op. RI-245 (1995) (one-third). A widely respected expert in legal ethics, Arthur J. Lachman, also concluded that STL's fee-splitting provision violates RPC. CP 73-78. But the Division I's opinion does not grapple with these authorities, instead throwing its lot with *Groen* and its ilk.

This Court should grant review to guide the bar and the public on whether RPC 5.6(a) imposes merely a reasonableness test or instead more strictly prohibits financial disincentives. Without this Court's guidance, law firms around the state will assume Division I's opinion lends support for amending their partnership and employment contracts to mirror STL's.

(2) Division I's Emphasis on a Law Firm's Business Interests Conflicts with This Court's Directives for Interpreting and Applying the RPCs

Not only does this issue satisfy RAP 13.4(b)(4), but also this Court should review it under RAP 13.4(b)(1) because Division I construed RPC 5.6(a) contrary to the principles in this Court's decisions on the RPCs.

(a) A Broad Interpretation of RPC 5.6(a) Consistent with Its Purposes Prohibited Division I from Weighing Law Firms' Business Interests

This Court's precedents require the RPCs must be construed "broadly" to advance the rules' purposes. *Gustafson v. City of Seattle*, 87 Wn. App. 298, 302, 941 P.2d 701 (1997); *see also, e.g.*, *Eriks*, 118 Wn.2d at 459 (applying this principle to disciplinary rules that preceded the RPCs); *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983) ("quite broadly"). But here, Division I never asked whether its construction of RPC 5.6(a) protected client choice or lawyers' professional freedom. Division I instead exalted a policy that the RPCs do not serve—law firms' economic

interests. Op. 12-13. By stressing a policy alien to RPC 5.6(a), Division I marched in lockstep with the minority view's desire to protect "the legitimate business interest of law firms." *Howard*, 863 P.2d at 160.

Division I's analysis conflicts with the broad interpretation that this Court's precedents require. Look no further than the rule's plain language: it prohibits any contract that "restricts" professional freedom. RPC 5.6(a). It does not ask whether that restriction can be justified as reasonable in light of the law firm's countervailing business interests. *See id.*

Division I also failed to read RPC 5.6(a) as a whole, overlooking its express exception. In this relevant proviso, the rule permits restrictions on a lawyer's right to practice if the limitation "concern[s] benefits upon retirement." RPC 5.6(a). This "retirement benefits exception to rule 5.6 provides protection for a law firm's 'legitimate interest in its own survival and economic well-being and in maintaining its clients.'" *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*,

747 A.2d 1017, 1031 (Conn. 2000) (quoting *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 101, 550 N.E.2d 410 (1989)). That rationale—a firm's business interests—is the same one that Division I grounded its decision on. By carving out this express exception, however, this Court intended RPC 5.6(a) to not include the kinds of implied exceptions for law firms' *other* economic interests that would receive weight under the minority view's reasonableness balancing test. This reading follows from an interpretive principle that applies to statutes and court rules alike: the "[e]xpression of one thing in a [rule] implies exclusion of others, and this exclusion is presumed to be deliberate." State v. Kelley, 168 Wash.2d 72, 83, 226 P.3d 773 (2010) (citation omitted). Because RPC 5.6(a) includes no other express exceptions to account for firm's business interests, no open-ended reasonableness test should be used to create other de facto exceptions.

In short, by protecting STL's asserted business expectancy, Division I's decision constructs RPC 5.6(a) in

service to a purpose that the rule does not contemplate.

(b) <u>A Secret 50/50 Fee-Splitting Provision for Unearned Fees Violates the Public Policies Embodied in RPC 5.6(a) by Infringing on Cient Choice and by Allowing Law Firms to Effectively Bind Attorneys from Leaving</u>

But more than that, Division I's analysis brings its decision into irreconcilable tension with RPC 5.6(a)'s actual policies. Division I's approval of STL's one-size-fits-all approach undermines client choice because it treats cases as belonging to the firm that originates it rather than as the client's own matter. Contrary to Division I's opinion, a law firm "does not own a client or an engagement." *In re Thelen LLP*, 24 N.Y.3d 16, 22, 20 N.E.3d 264 (2014). In this public-service profession, "clients are not merchandise," and lawyers are not "tradesmen" who can "barter in clients." *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991). So a firm has no "rights" in departing clients' matters. Op. 13. Instead, a law firm "is only entitled to be paid for services actually rendered." *Thelen*, 24 N.Y.3d at 22.

Division I's opinion mischaracterization of a client matter as the law firm's property right stems in part from its misunderstanding of contingency fees. Division I reasoned the fee-splitting agreement applied "to contingency fee cases opened only while Banks was with STL, not after his departure," as if this origination vested STL's "rights" in the contingency fees that the former clients later paid to Banks. Op. 9, 13. That is incorrect. Attorneys have no right to collect a contingency fee after a client discharges them, as happened here, unless they have already "substantially performed" the contingency (*i.e.*, secured a settlement). *Barr v. Day*, 124 Wn.2d 318, 329-30, 879 P.2d 912 (1994). Here, when these clients discharged STL, the firm had done little, if any, work on most their cases. CP 92, 177-78. STL produced no contrary evidence. BR 1-58. And STL conceded that "Banks litigated the Cases *following his departure* to resolution." BR 7 (citing CP 175) (emphasis added). In these circumstances, STL could not "have a property interest in work performed by former partners at their new firms." *Thelen*, 24

N.Y.3d at 30. STL had the right to nothing more than "reasonable fees for the services rendered before the discharge." *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997) (citation omitted). That is, to its attorneys' time on the matters multiplied by its hourly rates. And yet Division I's opinion allowed STL to do indirectly what it could not do directly-—collect a contingency fee from its former clients, and assert an interest in the work that Banks did in securing substantial performance of these cases' contingencies. That result does not square with the policies that undergirds RPC 5.6(a).

