

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

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.

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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.
- (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

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 of no effect, the same shall not affect in any respect the validity of any other paragraph of this Agreement.

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

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.

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Model Code of Professional Responsibility.⁴ DR 2-108 (B) of the ABA Model Code of Professional Responsibility at that 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,

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.

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.

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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

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.

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 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

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)).

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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.

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