

The chief legal officer calls you in to his office. "Good news, Chuck ... We have settled the new case with the aggressive DC lawyers. Now tell our defense team to draft a settlement agreement that ties up that DC firm tight as a drum. I don't want to see those guys on the other side from us ... period!! Is that clear? Put in the agreement that they can never represent anyone against us ever again, understand?" But, you gasp, "That's prohibited by the ethics rules." He groans. "What has this world come to? Okay, make the settlement confidential, the documents confidential, hire them as our lawyers... I don't care how much extra you need to pay the attorneys, keep them off of our backs." You walk out with a bad feeling.

Practice Restrictions in Settlement Agreements

BY JOHN K. VILLA

You were right to have a bad feeling as these indirect practice limitations, as prevalent as they are, are subject to challenge in many jurisdictions. While it has historically been relatively common to demand settlement terms that have the effect of limiting a lawyer's ability to represent other litigants,¹ most litigators now realize that an express restriction on future representations included as part of a settlement agreement is prohibited by the ethical rules² and could subject participating counsel to disciplinary sanctions.³

But what about other types of agreements within a settlement package that may achieve a similar result. For example, is it ethical to ask plaintiff's counsel to promise not to use certain information learned during the course of the representation in any future litigation involving the company, or to agree to represent or consult for the opposing party as a consultant or as counsel after settlement of the existing claim? The short and somewhat surprising answer: maybe not. To

answer this question, we must examine the ethical rules and their interpretation by both courts and ethics' commissions. This, as you should be warned, is an area where ethics theory may depart substantially from practice.

Rule 5.6: Limitations on Practice

Our focal point is Rule 5.6 of the *Model Rules of Professional Conduct*,⁴ which provides, in pertinent part:

A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.⁵

The rule is premised on three public policy rationales. As explained by the American Bar Association (ABA):

The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individu-

als. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel.⁶

Thus, even though a client may be delighted to accept a limitation on her lawyers' future right to represent other similar clients in exchange for receiving herself a larger settlement, and might readily direct her lawyer to enter into that settlement, and Rule 1.2 would normally require a lawyer to follow the client's instructions to accept a settlement agreement,⁷ the lawyer's ability to do so is limited by Rule 5.6(b).⁸

According to the comment to Rule 5.6, subdivision (b) "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."⁹ While an explicit limitation on a lawyer's right to represent other clients with similar claims against the same opposing party is "[t]he most obvious example of an ethically impermissible settlement provision" under the rule,¹⁰ the ABA has opined that the rule applies not only to such an explicit limitation,¹¹ but also to other limitations that indirectly restricts a lawyer's right to practice.¹²



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Indirect Limitations and ABA Opinion 00-417

In *Formal Opinion No. 00-417*, the ABA Standing Committee on Ethics and Professional Responsibility addressed the application of Rule 5.6(b) to a settlement agreement that prohibited counsel from using information learned during the existing representation in any future representation against the same opponent. Finding that the restriction was impermissible under Rule 5.6(b), the committee explained that, even though it was not a direct ban on any future representation, “[a]s a practical matter . . . [it] effectively would bar the lawyer from future representations because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation.”¹³ In addition, such a provision would undermine an important policy rationale underlying Rule 5.6(b)—by preventing the use of information learned during the prior representation, the provision would restrict the public’s access to the services of a lawyer who, “by virtue of [his] background and experience, might be the most qualified lawyer available to represent future clients against the same opposing party.”¹⁴

In reaching its determination, the committee was careful to distinguish between a restriction against the *use* of information learned during the representation and a restriction against the *disclosure* of confidential information, such as the terms of the settlement, noting that the latter type of restriction merely comports with the requirements of Rule 1.6 and “does not necessarily limit the lawyer’s future practice in the manner accomplished by a restriction on the use of information relating to the opposing party.”¹⁵ And, while acknowledging that Rule 1.9(c) precludes a lawyer from subsequently using information relating to a prior representation,¹⁶ the committee noted that the restraint imposed under that rule does not extend to

the subsequent use of information that is not adverse to the interests of the former client or that is publicly known.¹⁷

Many jurisdictions concur with the ABA that settlement agreements containing indirect restrictions on the lawyer’s right to practice violate those jurisdictions’ respective equivalents of Rule 5.6(b). Examples of similar provisions found to constitute unethical restrictions under the rule include those that require counsel to keep confidential public information concerning the case, such as the identity of the defendant, the allegations of the complaint, and the fact of settlement;¹⁸ those that prohibit counsel from disclosing information concerning the business or operations of the opposing party;¹⁹ those that require counsel to turn over her work product to opposing counsel;²⁰ and, those that bar counsel from subpoenaing certain records or fact witnesses, or from using certain expert witnesses in future actions against the opponent.²¹