A firm in STL's position can serve notices of attorney's liens under RCW 60.40 and claim quantum meruit (in contingency-fee cases) from its former clients or bill for hourly work already performed. But STL did not make a case-by-case claim for the reasonable value of its services rendered to date for each individual. Instead, STL sought to exact a fixed, across-the-board 50/50 or 40/60 cut from all those cases. CP 1-6. STL went too far, as Lachman concluded. CP 77.

While Banks might have earned a similar fee share if he had stayed at STL, Division I undercut RPC 5.6(a)'s policies by holding that STL's 40%-50% cut created no financial disincentive. Op. 13. Rather than comparing the possible outcomes *with* the restriction *in place*, Division I should have compared the scenarios if it were *not* in the employment contract. Without the fee-splitting provision, Banks would've received 100% of the contingency fees, less STL's quantum meruit claim if STL had gone that route. By halving that amount, the fee-splitting clause tipped the balance toward staying.

In any event, *actual* harm should not matter when evaluating a contract's compatibility with RPC 5.6(a)'s policies. *See, e.g.*, *Jacobson Holman, PLLC v. Gentner*, 244 A.3d 690, 702 (D.C. 2021) (refusing to "look to the actual impact of this forfeiture provision on a departing lawyers practice going forward"); 2 Hazard & Hodes, *supra*, §53.03, at 50-8 ("Under Rule 5.6(a), no actual anticompetitive effect on any marketplace for legal services need be shown."). What matters is whether "a

particular provision in a firm agreement *could* provide a material disincentive to one or more lawyers who may wish to leave a firm." *Id.* This Court should adopt that test for whether a contract counts as an impermissible "restrict[ion]" under RPC 5.6(a).

By requiring that an attorney in Banks's shoes produce evidence of actual harm—such as by showing a client hired a different attorney—Division I's opinion also conflicts with the test in *LK Operating* for deciding whether a contract is void for violating a public policy set out in the RPCs. Under *LK Operating*, the court must inquire "whether the contract has *a tendency* to be against the public good, or to be injurious to the public." 181 Wn.2d at 86 (quotation omitted) (emphasis added). By requiring (at Op. 13) that Banks show evidence that STL's clients had been unable hire Banks, Division I removed RPC 5.6(a)'s ability to protect clients from future harm. In other words, Division I incorrectly conceived RPC 5.6(a) as only a harm-remediation measure rather than also a harm-prevention tool.

Finally, Division I's opinion undermines client choice also by condoning STL claiming a fee split without prior disclosure to the client. That outcome runs afoul of RPC 1.5(a)-(c) and RPC 1.4. While Division I refused (at Op. 13 n.11) to consider other parts of the RPCs as constituting a new issue, Banks properly cited those provisions to ensure that the appellate courts construe RPC 5.6(a) "in the context of the RPCs as a whole." *LK Operating*, 181 Wn.2d at 75.

Even if this Court embraces the minority reasonableness test, it should scrutinize the trial court's judgment, which required Banks's clients to pay an average of about $25,000 to STL. CP 375-79. *See Johnson Family Law,* 2024 WL 159107, at *3-*4 (striking down as unreasonable a per-client flat amount designed to recoup marketing expenses).

G. CONCLUSION

This Court should grant review.

This document contains 4,990 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of January 2024.

Respectfully submitted,

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APPENDIX

RPC 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 rights of a lawyer or an LLLT 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.

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] **[Washington revision]** This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17, a lawyer's plea agreement in a criminal matter, or a stipulation under the Rules for Enforcement of Lawyer Conduct.

[Comments adopted effective September 1, 2006.]

Additional Washington Comment (4)

[4] The prohibition in paragraph (a) on offering or making agreements restricting a lawyer's right to practice also applies to LLLTs. An LLLT is prohibited from entering into an agreement restricting the right to practice as part of a settlement under LLLT RPC 5.6(b).

[Comment 4 adopted effective April 14, 2015.]

FILED
10/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEATTLE TRUCK LAW, PLLC, a Washington Professional Limited Liability Company, Respondent, v. JAMES BANKS, and the marital community composed thereof, Washington State residents, Appellants.	No. 84337-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Seattle Truck Law, PLLC (STL) sued its former employee, attorney James Banks, seeking a split of contingent fees under an employment agreement. The trial court granted partial summary judgment for STL. On appeal, Banks argues that the trial court erred by granting summary judgment for STL because the employment agreement violates Rule of Professional Conduct (RPC) 5.6. Banks also argues that the trial court erred in denying summary judgment on his claim of breach of contract.

We affirm.

I

STL is a personal injury law firm that specializes in large truck and bus crash cases. Morgan Adams is the principal owner of STL. In November 2017, STL hired Banks. Banks signed an employment agreement with STL (agreement). Under the agreement, Banks would receive 50 percent of the attorney fees earned on all car crash cases he worked, no matter who initiated the case, but Banks would "not have a set fee, if any, on trucking cases as the car wreck cases [were] expected to compensate [Banks] for any time spent on the trucking cases."

The agreement also contained provisions in the event that Banks separated from STL. It stated, in part:

> On contingency files opened at the office, that you take with you if you leave, you agree you will repay all costs and expenses owed to the firm within three (3) months of the date you leave. You further agree to remit fifty percent (50%) of any attorney fees received on those files to the firm for the first year from the date you leave and forty percent (40%) the second year, and thereafter.

The agreement also stated:

> Should you leave, a full accounting shall be made at the settlement or resolution of all files in which the firm has an interest on the first of each month. A copy of the settlement sheet, for any contingency case settled the prior month, shall be provided with the accounting. A current update on all open files, in which I have an interest, shall be provided at least quarterly, four (4) times a year, on January 1st, April 1st, July 1st, and October 1st until all cases are resolved.

Further, under the agreement, Banks had no claim to files left with STL after his departure.

Banks began employment with STL on January 1, 2018. Two years later, on January 1, 2020, STL and Banks executed an addendum to the agreement. Under the

addendum, for cases credited to Banks, Banks would receive 35 percent of the attorney fees earned for the first $500,000 and 40 percent of the attorney fees earned in excess of $500,000. The addendum reiterated that there was no set fee division, "You will not have a set fee on cases. Fee splits will be made based on overall work on the files, origination, and at Seattle Truck Law's discretion as they have been in the past." The addendum did not alter the provisions addressing Banks's handling of files following his separation from STL.

