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## **Wisconsin Memorandum Ethics Opinion EM-14-01: Retirement Benefits and Restrictions on the Right to Practice**

*July 23, 2014*

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**Question: Do payments based upon a multiple of average earnings and months of full-time employment, for which the lawyer becomes eligible at age 55 and retirement (also available upon death or disability), payable over nine years, constitute retirement benefits for purposes of SCR 20:5.6, so that these payments may be conditioned upon the receiving lawyer refraining from engaging in the private practice of law in competition with the firm?**

**Answer:** SCR 20:5.6 prohibits lawyers from entering into partnership, shareholder, operating or employment agreements that restrict the right of the lawyer to practice after termination of the agreement. This Rule thus effectively prohibits non-compete provisions in lawyers' employment agreements and has been consistently interpreted to also prohibit agreements which impose financial penalties upon competition. The sole exception to this prohibition concerns benefits upon retirement, which may be conditioned upon the recipient lawyer from refraining engaging in the practice of law entirely or under certain conditions.

The requesting lawyer provides an excerpted portion of a shareholder employment agreement entitled "Retirement Benefits" and this opinion is based solely upon the information contained therein. The conditions for receipt of the payments are set forth generally in the question above. The agreement defines retirement as ceasing employment and refraining from engaging in the practice of law except for certain specified exceptions.

Neither SCR 20:5.6 nor its accompanying comment define what constitutes a bona fide retirement benefit. There also appears to be no Wisconsin cases or ethics opinions interpreting this Rule. The leading source of guidance on this topic, therefore, is ABA Formal Ethics Opinion 06-444, which provides in relevant part:

To be considered a "retirement benefit" capable of restriction under Rule 5.6(a), the benefit must be one that is available only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers. Thus, the benefits should be payable only upon the satisfaction of minimum age and years-of-service requirements that are consistent with the concept of retirement. At a minimum, a benefit that is payable to a lawyer who has attained an age at which it is common

for employers to offer early retirement and who has worked for the firm or employer for a substantial period of time would constitute a bona fide retirement benefit under generally accepted definitions of that phrase. In contrast, restrictions on the receipt of benefits payable during the prime of a lawyer's career and after only a relatively modest period of service with the firm would clearly be targeting, in most cases, lawyers who are withdrawing for competitive reasons, not to "wind down" their legal careers, and could not be considered restrictions on "retirement benefits" under Rule 5.6(a).

Other indicia of a legitimate retirement benefit – none of which are mandatory or dispositive of the issue, but each of which could provide additional support for a conclusion that a benefit falls within the Rule 5.6(a) exception – include (i) the presence of benefit calculation formulas, (ii) benefits that increase as the years of service to a firm increase, and (iii) benefits that are payable over the lifetime of a retired partner. Similarly, if there is an interrelationship between the benefits and payments from other retirement funds, such as Social Security and defined contribution retirement plans (that is, the payments from the firm decrease as other sources of retirement income phase in), the benefits are more likely to be considered "retirement benefits" under Rule 5.6(a).

(footnotes omitted)

Using these criteria, it is the opinion of the Committee that the payments described in the agreement are retirement benefits as that term is used in SCR 20:5.6. This conclusion is based upon the following:

- a) The payment is based upon the receiving lawyer having reached a minimum age (55), and thus not available to any lawyer who departs the firm prior to that age.
- b) The payment calculation is based in part upon length of full-time employment with the firm
- c) The agreement appears to imply that the retirement payment will be made from future revenues of the firm rather than income generated by the lawyer during the course of employment. Some courts have found this to be an indication of a bona fide retirement benefit.<sup>1</sup>
- d) The payout period for the benefit is nine years. While this period is not a "lifetime" payout, it is of sufficient length to lend support to the conclusion that the benefit is a retirement benefit.

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<sup>1</sup> See e.g. *Schoonmaker v. Cummings & Lockwood of Conn. P.C. 747 A.2d 1017 (Conn. 2000)*.

For these reasons, the Committee concludes that provision at issue is a bona fide retirement benefit as that term is used in SCR 20:5.6. This conclusion is based solely upon the information provided by the requesting lawyer.