New York State Bar Association
Committee on Professional Ethics

Opinion 1151 (5/1/2018)

Topic: Restrictive Covenants on Lawyers

Digest: A lawyer may not enter into an agreement with an employer restricting the lawyer's right to practice law following termination of employment, even when the employment does not involve the practice of law, but a lawyer may agree to a post-employment restriction expressly made subject to applicable ethical rules.

Rules: 5.6(a)

FACTS

1. The inquirer, admitted to practice law in New York, is currently employed by an organization that does not render legal services. As an employee, the inquirer does not practice law, does not render legal advice to the organization or any of its constituents, and does not hold herself out as an attorney.

2. The organization's standard procedure is to ask its employees to sign an agreement with various provisions which the organization considers protective of its business interests. The contract, in nine single-spaced pages, deals with many matters, including, among other things, confidential information (meaning data the organization regards as proprietary as defined in the contract); ownership of intellectual property; business conflicts; and interactions with the organization's customers and contractors. Of particular relevance here is a provision – headed "Agreement Not To Solicit" – which says, in part, that an employee signatory "may not, directly or indirectly," communicate with or provide services to any current or prospective customer of the organization "relating in any way" to "any services related to the business" of the organization. The contract provides that this prohibition applies during the signatory's employment and for eighteen months following the end of employment.

3. The inquirer wishes to retain the option, at such time as her current employment ends, to engage in the practice of law. She is concerned that the post-employment 18-month tail on the "Agreement Not To Solicit" is so broad as to permit an interpretation imposing a restrictive covenant on her right to practice. In view of this concern, her employer offered to include a proviso that the clause is enforceable only "to the extent not inconsistent" with applicable ethical rules

QUESTIONS

4. May a lawyer enter into an agreement with an employer stipulating that, during the course of employment and for a stated period thereafter, the lawyer may not provide any services relating to the business of the employer when the employer is not engaged in, and the lawyer's employment does not involve, the rendition of legal services?

OPINION

5. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the "Rules") says that a "lawyer shall not participate in offering or making" any "partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of the lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." "The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely." N.Y. State 858 ¶ 7 (2011); *see* Rule 5.6, Cmt. [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."). Agreements prohibited by Rule 5.6(a)(1) limit the pool of available attorneys, a client's choice of legal counsel, and a lawyer's autonomy in accepting new engagements.

6. Rule 5.6(a)(1) applies no matter whether the employment agreement engages the lawyer to practice law. We have not previously had a chance to address this precise issue. Our prior opinions on Rule 5.6(a)(1) – including those issued under its substantially identical predecessor, DR 2-108 of the New York Code of Professional Responsibility (the "Code") – as well as the New York case law applying the ban on restrictive covenants, involve law partnership agreements, or agreements between practicing lawyers and their clients. *See, e.g.,* N.Y. State 858 (confidentiality clauses in agreements with members of an in-house legal department may not extend so beyond a lawyer's duty to maintain confidential information as to restrict a lawyer's post-employment right to practice law); *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (striking down non-compete restrictions in a law partnership agreement). Nevertheless, the unambiguous language of Rule 5.6(a)(1), and the purposes it promotes, supply no basis to distinguish between a contract with a non-client employer (or any other party) restricting a lawyer's right to practice law after the relationship is ended. In each circumstance, the lawyer would be making or participating in the making of an agreement that, by restraining the lawyer's ability to practice law, constricts the freedom of the client to choose a lawyer and the lawyer to accept an engagement.

7. Hence, if the language set forth in the "Agreement Not To Solicit" clause "restricts the right of the lawyer to practice law after termination of" the inquirer's employment, then Rule 5.6(a)(1) forbids the lawyer to agree to that language. Whether contractual language amounts to such a restriction – a separate issue – is a fact-intensive inquiry that customary canons of contract construction control. Although arguments may exist that the employment agreement at issue here is not intended to restrict the inquirer's post-employment right to practice law, the inquirer believes, and we think reasonably so, that the sweeping language of the "Agreement Not To Solicit" clause is sufficiently broad to restrain the lawyer from engaging in the practice of law following termination of her employment. Accordingly, in these circumstances, we conclude that the inquirer may not enter into the employment contract as currently written.

8. Here, though, the inquirer has another option, which is to accept the employer's offer to include language in the agreement to the effect that the "Agreement Not To Solicit" clause is enforceable, and may be invoked, only to the extent that the language is consistent with Rule 5.6(a)(1) or other applicable Rule. This added language, in our view, would remove any doubt about whether the clause impermissibly impinges on the lawyer's right to practice law following the end of employment.

CONCLUSION

9. A lawyer may not enter into an employment agreement that restricts the lawyer's right to practice law following termination of employment, even when the employment itself does not involve the practice of law, but a lawyer my agree to a post-employment restriction that is expressly made subject to applicable ethical rules.

(3-18)