Banks terminated his employment with STL on December 31, 2020. Banks notified clients in writing that they could continue to be represented by STL or by Banks at his new solo practice. Eight clients chose to have Banks represent them going forward.

On November 29, 2021, after Banks settled several cases that originated with STL and Banks refused to split the fees with STL as required by the agreement, STL sued Banks for breach of contract, quantum meruit, and an accounting. Banks's counterclaim asserted claims for wrongful withholding of wages under RCW 49.48 and 49.52; failure to pay minimum wage pursuant to RCW 49.46 and 49.52; wrongful termination through constructive discharge; quantum meruit; and breach of contract.

Both STL and Banks moved for summary judgment. The trial court denied Banks's motion for summary judgment. The trial court found that the fee-splitting provision:

> does not restrict Mr. Banks's ability to practice law and continue working on cases. This provision does not constitute a time or geographical restriction on Mr. Banks and is not a non-competition provision. Fee splits between a law firm and an employee-attorney are not uncommon. RPC 5.6 could have included a section prohibiting such an arrangement, and

> the Rules of Professional Conduct drafters chose not to include such a prohibition. I find that this provision does not violate RPC 5.6.

The trial court found that the agreement includes "clear and unequivocal language" about the payment of fees and found that STL did not wrongfully withhold wages owed to Banks. As a result, the trial court granted STL's motion for summary judgment on its breach of contract claim.

The parties then agreed to a stipulation for entry of summary judgment dismissing all remaining claims and counterclaims. STL moved for entry of judgment against Banks. On September 12, 2022, the trial court granted judgment for $200,197.80, $23,806.45 in interest, and $1,092.00 in costs and attorney fees.

Banks appeals.

II

We review orders on summary judgment de novo engaging in the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Folsom, 135 Wn.2d at 663. The party moving for summary judgment carries the burden to show that there are no genuine issues of material fact and all reasonable inferences must be resolved against the moving party. Folsom, 135 Wn.2d at 663. "The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion." Folsom,

135 Wn.2d at 663. We examine "all the evidence presented to the trial court." Folsom, 135 Wn.2d at 663.[1]

A

Banks appeals the trial court's order concluding that the agreement is an enforceable contract. Banks argues that the fee-splitting provision on contingency fee cases in the agreement violates RPC 5.6(a). As a result, Banks asserts, the agreement's violation of RPC 5.6(a) renders it unenforceable as against public policy.

1

To begin, STL asserts that the RPCs do not impact the parties' agreement because the RPCs are intended to govern disciplinary proceedings and may not be used as a mechanism for an attorney to avoid contractual obligations. We disagree.

Our Supreme Court has held that in some cases violations of the RPCs in the formation of a contract may render that contract unenforceable as violative of public policy. LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014). However:

> Just because the RPCs can be a valid source of public policy does not mean that every violation of every RPC that relates to a contract renders the contract unenforceable. The underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the public. While all RPC violations are in some way injurious to the public, not all RPC violations will render any related contract injurious to the public.

LK Operating, 181 Wn.2d at 87 (emphasis added). The court "explicitly recognize[d] that a contract is not automatically unenforceable based solely on the fact that it has

[1] STL asks this court not to consider the declaration of Arthur Lachman. STL moved to strike the declaration in the trial court but the court did not consider the motion. STL has not assigned error to that decision by the trial court. Because the declaration was presented to the trial court, we consider it.

some connection to some RPC violation." LK Operating, 181 Wn.2d at 88. This would "ignore the clear admonishment that 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.'" LK Operating, 181 Wn.2d at 88. The court emphasized, "[w]e do not purport to set out any all-encompassing rule for how violation of any RPC in connection with a contract might affect that contract's enforceability." LK Operating, 181 Wn.2d at 89-90. "Whether a given set of facts establish an RPC violation is a question of law subject to de novo review." LK Operating, 181 Wn.2d at 72.

Thus, the questions we consider are whether the agreement violated RPC 5.6, and, if so, does the violation render the agreement unenforceable as against public policy?

2

Banks contends that the agreement's provision calling for a 50 percent split in the first year and a 40 percent split of contingent fees thereafter for files opened at STL that Banks takes with him violates RPC 5.6 because it serves as a financial disincentive to a departing lawyer—thus restricting the lawyer's future practice, as well as the client's right to choose a lawyer. We disagree.

RPC 5.6, titled Restrictions on Right to Practice, provides in part:

> 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 or an LLLT [a limited license legal technician] to practice after termination of the relationship, except an agreement concerning benefits upon retirement

The comments explain the policy behind the rule:

> [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

RPC 5.6, cmt. [1].

Washington's RPC 5.6 is patterned on the American Bar Association (ABA) Model Rule of Professional Conduct 5.6.[2] The ABA rule was adopted as part of the original set of Model Rules in 1983. See ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at Rule 5.6 (2006) (A LEGISLATIVE HISTORY). ABA Model Rule 5.6 was amended in 2000 to broaden the scope beyond partnership agreements.[3] See A LEGISLATIVE HISTORY: supra, at Rule 5.6. But otherwise the rule has not undergone substantive changes.

To date, Washington courts have not considered RPC 5.6. In addition, Washington State Bar Association (WSBA) advisory opinions have dealt with more direct restrictions on the right to practice in contrast to the fee-splitting provision in this case. See WSBA Rules of Pro. Conduct Comm., Advisory Opinion 2118 (2006) (finding noncompete provisions prohibiting attorney from contacting or soliciting clients or potential clients of the firm across several geographic regions for two years following termination violated RPC 5.6(a));[4] WSBA Rules of Pro. Conduct Comm., Advisory Opinion 1998 (2002) (finding a provision that prevents a terminated lawyer from

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[2] But Washington's RPC 5.6 also applies to LLLTs.

[3] Before 2000, the model rule stated:

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 the relationship, except an agreement concerning benefits upon retirement.

