STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PAUL B. BECKER, ESQ.

Petitioner/Plaintiff,

vs.

Index No. 602107/2011

CELLINO & BARNES, P.C.

Respondent/Defendant.

BEFORE: JUSTICE JOHN A. MICHALEK

APPEARANCES:

JOHN FEROLETO–ATTORNEYS AT LAW
Paul B. Becker, Esq. of counsel
Attorneys for Paul B. Becker, Esq.

CELLINO & BARNES, P.C.
Gregory V. Pajak, Esq., of counsel
Ellen B. Sturm, Esq., of counsel
Attorneys for Cellino & Barnes, P.C.

MICHALEK, J.

Petitioner Paul B. Becker, Esq. seeks a declaratory judgment that certain portions of the employment agreement that he signed with The Barnes Firm, P.C. now known as Cellino & Barnes, P.C.[1] are unenforceable under the applicable ethical rules. Cellino & Barnes, P.C. ("the Firm") opposes the application and, in a cross-petition, seeks an order declaring that Becker violated the employment agreement and

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1 The parties do not question the enforceability by or against Cellino & Barnes, P.C. of The Barnes Firm, P.C.'s agreement.

awarding the Firm attorneys' fees, costs and disbursements. Although in some respects this case presents questions of first impression, applicable principles of law embedded in seminal Court of Appeals cases under the former Disciplinary Rules guide the court's determination.

As a preliminary matter, the Firm asserts that the special proceeding format is improper, and this should have been brought as an action (*see* CPLR 3011); however, as counsel notes, under CPLR 105 the court may convert this proceeding to an action, and the court does so (*see Esformes v Brinn*, 52 AD2d 459, 462 [2nd Dept 2008]). References to the parties in this decision will be to plaintiff (or "Becker") and defendant (or "the Firm").

BACKGROUND

The following facts are not in dispute unless otherwise stated. Becker commenced employment with the Firm on March 31, 2003, entering into an agreement not at issue in this action (Ciambella Affid. ¶ 4). On November 14, 2005, Becker entered into a second Employment Agreement (Petition, Ex. A ["the Agreement"]). On January 18, 2008, Becker entered into an addendum to the Agreement which amended only his compensation arrangement with the Firm, increasing his compensation incentive payments on certain cases to 20 percent of the net legal fee (minus his $60,000 "salary" or draw) (Ciambella Affid. ¶ 6, and Answer and Joint Affirmation Supporting Cross-Petition [hereafter Joint Affirm.] Ex. A).[2] The Firm submits a chart indicating that Becker's compensation ranged from $65,736 in 2004 to $125,837 in 2008 (Joint Affirm. ¶ 21 & Ex. B).

On January 2, 2009, Becker gave the Firm 15 days written notice that he would be leaving (Becker Affirm. ¶ 3). January 16, 2009 was his last day of work at the Firm (*id.* ¶ 4). The parties dispute whether certain provisions of the Agreement should govern the distribution of attorney's fees earned from cases of clients who followed Becker when he left.

The Agreement identifies the Firm as an employer and Becker as an employee, such that only the Firm has clients; the employee merely "services" them. The Recitals note that the "overwhelming majority of the Employer's personal injury clients are obtained by marketing, advertising and otherwise by Employer expending 'case acquisition costs'", which are calculated in an Exhibit A which has not been submitted to the court (*see* Agreement ¶ 1 [A], [B]).[3] The Agreement

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2 Becker disputes whether he was in fact paid according to the addendum during 2008 (Reply Affirm. ¶¶ 66-67).

3 The Agreement indicates that Becker viewed the exhibit but was not permitted to have a copy of it, and "specifically agrees (i) not to challenge the validity and accuracy of Exhibit 'A'" nor to disclose its contents to a third party (*id.* ¶1[B] [i], [ii]). Nowhere in the record is the make-up of the case acquisition costs further

states:

> Employer's total case acquisition costs now constitute and will likely continue to constitute, an amount approximately equal to 43.56 % of Employer's total expenses (excluding attorney bonuses).

(*Id.* ¶ 1 [B]).

Under the Agreement prior to 2008, Becker was to be paid a salary of $50,000 plus "Net Incentive Compensation" (*id.*¶¶ 3 [B], 4 & 5). Paragraph five provides that "Gross Incentive Compensation ... on a resolved case shall be calculated by multiplying (i) ten percent (10%) by (ii) the 'Net Legal Fee' received by Employer," minus monthly advances of $583.33 (an annual total of $7,000) (Agreement ¶ 5 [A] - [C]).[4]

Becker was deemed an employee at will, subject to immediate termination with or without cause or notice (*id.* ¶¶3 [A], 7); however, he was permitted to decide to leave voluntarily only upon 15 days prior written notice personally delivered to the President of the Firm ("the termination period") (*id.* ¶ 7).

