

New York Bar Blesses Agreement for In-House Lawyer Imposing Post-Employment Confidentiality Obligations

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New York State Bar Association Committee on Professional Ethics, Opinion 858 (Mar. 17, 2011)

Brief Summary

An employment agreement for in-house counsel, imposing confidentiality obligations on an attorney that extend beyond the tenure of employment, does not unethically restrict a lawyer's right to practice law so long as the agreement contains a "savings clause" providing that it must be construed consistently with applicable rules of professional conduct.

Complete Summary

The New York State Bar Committee on Professional Ethics addressed the issue of whether an in-house attorney's employment agreement that prohibits the lawyer from disclosing confidential client information after employment ends is an unethical restriction on the attorney's right to practice law following employment, under New York Rule of Professional Conduct 5.6(a)(1). The committee indicated that Rule 5.6(a)(1) could potentially be violated only if the contractual provision extended the lawyer's confidentiality obligations beyond what is otherwise required under Rule 1.6 and Rule 1.9 imposing duties of confidentiality in relation to current and former clients. The committee opined that the agreement did not violate Rule 5.6(a)(1) because the contract at issue contained a "savings clause" ensuring that the contract was interpreted consistently with applicable rules of professional conduct. The committee then indicated that it would not opine on the precise extent to which the contractual confidentiality provision was enforceable.

Significance of Opinion

This opinion is an addition to those in other jurisdictions in a growing trend toward endorsing the use of “savings clauses” as a method of ensuring that attorney employment agreements comply with rules similar or identical to Rule 5.6(a)(1). Because the lawyer’s ethical confidentiality obligations already persist after employment ends pursuant to the rules, these agreements arguably ultimately beg the question of precisely what is being protected by contract that is not otherwise protected by rule. Nonetheless, there can be material benefits to having a contractual agreement if enforcement to protect the confidential information and/or to disqualify an attorney or law firm ever becomes an issue.

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