Committee Opinion
February 24, 1998

LEGAL ETHICS OPINION 1715 — SETTLEMENT AGREEMENT; FUTURE CONFLICTS; RESTRICTION OF LAWYER'S PRACTICE.

This responds to your letter dated December 15, 1997, requesting an advisory opinion that addresses a proposed settlement agreement concluding an employment discrimination case that a former employee, represented by Lawyers A and B, brought against the former employer, XYZ Company and a supervisor. The relevant provisions of the settlement agreement are, as follows:

> 1. **Payment to Plaintiff**. Within five business days of the signing of this Agreement by all parties, XYZ Co. will pay Plaintiff and her attorneys the sum of _____ thousand dollars ($___,000.00).
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> 2. **Employment Counseling and Training for XYZ Co. and its Parent**. The Parties recognize that Plaintiff's attorney, Lawyer A and Lawyer B, have as a result of the discovery process in the litigation, gained an insight into XYZ Co.'s employment policies that could be extremely useful in furthering the goals of (1) XYZ Co. and its parent company to comply with the letter and the spirit of employment-related laws, and (2) Plaintiff and her attorneys to help promote employment policies that are beneficial to the many other employees, black and white, of those companies and to advance the objectives of the various federal and state laws at issue in the litigation. Therefore, the Parties agree that Lawyer A and Lawyer B shall within 90 days of the execution of the Agreement, sit down with various managers from XYZ Co. and from the parent of XYZ Co. for a total of at least eight hours on two different days, at a place of XYZ Co.'s choosing in _____ County, Virginia, and based upon what they learned in the litigation and additional employment-related information confided to them in the meeting, provide advice and counseling to XYZ Co. and its parent on any changes to employment policies and/or practices that either of the attorneys believes would be both practical and beneficial to the companies, including but not limited to advice on how to deal with current employment issues raised by the managers and how to avoid future employment-related litigation. In exchange for this advice and counseling XYZ Co. shall pay $3,250 in advance to each Lawyer A and Lawyer B. While XYZ Co. and its parent would like to have further advice and counseling from Lawyer A and Lawyer B beyond the initial meetings, neither Lawyer A nor Lawyer B is obligated to provide such further advice or counseling.
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> XYZ Co. shall pay $200 per hour to each of Lawyer A and Lawyer B for additional time (including travel) spent beyond the initial eight hours.
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> 13. **Disclosure and Waiver of Possible Conflict/No Reapplication for Employment**. Plaintiff recognizes that, as a result of this settlement, it is likely that neither Lawyer A nor Lawyer B would be able to represent her in a further employment-related dispute against XYZ Co., its employees or its parent. Plaintiff

> also recognizes, however, that, as a result of this settlement she has given up any such claim. Because Plaintiff hereby promises, as part of this settlement, never again to apply for employment with XYZ Co. or its parent, she recognizes that she cannot have any future employment-related claims against XYZ Co., its employees, or its parent. Furthermore, as plaintiff has stated from the outset of this litigation, she did not bring this litigation for the money; she brought it in order to improve things at XYZ Co. for the employees who work there, some of whom are her friends. Plaintiff sincerely desires XYZ Co. and its parent to have the benefit of the above-described counseling from Lawyer A and Lawyer B because such counseling will help accomplish her objective in this litigation. Therefore, Plaintiff hereby voluntarily waives any actual or apparent conflict of interest inherent in or created by this Agreement.

In the facts you present, plaintiff and defendants agree that plaintiff's lawyers are in a unique position, by reason of their intensive discovery of defendants' employment records, to provide valuable advice to defendants that will assist defendants in conforming employment practices to the requirements of applicable law. In the facts you present, plaintiff's lawyers have not represented any other client adverse to defendants and do not have a present expectation of such representation in the future. Finally, in the facts you present, plaintiff's stated objective in bringing the litigation against defendants will be furthered if defendants' employment practices are improved in conformity with applicable law as a result of advice provided to defendants by plaintiff's lawyers following the settlement agreement.

