

# Running Into Trouble

Noncompete Agreements for Lawyers are Open to Interpretation, Some Say Unethical

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## Business of Law

Victoria Vuletich understands how hard lawyers work to attract and advocate for clients and understands how they can take ownership of the work they do for their clients. But Vuletich, who formerly worked as assistant counsel at the State Bar of Michigan's ethics hotline, can't make it clear enough when she says, "Lawyers don't own their clients."

That's the idea behind Michigan Rule of Professional Conduct's prohibition of noncompete agreements for lawyers.

MRPC 5.6 states: "A lawyer shall not participate in an offering or making of: (a) an 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 as permitted in Rule 1.17; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

The reason, according to Andrey T. Tomkiw, of Royal Oak-based Tomkiw Dalton PLC, is that clients should be free to choose whatever lawyers they want. That's why the practice of law, and to a degree the practice of medicine,

in which noncompetes are addressed in professional ethics rules.

"It's unethical to even put one of these agreements in front of an attorney," he said.

But he's been presented with one, and he thinks many of his colleagues have been asked to sign noncompete agreements too.

Tomkiw understands why he's been asked to sign such an agreement. It's not that the firm wanted to prohibit him from making a living. It's that it was trying to protect its bottom line and its information, he said.

## Conflicting Rulings

The rule is often overlooked, Vuletich said.

"This rule is often observed more in breach than compliance," said Vuletich, who is now an assistant professor at The Thomas M. Cooley Law School's Grand Rapids campus.

The reason the rule is often breached is that Michigan is one of four states (including Arizona, Pennsylvania, and California) that has allowed some form of noncompete agreements to be imposed on lawyers departing from a firm.

And those agreements have not been decided in that state's Supreme Court, leaving the issue more open to interpretation than in other states, she said.



The majority of states, she said, have taken the stance that financial disincentives for lawyers departing a firm have a restrictive effect on client choice.

But the four states that adopt the minority view have allowed disincentives to be imposed if they are reasonable, Vuletich said.

"The question becomes, when [does] a financial disincentive provision stop being reasonable and become a prohibitive restriction on the right of a lawyer to practice," she said. "That means that it's done on a fact-by-fact, case-by-case basis. That's shorthand for 'litigation.'"

Though no noncompete agreements have been challenged in the Michigan Supreme Court, a few have been addressed in the Michigan Court of Appeals, and those few have offered what Vuletich called conflicting rulings.

In the 1992 case *McCroskey, Feldman, Cochrane & Brock PC v. Waters*, the Court of Appeals upheld contractual provisions that required a departing partner to pay 25-75 percent of fees and costs advanced by the firm, in those cases where the departing partner retained cases he started while with the firm.

Though the court upheld the provisions, because they addressed fee splitting more than competition, states in the majority view have not permitted such restrictions, Vuletich said.

"In Massachusetts, a much less onerous provision of 15 percent was struck down," she said.

In a February 2008 Court of Appeals ruling in the unpublished *Kohl, Harris, Nolan & McCarthy PC v. Peters*, the court upheld a fee-splitting agreement between a lawyer and his former firm.

Though Vuletich said it does make sense for a firm to be reimbursed for any advanced costs, in the event that a lawyer leaves the firm, she questions how the courts will define reasonableness in post-departure fee splitting.

"When does recoupment stop being reasonable?" she asked. "That's where things get pretty fuzzy."

### **Going Too Far?**

It's not fuzzy at all, according to Steven M. Ribiat, shareholder at Butzel Long PC's Bloomfield Hills office, who serves as the practice group leader of the firm's business litigation group.

Butzel Long lost some lawyers during the last year, he said. Some departures were

voluntary. Some were not. Even though the departing lawyers took with them years of experience and, in some cases, clients, Ribiat said the firm didn't try to impose any post-departure agreements.

What is allowed, he said, is for a firm to protect its brand and trademark. If the firm has a slogan or trademarked motto, a departing lawyer is not allowed to use it.

Also allowed is for a firm and a departing lawyer to come to an agreement regarding severance and retirement benefits.

"You can tell a lawyer that if he leaves to practice elsewhere, there could be restrictions on retirement benefits. But if he's really retiring, he would have a right to 100 percent of his retirement," Ribiat said. "As a matter of ethics, that's OK. Departing lawyers are not allowed to take client files, or any part of the files, without permission. And they are not allowed to solicit clients to follow them to their new practice.

"It's fine to tell a client that you're leaving, and where you're going, but you can't directly ask them to follow you," Ribiat said.

The departing lawyer also is prohibited from soliciting other lawyers and staffers, he added.

But that does happen, he said, and it's usually unchallenged.

"It comes down to if one person is unhappy at the firm, it becomes known. And other people who are similarly unhappy tend to also make it known. You can't really do much about it if they all want to leave," Ribiat said.

At the same time, blatant soliciting would not be tolerated by most firms.

"The saying is that pigs get fat and hogs get slaughtered," he said. "Some abuse is OK, but if you go too far, you'll upset someone enough that they'll do something about it."

And sometimes, he said, firms go too far in trying to restrict a departing lawyer's professional activities.

"There are some interpretations that say, 'You have the right to practice if you leave - voluntarily or involuntarily - and you take any of our clients with you, you have to pay the firm a specified amount of dollars for the duration of the matter.' Truth is, you can't do that," Ribiat said. "You can't put financial restrictions on the lawyer's ability to leave the firm.

"You just have to let them go. That's the business of law."