STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. __

QUESTIONS PRESENTED

(1) Do employment or stock award agreements that impose a covenant not to compete on in-house counsel violate Nevada Rule of Professional Conduct ("NRPC" or "Rule") 5.6?

(2) Do employment or stock award agreements that include a confidentiality agreement violate Rule 5.6? [1]

ANSWER

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, because such an agreement interferes with an attorney's professional autonomy to practice his or her profession and clients' freedom to hire the attorney of their choice. A confidentiality agreement may be part of an in-house counsel's employment or stock award agreement, as long as it does not exceed the scope of Rule 1.6 and does not restrict the attorney's right to practice law after termination.

RELEVANT FACTS

Attorney worked as in-house counsel at Corporation A. "In consideration" for being granted an award in stock, Attorney signed a stock award agreement (hereafter, "Agreement") that included two restrictive covenants: (1) a one-year covenant not to compete; and (2) a confidentiality agreement that survived termination. The covenant not to compete provides, in relevant part, that Attorney is prohibited from engaging "on behalf of any person, company or entity in any activities worldwide" relating to the development and design of products and services "competitive with or similar to" those of Corporation A and its subsidiaries. The confidentiality agreement prohibits Attorney from disclosing any "Confidential Information," which is defined to include: (a) information not generally known to the public that is either (i) generated by or used in the operation of the corporation and related to the actual or anticipated business, research, or development of the corporation or its subsidiaries; or (ii) "suggested by or result[ing] from any task assigned to [Attorney] by the Corporation" or "work performed by the [Attorney] for or on behalf of the Corporation . . . ." The restrictive covenants clause provides that if any portion of the clause is unenforceable, that portion "may be severed or modified by a court of competent jurisdiction . . . ."

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[1] Although the inquirer asked for an opinion as to whether the restrictive covenants are enforceable, the Committee only expresses an opinion as to the ethical implications of the restrictive covenants at issue.

After years of service, Attorney was terminated by Corporation A and thereafter offered a position as in-house counsel for Corporation B. Corporation B is engaged in the same or similar business as Corporation A. Corporation A seeks to enforce the restrictive covenants, including the non-compete clause.

DISCUSSION

Rule 5.6 and Its Purpose.

Rule 5.6 provides, in relevant part, that an attorney:

> [S]hall not participate in offering or making [an] . . . 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. . . .

NRPC 5.6(a).

Nevada's Rule 5.6 is identical to ABA Model Rule of Professional Conduct ("Model Rule") 5.6. Comment 1 to Model Rule 5.6 makes clear that the rule has a dual purpose: (1) preserving the attorney's professional autonomy; and (2) preserving the client's freedom to hire the attorney of its choice.[2]

Rule 5.6 permits only restrictions incident to provisions concerning retirement benefits for service with the firm. NRPC 5.6(a); comment 1 to Model Rule 5.6. The rationale behind the retirement benefits exception is that, when an attorney receives full retirement benefits, there is an assumption the lawyer "is truly retiring from practice" and may be required "to stay retired" as a condition of receiving benefits. Annotated Model Rules of Professional Conduct 466-67 (4th ed. 1999). Thus, an agreement that conditions retirement income, in part, on the attorney substantially ceasing active practice may be a "bona fide retirement plan that complies with Rule 5.6(a)." *Hoff v. Mayer, Brown & Platt*, 772 N.E.2d 263, 266, 269 (Ill. App. 2002). But, as the ABA has cautioned, to come under the exception, the restriction must affect "benefits that are available only to a lawyer who is in fact retiring from the practice of law, and cannot impose a forfeiture of income already earned by the lawyer." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-444 (2006).

Here, the Agreement appears to be part of a compensation structure.[3] None of its terms suggests that the Agreement was for retirement benefits. Therefore, the retirement benefits exception is not at issue here.

