

You have provided information and a proposed agreement whereby a lawyer-employee of a law firm/Professional Corporation (“P.C.”) would become a shareholder in the P.C., which currently has only one shareholder, upon execution of a “Covenant Not to Compete” with the P.C. upon termination of the employment relationship. The proposed agreement would be partial consideration to the P.C. in return for the lawyer-employee's becoming a shareholder, and, among other provisions, substantively provides that, for three years following the lawyer-employee's termination for any reason, he will not, either directly or indirectly, solicit, attempt to solicit, or divert any client for whom either the P.C., its current sole shareholder, or any employee has performed any legal services.

The proposed Covenant further provides that should the lawyer-employee violate any provision of the agreement, he would pay compensation of a minimum of one hundred thousand dollars within ten days of the violation and would further pay compensation of a minimum of two thousand dollars or an amount equal to the amount billed, if greater, for each client for whom the lawyer-employee provides legal services during the three year period. The agreement indicates that it would not apply to any clients of the P.C. who can be specifically identified as clients who were introduced to the P.C. by the lawyer-employee. Finally, the agreement indicates that the lawyer-employee acknowledges that the agreement is not intended to “in any way prevent Employee from engaging in the practice of providing legal services in any jurisdiction in which Employee is licensed to practice.”

You have requested an advisory opinion on the propriety of the proposed agreement, with particular reference to the issues of conditions restricting an attorney's right to practice and the division of client fees between attorneys not employed by the same firm.

The Committee agrees that Disciplinary Rules 2-106(A) [DR:2-106] and 2-105(D) [DR:2-105] are the appropriate and controlling aspects of the Virginia Code of Professional Responsibility. Disciplinary Rule 2-106(A) plainly prohibits a lawyer from being a party to a partnership or employment agreement that restricts the right of a lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits. The Rule includes no quantifier or gradation of the prohibition. With regard to the division of legal fees between lawyers who are not in the same firm, DR:2-105(D) is similarly succinct. It sets out three conditions precedent to such a fee division and permits the division to be made *only* if all three are met: the client must consent to the employment of additional counsel; both *attorneys must expressly assume responsibility to the client*; and the terms of the division must be disclosed to the client and the client must consent thereto. (emphasis added)

It is well settled that agreements restricting the lawyer's ability to practice law are viewed differently from similar agreements executed in a business setting. The Committee has previously opined and it continues to be the opinion of the Committee that such agreements are clearly violative of the prohibitions of the Code of Professional Responsibility since the “attorney/client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice.” *Dwyer v. Jung*, 336 A.2d 498, 500 (N.J. 1975) citing *Drinker*, Legal Ethics, at 89 *et seq.* (1965). See also LE Op. 880. Similarly,

“a covenant restricting a lawyer after leaving a partnership from accepting employment by persons who were theretofore clients of the partnership, or from otherwise fully practicing his profession, is 'an unwarranted restriction' on the right of the lawyer to choose his clients in the event they seek his services and an unwarranted restriction on the right of the client to choose the lawyer he wishes to represent him.”

Dwyer, at 501.

The Committee specifically adopts the language of ABA Informal Opinion 1072 which emphatically finds that

“[t]he right to practice law is a privilege granted by the State, and so long as a lawyer holds his license to practice, this right cannot and should not be restricted by such an agreement. The attorneys should not engage in an attempt to barter in clients, nor should their practice be restricted. The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services.”

It is further the opinion of the Committee that the provisions of the proposed agreement relating specifically to “compensation and not as a penalty” being paid by the lawyer-employee to the P.C. of some or all of the fees billed to clients for whom he provides services is clearly violative of the fee division provisions of DR:2-105(D) since there is no expectation that the P.C. would have assumed responsibility for the client nor that the client would have agreed to either the employment of additional counsel or to the division of fees.

Committee Opinion
April 6, 1989