The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
April 28, 2022

2022COA48

No. 20CA2043, *Johnson Family Law, P.C. v. Grant Bursek* — Attorneys — Rules of Professional Conduct — Restrictions on Right to Practice

A division of the court of appeals addresses two issues of first impression regarding the propriety of agreements between law firms and attorneys that restrict a departing attorney's practice. First, the division holds that a financial disincentive to post-departure representation — as opposed to a direct prohibition — may violate Colo. RPC 5.6(a) if it is unreasonable under the circumstances. Second, the division holds that restrictions on practice that violate Rule 5.6(a) are necessarily void as against public policy. Applying those principles here, the division concludes that an agreement imposing on a departing associate a $1,052 fee per client that left with him violated Rule 5.6(a). Thus, the fee was unenforceable.

COLORADO COURT OF APPEALS **2022COA48**

Court of Appeals No. 20CA2043
City and County of Denver District Court No. 19CV34812
Honorable Morris B. Hoffman, Judge

Johnson Family Law, P.C., d/b/a Modern Family Law,

Plaintiff-Appellant,

v.

Grant Bursek,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

Division I
Opinion by JUDGE FOX
Dailey and Schutz, JJ., concur

Announced April 28, 2022

Cohen Black Law, LLC, Nancy Cohen, Denver, Colorado, for Plaintiff-Appellant

Spencer Fane, LLP, Troy R. Rackham, Denver, Colorado, for Defendant-Appellee

¶ 1 As the late Chief Justice Rehnquist observed, attorneys "in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." William H. Rehnquist, Dedicatory Address, *The Legal Profession Today*, 62 Ind. L.J. 151, 152 (1986). When an attorney so departs a firm, their withdrawal from and competition with the firm can cause a great financial strain. To protect their commercial interests, firms may contractually impose various restrictive covenants on a departing attorney. Such agreements, however, risk running afoul of Colo. RPC 5.6(a)'s prohibition on "agreement[s] that restrict[] the right of a lawyer to practice."

¶ 2 Courts have invariably held that Rule 5.6(a) prohibits agreements that directly restrict an attorney's right to practice. But what about financial disincentives that may indirectly do so? This opinion explores, for the first time in Colorado, whether an agreement that imposes a fee on a departing attorney for each client that departs with him violates Rule 5.6(a). We conclude that such a fee may violate the rule, but only if it is unreasonable under the

circumstances. We further conclude that a contractual provision that violates Rule 5.6(a) is necessarily void as against public policy.

¶ 3 Plaintiff, Johnson Family Law, P.C., doing business as Modern Family Law (MFL), appeals the district court's order finding that its agreement with a former associate attorney, Grant Bursek, violated Rule 5.6(a) and was thus unenforceable. We conclude that the agreement's imposition of a $1,052 fee per client that departed with Bursek was unreasonable, and thus we agree with the district court that the fee violated Rule 5.6(a). We disagree, however, that the violation rendered the entire agreement unenforceable and conclude that only the provisions imposing the fee are void. Accordingly, we affirm in part and reverse in part the judgment of the district court.

I. Background

¶ 4 MFL, a law firm specializing in family law matters, hired Bursek in April 2018 to join its Denver office as a "Business Development Attorney." Initially, Bursek's primary responsibilities were to find potential clients for the firm and conduct initial consultations. However, in December 2018, MFL offered Bursek a position as an associate attorney, and Bursek began directly representing clients who retained the firm. He was paid a

semi-monthly salary of $3,333. On March 1, 2019, MFL reduced his salary to $2,083.33, but allowed him to receive a commission on cases to which he contributed.

¶ 5 In April 2019, MFL asked Bursek to sign a "Reimbursement Agreement" (Agreement). Should Bursek leave the firm, the Agreement required Bursek to pay MFL $1,052 for each client that departed with him. Specifically, the Agreement provided that,

> [i]n the event Attorney's employment with [MFL] terminates, either voluntarily or involuntarily, Attorney agrees to reimburse [MFL] for marketing expenses related to any client, case or active matter which Attorney takes with them . . . and continues representation of the client begun during their employment with the firm.

It stated that "[t]he amount of reimbursement for each client is based on actual expenses at each firm location and," for the Denver office, "shall be . . . $1,052." The Agreement further directed that

> [i]n the event a client elects to terminate [the] Agreement with [MFL] and retain Attorney, Reimbursement Amount . . . shall be due from Attorney to [MFL] for that client . . . with[in] thirty (30) days of each client's election.

¶ 6 Notably, the Agreement also explained how the reimbursement costs were calculated:

> These Reimbursement Amounts are determined based on [MFL]'s historic costs directly related to marketing expenses for each client at each location. The parties hereto recognize that actual expenses may be difficult to determine and agree that these Reimbursement Amounts, based on historic costs, shall act as [liquidated] damages. Each party hereto agrees to be bound by these amounts rather than a specific calculation for actual marketing expenses.

