

You have indicated that an attorney, as Sole Proprietor, intends to contract with another attorney for the provision of legal research and brief writing services.

Under the terms of the Agreement, Sole Proprietor attempts to limit his professional liability through the division of his services into two classes. The Agreement describes Sole Proprietor's Class 1 category of services as:

Research of statutes, cases, treatise articles or other authorities that have been cited to [Sole Proprietor] by Attorney, or research according to an outline prepared by Attorney or other specific instructions from Attorney; and the writing of briefs and papers by either rewriting drafts prepared by Attorney or by following an outline prepared by Attorney or other specific instructions from Attorney; and other research or writing of briefs and other papers that does not require the exercise of legal knowledge or skill or other professional legal judgment by [Sole Proprietor].

The Agreement describes Class 2 services as:

Research of issues or an area of law without specific instructions from Attorney; and the drafting of papers without specific instructions from Attorney; and other research or preparation of briefs or other papers that requires the exercise of legal knowledge or skill or other professional legal judgment by [Sole Proprietor].

The Agreement recites that, under the Rules of the Supreme Court of Virginia (1991) and in the opinion of the Legal Ethics Committee of the Virginia State Bar, "the services provided by [Sole Proprietor] that may fairly be described in the Class 1 category of services do not constitute the practice of law." In addition, Agreement states that where Sole Proprietor provides services in the Class 1 category, he is not bound by § 54.1-3906 and § 26-5 of the Code of Virginia (1950), as amended, and Attorney agrees to limit Sole Proprietor's liability for negligent practice of law for services provided which fall into those described within Class 1. Attorney further agrees that Sole Proprietor shall not be professionally liable to Attorney for the negligent practice of law in performing services that are indicated by the parties to be or may fairly be described in the Class 1 category of services. The Agreement specifically indicates that Attorney assumes the risk of any injury arising from the performance of said services by Sole Proprietor. However, the Agreement finally states that where services are provided that "are indicated by the parties to be or may fairly be described in the Class 2 category of services, [Sole Proprietor] is by ethical rules and by statute professionally liable to Attorney for the negligent practice of law in performance of said services."

Finally, under the terms of the Agreement, Sole Proprietor does not contract with any clients of Attorney to provide services to said clients, nor does Sole Proprietor contract with Attorney to benefit clients of Attorney in any way or to serve as a co-counsel with Attorney in the representation of Attorney's clients.

You have asked the Committee to opine whether, under the facts of the inquiry, (1) the distinction made in the agreement between what does and does not constitute the practice

of law is accurate, and (2) such distinction may be properly placed in a services contract for the purpose of limiting an attorney's liability.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:6-102(A). Disciplinary Rule 6-102(A) states that a lawyer shall not limit his liability to his client for his personal malpractice.

The Rules of Court provide that the relation of attorney and client exists, and one is deemed to be practicing law, wherever one person furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill. The Rules further state, in pertinent part, that the relation of attorney and client exists, and one is deemed to be practicing law whenever one undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires and whenever one, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character. (See Part Six: Section 1: Rules of the Supreme Court of Virginia: Unauthorized Practice Rules -- Practice of Law in the Commonwealth of Virginia.)

The Committee believes that, when conducted by a member of the bar, those activities described as either Class 1 or Class 2 services provided to other attorneys by Sole Proprietor would constitute the practice of law by Sole Proprietor. It is the opinion of the Committee that Sole Proprietor would be preparing legal instruments for a client, under circumstances which imply his possession and use of legal knowledge and skill, irrespective of the fact that his client is another attorney.

Thus, the Committee opines that where an attorney-client relationship exists, the plain language of DR:6-102(A) does not permit a lawyer to limit his professional liability to that client. (See LE Op. 877, LE Op. 1211, LE Op. 1364.)

The Committee is not opining as to the legality of the contract for services which you have provided or any of its component provisions. However, the Committee does advise that the statement contained in the Agreement, speaking to the Rules of the Supreme Court of Virginia and the opinion of the Legal Ethics Committee as having determined that certain services do not constitute the practice of law, is incorrect.

Committee Opinion
May 14, 1991

Committee Reconsideration and Affirmation
June 12, 1991