[4] https://ao.wsba.org/print.aspx?ID=1557

soliciting, hiring, or recruiting other lawyers from prior firm violates RPC 5.6(a));[5] WSBA Rules of Pro. Conduct Comm., Advisory Opinion 1446 (1991) (finding buy/sell agreement conditioning law firm's obligation to purchase shareholder's interest on covenant not to compete violates RPC 5.6);[6] WSBA Rules of Pro. Conduct Comm., Advisory Opinion 927 (1985) (finding proposed agreement in which the purchase price of a departing shareholder's stock would depend on whether the departing stockholder signed a covenant not to compete violates RPC 5.6(a)).[7]

The prevailing view outside Washington is that the purpose of RPC 5.6 is "to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice." Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 18, 607 A.2d 142 (1992). The rule is "designed to serve the public interest in maximum access to lawyers." Jacob, 128 N.J. at 18; see also Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 550 N.E.2d 410, 411, 551 N.Y.S.2d 157 (1989) ("The purpose of the rule is to ensure that the public has the choice of counsel."); Law Offs. of Ronald J. Palagi, PC v. Howard, 275 Neb. 334, 349, 747 N.W.2d 1 (2008) ("[T]he client's freedom of choice is the paramount interest the ethics rules attempt to serve.").

Direct restrictive covenants are almost universally struck down as violative of RPC 5.6. See Ipsos-Insight, LLC v. Gessel, 547 F. Supp. 3d 367 (S.D.N.Y. 2021) (holding noncompete agreement between in-house counsel and company was unenforceable as a matter of public policy based on violation of RPC 5.6(a)); Feiner & Lavy, PC v. Zohar, 195 A.D.3d 411, 150 N.Y.S.3d 238 (2021) (holding an employment

[5] https://ao.wsba.org/print.aspx?ID=1241
[6] https://ao.wsba.org/print.aspx?ID=526
[7] https://ao.wsba.org/print.aspx?ID=38

agreement prohibiting associate from practicing within 90 miles of New York City or in Israeli community for 3 years after departure from firm was void and unenforceable under RPC 5.6).

Financial disincentive provisions may also be unenforceable as against public policy. For instance, in Cohen, the court considered a partnership agreement with a forfeiture provision through which departing partners who continued to practice in a described geographical area relinquished their rights to profits earned before departure. 550 N.E.2d at 410. The court held, "[t]he forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel." Cohen, 550 N.E.2d at 411. But the court cautioned "against a categorical interpretation or application" of its narrow holding that was specific to the provision before it. Cohen, 550 N.E.2d at 413. See also Gray v. Martin, 63 Or. App. 173, 663 P.2d 1285 (1983) (holding a firm cannot condition a withdrawing partner's right to payment upon his promise not to compete within geographic area); Jacob, 128 N.J. at 14, 22 (holding provision in partnership agreement that barred partners from collecting termination compensation if they continued to represent firm clients or solicited firm attorneys within a year of departure was unenforceable because "indirect restrictions on the practice of law, such as the financial disincentives at issue in this case, likewise violate both the language and the spirit of RPC 5.6").

But the provision at issue in the agreement applies to contingency fee cases opened only while Banks was with STL, not after his departure:

> On contingency files opened at the office, that you take with you if you leave, you agree you will repay all costs and expenses owed to the firm within three (3) months of the date you leave. You further agree to remit fifty percent (50%) of any attorney fees received on those files to the firm for the first year from the date you leave and forty percent (40%) the second year, and thereafter.

Nor did the provision limit Banks's future practice of law—either field of law or geographic area—after he left STL.

Banks relies heavily on Arena v. Schulman, LeRoy & Bennett, 233 S.W.3d 809 (Tenn. Ct. App. 2006), and argues that the provision here is more onerous. In Arena, the Tennessee Court of Appeals considered a shareholder agreement that required a departing shareholder to pay the firm 50 percent of fees received from contingent fee cases if the shareholder continued practicing within the same and surrounding counties. 233 S.W.3d at 810. The court concluded that the economic disincentive constituted an impermissible restraint on the practice of law. Arena, 233 S.W.3d at 812. But the court explained, "[i]t is not impermissible for a law firm to make an economic claim to a client's file that originated while the withdrawing attorney was with the firm." Arena, 233 S.W.3d at 814. The court emphasized, "[t]he problem with the agreement at issue is that it waived any claim to the files Arena took with him unless Arena chose to stay in an area that would put him in competition with the firm . . . [the agreement] therefore, tells us the law firm placed no economic significance on the value of the files and that it made no claim to the fees to be earned thereon, provided Arena left the territory." Arena, 233 S.W.3d at 814 (emphasis added). Thus, the agreement was a direct restrictive covenant on the right to practice.

In response, STL relies on cases that have considered more comparable fee-splitting agreements for contingent fee cases. Of particular relevance is Groen, Laveson, Goldberg & Rubenstone v. Kancher, 362 N.J. Super. 350, 827 A.2d 1163 (App. Div. 2003), where the New Jersey Appellate Division addressed a contingency fee agreement almost identical to this one. In Groen, a partnership agreement provided that contingent fees collected in cases the departing partner took upon withdrawal from the firm would be divided equally between the partnership and the departing partner. 362 N.J. Super. at 352. The court noted there was no showing in the record that the agreement prevented the departing partner from continuing his practice or handling cases that clients wanted him to take from the plaintiff firm. Groen, 362 N.J. Super. at 361. The court found that the agreement did not have the same effect on the client's right to counsel as other cases involving restrictions on the departing attorney's ability to continue the representation of a client and upheld the agreement. Groen, 362 N.J. Super. at 354.

In Barna, Guzy & Steffen, Ltd. v. Beens, 541 N.W.2d 354, 355 (Minn. Ct. App. 1995), the Minnesota Court of Appeals considered a shareholder agreement that required a departing shareholder to pay 50 percent of contingent fees received to the firm for cases that were initiated at the firm. The court held that the agreement did not violate Minnesota's RPCs, including 5.6, noting:

> The situation here is distinguishable from one in which a separation agreement effectively penalizes an attorney for continuing to represent certain clients. Under the shareholder agreement, Beens will still receive 50% of the contingency fee. As the Barna firm points out, the agreement cannot serve as a financial disincentive because Beens would have received less than 50% of the contingency fee if he had remained at the firm.