¶ 7 Though unsure of its enforceability, Bursek signed the Agreement.

¶ 8 When Bursek resigned from MFL in September 2019, eighteen of MFL's clients left with him. MFL requested that Bursek remit payment of $18,963 per the terms of the Agreement, but Bursek refused, claiming that the Agreement was unenforceable.

¶ 9 MFL filed a complaint in district court asserting two claims: (1) a breach of contract claim premised on Bursek's refusal to pay the $1,052 per client fee; and (2) a claim for declaratory judgment that a separate contract, a "Confidentiality and Nondisclosure Agreement" (CNA), was enforceable against Bursek. After Bursek answered the complaint, MFL filed a motion for determination of law under C.R.C.P. 56(h), requesting that the court determine whether the Agreement and the CNA were enforceable.

¶ 10 The district court was persuaded that the $1,052 fee in the Agreement violated Colo. RPC 5.6(a) because it constituted "an unreasonable restriction on [Bursek's] right to practice." It then concluded that, accordingly, the Agreement was entirely unenforceable as a matter of law. Thus, it dismissed MFL's breach of contract claim with prejudice.

¶ 11 As to the CNA, the court agreed with MFL that it was enforceable and thus entered judgment in favor of MFL on its second claim.

¶ 12 MFL now appeals.

II. Standard of Review

¶ 13 "We review de novo a district court's order determining a question of law under C.R.C.P. 56(h)." *Smith v. State Farm Mut. Auto. Ins. Co.*, 2017 COA 6, ¶ 5.

III. Violation of Rule 5.6(a)

¶ 14 MFL appeals the portion of the district court's order finding, as a matter of law, that the Agreement is unenforceable in its entirety. In doing so, it asks us to consider two discrete, but related, legal issues that have yet to be addressed in Colorado.

¶ 15 We first consider whether an agreement that imposes a financial disincentive — but not a direct prohibition — on a departing attorney's continued representation of a client violates Rule 5.6(a). We conclude that such an agreement can violate the rule, but the inquiry must be case-specific, requiring an assessment of whether a particular disincentive unreasonably restricts an attorney's practice under the unique factual circumstances of each agreement. Because the Agreement's assessment of a $1,052 fee per client who departed with Bursek is unreasonable here, we conclude that the Agreement violates Rule 5.6(a).

A. Financial Disincentives Can Violate Rule 5.6(a)

¶ 16 Rule 5.6(a), titled "Restrictions on Right to Practice," is identical to Model Rules of Pro. Conduct R. 5.6 (Am. Bar Ass'n 2019) (Model Rule 5.6). As relevant here, Colorado's rule 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 right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

Colo. RPC 5.6(a).

¶ 17 Plainly, the rule is intended to preserve the professional autonomy of attorneys who depart from a firm. *See* Colo. RPC 5.6 cmt. 1. But comment 1 of the rule clarifies that its purpose is two-fold, acknowledging that "[a]n agreement restricting the right of lawyers to practice after leaving a firm . . . also limits the freedom of clients to choose a lawyer." Indeed, "despite its wording in terms of the lawyer's right to practice," the prevailing view is that Rule 5.6(a)'s primary purpose is "to ensure the freedom of clients to select counsel of their choice." *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992); *see also Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989) ("The purpose of the rule is to ensure that the public has the choice of counsel.").

¶ 18 The scope of the rule has been the subject of increasing dispute as law firms seek to address a rise in lawyer mobility. Previously, law firms' investments in the development of clientele was "fairly secure, because the continued loyalty of partners and associates to the firm was assumed." *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993) (citation omitted). "But more recently, lateral hiring of associates and partners, and the secession of partners

from their firms has undermined this assumption." *Id.* And when attorneys with a lucrative practice leave a law firm with their clients, "their departure from and competition with the firm can place a tremendous financial strain on the firm." *Id.*

¶ 19 Judicial and ethics opinions throughout the country universally recognize the impropriety of directly restrictive covenants — agreements that prohibit, for example, a departing lawyer from representing certain clients or practicing in a specified area. *See, e.g.*, *Dwyer v. Jung*, 336 A.2d 498, 500-01 (N.J. Super. Ct. Ch. Div.) (recognizing that such agreements are prohibited under the precursor to Model Rule 5.6), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975); *Jacob*, 607 A.2d at 147 ("The case law is clear that [Model Rule 5.6] forbid[s] outright prohibitions on the practice of law."); *Haight, Brown & Bonesteel v. Superior Ct.*, 285 Cal. Rptr. 845, 848 (Ct. App. 1991) (Under a substantially similar rule, "an attorney may not enter into an agreement to refrain altogether from the practice of law."); ABA Comm. on Ethics & Pro. Resp., Informal Op. No. 1417 (1978) (reaffirming that agreements restricting practice within a certain geographic area or on behalf of specific clients violate the precursor to Model Rule 5.6); D.C. Ethics

Op. 368 (2015) (An identical rule's "prohibition extends . . . to absolute bars upon competition with the former firm."). It is less clear, however, whether a law firm may indirectly restrict a departing attorney's ability to practice via financial disincentives. Jurisdictions to consider the issue have adopted one of two opposing views.

