Heretofore came the Virginia State Bar, by Jean P. Dahnk, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10 (g), and filed a Petition and Notice of Advisory Opinion Review requesting consideration of Legal Ethics Opinion No. 1765.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, now, therefore, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1765 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1765
WHETHER AN ATTORNEY WORKING FOR A FEDERAL INTELLIGENCE AGENCY CAN PERFORM UNDERCOVER WORK WITHOUT VIOLATING RULE 8.4

I am writing in response to your letter dated December 26, 2001, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee"). As you may recall, this committee stayed the issuance of an opinion in response to your request as a proposed amendment to the pertinent ethics rule, 8.4(c), was pending before the Supreme Court of Virginia. On March 25, 2003, the Supreme Court of Virginia adopted a revised Rule 8.4. Accordingly, this committee is now providing you with the response to your request. For clarity, the former Rule 8.4(c) was as follows:

> It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The newly adopted Rule 8.4(c) reads as follows:

> It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law.* (Emphasis added).

You have requested reconsideration of two prior legal ethics opinions 1217 and 1738. Each of those opinions involved the tape-recording of conversations by attorneys, or by those at their direction without consent of all parties to the conversations. In LEO 1738, this committee reviewed the bright line prohibition against the non-consensual tape-recording by attorneys presented in LEO 1217. The committee in LEO 1738 reviewed that conduct with regard to former Rule 8.4(c)'s prohibition against "conduct involving dishonesty, fraud, deceit, or misrepresentation" and with regard to *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). Prior legal ethics opinions have cited Gunter for the general proposition that "the mere fact that particular conduct is not illegal does not mean that such conduct is ethical," as well as for the more specific proposition that just because an attorney may legally tape-record a particular conversation does not necessarily mean he is permitted to do so under the ethics rules. *See*, LEO 1738. The committee opined that in most instances the prohibition established in 1217 should apply; however, the committee identified three necessary exceptions. The first exception is afforded to attorneys working in law enforcement. A second exception was specified for housing discrimination testers. The third exception would be triggered by either the threat or actual commission of criminal activity where the attorney is the victim. The committee makes a final clarifying point in LEO 1738 that this list of exceptions was not necessarily an exhaustive list; the opinion acknowledges that there may be "other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical." The opinion suggested that the committee would await a subsequent specific inquiry before addressing any other possible scenarios.

Your request for reconsideration of these prior opinions specifically seeks extension of the 1738 list of exceptions to include the various lawful activities performed by federal attorneys as part of the federal government's intelligence and/or investigative work. The exception created in LEO 1738 for "law enforcement," does not apply to all of these federal intelligence activities as, for example, the CIA is by statute prohibited from engaging in law enforcement. *See*, 50 U.S.C. § 403(d)(3). In contrast, the activities you wish this committee to consider are those involved in authorized intelligence or counterintelligence activities as well as "special activities," also known as "covert actions."

The "law enforcement" exception identified in LEO 1738 was based on several points of analysis. First, the opinion points out that a total ban on non-consensual tape-recording ignores the fact that such recording is a "legitimate and effective investigative practice for law enforcement." Second, the opinion looks at the impact of banning such activity and predicts that such a ban would hinder access to reliable information. Third, the committee opined that the ban in Gunter should be limited to its facts as that case presented especially egregious activity by the attorney involved, with such activity bearing little resemblance to legitimate law enforcement conduct. Fourth, the committee expressed concern that if lawyers were not able to direct non-attorneys to do this sort of activity, then lawyers would be discouraged from supervising investigators and law enforcement officers; the committee did not want to produce a chilling effect on needed supervision. Weighing clarity of an outright prohibition as suggested in LEO 1271 against the benefit of allowing the tape-recording by law enforcement professionals, the committee concluded that non-consensual recording, and other similar undercover techniques, are "methods of gathering information in the course of investigating crimes or testing for discrimination [that] are legal, long-established, and widely used for socially desirable ends."