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[2] The preamble and comments to the Model Rules "may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct." NRPC 1.0A; *see also Palmer v. Pioneer Inn. Assocs., Ltd.*, 118 Nev. 943, 949, 59 P.3d 1237, 1241 (2002) (consulting ABA comments for guidance on (former) S.C.R. 150(2) and citing cases doing so previously).

[3] The Committee received only a one-page abstract of the Agreement and therefore assumes, for the purpose of rendering this Opinion, that the Agreement is not an "agreement concerning benefits upon retirement."

Rule 5.6 Applies to In-House Counsel.

All attorneys admitted to practice in Nevada are subject to Nevada's Rules of Professional Conduct. *See* NRPC 8.5. Even attorneys who are licensed elsewhere, but are admitted in Nevada for the limited practice of exclusive employment with a business entity as in-house counsel, are subject to Nevada's Rules of Professional Conduct. *See* S.C.R. 49.10(2)(a)(6) (requiring an attorney applying for the limited practice as in-house counsel to agree "to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys. . .."").

Rule 5.6 contains no language limiting its application to agreements among attorneys in law firm settings: The Rule more generally prohibits lawyers from participating "in offering *or making*" an employment agreement that restricts the attorney's right to practice. NRPC 5.6 (emphasis added). Thus, as the ABA Committee on Ethics and Professional Responsibility concluded more than twenty years ago, Rule 5.6 both prohibits in-house (or outside) counsel from offering, and prohibits lawyers from accepting, in-house employment that restricts the in-house attorney from representing anyone against the corporation in the future. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-381 (1994). "Just as in the partnership situation, restricting a lawyer from ever representing one whose interests are adverse to a former client would impermissibly restrain a lawyer from engaging in his profession." *Id.; see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1301 (March 25, 1975) (reasoning under a predecessor rule that the ethical considerations are the same whether the attorney is in private practice or serving as in-house counsel).

The Covenant Not to Compete Violates Rule 5.6.

By its terms, Rule 5.6 is limited to covenants not to compete that restrict the "practice" of law. NRPC 5.6. Thus, Rule 5.6 is not implicated if a company prohibits in-house attorneys from accepting a *non*-legal position with a competitor. *See*, *e.g.,* Conn. Bar Ass'n Comm. on Prof. Ethics, Informal Op. No. 02-05 (2002) (concluding that Rule 5.6 does not limit otherwise permissible restrictions on activities other than the practice of law).

The non-compete clause of the Agreement, however, does not distinguish between legal and non-legal work: It prohibits—without limitation—Attorney from engaging in "*any* activities" relating to the same business of the corporation and its subsidiaries. To the extent this restriction addresses and limits Attorney's practice of law—and by its unqualified terms, it does—it violates Rule 5.6. The majority of state bar committees have concluded likewise. *See, e.g*., Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 02-05 (Feb. 26, 2002); N.J. Advisory Comm. on Prof'l Ethics, Op. 708 (2006).[4]

[4] Ethics opinions issued elsewhere on similar issues may serve as guidance for interpreting Nevada Rules of Professional Conduct. *See Palmer*, 118 Nev. at 951-58, 59 P.3d at 1243-48 (canvassing the law in various states on the interpretation and application of (former) S.C.R. 182 and Model Rule 4.2 before adopting the "managing-speaking agent test" articulated by the Washington Supreme Court in *Wright by Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984)).

It makes no difference that the restrictive covenants provision at issue concludes by saying that a court may modify or sever any portion of the clause the court deems unenforceable. This generic severance clause does not eliminate the ethical violation because it: (1) requires court action; and (2) does not specifically address Rule 5.6.

The Committee believes that compliance with Rule 5.6 requires either a carve-out in the non-compete clause itself or a separate, specific "savings clause" that recognizes Rule 5.6 and requires the non-compete clause to be interpreted consistent with that Rule. *See* Wash. State Bar Advisory Op. 2100 (2005) (concluding that the broad non-compete clause did not implicate Rule 5.6 because it was followed by an express qualification that, "[a]s it relates to the practice of law, this provision shall be interpreted consistent with the Washington RPCs . . . including RPCs 5.6, 1.9, and 1.6.").

