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TO THE FORUM:

I've been a litigation attorney for about seven years now, but recently a former colleague approached me with an opportunity to go in-house at his company. The offer is tempting because recent changes in my personal life have made the litigation grind difficult for me, and I feel like it's a perfect time in my career to shift gears. I've been at my current firm for about five years, and when I came onboard I signed an employment agreement that contained a non-compete clause. At the time, I was still a relatively young attorney and didn't think much of it. After pulling out the agreement and looking at it now, even though the restrictions seem reasonable in time and scope, I am starting to question whether the non-compete is enforceable at all. Are restrictive covenants contained in attorney employment contracts valid and enforceable? What about in my particular situation, where I am potentially going in-house and will not be "competing" against my old firm? If I ultimately decide that in-house life isn't for me and move to another law firm before the expiration of the non-compete, will I be able to reach out to my former clients and bring them to my new firm? What if I ultimately decide to leave the legal profession altogether?

While we're on the topic of restrictive covenants, I'm also curious about a confidentiality agreement that my colleague's company gave me to review before I officially start work as in-house counsel. As a condition of my employment at the company, I am required to sign a confidentiality agreement. The agreement prohibits me from using or disclosing information that the company deems or designates confidential, and these confidentiality obligations survive the termination of my employment with the company. If I eventually decide to return to litigation or go to another law firm, will I still be bound by these obligations? I'm afraid that it could limit my employment opportunities in the future. There is a carve-out in the agreement that says that it is subject to the applicable rules of professional conduct, but is that enough? How do the rules of professional conduct treat these types of agreements?

Sincerely,
Soon B. Inhouse

DEAR SOON B. INHOUSE:

Your instinct questioning your ethical obligations under the restrictive covenants in your employment agreement is correct. As lawyers, we should always be wary of contractual obligations to third parties that may inhibit our obligations to clients or affect our duties under the New York Rules of Professional Conduct (RPC). RPC 5.6(a)(1) tells us that "[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…" "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* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011), citing RPC 5.6 Comment [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.") Restrictive covenant obligations on lawyers may have the practical effect of limiting available attorneys, thereby limiting a client's ability to choose the appropriate counsel and a lawyer's ability to accept new clients. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011); NYSBA Comm. on Prof'l Ethics, Op. 1151 (2018).

RPC 5.6(a)(1) prohibits even an objectively reasonable non-compete clause in any lawyer's partnership or employment agreement. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1499 (2016 ed.). This type of ethical rule is fascinating because it is almost unique to lawyers. *See id.* In almost every other line of work or business, as long as restrictive covenants are reasonable in time, geography and scope of

work, the restrictions will generally be permitted. *See id.* Put differently, traditional non-compete clauses, if permitted for lawyers, would make it difficult for a client to follow his or her lawyer if the lawyer moved to a different firm. *See id.* The ethics rules as written clearly emphasize a client's right to choose his or her representation.

Not only does RPC 5.6(a)(1) prohibit traditional non-compete clauses for lawyers, it also prohibits agreements that create financial disincentives for lawyers who take clients when they leave a firm. One important case addressing restrictions on a lawyer's ability to practice is *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989). In that case, the Court of Appeals, which interpreted the predecessor to RPC 5.6(a)(1), DR-2-108(A), while emphasizing the importance of a client's choice of counsel, held that a provision in the partnership agreement at issue, providing for a financial disincentive for a lawyer to compete against the firm after his departure, was an impermissible restriction on the practice of law and unenforceable as against public policy. *See Cohen*, 75 N.Y.2d at 96; *see also Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 380-81 (1993) ("[R]estrictions on the practice of law, which include 'financial disincentives' against competition as well as outright prohibitions, are objectionable primarily because they interfere with the client's choice of counsel: a clause that penalizes a competing attorney by requiring forfeiture of income could 'functionally and realistically discourage' a withdrawing partner from serving clients who might wish to be represented by that lawyer."), citing *Cohen*, 75 N.Y.2d at 98.

An employment contract that includes a restrictive covenant and a provision that specifically states that the restrictive covenant should only be enforced to the extent it is consistent with the lawyer's ethical obligations under Rule 5.6(a)(1) or any other applicable rule, however, would be generally acceptable. *See* NYSBA Comm. on Prof'l Ethics, Op. 1151 (2018). The NYSBA Committee on Professional Ethics recently opined that this type of carve-out or savings clause would "remove any doubt about whether the clause impermissibly impinges on the lawyer's right to practice law following the end of employment." *See id.*

A lawyer's obligations under RPC 5.6(a)(1) are applicable even when the employer engages a lawyer for a purpose other than the practice of law. *See id*. The distinction whether the engagement relates to the practice of law or not is of no consequence since those restrictions may still have the practical effect of limiting a client's ability to choose their counsel, and the lawyer's autonomy in accepting an engagement as counsel. *See id.* The language of RPC 5.6(a)(1) is intended to cover lawyers of every type and description. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1497. RPC 5.6(a)(1) does not, however, apply to agreements between a lawyer, or law firm, and a non-lawyer. *See id.* Lawyers and law firms are free to enter into non-compete agreements with other employees such as paralegals or assistants. *See id.*

While employed at a law firm, lawyers continue to have, at a minimum, a duty of loyalty to that firm, but, that said, RPC 5.6(a) prevents a law firm from restricting a lawyer's ability to reach out to clients and personnel after the termination of employment. *See id.* at 1500, citing Paul DeBenedetto, *Houston Firm Sues Ex-Associate for Trying to Poach Clients* (Law 360 Jun. 4, 2015.) Unlike states such as Virginia and Florida, there are no specific New York rules that address how a lawyer should advise their clients that they are departing a firm and moving to another firm. *See id.* While a lawyer is permitted to advise his or her clients of their departure from the firm, it should not be done in secret and it should be on notice to the firm. *See id.*, citing *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112 (1995).