Paragraph 8(A) spelled out his obligations not to compete with the Firm while in its employ:

> ... Employee shall not, directly or indirectly (i) contact any

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explicated.

[4] The employee "acknowledge[d]" that the incentive compensation would not have been offered if he or she had not agreed to paragraphs 8 and 9 of the Agreement (*id.* ¶ 5 [H] - [I]).

> client(s) of Employer, or (ii) contact any prospective client(s) of Employer or (iii) take any other action, for the purpose of attempting to obtain or obtaining any such client or prospective client of Employer as a future client of Employee or as a client of any other lawyer or law firm. Employee acknowledges that any such contact or action would constitute a breach of Employee's fiduciary duty and duty of loyalty, and/or his other duties and obligations owed by [him to the Firm] hereunder and/or pursuant to law, and that it would cause losses, damages and harm to the Employer.

(*id*. ¶ 8 [A]). In other words, this obligation not to contact any clients included the 15 day time period after Becker gave notice he was leaving the firm (*id*. ¶¶7, 8 [A]).

Within 10 business days after termination of the employee's employment, the Firm was required to send a letter to all of its clients that the employee had serviced, giving notice that the employee was no longer employed by the Firm, stating who the new lawyer would be, and advising "the client(s) of his or her rights"; copies of these letters with addresses redacted would be sent to the departing lawyer (*id*. ¶ 8 [B]). The Firm mailed letters as required under the Agreement to clients for whom Becker worked on January 26, 2009 – 24 days after he gave notice he was leaving (Joint Affirm. ¶ 23 & Ex. C [single letter sent to Becker]).

Paragraph 8 (C) severely limits the departed lawyer's ability to speak to the clients:

> After Employee's termination date, ... Employee agrees that he or she shall not, directly or indirectly, **initiate contact**

> **with any client of Employer, including but not limited to clients of Employer assigned to and served by Employee while employed... or directly or indirectly solicit such client in any way to reconsider or change his/her/their representation and/or to become a client of Employee or some other attorney or firm**, but Employee will have the right to respond to a communication from any such client and discuss whatever the client wishes to discuss.

(*id.* ¶ 8 [C] [emphasis supplied]). The provision contains numerous acknowledgments by the Employee that Employee's "fiduciary duty" and duty of loyalty to the Employer included its duty to refrain from soliciting any clients of Employer (*id.* ¶ 8 [D]).[5]

Under paragraph 9:

> Upon termination of Employee's employment with Employer and as of his/her termination date:
> A. Employee ... shall be entitled to earned and vested Net Incentive Compensation in excess of salary for any resolved case that was so resolved prior to Employee's termination date.
> B. Employer shall be entitled to retain all client files for all cases assigned to Employee, unless a client of Employer requests, in writing addressed to Employer, that a different disposition be made of his or her case. ..

(*id.* ¶ 9[A]). The employee is barred from removing any client contact information or anything but his own personal documents during or after the "notice period" if he gives notice, or after termination, if he is fired (*id.* ¶ 9 [B]).

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5 *See infra*, discussion of an associate attorney's duties toward a partnership, at p. 15-16.

If clients ultimately sought out and retained Becker, the Firm contracted for a lien on the file to be computed under paragraph 9(C) (iii) or paragraphs 9 (D) and (E), provisions which "neither Employee nor Employee's new law firm shall challenge, in any action, proceeding, or otherwise, the reasonableness, validity or any component of or the division of such legal fees as set forth" in those paragraphs (*id.* ¶ 9 [C] [i] [b]).[6]

Under both Paragraph 9 (C) (iii) and (E), if a client decides and notifies the Firm in writing that he/she will follow the departing employee, the Firm is entitled to the following amounts of the "total combined legal fees" earned by the former employee on that client's case.

