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ADVANCE SHEET HEADNOTE
January 16, 2024

2024 CO 1

No. 22SC497, *Johnson v. Bursek*—Rules of Professional Conduct—Public Policy—Sua Sponte Rulings.

The supreme court holds that Colorado Rule of Professional Conduct 5.6(a) prohibits agreements which require a lawyer departing from a firm to pay the firm an undifferentiated per-client fee for continued representation of those clients. The court also holds that Rule 5.6(a) constitutes public policy and that contractual violations of the Rule are void as against public policy. Finally, the court takes notice of the court of appeal's sua sponte severability ruling and, in light of fairness concerns, vacates the court of appeals' opinion insofar as it conflicts with the trial court's severability analysis.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 1

Supreme Court Case No. 22SC497
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA2043

Petitioner:

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

v.

Respondent:

Grant Bursek.

Judgment Affirmed in Part and Reversed in Part
en banc
January 16, 2024

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JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 When attorney Grant Bursek left employment with Johnson Family Law, P.C., d/b/a Modern Family Law ("MFL"), eighteen of the firm's clients followed, preferring to maintain the attorney-client relationship they had established with him. MFL subsequently sought to enforce an agreement that required Bursek to pay an undifferentiated per-client fee for continued representation of these clients. Bursek now argues that this per-client fee violates the Colorado Rules of Professional Conduct, which prohibit attorneys from making employment agreements that "restrict[] the right of a lawyer . . . to practice after termination of the relationship." Colo. RPC 5.6(a). We agree. There may be circumstances in which a firm can seek reimbursement of specific client costs when the client leaves a firm to follow a lawyer. But a firm may not require a departing attorney to pay an undifferentiated fee in order to continue representing clients who wish to maintain their relationship with that attorney. Such an agreement is an impermissible restriction on the attorney's right to practice and on the clients' right to counsel of their choice, both of which are important policy interests protected by Colorado Rule of Professional Conduct 5.6.

I. Facts and Procedural History

¶2 In April 2019, Bursek—an associate attorney at MFL in Denver—signed a "Reimbursement Agreement" that required him "to reimburse [MFL] for

marketing expenses related to any client, case or active matter" that left the firm and followed him.[1] Recognizing that "actual expenses may be difficult to determine," the agreement provided that "historic costs directly related to marketing expenses" for each client of the Denver office were $1,052. Thus, for each client who chose to continue being represented by Bursek, the agreement required him to pay MFL $1,052, whether or not there was evidence that MFL had expended marketing funds on that client. If Bursek did not pay the total amount owed under the agreement within thirty days of departing the firm, he would owe interest accruing at a rate of 1.5% per month (18% per year) on any unpaid amounts. The agreement also contained a provision requiring Bursek to pay MFL's "court costs and expenses, including reasonable attorneys fees" for any litigation about the agreement, regardless of whether MFL prevailed in that litigation. Finally, the agreement included a severability clause providing that, if any "part" or "provision" was "held to be void or unenforceable," such a holding would not "invalidat[e] the remaining provisions."

¶3 Bursek left MFL in September 2019. Eighteen clients elected to leave the firm and continue their attorney-client relationship with him. MFL demanded $1,052 for each client—a total of $18,936—as reimbursement under the agreement.

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[1] The agreement made an exception for clients or matters that Bursek had brought with him to the firm.

When Bursek refused to pay, the firm sued for breach of contract. At trial, both parties asked the court to determine whether the agreement was enforceable under Rule 5.6(a).

¶4 The trial court concluded that the per-client reimbursement requirement unreasonably restricted Bursek's right to continue to represent his clients. The court further determined that the entire agreement was unenforceable.

¶5 MFL appealed, and a division of the court of appeals affirmed in part. *Johnson Fam. Law, P.C. v. Bursek*, 2022 COA 48, ¶ 65, 515 P.3d 179, 191. The division held that a fee that disincentivizes an attorney from leaving a firm can comply with Rule 5.6(a) if it is not "unreasonably restrict[ive]." *Id.* at ¶ 15, 515 P.3d at 183. To determine whether a fee is unreasonably restrictive, the division concluded that a court should examine a number of factors, including: the agreement's effect on lawyer autonomy and client choice, the financial burden an attorney's departure imposes on the firm, the relationship of the disincentive created by the reimbursement to the harm suffered by the firm, and whether the reimbursement requirement has any colorable justification apart from disincentivizing competition. *Id.* at ¶ 36, 515 P.3d at 187. The division also referenced other relevant factors, including the number of departing clients, the lawyer's billing rate and salary structure, the client's tenure with the firm, the community where the lawyer practices, and the practice area at issue. *Id.* After considering all these

factors as they applied to Bursek, the division found the fee unreasonable and held that the contract provision relating to the fee was unenforceable. *Id.* at ¶¶ 48, 62, 515 P.3d at 189, 191.

