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Restrictive Covenants

I. Introduction and Scope

Rule 5.6(a) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) provides that a "lawyer shall not participate in offering or making . . . a partnership, share-holders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement."

The Rule reflects that 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."[1] If the Rule did not bar such agreements, "the public would be restricted from access to lawyers who, by virtue of their background and experience, might be the best available lawyers to represent them."[2]

The Rule prohibits lawyers from agreeing to certain terms that restrict the right to practice law. The practice of law is broad. It includes the obvious—advising clients about legal issues, writing contracts, and litigating matters in court. It also includes providing

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[1] Colo. RPC 5.6, cmt [1]

[2] Am. Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 94-381, "Restrictions on Right to Practice" (1994).

information about legal services, teaching others how to practice law, and screening for conflicts of interest. But the right to practice law has limits. Statutes, case law, and court rules limit the right to practice law.

Any private agreement that restricts the ability of a lawyer to practice law more than the law already does violates the Rules. If the agreement restricts the lawyer in the practice of law no more than the Rules already do, then the agreement does not restrict the lawyer's right to practice law.

II. Syllabus

This opinion examines various covenants that may be included in some form in an agreement covered by Colo. RPC 5.6(a), including covenants restricting competition and the solicitation of employees, confidentiality provisions, placement agency provisions, provisions requiring notification about future employers, and savings clauses. Provisions such as these violate Colo. RPC 5.6(a) if they interfere with a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of a similarly situated lawyer who does not sign the agreement.

III. Analysis

A. Covenants Not to Compete

Rule 5.6(a) "plainly forbids any agreement that would entirely prohibit a lawyer from practicing law after departure from a firm."[3] A "general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated

[3] *Johnson Family Law, P.C. v. Bursek*, 2024 CO 1, ¶ 10, 541 P.3d 605, 609.

period [is] an unwarranted restriction on the right of a lawyer to choose where [to] practice and inconsistent with our professional status."[4] Courts and ethics committees consistently apply the rule to prohibit covenants not to compete that directly prohibit a lawyer from practicing in certain areas or regions.[5]

An agreement that does not bar competition with a former firm but provides financial disincentives to competition violates Rule 5.6(a) unless the agreement represents "a reasonable balance between client choice and attorney autonomy on the one hand and a firm's interest in financial and practice stability on the other."[6] The Colorado Supreme Court held that "an undifferentiated fee assessed for each client who chooses to follow a departing lawyer violates Rule 5.6(a)."[7] The Court observed that "such a fee forces attorneys to make individualized determinations of whether a client is 'worth' retaining and incentivizes them to retain clients in high-fee cases and to jettison clients with less lucrative claims."[8]

The Court left open the possibility of circumstances that could "justify a firm seeking reimbursement of particular costs that it incurred for or expended on a client. . . . for

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[4] ABA Comm. on Ethics and Prof. Resp., Formal Op. 300 "It Is Unethical for an Attorney Employing Another Attorney to Include as Part of the Employment Contract a Restrictive Covenant Prohibiting the Employee from Practicing Law in the City and County for Two Years After the Termination of Employment" (1961).

[5] *See, e.g., In re Hanley*, 19 N.E.3d 756, 756 (Ind. 2014) (noncompete provision prohibit attorney from practicing Social Security disability for two years after termination violated RPC 5.6(a)); WSBA Rules of Pro. Conduct Comm., Advisory Opinion 2118 (2006) (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)).

[6] *Bursek*, 541 P.3d at 609.

[7] *Id.*, at 610.

[8] *Id.*

example, the firm had advanced litigation costs for a client or expended unusual funds to attract a particular client[.]"[9] The Committee cautions that in circumstances where a firm has advanced litigation costs for a client pursuant to an agreement where the client will pay those costs back to the firm from the amounts recovered in a contingency case, a provision requiring a departing lawyer to take on an obligation to repay those costs, particularly on terms or a schedule different from the agreement between the former firm and client, might create a conflict of interest between the lawyer and client. And a newly departing lawyer's obligation to reimburse a substantial amount in costs immediately that would otherwise be owed to the former firm by the client out of the amounts recovered in a contingency case may be so prohibitive as to make the representation impossible.