Initially, the Firm is entitled to collect its case acquisition costs, deemed equivalent to 43.56 percent off the top of any legal fee earned by the employee from any prior client of the Firm. Further, the Firm is entitled to the following <u>additional</u> percentages:

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6 It is further provided that "to the extent appropriate and necessary, such payments/division [i.e. the amount of the Firm's lien on the files] shall be intended and deemed to be in compliance with DR 2-107 or otherwise and (d) that such division and allocation of fees is fair and reasonable and reasonably reflects Employer's contribution to and work on the case/file" (*id.* ¶ 9 [C] [i] [c], [d]). In addition, if any client represented by the employee requests that his or her case be transferred, disbursements must first be paid in full (*id.* ¶ 9 [B] [ii], [I]).

<u>Where less than 24 months has passed since the date of the injury:</u>

<u>if the case is not yet in suit</u> : the firm obtains an additional 40 % of the remaining fee (i.e. out of $100,000, employee retains $33,864.00, or approximately 1/3 of the fee)

<u>if the case is in suit but no note of issue has been filed</u>: the firm obtains an additional 60 % of the remaining fee (i.e. out of $100,000, the employee retains $22,576, or less than 25 percent)

<u>If more than 24 months have passed since the injury or if a note of issue has been filed on a case in suit</u>: the Firm obtains an additional 70 % of the remaining fee (after 43.56 % off the top)(i.e. out of $100,000, employee retains $16,932).(*id.* ¶ 9 [C] [iii]).

<u>If Employee violates the contract by contacting the client or prospective clients</u>: the Firm obtains an additional 80 % of the remainder of the fee (or, out of $100,000, the employee retains $11,288.00 [*id.* ¶ 9 (E)]).

In the Agreement, the employee acknowledges that this reduction of fees for violation of paragraph 8 is not a penalty, but "actual damages" suffered by Employer (*id.* ¶ 9 [E] [y]), and is equivalent to the quantum meruit or proportionate share of the contingency fee plus case acquisition costs, and therefore fair compensation to Employer (*id.* ¶9 [F]).

Finally, a party who sues for breach of the Agreement and prevails shall be compensated for its reasonable costs, attorneys' fees and expert fees (*id.* ¶ 12).

CONTENTIONS OF THE PARTIES

Neither party seeks discovery prior to a ruling on the cross-petitions/complaint and counterclaim (*cf. Ford v Cardiovascular Specialists, P.C.*, 71 AD3d 1429 [4th Dept 2010]). Neither claims that the Agreement is ambiguous in any provision, and the court agrees that it is not (*see generally St. Mary v Paul Smith's College of Arts & Sciences*, 247 AD2d 859 [4th Dept 1998]).

Plaintiff contends that the Agreement violates several provisions of the Rules of Professional Conduct (RPC), including Rule 5.6, and its predecessor former DR 2-108 (A), which bar lawyers from entering into agreements that restrict a lawyer's right to practice; Rule 1.5(g) and former DR 2-107 which concern division of legal fees among lawyers; among others.[7]

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[7] "Effective April 1, 2009, the New York Rules of Professional Conduct ... replaced the Code of Professional Responsibility ... in an effort to enhance the consistency of ethical standards. The New Rules include approximately three-quarters of the former Code, with the remaining one-quarter coming from the ABA's Model Rules. Simon, Comparing the New N.Y. Rules of Professional Conduct To the N.Y. Code of Professional Responsibility, New York State Bar Association Journal, May 2009, at 9.... The New Rules align New York with the 47 other states that have adopted the ABA model" (*DeLorenz v Moss*,

Specifically, plaintiff contends that the Agreement's restrictions on client contact and additional financial disincentives to contact or service clients he represented while working at the Firm are against public policy because they impinge upon the clients' choice of counsel. Plaintiff cites New York law, and the opinions of a number of other state courts and ethics commissions to that effect (*see e.g.* Memo of Law at pp. 19-35).

According to Becker, there are three potentially unenforceable provisions of the Agreement at issue. First, the no-contact provisions; under those provisions, he asserts,

> [T]he only way an attorney can speak to a client [after giving notice he is leaving]... is if after receiving the letter from the firm regarding the departure the client seeks out and contacts the attorney. The client does not know the attorney cannot contact her or inform her of the impending departure. The client does not know that the attorney left on his own terms or by his own volition. It is designed so that the attorney appears to have abruptly left or abandoned the clients. It is designed to keep the client *uninformed* and *misinformed*

(Becker Memo of Law at 3 [emphasis in original]). Second, Becker challenges the provision that 43.56 percent of any fee from a former Firm client goes back to the Firm for "case acquisition costs"; and third, Becker challenges the provision giving the Firm a certain additional

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2009 WL 2045623, *2 [Sup Ct Nassau County 2009]). The court notes that the parties entered into the Agreement under the old CPR, and Mr. Becker left the Firm in January 2009, also under the old CPR.

percentage of the fee, depending on how much time has passed since the injury sued for and what procedural status the case was in when it left the Firm. Specifically, Becker asserts that the Agreement is against public policy because it provides for a division of fees without client consent or regard for the amount of services rendered by the Firm (Memo at 30 et seq.).