1. The Agreement Does Not Come Within a Recognized Exception.

Some courts have held that partnership agreements attaching reasonable economic consequences to a departing attorney's right to compete do not violate Rule 5.6. For example, in *Howard v. Babcock*, 863 P.2d 150, 151 (Cal. 1994), a law firm's partnership agreement provided that an attorney who withdrew from the firm before the retirement age of 65 and competed with the firm would have to forego certain contractual withdrawal benefits. The California Supreme Court concluded that a partnership agreement "imposing a reasonable toll on departing partners who compete with the firm is enforceable," because such agreement:

> . . . **does not restrict the practice of law**. **Rather, it attaches an economic consequence** to a departing partner's unrestricted choice to pursue a particular kind of practice.

Howard, 863 P.2d at 151 (emphasis added).

Similarly, in *Fearnow v. Ridenour, Swenson, Cleere & Evans*, *P.C.*, 138 P.3d 723, 725 (Ariz. 2006), the Arizona Supreme Court held that a shareholder agreement requiring a departing lawyer to forego his stock at no compensation should the attorney thereafter compete with the firm does not violate its version of NRPC 5.6, but should be evaluated, like any other covenant not to compete, based on reasonableness. The Arizona Supreme Court found "the reasoning of *Howard* compelling," and observed:

> Neither ER 5.6 nor prior ABA opinions, however, expressly deals with agreements that do not restrict a lawyer's right to practice or compete, but rather impose **only some financial disincentive for doing so**.

Id. at 726 (emphasis added); *see also McCroskey, Feldman, Cochrane & Brock, PC v. Waters*, 494 N.W.2d 826 (Mich. Ct. App. 1992) (upholding non-compete that merely attached financial consequences on departure in form of requiring attorney to pay costs and a percentage of fees generated).

Here, by contrast, the Agreement contains an outright and upfront prohibition to compete with the Corporation for a period of one year after Attorney ceases to be employed "in consideration of the granting of the Award." Moreover, the restrictive covenant applies whether

Attorney voluntarily leaves or is terminated by the corporation. By its terms, therefore, the covenant not to compete does not merely provide for a financial disincentive—*e.g.*, a requirement to give up a percentage of stock should Attorney choose to leave—rather, it conditions the stock award itself upon the lawyer not competing with the corporation for a year. This violates Rule 5.6 and makes the clause unenforceable. *Accord Cohen v. Lord, Day & Lord*, 75 N.Y. 2d 95, 96, 550 N.E.2d 410 (1989) (holding unenforceable a law firm partnership agreement that conditioned payment of earned, but uncollected, revenues upon a withdrawing partner's agreement to refrain from practicing law in competition with the firm).

Because the covenant not to compete broadly prohibits the Attorney's right to practice and the client's right to retain the attorney, and no exception applies, the Agreement violates NRPC 5.6.

2. The Confidentiality Agreement Is Too Broad and also Violates Rule 5.6.

Confidentiality agreements have been upheld under attorney rules of professional conduct as long as the agreements do not restrict an attorney's right to practice and are not broader than the obligations imposed in Model Rule 1.6. *See, e.g.*, N.Y. Comm. on Prof'l Ethics, Op. 858 (March 17, 2011). For all practical purposes, a lawyer's duty of confidentiality is already very broad: lawyers "shall not reveal information relating to representation of a client . . . ." NRPC 1.6(a). The "confidentiality rule applies not only to matters communicated in confidence *by the client* but also to *all information* relating to the representation, whatever its source." ABA comment 3 to Model Rule 1.6 (emphasis added); *accord* Nev. State Bar Standing Comm. on Ethics and Prof'l Responsibility Formal Op. 41 (June 24, 2009)("**ALL** information relating to the representation of the client" is confidential under NRPC 1.6) (emphasis in the original); *see also* Arizona State Bar Ethics Op. 95-04 (April 1995) ("Clearly, *any* lawyer . . . has an ethical obligation not to divulge . . . confidential communications, information and secrets imparted to him by his client or otherwise obtained in the course of the representation of the client. That obligation outlasts the term of the attorney-client relationship.").

