

LEGAL ETHICS OPINION 1711

PARTNERSHIP AGREEMENT; CAPITAL  
ACCOUNTS AND RETIREMENT  
BENEFITS; RESTRICTIONS ON  
PARTNERS WITHDRAWING FROM  
PARTNERSHIP.

You have presented a hypothetical situation in which a firm practices law as a limited liability partnership. New partners are not required to buy into the partnership, but capital accounts are established for each new partner at zero balance with a share of the partnership's capital assets credited to each account as the partner's seniority grows. With the approval of the firm's Management Committee, partners are permitted to draw down portions of their capital accounts for the purpose of furnishing their offices. Senior partners' accounts frequently are in the \$65,000-\$75,000 range. Until 1996, the partnership provided that:

In the event of the voluntary withdrawal or retirement of any other partner, he or she shall only be entitled to the amount shown on the partnership books as the capital account of said partner at the close of the preceding calendar year, which amount shall be payable, at the option of the partnership, over a period of one hundred twenty (120) months.

In 1997 the preceding provision of the partnership agreement was amended to add:

In the event the partner voluntarily withdraws from the firm and retires from the practice of law, his or her capital account shall be paid over a period of sixty (60) months.

You are concerned that additional language permits the firm to penalize a withdrawing or retiring partner who chooses to continue practicing law following his or her departure from the firm. If he or she gives up the practice of law, the capital account must be paid out over a period of five years. If he or she chooses to continue to practice law, the partnership has the option of paying out the capital account over a period of up to ten years.

Under the facts you have presented, you have asked the committee to opine as to whether the additional provision to the partnership agreement creates an impermissible restraint on the withdrawing attorney's right to practice law after the termination of the partnership relationship. You also ask whether a withdrawing partner's entitlement to his or her capital account upon withdrawal or retirement constitutes a retirement benefit within the exception to DR:2-106(A). The appropriate and controlling disciplinary rule relative to your inquiry is DR:2-106(A) which states:

a lawyer shall not be a party to a 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.

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The committee has previously opined that it is not permissible for a firm to restrict departing attorneys: from practicing within a “reasonable radius” of the firm in order to obtain benefits under an unqualified deferred compensation plan (LE Op. 880); to wait to contact their clients regarding their termination until the firm first receives a response to its letter to the client seeking an election of an attorney to proceed on their cases (LE Op. 1403); from practicing within the same geographic area as the firm for a specified period after termination of employment (LE Op. 246); and from receiving termination compensation if a covenant not to compete with the firm is violated (LE Op. 428).

The committee has also held that *only* (emphasis added) those agreements which restrict the lawyer's right to practice after the termination of their relationship are prohibited; there is no prohibition on agreements that affect the termination of the relationship itself (LE Op. 985).

In the facts you present, the committee believes that the different time periods in the firm's pay-out of the departing attorney's capital account is an agreement affecting only the termination of the relationship itself, not a restriction on the attorney's right to continue to practice law after the termination of the relationship. Therefore, in the committee's opinion, the additional provision in the partnership agreement is not a violation of DR:2-106(A).

Since the committee finds no violation of the Code of Professional Responsibility here, your second question regarding whether this capital account constitutes a retirement benefit is rendered moot.

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November 21, 1997