In opposition, the Firm asserts that Becker improperly asks for an advisory opinion concerning aspects of the Agreement that are not in controversy and for which no breach is claimed (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 354 [1988]; *Kroemer v Pensgen*, 38 AD3d 1239 [4th Dept 2007]). Secondly, the Firm contends that the law offices of John Feroleto, with whom Becker is now associated, is a necessary party. Third, the Firm asserts that the non-communication provisions did not impact the clients' choice of counsel, because the Firm promptly informed the affected clients of Becker's departure and several clients of the Firm did retain Becker after he left the Firm (Joint Affirm., Exs. B & C). The Firm denies that the Agreement impermissibly provided a financial disincentive to Becker to compete upon termination of his employment, in violation of RPC rule 5.6 or former DR 2-108(A), and that Rule 1.5(g) is inapplicable. Finally, in a counterclaim, the Firm seeks that portion of the attorneys' fees Becker received from the nine clients who followed him, to which it asserts it is entitled under the Agreement, and the reasonable costs and fees associated with having to sue under the Agreement to obtain its share of the fees (Joint Affirm. ¶ 101-108).

LAW

The Firm contends that whether the employment agreement operates as a restriction on a client's choice of counsel is not in controversy and therefore the Court may not reach the issue (Joint Affirm. ¶¶54-58). Specifically, the Firm states that it is not now claiming that Plaintiff breached paragraph 8 (C) of the Agreement due to improper client solicitation, because "[u]pon further investigation, the [Firm] determined that there was insufficient evidence to support the belief that [Becker] had breached the Employment Agreement" in that way (Joint Affirm ¶31),[8] and therefore that plaintiff's recovery on cases that he took with him is not limited to 11 percent of total legal fees recovered. The parties disagree whether this is a justiciable issue.

The Firm concedes that on or about January 21, 2009, a letter was sent to plaintiff from the Firm's then-attorney, Krista Gottlieb, informing plaintiff that, based in part upon letters he sent to three clients, there was "clear proof of violation" of the Agreement (Joint Affirm., Ex. D).

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8 Becker asserts that the attorneys signing the joint affirmation lack personal knowledge of the facts they represent. To the court, the Firm is not asserting additional evidence, but rather taking a different legal position; the question is whether the Firm's change of legal theory deprives the court of jurisdiction to issue a declaratory judgment concerning the issue at hand.

The letter further states:

> Based upon these violations the Employment Agreement provides that Mr. Becker's and/or his new employer's portion of any legal fees on such converted case [sic] are limited to no more than 11% of the total legal fee recovered..... This 11% would, of course, be in place of any other fee allocations otherwise available between the firms.

(*Id.*). A second letter was sent on January 28, 2009, making the same claims (Becker Reply Affirm., Ex. A).

Submitting numerous additional letters between the parties, plaintiff contends that the Firm persisted in this position until it filed its joint affirmation and notice of cross-petition in May 2011 (Becker Reply Affid. ¶¶18-24 & Ex. A). Because as of 2009, the Firm had made it clear to plaintiff that he was subject to the 11 percent provision if he initiated contact with the clients he formerly represented, dropping that claim two years later does not eliminate the effect those provisions and the Firm's reliance on them had upon plaintiff's communications with those clients – and their right to the lawyer of their choice.

"It is fundamental that the function of the courts is to determine controversies between litigants .... They do not give advisory opinions" (*New York PIRG, inc. v Carey*, 42 NY2d 527, 529 [1977] [citation omitted]). "[T]he courts should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties" (*id.* at 530).

However, in this case, it is the clients who are deemed to have been harmed by the non-contact provisions of the agreement. Clearly it is the contact during the departing attorney's transition that is critical to the client at the time.

More importantly the fact that the Firm states Becker never violated the Agreement is evidence that the clients were deprived of communication from him that might have been relevant to their decisions about whom to continue to retain as their counsel.

It may behoove plaintiff even at this late date, to contact his former clients and explain to them why he failed to communicate with them about so important a piece of information as that he was leaving the firm and unable – due to the Agreement - to contact them about anything – including any developments in their cases in the three weeks between the time he noticed his termination and the Firm sent its letter.

