Ethics of Settlement
Restricting Plaintiff's Counsel from Representing Future Claimants

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After years of litigation, your client, Widget Manufacturing Co., has reached an agreement to settle Plaintiff's design defect claims relating to Widget's top-selling product. Both sides have devoted significant time and resources to the lawsuit: Thousands of pages of proprietary information have been produced by Widget to Plaintiff's counsel under the terms of a protective order; dozens of witnesses have been deposed, expert reports exchanged; and extensive briefing on the legal issues submitted.

Widget's CEO is happy with the decision to settle, but is worried that this costly litigation arises from nothing more than a personal vendetta by Plaintiff's lawyer, Sue Orbesood. He believes Ms. Orbesood intends to make a career out of suing Widget. Because the desire to get Ms. Orbesood out of its hair was central to Widget's decision to settle, Widget's CEO instructs you to include in the settlement agreement the following provisions:

- Ms. Orbesood will not represent future claimants in product liability cases against Widget;
- She will keep the facts, terms and amount of the settlement confidential;
- She will not advertise the fact that she prosecuted a product liability action against Widget and shall not use Widget's name in any advertising or promotional materials;
- She will not solicit individuals with potential product liability claims against Widget, nor refer them to other counsel, nor share a fee with other counsel in connection with such claims; and
- She will not only return all confidential documents produced during the litigation pursuant to the terms of the existing protective order, but also all of her work product, which she will not use to aid any future claimants.

In return, Widget will reimburse half of Ms. Orbesood's expenses relating to litigation, in addition to the settlement amount already agreed upon between the parties. If Ms. Orbesood will not agree to these terms, Widget CEO's suggests, as an alternative, that Widget offer to retain Ms. Orbesood as a legal consultant. Widget would pay her a monthly fee to be "on call" to advise it in connection with product liability claims as they arise. The agreement would be memorialized in a separate retainer agreement entered after the settlement with her client is consummated. Ms. Orbesood would be providing valuable insight to help Widget minimize its exposure to future lawsuits, and the arrangement would have the intended result of conflicting her out of taking any cases against Widget in the future.

Is This Ethical?

Can you ethically seek to include in the settlement agreement any of the provisions Widget wants in the settlement agreement? Can you ethically negotiate the side retainer agreement between Widget and Ms. Orbesood to conflict her out of future cases? The answer to both questions may be surprising: no. Despite how desirable such terms may be to the parties in the case, Ms. Orbesood and you could both face disciplinary action for violating the rules of

professional conduct if any of these terms are negotiated or become part of a settlement of the case. *Restraints on a lawyer's right to practice law as part of a settlement of client controversy are strictly prohibited.*

The rules of professional conduct of all 50 states include an express prohibition against a lawyer participating in making — or even offering — an agreement in which restriction on a lawyer's right to practice law is part of the settlement of a client controversy. See ABA Model Rules of Prof'l Conduct, Rule 5.6(b), upon which most states' ethics rules are based; Cal. Rules of Prof'l Conduct, Rule 1-500. Many jurisdictions have also found that agreements violating this rule are void as a matter of public policy. See, e.g., *Cardillo v. Bloomfield 206 Corp*., 411 N.J. Super. 574, 580 (App. Div. 2010); *Jarvis v. Jarvis*, 12 Kan. App. 2d 799, 802 (1988). Lawyers have received sanctions ranging from public reprimand to disbarment for their involvement in such agreements.

Reasons for the Rule

There are three policy reasons for this rule. First, such agreements restrict the public's access to lawyers who may be the most capable to handle a particular claim. This public policy favoring full access to qualified legal counsel is perhaps the most oft-cited reason for the rule. Second, such a settlement may provide a client with rewards that bear less relationship to the merits of the claim than to the defendant's desire to "buy off" plaintiff's counsel. Third, such agreements create a conflict of interest between the lawyer's present clients and potential future clients. ABA Comm. on Ethics & Prof'l Responsibility Formal Ops. 93-371 and 00-417.

