

In this hypothetical, Attorney C was a partner with Abbott, Booth & Costello from 1990 through 2000. Attorney C formed a new law firm in 2000, Costello, Dell & Edwards. Attorney C resigned from Costello, Dell & Edwards on May 15, 2007, which is now Dell & Edwards. On May 15, 2007, Attorney C was convicted of a felony for alleged actions taken on behalf of a client while employed by Abbot, Booth & Costello in 1995. As of yet, Attorney C has not been contacted by the Virginia State Bar and still holds a valid Virginia State Bar license. Attorney C assumes his license will be suspended or revoked in the future and seeks advice on the permissible extent of his involvement with both former firms and other law firms, such as Xander, Young & Zimmer, where there has been no past association by Attorney C. Attorney C also seeks advice on his ability to own and operate a company that provides non-legal project management and business management services and whether the entity can enter into contracts and provide services to his former law firm and/or any other lawyers, law firms or professional corporations.

QUESTIONS PRESENTED

- 1) Which of these dates triggers the employment prohibition in Rule 5.5(a): (i) the date of the alleged acts which resulted in a felony conviction; (ii) the date of the felony conviction; or (iii) the date of suspension or revocation by the Virginia State Bar? More specifically, does Rule 5.5(a) prohibit Dell & Edwards from employing Attorney C during the term of Attorney C's suspension or revocation?
- 2) Does Rule 5.5(b) prohibit Xander, Young & Zimmer from employing Attorney C in a capacity other than "consultant, law clerk or legal assistant" and can the firm permissibly undertake the representation of former clients of Attorney C during the term of his suspension or revocation?
- 3) Is Attorney C prohibited from owning and operating, or simply being employed by, Costello Management, LLC, an entity created to provide non-legal project management and business management services? Can the entity enter into contracts and provide services to either Attorney C's former law firm and/or any other lawyers, law firms or professional corporations?

APPLICABLE RULES & OPINIONS

The appropriate and controlling rules relative to this hypothetical are Rules 5.5(a) and (b).¹ Also pertinent to the Committee's analysis are LEOs 1260, 1490 and 1514.

ANALYSIS OF THE QUESTIONS PRESENTED

¹ Rule 5.5. Unauthorized Practice Of Law; Multijurisdictional Practice of Law.

(a) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.

(b) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk, or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

In answering the first question, the propriety of Attorney C's employment by Dell & Edwards is dependent upon the determination of the "date of the acts which resulted in suspension or revocation." In your hypothetical, the alleged acts which resulted in suspension or revocation are actions or omissions that occurred in the course of Attorney C representing the client in 1995 that led to the felony conviction. Assuming this is correct and applying the "date of the acts which resulted in suspension or revocation," i.e., 1995, Attorney C may not be employed in any capacity by either of Attorney C's former law firms. In other words, the trigger date for the employment prohibition in Rule 5.5(a) is really the date of the alleged misconduct resulting in suspension or revocation of the lawyer's license, not the date of the felony conviction nor the date that the Disciplinary Board suspends or revokes Attorney C's license. The actual determination, however, of the "date of the acts which resulted in suspension or revocation" is both a factual and legal determination outside the purview of this Committee.

As to your second question, Rule 5.5(a) is precise in its prohibition of Attorney C working "in any capacity" for a firm he had previously been associated with "at any time on or after the date of the acts which resulted in a suspension or revocation." Further, Rule 5.5(b) provides restrictions regarding the representation of Attorney C's former clients where Attorney C is employed as a "consultant, law clerk or legal assistant." The prohibition in this rule clearly bars Attorney C's employment as a "consultant, law clerk, or legal assistant," but is silent about employment in other capacities in a law firm, i.e., bookkeeper, receptionist or office manager. The Committee opines that Xander, Young & Zimmer may employ Attorney C in the capacities specifically listed in Rule 5.5(b) as well as in any position or title, regardless of name, if the work is typically performed by a "consultant, law clerk or legal assistant;" however, the firm then may not represent any former client of Attorney C or his former law firm.² Conversely, it would be permissible under Rule 5.5(b) for Xander, Young & Zimmer to employ Attorney C in any other capacity except as a "consultant, law clerk or legal assistant" and continue to represent former clients of Attorney C or his former law firm.

In response to question three, this Committee opined in LEO 1260 that Rule 5.5(a) (DR:3-101(B)) would act as a bar to a law firm's retention of an adjusting firm where the firm's former disbarred partner was "the Chief Executive Officer providing administrative services to the insurance adjusting company and the specific employee who would provide to the law firm the services as described.... The Committee is of the view that the rule expressly prohibits former attorney 'X' from rendering any services to the two attorneys who are currently principals in the law firm of A, B, and C but who were formerly associated in the law firm which was founded by former attorney 'X.'" LEO 1260.

In LEO 1491, however, the Committee opined that a lawyer who only provided sporadic referrals to a law firm, together with a sublease arrangement, was not in "association" with the law firm as to prohibit the lawyer from later working for the law firm or owning an interest in a title company that provides non-legal services to clients of the law firm. Consequently, relying on the analysis in these former opinions, Attorney C cannot be associated or employed in any capacity with a company that provides services to Dell & Edwards; however, nothing would prohibit Attorney C from owning or being employed by an entity that provided non-legal services to any other law firm or company.

CONCLUSION

² See LEO 1514. The Committee enumerated various functions that if performed by a suspended lawyer would be a violation of Rule 5.5(b) (DR:3-101(C)), which include: clerical duties involved in the preparation of Warrants, Garnishments, pleadings and other legal papers; communications with personnel in various Clerk's Offices; communication with personnel employed by collection clients; routine duties normally associated with debt collection; routine accounts of money collection on behalf of collection clients; and calculation of fees and preparation of bills.

Rule 5.5(a)'s language "the date of the acts which resulted in suspension or revocation" means the date of the alleged misconduct or acts upon which the lawyer's suspension or revocation is based. Determination of the actual date is both a factual and legal determination made by a disciplinary tribunal and beyond the Committee's purview.

A law firm may not employ *in any capacity* a suspended or revoked lawyer if the disciplined lawyer was associated with that firm on or after the dates of the acts which resulted in suspension or revocation. A law firm not subject to the hiring prohibition in Rule 5.5 (a) may hire the disciplined lawyer as a consultant, law clerk or legal assistant provided the hiring firm does not then represent any former or current clients of the disciplined lawyer or clients of the lawyers or law firms prohibited from hiring the disciplined lawyer in any capacity.

Further, nothing would prohibit the suspended or disbarred lawyer from owning or being employed by a business providing non-legal services as long as that business is not employed by one of the lawyer's former law firms.

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

Committee Opinion
December 9, 2009