Restrictive Covenants Place In-House Attorneys in a Real Predicament – But Are They Enforceable?

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Employers enter into restrictive covenants with members of their workforce to protect their trade secrets and confidential information, particularly with employees who have access to such information. As in-house counsel become more involved in business affairs and put on a business "hat" for some of their roles, they may have more exposure to sensitive, non-public information about the business that can either be helpful to competitors or would cause damage to the business if disclosed to the outside world. Accordingly, an increasing number of businesses are entering into restrictive covenant agreements with in-house attorneys. But are such agreements enforceable?

ABA Model Rule of Professional Conduct 5.6 deals with restrictions on a lawyer's right to practice law following the termination of employment. The Rule provides that a lawyer shall not enter into a "partnership, shareholders, operating, employment, or similar type of agreements that restricts the right of a lawyer to practice after termination of the relationship …." The model rule has been widely accepted with 49 states adopting it or some modified version of the Rule or its predecessor. The Rule also has been consistently applied in the context of law firms, with the vast majority of cases and ethics opinions holding that such agreements are unenforceable *between* attorneys.

Unfortunately, there is not much authority addressing the enforceability of these agreements with respect to in-house counsel. A number of jurisdictions (including Connecticut, the District of Columbia, New Jersey, Pennsylvania, South Carolina, Virginia, and Washington) have issued ethics opinions holding that restrictive covenants with in-house attorneys are unenforceable. The New Jersey ethics opinion is the most detailed and oft-cited. It held that Rule 5.6 was applicable to in-house counsel, and that post-employment restrictive covenants with in-house attorneys are unenforceable.

However, a recent, unpublished trial court opinion in Colorado (*Dish Network Corp. v. Shebar*) found the opposite and granted a preliminary injunction against an in-house attorney who had left his employer to work for a competitor. The court held that Rule 5.6 did not apply to his situation. The court reasoned that Rule 5.6 only applied to agreements *between* attorneys, and therefore the Rule did not apply because the employer was a non-attorney. The court reasoned that the ethical rules were intended to protect the public from unethical conduct by the attorney, not to protect the attorney from their non-attorney clients. Finally, to the extent Rule 5.6 applied, it was only to establish an ethical violation by the in-house attorney.

Whether post-employment restrictive covenants are enforceable against in-house attorneys seems to be an open question under the current state of the law without further guidance from the courts or state legislatures. Even in Colorado, where a court enforced such an agreement, the opinion was unpublished and not based on controlling Colorado Supreme Court precedent. This puts in-house attorneys in a real predicament if their employer presents them with a restrictive covenant. They must either (1) risk committing an ethical violation by signing the agreement, or (2) potentially jeopardize their position with the company by refusing to sign it.

The most practical advice may be to raise the ethical concerns with the employer. If the employer insists on the contract, then the attorney must decide whether to sign it. If the attorney later joins a competitor, the attorney would be wise either to comply with the terms of the agreement or seek a release, or otherwise face the risk of litigation.