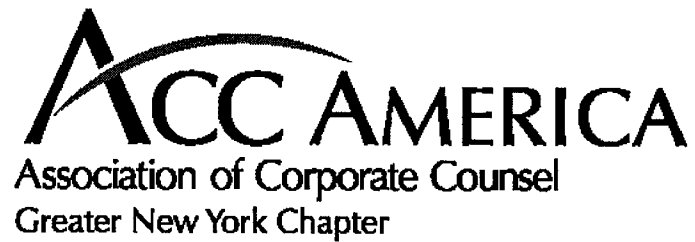


Restrictive Covenants in an In-House Setting

Philip K. Davidoff, Esq.,

Partner, Ford & Harrison LLP

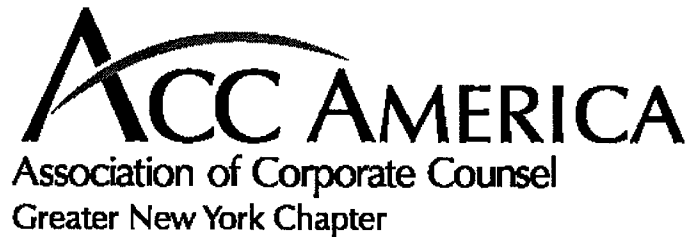


- Confidentiality Agreements
- Non-Compete Agreements
- Non-Solicitation Agreements

- ***Rule 5.6 – Restrictions on the Right to Practice***

***“a lawyer shall not participate in offering or making:
(a) a partnership, shareholder, 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” N.Y. R.
Prof. Conduct 5.6(a)(1).***

- ***Main purposes of Rule 5.6 (a)(1) is to protect the
ability of clients to choose their counsel freely and to
protect the ability of counsel to choose their clients
freely.***



May a General Counsel include restrictive covenants in In-House counsel employment Agreements?

Recent Ethics Opinions Addressing Issues

New York, New Jersey, Connecticut, and Washington State



New York Committee on Professional Ethics Opinion 858 (3/17/11)

- Conditioning In-House Attorney's Employment on Execution of Confidentiality Agreement
- Ethical, *if* the agreement makes clear that confidentiality obligations do not restrict the attorney's right to practice law and does not expand the scope of duty of confidentiality under the RPC.
- Approvingly cites New Jersey and Washington Ethics Opinions on Use of Non-Compete Agreements



Employment Agreements for In-House lawyers are subject to Rule 5.6 and may not include restrictive employment provisions or covenants not to compete.

New Jersey Sup. Ct. Advisory Comm. On Prof. Ethics. Op. 708, 2006.



Washington and Connecticut Ethics Opinions posit that in-house counsel may be asked to sign non-compete agreements, *BUT* the non-compete obligation is enforceable only if the attorney obtains a *non-legal* position with a competitor. Washington Bar Op. 2100 (2005); Conn. Bar Ass'n, Comm. on Prof. Ethics, Information Op. No. 02-05 (Feb. 26, 2002).



Committee on Professional Ethics

Opinion 858 (3/17/11)

Topic: Conditioning in-house attorney's employment on execution of a confidentiality agreement.

Digest: A general counsel licensed in New York may ethically require staff attorneys to sign a confidentiality agreement that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the New York Rules of Professional Conduct, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules.

Rules: 1.6(a), 1.9(c), 5.6(a)

QUESTION

1. As a condition of an in-house staff attorney's employment or continued employment, may a New York lawyer acting as in-house general counsel for a New York not-for-profit corporation require an in-house staff attorney to enter into an employee confidentiality agreement which (1) prohibits the employee-attorney from disclosing information deemed confidential, including information as to the employer's trade secrets and business and regulatory activities; and (2) contains a "savings clause" providing that the restrictive covenant shall be interpreted consistently with applicable rules of professional conduct and will not restrict the lawyer's right to practice law following employment?