Barna, 541 N.W.2d at 357. The Barna court also noted that "[i]f such agreements cannot be enforced, law firms will face instability because attorneys will be motivated to leave firms when they receive lucrative contingent fee cases, and attorneys will be encouraged to battle over clients." 541 N.W.2d at 356.

In Warner v. Carimi Law Firm, 98-613 (La. App. 5 Cir. 12/16/98) 725 So. 2d 592, 594, 599, the Louisiana Court of Appeals considered an employment agreement between a lawyer and his former firm requiring the attorney to pay 50 percent of the fees recovered in cases taken from the firm. The Court of Appeals agreed with the trial court's findings:

> Warner has presented no proof that this contract in any way prevented him from representing any client on any file . . . As a matter of fact, quite to the contrary as is evidenced by the record, Warner undertook the representation of every client . . . and brought that case to a successful conclusion. Therefore, this Court concludes that any theoretical impairment of a client's ability to choose the attorney of their choice is simply not borne out by the facts of this case. And from a theoretical point of view, this Court notes that an agreement such as the one herein wherein two attorneys in the same law firm who freely agree to a particular split of a fee at the conclusion of a case if one or the other terminates their employment is actually very conducive to the orderly conduct of practicing law.

Warner, 725 So. 2d at 595. As a result, the Court of Appeals held the contract did not violate the RPCs. Warner, 725 So. 2d at 596.[8]

Unlike in Arena, here, STL placed economic significance on the value of the files, claiming entitlement to a portion of the fees to be earned on any file that Banks took with him. STL did not place a geographical restraint on Banks's ability to practice law or

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[8] The preceding three states have adopted ABA Model Rule 5.6, with New Jersey maintaining the 1983 version. See CPR POL'Y IMPLEMENTATION COMM., ABA, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_6.pdf.

a restraint on his ability to compete with STL. Instead, STL protected the firm's rights in case the parties terminated their relationship after cases were initiated at the firm. Thus, this case is analogous to Groen, Barna, and Warner.

And as was the case in Barna, the fee-splitting provision entitled Banks to a higher percentage of the contingent fees than he was entitled to as an employee of STL.[9] Thus, the agreement could not serve as a financial disincentive.

While Amici[10] make several broad arguments about the perils of fee-splitting provisions, any theoretical impairment of a client's ability to select the attorney of their choice is not borne out by these facts where Banks represented all eight of the clients who elected to retain him to the successful completion of their cases. Warner, 725 So. 2d at 595. And Amici are incorrect that "little to no work had been done on [these] matters" before Banks's resignation from STL. Indeed, the first case settled within the first six weeks of Banks's departure from STL, five of the cases settled in 2021, while the remaining three settled in 2022.

Banks has not established that this fee-splitting provision violated RPC 5.6. We thus conclude that the trial court did not err by granting STL summary judgment as a matter of law.[11]

[9] Under the addendum, Banks was entitled to 35 percent for the first $500,000 of attorney fees credited to him and 40 percent of the attorney fees earned in excess of $500,000.

[10] We granted leave for several licensed Washington attorneys to file an amicus brief in support of Banks's position. We have reviewed the brief of amici curiae as well as STL's answer. Following oral argument, Banks moved to disregard the appendix in STL's answer. Because the appendix cites materials that were not in the record before this court, we grant Banks's motion to disregard the appendix. RAP 10.3(a)(8).

[11] Banks also argues that this interpretation of RPC 5.6 allows firms to circumvent the restrictions in RPC 1.5(a)-(c) on fees. Because Banks did not make this argument before the trial court, under RAP 2.5(a), we do not consider this argument.

III

Banks next argues that STL breached the agreement by withholding wages for two client matters. We disagree.

In construing a written contract, the basic principles require that (1) the intent of the parties controls, (2) the court determines the intent from reading the contract as a whole, and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965). "'An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.'" GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 140, 317 P.3d 1074 (2014) (quoting Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)). "It is a fundamental precept of contract law that contracts must be interpreted in accordance with all of their terms." Storti v. Univ. of Wash., 181 Wn.2d 28, 38, 330 P.3d 159 (2014). If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. Voorde Poorte v. Evans, 66 Wn. App. 358, 362, 832 P.2d 105 (1992).

Under the agreement, Banks would "not have a set fee, if any, on trucking cases as the car wreck cases are expected to compensate [Banks] for any time spent on the trucking cases." The addendum reiterates: "You will not have a set fee on cases. Fee splits will be made based on overall work on the files, origination, and at Seattle Truck Law's discretion as they have been in the past."

The agreement also expressly provides that if Banks leaves STL:

> [Adams] will keep all fees on any files left with the firm after you leave, on the theory that if you leave the case it is a dog (difficult case), and any fee will be well earned by myself or another lawyer here at the firm. You will have no claims on these files.

(Emphasis added). And under the addendum, "[o]ther than income discussed below, the other aspects and terms of our November 29, 2017 agreement (bar dues, CLE, separation terms to include files you take with you, files you leave, etc. . . .) will remain the same." (Emphasis added).

As for client I.H., the case was opened in December 2018 and settled in July 2020, before Banks left STL. But Banks did not originate the case. STL asserted that Banks sent three e-mails on the I.H. case and did no other work. Banks asserted: "I was on several e-mails. I had several discussions with Mr. Adams. I recall reviewing the file, giving my input. I was asked to draft some motions. I don't recall the specific motions, but I was requested to draft motions." STL "exercised its discretion, subject to the terms of the Agreement, and determined that Banks was not to be credited any fees in the I.H. matter." The terms of the agreement and addendum unambiguously provide STL with this discretion.