Provisions that forfeit fees or compensation to which a lawyer is otherwise entitled if the lawyer competes with a firm or employer, or which provide for additional compensation (such as additional stock options) to a lawyer who agrees not to compete with a firm or employer, violate Colo. RPC 5.6(a). Although such a provision does not explicitly bar a lawyer from practicing law, the effect is the same. Because a lawyer cannot agree not to compete with a former employer, a lawyer cannot agree to be paid not to compete with a former employer and cannot condition the receipt of vested benefits on not competing with a former employer. Provisions that impose a financial cost on a lawyer for competing with a firm, however, are different from "an agreement concerning benefits upon retirement"

[9] *Id.*

that includes restrictions on the right to practice law. Colo. RPC 5.6(a) permits such restrictions in connection with benefits upon retirement.

Colo. RPC 5.6(a) applies to all employment agreements, including those between a corporation and an in-house lawyer.[10] An in-house lawyer may not agree to an employment agreement that restricts the lawyer's right to practice law, after termination of the agreement, such as a blanket prohibition on working for a competitor.[11]

Agreements that blanketly limits the clients that a lawyer may represent, such as agreements prohibiting a personal injury lawyer from representing clients with a certain injury against a certain defendant or a corporate lawyer from representing clients in a certain industry, violates Colo. RPC 5.6(a). But an agreement that limits a lawyer from representing a client in a circumstance where Colo. RPC 1.9(a) would prohibit the representation does not violate Colo. RPC 5.6(a). Colo. RPC 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests, unless the former client gives informed consent in writing.

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[10] *See, e.g.* Conn. Bar Ass'n. Comm. On Prof. Ethics, CT. Eth. Op. 02-05, "Non-Competition Agreement as Condition of Additional Compensation to Attorney/Employee" (2002) ("the corporate 'in-house' relationship described in this case falls within the purview of Rule 5.6."); Ohio Bd. of Prof. Conduct Op. 2020-01, "Covenant Not to Compete Offered to In-house Counsel" (2020) ("an employment contract offered by a client that restricts an in-house lawyer from providing legal services after separation from employment implicates the prohibition in Prof.Cond.R. 5.6(a).").

[11] Nevada State Bar Standing Comm. on Ethics and Prof. Resp. Formal Op. No. 56 (2019), available at https://nvbar.org/wp-content/uploads/NV-Ethics-Opinion-56-re-In-House-Employment_Stock-Agreement.pdf.

A lawyer could agree to a position contingent on the lawyer's agreement not to represent any person adverse to the client or employer's clients in the same or substantially related matters as that lawyer worked during the lawyer's employment. The term does not restrict a lawyer's right to practice law because the term is consistent with the existing limits on representation in Colo. RPC 1.9(a).

Lawyers do more for clients than practice law. Often, an in-house lawyer wears two or three hats, providing legal services, law-related services, and non-legal or law-related services. Rule 5.7(b) defines law-related services as the "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." A lawyer is subject to the Rules of Professional Conduct when providing law-related services if those services are provided "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients."[12] Comment 9 to Colo. RPC 5.7 explains that "law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."

[12] Colo. RPC 5.7(a)(1). Although not directly relevant to this opinion, a lawyer is also subject to the Rules of Professional Conduct when providing law-related services if those services are provided "in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." Colo. RPC 5.7(a)(2).

The right to practice law expressed in Rule 5.6(a) includes the provision of law-related services. A lawyer may not offer or agree to a term that prohibits the lawyer from providing law-related services to a future client if those law-related services would be provided in circumstances where they are not distinct from the lawyer's provision of legal services.[13] Other committees that have concluded "a lawyer may execute an employment contract for an in- house position that is drafted in a manner to permissibly restrict only those future activities that do not constitute the practice of law."[14] A lawyer may execute such a contract so long as the practice of law includes the provision of law-related services as contemplated by Colo. RPC 5.7(b).

A lawyer might perform services for an employer that are distinct from the lawyer's provision of legal services so do not qualify as law-related services. For instance, a startup company may rely on its general counsel's computer sciences background rather than hire a new developer for a discrete coding project.