FACTS

2. The inquiring attorney, a New York attorney, is the in-house general counsel of a New York not-for-profit corporation (the "Corporation"). The Corporation has regional offices across the country, including in New York, and it employs in-house staff attorneys who are members of the New York bar. This inquiring attorney wants to require the Corporation's in-house attorneys to enter into the same confidentiality agreement imposed on all other current or prospective employees as a condition of employment or continued employment. The proposed confidentiality agreement is a form agreement intended to have effect in multiple jurisdictions.

3. The Corporation provides regulatory and business services and engages in research and marketing activities. These services and activities involve highly sensitive information. The information that the Corporation seeks to keep confidential may relate to the Corporation and may also relate to its customers, vendors and members.

4. The proposed confidentiality agreement purports to bar employees from using or disclosing information (except as required by the scope of the employee's employment duties) that the Corporation has delineated as confidential. The proposed agreement provides that these confidentiality obligations survive termination of employment – indefinitely as to all trade secrets, and for two years with respect to any other confidential information. However, the proposed confidentiality agreement sets forth exclusions for previously acquired information, public knowledge, or information available from other sources, and sets forth an exception for compliance with court orders.

5. The proposed confidentiality agreement also contains a "savings clause" applicable only to licensed attorneys. The savings clause expressly limits the agreement's confidentiality restrictions by providing that the agreement "shall be interpreted to be consistent with" the applicable rules of professional conduct or ethics rules and that it "shall not expand the scope" of an attorney's duties to maintain privileged and confidential information under any such rules.¹

OPINION

6. The central question here is whether the proposed confidentiality agreement will restrict an in-house lawyer's right to practice law following employment. Rule 5.6(a)(1)

¹ The proposed agreement that we address in this inquiry provides:

If I am a licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct.

of the New York Rules of Professional Conduct (the “Rules”) prohibits lawyers from participating in, offering or making agreements that restrict the right of a lawyer to practice law upon the termination of an employment relationship. Specifically, Rule 5.6(a)(1) provides as follows:

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, 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 [Emphasis added.]

7. 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. 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.”); N.Y. State 129 (1970) (“A covenant restricting a lawyer after leaving the partnership from fully practicing his profession appears ... to be an unwarranted restriction on the right of the lawyer to choose his clients in the event they seek his services and an unwarranted restriction on the right of the client to choose the lawyer he wishes to represent him”); see also *Cohen v. Lord, Day & Lord*, 75 N.Y.2d. 95, 98 (1989) (“The purpose of the rule is to ensure that the public has the choice of counsel”). Agreements prohibited by Rule 5.6 have the practical effect of restricting the pool of available attorneys and thus limiting a client’s choice of legal counsel and a lawyer’s autonomy in accepting new engagements.

8. When one New York lawyer seeks to impose a confidentiality provision on another New York lawyer as a condition of employment, a pivotal question is whether the confidentiality provision defines protected information more expansively than Rule 1.6(a), which itself is quite broad. Rule 1.6(a) provides, in pertinent part, as follows:

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

9. A New York attorney’s continuing obligation of confidentiality after termination of employment is almost equally broad, though not unlimited. Rule 1.9(c) provides that a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

- (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
- (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

10. If the proposed confidentiality agreement protects more information than Rules 1.6(a) and 1.9(c), a New York lawyer who enforces the agreement after an in-house legal employee terminates employment may be violating Rule 5.6(a)(1) by restricting the former in-house lawyer's practice of law. However, as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules.

11. This Committee's prior opinions regarding restrictive covenants that affect competition, and the Committee's prior opinions regarding obligations that restrict a lawyer's right to practice law, arose in the quite different contexts of partnership agreements and settlement agreements. See N.Y. State 129 (1970) (lawyer must not "be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of the lawyer to practice law after the termination of the relationship created by the agreement"); N.Y. State 730 (2000) (lawyers must not enter into a settlement agreement whose overly-broad confidentiality provisions restrict the right of the lawyer to practice law). Thus, N.Y. State 129 and N.Y. State 730 do not control the present situation. Much more closely on point are New Jersey Opinion 708 (2006) ("it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer"); and Washington State Advisory Opinion 2100 (2005) (confidentiality provision that dealt specifically with a lawyer's post-employment activities unrelated to the practice of law did not violate Rule 5.6(a)).