As for client P.B., a trucking case, the case was opened in 2019 and did not settle until summer 2021 after Banks left STL. STL continued to work on the case into 2022. A separate stage of the P.B. matter focused on an uninsured motorist claim. Before he left STL, Banks was credited with 100 percent of the fees for that portion of the case. The agreement was unequivocal, if Banks left STL, STL would keep all fees on files left with STL and Banks would have no claims on the files.

We affirm.

Mann, J.

WE CONCUR:

Feldman, J.

Birk, J.

FILED
12/29/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEATTLE TRUCK LAW, PLLC, a Washington Professional Limited Liability Company, Respondent, v. JAMES BANKS, and the marital community composed thereof, Washington State residents, Appellants.	No. 84337-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTIONS TO PUBLISH

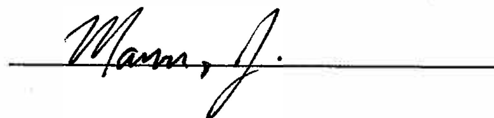
Appellant James Banks moved to reconsider the court's opinion filed on October 30, 2023. Respondent Seattle Truck Law, PLLC, filed a response. The panel has determined that the motion for reconsideration should be denied. Banks and Seattle Truck Law, PLLC both moved to publish the court's opinion. The panel has determined that the motions to publish should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied. It is also

ORDERED that the motions to publish are denied.

FOR THE COURT:



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2022 MAY 20 03:02 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 21-2-15646-7 SEA

Honorable Maureen McKee

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SEATTLE TRUCK LAW, PLLC, a Washington professional limited liability company, Plaintiff, v. JAMES BANKS, and the marital community comprised thereof, Defendant. _____________________ JAMES BANKS, an individual, Counterclaim Plaintiff, v. SEATTLE TRUCK LAW, PLLC, a Washington professional limited liability company; and MORGAN ADAMS, an individual; Counterclaim Defendants.	No. 21-2-15646-7 SEA DECLARATION OF ARTHUR J. LACHMAN

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1 I, Arthur J. Lachman, declare as follows:

2 1. I am over the age of eighteen, and I am competent to testify to the matters herein.
3 I have personal knowledge of the matters stated herein, or as indicated, have information
4 concerning those matters.

5 **BACKGROUND & QUALIFICATIONS**

6 2. As indicated on my attached CV, I have been a lawyer licensed to practice in the
7 State of Washington since 1989, when I graduated with highest honors from the University of
8 Washington School of Law in Seattle. After a clerkship with Judge Eugene Wright of the Ninth
9 Circuit Court of Appeals and a year of teaching litigation and commercial law subjects at the
10 University of Puget Sound (now Seattle University) School of Law in 1991, I practiced as a
11 commercial litigation attorney since 1991. I taught both civil procedure and pre-trial practice
12 classes at UW Law School, and served on the WSBA Court Rules Committee, in the 1990s, and
13 I have worked on litigation matters for clients in a wide variety of contract, tort, and statutory
14 lawsuits on behalf of both plaintiffs and defendants in state and federal courts.

15 3. From 1999 until 2003, I served as chair of Graham & Dunn's Ethics/Loss
16 Prevention Committee, where I had primary responsibility for resolving ethics and loss
17 prevention issues at the firm. Since 2003, my solo practice has focused on advising lawyers and
18 law firms on ethics and risk management issues. My practice involves a wide range of lawyer
19 ethics and risk management advising and consulting services, including providing opinions and
20 advice to lawyers and firms about ethics, discipline, sanctions, and liability issues (including
21 those related to conflicts of interest and attorney-client privilege); conducting training on ethics
22 and liability issues; providing expert services in liability (including the lawyer's duty of care)
23 and lawyer disqualification matters; and consulting on the development of a risk management
24 program for a national insurer of criminal and legal aid lawyers. A significant part of my practice
25 includes advising lawyers on professional responsibility and risk management issues in
26 connection with their civil litigation practices. I have also conducted numerous ethics CLE

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programs on ethics and liability issues for practicing lawyers, including the Ethics School for the WSBA Office of Disciplinary Counsel, and taught the Professional Responsibility class at the University of Washington School of Law in the winter quarter of 2013 and the spring quarter of 2008.

4. I was a member of the WSBA Rules of Professional Conduct Committee from 2003 to 2008, and served as its chair from 2008 to 2010. In addition, I have worked on WSBA task forces dealing with advance fee/retainer issues, lawyer succession planning, and revisions to advertising and solicitation ethics rules. I served as President of the Association of Professional Responsibility Lawyers (APRL), a national organization of lawyers who practice in the areas of legal ethics and lawyer risk management. I have been actively involved in creating training sessions for APRL, and have served on many panels presenting ethics issues. I served as Chair of the Planning Committee for the ABA Center for Professional Responsibility's annual National Conference on Professional Responsibility, the country's premiere legal ethics program. I also served a two-year term as the national co-chair of the Firm Counsel Project, an ABA initiative bringing together lawyers working as ethics and risk management counsel in law firms, and I moderated several local FCP roundtables in Seattle.

5. I am a co-author (with Professors Thomas Andrews and Robert Aronson, and practitioner Mark Fucile) of the treatise, *The Law of Lawyering in Washington,* published in 2012 by the WSBA. I drafted Chapter 9 of that treatise dealing with fees and trust accounts. In addition, I edited portions of the 2009 and 2020 revised editions of the Washington Legal Ethics Deskbook, also published by the WSBA.

MATERIALS REVIEWED & RELIED UPON

6. In reaching my opinions in this declaration, I have reviewed and relied on the following materials:

- Complaint for Damages, dated 10/18/2021;

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- Defendant's First Amended Answer, Affirmative Defenses & Counterclaims, dated 3/8/2022;
- Employment Agreement, executed on 11/29/2017;
- Revisions to Employment Agreement, executed on 1/1/2020;
- Defendant's Response to Plaintiff's Motion for TRO, dated 2/8/2022;
- Declaration of James Banks in Support of Defendant's Response to Plaintiff's Motion for TRO, dated 2/8/2022; and
- Declaration of James Banks in Support of Motion for Summary Judgment, dated 5/20/2022.