A lawyer may agree to an employment agreement that restricts the lawyer's future employment if the restriction does not impede the lawyer's right to practice law or provide law-related services. For instance, an in-house lawyer for a company developing a product may agree to a term that prohibits the lawyer from working in a non-legal capacity doing

[13] Phil. Bar Ass'n Ethics Op. 2003-9 (2003) ("the duties described as "non-legal" by the Inquirer are not distinct from legal duties, and indeed, [] a lawyer is not permitted to allow a non-lawyer to impose on him a definition of what constitutes legal services.").
[14] Ohio Bd. of Prof. Conduct Op. 2020-01, "Covenant Not to Compete Offered to In-house Counsel" (2020).

research and development for a competitor developing a similar product.[15] Such a term would not limit a lawyer's right to practice law so long as it does not also prohibit a lawyer from providing legal or law-related services to the competitor that are distinct from the non-legal capacity.

B. Covenants Not to Solicit Employees

A provision in an agreement covered by Colo. RPC 5.6(a) that prohibits a lawyer from soliciting employees of the lawyer's former employer or firm may violate that rule.

Other committees have consistently applied the rule to conclude that a lawyer may not offer or agree to a non-solicitation or anti-raiding provision that prohibits a lawyer from soliciting another lawyer to leave or join a firm.[16] The New Jersey Supreme Court explained that an "associate familiar with the complex facts of a major case for a client who chooses to follow a departing partner may be an irreplaceable asset to that case."[17]

The rule explicitly prohibits a lawyer from restricting the right of a licensed legal paraprofessional (LLP) to practice after termination of the relationship. This means a lawyer may not restrict the LLP's right to practice directly through an employment agreement with the LLP or indirectly through an employment agreement with a lawyer.

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[15] Wash. State Bar Ass'n Advisory Op. 2100, "Non-compete provision in employment agreement" (2005) ("The provision at issue deals specifically with a lawyer's post-employment activities that are not related to the practice of law, thus, the provision does not violate RPC 5.6(a).").

[16] New Jersey Advisory Comm. on Prof. Ethics, Formal Op. 708 "Restrictive Covenants For In-House Counsel" (July 2006) (opining "an anti-raiding provision such as this one violates our Rules of Professional Conduct both with respect to the hiring of other attorneys."); Phil. Bar Ass'n Formal Op. 2003-9 ("Rule 5.6 would prohibit a lawyer from agreeing to a non-solicitation clause, certainly as it applies to soliciting lawyers[.]") (hereinafter Phil. Op. 2003-9)..

[17] *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 31, 607 A.2d 142, 153 (1992).

Provisions that restrict a lawyer from soliciting other non-lawyer employees may violate the rule. Comment [2] to Colo. RPC 5.3 explains that lawyers "generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."

The Philadelphia Bar Association's Ethics Committee explained, "If part of the lawyer's new job is to provide [the lawyer's] new client with the best 'team' of personnel, [the lawyer] cannot agree to restrict [the lawyer's] ability to do that."[18] Indeed, "the unrestricted 'practice of law' includes the right to solicit both attorneys and those members of the paraprofessional staff that attorneys believe are necessary to provide the best legal service for their clients."[19]

On the other hand, there are likely employees who do not contribute to a lawyer's practice of law or provision of law-related services such that a restriction on solicitation of those employees may not restrict the right of the lawyer to practice of law. For instance, a provision that restricts an in-house attorney from soliciting employees who perform non-legal work, like product development or sales, from joining a subsequent employer to perform that same non-legal work would not restrict the lawyer's right to practice law.

While a provision restricting a lawyer's ability to solicit employees from a former employer may violate Colo. RPC 5.6(a), the Colorado Court of Appeals held that a provision that restricts a lawyer's ability to solicit employees from a current employer does not

[18] Phil. Op. 2003-9.
[19] *Jacob*, 128 N.J. at 31-32, 607 A.2d at 153.

violate the rule.[20] The court explained that such a provision, which is consistent with the common law duty of loyalty, "was at most a de minimis restriction on her autonomy and did not impair client choice."[21]

C. Confidentiality Agreements

The practice of law necessarily involves using the information a lawyer knows. Lawyers receive information then rely on their professional discretion to use that information, sometimes disclosing the information as part of its use. Lawyers also owe duties to current and former clients not to use or disclose certain information.