In applying the analysis found in LEO 1738 to your situation, the committee notes one pertinent legal development since the issuance of that opinion. Specifically, the American Bar Association (ABA) issued Formal Ethics Opinion 01-422, addressing non-consensual tape-recording by attorneys. In that opinion, the ABA reverses its prior position, taken in Formal Opinion 337, that such recording is unethical. In the new opinion, the ABA concludes that under the ABA Model Rules of Professional Conduct, there is no blanket prohibition against an attorney electronically recording a conversation without the knowledge of the other party or parties to the conversation. LEO 1738 cites the now withdrawn Formal Opinion 337 in finding support for the conclusion in LEO 1738 that the conduct is impermissible outside of certain specific contexts. However, the committee does not see the ABA's reversal as cause to supersede the conclusions drawn in LEO 1738. 1738

cites Gunter as primary authority for the general tape-recording prohibition. The committee notes that while Formal Opinion 337, which is cited within Gunter, has been withdrawn, Gunter remains the current judicial authority regarding this issue in Virginia. Accordingly, with regard to the permissibility of tape-recording, this committee opines that the ABA's reversal on the question does not undermine the basis for the committee's conclusion in LEO 1738. With regard to other conduct at issue (such as alias identities), the committee notes that Formal Ethics Opinion 01-422 delineates that it is addressing exclusively the issue of tape-recording, and "leave[s] for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical." Therefore, this committee will look primarily to the Virginia Rules for Professional Conduct and prior opinions of this committee rather than the position of the ABA in resolving your question.

While the majority of the discussion in LEO 1738 does focus on non-consensual tape-recording, the opinion also applies the same analysis to other investigative techniques that may involve deceit or misrepresentation, such as the undercover identities used by housing discrimination testers. Thus, in resolving your question regarding intelligence and other related activities, the committee believes that its analysis in that opinion is easily extended to the sort of activities outlined in your request. The lawful methods used by intelligence professionals serve a similarly "important and judicially-sanctioned social policy" as that served when those methods are used by law enforcement professionals. The committee sees no reason to distinguish, for purposes of permissibility of investigative techniques under the Rules of Professional Conduct, between the activities of these two groups of government attorneys. As suggested by the closing language of LEO 1738, the committee contemplated there may be additional appropriate exceptions to the strict interpretation of former 8.4(c); the committee agrees with the requester that intelligence and covert activities of attorneys working for the federal government are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney employed by the federal government uses lawful methods, such as the use of "alias identities" and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

To the extent that anything in this opinion is in contradiction to the language in LEO 1217, that opinion is overruled.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

A Copy,
Teste:
Clerk

LEGAL ETHICS OPINION 1788
POTENTIAL RESTRICTION ON ATTORNEY'S RIGHT TO PRACTICE LAW WHEN CO. X REQUIRES ATTORNEY TO AGREE NOT TO FILE FUTURE LAWSUITS AGAINST CO. X IN EXCHANGE FOR SETTLEMENT CONDITIONS

You have presented a hypothetical situation involving three Virginia law firms ("Law Firms") involved in plaintiffs' personal injury claims arising out of exposure to asbestos. Law Firms are located in a Virginia metropolitan area of one million. The Law Firms include general practice attorneys, but for the past 25 years the Law Firms' practice has consisted primarily of the representation of individuals seeking compensation for personal injuries and wrongful death arising from exposure to asbestos. The clients represented by Law Firms were employed at X Corporation, which at that time, was the largest private industrial employer in the State. Along with several other law firms across the country, the Law Firms have developed a substantial expertise in the area of asbestos litigation, have a national reputation regarding same, and have successfully represented thousands of individuals in asbestos-related disability and death claims. These law firms with a national reputation for expertise in asbestos-related disability and death claims often represent plaintiffs outside the geographic areas in which they have offices.