Based on the facts presented, you have asked the committee to address the following questions:

> 1. Does the proposed settlement agreement violate DR:2-106(B) which prohibits a lawyer from entering into a settlement agreement which "broadly restricts" the lawyer's right to practice law?
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> 2. Does the proposed agreement offend the ethical precepts set forth in Ethical Considerations 9-2 and 9-6? And
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> 3. Does DR:5-105(D) prohibit the proposed settlement agreement under which Plaintiff's former attorneys will undertake to represent Defendants in a "substantially related" matter?

The appropriate and controlling disciplinary rules relative to your inquiry are:

> DR:2-106(B): 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. (emphasis added).
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> DR:5-101(A): A lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial,

> business, property; or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.
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> DR:5-105(D): A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interests of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.
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> EC:9-2: Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.
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> EC:9-6: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

In 1985, the committee expressed its opinion that "It is improper for a plaintiff's attorney to enter into a settlement agreement which includes, as a condition of settlement, that the plaintiff's attorney will not thereafter accept cases or prosecute similar claims against the same defendant." LE Op. 649, citing DR:2-106(B) and not elaborating on its prohibition against only those settlement agreements that broadly restrict a lawyer's right to practice law. The Alabama ethics panel permitted a provision in a class action settlement agreement that plaintiff's lawyer would not prosecute any other actions against the class action defendants which involved the same violations alleged against them in the settled action. Such a provision, it was concluded, did not "broadly" restrict the lawyer's right to practice law. Alabama State Bar Opinion 85-115 (1986).

Whether a lawyer has entered into an agreement that "broadly" restricts the right to practice law is a fact-intensive question and cannot be answered in an all-encompassing fashion. For example, if a law firm with a boutique employment discrimination law

practice in a community agrees as a term of a client's settlement not to prosecute future employment discrimination claims against the community's only significant employer, it is likely that the agreement broadly restricts the right to practice law. A different conclusion may obtain, however, if the law firm's practice is not substantially limited to employment discrimination, or if the employer is but one of many significant employers in the community.

In the facts you present, neither Lawyer A nor Lawyer B has his office in the same community as XYZ Co. Lawyer A's office is in a town near XYZ Co.'s facility; Lawyer B's office is in a large city. Although Lawyer A has a local practice, and Lawyer B a broad geographical practice, employment discrimination law does not constitute the sole practice of either of them. Neither of them represented a client against XYZ Co. before their representation of plaintiff, and neither of them has an expectancy of such a representation in the future.

Even if not prosecuting future claims against a single defendant "broadly restricts" the lawyer's right to practice law, which is problematic on the facts presented, the pivotal issue is whether the restriction is contained in an agreement that the lawyer entered into. The settlement agreement in your hypothetical, unlike the settlement agreement in LE Op. 649, does not include a provision that Lawyers A and B will thereafter refuse to prosecute similar claims against XYZ Co. The settlement agreement itself does not restrict Lawyers A and B from subsequent representation adverse to XYZ Co. Rather, the restriction is rooted in DR:5-105(A) and (B), governing representation adverse to a current client and in DR:5-105(D), governing representation adverse to a former client. Such representation may be ethically permissible with the clients' informed consent. The source of the restriction is significant since DR:2-106(B)'s prohibition is that a lawyer shall not enter into "an agreement that broadly restricts his right to practice law." (italics supplied.) The agreement in your hypothetical does not set forth any such restriction to which Lawyers A and B have agreed. The 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. See ABA/BNA Lawyers' Manual on Professional Conduct 51:1209-51:1212 (1995).