Colo. RPC 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Colo. RPC 1.6(b). Colo. RPC 1.9(c)(1) prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client except as the Rules of Professional Conduct would permit or require with respect to a client, or when the information has become generally known. And Colo. RPC 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules of Professional Conduct would permit or require with respect to a client.

Confidentiality provisions that do "not exceed the scope of Rule 1.6" and do not restrict the lawyer's right to practice law after termination of the agreement do not violate

[20] *Franklin D. Azar & Assocs. P.C. v. Ngo*, 2024 COA 99, ¶ 28, 560 P.3d 446, 453.
[21] *Id.*

Colo. RPC 5.6(a).[22] Agreements covered by Colo. RPC 5.6(a) that impose a confidentiality obligation on the lawyer outside of what the rules impose on the lawyer may restrict the lawyer's right to practice law in violation of the rule.[23]

The effect of a confidentiality provision may be to prevent a lawyer's employment with another client or employer. As a lawyer, "accepting employment with one employer may preclude certain other subsequent employment. Rule 5.6 is not so broad as to change that result."[24] This effect is consistent with Colo. RPC 1.7(a)(2), which prohibits representation of a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to a former client. Such a conflict may be waivable under Colo. RPC 1.7(b), which requires informed consent, but a confidentiality provision operates to reject in advance any consent to the waiver. It is also consistent with Colo. RPC 1.9(c), which prohibits a lawyer from using information related to the representation of a former client to the disadvantage of the former client except as the rules would permit or require with respect to a client or when the information has become generally known and prohibits a lawyer from revealing information related to the representation of a former client except as the rules would permit or require with respect to a client.

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[22] Nevada Standing Comm. on Ethics and Prof. Resp. Formal Op. No. 56 (2019), available at https://www.nvbar.org/wp-content/uploads/NV- Ethics-Opinion-56-re-In-House-Employment_Stock-Agreement.pdf; *see also* Phil. Bar Ass'n Ethics Op. 2003-9 (2003) (explaining that "though duplicative of Rule 1.6" a clause regarding confidentiality of information does not violate Rule 5.6(a)); South Car. Bar Ass'n Ethics Advis. Op. 00-11 (2000) ("Fully consistent with Rule 1.6 and Rule 5.6, the corporation could insist that a lawyer employee sign a confidentially agreement promising to preserve the corporation's trade secrets as a condition to employment.").

[23] *See* N.Y. State Bar Ass'n Ethics Op. 858 (2011), available at https://nysba.org/ethics-opinion-858/.

[24] South Car. Bar Ass'n Ethics Advis. Op. 00-11 (2000).

If a lawyer cannot represent a client without being materially limited by a duty of confidentiality, the lawyer cannot represent that client. If a lawyer owes a duty to keep confidential information related to the representation of a former client that might materially benefit a potential new employer to the disadvantage of the former client, the lawyer should not take the employment.

While "a current client's interests should assume a certain priority for the lawyer, the extent of those interests that continue to have a claim on the lawyer after the lawyer-client relationship is terminated is defined by the scope of the restriction contained in Model Rule 1.9."[25] So confidentiality provisions that exceeds the scope of Rule 1.9(c) may violate Rule 5.6(a) if it operates to restrict a lawyer's right to practice law.

In Formal Opinion 92, this Committee examined Colo. RPC 5.6(b), which prohibits a lawyer from offering or agreeing to a term that would restrict the lawyer's right to practice as part of a settlement of a client controversy.[26] In it, we explained that "the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation."[27] The same test is appropriate for determining the propriety of a provision under Rule 5.6(a). A partnership, shareholder, operating, employment, or other similar type of agreement violates Colo. RPC 5.6(a) if it

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[25] ABA Comm. on Ethics and Prof. Resp., Formal Op. 94-381, "Restrictions on Right to Practice" (1994).
[26] CBA Formal Op. 92, "Practice Restrictions in Settlement Agreements" (1993), available at https://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_92_2011.pdf.
[27] *Id.*

would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of a similarly situated lawyer who does not sign the agreement.