The Law Firms include other lawyers who practice in other areas, including government contracts, general business, banking, real estate, and personal injury that is not asbestos-related. The Law Firms have represented a large number of claimants employed by X Corporation for asbestos-related injuries and death. Law Firms entered into an agreement (Agreement) with X Corporation which set forth the terms and conditions under which X Corporation would consider formal approval of settlements entered into between plaintiffs represented by the Law Firms and individual defendants in ongoing third-party asbestos litigation where X Corporation had actual or potential liability under workers' compensation laws for the plaintiffs' asbestos-related injuries.[1]

As part of the Agreement, twenty attorneys ("plaintiffs' attorneys") who were then associated with the Law Firms were required to personally and individually agree not to file or cause to be filed any future lawsuits against X Corporation, its parent company, its subsidiaries and any of their officers, directors, agents or employees under any theories of liability for asbestos exposure except actions for workers' compensation. In addition, the Agreement further required that all future partners or associates of the Law Firms, as a condition of their future employment, execute a copy of the Agreement and be personally and individually bound thereby. Examples of the restrictions on the right of plaintiffs' attorneys to practice law were listed in the Agreement as follows:

(1) No action shall be filed by plaintiffs' attorneys based on workplace exposure based on any theory other than workers' compensation.

FOOTNOTE

1 According to the hypothetical request, X Corporation's approval of Law Firms' settlements with third parties was necessary because of its actual or potential liability to these employees under Virginia workers' compensation laws or the Longshoreman and Harbor Workers' Compensation Act (LHWCA). Failure to secure X Corporation's consent would have forfeited the settling plaintiffs' right to receive future, lifetime workers' compensation benefits. Under the provisions of the LHWCA the employer has an absolute right to refuse to approve a third-party settlement. Good faith or reasonableness is not required. 33 U.S.C. § 933(g). Thus, X Corporation had the right to deny consent to a settlement, which would have deprived settling plaintiffs of future benefits. *See, Ingalls Shipbuilding, Inc. v. Director OWCP*, 519 U.S. 248 (1997). Prior to 2001, Virginia law also forfeited future compensation if an employee failed to get the consent of his employer to a third-party settlement. *See, VA Code* Ann. § 8.01-424.1.

(2) No action shall be filed by plaintiffs' attorneys for a present or former employee and/or his family for asbestos exposure outside the workplace.

(3) No action shall be filed by plaintiffs' attorneys arising out of the . . . asbestos litigation . . . which involves exposure at locations other than (X Corporation) on (structures) which were built or repaired by (X Corporation).

(4) No action shall be filed by plaintiffs' attorneys arising out of asbestos exposure of non-employees on premises owned or controlled or used by (X Corporation).

In addition, the Agreement provided that the restrictions pertaining to the practice of law would be submitted to the appropriate ethics committee of the Virginia State Bar for review. Any provision found to violate "any ethical standards or canons of the professional practice of law" would be deemed to be void and of no effect.[2]

Over the past 25 years, plaintiffs represented by the Law Firms who were employees or former employees of X Corporation have settled thousands of third-party asbestos-related personal injury or death claims pursuant to the terms of the Agreement. In addition, since 1983, the Law Firms, with the knowledge of X Corporation, have represented eighteen family members of former employees of X Corporation who contracted disabling and/or fatal asbestos-related diseases as a consequence of household exposure to asbestos-contaminated work clothes of a spouse, parent, sibling or other immediate family member.

Lawsuits were not filed against X Corporation in any of these household exposure cases. However in each instance, plaintiffs' attorneys submitted pertinent exposure history and medical data to X Corporation with a demand for payment. X Corporation negotiated and settled each of these claims with one of the plaintiffs' attorneys. The settlements were then approved by the appropriate circuit court upon petitions and orders prepared by plaintiff's attorneys and agreed upon by the plaintiffs and X Corporation. At no time did X Corporation object to plaintiffs' attorneys' representation of these claimants nor did it ever invoke the restrictions on plaintiffs' attorneys' right to practice law contained within the Agreement.

