

LEGAL ETHICS OPINION 1403

FEES; LAW FIRMS; EMPLOYMENT AGREEMENT; PROPRIETY OF EMPLOYMENT AGREEMENT; REQUIRING CLIENT TO CONTACT FIRM; RETENTION OF CLIENT FILES BY FIRM; DIVISION OF FEES BETWEEN ATTORNEYS.

You have presented a hypothetical situation in which an associate is hired by a large law firm upon graduation from law school. Six months later, he is presented with an agreement which purports to settle future disputes regarding the allocation of attorneys' fees upon termination of said associate from the firm. After three years of employment, the associate and firm agree to terminate the employment. The associate communicates his belief that the agreement is unenforceable. The firm seeks enforcement of the agreement in a civil forum.

The agreement provides that the attorney agrees that all client files, client lists, calendars, or any other documents or copies thereof prepared during the attorney's tenure with the firm, and related to the attorney's work for the firm, are the property of the firm and shall not be removed by the attorney from the premises of the firm in connection with the attorney's intended or actual termination.

The agreement also states that the firm will send a letter to all clients of the attorney, indicating the attorney's termination and requesting the client to indicate a choice of attorney for continued representation. Furthermore, the agreement requires that the attorney will at no time during his/her association with the firm and thereafter until the receipt by the firm of a response from the client to the letter regarding client's election, contact the client regarding his termination or discuss his termination with the client.

The agreement further provides for a schedule for the apportionment, between the attorney and the firm, of all fees generated by the attorney on any client's case in which the client elects to be represented by the attorney after the attorney leaves the firm.

You have asked the Committee to opine whether, under the facts of the inquiry, the agreement is proper, with particular reference to the issues of conditions restricting the attorney's right to practice and the division of client fees between the firm and its former associate.

The appropriate and controlling disciplinary rules related to your inquiry are DR:2-105(D), DR:2-106(A), DR:2-108(D), and DR:5-106(B).

Disciplinary Rule 2-105(D) states that a division of fees between lawyers who are not in the same firm may be made only if: (1) the client consents to the employment of additional counsel; (2) both attorneys expressly assume responsibility to the client; and (3) the terms of the division of the fee are disclosed to the client and the client consents thereto. Disciplinary Rule 2-106(A) provides that a lawyer shall not be a party to

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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. Disciplinary Rule 2-108(D) states that, upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. Also, the lawyer may retain papers relating to the client to the extent permitted by applicable law. Disciplinary Rule 5-106(B) states that a lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to regulate his professional judgment in rendering such legal services.

The Committee opines that the provision in the agreement that the attorney is not to contact a client regarding his termination until the firm has first received a response to its letter on the client's election amounts to a restrictive covenant, in violation of DR:2-106(A). The policy behind the ban on such restrictions is to protect the ability of clients to freely choose counsel and to protect the autonomy of that counsel. The agreement provision restricts the ability of the client to make an informed and free choice of counsel.

Also, the Committee opines that requiring the client to contact the firm violates DR:5-106(B) in that the employer/firm would be directing and regulating the lawyer's professional judgment in the providing of legal services to his/her client.

The Committee has consistently opined that the client, and not the lawyer or law firm, owns the file, except where a lien to protect attorney fees is permitted by law. Even where a lien is appropriate the file must be made available to avoid prejudice to the client. See LE Op. 1366, LE Op. 1176, LE Op. 1171.) Therefore, the Committee opines that the provision in the agreement which states that all client files prepared during the attorney's tenure with the firm are the property of the firm and that the firm will retain control over the files, violates DR:2-108(D).

As to the division of fees, the Committee has previously opined that the provisions in any employment agreement must meet all of the requirements of DR:2-105(D). The Committee opines that the division of fees and the sliding fee schedule outlined in the agreement in question are in violation of DR:2-105(D), in that there is no provision for client consent to joint counsel; there is no provision for both the firm and the attorney to assume responsibility for the client; and there is no provision for the terms of the fee division to be disclosed to, and consented to by, the client.

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