Ohio Board of Professional Conduct

OPINION 2020-01

Issued February 7, 2020

Covenant Not to Compete Offered to In-house Counsel

SYLLABUS: An in-house lawyer may not agree to an employment contract with a covenant not to compete that would restrict the lawyer's right to practice after separation of employment.

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QUESTION PRESENTED: Whether a lawyer accepting employment as in-house counsel performing a combination of both legal and business services may execute an employment contract with a covenant not to compete. The covenant would prohibit the lawyer from working for a business competitor for a term of 12-24 months after separation of employment.

APPLICABLE RULES: Prof. Cond. R 1.4, 5.6

OPINION: Employment contracts between businesses and licensed professionals may include a restrictive covenant preventing the employee from accepting employment with a competitor for a period of time or within a geographic area. A covenant not to compete is generally enforceable in Ohio if it is found to be reasonable. *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 26, 325 N.E.2d 544 (1975). However, this legal standard is not applicable to lawyers presented with a covenant not to compete by an employer. Prof.Cond.R. 5.6(a) prohibits a lawyer from entering into an agreement that restricts his or her right to practice law. The rule provides, in pertinent part:

> A lawyer shall not participate in the 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.

An agreement that restricts the right of a lawyer to practice after leaving employment limits the professional autonomy of the lawyer and the ability of clients to choose their lawyer. Prof.Cond.R. 5.6, cmt. [1]. In a case involving conflicts-of-interest, the Supreme Court of Ohio recognized that a strong public-policy interest exists in permitting a party's "continued representation by counsel of his or her choice." *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St.3d 1, 5-6, 1998-Ohio-439. Relying on Prof. Cond. R. 5.6 and a prior Board advisory opinion, an Ohio appellate court has recognized that a lawyer's professional autonomy and a client's freedom of choice outweigh a business's interest in protecting itself from competition. *Hackett v. Moore*, 160 Ohio Misc.2d 107, 2010-Ohio-6298 at ¶6, citing Adv. Op. 1991-3.

The prohibition in Prof.Cond.R. 5.6(a) has been interpreted as applying not only to a lawyer's employment in a traditional law firm setting, but also to situations involving employment arrangements offered by clients. *See generally*, ABA Op. 94-381, ABA Informal Op. 1301 (the right to practice law is granted by the state and cannot be restricted by an agreement with a client restricting future employment.) Some jurisdictions have specifically concluded that the client-lawyer relationship formed when a business or corporation employs an in-house lawyer is subject to the prohibition contained Prof.Cond.R. 5.6(a). Conn. Ethics. Op. 02-05 (2002), N.J. Ethics Op. 708 (2006).

The Board similarly concludes that an employment contract offered by a client that restricts an in-house lawyer from providing legal services after separation from employment implicates the prohibition in Prof.Cond.R. 5.6(a). Consequently, a lawyer may not ethically agree to an employment contract with a covenant not to compete that will restrict his or her future legal practice after separation of employment.

In-house counsel engaging in both legal and business services

Lawyers occasionally are hired by businesses in positions providing a combination of both legal and business services. The prohibition in Prof.Cond.R. 5.6(a) applies to restrictions on a lawyer's provision of future legal services, but not to job functions the lawyer may perform that do not constitute the practice of law. *See* Conn. Ethics. Op. 02-05 (2002). A lawyer considering executing a contract with a covenant not to compete for a position that will provide both legal and business services should consider the extent

the agreement will prevent the lawyer from providing legal services after separation of employment. As an alternative, a lawyer may execute an employment contract for an in-house position that is drafted in a manner to permissibly restrict only those future activities that do not constitute the practice of law. For example, the inclusion of a clause in an employment contact limiting the covenant not to compete to matters other than the practice of law allows the lawyer to ethically execute the contract without implicating the prohibition in Prof.Cond.R. 5.6(a). *Id*.[1]

CONCLUSION: A restriction on the right of a lawyer to practice limits the professional autonomy of the lawyer and ability of clients to select the counsel of their choice. A lawyer may not accept a contract for in-house employment that contains a covenant not to compete restricting his or her right to practice after separation of employment. In-house lawyers providing both business and legal functions should consider the impact of a restrictive covenant on their future practice. In such a situation a lawyer may ethically execute an employment agreement with a restrictive covenant that also contains a clause that limits the covenant only to matters other than the practice of law.

[1] While beyond the scope of this opinion, Prof.Cond.R. 5.6(a) also prohibits lawyers from participating in the drafting or offering of an employment contract that includes a covenant not to compete restricting another lawyer's right to practice.