Because the parties have heretofore always been able to reach amicable settlements, the restrictions on the practice of law contained within the Agreement have not been submitted to any ethics committee(s) of the Virginia State Bar or to any other judicial or quasi-judicial body for review. However, plaintiffs' attorneys' currently represent 17 claimants who allegedly have contracted disabling and/or fatal asbestos-related diseases as a result of household exposure to asbestos-contaminated clothing brought home from work by a family member employed by X Corporation. Plaintiffs' attorneys have submitted these claims to X Corporation with demands for payment, but settlement of these cases appears unlikely. These claimants must now file lawsuits against X Corporation in order to receive a judicial resolution of their claims. X Corporation objects to the involvement of plaintiffs' attorneys in these lawsuits based upon the prohibitions on the practice of law contained within the Agreement.

You have asked the Standing Committee on Legal Ethics to address two issues:

1. Do the restrictions contained in the Agreement violate any ethics rules which prohibit an attorney from entering into an agreement, as part of the settlement of a suit or controversy, which broadly restricts the lawyer's right to practice law?

2. Do the restrictions contained in the Agreement violate any ethics rules that prohibit a lawyer from entering into a partnership or employment agreement that restricts the lawyer's right to practice after termination of the agreement?

Issue One: The Committee has concluded that the applicable and controlling rule is DR 2-106 (B) of the Virginia Code of Professional Responsibility in effect in April 1983 when the subject agreement was executed. That rule provided "in connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that broadly restricts his right to practice law."[3]

The Committee also notes that, at the time the Agreement was executed, lawyers practicing in the federal courts in the Eastern District of Virginia, by local rule, were subject to the ABA Model Code of Professional Responsibility.[4] DR 2-108 (B) of the ABA Model Code of Professional Responsibility at that

FOOTNOTE

2 The relevant language of the Agreement states:

It is understood and agreed that the provisions of paragraph 4 herein and the second sentence of paragraph 6 pertaining to restriction of the practice of law of plaintiffs' attorneys shall be submitted for review by appropriate ethics committee(s) of the Virginia State Bar Association [sic].

(1) If it is determined that the provisions of paragraph 4 and/or the said second sentence of paragraph 6 do not violate any ethical standards or canons of the professional practice of law, then the said provisions shall continue in full force and effect.

(2) If it is determined that any of the provisions of said paragraph 4 or the said second sentence of paragraph 6 violate any ethical standards or canons of the professional practice of law, then, in that event, the said paragraph 4 or such portions thereof and/or the said second sentence in paragraph 6 shall be deemed to be void and of no effect. However, the parties hereto agree that if the reviewing committee offers any guidelines along which the said provisions may be rewritten so as not to violate any ethical standards or canons of the professional practice of law, the parties hereto will in good faith negotiate to attempt to reach an Agreement on appropriate revisions.

(3) In the event that paragraph 4, or portions thereof, or the said second sentence in paragraph 6 shall be determined to be invalid and thereby void and or no effect, the same shall not affect in any respect the validity of any other paragraph of this Agreement.

FOOTNOTE

3 Former DR 2-106 (B) is similar to current Virginia Rule 5.6 (b) adopted by the Virginia Supreme Court on January 1, 2000, although the current rule *permits* a broad restriction on a lawyer's right to practice law if approved by a tribunal or a governmental entity.

4 In 1983, Local Rule 7 (I) of the Eastern District of Virginia stated: "The ethical standards relating to the practice of law in this court shall be the Canons of Professional Ethics of the American Bar Association now in force and as hereafter modified or supplemented." By the time the agreement was executed in 1983, the original ABA Canons of Professional Ethics had become the ABA Model Code of Professional Responsibility.

time stated: "in connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." Model Rule 5.6, subsequently adopted by the ABA, contains similar language: "a lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice law is part of the settlement of a client controversy."