¶ 20 In a majority of jurisdictions, courts have interpreted iterations of Model Rule 5.6(a) as precluding any provision that penalizes a lawyer for competitive post-termination practice. Those courts have reasoned that even indirect restrictions on the practice of law, such as financial disincentives, violate the language and the spirit of the rule. Two oft-cited majority view cases are illustrative.

¶ 21 In *Cohen v. Lord, Day & Lord*, a partner departed from a New York law firm to join another firm in the area, taking with him a number of the firm's clients. 550 N.E.2d at 410. The firm's partnership agreement recognized a right in a withdrawing partner to share in net profits from fees earned before, but collected after, his departure. *Id.* at 410. But the agreement also included a forfeiture provision whereby departing partners who continued to practice in a described geographical area relinquished their right to

such profits. *Id.* at 410-11. Invoking that provision, the firm refused to fully compensate the partner when he departed. *Id.* at 411.

¶ 22 New York's highest court considered whether the forfeiture provision violated Disciplinary Rule 2-108(A) of its Rules of Professional Conduct — the precursor to Model Rule 5.6(a) with nearly identical language. *See id.* The firm argued that the provision did not "restrict" the withdrawing lawyer's right to practice because the lawyer could still practice in a different region or practice locally by accepting the consequences of the forfeiture penalty. *Id.* at 412. The court, however, was unpersuaded. It held that

> while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The 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.

Id. at 411. The court "expressly caution[ed]," however, "against a categorical interpretation or application" of what it described as a "narrow holding." *Id.* at 413. It suggested that its ruling did not necessarily extend to any financial disincentive to competition, but only to the specific type of forfeiture provision before it. *Id.*

¶ 23 Yet other courts adopting the majority view have been less tentative. In *Jacob v. Norris, McLaughlin & Marcus*, for example, the Supreme Court of New Jersey broadly concluded that "*[a]ny* provision penalizing an attorney for undertaking certain representation 'restricts the right of a lawyer to practice law' within the meaning of [New Jersey Rule of Professional Conduct 5.6]" — a rule identical to Colorado's Rule 5.6. 607 A.2d at 148 (emphasis added). Thus, the court found violative of the rule an agreement that required several departing partners to forfeit their entitled termination compensation because they took with them a number of lucrative clients. *Id.* at 155. The court explained that

> by forcing lawyers to choose between compensation and continued service to their clients, financial-disincentive provisions may encourage lawyers to give up their clients, thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel. Those

> provisions thus cause indirectly the same objectionable restraints on the free practice of law as more direct restrictive covenants. . . . Because the client's freedom of choice is the paramount interest to be served by [Rule 5.6], a disincentive provision is as detrimental to the public interest as an outright prohibition.

Id. at 148-49.

¶ 24 The minority view, on the other hand, is more sympathetic to agreements designed to compensate law firms for the detrimental impact of an attorney's departure. Courts adopting the minority view endeavor to strike a balance between the interests of clients in retaining the attorney of their choice and the interest of law firms in a stable business environment. In so doing, they have construed iterations of Model Rule 5.6 to allow reasonable financial disincentives to competition.

¶ 25 *Howard*, 863 P.2d 150, perhaps best articulates the minority view. There, the California Supreme Court considered whether a partnership agreement requiring withdrawing partners to forego certain withdrawal benefits if they competed with the firm violated Rule 1-500 of California's Rules of Professional Conduct — a rule substantially similar to Rule 5.6(a).

