



Considering a Covenant Not to Compete for In-house Counsel? Not So Fast

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Are you an in-house attorney considering entering into a non-compete agreement with your employer? Or, are you an attorney drafting or offering non-compete agreements to in-house attorneys? If so, you will want to rethink those practices.

On February 7, 2020, the Ohio Board of Professional Conduct (“the Board”) issued an advisory opinion that sharply restricts the use of non-compete covenants in employment contracts for in-house counsel. See Board of Professional Conduct Advisory Opinion No. 2020-01. Such covenants are common in businesses to prohibit certain employees from working for business competitors post-separation. But whether they may ethically extend to in-house counsel has been less clear.

In its opinion, the Board clarified three important issues concerning non-competes for in-house counsel.

Question No. 1: May an in-house attorney ethically enter into a non-compete agreement that restricts that attorney’s future legal practice?

Answer: No. Rule 5.6(a) of the Ohio Rules of Professional Conduct—prohibiting attorneys from entering into agreements that would restrict the future practice of law—applies to attorneys engaged in the private practice of law and in-house counsel roles alike.

While this Rule has been traditionally applied to attorneys in the private practice of law, its application to in-house counsel had been less clear. The Board’s opinion clarified this point.

Question No. 2: May an in-house attorney providing both legal and business advice to a company enter into a contract containing a non-compete covenant?

Answer: It depends. Because Rule 5.6(a) solely applies to the practice of law, in-house counsel may sign an employment contract containing a non-compete covenant if the contract contains a clause that limits the covenant strictly to matters other than the practice of law, such as providing business advice. But any provision that also restricts the attorney's future practice of law would violate the Ohio Rules of Professional Conduct.

Question No. 3: What about an attorney who drafts or offers an employment contract to an in-house attorney that includes a non-compete covenant? Would this run afoul of the Ohio Rules of Professional Conduct?

Answer: Yes. While the Board acknowledged this question was outside the scope of the opinion, it did conclude that Rule 5.6(a) also prohibits an attorney from participating in the drafting or offering of a contract that contains such a non-compete clause to another attorney.

Conclusion: Regardless of whether an attorney is in private practice or an in-house role, be careful when dealing with non-compete agreements for attorneys.

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