12. In any event, the proposed confidentiality agreement in question contains a so-called "savings clause." This savings clause specifically states that, as applied to licensed attorneys, the agreement's provisions are not meant to restrict the employee's post-termination right to practice law in violation of the applicable rules of professional conduct or in violation of the ethics rules of the jurisdictions in which the attorney is licensed. The agreement also provides that it is to be interpreted consistently with all such rules and does not expand the duty to maintain confidentiality under those rules.

13. The effect of this "savings clause" is to make plain that, to the extent the limitations imposed by the proposed agreement appear to be more stringent than the Rules, the limitations in the agreement apply only to an attorney's use and disclosure of information with respect to the practice of law. Thus, even if the contractual

confidentiality provision on its face might be construed to expand the scope of an attorney's confidentiality obligations beyond those provided by the Rules, the savings clause keeps the agreement within the confines of the Rules and renders further analysis under Rule 5.6 unnecessary. See Connecticut Informal Opinion 02-05 (2002) (deciding, in connection with a proposed employment agreement that would apply to lawyers, that a savings clause in the agreement "fairly vitiates ethical concerns over executing, procuring execution, and/or enforcement of the agreement while seeking to preserve legitimate non-ethical concerns").

14. We therefore determine that the proposed confidentiality agreement does not run afoul of Rule 5.6(a)(1). In making this determination, this Committee does not reach or imply any conclusion as to whether the confidentiality agreement is enforceable. However, we have noted that "an agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule." N.Y. State 730 (2000) (*citing Feldman v. Minars*, 230 A.D.2d 356 (N.Y. 1st Dep't 1997)). Conversely, a contractual provision that passes ethical muster may be unenforceable. In either case, enforceability is a question of law beyond our jurisdiction.

CONCLUSION

15. A general counsel who is a New York attorney may require in-house staff attorneys to sign a confidentiality agreement that might otherwise extend staff attorney confidentiality obligations, after the employment period, to information not otherwise protected as confidential information under the Rules, if the agreement makes plain that such confidentiality obligations do not restrict the former in-house attorney's right to practice law following employment and do not expand the scope of the attorney's duty of confidentiality under the Rules.

(2-11)

Advisory Committee on Professional Ethics
Appointed by the Supreme Court of New Jersey

OPINION 708

Advisory Committee on Professional Ethics

Restrictive Covenants For In-House Counsel

The inquirer asks whether an employer's request that its in-house counsel execute restrictive covenants as a term and condition of employment violates the *Rules of Professional Conduct*.¹ Specifically, the following provisions from a proposed agreement have been identified by the inquirer as potentially violative of the *Rules*:

3. During and after my employment, I will keep secret and confidential, and will not disclose, transfer to others or use, directly or indirectly, any and all [Employer] Trade Secrets, Proprietary and Confidential Information as defined below, and I will handle [Employer] documents, computing and communications equipment in accordance with company policies and surrender all such materials to [Employer] upon request. ...

4. I will disclose in writing to my supervisor and [Employer]'s Intellectual Property Department all inventions, discoveries, improvements, machines, devices, designs, processes, products, software, treatments, formulae, know-how, and/or compounds ("Inventions") conceived or made by me, whether alone or jointly with others, during my employment with [Employer]. All my right, title and interest in such Inventions, whether patentable or not, shall be the sole property of [Employer] and I hereby assign and agree to assign the same to [Employer]. ...

¹ Because the inquirer is employed as an attorney, we do not address the applicability of the *Rules of Professional Conduct* upon a restrictive covenant agreement offered to a business person who happens to hold a law degree.