¶ 26 The court "question[ed] the premise that [such] an agreement . . . would necessarily discourage withdrawing partners from continuing to represent clients who choose to employ them." *Id.* at 159. "Unless the penalty were unreasonable," it posited, "it is more likely that the agreement would operate in the nature of a tax on taking the former firm's clients — a tax that is not unreasonable, considering the financial burden the partners' competitive departure may impose on the former firm." *Id.* Viewed in that light, the court reasoned that "[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law." *Id.* at 156. "Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." *Id.*

¶ 27 The *Howard* court ultimately agreed with a California Court of Appeal's decision in *Haight*, 285 Cal. Rptr. at 848, which held that "the rule simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law." Quoting approvingly from *Haight*, it stated that:

> [t]he rule does not . . . prohibit a withdrawing partner from agreeing to compensate his former partners in the event he chooses to represent clients previously represented by the firm from which he has withdrawn. Such a construction represents a balance between competing interests. On the one hand, it enables a departing attorney to withdraw from a partnership and continue to practice law anywhere within the state, and to be able to accept employment should he choose to do so from any client who desires to retain him. On the other hand, the remaining partners remain able to preserve the stability of the law firm by making available the withdrawing partner's share of capital and accounts receivable to replace the loss of the stream of income from the clients taken by the withdrawing partner to support the partnership's debts.

Howard, 863 P.2d at 156 (quoting *Haight*, 285 Cal. Rptr. at 848).

¶ 28 In sum, the court concluded that "an agreement between law partners that a reasonable cost will be assessed for competition is consistent with [R]ule 1-500." *Id.*

¶ 29 Commenting on the majority view's "steadfast concern to assure the theoretical freedom of each lawyer to choose whom to represent and what kind of work to undertake, and the theoretical freedom of any client to select his or her attorney of choice," the court noted that it was "inconsistent with the reality that both

freedoms are actually circumscribed." *Id.* at 158. The court pointed out that

> the attorney, like any other professional, has no right to enter into employment or partnership in any particular firm, and sometimes may be discharged or forced out by his or her partners even if the client wishes otherwise. Nor does the attorney have the duty to take any client who proffers employment, and there are many grounds justifying an attorney's decision to terminate the attorney-client relationship over the client's objection. Further, an attorney may be required to decline a potential client's offer of employment despite the client's desire to employ the attorney.

Id. at 158-59 (citation omitted). The same rings true under the Model Rules and our Colorado Rules of Professional Conduct. *See, e.g.*, Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 2019) (prohibiting representation that involves a concurrent conflict of interest); Colo. RPC 1.7 (same); Model Rules of Pro. Conduct r. 1.9 (Am. Bar Ass'n 2019) (prohibiting representation of a client whose interests are materially adverse to those of a former client in a substantially related matter); Colo. RPC 1.9 (same); Model Rules of Pro. Conduct r. 1.10 (Am. Bar Ass'n 2019) (imputing conflicts of other lawyers in a firm to disqualify a lawyer from representation);

Colo. RPC 1.10 (same); Model Rules of Pro. Conduct r. 1.16 (Am. Bar Ass'n 2019) (an attorney must withdraw from representation under certain circumstances, and may withdraw if good cause exists to do so); Colo. RPC 1.16 (same).

¶ 30 The Arizona Supreme Court followed suit in *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2006), further substantiating the minority view that agreements imposing reasonable financial disincentives upon lawyers departing a law firm do not violate Rule 5.6(a). The court declined to read Arizona Rules of Professional Conduct Ethical Rule 5.6(a) — a rule identical to Colorado's Rule 5.6(a) — as expansively as jurisdictions applying the majority view. *Id.* at 729. Citing *Howard*'s reasoning, the *Fearnow* court concluded that the rule's "language should not be stretched to condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment." *Id.* Instead, the court explicitly stated that "[s]uch agreements . . . should be examined under [a] reasonableness standard." *Id.*

¶ 31 Persuaded by the reasoning in *Howard* and *Fearnow*, we agree that the majority view is untenable for two principal reasons.

¶ 32 First, the majority position — that agreements assessing a cost for competition necessarily violate Rule 5.6(a) — oversimplifies the tension between such compensatory arrangements and their effect on client choice. It erroneously assumes that *any* restriction on a departing lawyer's practice is an affront to client choice, and that *any* burden of compensating the firm is a restriction on the lawyer's practice. But "[n]ot all compensatory arrangements significantly, or even necessarily, interfere with a departing lawyer's actual availability to serve clients." Linda Sorenson Ewald, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. Legal Pro. 1, 42-43 (2001-2002). Indeed, "[t]here are dozens of examples of lawyers signing forfeiture or other compensatory agreements and then competing with the firm." *Id.* at 43 n.202. Ultimately, whether a financial disincentive "might cause a client to look elsewhere for service, or might induce a lawyer to decline legal work if proffered, will depend on many factors," such as "the lawyer's overall costs of practice, the level of prevailing fees and the availability of alternative sources of legal services in the community, and the value to the lawyer of cultivating certain clients." *Id.* at 43. "These important variables receive no consideration when all

compensatory agreements are lumped together as restrictions on practice and are deemed categorically to violate Rule 5.6." *Id.*