A confidentiality provision that prohibits a lawyer from using or disclosing legal research or legal knowledge the lawyer learned working for an employer that is broader than Rule 1.9(c) restricts the lawyer's right to practice law and therefore violates Rule 5.6.[28] A confidentiality provision that prohibits a lawyer from employing or disclosing to other lawyers a witness preparation strategy, third-party vendors used in litigation, or information about judges or opposing lawyers violates Rule 5.6(a) because it restricts a lawyer's independent judgment more than the rules otherwise would.

A confidentiality provision that prohibits the lawyer from disclosing the lawyer's representation of a client, including in-house employment with a client, violates Rule 5.6(a).

The identity of a client or former client is information that a lawyer must keep confidential under Colo. RPC 1.6(a) and 1.9(c). We previously explained that "what is confidential under Rule 1.6 is much broader than the evidentiary attorney-client privilege. 'The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' The Colorado Supreme Court broadly interprets 'client information.'"[29]

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[28] *See* Nevada State Bar Standing Comm. on Ethics and Prof. Resp. Formal Op. No. 56 (2019), available at https://www.nvbar.org/wp-content/uploads/NV- Ethics-Opinion-56-re-In-House-Employment_Stock-Agreement.pdf

[29] CBA Formal Op. 130, "Online Posting and Other Sharing of Materials Relating to the Representation of a Client" (2018) (quoting Colo. RPC 1.6, cmt. [3] and *People v. Hohertz*, 102 P. 3d 1019, 1022 (Colo. 2004)), available at https://www.cobar.org/Portals/COBAR/Repository/ethicsOpinions/1118/CBA%20Formal.pdf?ver=2019-11-18-083543-010.

Colo. RPC 1.6(b)(7) permits a lawyer to reveal information related to the representation of a client to detect and resolve conflicts of interest arising from the lawyer's change of employment unless the information is protected by attorney-client privilege and its revelation is not likely to materially prejudice the client. The identity of a client is typically unprivileged information unless a reasonable inference of disclosure of the client identity is the content of a confidential communication.[30] If a lawyer cannot screen potential conflicts of interest when joining a new firm, the lawyer cannot practice law. An agreement that prohibits the lawyer from disclosing the identity of a client to clear potential conflicts of interest restricts the lawyer's right to practice law.

A provision that prohibits a lawyer from describing the nature of their experience and prior work violates Colo. RPC 5.6(a). The rationale behind the prohibition on allowing restrictions on the right to practice law in employment agreements and to settlement agreements, is that such agreements restrict "the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals."[31] Providing information about legal services is part of the practice of law. Information about a lawyer's experience is crucial information to educating the public on the very best available talent to represent them on certain matters. An agreement that restricts a lawyer from disclosing the lawyer's relevant experience to the public or potential clients restricts the lawyer's right to practice law and violates Colo. RPC 5.6(a).

[30] Restat. 3d of the Law Governing Lawyers, § 69, cmt. g.
[31] ABA Formal Opinion 95-394.

D. Provisions Requiring a Temporary Employer to Pay a Placement Agency a Fee if the Employer Offers Permanent Employment to a Lawyer

This Committee previously evaluated Rule 5.6 in connection with a placement agency's requirement that a firm or temporary lawyer give notice to the placement agency or pay a fee to the placement agency if the temporary lawyer accepts permanent employment with a firm.[32] We concluded that were Rule 5.6 to be applied literally, such requirements would be prohibited. However, because the comment to Rule 5.6(a) reflects that it was intended to apply to agreements restricting employment "after leaving a firm," the rule was not intended to bar such provisions in placement agency agreements.[33]

Since the Committee adopted Opinion 105, the District of Columbia Bar similarly concluded that, although a temporary lawyer or a lawyer employing a temporary lawyer violates Rule 5.6 by entering into an agreement barring the temporary lawyer's employment by a third party, the employer's payment of a placement fee to a placement agency for the permanent employment of the lawyer does not violate Rule 5.6.[34] This Committee agrees with the District of Columbia Bar. The payment of a placement fee to a placement agency for the permanent employment of a temporary lawyer does not restrict the lawyer's rights to practice after leaving permanent employment. Accordingly, such an agreement does not violate Colo. RPC 5.6(a).