It can be argued that XYZ Co.'s employment of plaintiff's counsel, as a term and condition of the settlement agreement, is merely a ruse to circumvent DR:2-106(B). The committee necessarily takes the settlement agreement on its face and cannot speculate about, let alone analyze, the motive or subjective intent of the parties. As recited in the agreement, defendants are to employ Lawyers A and B in a substantial way to seek their guidance on how to reform their existing employment policies and practices. According to the agreement, this is also plaintiff's primary objective, paramount to any monetary compensation derived from the settlement. DR:7-101(A) obligates Lawyers A and B to seek the lawful objectives of their client by all available means permitted by law and the Disciplinary Rules. The facts presented in your hypothetical do not suggest that defendants are trying to "buy off" plaintiff's counsel, or that defendants are deliberately seeking to "conflict out" successive employment of Lawyers A and B by prospective clients with similar employment-related claims.

In the facts you present, the committee believes that the proposed agreement does not place plaintiff's counsel at risk of violating DR:5-105(D). Under the terms of the proposed agreement, plaintiff has released any and all claims she has or may have against defendants arising out of her employment at XYZ Co. and further agrees never to seek employment with that company in the future. Consequently, plaintiff would not have any employment related claims in the future against defendants. XYZ Co.'s employment of plaintiff's counsel upon conclusion of the present case would not be adverse to any interest of plaintiff. Even if successive employment of plaintiff's counsel by defendants were in some way adverse to plaintiff's interests, by the terms of the agreement she has authorized her lawyers to counsel and advise defendants and has expressly waived any conflict of interest. Therefore, the committee concludes that there is no violation of DR:5-105(D).

In considering the settlement agreement, and defendants' employment of plaintiff's lawyers post-settlement, the committee also examined DR:5-103(A)'s prohibition against a lawyer acquiring a proprietary interest in the cause of action or subject matter of litigation conducted for a client. The committee is of the opinion that the provision of the settlement agreement calling for defendants' payment of legal fees to plaintiff's lawyers for post-settlement advice to defendants does not constitute the acquisition of a proprietary interest in plaintiff's cause of action or the subject matter of plaintiff's litigation. See C. Wolfram, Modern Legal Ethics § 8.13 at 491 (1986); ABA, Annotated Model Rules of Professional Conduct, Rule 1:8(j) comment (3rd ed. 1996) (prohibition rooted in common law doctrines of maintenance and champerty). ABA Informal Opinion 1397 (1977) illustrates the proscribed proprietary interest contemplated in DR:5-103(A). There the lawyer, as consideration for legal services, had acquired a one-fourth interest in the client's real estate that was the subject of the dispute in which he represented the client. In People v. Franco, 698 P.2d 230 (Colo. 1985), there was a violation of DR:5-103(A) where a lawyer, as security for the payment of fees, took a deed of trust on real estate that was the subject of a court-ordered sale and division of proceeds between the husband and the wife. See LE Op. 1653.

In contrast, Lawyers A and B have not acquired a proprietary or financial interest in their client's cause of action. On the facts presented, the client's cause of action has been settled by some monetary payment and, in fulfillment of the client's express desire, by XYZ Co.'s employment of Lawyers A and B to conform its employment practices to applicable laws. The employment of Lawyers A and B is not, however, an element of her cause of action against XYZ Co. The employment is derivative of the settlement but not of the cause of action itself.

The committee observes, however, that the provision of the settlement agreement for defendants' payment of legal fees to plaintiff's lawyers for post-settlement legal advice constitutes a financial or business interest on the lawyers' part under DR:5-101(A). Since such an interest may affect the lawyers' professional judgment on behalf of plaintiff in negotiating the settlement agreement, DR:5-101(A) requires full and adequate disclosure to plaintiff and consent from plaintiff with respect to her lawyers' interest in the

settlement. If plaintiff's stated consent in the settlement agreement is a product of her lawyers' full and adequate disclosure, which the settlement agreement suggests has occurred, then defendants' post-settlement employment of plaintiff's lawyers with her consent does not offend DR:5-101(A).

Legal Ethics Committee Notes. – Rule 5.6(b) would permit such a restriction on practice of law if "approved by a tribunal or government entity."