¶6 However, the division also reversed in part, sua sponte holding that, in light of the agreement's severability clause, the provisions of the contract that did not impose the per-client fee—including the court costs and fees provision—remain enforceable. *Id.* at ¶¶ 61–62, 515 P.3d at 191.

¶7 MFL petitioned this court for review, and we granted certiorari to determine whether (1) a firm may ever contractually require a departing lawyer to pay a per-client fee for each client the lawyer takes with them and (2) if so, how to determine the reasonableness of such an agreement.[2]

II. Analysis

A. Standard of Review

¶8 We review interpretations of the Colorado Rules of Professional Conduct de novo. *People v. Hoskins*, 2014 CO 70, ¶ 17, 333 P.3d 828, 834. Our interpretation of

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[2] Specifically, we granted certiorari to review:

1. [REFRAMED] Whether the division erred in concluding that a law firm could contractually require a departing lawyer to pay a fee for each client the lawyer took with them.
2. [REFRAMED] If a law firm can charge a fee, whether the division erred in concluding that the Reimbursement Agreement at issue imposed an unreasonable fee.

a rule is informed by the comments to that rule. *Matter of Storey*, 2022 CO 48, ¶ 38, n.4, 517 P.3d 1243, 1253 n.4. We also review de novo whether a contract violates public policy. *Calvert v. Mayberry*, 2019 CO 23, ¶ 13, 440 P.3d 424, 429.

B. Rule 5.6(a) Prohibits Firms from Imposing an Undifferentiated Per-Departing-Client Fee on Exiting Lawyers.

¶9 Colorado Rule of Professional Conduct 5.6(a) states that "[a] lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement." A comment to the rule notes that such an agreement "not only limits [an attorney's] professional autonomy, but also limits the freedom of clients to choose a lawyer." Colo. RPC 5.6, cmt. 1.

¶10 The language of Rule 5.6(a) plainly forbids any agreement that would entirely prohibit a lawyer from practicing law after departure from a firm. But what about an agreement—like the one at issue here—that imposes a financial cost on a lawyer who leaves a firm and intends to continue a practice in competition with that firm? As to this type of agreement, courts are divided on how to apply their states' version of Rule 5.6(a). *See* Karen E. Komrada, *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.: Encouraging Firms to Punish Departing Attorneys?*, 48

Ariz. L. Rev. 677, 680–81, n.38 (2006) (noting two different approaches to Rule 5.6(a)).

¶11 The majority view, articulated in cases like *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992), holds that *any* contractually imposed financial burden on an attorney's professional autonomy violates the rule. In *Jacob*, for example, two New Jersey attorneys left one firm to establish another. *Id.* at 144–46. Several clients opted to leave the firm and follow these attorneys. *Id.* The firm's Service Termination Agreement provided that departing attorneys were entitled to termination compensation only if they did not compete with the firm upon departure. *Id.* The exiting attorneys sued, claiming that such a restriction on practice was void under New Jersey Rule of Professional Conduct 5.6(a), which is identical to Colorado's rule. *Id.* at 148. The New Jersey Supreme Court agreed, finding that the denial of termination compensation was a "financial disincentive[]" to representation and that "[a]ny provision penalizing an attorney for undertaking certain representation 'restricts the right of a lawyer to practice law' within the meaning of the RPC." *Id.*; *see also Law Offs. of Ronald J. Palagi, P.C., L.L.O. v. Howard*, 747 N.W.2d 1, 13 (Neb. 2008); *Schoonmaker v. Cummings & Lockwood of Conn., P.C.*, 747 A.2d 1017, 1030 (Conn. 2000); *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 493 S.E.2d 364, 367 (Va. 1997); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530–31 (Tenn. 1991); *Anderson v. Aspelmeier, Fisch,*

Power, Warner & Engberg, 461 N.W.2d 598, 601–02 (Iowa 1990); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989).