To the court, the Firm's current position appears to be a recent fabrication to avoid a judicial determination. Therefore, any decision on the no-contact provisions is a live controversy and not an advisory opinion.

LAW ON NON-COMPETES AMONG LAWYERS

The fiduciary relation among law partners is terminated upon notice of dissolution (*see 6D Farm Corp v Carr*, 63 AD3d 903, 906 [2nd Dept 2009]).

> The solicitation of a firm's clients by one partner for his own benefit, prior to any decision to dissolve the partnership, is a breach of the fiduciary obligation owed to each other and the partnership, and a breach of the partnership agreement in general .... Although dissolution occurs when the partners determine to discontinue business . . ., the partnership is not terminated until the winding up of partnership affairs is completed (see Partnership Law, § 61). ... After dissolution, each former partner is free to practice law individually, and has the right to accept retainers from persons who had been clients of the firm

(*Matter of Silverberg [Schwartz]*, 81 AD2d 640, 641 [2nd Dept 1981]; *see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 119-120 [1995]). *Graubard* held that "pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain ... is actionable" as a breach of fiduciary duty (*id.*; *see Dowd & Dowd Ltd v Gleason*, 181 Ill2d 460, 474 [1998]). "Such conduct exceeds what is necessary to protect the important value of client freedom of choice in legal representation" (*Graubard*, 86 NY2d at 120).

The rules are somewhat different for lawyers who are associated with a firm but not partners - such as Becker. The law is clear that an at-will employee owes no fiduciary duty to his employer, and vice versa (*Sullivan & Cromwell v Charney*, 15 Misc3d 1128 (A), * 7 [Sup Ct. NY County 2007], citing *Schenkman v New York Coll. Of Health Professionals*, 29 AD3d 671, 672 [2nd Dept 2006]). Rather, absent a non-competition agreement with their employer, employees owe a duty of loyalty that bars the employee, during employment, from unfair competition or diversion of business opportunities (*Sullivan & Cromwell*, 15 Misc3d 1128(A), at *7; *see Butler, Fitzgerald & Potter v Beggan*, 1994 WL 463966 [SDNY Aug. 23, 1994]).

Therefore, "absent a covenant not to compete ..., a former employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods employed" (*Catalogue Service of Westchester, Inc., v Henry*, 107 AD2d 783, 784 [2nd Dept 1985]). Thus, "in the absence of a written agreement a court will enjoin a former employee from competing with his former employer only upon a showing that the employee has engaged in fraud or other wrongful conduct, that the nature of his work was unique or extraordinary or that the competition is based upon a customer list which is properly considered a trade secret" (*Reidman Agency, Inc. v Musnicki*, 79 AD2d 1094 [4th Dept 1981]).

It follows that paragraph 8(A), which bars any contact with clients by the employee at any time, including during the 15 day notice period, does not mirror the duty of loyalty of an employee but, rather, constitutes a non-competition agreement. The Rules of Professional Conduct add an additional layer of scrutiny.

Former DR 2-108 (A) of the CPR provided that a lawyer could neither be a party to nor "participate in a partnership or employment agreement with another lawyer that *restricts the right of a lawyer to* *practice law after the termination of a relationship created by the agreement*, except as a condition to payment of retirement benefits" (emphasis supplied). The current Rule of Professional Conduct 5.6 (a) provides in pertinent part:

> (a) A lawyer shall not participate in offering or making:
> (1) a partnership, ..., 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 ...

(22 NY ADC 1200.0, Rule 5.6 [a] [1]). It is evident that the language of the former DR and the current RPC is virtually identical.

Any discussion of attorney non-competition agreements must include the seminal case of *Cohen v Lord Day & Lord* (75 NY2d 95 [1989]), in which the Court of Appeals held that "[a] law firm partnership agreement which conditions payment of earned but uncollected partnership revenues upon a withdrawing partner's obligation to refrain from the practice of law in competition with the former law firm restricts the practice of law in violation of Disciplinary Rule 2-108 (A) ... and is unenforceable in these circumstances as against public policy" (75 NY2d at 96). The court reasoned that:

> [W]hile 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

(*Cohen v Lord, Day & Lord*, 75 NY2d at 98).