¶ 33 Second, the majority view does not account for the legitimate interests of law firms facing the reality of increased lawyer mobility in modern practice. Courts adopting the majority view discount law firms' right to protect against the financial consequences of departing lawyers, concluding brusquely that "[t]he commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice." *Jacob*, 607 A.2d at 151. While that may be true, that does not mean a balance cannot be struck between the two interests — after all, as noted above, not every compensatory agreement poses an unreasonable barrier to client choice. In fact, compensatory agreements may serve clients as well as the financial well-being of the law firm. *See Howard*, 863 P.2d at 159-60 (observing that without such agreements, a "culture of mistrust that results from systemic grabbing" is likely to occur, leaving firms less willing to invest in lawyers and clients who may later leave). Nor are we convinced that Rule 5.6(a) cannot be read to allow firms to preserve their commercial interests following an attorney's departure.

¶ 34 That is not to say, however, that we fully endorse the minority view either. To the extent courts adopting the minority view posit that financial disincentives do not "restrict" the practice of law, but merely attach an economic consequence to a departing attorney's choice to pursue a particular kind of practice, we disagree that the rule should be read so narrowly. *See Howard*, 863 P.2d at 156; *Fearnow*, 138 P.3d at 728. Such an interpretation ignores the plain language of Rule 5.6(a) and overlooks the practical effect of compensatory agreements. Under such an interpretation, Rule 5.6(a) would *never* preclude financial disincentives; it would encompass only direct prohibitions on representation. If that was indeed the drafters' intention, they could have used a narrower word, like "prohibits." Instead, they used the word "restricts," which, by definition, is broad enough to preclude any agreement that "check[s], bound[s], or decrease[s] the range, scope, or incidence of" a lawyer's right to practice. Webster's Third New International Dictionary 1937 (2002). Surely a financial penalty can be so exorbitant that it has the practical effect of prohibiting representation, perhaps in a manner equal to a direct prohibition. *See Jacob*, 607 A.2d at 150 ("'[M]oney is money and the effect of

[the] denial of money' has a chilling effect on a lawyer's willingness to represent clients.") (citation omitted). Thus, although the minority view recognizes that direct prohibitions violate the spirit of the rule, it is counterintuitive to accept that financial disincentives may never do so.

¶ 35 On the other hand, to assume, as the majority view does, that *any* financial disincentive will contravene the spirit of Rule 5.6(a) also goes too far — as noted, it is conceivable that a disincentive may not effectively "restrict" a lawyer's practice in any meaningful way. Hence, cases representing the minority view have suggested that the propriety of financial disincentives ought to be assessed on a case-by-case basis. *See Howard*, 863 P.2d at 156; *Fearnow*, 138 P.3d at 729. We find this approach most sensible.

¶ 36 Consistent with the minority view, we are persuaded that the relevant inquiry should not be simply whether, in the broadest sense, an agreement "restricts" a departing lawyer's practice, lest any financial disincentive be struck down regardless of its practical effect and in spite of law firms' legitimate commercial interests. Rather, we should ask whether an agreement *unreasonably* does so. Thus, we conclude that whether a financial disincentive violates

Rule 5.6(a) is best assessed under a reasonableness standard looking at the particular circumstances of each case. Whether a disincentive is reasonable will depend, in part, on the extent of its effect on lawyer autonomy and client choice, the financial burden an attorney's departure imposes on a firm, the relationship of the disincentive to the harm suffered by the firm, and whether it has any colorable justifications apart from disincentivizing competition. Other relevant and nonexclusive factors include the number of clients leaving with the departing lawyer, the lawyer's billing rate, the lawyer's salary structure, the client's tenure with the firm, the community where the lawyer practices, and the practice area at issue.

B. The Agreement Violates Rule 5.6(a)

¶ 37 Having so concluded, we turn now to whether the agreement before us violates Rule 5.6(a).

¶ 38 The Agreement requires Bursek to pay MFL $1,052 for each client who departed with him, purportedly to reimburse the firm for its marketing expenses. Of the jurisdictions that have adopted the minority view of Rule 5.6, we found only one opinion addressing the propriety of this specific type of compensatory arrangement.

¶ 39 Post-*Fearnow*, the Arizona Supreme Court's Attorney Ethics Advisory Committee considered whether an agreement that required a departing attorney to pay $3,500 per client that he continued to represent violated Arizona's identical version of Rule 5.6(a). Ariz. Att'y Ethics Advisory Comm. Ethics Opinion 19-0006 (2020). Distinguishing *Fearnow*, the Committee concluded that such a financial disincentive falls within the scope of the rule's prohibition. *Id.* at 6.

