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PRACTICE RESTRICTIONS IN SETTLEMENT AGREEMENTS

Adopted June 19, 1993.

Syllabus

A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy or suit. Rule 5.6(b), Colorado Rules of Professional Conduct. This prohibition includes but is not limited to settlement agreements barring the lawyer representing the settling claimant from representing other claimants against the party defending the claim. Other restrictions impeding the lawyer's ability to represent effectively other claimants against the settling party defending the claim may also be unethical. A claimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel.

Opinion

Rule 5.6(b) of the Colorado Rules of Professional Conduct provides in pertinent part: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy or suit."

This provision is a continuation of the prohibition contained in DR 2-108(B) of the Colorado Code of Professional Responsibility, which stated: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his [or her] right to practice law."

The rationale for this rule is that restrictions of this kind placed on a settling claimant's¹ lawyer would be contrary to the meaning and spirit of former Canon 2, which urged lawyers to make legal counsel available. *Annotated Code of Professional Responsibility* 115 (1979). Similarly, as the Chair of American Bar Association Committee on Ethics and Professional Responsibility explained to the ABA House of Delegates in 1970:

[A] covenant of that type would, in effect, restrict . . . a lawyer's ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients. Secondly, we [the Committee] felt that a covenant of that type would inevitably involve a conflict of interests.

Id. See also ABA Comm. on Professional Ethics, Informal Op. 1039 (1968) (unethical to accompany settlements in private antitrust litigation with covenants not to sue or aid anyone in suit against the settling defendants), which predated the ABA Code of Professional Responsibility.

Rule 5.6(b) and its predecessor, DR 2-108(B), generally have been understood to hold unethical any settlement provision that requires a lawyer to decline future representation against a party defending the claim that is being settled. *Annotated Model Rules of Professional Conduct* 475-76 (2d ed. 1992). Case law and ethics opinions are virtually unanimous on this point. See, e.g., *Cohen v. Graham*, 44 Wash. App. 712, 722 P.2d 1388, 1390-91 (1986); ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 93-371 (Apr. 16, 1993); Oregon State Bar, Legal Ethics Comm., Formal Opinion No. 1991-47 (July 1991). The Comment to Rule 5.6 recognizes that paragraph (b) "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The Colorado Committee Comment goes on to note that Rule 5.6 is "substantially similar to DR 2-108, but it properly extends the proscriptions contained in the Disciplinary Rule to offers as well as actual agreements."

Practice restrictions of the kind prohibited in Rule 5.6(b) are clearly overbroad and antithetical to a lawyer's ability to practice. Where the lawyer is representing contemporaneously settling and non-settling claimants, such restrictions could create an irreconcilable conflict of interest. *See* Michigan Committee on Professional and Judicial Ethics, Op. CI-1165 (1986) (a settlement that requires a lawyer to withdraw from concurrent representation of other clients against the same defendant improperly restricts an individual's right to retain counsel of choice). Such a contractual restriction also creates a conflict of interest between the lawyer and future clients, contrary to Rules 1.7(b) and 1.9(a) of the Colorado Rules of Professional Conduct, and has been deemed to be in contravention of public policy. *See, e.g., Jarvis v. Jarvis*, 12 Kan. App.2d 799, 758 P.2d 244, 247(1988).

Other types of restrictions less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim may similarly violate Rule 5.6(b). Ethics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation. *See, e.g.,* New Mexico Ethics Comm. Op. 1985-5 (unethical as a condition of settlement for plaintiff's counsel in wrongful death action to be required to turn over attorney work product without which the lawyer's ability to practice law would be restricted); District of Columbia Bar Op. No. 35 (1977) (unethical for an attorney as part of a settlement to agree not to refer a potential client to another attorney if that potential client has a claim against the defendant involved in the settlement); Ariz. Op. No. 90-6 (7/18/90) (lawyer who represents several franchisees against a franchisor may not enter into a settlement agreement that provides that the lawyer will disclose the names of all franchisees who have contacted the lawyer regarding potential representation against the defendant).

The rationale for the prohibition against such lesser restrictions is that they too are "restriction[s] on the lawyer's right to practice" precluded by Rule 5.6(b). In the words of the New Mexico Ethics Committee in declaring that the turning over of needed attorney work product as a condition of settlement is prohibited: "If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish directly. . . . The lawyer cannot agree to any condition that restricts her right to practice law." Opinion 1985-5, quoted in Pitulla, "Co-opting the Competition Beware of Unethical Restrictions in Settlement Agreements," 78 A.B.A.J. 101 (Aug. 1992). Prohibited restrictions may include barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimants lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants.

In the opinion of this Committee, the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Material restrictions obtained with an eye towards thwarting a non-settling claimant from obtaining counsel of choice fail this test. Although public policy favors fair settlements, the public policy favoring full access to legal assistance should prevail. *See* Dallas Legal Ethics Committee, Opinion 1982-5, *ABA/BNA Lawyer's Manual on Professional Conduct* 801: 8406 (1982).

Not all settlement arrangements affecting a lawyer are improper. A lawyer may enter into a settlement agreement conditioned upon nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record. *See* New Mexico Ethics Comm. Op. No. 1985-5. Similarly, it is "close, but permissible" for a lawyer defending a class action lawsuit to ask the plaintiffs' lawyer for settlement purposes to state that he or she has no present intention of filing suit against the defendant in similar cases. Philadelphia Op. 86-121 (9/11/86), *ABA/BNA Lawyer's Manual on Professional Conduct* 901:7508 (1987). Such conditions do not materially restrict a lawyer's ability to practice law. Other such conditions and limitations may well survive scrutiny under Rule 5.6(b) if they legitimately bear on the claim being compromised by the settling claimant and are not a facade for creating an actual or potential conflict of interest between the settling claimant's lawyer and his or her non-settling clients, present or future. Thus, for example, a settlement requirement that a lawyer return documents obtained in discovery as a condition of settlement is not unethical in proper circumstances.

As Rule 5.6(b) notes explicitly, its mandate applies not only to agreements restricting practice, but extends even to a lawyer's offer of one. For good reason. As one ethics commentator has stated: "When restrictions on the practice of law become bargaining chips between parties, the integrity of the profession is threatened." *Pitulla, supra*, 78 A.B.A.J. at 101.

NOTE

1. Usually the settling plaintiff's counsel is the one who may be subjected to such attempted restrictions. This Opinion refers generically to "claimant's counsel," however, because the same ethical considerations apply to restrictions on counsel asserting counterclaims, cross-claims and third-party claims.