The Committee has not determined whether the ABA rules govern your hypothetical. That is an issue beyond the Committee's purview. When issuing advisory opinions the Committee applies the Virginia rules, not the rules of another jurisdiction. Therefore, while it could be that the ABA rules may also govern the conduct of the plaintiffs' attorneys when practicing in federal court in the Eastern District, the plaintiffs' attorneys in your hypothetical are licensed to practice in Virginia and therefore subject to professional regulation by the Virginia State Bar. The lawyers in your hypothetical, therefore, are bound by the Virginia Rules of Professional Conduct, or its predecessor, the Virginia Code of Professional Responsibility.

Whether an agreement between an attorney and a settling defendant broadly restricts the right to practice law in violation of DR 2-106(B), is a "fact-intensive question and cannot be answered in an all-encompassing fashion." Va. Legal Ethics Op. 1715 (1986). Factors to be considered include the nature, scope and geographical location of the attorneys' practice, the composition of the surrounding legal community and the significance of the defendants' role in the community. *Id.* Also of importance is whether the attorney has represented similarly situated plaintiffs against the defendant in the past and whether the attorney has an expectancy of representing plaintiffs against the defendant in the future. *Id.* In addition, whether the restriction is "broad" is to be analyzed in terms of its impact on the practice of each individual attorney and not the law firm as a whole.[5]

In 1985, this Committee held that a settlement agreement which contained a provision preventing a plaintiff's attorney from thereafter accepting cases or prosecuting similar claims against the same defendant was improper under DR 2-106(B), the predecessor to Rule 5.6(b). Va. Legal Ethics Op. 649 (1985).[6] In contrast, LEO 1715, supra, the Committee found that the proposed agreement in that case did not violate DR 2-106(B). However, the facts in that opinion are dissimilar to those in the hypothetical now being presented to the Committee. In LEO 1715, plaintiffs' attorney settled an employment discrimination suit on behalf of a former employee against the former employer. Plaintiffs' attorneys, because of their intensive discovery of defendant's employment records, were in a unique position to provide valuable advice to the employer regarding its employment practices. As part of the settlement agreement the plaintiffs' lawyers were hired for a fee by the defendant employer to provide advice regarding its employment practices. As a result the plaintiffs' lawyers were conflicted out of future cases against the defendant employer.

In upholding the agreement, the Committee in LEO 1715 remarked that it promoted the public good by assisting the defendant employer in its effort to bring its employment practices in compliance with the spirit of employment-related laws and by helping to promote good employment practices. In addition, the plaintiff's lawyers in that hypothetical did not represent any other client adverse to the employer and had no expectation of such representation in the future. More importantly, unlike the settlement agreement in LEO 649 and the Agreement now before this Committee, the agreement in LEO 1715 did not include a provision that the plaintiffs' lawyers would be prevented from prosecuting similar claims against the defendant employer in the future. Thus, the Committee believed that the agreement under consideration in that opinion did not violate the important public policy favoring clients' unrestricted choice of legal representation. *See* Committee Commentary to Virginia Rule 5.6.

The Committee observed that "[t]he common thread in the settlement agreements uniformly disapproved by other ethics panels was an explicit provision that prohibited representation of future clients against the same defendant." *ABA/BNA Lawyers' Manual on Professional Conduct* 51:1209-51:1212 (1995). It opined that, because the settlement agreement did not directly restrict plaintiff's attorneys from subsequent representation adverse to the defendant employer and because the employers' employment of plaintiffs' attorneys was not a ruse to circumvent DR 2-106(B), the Disciplinary Rule was not implicated.[7]

In the hypothetical you present, the Agreement with X Corporation specifically prohibits the individually signing attorneys from filing or causing to be filed any action on behalf of any plaintiff at *any* future time for *any* asbestos-related cause of action on any theory other than workers' compensation.

The Committee acknowledges other bar opinions holding that agreements similar in nature to the Agreement in your hypothetical have been deemed improper restrictions on the lawyers' right to practice law. However, most of those opinions applied rules which on their face appear to prohibit *any* restriction on a lawyer's right to practice law. Virginia's rule is unique and requires that the settlement agreement *broadly* restrict a lawyer's right to practice law.