The ABA agrees:

> [T]he avowed purpose of the restrictive covenant under consideration—protection of confidences and secrets—is already assured, given expected adherence to the Code of Professional Responsibility, and therefore the covenant appears superfluous.

ABA Informal Op. 1301 (March 25, 1975).

Therefore, "to further limit the [in-house] lawyer's future employment, by contract, cannot be reconciled with his professional standing and position." *Id.*; *accord* N.Y. State Bar Ass'n Comm. on Professional Ethics Opinion 858 (March 17, 2011) (an otherwise valid confidentiality agreement may extend staff attorneys' confidentiality obligations "after their employment ends" if the agreement makes clear that the "confidentiality obligations [1] do not restrict the staff attorney's right to practice law after termination and [2] do not expand the scope of the staff attorney's duty of confidentiality under the Rules").

Even without a confidentiality agreement, attorneys employed as in-house counsel are already subject to an ethical obligation to refrain from: (1) using confidential information relating to the representation of a former client to that client's disadvantage; and (2) revealing information relating to the former client's representation. *See* NRPC 1.9 (c). Thus, in-house counsel's right to practice and their client's choice to employ them under Rule 5.6 is subject to in-house counsel's obligations to their former clients under Rule 1.9.

Here, the first part of the confidentiality agreement does not raise ethical issues because it addresses confidential business information, such as trade secrets and customer lists, which is something a company should be permitted to protect. However, the second part requires the Attorney to keep confidential all information suggested by or resulting from *any* task assigned to Attorney or "work performed by the [Attorney] for or on behalf of the Corporation . . . ." The confidentiality agreement thus not only prohibits Attorney from revealing information relating to the representation of a client—an ethical obligation already assured by Rule 1.6 and Rule 1.9(c)(2)—but would also prohibit Attorney from using or disclosing, for example, any legal research conducted for the corporation, or legal knowledge Attorney acquired from "any task" assigned to Attorney. This unduly and unnecessarily expands the scope of Rule 1.6 and Rule 1.9, and violates Rule 5.6 because it restricts Attorney from using his legal knowledge and skills. To avoid this result, companies may obtain the same protection by including a savings clause like the one at issue in New York State Bar Committee Opinion 858, *supra*, which provided that the confidentiality agreement is to be interpreted consistent with the Rules of Professional Conduct and "shall not expand the scope" of an attorney's confidentiality obligations under such rules.

CONCLUSION

The Committee concludes that the Agreement's covenant not to compete and confidentiality clause violate Rule 5.6. The covenant not to compete violates Rule 5.6, because it is unqualified, not limited to non-legal work, and therefore impermissibly restricts the Attorney's practice of law and Corporation B's freedom to hire the Attorney. The confidentiality agreement exceeds the scope of Rule 1.6 and also interferes with Attorney's right to practice law, because its broad terms prohibit Attorney from using legal knowledge and research acquired as a result of legal tasks performed for Corporation A. The Committee believes that Nevada corporations employing in-house counsel and attorneys accepting employment as in-house counsel in Nevada can avoid ethical violations under Rule 5.6 by adding a savings clause to restrictive covenants that is self-executing, specifically references Rules 5.6, 1.6, and 1.9, and provides that the restrictive covenants are subject to or to be interpreted consistent with these Rules.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

AUTHORITIES

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NRPC 1.9
NRPC 5.6
NRPC 8.5
SCR 49.10(2)(a)(6)
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