¶12 The minority view, exemplified by *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993), does not treat financial disincentives to departure and competition as per se violations of Rule 5.6(a). Instead, these cases evaluate agreements for whether they represent a reasonable balance between client choice and attorney autonomy on the one hand and a firm's interest in financial and practice stability on the other. In *Howard*, the California Supreme Court considered, under the state's equivalent to Rule 5.6(a), the propriety of a partnership agreement that imposed financial disincentives on lawyers who left the firm and set up a competing practice. 863 P.2d at 151. The court acknowledged that the prevailing application of Rule 5.6(a) to such agreements was to find them unenforceable. *Id*. at 157–58. However, it concluded that changes in the practice of law such as a decline in institutional loyalty and an accompanying increase in lawyer mobility required some consideration of the impact on a firm when attorneys depart and clients follow them. *Id.* at 158–60. And after balancing the "interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment," the court ultimately determined that the financial disincentives in question were reasonable. *Id.* at 160; *see also Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 728–29 (Ariz. 2006).

¶13 The division below adopted the minority approach, concluding 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." *Bursek*, ¶ 36, 515 P.3d at 187. As a general matter, we agree that the reasonableness inquiry is an appropriate approach to assessing whether a particular financial disincentive imposed on a departing lawyer constitutes a restriction on the right to practice. As to the specific financial disincentive at issue here, however, we conclude that an undifferentiated fee assessed for each client who chooses to follow a departing lawyer violates Rule 5.6(a).

¶14 An agreement that requires a lawyer to pay a former firm such an undifferentiated fee is fundamentally at odds with the twin policy goals of Rule 5.6(a): to protect lawyers' professional autonomy and to ensure that clients have the freedom to choose an attorney. As the Ethics Advisory Committee of the Arizona Supreme Court recognized when considering a similar agreement, 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." Sup. Ct. of Ariz. Att'y Ethics Advisory Comm. Ethics Op. EO-19-0006 (2020), https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=728

[https://perma.cc/8GE7-3939].[3] Of particular concern, 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 to jettison clients with less lucrative claims. This direct intrusion on the attorney-client relationship is quite different from financial disincentives that might indirectly affect client choice by making it more costly for an attorney to leave a firm. No reasonableness analysis is needed to determine that per-client fees of the sort at issue here violate Rule 5.6(a).

¶15 Of course, there could be circumstances that justify a firm seeking reimbursement of particular costs that it incurred for or expended on a client. If, for example, the firm had advanced litigation costs for a client or expended unusual funds to attract a particular client, it might be reasonable and consistent with Rule 5.6(a) to expect the exiting lawyer to reimburse those costs. This is not what occurred here. The $1,052 per-client fee applied under the agreement without regard to costs attributable to any specific client. In fact, there is no indication that MFL's marketing costs would have been different if none of these clients had ever hired the firm. Because we are not presented here with any client-specific cost scenario, we need not (and do not) decide the questions such a

[3] Ethical Rule 5.6(a) of the Arizona Rules of Professional Conduct is functionally identical to Colorado Rule of Professional Conduct 5.6(a).

scenario might present.[4] What we do conclude is that a fee of the type imposed here—one based not on specific spending for a client but imposed without any individualized assessment of every client who wishes to maintain an attorney-client relationship with a departing attorney—violates Rule 5.6(a).

C. The Undifferentiated Per-Departing-Client Fee Is Against Public Policy and the Agreement Is Unenforceable.

¶16 We must now consider whether the fact that the agreement entered into by Bursek and MFL violates Rule 5.6(a) means that it is unenforceable as a contract. Although "Colorado courts recognize a strong policy of freedom of contract," *Calvert*, ¶ 21, 440 P.3d at 430, we have also long held that "a contract violative of public policy is unenforceable," *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992). An ethics rule like Rule 5.6(a) qualifies as public policy when it (1) was "designed to serve the interests of the public rather than the interests of the profession"; (2) does "not concern merely technical matters or administrative regulations"; and (3) "provide[s] a clear mandate to act or not to act in a particular way." *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996).