Cohen also addressed the defendant law firm's contention that forfeiture of departure compensation was justified because of the "economic hardship suffered by a firm when a partner leaves to join a competitor firm" (75 NY2d at 100). The court stated:

> While a law firm has a legitimate interest in its own survival and economic well-being and in maintaining its clients, it cannot protect those interests by contracting for the forfeiture of *earned revenues* during the withdrawing partner's active tenure and participation and by, in effect, restricting the choices of the clients to retain and continue the withdrawing member as counsel

(75 NY2d at 101 [emphasis supplied]). Thus, where a separation agreement between a firm and a departing lawyer contracts for the forfeiture of already earned revenues if he or she competes with the firm, that provision is unenforceable.

The instant case differs from *Cohen* in some degree. Under the Agreement here, Becker is entitled to "earned and vested Net Incentive Compensation in excess of salary for any resolved case" (Agreement ¶ 9 [A]); the revenues that Becker will forfeit will not be past earnings, but future revenue, i.e. between 66 and 88 percent of the fees he earns in the future, from the case of any client who follows him from the firm.

However, in a later case, the Court of Appeals held unenforceable a clause that, alternatively, required the departing partner to give back either 12.5 percent of his or her partnership income from the last two years, or 12.5 percent of his or her billings to former firm clients in the ensuing two years (*see Denburg v Parker Chapin Flattau & Klimpl,* 82 NY2d 375, 381-383 (1993) [partners who earned less than a certain annual draw while at the firm were exempt, so long as they took no firm clients for two years]). The court ruled that "a clause that penalizes a competing attorney by requiring forfeiture of income could 'functionally and realistically discourage' a withdrawing partner from serving clients who might wish to be represented by that lawyer" (*id*. at 380, quoting *Cohen*, 75 NY2d at 98).

Plaintiff's brief quotes a Nebraska Ethics Advisory Opinion, which states that, with the exception of Maine and California:

> ...all states which have considered the matter have rejected the imposition of financial penalties in the case of a withdrawing lawyer's competition

(Neb. Ethics Adv. Opn. for Lawyers No. 06-09).

APPLICATION OF LAW TO FACTS

Paragraph 9: NON-COMPETITION AGREEMENTS

The Firm contends that the purpose of paragraphs 8 and 9 is to reimburse the firm for its case acquisition costs, not to prevent competition (Joint Affirm. ¶¶36-38) and plaintiff retains more of the fees of a hypothetical client's case having left the firm than he would have if he had stayed (*id.* ¶ 71 & Ex. B). The Agreement requires that the employee agree never to challenge the stipulated percentage of liens the Firm will assert; that such division of fees complies with DR 2-107, and is fair and reasonably reflects the Employer's contribution to and work on the case file (Agreement ¶ 9 [C] [i] [b] - [d]). However, as stated by the Court of Appeals when construing a non-competition agreement, "focus should essentially be not on the intent of the clause but on its effect" (*Denburg*, 82 NY2d at 381).

Considering the above, the court determines that portions of paragraph 9 of the Agreement are unenforceable as a matter of public policy. To the extent that a departing lawyer such as Becker must continue to pay the Firm's overhead in the amount of 43.56 percent of the fees that he earns if he represents a former firm client, that penalty serves as a strong disincentive for him to represent any client who wishes to follow him.[9]

The court notes that the percentage attributable to case acquisition costs has not altered since 2005, and the firm does not attempt to establish the actual amount of its case acquisition costs (which it considers to be confidential information). Therefore, the imposition of

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[9] Because the court finds the 43.56 percent lien to be unenforceable, that renders paragraph 9 (G) unenforceable as well (alternate provisions should any part of the Agreement be found unenforceable).

the 43.56 percent lien is more appropriately deemed a penalty, because there is no proof it bears any relationship to actual damages or expenses. Further, the Agreement specifically defines case acquisition costs as not including any legal work performed on the client matter (*see* Agreement ¶ 1 [A] ["substantial amounts of time, experience, expertise, money and other expenditures for marketing and advertising to solicit and obtain clients and referrals of clients of the Employer"]).[10]

Thus, the court declares that paragraph 9 (C) (i); 9 (C) (iii) (a) (x); 9 (C) (iii) (b) (x); 9 (C) (iii) (c) (x); and 9 (G) are unenforceable under Rule 5.6 of the Rules of Professional Conduct and its predecessor, DR 2-108 (A).