OPINION

7. Washington RPC 5.6(a) prohibits lawyers from offering or making "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, except an agreement concerning benefits upon retirement." According to the rule's official comment, "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. [RPC 5.6(a)] prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm." Numerous Washington State Bar Association (WSBA) advisory ethics opinions have examined non-compete restrictions in employment agreements, including those containing liquidated damages clauses, and have generally concluded that these sorts of restrictions violate RPC 5.6(a). *See* WSBA Ethics Advisory Op. 2118 (2006) (citing earlier ethics opinions).

8. As the WSBA ethics opinions suggest, indirect restrictions on competition, including financial disincentives for taking "firm" clients, violate RPC 5.6(a).[1] The rule prohibits

[1] *See also* 2 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, THE LAW OF LAWYERING §53.03, at 50-8 (4th ed. 2021-1 Supp.) ("Under Rule 5.6(a), no actual anticompetitive effect on any marketplace for legal services need be shown. It is sufficient to show that a particular provision in a firm agreement could provide a material disincentive to one or more lawyers who may wish to leave a firm or could inhibit one or more clients from remaining, post-departure, with the lawyer or lawyers of their choice."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §13, cmt. *b* (2000) ("a lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the *substantial effect* of the

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any restriction that "would tend to discourage a lawyer who leaves [a firm] from competing with it" because "the law should provide the fullest possible freedom of choice to clients."[2]

9. On its face, an employment agreement that requires a lawyer to pay a former employer a flat percentage of fees received in all cases in which the client elects to move representation to the departing lawyer's firm violates RPC 5.6(a). While the WSBA has not opined specifically on blanket percentage fee requirements applying to all moved cases in employment or partnership agreements, ethics opinions from other jurisdictions interpreting identical ABA Model Rule language are unanimous in finding that such provisions constitute restrictions on practice that violate RPC 5.6(a).[3]

10. For example, in applying RPC 5.6(a), the Ohio Board of Professional Conduct recently rejected a law firm's use of employment agreements requiring associates to pay a stated percentage of fees earned post-departure from clients electing to remain clients of the departing associate, noting that

> financial disincentives in an employment agreement, such as requiring a departing attorney to pay a percentage of fees generated from work occurring subsequent to departure, places both a burden on the departing attorney and impairs a client's right to choose counsel. The economic deterrent for the departing attorney may discourage or prevent the departing associate from agreeing to continue to represent the client, despite the client's wishes. The purpose of the provision in the employment agreement is to discourage competition. Moreover, as a result of the agreement, the departing lawyer has significantly less discretion in agreeing to continue to represent the client than a lawyer not subject to the agreement.

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covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm") (emphasis added). *See also Eisenstein v. David G. Conlin, P.C.,* 827 N.E.2d 686, 691 (Mass 2005) ("The scope of Rule 5.6 is not limited to agreements that directly penalize a withdrawing attorney for competing by denying that attorney compensation already earned while at the firm. . . . The 'broad prophylactic object' of rule 5.6 . . . requires close judicial scrutiny of any partnership [agreement] provision that imposes financial disincentives on attorneys who leave a firm and then compete with it.").

[2] *Eisenstein, supra,* 827 N.E.2d at 692. *See also* N.C. Ethics Op. 2008-8 ("*Any* financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of Rule 5.6(a).") (emphasis added).

[3] Washington's version of RPC 5.6(a) is identical to the ABA Model Rule, and it has been adopted in the same form in virtually all U.S. jurisdictions.

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Ohio Advisory Ethics Op. 2021-7.

11. Ethics opinions from other jurisdictions have long so held. In interpreting the prior Code of Professional Responsibility version of the rule, which was substantially the same as the Model Rule version adopted in Washington, the Texas Committee on Professional Ethics noted:

> The interjection of a fee to a third party obviously impairs the creation of a lawyer-client relationship between the departing lawyer and clients of his former firm. The impairment arises on both sides of the transaction. The attorney may be unwilling to work at substantially reduced rates for even his best clients, and pressure against acceptance in favor of clients paying full value to the firm would rise within the new employer. The attorney would thus be compelled to decline employment and the client would be deprived of the attorney of his choice. The restrictions may not be explicit, but the result clearly violates DR 2-108(A).

Texas Ethics Op. 459 (1988).[4] And the State Bar of Michigan concluded that it was improper for a law firm to provide in an employment contract with an associate that, upon leaving the firm, the lawyer would be required to pay to the former employer a percentage of fees earned thereafter from clients brought from the former employer, noting:

> The language in the proposed contract acknowledges a departing lawyer's right to continue to practice and represent former clients of the firm. The proposed agreement, however, imposes a burden on the departing lawyer which makes it difficult, if not impossible, for that lawyer to represent former clients of the firm. Under the contract provision, the departing lawyer would be required to pay one-third of all fees billed and collected from former clients of the firm for a period of four years. The agreement further purports to state that this payment does not represent a penalty, but rather is fair compensation for the loss of good will and future profits. A disclaimer that this does not represent a penalty to the contrary, its obvious intent is to make it difficult, if not impossible, for the departing lawyer to represent clients of the lawyer's former law firm. The impact of the agreement is that the departing lawyer in representing former clients will either operate at a financial detriment or be placed at a competitive disadvantage because the lawyer will have to charge higher fees in order to absorb the payment to the law firm.

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[4] *See also* D.C. Ethics Op. 65 (1979) (interpreting the prior Code provision, and concluding that an employment agreement's provision requiring payment of 40% of net billings for two years to the former firm for transferred clients "impose[s] a barrier to the creation of a lawyer/client relationship between the lawyer and clients of his former firm" that "at least indirectly interferes with clients' choice of an attorney" in violation of the ethics rule); *Eisenstein, supra,* 827 N.E.2d at 690-92 (refusing to enforce an agreement under RPC 5.6(a) requiring withdrawing partners to remit 15% of fees received at their new firms for work done for current or former firm clients of former firm for a period of four years).