8. I agree that, during my employment and for a period of one (1) year immediately after termination of my employment:

(a) I will not become employed by, provide services to or assist, whether as a consultant, employee, officer, director, proprietor, partner or other capacity, any person, firm business or corporation which (i) is a Competitor of [Employer] (as defined in paragraph 9 below) or (ii) is seeking to become a Competitor of [Employer]; provided however, that the provisions of this subparagraph (a) shall not apply if my employment is terminated by [Employer] without cause; and

(b) I will not, alone or in concert with others, employ or attempt to employ, induce or solicit other employees of [Employer] to work for me, any other person, firm, business or corporation which (i) is a Competitor of [Employer] or (ii) is seeking to become a Competitor of [Employer]. ...

9. As used in this Agreement, "Competitor of [Employer]" means any person, firm, corporation or business which, directly or indirectly, develops, manufactures, sells or distributes products and/or services, that are the same, or substantially similar to, or compete in the marketplace with, the products and/or services developed, manufactured, sold or distributed by the business unit(s) in which I worked, or as to which I had access to Trade Secrets, Proprietary and Confidential Information, during the last two (2) years of my employment with [Employer].

We begin by recognizing that long ago in *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585 (1970), New Jersey abandoned its prior view that such agreements are void *per se* and endorsed "the total or partial enforcement of noncompetitive agreements to the extent reasonable under the circumstances." Accord *Maw v. Advanced Clinical Communications, Inc.*, 179 N.J. 439, 447 (2004).

Notwithstanding the viability of restrictive covenants in commercial contexts, our Supreme Court also has made clear that direct and indirect restrictions of this nature on the practice of law violate both the language and the spirit of RPC 5.6. In *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10 (1992), our Supreme Court held:

The *Rules of Professional Conduct* govern the practice of law based on ethical standards, not commercial desires. The commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice. The more lenient test used to determine the enforceability of a restrictive covenant in a commercial setting is not appropriate in the legal context.

Id. at 27 (citations omitted). Adopting a rationale first articulated in *Dwyer v. Jung*, 133 *N.J. Super.* 343, 347 (Ch. Div.), *aff'd* 137 *N.J. Super.* 135 (App. Div. 1975), the Supreme Court discussed at length the policy considerations underlying its holding and concluded:

The history behind [RPC 5.6] and its precursors reveals that the *RPC*'s underlying purpose is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice. The *RPC* is thus designed to serve the public interest in maximum access to lawyers and to preclude commercial arrangements that interfere with that goal.

Id. at 18 (citing Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, p. 486 (1985)). Thus, the New Jersey Supreme Court declared in *Jacob*: "The case law is clear that *RPC* 5.6 and its precursor, *DR* 2-108(A), forbid outright prohibitions on the practice of law." *Id.* at 19.

New Jersey has adopted ABA Model Rules 1.9 and 5.6. Specifically, New Jersey *Rule of Professional Conduct* 5.6 closely tracks the ABA model rule:

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after the termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

RPC 5.6 (1984).

For its part, the ABA has consistently taken the position that the predecessors to these ethical rules generally prohibited the use of restrictive covenants between lawyers. ABA, Comm. on Prof. Ethics, Formal Op. No. 300 (Aug. 7, 1961); ABA, Comm. on Prof. Ethics, Informal Op. No. 1072 (Oct. 9, 1968). Similarly, the overwhelming majority of state bar associations and courts have decided that it is unethical for a lawyer to be party to an employment or partnership agreement which restricts the right of a lawyer to practice law after the termination of the relationship, except as a condition of the payment of retirement benefits. These states rely on ABA Model Rule 5.6 or *DR* 2-108(A) (or state versions of those model rules) and find that such non-compete agreements are unethical because they unduly limit the freedom of clients to choose their lawyer and improperly impinge upon the lawyer's professional autonomy.

In 1969, this Committee relied on the ABA's preliminary draft of *DR* 2-108(A), the predecessor to New Jersey's *RPC* 5.6, to hold a restrictive covenant in a law firm partnership agreement to be unenforceable. ACPE Opinion No. 147, 92 *N.J.L.J.* 177 (March 20, 1969). We concluded that the restrictive covenant at issue was "improper, unworthy of the legal profession, and unethical."