The last two policy reasons address the conflict of interest that arises because the financial interests of the lawyer, as well as the interests of future clients, become considerations in the settlement, instead of solely the actual merits and circumstances of the current controversy, considered through arms-length negotiation. It is the interest of the clients in the current controversy that must be the negotiating lawyers' focus — not questions of whether plaintiff's attorney will or can agree to restrict his or her future practice, nor the value to defendant to "get rid" of plaintiff's counsel. Because of these policy interests, Rule 5.6 is a bright-line rule prohibiting lawyers from even suggesting such restrictions in the context of settlement negotiations. Even if Widget and Ms. Orbesood's client want the restrictions to be part of their deal, the lawyers are ethically estopped from including them. *See* ABA Formal Op. 93-371; Pa. Bar Ass'n. Op. 95-13 (1995).

The rule has been heavily criticized as being based upon weak policy considerations and as removing very effective bargaining chips from the settlement table, thus impeding strong public policies in favor of prompt and efficient settlements and freedom of contract. *See, e.g*., Stephen Gillers and Richard W. Painter, Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements, 18 Geo. *J. Legal Ethics* 291 (2005); Yvette Golan, Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b), 33 Sw. *U. L. Rev*. 1 (2003)). There is also contradictory legal precedent in a few jurisdictions holding that such agreements are legally enforceable, regardless of whether they raise disciplinary issues for the lawyers involved. *See Lee v. Florida Dep't of Ins*., 586 So.2d 1185, 1188 (Fla. Dist. Ct. App. 1991); *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614, 617 (App. Div. 1st Dep't 1996)

(holding agreement restricting a lawyer's practice as part of a settlement was not against the State's public policy). As a direct response to *Feldman*, the New York City Bar Association issued an opinion that, even if such an agreement is legally enforceable, a lawyer may not ethically enter into a settlement agreement that restricts her own or another lawyer's ability to represent one or more clients. N.Y.C. Bar. Ass'n Formal Op. 1999-03

Indeed, regardless of the criticisms of the rule, ethics committees uniformly opine that Rule 5.6(b) unequivocally prohibits a lawyer from participating in any arrangement that directly — or indirectly — restricts a lawyer's right to practice as part of a settlement of a client's claim. Many of the indirect attempts that Widget's CEO suggests have been found to violate Rule 5.6. Each is discussed in turn.

Agreements to Keep Settlement Terms Confidential

Agreements to keep settlement terms confidential or to limit attorney advertising and solicitation may violate the rule.

While settlement agreements requiring the parties to keep confidential the private terms of a settlement are permissible, confidentiality agreements that extend to information that is a matter of public record are not. Such agreements are construed to violate Rule 5.6 by having both the intention and effect of prohibiting counsel from "informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases." D.C. Bar Legal Ethics Comm. Op. 335 (2006); *see also* N.H. Ethics Comm. Adv. Op. 2009/10-6; Alaska Bar Ass'n Ethics Comm. Op. 2000-2; N.M. Ethics Comm. Op. 1985-5.

In the same vein, restrictions on a lawyer's right to advertise his or her involvement in a lawsuit against a company, to solicit future clients, to contact potential claimants about actions against the defendant or to refer potential clients to other counsel to handle such matters also have been found to violate Rule 5.6. See ABA Formal Op. 00-417; Colo. Ethics Op. 92; Ariz. Ethics Op. 90-06 (1990).

Agreements governing confidential information cannot be construed to bar a lawyer from future representations. While protective orders and agreements prohibiting the disclosure of confidential information are enforceable and ethically permissible, restrictions on any use of information gleaned from a current representation in future representations can also violate Rule 5.6. This is because the only way a lawyer could effectively comply with such a broad restriction on 'Use" of information he or she has learned the context of the settled matter would be never to represent another client in any matter that touched on the same facts or information. See ABA Formal Op. 00-417; N.Y. State Bar Ass'n. Op. 730 (2000).

Several variations on the theme of limiting a lawyer's future use of information have been held to violate Rule 5.6, including agreements:

- Not to subpoena specified documents or witnesses in the course of representing non-settling claimants (Colo. Bar Ass'n Formal Ethics Op. 92 (1993);

- Barring a settling lawyer from using certain expert witnesses in future cases imposing forum or venue limitations in future cases (Id.);
- Requiring a lawyer to turn over her entire file, including work product (N.M. Formal Op. 1985-5); and
- Not to disclose a published study that resulted in a manufacturer's changing its product's warnings (N.H. Ethics Comm. Adv. Op. 2009/10-6).

