A 1099 Lawyer and a Non-Compete Clause

I am about to hire a contract attorney to work on a matter. I want a clause that says he or she will not take any of my clients for 3-5 years after working for me. Can someone supply me with such a clause?

Were it here, such a restriction is not enforceable. Maybe it works differently in other jurisdictions.Darrell G. Stewart, Texas

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In most jurisdictions such a clause would be unenforceable because we are ethically required to permit the client to make the choice of who go to with when an attorney leaves. I would strongly urge you to consult with your bar's ethics hotline or ethics counsel before trying to incorporate such a provision into an agreement with another attorney.

Kevin Grierson, Virginia

While that sounds like a straightforward noncompete, I think you're probably running afoul of your state's ethics rules. I don't think you can prevent a client from going to any attorney they want … And if they just happen to want to go with the attorney that worked with them on their project before they left your firm, I think you are SOL.

Peter Clark, Massachusetts

Would a non-solicitation agreement with the contract attorney work?

John Varde, Illinois

Highly doubtful that clause is enforceable since the legal system leans heavily on it is the client's choice on which lawyer to hire.

I would lean more towards the other attorney agrees not to actively solicit or use your client database to solicit versus saying they cannot take any of your clients.

Erin M. Schmidt, Ohio

I think you got a second problem; not only can client choose who they want but most states have bar rules to the effect of a lawyer will not enter into an agreement restricting who he can work for or what he can do.

See, for instance:

https://www.floridabar.org/etopinions/etopinion-93-4/

And rule 4-5.6

Here's ABA model rules but most states have similar one

Rule 5.6: Restrictions on Rights to Practice

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Law Firms And Associations

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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Ronald A Jones, Florida

I agree with what Erin said. It might be permissible to have a clause prohibiting solicitation of clients as long as the clause did not bar the attorney from accepting work from clients who want to retain that attorney on their own initiative.

On the other hand, trying to enforce a breach could be problematic. For example, you might need the client to testify regarding who solicited who. If the client states that the client was the initiator, you could end up facing a bar complaint.

The better approach would be to hire an attorney who understands that it is not appropriate to steal clients. I think this would be an implicit understanding for attorneys who do a lot of contract work or who accept a lot of referrals.

Bert Krages, Oregon

I have watched the thread here. Couldn't you put a no-solicitation clause into the agreement prohibiting the contract attorney from soliciting your clients. The clients are free to reach out to him, but he should not be free to poach your clients.

Kenneth A. Sprang, Pennsylvania

Also, 3-5 years is overbroad and will probably be unenforceable. I recommend not longer than 2 years -- unless the rules in CT are wildly different from GA.

Sheri Oluyemi

In CA, a departing attorney from a firm may announce that he has left and may be contacted at his new address.

In CA, an attorney cannot "solicit" clients, non-compete or not. It is against our Rules of Professional Conduct.

I don't believe that in CA the hiring attorney could find a way to restrict the former employee, from announcing to clients of the hiring attorney that he has left and may be contacted at his new address.

But as to a contractor, if the hiring attorney and contracting attorney have a valid agreement that the contracting attorney will not disclose to the client that the contracting attorney is performing services for the hiring attorney that relate to the client [maybe such an agreement might ethical, depending upon the situation, and depending upon the billing arrangements] then, maybe a provision that prohibits the contracting attorney from contacting the hiring attorney's clients might be viable.

Just musing here.

Roger Rosen, California

I don't think so. You are talking about 2 separate rules. One rule says client is free to choose their attorney; that rule would allow non solicitation clause.

But Rule 5.6 prohibits an attorney from entering into an agreement restricting their right to practice.

See, for instance, this opinion by DC bar on facts that are similar to what is proposed.

https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion291.cfm

Ronald A Jones

I do not read that case to be as pertinent to these facts or that it bans restricting the lawyer from active solicitation or using client lists once employment is finished. The case cited prevented the lawyer from accepting

employment with the law firm they were temping in or any of the law firms clients for one year. And it banned the lawyer from actively applying to jobs with those folks.

That is not the same thing as saying a temp lawyer cannot actively solicit clients of a firm or that a lawyer cannot use, what is essential, that firms IP to obtain clients. Those are different matters.

In some ways, other rules may apply here as well, including the footnote in this case that the client should be informed that the lawyer is temporary but also, in some states, you may look at the rules on fee splitting and consider of counsel status versus temp status.

Erin M. Schmidt

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the case is not the rule. The case discusses the rule. I realize the facts in the case are not identical to this; however the rule itself is broader than the case.

This is the rule:

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; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

The original question was:

> I am about to hire a contract attorney to work on a matter. I want a

> clause that says he or she will not take any of my clients for 3-5

> years after working for me. Can someone supply me with such a clause?

And then the follow up question was

couldn't you put a no-solicitation clause

> into the agreement prohibiting the contract attorney from soliciting

> your clients. The clients are free to reach out to him, but he should

> not be free to poach your clients.

And, under rule 5.6, the answer to both of those questions would seem to be "no". The rule is mandatory; "shall not". It applies to BOTH the attorney who is being asked to restrict their practice AND the attorney who is asking for the restriction (shall not particiapte in OFFERING or MAKING: It applies to both attorneys). It applies to what happens after termination of the employment relationship; of course if the relationship is ongoing they can restrict employmnet, if I'm working for someone I can't run my own side practice taking clients.

But, after the employment relationship ends, you cannot "restricts the right of a lawyer to practice after termination of the relationship" .

Non competiion agreement is a restriction on right to practice; even a 'non solicitation' agreement is a restriction on the right to practice. Both violate the rule.

If you are contemplating entering this sort of deal I would suggest calling your bar office and running it past them.

True story; Back when I was first admitted but hadn't opened my practice I considered working for legal temp agency; I looked into it and they had a restrition to the effect that I would not be hired by where I was working

unless the hiring firm paid a finders fee; this is actually pretty standard language in temp agency work. But it set off red flags; I called bar and asked and they said no, it was a violation of the rules. They were also VERY interested in knowing what law firm I would have been working at; because they seemed to think the law firm that was using these temps was in violation of the rules by agreeing not to hire without paying a finders fee; not that they can't pay a finders fee; that would be fine for a headhunter firm, but because they knew it was a restriction on the right to practice by the hired attorney. I told them I didn't know who it was as I didn't sign on. But the point is, the rule is clearly designed to protect the "newbie' attorney.

Ronald A Jones

Hence why the limitation is on the temp lawyers' use of the law firms intellectual property, which is the client list.

Not being able to take, access, or use my intellectual property when you are no longer working at my firm is not a limitation on your right to practice

Erin M. Schmidt