Court Enjoins Lawyer From Competing and Soliciting Clients of Former Law Firm

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A Philadelphia County state court judge recently issued a preliminary injunction in favor of a law firm against a former associate enforcing a 60-day notice provision. In doing so, the Court ruled that the former associate could not work elsewhere for 60 days and could not solicit his former employer's clients. If the decision is upheld and/or followed by other courts, it provides ammunition for employers to argue that notice provisions are not tantamount to non-competes. Employees frequently argue that notice provisions may not be enforced because courts may not compel employees to work for an employer as such an order would run afoul of the Constitutional prohibition on involuntary servitude. While that may be true, the injunction recently issued by the Philadelphia court reflects a possible appetite among the judiciary to prevent former employees from shirking their notice obligations without consequence.

Factual Background

Kline & Specter, P.C., is a personal injury law firm with offices in Pennsylvania, New York and New Jersey. Robert F. Englert, Jr., Esquire, is a former associate who joined K&S straight out of law school. During a preliminary injunction hearing, K&S' counsel argued that Englert should be held to the terms of an employment agreement that required him to provide 60 days notice. According to K&S, Englert should be precluded from working anywhere but K&S for the duration of his notice

provision. K&S reasoned that Englert failed to provide information needed by the firm to continue representing its clients.

The Court observed that K&S' request sounded an awful lot like a restrictive covenant. Such agreements are generally not enforceable against lawyers. In fact, most states have adopted ethical rules similar to Rule 5.6 of the Model Rules of Professional Conduct that make it unethical for lawyers to make, or even offering to make, an "agreement that restricts the right of a lawyer to practice after termination of the relationship…."

Over the years, courts and bar associations have interpreted these rules to prohibit the enforceability of restrictive covenants against lawyers. For example, in Illinois, an appellate court held that non-competes are unenforceable against lawyers because they run afoul of the public policy embodied in Rule 5.6. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 481 (1998). More recently, a New Jersey advisory committee on professional ethics rejected the use of agreements that try to restrict who a corporate counsel may represent after leaving the company.

Just how the Philadelphia Court managed to overcome its trepidation about K&S' agreement is unclear. Not long after the preliminary injunction hearing began, the courtroom was closed to the public and the record was sealed because Englert allegedly attached a copy of a disciplinary complaint to his filings. Under applicable Pennsylvania rules, such complaints are to be kept confidential. While one may speculate that K&S' confidentiality concerns could have been addressed by something less than a complete sealing of the record, it is hard to determine exactly what measures would suffice given the secrecy surrounding the hearing.

The docket entry, however, reflects the Court's preliminary injunction. (A copy is available in pdf format below) According to the Court, K&S has a clear right to the relief it was seeking, and it stood to suffer irreparable harm and loss in the absence of such relief. On this basis, the Court ordered Englert to (1) comply with all provisions of his employment agreement; (2) refrain from affiliating with a law firm or otherwise obtain employment other than with K&S (except as permitted in the employment agreement); and (3) not solicit K&S clients. By its terms, the order remains in effect until September 5, 2011, or until the Court rules otherwise.

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