¶ 40 The Committee explained that

> *Fearnow* and the California cases on which it relied each involved the forfeiture of capital interests and accounts-receivable for which a departing partner or shareholder would otherwise be compensated under the terms of the partnership or shareholder agreement, based on the lawyer's competition with the firm. Such agreements . . . are related to the capital structure of the firm, and the firm's legitimate concern with maintaining the stability of that structure, rather than to continued representation of *particular clients*.

Id.

¶ 41 An agreement imposing on a departing associate a flat fee for each client the lawyer continues to represent is materially different. The Committee observed that such an agreement

> is not an agreement among partners or shareholders on an equal footing, but rather an agreement imposed on a newly hired associate who is not in the same bargaining position. And the agreement is one-sided in that it protects the firm but will never benefit the associate. It also involves an affirmative obligation to pay the firm, rather than the forfeiture of benefits to which the associate would otherwise be contractually or legally entitled. Finally, unlike the *Fearnow* agreement, it is directly tied to the continued representation of particular clients.

Id.

¶ 42 The Committee found those differences dispositive in its analysis. In concluding that the $3,500 fee violated Arizona's version of Rule 5.6(a), it reasoned that

> [s]uch a penalty does not just discourage the lawyer from leaving the firm, or protect the firm's capital structure. . . . [It] acts as a substantial disincentive for the departing lawyer to agree to continue representing a client who wants to continue working with that lawyer. That is particularly true for clients with lower-value cases. It also incentivizes charging those clients higher fees and creates a potential conflict between the lawyer's interests and the interests of a particular client. More than the agreements at issue in *Fearnow* and the California cases on which *Fearnow* relied, the agreement appears on its face to be an attempt to prevent the associate from representing specific clients.

Id.

¶ 43 We find the Committee's analysis compelling and, for largely the same reasons, conclude that MFL's agreement violates Rule 5.6(a).

¶ 44 The close nexus between the fee imposed by the Agreement and Bursek's representation of specific clients is particularly problematic. Where a fee is incurred on a client-by-client basis, it can have a heightened effect on a lawyer's autonomy and his clients' choice of counsel. As explained in the Arizona ethics opinion, such a fee acts as a substantial disincentive to representation, and it may give rise to a conflict of interest that precludes representation. *See* Colo. RPC 1.7(a)(2) (proscribing conflicts between a lawyer's personal interests and those of a client); *id.* at cmt. 10 (explaining that "a lawyer may not allow related business interests to affect representation"). Furthermore, $1,052 is not an insignificant sum, especially considering that the fee was greater than half of Bursek's semi-monthly base salary at the time he departed MFL. And that financial burden accumulated for each of the eighteen clients that Bursek continued to represent, increasing the likelihood that the $1,052 opportunity cost per client

would eventually prove to be a barrier to representation. Thus, at the outset, we conclude that the $1,052 fee, being triggered by the representation of specific clients, had a substantially restrictive effect on Bursek's practice.

¶ 45 Moreover, such a significant restriction on Bursek's practice is not justified in light of MFL's commercial interests at stake. Unlike *Fearnow* and *Howard*, the disincentive here is not designed to maintain the capital structure of MFL; it imposes an affirmative obligation to pay MFL rather than a forfeiture of capital interest or accounts receivable. And while the Agreement states that the purpose of the fee is to recoup marketing costs — which is, perhaps, a legitimate interest — MFL did not explain why the $1,052 per client fee represents a fair estimation of marketing costs for each client. In fact, the fee was imposed even for clients whom Bursek brought to MFL himself, separate and apart from the firm's marketing efforts. As the district court pointed out, the fee appears to be a disguised attempt to penalize competition rather than a legitimate effort to reimburse the firm for actual marketing expenses. Thus, it has no clear relationship to any harm caused by Bursek's departure.

¶ 46 The area of practice, family law, is also significant here. Family lawyers not only provide legal advice, they provide a host of supporting roles that defy measurement. It was entirely reasonable for Bursek's clients to follow the lawyer they trusted. That the Agreement restricted his clients' mobility within such a sensitive practice area weighs further against its reasonableness.

¶ 47 Several other factors considered in the Arizona ethics opinion are also relevant. As an associate, Bursek's departure likely did not impose as great a burden on MFL as the departure of a partner, unlike *Howard* and *Fearnow*. And Bursek's disparity in bargaining power as an associate along with the one-sided nature of the Agreement highlight its overall inequity.

¶ 48 Accordingly, although the Agreement imposes a fee of $1,052, versus the $3,500 at issue in Arizona Ethics Opinion 19-0006, it nonetheless represents an unreasonable restriction on Bursek's right to practice under the circumstances. Thus, the Agreement violates Rule 5.6(a).[1]

---

[1] Neither party requested that we remand the case for additional factual development depending on our conclusion as to the appropriate legal standard. Nor, in our view, is a remand

IV. Enforceability of the Agreement

¶ 49 But does the Agreement's violation of Rule 5.6(a) render it unenforceable?