ABA’s Ethical Guidelines for Settlement Negotiations

Limitations in settlement agreements that affect the use or disclosure of information are not the only types of limitations found to violate Rule 5.6(b) as indirect restrictions on the right to practice. In its *Ethical Guidelines for Settlement Negotiations*, the ABA’s Section on Litigation proscribes as unethical, settlement provisions in which a plaintiff’s attorney agrees to become a consultant for, or be retained as an attorney by, the opponent.²² Such a provision may be regarded as a “buy off” of plaintiff’s attorney, since “conflict of interest rules will prevent the plaintiff’s lawyer from representing future plaintiffs against the defendant without the defendant’s consent.”²³ Some courts have agreed with this analysis.²⁴

In *Adams v. BellSouth Telecomm., Inc.*,²⁵ for example, a federal district court concurred with the findings of the magistrate that the defendant’s

counsel violated Florida Bar Rule 4-5.6(b) by conditioning settlement of the underlying action on the inclusion of a consulting agreement. Under this agreement, which was not made known to the plaintiffs, counsel for both parties agreed that plaintiffs’ counsel would be hired as a consultant for the defendant upon settlement of the existing case.²⁶ The agreement further provided that consideration for the consulting arrangement would be taken from the total amount of the settlement.²⁷

According to the court, the record disclosed that defense counsel aggressively negotiated for inclusion of the consulting arrangement in the settlement: Due to questionable litigation tactics on the part of plaintiffs’ counsel, defense counsel “sought ‘finality’ for their client by preventing the filing of similar future suits by Plaintiffs’ counsel.”²⁸ Although noting that this motive was neither disreputable nor detrimental to the interests of the defendant,²⁹ the court held that the consulting agreement constituted a clear practice restriction that violated Rule 4-5.6(b) for several public policy reasons: not only was the agreement “a payoff to Plaintiffs’ counsel to make them go away and never come back[,]”³⁰ but it created a direct conflict of interest between plaintiffs’ counsel and their clients.³¹

Rule 5.6(b) is not without its critics,³² and courts have not always been willing to invalidate restrictive settlement agreements that violate the rule.³³ Indeed, you can question whether it is consistent with zealous advocacy for your client to forego an advantageous bargaining chip in settlement negotiations to preserve the rights of non-clients who have chosen to sit out the battle on the sidelines. The rule remains, however, and counsel who offer or accept practice restrictions in settlement agreements must examine the extent to which they commit an ethical violation for which disciplinary sanctions may be imposed.³⁴

What is our hapless young lawyer to do?

- Review the ethics rules and, particularly, the decisions in the state whose law will govern the settlement agreement and counsel's conduct. Remember, the enforceability of the provision is one issue; the ethical propriety of the lawyer's conduct under governing law is another.
- A carefully written settlement agreement limiting disclosure of confidential materials, and requiring advance notice of potential disclosures, may nonetheless cause opposing counsel to review with great care the wisdom of proceeding against your client again.
- Severability in settlement agreements may be important to make sure that even if some provisions are stricken, others may survive.

While the likelihood of ethical sanctions remains low, these rules are important as they may prove to be the undoing of provisions of agreements that are the very reasons for some settlements. Figure them out now. 

Have a comment on this article?

