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Ipsos-Insight v. Gessel Article: Non-Competes are Enforceable in New York, but Attorneys get a Pass

Non-competition agreements are ubiquitous across the United States in most industries and at all levels of those industries. These agreements have come under increasing scrutiny, including by the Federal Trade Commission and the New York Attorney General. While non-competition agreements are largely permissible in the professions, one notable holdout that prohibits them is the one that writes and enforces them — attorneys. Ethical rules in New York largely prohibit attorneys from agreeing to non-competition provisions as a condition of their employment, but a recent case questions whether that rule should be reconsidered.

In July, Judge Furman of the Southern District of New York addressed an issue of first impression under New York law, whether "a non-compete agreement between a company and one of its in-house lawyers that restricts the lawyer's ability to work post-employment is *per se* unenforceable." *Ipsos-Insight, LLC v. Gessel,* No. 21-CV-3992 (JMF), 2021 WL 2784634, at *1 (S.D.N.Y. July 2, 2021). While Judge Furman ultimately granted the former employee's motion to dismiss because the non-competition agreement was unenforceable, he noted that rules regarding non-competes for attorneys are worth reconsidering. *Id.*

In that case, the defendant, Jacob Gessel, was a former in-house counsel for plaintiff, Ipsos-Insight, a market research company. *Id.* As a condition of his employment, Mr. Gessel was subject to, among other things, a paid non-compete clause where, if the company chose to invoke the clause, Mr. Gessel would be given up to a year's worth of salary and would be prohibited from working for competitors of Ipsos. *Id.* Mr. Gessel resigned from his position and began working for a direct competitor of Ipsos shortly thereafter. *Id.* Ipsos brought an action alleging breach of contract in part because of his violation of the non-compete clause. *Id.* at 2. Mr. Gessel moved to dismiss "on the ground that non-compete clauses are *per se* unenforceable against attorneys, including in-house counsel, under New York law." *Id.* at *2.

The court started with the New York Rules of Professional Responsibility, which provide that "[a] lawyer shall not participate in offering or making . . . a partnership, shareholder, operating, 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." *Id.* at *3. The primary purpose of this rule is to protect the ability of clients to freely choose their counsel and to protect the ability of counsel to choose their clients. This rule applies regardless of whether the attorney is in-house or private practice.

In reaching his decision, Judge Furman relied on two New York Court of Appeals decisions: *Cohen* and *Denburg*. *Cohen* involved a forfeiture-for-competition provision in a law firm's partnership agreement. *Id.* at *4 (citing *Cohen v. Lord, Day & Lord,* 550 N.E.2d 410 (1989)). The Court in that case held that the provision was an "impermissible restriction on the practice of law" under the precursor to Rule 5.6(a). *Denburg* involved a provision in a law firm agreement that "imposed a financial obligation on withdrawing partners who continued to practice law in the private sector." *Id.* (citing *Denberg v. Parker Chapin Flattau & Klimpl,* 624 N.E.2d 995 (1993)). The Court in that case found the provision unenforceable because the effect of the clause deterred competition and infringed on clients' choice of counsel. *Id.*

The Court noted that in "the absence of these cases, the Court would almost certainly reject Gessel's argument that the Non-Compete Clause is categorically unenforceable" because the clause would be subject to the traditional reasonableness inquiry that governs non-compete agreements in the state. *Id.* The Court took another critical look at the "*per se* rule against non-compete clauses" for attorneys noting that the rule is "difficult to defend" because clauses like this can be used in other professions, such as medicine and accounting. *Id.* at *5. Moreover, the Court reviewed additional criticisms of Rule 5.6(a) including a Colorado court that interpreted its own rule 5.6(a) (which was "substantially identical" to New York's) and found that "an ethical rule should not serve as license for an attorney to break a promise, go back on his word, or decline to fulfill an obligation, in the name of ethics." *Id.*

In outlining the ruling, after going through multiple criticisms of Rule 5.6(a), the Court explained that the New York Court of Appeals decisions "stand for the proposition that an agreement that runs afoul of Rule 5.6(a) is *per se* unenforceable under New York law." *Id.* at *8. The Court further wrote that this rule "applies not only in the law firm context, but also in the in-house context." *Id.* Finally, accepting Rule 5.6(a) as binding on New York in-house lawyers, the Court explained that "companies would have an incentive to insist that their in-house lawyers sign commercially valuable non-compete clauses as a condition of employment (notwithstanding the resulting ethical violations of any lawyers who participated in drafting such agreements, as well as the in-house lawyers who signed them)." This would result in a difficult choice for in-house attorneys who would have to either "violat[e] their ethical obligations or forgo[ ] employment."

While this ruling is unlikely to have any immediate effect on the New York Rules of Professional Responsibility, it is possible that this will be the start of a conversation. Judge Furman appears to request further consideration of the rules, as he writes, "a strong case could perhaps also be made for limiting *Cohen* and *Denburg* to their facts and not extending their holdings to agreements with in-house counsel." *Id.* at *8. Notwithstanding this decision or Rule 5.6(a), attorneys are still bound by strict duties of confidentiality under Rule 1.6 and are subject to obligations regarding former clients under Rule 1.9. Going forward, both in-house attorneys and law firms should be aware of this ruling and consider either tailoring non-compete agreements with attorneys accordingly or outright eliminating them.

If you have any questions about this decision or non-competition agreements, please contact Joseph S. Nacca, Samuel P. Wiles or the Bond attorney with whom you are regularly in contact.

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