¶ 50 To answer this question, we address, as a matter of first impression, whether the rule qualifies as an expression of public policy and, if so, whether a contract that violates the rule is unenforceable as against public policy. We conclude that the rule qualifies as an expression of public policy and that a contractual provision that violates the rule is necessarily void. We further conclude, however, that a Rule 5.6(a) violation will not void an entire contract, but only the violative provision. Accordingly, we affirm the district court's determination that the Agreement violates Rule 5.6(a), but we reverse the portion of the order declaring the entire agreement unenforceable.

---

necessary. MFL asked the trial court to resolve a question of law based on the undisputed facts put before it. And the factual record presented is sufficient for us to review the trial court's decision. Indeed, the undisputed facts in the record address the majority of the nonexhaustive list of relevant factors we highlighted above. And we cannot see how remanding for MFL to address the remaining few factors would change the outcome in light of the Agreement's substantial restrictive effect. Thus, we address the reasonableness of the Agreement on the record before us.

A. Expression of Public Policy

¶ 51 "Colorado courts recognize a strong policy of freedom of contract." *Calvert v. Mayberry*, 2019 CO 23, ¶ 21. Generally, "[c]ontracts between competent parties, voluntarily and fairly made, should be enforceable according to the terms to which they freely commit themselves." *Ravenstar, LLC v. One Ski Hill Place, LLC*, 2017 CO 83, ¶ 12 (quoting *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 75 (Colo. 1991) (Rovira, C.J., dissenting)).

¶ 52 At the same time, however, we adhere to the "long-standing principle of contract law that a contractual provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy." *F.D.I.C. v. Am. Cas. Co.*, 843 P.2d 1285, 1290 (Colo. 1992); *see also Calvert*, ¶ 21 ("[A] contract is unenforceable by either party if it is against public policy."). "Public policy 'is that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good.'" *Calvert*, ¶ 22 (quoting *Russell v. Courier Printing & Publ'g Co.*, 43 Colo. 321, 325, 95 P. 936, 938 (1908)).

¶ 53 In *Calvert*, ¶ 22, our supreme court clarified that a Colorado Rule of Professional Conduct may qualify as an expression of public

policy if it satisfies the test from *Rocky Mountain Hospital & Medical Services v. Mariani*, 916 P.2d 519, 525 (Colo. 1996). To do so, "an ethical rule must (1) 'be designed to serve the interests of the public rather than the interests of the profession,' (2) 'not concern merely technical matters or administrative regulations,' and (3) 'provide a clear mandate to act or not to act in a particular way.'" *Calvert*, ¶ 22 (quoting *Mariani*, 916 P.2d at 525).

¶ 54 As to the first element, we have already observed that Rule 5.6(a) serves two purposes. Per the plain language of the rule, it is clearly intended to protect lawyers' professional autonomy. However, as discussed, despite its wording in terms of the lawyer's right to practice, the rule's primary purpose is to preserve the freedom of clients — i.e., the public — to select counsel of their choice. *See* Colo. RPC 5.6 cmt. 1 (acknowledging that "[a]n agreement restricting the right of lawyers to practice after leaving a firm . . . also limits the freedom of clients to choose a lawyer"); *Jacob*, 607 A.2d at 146 (Rule 5.6(a)'s primary purpose is "to ensure the freedom of clients to select counsel of their choice."); *Cohen*, 550 N.E.2d at 411 ("The purpose of the rule is to ensure the public has the choice of counsel."). Because the rule's primary purpose is to

serve the interests of the public, it satisfies the first element of the *Mariani* test. *See Calvert*, ¶ 24.

¶ 55 Second, Rule 5.6(a) provides substantive protection of an attorney's right to practice post-departure, thereby safeguarding professional autonomy and freedom of choice. Thus, the rule is not merely technical or administrative. *See id.* at ¶ 25.

¶ 56 And third, Rule 5.6(a) is an imperative rule, directing that "[a] lawyer *shall not* participate in offering or making . . . [an] agreement that restricts the right of a lawyer to practice after termination of the relationship." (Emphasis added.) Because the rule clearly outlines specific conduct in which an attorney must not engage, it contains a clear mandate not to act in a certain way and thus satisfies the third element of the *Mariani* test. *See Calvert*, ¶ 26.

¶ 57 Accordingly, Rule 5.6(a) qualifies as an expression of public policy.

