Potential Limitations in Lawyer Employment Agreements

Law firms must be careful when considering restrictions on a departing lawyer's opportunity to engage in the practice of law, especially because of conflicts between ethics rules that apply specifically to attorneys and general employment law principles.

BY DEAN R. DIETRICH

Question

I am hiring a new associate for our law firm. Can I put items in the employment agreement about not taking clients, employees, or other attorneys if the new attorney decides to leave the law firm?

Answer

There are several different components to answering this question. It is well recognized under the Wisconsin Rules of Professional Conduct that a lawyer may not enter into an employment agreement with another lawyer that prevents the other lawyer from engaging in the representation of clients in any fashion. Wisconsin Supreme Court Rule 20:5.6 provides the following:

SCR 20:5.6 Restrictions on right to practice. A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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

The practical effect of this language is that a lawyer or law firm that is hiring a new lawyer cannot condition the hiring of the new lawyer on entering into a non-compete agreement that limits the new lawyer from engaging in the practice of law in certain areas or prevents the lawyer from contacting clients of the law firm if the new lawyer departs the firm. The timing of any communication from the departing lawyer to a client is subject to limitations on how and when the departing lawyer can contact the clients whom they represented while with the law firm.

Similarly, the supreme court rule language would also apply to an agreement that prohibits the departing lawyer from recruiting other lawyers from the law firm to leave the law firm and begin practice with the departing lawyer. It has been determined that such a prohibition, typically called a non-solicitation clause, would also limit the ability of the new (and departing) lawyer to engage in the practice of law after departure.

What is not clear is whether a law firm hiring a new lawyer could require the lawyer to sign a non-solicitation agreement that prevents the lawyer from soliciting paraprofessional staff or support staff from the law firm if the lawyer decides to leave the law firm. Mark Goldstein, of Goldstein Law Group S.C., who represents employers in labor and employment matters, has pointed out that employment law principles sometimes do not coincide with principles under the supreme court rules.

"Subject to the bounds of *Manitowoc Co. v. Lanning*, 2018 WI 6, [379 Wis. 2d 189, 906 N.W.2d 130,] employers have the right to enter a non-solicitation agreement with a new employee [that] provides that the new employee may not seek to hire other employees of the company if the employee decides to leave employment," noted Goldstein. "In other words, common law, which would apply to non-lawyers on staff, looks very different from the requirements under SCR 20:5.6, which applies to lawyers," said Goldstein. "This is an uncharted area and law firms need to be careful when considering restrictions on the departing lawyer's opportunity to engage in the practice of law."

The breadth of the SCR 20:5.6 restrictions is an open question and will likely depend on the specific facts of each lawyer's legal practice and needs for staffing and training those staff. Law firms should investigate these potential limitations closely before requiring those restrictions in an employment agreement. **WL**

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