

Committee Opinion
February 7, 1995

LEGAL ETHICS OPINION 1615

AGREEMENTS RESTRICTING LAW
PRACTICE; IN-HOUSE COUNSEL; NON-
COMPETE EMPLOYMENT
AGREEMENT.

You have presented a hypothetical situation in which Corporation A (the "Company") wishes to hire a member of the Virginia State Bar (the "Individual") to serve as General Counsel for a department of the Company, whose principal executive offices are located in Virginia. You indicate that, while serving as General Counsel, the Individual will become familiar with the Company's trade secrets and other highly confidential proprietary information, which information, if revealed to a competitor of the Company, would cause substantial and irreparable harm to the Company. The Individual has legal expertise in an area which would be useful to the Company's competitors and thus, it is reasonably likely that the Individual would be an attractive candidate for an in-house legal position with the Company's competitors, particularly after serving as General Counsel for the Company.

You further indicate that the Company and the Individual wish to enter into an agreement whereby the Individual agrees not to work for a competitor of the Company, as the competitor's in-house counsel, for a period of one year following the termination of his employment by the Company. The agreement states expressly that the Individual may serve as outside counsel for a competitor, after leaving the employ of the Company, so long as the Individual does not disclose the Company's confidential proprietary information. This agreement will not be part of an employment agreement, but rather will be a separate non-competition and confidentiality agreement with a lawyer who will serve as an at-will employee.

You have asked the committee to opine whether, under the facts of the inquiry, a lawyer may be a party to a confidentiality and non-competition agreement (not part of an employment agreement) with a corporate employer/client, wherein the lawyer agrees not to serve as in-house counsel for a competitor of the corporate employer/client for one year following termination of the lawyer's employment with the corporate employer/client.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:2-106(A), which states that a lawyer shall not be a party to a partnership or employment agreement that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

The committee is of the opinion that the non-competition portion of the agreement is improper under the Disciplinary Rule. The fact that the non-competition agreement is in a separate document which is not physically part of either an employment or partnership agreement is not significant in the committee's opinion. The committee is of the view that the restriction of the lawyer's practice which prevents him from serving as in-house

Committee Opinion
February 7, 1995

counsel for a competitor for a period of one year violates DR:2-106(A), even though service as outside counsel for a competitor is permitted. *See* LE Op. 1403.

The committee recognizes the corporate employer's concerns as to the preservation of its confidential and proprietary information. However, under the Code of Professional Responsibility, protection of client confidences and secrets is assured. Therefore, the committee believes that the portion of the agreement which requires the attorney not to disclose confidential and proprietary information is superfluous. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1301 (1975).