Turning to the precise issue posed by this inquiry, *i.e.*, the ethical impact upon “in-house” or corporate counsel who are asked to sign restrictive covenants purportedly designed to protect the employer’s confidential business information and trade secrets, the ABA has rejected the use of such covenants for corporate counsel. ABA, Comm. Prof. Ethics, Informal Op. No. 1301 (Mar. 25, 1975). This opinion and its rationale were affirmed by the ABA in 1994. ABA, Comm. on Ethics and Prof. Responsibility, Formal Op. 94-381 (May 9, 1994).

Likewise, the several jurisdictions that have evaluated the ethical propriety of non-compete agreements for in-house counsel have all concluded that the fact that the lawyer worked in a corporate counsel position did not change or affect the analysis of the restrictive covenant.² Similarly, while accepting the applicability of attorney ethics to restrictive covenants for in-house counsel, ethics opinions from Connecticut and Washington have endorsed the use of “savings clauses,” providing that the restrictive covenants were to be interpreted to comply with any applicable rules of professional conduct and expressly citing ABA Model Rule 5.6 or its state counterpart. Conn. Bar Ass’n, Comm. on Prof. Ethics, Information Op. No.02-05 (Feb. 26, 2002) (*available at* 2002 WL 570602); Wash. St. Bar Ass’n, Informal Op. No. 2100 (2005) (*available at* <http://pro.wsba.org/io/>).

Applicability of *RPC 5.6* to Corporate Counsel. Against this backdrop, we first address the question of whether the New Jersey *Rules of Professional Conduct* apply to corporate counsel in a situation such as this. Pursuant to *Rule 1:14*, the *Rules of Professional Conduct* “shall govern the conduct of members of the bar and judges and employees of all courts of this State.” Therefore, the *Rules of Professional Conduct* would apply to any lawyer who is admitted to practice in New Jersey, regardless of whether the lawyer is working for a law firm or in-house. For in-house counsel who are based in New Jersey but not admitted to practice in this State, the New Jersey Supreme Court recently enacted *Rule 1:27-2*. This rule permits an in-house lawyer to hold a “limited license,” which authorizes the lawyer to perform legal work solely for his or her designated employer in New Jersey and requires the lawyer to follow our *Rules of Professional Conduct*. *R. 1:27-2*. Therefore, it is our opinion that in-house or corporate counsel in New Jersey must abide by the *Rules of Professional Conduct*, regardless of whether they are members of the bar of our State.

The Employment Agreement. With respect to the employment agreement specifically cited to us by the inquirer, it contains four distinct provisions which require our analysis. We will review each one separately, because as the Supreme Court instructed in *Jacob, supra*, 128 *N.J.* at 154-55, even if certain restrictive covenants which are part of an agreement involving lawyers violate our *Rules of Professional Conduct*, the remainder of the contract may remain enforceable if the offending provision does not defeat the central purpose of the agreement and can be severed.

² Va. St. Bar, Comm. Op. LEO #1650 (Feb. 7, 1995) (*available at* <http://www.vacle.org/opinions/1615.TXT>); Phila. Bar Ass’n, Prof. Guidance Comm., Guidance Op. No. 96-5 (May 1996) (*available at* 1996 WL 337310); Wash. D.C. Bar Ass’n Op. 291 (June 15, 1999) (*available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions); Maryland State Bar Ass’n, Committee on Ethics, Ethics Docket 91-34 (1991). *Cf.*, Ill. St. Bar Ass’n, Advisory Op. on Prof. Conduct, Op. No. 92-14 (Jan. 22, 1993) (*available at* 1993 WL 836947).

Post-Employment Restrictions. As mentioned above, the overwhelming majority of jurisdictions in the United States follow the ABA's approach and hold that restrictive covenants affecting lawyers, whether employed by corporations or private law firms, generally violate state ethical standards. Several jurisdictions have found that non-compete agreements designed to protect against the disclosure of a corporation's confidential information and trade secrets are superfluous, due to a lawyer's overriding obligation to maintain client confidentiality.