¶17 As we have noted, Rule 5.6(a) has two policy objectives—to preserve lawyers' professional autonomy and to protect clients' interest in choosing

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[4] Similarly, the issue of whether expenses particular to the departing lawyer (e.g., training costs, relocation expenses) may be recouped without running afoul of Rule 5.6(a) is not before us. Therefore, this opinion does not reach that issue.

representation. Thus, its design is not exclusively to serve the public interest. And if lawyer autonomy were the primary purpose of the rule, a preference for freedom of contract might override the concerns we express here. We agree, however, with other courts that have concluded that Rule 5.6(a) is designed primarily to protect client choice. *See Law Offs. of Ronald J. Palagi*, 747 N.W.2d at 13; *Schoonmaker*, 747 A.2d at 1030; *Shuttleworth*, 493 S.E.2d at 367; *Cohen*, 550 N.E.2d at 411. As the New Jersey Supreme Court explained in *Jacob*, "the [rule's] underlying purpose is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice." 607 A.2d at 146. Moreover, while the Rule also provides protection to attorney autonomy, we have elsewhere held that a Rule of Professional Conduct meets *Mariani*'s first step even when it grants an "incidental benefit to the legal profession" so long as the rule's "primary purpose is to serve the interests of the public." *Calvert*, ¶ 24, 440 P.3d at 431. Therefore, because Rule 5.6(a) is designed primarily for the benefit of the public "rather than the interests of the profession," it satisfies the first factor of the *Mariani* test. *Mariani*, 916 P.2d at 525.

¶18 As to the second and third factors, Rule 5.6(a) plainly concerns a topic—the attorney-client relationship—that goes beyond "technical matters or administrative regulations." *Id*. And the rule provides a clear mandate "not to act in a particular way," *id.*, by indicating that attorneys "shall not" offer or make

employment agreements that restrict the right of a lawyer to practice upon conclusion of their employment with a firm.

¶19 Because Rule 5.6(a) satisfies each prong of the *Mariani* test, we conclude that it constitutes public policy. And because a contract is unenforceable if it is against public policy, we accordingly hold that any contract that violates Rule 5.6(a), such as one imposing a per-departing-client fee, is unenforceable.

D. The Division Erred in Sua Sponte Reversing the Trial Court's Severability Determination.

¶20 The division concluded that the only unenforceable provisions of the agreement were those that imposed a fee for each departing client Bursek continued to represent, and thus reversed the district court's decision that the entire agreement was unenforceable. *Bursek*, ¶¶ 61–62, 515 P.3d at 191. It did so without briefing or argument from the parties. Neither party asked this court to determine whether the division erred in this sua sponte determination. However, we may take notice of an issue not properly raised by the parties when failing to do so will "seriously affect the fairness . . . of judicial proceedings." *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Because the division's decision to reverse the trial court's severability ruling under these circumstances raises serious fairness concerns, we will address it.

¶21 At trial, the district court heard arguments from both parties concerning whether any part of the agreement was severable and, if so, whether the provision requiring Bursek to pay MFL's court costs and fees regardless of the outcome of any litigation was enforceable. In its order, the court held that the per-client fee provision rendered the agreement void in "its entirety," and found, by implication, that the agreement was not severable.

¶22 In its notice of appeal to the court of appeals, MFL asked the division to consider only whether the district court erred (1) in determining that the agreement violated public policy and (2) in dismissing the firm's contract claim. Neither issue requested review of whether the district court was correct in holding that the agreement was non-severable, nor did either party brief that question.[5]

¶23 Still, in one short paragraph, the division summarily reversed the district court's ruling on severability. This finding rendered the judicial proceeding unfair to Bursek by imposing substantial financial costs without providing adequate notice or an opportunity to be heard on the question. And because review by this court is discretionary, Bursek was not assured any further review of the division's

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[5] Although Bursek made a passing reference in his answer brief that the "lopsided attorney's fees" rendered the court cost provision void, and the division addressed that reference in its opinion, an argument that an attorney's fee provision violates Rule 5.6(a) is different from one asserting that an agreement that violates Rule 5.6(a) is severable.

decision and very well could have owed a substantial sum in attorney's fees and court costs on legal grounds he was never on notice that he needed to contest. Thus, because the division's decision implicated the fairness of the judicial proceeding, we sua sponte take notice of the division's ruling on severability.

¶24 In so doing, we do not address the merits of the division's severability analysis. Instead, we conclude only that an appellate court may not sua sponte address issues not presented by the parties without offering some clear justification for doing so. *See Moody*, 159 P.3d at 615; *Atkinson*, 297 U.S. at 160. In the absence of such a justification, the court may not consider the issue.

¶25 Here, because (1) both parties agree that the division sua sponte ruled on severability, and (2) the division did not make any attempt to justify its exercise of sua sponte review or give the parties an opportunity to address the severability issue, we reverse that portion of the division's opinion.

III. Conclusion

¶26 Rule 5.6(a) prohibits a firm from charging a departing attorney an undifferentiated fee for each client choosing to follow that attorney for continued representation. Any contract provision imposing such a per-client fee is therefore void as a matter of public policy. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.