PARAGRAPHS 8 and 9 (D), (E), and (F): NO-CONTACT PROVISIONS OF THE AGREEMENT

In *Cohen*, the Court of Appeals ruled that the purpose of former DR 2-108 (A) was "to ensure that the public has the choice of counsel" (75 NY2d at 98, citing ABA Formal Opn of Prof. Ethics No. 300 [1961]). Because Rule 5.6 is virtually identical, presumably any provision in a partnership or employment agreement that creates a material

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10 The issue is not, as the Firm would have it, whether Becker will make more money having left the firm than he would have made if he had stayed an "employee"; the question is whether the financial disincentive operates as an illegal bar to competition among lawyers, and the effect of such a provision on the clients.

disincentive for attorneys leaving a firm to agree to continue to represent the clients they had represented while at the firm, – thus depriving the clients of the right to choose them as attorneys – is a violation of the rule.

In paragraph 9 (E) and (F) of the Agreement, the employee acknowledges that the reduction of fees for violation of paragraph 8 (non-solicitation and no-contact provisions) is not a penalty, but "actual damages" suffered by Employer, and is equivalent to the quantum meruit or proportionate share of the contingency fee and therefore fair compensation to Employer (*id.* ¶9 [E]). The Agreement states that any Net Incentive compensation (i.e. the 10 percent or 20 percent minus salary compensation) the employee received while employed justifies the non-solicitation/no contact and fee-splitting provisions of paragraphs 8 and 9 (Agreement ¶ 5[H] - [I]). As noted by Becker, however, the no-contact/non-solicitation provisions affect the rights of third-parties, i.e. the clients, which the Firm cannot thus contract away, and it is their rights that the court must focus on.

Initially, the court deems the no-contact provisions of the Agreement unenforceable as a matter of public policy. As stated by the Court of Appeals:

> Even crediting [the law firm's] assertions as to the purpose of subparagraph 18 (a) [which was to recoup extraordinary partnership relocation costs], we conclude that its effect is to

> improperly deter competition and thus impinge upon clients' choice of counsel ....

(*Denburg*, 82 NY2d at 381).

Other jurisdictions have ruled similarly under the Model ABA rules or their version of the RPC. The Illinois Supreme Court held in *Dowd & Dowd, Ltd v Gleason* (181 Ill 2d 460, 481 [1998]) that Rule 5.6 "is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility" (*Dowd & Dowd, Ltd.*, 181 Ill2d at 481, citing 2 Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 5.6:201, at 824 [Supp 1997]).[11]

The court determines that both *Cohen* and *Denburg* mandate a declaration that the no-contact provisions are unenforceable, under either former DR 2-108 or Rule 5.6. Therefore, to the extent that

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11 An ABA formal opinion in 1999 stated: "Today we reject any implication of [prior informal opinions] that the notice to current clients and discussion as a matter of ethics must await departure from the firm.... In all these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation" (ABA Formal Opn. 99-414; *see also* Va State Bar Legal Ethics Comm. LEO 1403, 1991 [striking down a provision barring the attorney who was leaving the firm from speaking to the client any time before the firm's receipt of a response from the client to a letter sent by the firm –informing the client of the attorney's change of employment]).

paragraph 8 of the Agreement bars Becker from communicating with the clients he represented while employed by the Firm, it is unenforceable as an illegal non-competition agreement between lawyers. Further, to the extent that paragraph 9 increases the contractual lien to which the Firm is entitled due to Becker's alleged violation of paragraph 8, those provisions, i.e. paragraphs 9(D) and (E), are unenforceable for the same reason.

PARAGRAPH 9 (C): FEE-SPLITTING

As relevant to this case, the RPC Rule 1.5 provides as to fee splitting:

> (g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
> (3) the total fee is not excessive.
> (h) **Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation ... agreement.**

(Rule 1.5 [g], [h] [emphasis supplied]).

Becker asserts that Rule 1.5 (h) permits fee splitting without the strictures of 1.5 (g) only if the payments are made "TO" the former partner or associate, not if the payments run from the former partner or associate to the partnership.[12] In this case, the Agreement provides that none of the clients Becker "serviced" were "his" clients. The logical interpretation is that the parties agreed that the services performed by Becker while an employee of the Firm shall be attributed to the Firm for the purposes of determining whether, under the rules concerning attorney contracts dividing fees, the Firm performed any services for the client.

The law is clear that fee-splitting agreements between lawyers who have been associated or in partnership and are now parting ways are enforceable under contract law and do not run afoul of the ethics rules except in certain situations not present here. The Court agrees with the Firm, that Rule 1.5 (h) applies here and does not prohibit payment to the Firm pursuant to a separation agreement (*see Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2nd Dept 2005]).