The circumstances presented in your hypothetical are complex, and invite the Committee to make factual findings to determine whether the Agreement at issue creates a *broad* restriction of the plaintiffs' lawyers' right to practice law. Some of the factual matters include, for example: the length of time the parties have operated under the agreement; the numbers of cases settled or resolved in the past; the number of cases likely

FOOTNOTE

5 Eleven of the individually-signing plaintiffs' attorneys were not involved in the asbestos litigation but were required to sign the agreement because of their employment by one of the Law Firms. Seven of the individually-signing plaintiffs' attorneys devoted 100% of their practice to asbestos-related litigation. The remaining two plaintiffs' attorneys committed a portion of their practice to the asbestos litigation.

6 *See also* Oregon State Bar Legal Ethics Committee, Opinion 258 (1974); D.C.Bar Legal Ethics Committee, Opinion 35 (1977); and ABA Formal Opinion 93-371 (1993), holding that a lawyer may not accept or be part of a settlement agreement that would limit the ability of the lawyer to accept representation of future clients.

FOOTNOTE

7 The Committee in LEO 1715 cited, but did not appear to rely upon, Alabama State Bar Opinion 85-115 (1986), which permitted a restriction on a plaintiff's attorney's right to prosecute future cases against a settling defendant. The opinion, which contained a limited recitation of facts, stated without discussion or explanation that the settlement agreement in that case did not broadly restrict the plaintiff attorney's right to practice law.

to develop in the future where clients would have a direct action against Corporation X; the ability of clients to find other lawyers of equivalent expertise and experience in handling these cases; the nature and scope of the practices of the lawyers who are parties to the Agreement; the geographical location of those lawyers and the significance of the defendant Corporation X in the local community.

The Committee's role is to apply and interpret the Virginia Rules of Professional Conduct, not make findings of fact. The latter function is best suited for a court of law where the parties can present evidence to a trier of fact and have a determination made. Accordingly, the Committee does not reach a conclusion whether the subject Agreement imposes a broad restriction on the right to practice law.

Issue 2: The Agreement requires the plaintiffs' attorneys to agree that all of their future partners or associates be required, as a condition of their employment, to execute a copy of the Agreement and to be personally and individually bound thereby. By signing the Agreement, each and every future partner or associate of the Law Firms would be bound by the restrictive covenants found in the Agreement in perpetuity regardless of whether or not they terminated their relationship with the Law Firms.

Both DR 2-106(A) and Va. Rule 5.6 (a) prohibit a lawyer from entering into a partnership or employment Agreement restricting his right to practice law after termination of the relationship, except as a condition of payment of retirement benefits. In discussing DR 2-106(A),[8] this Committee has stated:

> The fundamental premises, though at times unspoken, are that clients of a law firm are not commodities, and that the law firm is not a merchant. If there is a break up of the firm initially chosen by a client, the client selects the lawyer or law firm to represent him thereafter. A client's freedom to hire counsel of his choice transcends a law firm's interest in being protected against "unfair" competition . . . . Clients are not "taken"; they have an unfettered right to choose their lawyer. Correspondingly, lawyers withdrawing from a law firm have an unfettered right to represent clients who choose them rather than choose to remain with the law firm.

Va. Legal Ethics Op. 1556 (1994) (citations omitted). The adoption of Rule 5.6 (a) does not change this view in any respect. Comment 1 to Rule 5.6 states:

> An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

This Committee has previously found it improper for an attorney and a law firm to enter into an employment agreement which precludes the attorney from practicing in the same geographical area as the firm even for a stated period of time after the attorney leaves the firm's employment. Va. Legal Ethics Op. 246. *See also* Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* § 40-1.1 (2000-01) (noting that ABA Model Rules and the ABA Model Code both prohibit employment contracts restricting a lawyer's right to practice law after termination of the employment relationship even if such restrictions are limited temporally and geographically). It does not matter what form the restriction takes. *See* VA. Legal Ethics Op. 1615 (1995) ("[t]he 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 restrictions in the current hypothetical are even more restrictive than the non-competition agreement in LEO 246. They apply to all plaintiffs' attorneys, existing and future, regardless of the nature of their practice, in perpetuity, and in all geographical areas. X Corporation could not have bound even its in-house counsel in this manner. *See* LEO 1615 which held that an agreement in which a corporate general counsel agreed not to work for a competitor of his corporate employer for one year following termination of employment violated VRPC 5.6(a).