B. Effect of a Rule 5.6(a) Violation

¶ 58 "[A]lthough 'all [ethical rule] violations are in some way injurious to the public, not all [ethical rule] violations will render any related contract injurious to the public.'" *Id.* at ¶ 28 (quoting *LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147, 1164

(Wash. 2014)). Indeed, as our supreme court recognized in *Calvert*, ¶ 29, some rules can conceivably be violated without offending the underlying public policy of the rule. In fact, in analyzing a violation of Colo. RPC 1.8, the court cautioned that "a holding that absolutely voids a contract for violating [Rule 1.8] may actually harm the person it is designed to protect." *Calvert*, ¶ 29. Hence, the court held that a contract entered into in violation of Rule 1.8 is only presumptively void. *Id.* at ¶ 30. If a party seeking to enforce the contract shows by a preponderance of the evidence that it does not offend the public policy considerations underlying Rule 1.8, it may still be enforceable. *Id.*

¶ 59 But Rule 1.8 is markedly different than Rule 5.6(a). For one, it does not impose an outright prohibition on certain types of agreements. The rule merely sets forth safeguards to ensure that a lawyer who enters into a business transaction with a client or acquires an interest adverse to a client does not abuse their inherent advantage and influence over the client. *See* Colo. RPC 1.8(a)(1)-(3) (the transaction and terms must be fair and reasonable to the client, the client must be advised to seek independent legal counsel, and the client must give informed consent). Thus, the

court in *Calvert* acknowledged that, while a contract may have technical infirmities under Rule 1.8, it nonetheless may satisfy the rule's three main public policy considerations: "(1) a fair, fully-disclosed transaction; (2) a properly-counseled client; and (3) no improper influence by the attorney." *Calvert*, ¶ 31.

¶ 60 It is only "because it is possible for a lawyer to enter into a contract in violation of Rule 1.8(a) without that contract offending public policy" that the court concluded such a contract is not per se unenforceable. *Id.* at ¶ 30. But the same cannot be said of agreements that violate Rule 5.6(a). To violate the rule, an agreement must restrict lawyer autonomy and clients' freedom of choice to a degree that is untenable in light of the firm's financial interests at stake. Thus, an agreement found to violate Rule 5.6(a) will necessarily offend the two underlying policies of the rule. Accordingly, unlike Rule 1.8(a), we see no reason to create for such agreements a rebuttable presumption of invalidity. Rather, we conclude that an agreement that violates Rule 5.6(a) is necessarily void as against public policy.

¶ 61 The parties dispute, however, whether the Agreement's Rule 5.6(a) violation voids the entire agreement or just the provisions

that impose the fee. Relying on *Calvert*, Bursek suggests the former. But where the failure to follow Rule 1.8(a)'s safeguards may taint an entire agreement, the same risk is not evident in a Rule 5.6(a) violation. As here, only the provisions imposing a financial disincentive may actually violate the rule's public policy considerations. Moreover, the specific agreement at issue includes a severability provision, directing that if "[a]ny . . . provision . . . of this Agreement . . . is held to be void or unenforceable," it shall not "invalidat[e] the remaining provisions." *See Reilly v. Korholz*, 137 Colo. 20, 27, 320 P.2d 756, 760 (1958) (Where a portion of an agreement that is contrary to public policy is severable, it "does not render the balance of the agreement void.").

¶ 62 In sum, then, we conclude that the provisions of the Agreement imposing the $1,052 per client fee are void as a matter of public policy, but the rest of the Agreement remains enforceable. Thus, we reverse the portion of the district court's order concluding that the entire Agreement is unenforceable.

V. Cross-Appeal and Remaining Contentions

¶ 63 Bursek cross-appeals, arguing that the district court erred by determining that a separate agreement he signed, the CNA, was

valid. However, because Bursek failed to file a notice of cross-appeal, we do not have jurisdiction to consider his claim. *See, e.g.*, *Globe Indem. Co. v. Travelers Indem. Co.*, 98 P.3d 971, 977 (Colo. App. 2004) (Where a party "d[oes] not file a notice of cross-appeal, this court has no jurisdiction to consider its argument.").

¶ 64 As to Bursek's remaining contentions that the disincentive provision is void for violating several other Colorado Rules of Professional Conduct, we need not reach them in light of our disposition. Nor, to the extent he raises it, will we consider Bursek's argument that the Agreement is entirely void because of its "asymmetric attorneys fee provision." Though he briefed this issue before the district court, he did not sufficiently develop this argument for our review. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010).

VI. Conclusion

¶ 65 The judgment is affirmed in part and reversed in part. We affirm the district court's determination that the Agreement's

$1,052 fee provision is void as against public policy.[2] However, we reverse the portion of the court's order declaring that the Agreement is unenforceable in its entirety.

JUDGE DAILEY and JUDGE SCHUTZ concur.

---

[2] To the extent our reasoning differs from that of the district court, we "may affirm on any ground supported by the record." *Taylor v. Taylor*, 2016 COA 100, ¶ 31.