It has been held that "there has never been a controversy as to fee sharing where a lawyer works on a case (Simon, *New York Code of Professional Responsibility Annotated*, at 402–405 [2007 ed]" (*Lapidus &*

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12 In opposition, the Firm claims that the cases relied upon by Becker are inapplicable because they predate Rule 1.5 (h). However, that argument overlooks former DR 2-107 (b), which is virtually identical.

Associates, LLP v Elizabeth Street, Inc., 25 Misc3d 1226 (A), *6 [Sup Ct NY County 2009]). Further,

> It has long been understood that in disputes among attorneys over the enforcement of fee-sharing agreements the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either "refused to contribute more substantially"

(*Benjamin v Koeppel*, 85 NY2d 549, 556 [1995] [citations omitted]; see also *Reich v Wolf & Fuhrmann, P.C.*, 36 AD3d 885, 886 [2nd Dept], *lv denied* 9 NY3d 812 [2007], quoting *Witt v Cohen*, 192 AD2d 528, 529 [2nd Dept 1993] [internal quotation marks and citation omitted] ["such an agreement is enforceable so long as the attorney who seeks his share of the fee has contributed some work, labor or service toward the earning of the fee"]).

Some earlier cases ruled unenforceable agreements between partners providing for a division of legal fees without regard to services actually rendered (*Matter of Silverberg [Schwartz]*, 75 AD2d 817 [2nd Dept 1980], *appeal dismissed* 53 NY2d 704 [1981] [such agreements are "void and against public policy" as unlawful covenants restricting practice], citing *Moffat v Cresap*, 33 AD2d 54 [1st Dept 1969], *affd* 29 NY2d 856 [1971]). These differences in the law were addressed by the United States Court of Appeals for the First Circuit in *Ballow Brasted O'Brien & Rusin P.C. v Gary Logan*, 435 F3d 235 [2nd Cir 2006]), in a different context.

> When an attorney is discharged without cause and asserts a claim for fees against successor counsel, he may recover either the fair and reasonable value of his services in quantum meruit or his proportionate share of the work performed on the entire case. Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658 (1993). Assuming that a discharged attorney elects the latter option, we see no reason why an agreement between the discharged attorney and the client's new attorney, regarding the allocation of fees, would not be subject to the proscriptions of DR 2-107.... [F]ixing the percentage to be paid to the discharged attorney at the time of substitution is likely to run afoul of DR 2-107 because that amount may not be "in proportion to the services performed by each lawyer"

(*Id.* [citations omitted]).

In contrast, there is no requirement under current Rule 1.5 (h) that the percentage fees be "in proportion to the services performed by each lawyer". Only if those percentages operate as a disincentive to the departing lawyer to continue to represent the clients he represented at the firm, would they run afoul of the ethics rules: not Rule 1.5 but rather Rule 5.6, as discussed above. The court determines that there are factual questions whether the percentage divisions under paragraph 9 (C) (iii) (a) (y), (b) (y) and (c) (y) violate rule 5.6, and therefore declines on this record to issue a declaration as to the enforceability of those provisions.

NECESSARY PARTY

The firm contends that the law offices of John Feroleto, with whom

Becker is now associated, is a necessary party to the action. The court agrees, although the absence of the law firm does not serve as a basis for dismissal, under the circumstances (*see* CPLR 1001; *Matter of Town of Preble v Zagata*, 250 AD2d 912 [3rd Dept 1998]).

CONCLUSION

Based upon the foregoing, the court grants the application in part, and declares that the following provisions of the Employment Agreement between plaintiff and defendant firm are unenforceable as in violation of the ethical rules governing the conduct of lawyers: paragraph 8; paragraph 9 (C) (i); 9 (C) (iii) (a) (x); 9 (C) (iii) (b) (x); 9 (C) (iii) (c) (x); 9 (D); 9 (E); 9 (F); and 9 (G). The court declines to rule on the enforceability of paragraphs 9 (C) (iii) (a) (y); 9 (C) (iii) (b) (y); 9 (C) (iii) (c) (y); or paragraph 12 due to the existence of questions of fact, and denies judgment on the counterclaim for the same reason. Finally, the court declares that the law offices of John Feroleto is a necessary party to the action.

Plaintiff to submit an order and partial judgment on notice to defendant.

Dated: December 20 2011

John A. Michalek

HON. JOHN A. MICHALEK, J.S.C.