

Rule 5.6 [RPC 1-500]

“Restriction on a Lawyer’s Right to Practice”

(Draft #5, 08/07/09)

Summary: Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6 prohibiting certain agreements restricting the right of a lawyer to practice law with the exception of an agreement concerning benefits upon retirement. The Comments to Proposed Rule 5.6 adopt verbatim the language of the Comments to ABA Model Rule 5.6, except that a sentence has been added to the end of Comment [1] noting an exception to paragraph (a) under the California Supreme Court’s decision in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rule	RPC 1-500
Statute	Business and Professions Code sections 6092.5(i), 6093
Case law	<i>Howard v. Babcock</i> (1993) 6 Cal.4th 409

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

Abstain/ 0

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.6* Restrictions on a Lawyer's Right To Practice

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6, as amended in February 2002.

In addition, Comments [1]-[3] to Proposed Rule 5.6 are identical to the comments to ABA Model Rule 5.6 with one addition: the Commission voted to add to Comment [1] a reference to an exception to paragraph (a) articulated by the California Supreme Court in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. The Court in *Howard* held that an agreement requiring a departing partner to forego certain benefits otherwise due, if the departing partner competes in specified geographical regions following withdrawal, is permissible and is not inconsistent with Rule 1-500 of the California Rules of Professional Conduct, if the agreement complies with Bus. & Prof. Code §§ 16600 et seq. The Commission considered the policy decision made by the Supreme Court in *Howard* and determined that this policy continues to be the appropriate policy for California and, as such, it should be explicit in the rule comments. As the Supreme Court reasoned, permitting such an exception “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment.”

* Proposed Rule 5.6, Draft 5 (8/7/09).

<p align="center"><u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 5.6 Restrictions on a Lawyer's Right to Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer shall not participate in offering or making:</p> <p>(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</p>	<p>A lawyer shall not participate in offering or making:</p> <p>(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</p>	<p>The introductory clause and paragraph (a) are identical to the Model Rule.</p>
<p>(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy</p>	<p>(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.</p>	<p>Paragraph (b) is identical to the Model Rule.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.6 Restrictions on a Lawyer's Right to Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.</p>	<p>[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm <u>an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See <i>Howard v. Babcock</i> (1993) 6 Cal.4th 409, 425.</u></p>	<p>Comment [1] is based on Model Rule 5.6, cmt. [1], except that the second sentence has been revised to include language and a citation to the California Supreme Court decision in <i>Howard v. Babcock</i>. The stated rationale for permitting such an exception, that it “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment,” is language taken directly from the decision. See Introduction.</p>
<p>[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.</p>	<p>[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.</p>	<p>Comment [2] is identical to the Model Rule.</p>
<p>[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.</p>	<p>[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.</p>	<p>Comment [3] is identical to the Model Rule.</p>

Rule 5.6 Restrictions on a Lawyer's Right to Practice

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- ~~(a)~~ A lawyer shall not ~~offer~~participate in offering or ~~enter into~~making:
- ~~(a)(1)~~ Aa partnership, ~~shareholders~~shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice ~~law~~ after termination of the relationship, except an agreement concerning benefits upon retirement; or
- ~~(2)~~ Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law.
- ~~(b)~~ an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy
- ~~(b)~~ Notwithstanding paragraph ~~(a)(1)~~ of this Rule or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:
- ~~(1)~~ The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and
- ~~(2)~~ The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a)(1) ~~permits~~ prohibits such agreements except for an agreement among partners imposing a ~~restrictive covenant~~ reasonable cost on departing partners who compete with the law firm in a law corporation, partnership or employment limited geographical area as such an agreement that provides that strikes a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during balance between the ~~existence~~ interests of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except clients in having the ~~ease~~ attorney of retirement from choice, and the active practice interest of law or as further noted below firms in a stable business environment. See *Howard v. Babcock (1993) 6 Cal.4th 409, 425.*
- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.
- [2] ~~Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to~~

~~bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (b)(1) and (b)(2) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127, 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenbaum & Walker, P.L.C.* (Iowa 1999) 599 N.W.2d 677, 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siofkin, Powers & Eberhardt* (Kan. 1990) 246 Kan. 450, 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule. See also *Neuman v. Atkman*, *supra*, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engborg* (Iowa 1990) 461 N.W.2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95,~~

~~100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).~~

[3] ~~While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80]. The Court's rationale for permitting such agreements is that "an 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. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." *Id.* at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. *Id.* at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct.* (1991) 234 Cal.App.3d 963, 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).~~

[4] ~~This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093~~

~~(governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 4-500).~~

Rule 1-500 Agreements Restricting 5.6 Restrictions on a Member's Lawyer's Right to Practice
(Comparison of the Current Proposed Rule to Current California Rule)

A lawyer shall not participate in offering or making:

- (a) ~~(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit partnership, shareholders, operating, employment, or otherwise, if the other similar type of agreement that restricts the right of a member lawyer to practice law after termination of the relationship, except that this rule shall not prohibit such an agreement which:~~ 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
- (1) ~~Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- (2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~
- (3) ~~Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~
- (B) ~~A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.~~

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the

interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.

- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Discussion:-

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)~~

Rule 5.6 Restrictions on a Lawyer's Right to Practice
(Commission's Proposed Rule – Clean Version)

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

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].
- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Rule 5.6: Restrictions on a Lawyer's Right to Practice

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arkansas: Rule 5.6(a) deletes references to a shareholder, operating, or other similar type of agreement, but adds a reference to “an agreement pursuant to the provisions of Rule 1.17” (which governs the sale of a law practice).

California: Rule 1-500 is essentially the same as Rule 5.6, but adds references to certain statutory exceptions.

Florida: In 1997, without amending the text of Rule 5.6, Florida added the following new paragraph to the Comment to its version of Rule 5.6:

This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes required by time-consuming quantum merit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client's inherent right to select counsel, are prohibited....

In addition, a new Florida Rule 4-5.8 prohibits a lawyer who is leaving a law firm from unilaterally notifying clients of the anticipated departure, or soliciting representation of the firm's clients, unless bona fide negotiations between the

lawyer and the law firm to draft a joint communication have failed. Similarly, a lawyer in a law firm undergoing dissolution must not unilaterally contact the firm's clients unless bona fide negotiations among authorized members of the firm have failed to produce an agreement on a method for notifying clients of the dissolution.

Georgia has adopted the pre-2002 version of ABA Model Rule 5.6 and its Comment essentially verbatim. (Georgia's previous DR 2-108(B) permitted a lawyer to agree in a settlement not to “accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.”)

New York: DR 2-108 provides as follows:

(A) A lawyer shall not be a party to or 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.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

Oregon: Rule 5.6(b) applies to a “direct or indirect” restriction on a lawyer’s right to practice.

Pennsylvania: Rule 5.6(a) permits an agreement that restricts the rights of a lawyer to practice as part of “an agreement for the sale of a law practice consistent with Rule 1.17.”

Texas: Rule 5.06(b) adds that “as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Virginia: Rule 5.6(b) forbids an agreement in which a restriction of the lawyer’s right to practice is part of the settlement of a controversy, “except where such a restriction is approved by a tribunal or a governmental entity.”

**Rule 5.6 Restrictions on a Lawyer's Right to Practice.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 0
Modify = 5
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Feldman, Phillip	M			The language of this rule should be simplified by tracking ABA Model 5.6 which is a more succinct rule.	The Commission did adopt the Model Rule.
2	Hawkins, Karen L. Taggart & Hawkins	M			In general the rule should not treat retirement and death benefit plans in a rigid manner and in 5.6(b)(2), the phrase "The affected compensation will be paid solely from future firm revenues" should be deleted. Rule 5.6(b)(2) also should retain the current list of compensation sources, forfeiture of which is prohibited under existing case law. Related comments should be made consistent with these revisions and the explanation of a "lawyer's vested interest in a retirement plan" should be clarified.	The Commission made the requested revision. The Commission agreed. The Commission revised the comments accordingly.
3	Los Angeles County Bar Association	M			Law firm retirement agreements & covenants not to compete should not be disciplinary offenses, the cases and applicable statutory authorities cannot be adequately analyzed in the narrow confines of a rule; the nuances of this topic are better left to the civil courts.	The Commission disagreed. The proposed Rule, in both its black letter and comment, affords the appropriate balance between lawyers' freedom to contract and the need, as recognized by the court in Howard, to regulate retirement agreements and covenants to avoid unreasonable restrictions on a lawyer's right to practice.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 5.6 Restrictions on a Lawyer's Right to Practice.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 0
Modify = 5
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The following discussion found in the current rule should be retained in the comments to the proposed rule: "Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions."	The Commission did not make the requested revisions. Paragraph (b) and Comment [2] to the proposed Rule, both of which are derived from Model Rule 5.6, adequately address the issue.
4	Orange County Bar Association	M			The standard in paragraph (B) of RPC 1 500 should not be deleted.	Commission agreed; however the standard in paragraph (B) of RPC 1 500 is included in proposed Rule 8.3 and not in rule 5.6.
5	San Diego County Bar Association	M			Approve of new rule, except that the apparent complete deletion of RPC 1 500 (B) should be reconsidered . One committee member dissented, on the basis that ethical rules should not govern internal law firm agreements relating to compensation. 5.6(b) in its current form can be used to prevent lawyers from serving clients in a specialized field once they leave a firm. "My fear is that the law firms may use the state bar mechanism to achieve their private ends rather than protecting the public from unscrupulous lawyers."	Commission agreed; however the standard in paragraph (B) of RPC 1 500 is included in proposed Rule 8.3 and not in rule 5.6. The Commission made no change. See response to Los Angeles County Bar Association.
6	San Francisco, Bar Association of	A			No objection to proposed new rule but committee assumes that RPC 1 500 (B) will be addressed elsewhere in the rules.	The assumption is correct; the standard in paragraph (B) of RPC 1 500 is included in proposed Rule 8.3 and not in rule 5.6.