As for New Jersey, we last spoke on this issue in 1969 in Opinion 147, *supra*, 92 *N.J.L.J.* 177. Thirty-seven years later, the views expressed then retain their vitality and persuasiveness. The New Jersey Supreme Court has consistently taken the same position. Although our Supreme Court in *Maw* recently recognized the increasing importance of restrictive covenants in the commercial world, the Court subsequently reaffirmed the importance of the *Jacob* ban on restrictive covenants for the legal profession. *Community Hosp. Group, Inc. v. Moore*, 183 *N.J.* 36 (2005).

The fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment. The *Court Rules* make clear that in-house counsel in New Jersey, whether licensed by this State or not, are bound to follow our *Rules of Professional Conduct*, including *RPC* 5.6. And the result we reach is consistent with every other state and local committee that has looked at the applicability of this rule to in-house lawyers. Va. St. Bar Conn. Op. LEO#1650, *supra*; Ill. St. Bar Ass'n, Advisory Op. on Prof. Conduct, Op. No. 92-14, *supra*; Conn. Bar Ass'n Comm. on Prof. Ethics, Information Op. No. 02-05, *supra*; Wash. St. Bar Ass'n, Informal Op. No. 2100, *supra*; Phila. Bar Ass'n, Prof. Guidance Com., Guidance Op. No. 96-5, *supra*; Wash. D.C. Bar Ass'n, Op. 291, *supra*.

Thus, we are of the opinion that Section 8(a) of the employment agreement cited by the inquirer violates *RPC* 5.6.

Trade Secrets and Proprietary and Confidential Information. We assume, for purposes of discussion, that the trade secrets and confidential information which the agreement in question seeks to protect would be worthy of protection under New Jersey law.

Although general rules concerning confidential information, *RPC* 1.6, or attorney-client privilege, *N.J.S.A.* 2A:84A-20(d), are easy to state, they are often difficult to apply to in-house counsel, because legal advice given in the corporate setting "is often intimately intertwined with and difficult to distinguish from business advice." *Leonen v. Johns-Manville*, 135 *F.R.D.* 94, 98 (D.N.J. 1990). Information relating to legal representation of a client, including a corporate client, is confidential pursuant to *RPC* 1.6. Similarly, because in-house lawyers are entitled to the same attorney-client privilege protections as their outside colleagues, *Tucker v. Fischbein*, 237 *F.3d* 275, 288 (3d Cir. 2001), communications made by and to in-house lawyers in connection with representatives of a corporation seeking and obtaining legal advice may be protected by attorney-client privilege, just as communications with outside counsel. See *Upjohn Co. v. United States*, 449 *U.S.* 383, 389-97 (1981). Thus, in the corporate context, client information relating to legal representation, and attorney-client communications, remain protected and confidential.

However, *RPC* 1.6 provides that an attorney's duty to retain confidentiality extends only to information "relating to [legal] representation of a client." Further, communications made by and to the in-house lawyer regarding business matters, management decisions or business advice are not protected by the attorney-client privilege. *E.g.*, *Boca Investing Partnership v. United States*, 31 *F. Supp.2d* 9, 11 (D.D.C. 1998) (citing *United States v. Wilson*, 798 *F.2d* 509, 513 (1st Cir. 1986)); *United States Postal Svcs. v. Phelps Dodge Refining Corp.*, 852 *F. Supp.* 156, 160 (E.D.N.Y. 1994) ("the attorney-client privilege attaches only to legal, as opposed to business services"); *Barr Marine Products Co., Inc. v. Borg Warner Corp.*, 84 *F.R.D.* 631, 633 (E.D.Pa. 1979) ("The communication must be made by the client to the attorney acting as an attorney and not, *e.g.*, as a business advisor.") For example, our Supreme Court has held that the attorney-client privilege does not extend to lawyers performing non-legal functions, such as conducting workplace investigations. *Payton v. New Jersey Turnpike Auth.*, 148 *N.J.* 524, 550-53 (1997).

Not all duties of an in-house lawyer may involve the practice of law. It is conceivable that an in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by *RPC* 1.6 or the attorney-client privilege. Therefore, it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer in the course of performing legal functions beyond the scope of the *RPCs*.³ Because the terms of the agreement presented by the inquirer make no reference either to the latter's functions and duties as a lawyer or to the *RPCs*, the requirements of Section 3 of the agreement in question are impermissible.

