Ethical Coffee Break no. 2 (April)

New York

The New York State Committee on Professional Ethics approves employment confidentiality clause conditioning in-house attorney's employment on execution of a confidentiality agreement that bars use and disclosure because of a general saving clause.

An attorney licensed in New York, working as general counsel of a New York not-for-profit corporation, intends to require to his in-house staff attorneys (who are members of the New York Bar) the signature of the same confidentiality agreement imposed on all other current or prospective employees as a condition of employment or continued employment. The agreement is a form agreement intended to have effect in multiple jurisdictions. In particular the proposed confidentiality agreement purports to bar employees from using or disclosing information that the corporation has delineated as confidential. The proposed agreement provides that these confidentiality obligations survive the termination of employment – indefinitely as to all trade secrets, and for two years with respect to any other confidential information. There is, however, a "savings clause" applicable only to licensed attorneys that expressly limits the agreement's confidentiality restrictions by providing that the agreement "shall be interpreted to be consistent with" the applicable rules of professional conduct or ethics rules and that it "shall not expand the scope" of an attorney's duties to maintain privileged and confidential information under any such rules.[1]

After having considered the applicable rules and in particular Rules 1.6(a), 1.9(c), 5.6(a), the Committee decides that the request is not unethical. In particular, the proposed agreement is not in violation of Rule 5.6(a)(1), because it specifies that the

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[1] This is the language of the saving clause :

> If I am a licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct.

confidentiality obligations do not restrict a former in-house attorney's right to practice law after the end of employment and do not expand the scope of an attorney's duty of confidentiality under the Rules. Opinion 858(3/17/11).

A reasonable limitation on the scope of a representation to particular stage of a matter is permissible but the scope may be extended if withdrawal requires court's permission and court denies it.

A criminal lawyer limits his representation of clients to arraignment only. The NY Committee on Professional Ethics opines that the limitation complies with Rule 1.2(c) and Rule 8.4(d) (i.e. a lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice) but that the ethical obligation to represent client may extend beyond the initial limitation if withdrawal requires court's permission and court withholds or denies it.

These are the facts: A union legal services plan regularly retains a lawyer to represent union members in criminal matters for arraignment purposes only. Occasionally, however, a court disregards the terms of the union legal services plan and orders the attorney to continue representing a union member after arraignment. The Committee opines that even if the lawyer validly obtained his client's informed advance consent to withdraw after a discrete stage (such as after arraignment), the lawyer must also comply with Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." And also: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if the original limitation on the representation is ethical, and even if the lawyer has good cause for terminating the representation based on his client's knowing and free prior assent, Rule 1.16(d) requires the lawyer to continue the representation if ordered to do so by the court. Opinion 856 (3/17/11).

On issue of limited engagement agreements, see Nathan M. Crystal, "Limited Engagement Agreements: An Important Tool for Limiting Liability and Dealing with Conflicts", S.C. Lawyer (May 2011) (forthcoming).