

**ETHICS OPINION NUMBER 249
OF THE MISSISSIPPI BAR
RENDERED SEPTEMBER 13, 2001**

RESTRICTIONS ON THE RIGHT TO PRACTICE - A buy-out agreement requiring an attorney to pay a liquidated damages amount to the firm in the attorney leaves the firm is not a per se violation of MRPC 5.6.

The Ethics Committee of The Mississippi Bar has been asked to render an opinion involving the following facts:

Attorney A operates a practice in City X, and he wishes to expand his law practice to City Y by employing Attorney B to operate the new office. Attorney A intends to structure an employment agreement between his firm and Attorney B that will include a buy-out provision in the event that Attorney B should terminate his employment with the firm. This buy-out agreement is designed to protect the significant financial resources and other resources invested in training Attorney B.

The question presented to the Ethics Commission is as follows:

Does an employment agreement with a buy-out provision violate MRPC 5.6(a) if the provision requires an Attorney who is departing the employ of a firm to pay a specified amount to the firm because of his decision to terminate?

MRPC 5.6 states:

A lawyer shall not participate in offering or making:

(a) a partnership or employment 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 to which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

The Comment section to MRPC 5.6 states:

An agreement restricting the right of partners or associates 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 for restrictions incident to provisions concerning retirement benefits for service with the firm.

Thus, the purpose of MRPC 5.6 is to prohibit agreements restricting one from practicing law. The question presented to this Committee is whether a buy-out provision in an employment contract which requires an attorney to pay money to a firm is a violation of MRPC 5.6.

In 1991, the Ethics Committee considered a hypothetical involving a law firm's partnership agreement which provided for a substantial penalty for the withdrawal of a partner. The penalty would be reduced if the "withdrawing lawyer [had] been a partner for a period of ten years and [assured] the remaining partners in writing that he [would] not engage in the private practice of law in substantial competition with the law firm for a period of five years." The Committee found that the covenant required the departing partner to restrict his practice in violation of Rule 5.6 in order to obtain funds from his capital account. The Committee noted that the American Bar Association has addressed the question of the propriety of restrictive covenants of this sort and found them to be unethical. ABA Opinion 1301 (1975) (cited in E.O. 193 (1991)).

The hypothetical situation we are faced with today does not appear to restrict the attorney's ability to compete with his prior law firm. According to the requesting attorney, the purpose of the buy-out agreement is to protect the investment made by the law firm in the departing attorney. This is not a violation of MRPC 5.6. The requesting attorney further states that "by training Attorney B, supervising his work, providing him with a physical place to practice, and allowing him to make full use of the contacts, forms, and goodwill of the firm, Attorney A will invest significant resources in Attorney B." Therefore, the Committee is of the opinion that such a provision designed to protect the investments in the departing attorney is not a per se violation of MRPC 5.6.