Assignment of Inventions. In reviewing Section 4 of the agreement cited by the inquirer, which purports to assign all "Inventions" as defined therein to the sole ownership of the employer, it appears to the Committee that none of the aspects of this provision relate to legal advice or the practice of law. As such, there do not appear to be any ethical considerations implicated by this provision.

Non-Solicitation of Corporate Employees. Finally, Section 8(b) of the agreement prohibits the inquirer from attempting "to employ, induce or solicit other employees of [Employer] to work for me, any other person, firm, business or corporation" which is a competitor of the inquirer's employer. This issue was directly addressed by our Supreme Court in *Jacob*, which held that an anti-raiding provision such as this one violates our *Rules of Professional Conduct* both with respect to the hiring of other attorneys and also paraprofessionals. Because "[t]he practice of law also involves seeking the best services for one's clients," the Supreme Court concluded that such provisions violate *RPC* 5.6 by interfering directly with the practice of law as well as with a lawyer's ability to best serve his or her clients. *Id.* at 152-54. Our Supreme Court specifically cited to similar results reached in other ethics opinions. ABA Informal Op. 1417 (1978); District of Columbia Bar

³ Because the agreement in question contains no such language, we take no position at this time regarding the viability of a "savings clause" as part of restrictive covenants in employment agreements involving lawyers. See Conn. Bar Ass'n, Com. on Prof. Ethics, Informal Op. No. 02-05, *supra*; Wash. St. Bar Ass'n, Informal Op. No. 2100 (2005), *supra*.

Ass'n Op. 181 (1987) (*reprinted in* Nat'l Rep. on Legal Ethics n.10 (1988)). Accordingly, it is our opinion that Section 8(b) of the agreement in question violates *RPC* 5.6.



Search 1

Search Results

Note that the Rules of Professional Conduct were substantially revised in 2006. The language and citations in any Advisory Opinion issued prior to this date may not be consistent with the current rules.

1 of 1507 matched your query

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(Click the **opinion number** to view in print friendly format)

Opinion Number	Year Issued	RPC	Subject	Opinion
2100	2005	RPC 5.6	Non-compete provision in employment agreement	<p>QUESTION PRESENTED</p> <p>The inquiring attorney submitted a letter dated May 17, 2005, regarding whether a non-compete provision in an employment agreement violates RPC 5.6(a). The clause in question provides in part as follows:</p> <p>"For a period of five years after end of employment, the employee shall not directly or indirectly own, control, consult with, act as an independent contractor to, or be employed by any business similar to that conducted by the Company. As it relates to the practice of law, this provision shall be interpreted consistent with the Washington RPCs (or similar rules in other jurisdictions), including RPCs 5.6, 1.9, and 1.6. Employee shall not solicit any of the company's customer accounts or operate within the Company's general trading area. If a customer contacts the Employee about legal representation, Employee shall be free to provide legal representation consistent with the RPCs..."</p> <p>ANSWER</p> <p>The provision at issue deals specifically with a lawyer's post-employment activities that are not related to the practice of law, thus, the provision does not violate RPC 5.6(a).</p> <p>Discussion</p> <p>Rule 5.6 prohibits employment agreements that restrict a lawyer's right to practice after the termination of the relationship. Here, the express language of the "Restriction on Post Employment Competition" specifically states that the RPCs control, and that the "Employee" shall be free to provide post-employment legal representation consistent with the RPCs.</p> <p>The policy behind RPC 5.6 prohibiting agreements restricting the right of lawyer to practice after leaving employment is twofold. First, such agreements limit a lawyer's professional autonomy; and second, they limit the freedom of clients to choose a lawyer. The provision at issue does neither because it specifically states that as it (the provision) relates to the practice of law that the RPCs control, and it also allows for the "Company's" customers to contact the former "Employee" regarding legal representation. Consequently, the provision does not violate RPC 5.6(a).</p>