Settlements That Restrict A Lawyer's Practice

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Generally, lawyers are prohibited from entering into settlement agreements that will prevent them from being able to accept future clients against the same defendant. Rule 5.6(b) of the Rules of Professional Conduct provides: "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 the settlement of a controversy between private parties." Recently, the ABA opined that this prohibition also extends to settlements with the government despite the "private parties" language contained in the rule.Ftn 1

Rule 5.6(b) typically applies to situations where the defendant attempts to limit its exposure to future similar cases by including a provision in the settlement agreement preventing the plaintiff's lawyer from representing other clients with similar claims against the defendant. The rationales underlying the prohibition against these types of disqualifying provisions are: (1) such agreements restrict public access to lawyers who might be the best available talent to represent particular clients; (2) the use of these types of restrictive clauses may provide clients with settlement amounts that have less relationship to the merits of their claims than they do to the defendant's desire to disqualify plaintiff's counsel from representing future clients; and (3) the offering of such an agreement creates a conflict between the lawyer's present clients and future clients.

Very little lawyer discipline or malpractice law concerning this subject has developed despite the existence of the prohibition for nearly half a century. Moreover, one ethics scholar contends that despite the prohibition, anecdotal evidence exists that "lawyer buyout" has occurred in several high profile mass tort cases including asbestos and Dalkon Shield litigation in the 1980s and the 1970s class action involving the Buffalo Creek coal dam disaster.Ftn 2

More recently, lawyers have attempted to walk a tightrope on the prohibition by including novel provisions in settlement agreements. One unique clause involves plaintiff's counsel's agreement not to advertise for future similar clients. Another, suggested by well-known ethics scholars,Ftn 3 involves the defendant retaining plaintiff's counsel after the plaintiff's case has been settled. The intended consequence of hiring plaintiff's counsel is to disqualify the lawyer from future representations against the defendant.

Two recent developments have brought this issue into focus and raise questions about whether current settlement means employed by lawyers comply with, or instead circumvent, the ethical prohibition against lawyer buyout.

One development is the ABA's issuance of Formal Opinion 00-417 (April 7, 2000). Entitled, "Settlement Terms Limiting a Lawyer's Use of Information," the opinion addresses the propriety of settlement clauses designed to prevent plaintiff's counsel from using information learned during the current representation in any future representation against the defendant. Formal Opinion 00-417 concludes that such a clause violates Rule 5.6(b) because the clause effectively bars the lawyer from future representation due to the

inability to use certain information. The ABA explains that due to the lawyer's inability to use existing information, any future representations would be materially limited thereby creating an impermissible or disabling conflict under Rule 1.7(b) that would preclude representation. Examples cited by the ABA include the lawyer's inability to subpoena known existing records or witnesses or use certain expert witnesses.

The ABA distinguished "use of information" clauses, which it found to be improper, from generally accepted confidentiality clauses, which it found were proper. According to the ABA, the critical distinction is that confidentiality clauses prohibit the lawyer from disclosing facts of the prior representation or the terms of its settlement. This contrasts with the broader use of information clause that would prohibit use of all information obtained from the defendant and witnesses, even if it were general in nature and not fact specific to the prior representation.

Oregon Lawyers Suspended

The second recent development is the suspension of two Oregon lawyersFtn 4 for violating the lawyer buyout prohibitionFtn 5 by prospectively agreeing to be retained by the defendant before they had settled their pending client cases with the defendant. While imposing a one-year suspension, the court criticized the lawyers for signing prospective retainer agreements with the defendant, which were held in escrow by a mediator until all of the lawyers' clients had agreed to the defendant's settlement offer. Escrowing the prospective retainers did not persuade the court that the agreement to represent the defendant took place after the settlements of their clients' cases.

The lawyers did recognize the potential conflict created by the escrowed retainer agreements and consequently disclosed the conflict to their clients and also advised them to seek independent counsel. Nevertheless, the court still faulted the lawyers for the manner in which they disclosed their future employment with defendant. Specifically, they had represented to clients that the employment with the defendant was made as a "separate offer." In fact, during settlement negotiations the defendant had indicated that the future employment condition was a deal-breaker.Ftn 6 The disclosure to clients also failed to mention that the defendant had agreed to indemnify the lawyers for any client-related liability arising due to the defendant's future employment of the lawyers. Without this information, the court found the clients' consent to the conflict disclosed invalid.

Ordinarily, the issuance of ethics opinions and lawyer discipline decisions provides greater clarity about the professional standards. Arguably, these two developments have raised more questions than they answer.

Confidentiality clauses, which are standard fare in civil settlements, now may run afoul of Rule 5.6(b) if the language is broad enough to prohibit use of information instead of merely protecting against disclosure of facts and terms of settlement. Plaintiff and defense counsel alike must be mindful of this limitation since the ethics rule subjects lawyers on both sides of an offending agreement to discipline.

The hiring of plaintiff's counsel by the defendant does not appear to be a panacea for avoiding the lawyer buyout prohibition. Clearly, the hiring must come after, and be separate from, any client-related settlement. While this distinction is easy to articulate, the mechanics of orchestrating two independent agreements is a complex and difficult task. Few defendants are willing to compromise a claim without some associated condition or assurance that plaintiff's counsel will accept the future, but separate and independent, employment offer. At the same time, any nexus or correlation between the two, whether formally or informally, could trigger an ethics violation.

While neither of these two recent developments is particularly helpful in determining the extent to which settlement agreements can ethically restrict future practice, they do shed light on what is not acceptable.

1 See ABA Formal Opinion 95-394 (July 24, 1995) (prohibition of Rule 5.6(b) applies not only where the controversy is between private parties, but also where a party is a government entity).

2 David J. Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2624 (1995).

3 Hazard & Hodes, The Law of Lawyering, sec. 5.6:301, Professors Hazard and Hodes posit that a defendant's retention of plaintiff's counsel, after the settlement, does not violate the prohibition of Rule 5.6(b).

4 *In re Brandt and Griffin*, 2000 WL 1292614 (Or. Sup. Ct. Sept. 14, 2000).

5 The lawyer buyout prohibition in Oregon is governed by DR-2-108(B) of the Oregon Code of Professional Responsibility and is substantially similar, if not identical to, Rule 5.6(b) of the Rules of Professional Conduct.

6 Rule 5.6(b) and DR 2-108(B) expose both the offering and the accepting lawyer to discipline. The opinion is silent about any disciplinary action taken against the defendant's lawyers. However, it appears none of the defense lawyers were licensed to practice in Oregon and therefore not subject to Oregon lawyer discipline authority.