Agreements to "keep confidential interpretations of the law" may also run afoul of the rule. The Illinois State Bar Ethics Committee opined that an agreement restricting a lawyer from divulging the contents of an accountant's report on tax obligations violated the spirit of Rule 5.6 because it would create a conflict of interest between his present clients and his future clients who may also benefit from the interpretation of the tax laws contained in the report. Ill. State Bar Adv. Op. 11-02 (2011).

Nor may protective orders governing the use of confidential information during the course of litigation be construed to disqualify a lawyer from representing other clients involving similar facts in future cases. *See Hu-Friedy Mfg. Co. v. Gen. Elec. Co.*, 1999 U.S. Dist. LEXIS 11213 (N.D. Ill. July 19, 1999).

Agreements to "conflict out" the adversary's lawyer from representing future claimants violate the rule. Widget's suggestion that it hire Ms. Orbesood to conflict her out of future representation adverse to Widget also violates Rule 5.6. Lawyers have faced significant sanctions as a result of making such "side agreements" in conjunction with settlements of a current client's claims.

Cases in Point

Lawyers in Oregon were suspended from practice for a year for negotiating a side agreement with the defendant to serve as its legal consultants after the conclusion of a global settlement of their 120 clients' claims. The agreement violated Rule 5.6 even though they made attempts to separate the negotiation of the settlement and the engagement. *In re Brandt*, 331 Ore. 113, 121 (Ore. 2000). In *Fla. Bar v. St. Louis*, 967 So. 2d 108, 125 (Fla. 2007), the sanctions were more severe. The lawyer's firm negotiated an engagement agreement with the defendant at the same time it was negotiating settlement of 20 clients' claims for alleged damages caused by the defendant's recalled product. Pursuant to the engagement, the defendant agreed to pay the lawyer's firm $6.5 million, purportedly for future, unspecified legal work. The true purpose of the engagement was to create a conflict so that the firm would not be able to represent future claimants adverse to defendant. The lawyer was found guilty of violating several ethics rules, including Florida's version of Rule 5.6, and was disbarred and ordered to disgorge fees paid to him by defendant.

Not just plaintiffs' lawyers are subject to sanctions. The New Jersey Disciplinary Review Board publicly reprimanded both defendant and plaintiff's counsel for their involvement in an agreement restricting the plaintiff's right to practice. In re Gormally, 212 N.J. 486 (N.J. Dec. 19, 2012). In Adams v. Bellsouth Telcoms., 2001 U.S. Dist. LEXIS 24821, *45 (S.D. Fla. Jan. 29, 2001), the defendant's counsel was ordered to complete five hours of ethics courses and provide

a copy of the court's decision to the regulating authority of any state bar to which they are admitted.

What to Do?

So what should you do when faced by requests for restrictive covenants in settlement agreements similar to those posed by Widget? The guiding principle for such a situation can be summed up as follows: When settling a client controversy, do not offer or agree to any provision that would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of a lawyer who is not subject to the settlement agreement. N.D. State Bar Ethics Comm. Op. 1997-05 (1997); Colo. Ethics Op. 92. Put another way, when settling a client's claim, do not offer or accept any agreement that imposes any obligations or restrictions on a lawyer that exceed or contradict with the obligations and restrictions set forth in ethics rules and applicable law. Tex. Ethics Op. 505 (1994).

Where does this leave Widget and its discomfort with the thought of Ms. Orbesood as its adversary in the future? There are alternatives to provide them with at least some peace of mind. You could ask Ms. Orbesood if she has any other cases against Widget waiting in the wings or if she presently intends to represent any other clients in cases against Widget. If she is willing to answer that question and the answer is no, it likely would not be seen as a restriction on her right to practice to have her make such a statement as part of the settlement. *See DeSantis v. Snap-On Tools Co.*, 2006 U.S. Dist. LEXIS 78362, *34 (D.N.J. Oct. 27, 2006) (similar statement made in class action settlement agreement did not restrict class counsel from deciding to represent clients adverse to defendant in the future).

Of course, Widget also is not precluded from seeking to hire Ms. Orbesood as a legal consultant post-settlement — just as long as the idea is not even remotely broached with her during the settlement of her client's claims.

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