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NOTES

- 1 See David A. Dana and Susan P. Konniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. Ill. L. Rev. 1217 (2003) (noting that the inclusion of restrictions on future legal representation and on the publication of the fact of a settlement is a "thriving" settlement practice); Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 S.W. U. L. Rev. 1, 4 (2003) (stating that "a startling number of lawyers . . . offer and accept restrictive settlement agreements.").
- 2 See *ABA Model Rules of Professional Conduct*, Rule 5.6(b) (2006); *ABA Formal Op.* 93-371 (1993).
- 3 See *In re Zaruba*, 832 A.2d 317 (N.J. 2003); *In re Hager*, 812 A.2d 904 (D.C. 2002).
- 4 While all jurisdictions prohibit settlement agreements that include direct restrictions on future adverse litigation, most jurisdictions have adopted a rule fashioned on Model Rule 5.6(b). See Golan, *supra* n. 1, at 3 n. 7.
- 5 *ABA Model Rules of Professional Conduct*, Rule 5.6(b).
- 6 *ABA Formal Op.* 93-371, at 2.
- 7 See *ABA Model Rules of Professional Conduct*, Rule 1.2(a) (providing, in part, that "[a] lawyer shall abide by a client's decision whether to settle a matter.")
- 8 *ABA Formal Op.* 93-371, at 2.
- 9 *ABA Model Rules of Professional Conduct*, Rule 5.6(b), cmt. 2.
- 10 ABA, Section of Litigation, *Ethical Guidelines for Settlement Negotiations*, § 4.2.1, at 40 (Aug. 2002); see, e.g., *In re Hager*, 812 A.2d at 919 (finding that a settlement provision precluding plaintiffs' counsel from representing future consumers against the defendant manufacturer on similar claims involving defendant's shampoo directly contravened D.C. Bar Rule 5.6(b)).
- 11 *ABA Formal Op.* 93-371, at 3; see also *ABA Informal Op.* 1039 (1968).
- 12 *ABA Formal Op.* 00-417 (2000).
- 13 *Id.* at 2.
- 14 *Id.* at 2-3. As noted by one state ethic's commission, such a restriction on use would also defeat another policy underlying the rule, since it would create a conflict between the present client's interests and those of the lawyer and any future clients. *N.Y. Ethics Op.* 730 (2000) (construing N.Y. Code of Professional Responsibility DR 2-108(B), New York's version of Rule 5.6(b)).
- 15 *ABA Formal Op.* 00-417, at 2.
- 16 Model Rule 1.9(c) provides, in pertinent part: "A lawyer who has formerly represented a client in a matter or whose present or former firm has represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 [Candor Towards the Tribunal] would permit or require with respect to a client, or when the information has become generally known[.]" *ABA Model Rules of Professional Conduct*, Rule 1.9(c)(1) (2006).
- 17 *ABA Formal Op.* 00-417, at 2. As further noted by the Committee, "[t]he former client's disadvantage does not . . . encompass any detriment that might result when a client does not receive a monetary enhancement to a settlement conditioned on his lawyer's agreement not to use information relating to the representation against the opposing party in future representations." *Id.* at n. 15.
- 18 See D.C. Bar Legal Ethics Comm., *Op.* 335 (2006).
- 19 See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *Formal Op.* 730 (2000); see also Tenn. Bd. Of Prof'l Resp., *Formal Op.* 98-F-141 (1998) (provision prohibited plaintiff's counsel from using case information to assist other litigants).
- 20 See N.M. Bar Ethics Adv. Op. Comm., *Adv. Op.* 1985-5 (1985).
- 21 See Colo. Bar Ass'n Ethics Comm., *Formal Op.* 92 (1993).
- 22 *Ethical Guidelines for Settlement Negotiations*, *supra*, n. 10.
- 23 *Id.* at 40-41.
- 24 See *Adams v. BellSouth Telecomm., Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001); *In re Conduct of Brandt*, 331 Or. 113, 10 P.3d 906 (2000).
- 25 No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001).
- 26 2001 WL 34032759, at *1.
- 27 *Id.* The plaintiffs were never told the total amount of the settlement, but only the specific amount that each would receive, and were never given a breakdown of the attorneys' fees or costs. *Id.*
- 28 *Id.* at *3.
- 29 *Id.*
- 30 *Id.* at *6-*7.
- 31 *Id.* at *8.
- 32 See, e.g., Stephen Gillers, *A Rule Without a Reason*, 79-Oct A.B.A. J. 118 (1993) ("Rule 5.6(b) is an anachronism, illogical and bad policy."); see also Golan, *supra*, n. 1 (critiquing the policy arguments in support of Rule 5.6(b)).
- 33 See *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614, 617 (App. Div. 1st Dept. 1997) ("[W]e would conclude that an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York. At the least failure to enforce a freely entered into agreement would appear unseemly, and the "clean hands" doctrine would preclude the offending attorneys from using their *own* ethical violations as a basis for avoiding obligations undertaken by them. Even if it is against the public policy of this State, the "violation" can be addressed by the appropriate disciplinary authorities.") (emphasis in original).
- 34 See, e.g., *In re Hager*, 812 A.2d at 921-924 (imposing a one-year suspension, with reinstatement conditioned upon proof of rehabilitation "with inquiry thereunder primarily directed to" his plans to disgorge his fees).