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Michigan Bar Ethics Op. RI-245 (1995) (modified on a different issue in Ethics Op. R-19 (2000)).

12. The fact that the employment agreement at issue in this matter provides that the percentage required to be paid for Mr. Banks's former firm will be 50% for cases settled prior to 2022 and 40% thereafter does not matter under RPC 5.6(a). In rejecting a two-tier percentage fee payment requirement, a 1993 Maryland ethics opinion noted:

> Because of the arbitrary fee division percentages specified in the employment contract to be applicable to all cases, the effect of this contract would be to restrict the associate attorney's practice after termination. The percentage may be fair in some cases, but it would be quite unfair in other cases. That is, the percentage would be so high as to discourage the attorney from taking the case and thereby denying the client the attorney of his or her choice. This would be particularly true in a case that would require a lengthy and complicated trial in order to obtain recovery. It seems apparent that the law firm has picked a particularly high percentage for the division of fees [50% and 66.6% tiers] to discourage an associate attorney from taking any cases with him. In the Committee's opinion, that is exactly what Rule 5.6 prohibits.

Maryland Bar Ethics Op. 1993-21.

13. This is not to say that associate employment agreements cannot provide for firm recoveries of fees from departing lawyers that reflect the value of the firm's contribution to specific cases in quantum meruit or other reasonable basis.[5] On this score, the reasoning of a 2008 North Carolina ethics opinion is particularly instructive.

14. In Ethics Op. 2008-8, the North Carolina Bar considered and rejected under the rule three alternative schemes for compensating a departing associate's former firm on contingency matters taken with him to another firm. Rather than adopting a per se rule prohibiting any compensation at all to the former firm, the ethics opinion explained the principles that must govern such compensation in every case:

> The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's

[5] In fact, the Washington attorney's lien statute appears to contemplate such recoveries in permitting liens by lawyers for fees on an action or a judgment "to the extent of the value of any services performed by the attorney in the action." RCW 60.40.010(1)(d), (e).

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> representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation. . . . The formula may take into account the work performed on the representation prior to the lawyer's departure, non-lawyer resources that the firm allocated to the representation not including costs advanced for the client, firm overhead that can be fairly allocated to the client's representation prior to departure, and the legal work, non-lawyer resources, and overhead that will be required of the withdrawing lawyer to complete the representation.[6]

Crucially, the North Carolina ethics opinion went on to categorically reject a flat 70% percentage payable to the lawyer's former firm for post-termination fees under RPC 5.6(a):

> Because [the employment agreement] applies a "one size fits all" formula for the allocation of the fees and fails to take into account the amount of work performed and the resources expended on the representation before and after the lawyer's departure, the provision is likely to discourage a lawyer from taking any case that requires substantial additional legal work. [emphasis added]

A second alternative considered in the ethics opinion, providing a formula for decreasing percentages over time, also failed to comply with the rule because it "relies on an arbitrary timeframe unrelated to the actual legal work performed within this timeframe and is likely to create a substantial financial disincentive for a lawyer to continue to represent clients." Even a third alternative attempting to apportion the fee based upon the resources that the firm expended on the representation prior to the lawyer's departure was found violative of RPC 5.6(a) because allocating a flat 20% to recover advertising and marketing overhead costs was not reasonably related to the actual cost of such resources or expenses for the particular client.

15. The "one size fits all" percentage fee allocation applying to all matters as set forth in the employment agreement in this case, therefore, did not come close to complying with the requirements of RPC 5.6(a). On its face, the effect of the agreement executed prior to the termination of Mr. Banks's employment at the firm, viewed at the time it was executed, was to substantially restrict his willingness to compete with his former firm by creating a material financial disincentive to serve those clients in the form of a required, ongoing, and significant

[6] *See also* Fla. Ethics Op. 93-4 (contrasting a reasonable quantum meruit analysis for a former firm's compensation on transferred cases with a percentage fee calculation that would be considered punitive "because, by way of example, the firm would be entitled to 50% of any fee ultimately received by the departing associate from a client who came to the firm the day before the associate terminated employment").

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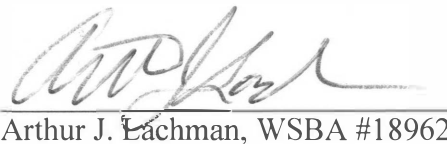
percentage payment to his former firm. Moreover, based on the materials I have reviewed, there was no attempt by the firm to create a formula that would place a reasonable value on the firm's contribution to the client representations while Mr. Banks was at the firm. In short, I cannot conceive of a set of facts under which the percentage fee calculation created in firm's employment agreement with Mr. Banks would pass muster under RPC 5.6(a).[7]

16. I have not been asked to offer an opinion, and at this time I have not formed an opinion, with respect to any other issues in this matter. I reserve the right to revise and supplement my opinions for additional issues that arise in this matter or based on additional information, evidence, or testimony that is provided to me.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED in Lake Forest Park, Washington, on this 20th day of May, 2022.



Arthur J. Lachman, WSBA #18962

[7] "Courts routinely refuse to enforce provisions in partnership agreements or the like that restrict the right of a lawyer to practice law by means of financial disincentives to competitive departures." ABA Formal Ethics Op. 19-489, at 5; *see also id.* at 5-6 & n. 15 (noting that "'[C]ourts will not enforce contract terms that violate public policy . . . the foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect' to provisions inconsistent with the rule") (citing cases); *Johnson Family Law, P.C., v. Bursek,* 2022 COA 48, at ¶¶58-60, 2022 WL 1252236, 2022 Colo. App. LEXIS 616 (Colo. App. Apr. 28, 2022) ("an agreement that violates Rule 5.6(a) is necessarily void as against public policy").

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 84337-1-I to the following:

Christopher L. Hilgenfeld
Daniel A. Rogers
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 3500
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Original electronically delivered via appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 29, 2024, at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

January 29, 2024 - 3:12 PM

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Appellate Court Case Number:	84337-1
Appellate Court Case Title:	Seattle Truck Law, PLLC, Respondent v. James Banks, Appellant

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