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[32] CBA Formal Op. 105, "Opinion on Temporary Lawyers" (1999).
[33] *Id.*
[34] District of Columbia Bar Op. No. 291 (Oct. 1999).

E. Provision Requiring Disclosure of Future Employers

A provision in an agreement covered by Colo. RPC 5.6(a) that requires a lawyer to notify an employer of the identity of a prospective future employer may violate Rule 5.6 if it interferes with a lawyer's ability to comply with Colo. RPC 1.6(a). As discussed earlier, Colo. RPC 1.6(a) prohibits a lawyer from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure" meets one of a few specific and narrowly drafted exceptions in Colo. RPC 1.6(b).

The client's identity is itself confidential information under Rule 1.6. A lawyer who discloses information related to the representation of a client to a former employer violates Colo. RPC 1.6(a) unless one of the exceptions in 1.6(b) applies. There is no exception for a contractual provision with a former employer requiring disclosure of such information.

If a lawyer was considering employment with a client who conditioned the lawyer's employment on confidentiality–a reasonable client expectation–a provision requiring the lawyer to disclose her employment with the client to a previous employer would restrict the lawyer from employment with and representation of that client. Thus, a provision that requires a lawyer to disclose information about the representation of a prospective client to the lawyer's former employer in violation of Colo. RPC 1.6(a) violates Colo. RPC 5.6(a) by restricting the lawyer's right to practice law.

On the other hand, a provision that requires a lawyer to disclose the lawyer's employment with a future employer to whom the lawyer is not providing legal services may not violate Colo. RPC 5.6(a). For instance, a provision requiring a lawyer to notify the

lawyer's former employer that the lawyer took a non-legal position performing research and development would not violate the rule.

F. Savings Clauses

An agreement governed by Colo. RPC 5.6(a) may include language that the agreement must be interpreted consistent with the Rules of Professional Conduct. An agreement also may be qualified to encompass only actions not in violation of the Rules of Professional. Such a savings clause allows a lawyer to make or offer an agreement that could be interpreted to restrict a lawyer's right to practice absent the clause.

Several committees have found that savings clauses permit a lawyer to enter into an agreement with an employer or firm without violating Rule 5.6(a). For example, the Connecticut Bar Association Committee on Professional Ethics and the Unauthorized Practice of Law determined a savings clause in a lawyer's in-house counsel non-compete agreement providing that it was effective and binding "only to the extent permissible under Rule 5.6 of the Connecticut Rules of Court-Rules of Professional Conduct" repaired the Rule 5.6(a) ethical concerns otherwise arising from the execution or enforcement of the agreement.[35] Similarly, the Washington State Bar Association considered a non-compete provision in a lawyer's employment agreement which stated "[a]s it relates to the practice of law, this provision shall be interpreted consistent with the Washington RPCs (or similar rules in

[35] Conn. Bar Ass'n Comm. on Professional Ethics, Formal Op. 02-05, "Non-competition Agreement As Condition of Additional Compensation To Attorney/Employee," (2002), available at 2002 WL 570602, *4.

other jurisdictions), including RPCs 5.6, 1.9, and 1.6."[36] Because the agreement contained express language that the Rules of Professional Conduct governed its interpretation, the Washington State Bar Association opined that the non-compete provision applied only to future activities unrelated to the practice of law and did not violate Rule 5.6(a).[37]

A savings clause does not save an agreement that facially violates Colo. RPC 5.6(a). If there is only one reasonable interpretation of a provision, and that interpretation violates Colo. RPC 5.6(a), then the provision violates the rule, regardless of any savings clause language. A lawyer cannot circumvent Colo. RPC 5.6(a) by agreeing to a provision that blanketly prohibits the lawyer from competing with a former employer or firm but includes something like "nothing in this agreement will be interpreted to violate the rules of professional conduct."

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[36] Wash. State Bar Ass'n Advisory Op. 2100, "Non-compete provision in employment agreement" (2005), available at https://ao.wsba.org/print.aspx?ID=1344.

