

Thursday 20th July, 2006.

On April 3, 2006 came the Virginia State Bar, by Phillip V. Anderson, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Rule 5.6(b), Section II, of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended to read as follows:

RULE 5.6 Restrictions On Right To Practice.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity.

COMMENT

[1] An agreement restricting the right of lawyers 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.

[2] Paragraph (b) prohibits lawyers from agreeing to a restriction on their right to practice, unless approved by a tribunal (in such situations as the settlement of mass tort cases) or a governmental entity. However, the lawyer must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 2-106, although it specifically permits a restriction if it is approved by a tribunal or a governmental entity.

COMMITTEE COMMENTARY

After a lengthy debate about the merits of settlements and the public policy favoring clients' unrestricted choice of legal representation, the Committee decided to generally prohibit provisions in settlement agreements that restricted a lawyer's right to practice, but added an exception if a tribunal or a governmental entity approves the restriction. The Comment emphasizes that lawyers whose right to practice has been restricted by a court-approved settlement should advise all future clients of the restriction and refer them to other counsel, if necessary.

Originally, Rule 5.6(b) prohibited only *broad* restrictions on an attorney's right to practice in settlement agreements. However, in line with the recommendations of the Boyd-Graves Conference Report of August 2004, the prohibition in Rule 5.6(b) is now expanded to reach *all* restrictions on the right to practice in settlement agreements, other than those within the exception afforded for settlement agreements approved by a tribunal or governmental entity. The current more expansive prohibition is in line with both the ABA's Model Rule 5.6 and with provisions in other jurisdictions.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective September 1, 2006.

A Copy,

Teste:

Clerk