

TOP STORY

Attorney Can Take Business Without Compensating Former Firm

By Leah E. Trahan – September 9, 2024

A state supreme court recently rejected an attempt by a law firm to charge a departing associate attorney for lost “marketing expenses” when the associate took clients to a new firm. In [Johnson Family Law, P.C. v. Bursek](#), the court refused to enforce a “reimbursement agreement” when a resigning associate took clients with him, concluding the agreement unreasonably restricted the attorney’s ability to practice law. The court reasoned that charging undifferentiated fees to departing attorneys substantially disincentivized lawyers from continuing their representation of clients. [ABA Litigation Section](#) leaders agree with the decision but note law firms may still be permitted to recover fees in limited circumstances. Litigation Section leaders further note that law firms can seek to retain associates—and thus clients—in other ways that do not run afoul of ethics rules.

Departing Associate Challenges Firm’s Recoupment of Fees

When an associate left his former family law firm in Denver, 18 clients followed. But the firm claimed the attorney owed \$18,936 for the privilege of taking clients. The firm argued it should be repaid \$1,052 per client for “marketing expenses” under the reimbursement agreement. These expenses, the firm asserted, represented “historic costs” for promotion. The associate challenged the agreement, claiming it violated [Colorado Rule of Professional Conduct 5.6](#), which prohibits a lawyer from entering into an agreement “that restricts the right of a lawyer to practice after termination of the [employment] relationship.”

The firm sued the associate in Colorado state court for breach of contract. “At trial, both parties asked the court to determine whether the agreement was enforceable under Rule 5.6(a).” The trial court agreed with the associate and concluded the per-client reimbursement scheme unfairly constrained the attorney’s practice. [On appeal](#), the Colorado court of appeals agreed, finding no justification for the agreement except to penalize competition.

State High Court Says Agreement Violates Public Policy

The Colorado Supreme Court next weighed in on the enforceability of the reimbursement agreement. As a case of first impression in the state, the state high court looked to other states for guidance. Some states consider any financial burden on professional autonomy ethically

suspect. Others weigh client choice and attorney autonomy against the financial stability of left-behind firms.

Ultimately, the agreement at issue could not survive either standard. The court noted this rule protects both an attorney's professional autonomy and the freedom of clients to choose their lawyer. The type of undifferentiated fee demanded by the law firm was categorically at odds with both goals. "Of particular concern," noted the court, was 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 jettison clients with less lucrative claims." This "might indirectly affect client choice by making it more costly for an attorney to leave a firm." However, the court left for another day the issue of what costs actually incurred for a client could be reimbursed without violating the rule.

Section Leaders Agree Firms Should Not Collect Fees on Former Clients

A fee agreement like the one at issue "chills our ability to move from firm to firm or to hang our own shingle," explains [Rita M. Aquilio](#), Watchung, NJ, Co-Chair of the Section's [Family Law Litigation Committee](#). "Really troubling," adds Aquilio, is a concern that attorneys "could even be responsible for compounded interest, for court costs, for their attorney fees."

New lawyers might have loans to pay back from law school, in addition to a mortgage or other personal costs, Aquilio explains. In that case, agreements like these are "a real tool to discourage an attorney" from leaving a firm, she adds.

But a firm's financial interests can still be protected from the loss of a client through less restrictive reimbursement agreements. "It might be reasonable for law firms to require attorneys departing with some of their former clients to reimburse discreet costs that are attributable to each of the clients leaving with the departing attorneys," explains [Eshigo P. Okasili](#), Silver Spring, MD, Co-Chair of the Section's Family Law Litigation Committee. The big difference in this case is that the fees were undifferentiated, but other types of fees might be recoverable "including, but not limited to, depositions, transcripts, phone calls, copying, filing fees, experts' fees attributable to each client," Okasili adds.

There Are Better Ways to Retain Attorneys

If a law firm's goal is to disincentivize attorneys from departing in the first place, there may be better solutions than restrictive reimbursement agreements. "Firms should communicate with their lawyers effectively to find out why they want to leave and see if they can accommodate

their needs,” urges Okasili. “For instance, offering flexible work schedules, attainable billable hours, extended vacation time and/or parental leave, enhanced benefits, in-house recreational facilities, reasonable accommodations could incentivize attorneys to stay,” she notes. “Flip the script and say, ‘We want you to grow your business so that you’re so successful that we all benefit from it,’” endorses Aquilio.

[Leah E. Trahan](#) is a contributing editor for Litigation News.

Related Resources

- [Comment on Am. Bar Ass'n Model Rule of Prof. Conduct 5.6.](#)
- Onika K. Williams, “[Firms May Force Lawyers to Sign Non-Solicitation Contracts](#),” *Litigation News* (Oct. 16, 2019).
- Kelso L. Anderson, “[Need a Lawyer? There’s an \(Unauthorized\) App for That](#),” *Litigation News* (Sept. 2, 2022).
- Daniel S. Wittenberg, “[The Virtual Practice of Law](#),” *Litigation News* (Mar. 22, 2017).