[37] *Id.*; *see also* NY State Bar Comm. on Prof. Ethics, Formal Op. 858, "Conditioning in-house attorney's employment on execution of a confidentiality agreement" (2011) (in-house counsel's requirement that associate lawyers enter into a confidentiality agreement expressly stating the confidentiality provisions are to be interpreted "'consistent with' the applicable rules of professional conduct or ethics rules and that it 'shall not expand the scope' of an attorney's duties to maintain privileged and confidential information under any such rules" did not violate the Rules of Professional Conduct); Ohio Board of Prof. Conduct, Formal Op. 2020-01, "Covenant Not to Compete Offered to In-house Counsel" (2020) (a non-compete agreement with a clause limiting the agreement to matters other than the practice of law does not violate Rule 5.6); Philadelphia Bar Ass'n Prof. Guidance Comm., Formal Ethics Op. 2003-9 (2003) (a proposed employment agreement for in-house counsel violates Rule 5.6 and cautioning the inquirer to include in the future a caveat "stating that nothing in the Agreement shall be inconsistent with any provisions of the Rules, and that if the Rules are deemed to prohibit any portion of the Agreement, the applicable provision of the Rules shall prevail").

But a savings clause that clarifies ambiguity, for instance the scope of legal compared to non-legal activities or the definition of confidential information, operates to save an agreement that otherwise could be interpreted to violate Colo. RPC 5.6(a).

In contrast to a savings clause specifically excluding any covenants in violation of the Rules, a severance clause typically requires a court action to determine whether a portion of an agreement is unenforceable. A severance clause has no effect on our determination of whether an agreement violates the Rules of Professional Conduct.[38]

G. Differences in Types of Agreement

Colo. RPC 5.6(a) does not differentiate between partnership, shareholders, operating, employment, and other similar type of agreements. A provision that restricts a lawyer's right to practice violates Rule 5.6(a) whether in a partnership or employment agreement. A lawyer's position as a partner or associate in a firm or in-house with a corporation may nevertheless affect whether an agreement violates Colo. RPC 5.6(a).

An employing corporation is the client of an in-house lawyer. A law firm is rarely the client of an associate attorney. So, the Rules impose different obligations on different lawyers by nature of their employment. A confidentiality provision for an in-house attorney may not violate Colo. RPC 5.6(a), but an identical provision for an attorney at a private law firm may violate the rule.

[38] *See, e.g.*, Nevada Standing Comm. on Ethics and Prof. Resp., Formal Op. No. 56, "Restrictions of Information; Duties to Former Clients" (2019) (explaining that a generic severance clause does not eliminate the Rule 5.6 ethical violation because it requires court action and does not specifically address Rule 5.6).

Whether some provisions violate Colo. RPC 5.6(a) depends on the reasonableness of the provision, like a provision that imposes costs on a departing lawyer who competes. What is reasonable for a partner departing a firm after fifteen years may be different than what is reasonable for an associate departing after one year.

H. Enforcement of Agreements that Violate Colo. RPC 5.6(a)

The Rules "are not designed to be a basis for civil liability."[39] The Committee takes no position on whether an agreement that violates Colo. RPC 5.6(a) may nevertheless be enforceable against an attorney or other person or is unenforceable due to public policy. The Colorado Supreme Court held that the rule is public policy and "any contract that violates Rule 5.6(a), such as one imposing a per-departing-client fee, is unenforceable."[40] The Court also observed that "Rule 5.6(a) is designed primarily to protect client choice" and "primarily for the benefit of the public rather than the interests of the profession[.]"[41] Courts exercise discretion and may not void an agreement that violates Rule 5.6(a) if voiding the agreement would benefit the profession and not the public. And it may be professional misconduct under Colo. RPC 8.4(c) for a lawyer to enter into an agreement that the lawyer knows violates Rule 5.6(a) with the intent to later disclaim its enforceability against a client under Rule 5.6(a).

The Committee cautions lawyers considering making or offering employment agreements with covenants that restrict a lawyer's ability to practice law that state and

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[39] Colo. RPC Preamble and Scope, cmt. [20].
[40] *Bursek*, 541 P.3d at 611.
[41] *Id.*

federal law may render certain restrictive covenants unenforceable independently, regardless of the application of the Rules of Professional Conduct.