Resolution of this second issue, unlike the first, does not require extensive factual analysis and findings. The language contained within DR 2-106(A) and VRPC 5.6(a) is clear, unambiguous and not subject to varying interpretations. Lawyers are not permitted to enter into agreements that, as a condition of their employment, restrict their right to practice law after termination of their employment, except an agreement concerning benefits upon retirement. In the hypothetical presented to the Committee, eleven lawyers with no involvement in the asbestos-related litigation were required to execute the Agreement simply because of their affiliation with one of the Law Firms. In addition, all future partners and associates of the Law Firms, as a condition of their employment, were required to sign the Agreement and be personally bound thereby.

By executing the Agreement these lawyers were required to bind themselves to the restrictive provisions contained therein as a condition of their employment. These restrictions are unlimited in duration and do not end upon termination of the lawyer's affiliation with either of the Law Firms. This Committee opines that these restrictive provisions violate DR 2-106(A) and Rule 5.6(a).

Whether the restriction is void and of no effect is a question of law beyond the purview of this Committee.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
February 17, 2004

FOOTNOTE

8 The VCPR predecessor to Rule 5.6 (a) was DR 2-106(A). DR 2-106(A) prohibited a lawyer from being "a party to" such an agreement, but was otherwise identical to Rule 5:6(a). *See, e.g.*, Va Legal Ethics Op. 1556 (1994) (quoting DR 2-106(A)).

LEGAL ETHICS OPINION 1789
CLIENT FILE—WHETHER AN ATTORNEY CAN REFUSE TO RELEASE INFORMATION AND MEDICAL REPORTS TO CLIENT AT HIS REQUEST

Your request presented a hypothetical situation involving a lawyer representing a client before the Social Security Administration. The client is seeking disability benefits under Title II of the Social Security Act. The client has disabling mental impairments affecting both personality and judgment. In the course of this representation, the attorney secured a copy of a report developed by the client's treating psychologist. The psychologist had prepared the report specifically at the direction of the client's long-term disability insurance carrier to determine the client's eligibility for those benefits. The carrier paid for the report.

The attorney's standard practice is to have the client secure the report directly from the evaluator so that the evaluator can discuss with the patient the implications of any findings or opinions expressed in the medical records. However, in the present instance, the carrier directed the psychologist not to release a copy of the report to the client. The psychologist refuses to authorize release of the report to the client; the attorney cannot ascertain whether this is for medical reasons or due to the carrier's instructions. The attorney is mindful of the client's right to obtain the record from his own Social Security file were he to so request.

Under the facts you have presented, you have asked this Committee to opine as to the following questions:

1. Is a medical record obtained in the course of litigation and submitted to the tribunal in support of the client's case part of the "client's file" requiring disclosure to the client pursuant to Rule 1.16(e)?

2. Can the insurance carrier and/or the psychologist prohibit the lawyer from providing this report to the client?

When a lawyer's client requests the contents of the file, the appropriate response for the lawyer hinges on whether the representation has terminated. The ethical duty of response to such a request varies depending on whether the requester is a current or a former client. During the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a), regarding communication. However, upon termination of the representation, the lawyer must follow the directives of Rule 1.16(e) regarding the disposition of the client's file.

