ISBA Professional Conduct Advisory Opinion

Opinion 23 – 05

October 2023

SUBJECT: Corporate and In-House Counsel; Restrictions on a Lawyer's Practice.

DIGEST: Lawyers offering or making an employment agreement that restricts the right of an in-house lawyer to practice law after termination of employment, such as through a noncompete provision, do not comply with the Illinois Rules of Professional Conduct.

REFERENCES: Illinois Rules of Professional Conduct 5.6 and 1.9(c)
Dowd & Dowd v. Gleason, 181 Ill.2d 460, 481 (1998).
Balla v. Gambro, Inc., 145 Ill.2d 492, 502 (1991).
Dish Network Corp v. Shebar, 2017 Colo Dist. LEXIS 87 (District Court of Colorado, Denver County, May 9, 2017).
Greissman v. Rawlings & Assoc., PLLC, 571 SW 3d 561, 568 (Ky 2019)
ISBA Advisory Opinion 97-09 (May 1998).
Ohio Board of Professional Conduct, Opinion 2020-01 (February 7, 2020).
State Bar of Nevada Formal Opinion No. 56 (December 19, 2019).
New Jersey Advisory Committee on Professional Ethics Opinion 708 (2006).
Washington State Bar Association Opinion 2100 (2005).
New York State Bar Association Opinion 858 (2011).
ABA Formal Opinion 94-381 (May 1994).

FACTS

An Illinois-licensed lawyer was hired several years ago by a large corporation in its in-house legal department. After the job offer was made, an Illinois-licensed lawyer at the corporation asked the lawyer to sign an employment agreement that included non-compete provisions.

QUESTION

In the context of a corporate legal department, can an Illinois licensed Illinois lawyer ask another Illinois licensed lawyer to sign an employment agreement that contains a non-compete agreement as a condition of employment?

OPINION

Illinois Rule of Professional Conduct 5.6 (Restrictions on Right to Practice) and its comments address the ethical propriety of lawyer employment agreements that include restrictions on future practice, including noncompete provisions. IRPC 5.6 provides:

> A lawyer shall not participate in 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; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

The Rule's Comments explain its purposes. The first purpose is to preserve lawyer autonomy (and mobility). The second is to ensure client choice of counsel. *See* IRPC 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.").

In Illinois, there is no question that lawyer noncompete agreements are ethically improper in a private law firm setting. In a situation involving departing private law firm members, the Illinois Supreme Court found IRPC 5.6's purposes to be "important considerations of public policy." As such, the Court refused to enforce a partnership agreement's noncompetition covenants. *Dowd & Dowd v. Gleason*, 181 Ill.2d 460, 481 (1998). *See* ISBA Advisory Opinion 97-09 (May 1998).

IRPC 5.6's application in a corporate legal department setting has not been addressed in Illinois. Nevertheless, the Committee believes it applies in a corporate setting based on four considerations, and so a corporate lawyer participating in making or offering a noncompete (or similar) agreement is generally ethically improper. First, there is no question the IRPC applies to all licensed Illinois lawyers regardless of practice setting. That includes lawyers working in a corporate (or other business entity) legal department. *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502 (1991) ("In-house counsel must abide by the Rules of Professional Conduct."). Second, the focus of IRPC 5.6 is the restrictive agreement, specifically including "employment or other similar type of agreement[s]," without regard to the practice setting of the participating lawyers. Third, the Rule's express purposes in support of lawyer autonomy and client choice make no distinction between lawyers in a corporate legal department and those in a private practice.

Finally, other jurisdictions' interpretations of Rule 5.6 overwhelmingly conclude that it applies to in-house counsel and the "offering or making" of restrictive agreements, such as those including noncompete provisions, in a corporate setting are ethically improper. Ohio Board of Professional Conduct, Opinion 2020-01 (February 7, 2020)("a [in-house] 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."); State Bar of Nevada Formal Opinion No. 56 (December 19, 2019)("An employment or stock agreement (other than an agreement concerning retirement benefits) with an in-house counsel that includes a covenant not to compete, restricting legal employment after the attorney's termination, violates Rule 5.6, ..."); ABA Formal Opinion 94-381 (May 1994)(An agreement purporting to limit an in-house counsel from ever representing anyone against his employer corporation would violate Model Rule 5.6.). *But see Dish Network Corp v. Shebar*, No. 2017CV31079, 2017 Colo Dist. LEXIS 87 (Colo. Dist. Ct., Denver County, May 9, 2017)(in what appears to be the sole outlier in Rule 5.6 jurisprudence, the court upheld a noncompetition agreement against an in-house lawyer and said "an ethical rule should not serve as a license for an attorney to break a promise, go back on his word, or decline to fulfill an obligation, in the name of ethics.").

Notwithstanding Rule 5.6's widely recognized applicability to in-house lawyers, because of the unique role often played by in-house lawyers, some restrictive employment agreements can be ethically appropriate. IRPC 5.6 itself is clear that it prohibits only an employment agreement that "restricts the right of a lawyer to practice." IRPC 5.6(a); *accord* Ohio Opinion 2020-01 ("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."); New Jersey Advisory Committee on Professional Ethics Opinion 708 (2006)(in discussing several aspects of an in-house employment agreement, the New Jersey Committee said "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… ."); Washington State Bar Association Opinion 2100 (2005) (noncompete and non-solicitation provisions in an in-house lawyer's employment agreement were ethically acceptable because it did not in any way restrict activities related to the practice of law.). Accordingly, an employment agreement that restricts an in-house lawyer's provision of accountancy, engineering, or any service other than the practice of law, could be ethically appropriate. In addition, apart from an employment agreement, lawyers must be mindful of their duties under IRPC 1.9(c) with respect to using or revealing client, *i.e.* their employer's, protected information.

In addition to general issues of applicability and scope, several authorities have commented on various iterations of "savings clauses" included in in-house lawyer employment agreements. Generally, as long as an agreement acknowledges the primacy of the lawyer's responsibilities under the Rules of Professional Conduct and does not conflict with those responsibilities (for instance by attempting to treat corporate information with greater confidentiality than it is afforded under the ethical rules) it may pass ethical scrutiny. Nevada

Formal Opinion No. 56 (Dec. 19, 2019)(commenting favorably on a savings clause that provided the in-house lawyer employment agreement was to be interpreted consistent with the Nevada Rules of Professional Conduct); New York State Bar Association Opinion 858 (2011)(commenting favorably on a savings clause that "makes plain" an employment agreement cannot restrict the right to practice or expand the duties of confidentiality under the rules.); Washington State Bar Association Opinion 2100 (2005)(finding no violation of Washington Rule of Professional Conduct 5.6 where the in-house counsel employment agreement stated that the Rules control and that counsel was free to provide post-employment legal representation consistent with those Rules). *See also Greissman v. Rawlings & Assoc., PLLC*, 571 SW 3d 561, 568 (Ky. 2019)(albeit in a private practice lawyer employment agreement, the Kentucky Supreme Court held "Since the plain language of the savings clause excludes any interpretation of the agreement that conflicts with the Rules of Professional Conduct, the agreement did not violate . . . Rule 5.6."). Because the Committee has not been presented with the employment agreement language at issue, the Committee declines to offer an opinion on the proper language, or even validity, of "savings clauses" in Illinois. However, such clauses as a general matter do not appear contrary to the purposes of IRPC 5.6.

CONCLUSION

The IRPC applies to in-house corporate lawyers, including IRPC 5.6. Lawyers offering or making an employment agreement that restricts the right of an in-house lawyer to practice law after termination of corporate employment, such as through a noncompete provision, does not comply with the Illinois Rules of Professional Conduct.