The restrictive covenants in your current employment agreement appear to violate RPC 5.6(a)(1) based upon the presence of a "non-compete" provision, without a savings clause, which would prevent you from representing your current clients after your employment with the firm concludes. This is in direct contravention of the goals of RPC 5.6(a)(1) to allow clients to freely choose their legal representation and to allow attorneys to choose their clients. Despite the fact that you are planning to work as an in-house attorney at the moment, and have no plans to engage individual clients, the restrictive covenants in your employment contract should not prevent you from reaching out to your former clients at a later date in the event you elect to return to private practice.

You have also raised some important issues regarding the confidentiality agreement that your new employer has presented to you for execution. The first question we must address in reviewing the confidentiality provision is whether it defines the protected information more broadly than RPC 1.6(a). *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011). RPC 1.6(a) defines confidential information as "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." RPC 1.6(a) notes that confidential information does not usually 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."

The continuing confidentiality obligations lawyers have to clients after the termination of their employment

though very broad are not unlimited. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011). RPC 1.9(c) addresses an attorney's duty of confidentiality after a current client becomes a former client. RPC 1.9(c) generally prohibits a lawyer from using or revealing confidential information of a former client, protected by RPC 1.6, without an expiration date. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 676-80, citing NYSBA Comm. on Prof'l Ethics, Op. 1032 (2014). RPC 1.9(c) is one of the most important provisions of the RPC because it imposes a continuing duty of confidentiality on lawyers even after the conclusion of the attorney-client relationship. *See id.* at 677.

If the proposed confidentiality agreement tries to protect more information than RPC 1.6(a) and RPC 1.9(c) require, any attempt by another attorney to enforce that confidentiality provision may be a violation of RPC 5.6(a)(1) because it may restrict the attorney's ability to practice law. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011); NYSBA Comm. on Prof'l Ethics, Op. 730 (2000) (The committee opined that a lawyer may not enter a settlement agreement that restricts his or her ability to practice law by prohibiting a lawyer from representing a client in cases where the attorney may use information not protected as a confidence under the Rules but covered by the settlement agreement.); *see also* New Jersey Advisory Comm. on Prof'l Ethics, Op. 708 (2006) (The committee opined that it may be reasonable for a corporation to request its lawyers to sign a confidentiality agreement as long as it does not seek to restrict the lawyer's ability to practice law or expand the nature of confidential information received by the in-house lawyer.) The NYSBA Committee on Professional Ethics has noted, however, that since the definition of "confidential information" under RPC 1.6 is very broad, most contractual confidentiality provisions do not exceed the scope of a lawyer's confidentiality obligations under the RPC. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011).

A savings clause stating that the confidentiality provision is subject to the applicable Rules of Professional Conduct is sufficient in this instance to protect your ethical obligations. This type of savings clause makes clear that to the extent any of the provisions of the proposed agreement appear to be narrower than the RPC, the savings clause keeps the agreement within the confines of the RPC and no further analysis under RPC 5.6 is necessary. *See id.*, citing Connecticut Bar Association Comm. on Prof'l Ethics, Informal Op. 02-05 (2002). As long as the confidentiality provision in your contract makes clear that the confidentiality obligations do not restrict the lawyer's right to practice law after the lawyer's termination, and does not expand the scope of the attorney's duty of confidentiality under the RPC, executing such an agreement would not interfere with your obligations under the RPC. Based upon the foregoing, we do not believe the type of confidentiality provision that you describe, with the applicable savings clause, violates your obligations under the RPC.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represent lenders in foreclosure actions and have access to a lot of information about real estate that is regularly advertised for sale to the public either through auctions or through short sales from borrowers in default. A few of my friends started buying distressed properties, doing some construction, and then flipping them for a profit. When they learned that I was dealing with properties in foreclosure every day, they started peppering me with questions about the properties and asking for tips on upcoming sales. My initial reaction was that I may not be permitted to disclose any information on the properties to my friends because it would be a violation of my confidentiality obligations to my clients. I know one of my clients likes to discuss the status of the properties in detail but then say, "That info is just between you and me. Just put the bare bones in the papers unless you think it is really necessary. Then you can feel free to use it."

But then I started to think about it more and I realized that the information that is most important to my friends, such as addresses, prices, and dates for auctions, is all in publicly filed court documents or is information that I talked about in open court and on the record. In other words, all the really important information is already available to the public. Does this clear me of any confidentiality issues permitting me to discuss the properties with my friends? What if I e-filed court documents with that information? While they haven't offered me any money yet, I suspect that if my friends acquire and flip a property I tell them about, they will give me a small portion of their profit as a thank you. Does this affect my ability to discuss the properties and can I accept such a gift?

Sincerely,
Luce Lips