Throughout representation of a client, Rule 1.4 requires the attorney to ensure proper attorney/client communication, outlined as follows:

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Generally, the rule does not direct the means by which an attorney may "keep a client reasonably informed." Depending on the circumstances, information may reasonably be provided, for example, at a meeting, in a telephone call, in a letter or other document, or via e-mail correspondence. Nevertheless, the rule requires more than just this general duty to keep the client reasonably informed; the lawyer is also required to "promptly comply with reasonable requests for information." A client's request for a copy of a particular document or documents in the file must be considered in light of that duty. While a lawyer may not be required to provide all file contents whenever requested, the lawyer must be sure to comply with 1.4(b) in responding to any reasonable client request for documents during the course of the representation. Additionally, the Committee notes that the attorney also has a duty to the client under Rule 1.15(c) to return client property received by the attorney to the client upon request.

The lawyer's obligations regarding file contents change upon termination of the representation. Rule 1.16 governs the termination of an attorney/client relationship. Paragraph (e) of that rule specifically addresses a lawyer's obligations regarding provision of file contents to a client upon request at the end of the representation. That paragraph states as follows:

RULE 1.16 Declining Or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the

> lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

The thrust of this rule is to require an attorney to provide the file at the termination of the representation, upon request of the client, one time. Paragraph (e) specifically addresses how to handle the client's file, with language breaking file contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property; the attorney must unconditionally return them to the client upon request. While the attorney may make a copy of such documents for his own use, he may not charge that copying expense to the client.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client, research materials, and copies of prior bills. For this second category, a lawyer may charge the client for the expense of the lawyer's making a copy of the items for his own retention. However, the attorney may not condition the release of the documents upon the client's prepayment of copying expenses.

A third category presented in Rule 1.16(e) includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client.

In applying paragraph (e)'s categories to the medical report at issue, the key category is the second one. That category in paragraph (e) includes "documents prepared by or collected for the client in the course of the representation." That language clarifies that the directive of the provision applies not only to material developed by the attorney himself but also to those documents obtained from others for the representation. A medical report from the client's treating psychologist is just such a document. Thus, the Committee opines that this medical report is part of the client file for purposes of Rule 1.16(e).

This request questions further whether either the carrier or the doctor can prohibit the attorney from providing the client with a copy of this report. In considering that question, this Committee references its previous opinion regarding carrier directives to insureds' attorneys. See, LEO 1723. In that opinion, which dealt with a carrier's directives to an insured's attorney to work with certain limitations on the scope of representation, the Committee noted that the attorney must remain mindful that he represents the insured, not the carrier. Accordingly, in rejecting the attorney's acceptance of the restrictions, the Committee noted:

> [I]t is ethically impermissible for an attorney to agree to an insurance carrier's restrictions on the right of the insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions.

Similarly, the present attorney must be mindful of the fact that he represents the patient, and not the carrier or the psychologist. This attorney should not follow the instruction of these nonclients to breach the attorney's ethical duties owed to his client, such as provision of file contents pursuant to Rule 1.16(e).

The Committee notes that while question two does not make express mention of mental health concerns as the reason for the psychologist's directive in this matter, the facts in the hypothetical do raise that possibility. Were the attorney to determine that the psychologist wants to preclude client access to the report out of concern for the effect on the client of such disclosure, the attorney may wish to consider whether Rule 1.14 is implicated in his situation.

Rule 1.14 provides guidance to an attorney with a client with impairment. In particular, the rule allows an attorney to take protective action with regard to his client under certain circumstances when the client cannot act in his own interest. The limited facts presented do not allow for analysis of whether Rule 1.14 is triggered in this particular situation. However, the Committee does note that while an attorney may never withhold a medical report from a client merely at the request of some other party, in rare instances, an attorney may appropriately consider whether the client is able to act in his own interest with respect to requesting the information.

The Committee further notes that the conclusions drawn in this opinion are only those within the purview of this Committee to interpret the Rules of Professional Conduct. Comment 11 to Rule 1.16 states that "the requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law." Interpretations of authority other than the Rules of Professional conduct would be beyond this Committee's purview. Accordingly, this opinion does not address legal questions of permissibility of disclosure of medical records under legal authority such as Virginia Code §§ 8.01-413 and 32.1-127.1:03 or the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. 1301 *et. seq.*

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 20, 2004