NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

OPINION 730 (7/27/00)

Topic: Settlement agreements; restrictive covenants.

Digest: Attorney may not enter into settlement agreement that restricts attorney's right to practice law by prohibiting future representation of clients in cases where attorney might use information not protected as a confidence or secret under Code but nevertheless covered by terms of settlement agreement.

Code: DR 2-108(B); 4-101.

QUESTION

In connection with the settlement of an employment discrimination case in which the attorney represents the plaintiff employee, may the attorney for the plaintiff-employee agree not to disclose any information concerning: (1) any matters relating directly or indirectly to the settlement agreement or its terms; (2) the business or operations of the defendant corporation; and (3) the termination of the client's employment with the defendant corporation?

OPINION

DR 2-108(B) provides, "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law." This rule is intended (1) to preserve the public's access to lawyers who, because of their background and experience, "might be the best available talent to represent these individuals," (2) to prevent parties from "buying off" the opposing lawyer, and (3) to prevent a conflict between a lawyer's present client and the lawyer's future ones. ABA Op. 93-371 (1993). The rule "prohibits lawyers from making or entering agreements that restrict a lawyer's right to represent certain clients or to sue specified parties as part of the settlement of a controversy between private parties." *Annotated Model Rules of Professional*

Conduct 468-69 (4th ed. 1999) (citing ethics opinions). This rule applies equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it.

In the employment discrimination context, DR 2-108 (B) would prohibit an agreement by the employee's lawyer not to represent other employees in claims of discrimination against the defendant employer. Although the proponent of such a restriction might argue that it is needed to prevent the lawyer's improper use or disclosure of information learned in the course of the representation that the lawyer may have a duty to keep confidential, such a restriction is far broader than necessary to serve this purpose and may not be justified on this ground. *Cf.* Ala. Op. RO-92-01.

The specific agreements presented in this inquiry do not directly restrict the inquirer's right as a lawyer to practice law or to represent similar clients. Nevertheless, the confidentiality language is likely to restrict the inquirer in a relationship with any future client employed (or formerly employed) by the same employer, because the language is so broad that the mere representation of an employee in the future by the inquirer could raise an issue as to whether the confidentiality agreement has been breached. The question is whether DR 2-108(B) forbids an attorney from agreeing to such confidentiality terms because they have the effect of restricting on the attorney's right to represent other clients in future cases against the present client's employer.

In general, conditions of settlement that require conduct on the part of a lawyer are permissible if they do not effectively restrict the lawyer from continuing or undertaking other representations and the lawyer's own client has the right to hold the lawyer to the particular conduct. For example, confidentiality provisions that, subject to limited exceptions, prohibit the parties and their lawyers from disclosing the terms of a settlement are common and do not violate DR 2-108(B). The obligation to preserve the confidentiality of settlement terms does not effectively restrict the lawyer from representing other clients. Further, the terms of a confidential settlement are client "confidences" or "secrets" within the meaning of DR 4-101, which establishes the lawyer's ethical duty of confidentiality. Therefore, the lawyer may not disclose the settlement terms without client consent and, conversely, the client may insist that the lawyer keep this information confidential. Since lawyers may not disclose confidential settlement terms without client consent, it is not an impermissible restriction on the right to practice law to require, as a condition of settlement, that the party's lawyer will not disclose this information. Likewise, other restrictions on disclosure of information covered by the confidentiality rule would ordinarily be permissible. *Cf.* Az. Op. 95-04 (1995) (in-house corporate lawyer may agree to nondisclosure of client confidences as condition of severance agreement).

At the same time, however, terms of a settlement agreement may violate DR 2-108(B) if their practical effect is to restrict the lawyer from undertaking

future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose. *See, e.g.*, ABA Op. 417 (2000)(limitation contained in settlement agreement would effectively bar future representations because the lawyer's inability to use information could materially limit and adversely affect representation of future clients); Colo. Op. 92 (1993) ("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."); N.M. Op. 1985-5 (1995) (lawyer may not agree, upon settlement, to disclose her entire work product to the opposing party, because doing so "may inhibit her representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims.").[1]

In this case, the proposed confidentiality terms appear to apply to some information that, ordinarily, the plaintiff's lawyer would have no duty to keep confidential under DR 4-101. For example, there is almost certainly information about "the business or operations of the defendant corporation" that is public information or that can be learned in future representations without relying on confidences or secrets of the current client. The duty of confidentiality under DR 4-101 would not preclude the lawyer from disclosing such information. The settlement terms would also be overbroad insofar as information about the defendant's business was learned by the lawyer prior to the representation or insofar as it was understood at the outset of the representation that the lawyer could use information of this nature in representing future clients. For similar reasons, the proposed settlement term that would prohibit disclosure of "*any* information concerning *any* matters relating *directly or indirectly* to the settlement agreement *or* its terms" appears to be overbroad.

These provisions would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret under DR 4-101 but was nevertheless covered by the settlement terms. A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients –precisely the problem at which DR

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1 We note that, by its terms, the rule applies only to restrictions on the lawyer's right to practice law that are imposed in the context of a settlement. Therefore, the rule does not restrict the lawyer and client from entering into a retainer agreement that clarifies the application of the conflict-of-interest rules or expands upon them by restricting the lawyer from undertaking certain future representations of others in matters that may be adverse to the client or that otherwise implicate the client's interests.

2-108(B) is aimed. *Cf.* DR 5-101(A) ("a lawyer shall not ... continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business ... or personal interests unless a disinterested lawyer would believe that the representation of the client would not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest").

An agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule. *See, e.g., Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997) (holding that agreement not to solicit clients is enforceable even assuming it violates the rule).[2] Whether this particular proposed agreement, if entered into, would be enforceable or what the consequences of breach would be are questions of law on which this Committee does not opine. Even if an agreement is enforceable, however, it may be impermissible under the Code. *See* N.Y. City 1999-3 (1999). Accordingly, whether or not the proposed restrictions on disclosure are enforceable, this Committee concludes that, because they are overly broad and would have the effect of restricting the practice of law, they are prohibited by DR 2-108(B).

CONCLUSION

For the reasons stated, the question is answered in the negative.

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2 The court's decision in *Feldman v. Minars* has been strongly criticized insofar as it further found that an agreement not to solicit clients would not violate the rule. *See* Simon's *New York Code of Professional Responsibility* 177-79 (2000 ed.). The intermediate appellate court's restrictive reading of the rule was influenced by its view that the rule is "an anachronism, illogical and bad policy." It may be worth noting that, despite the expression of this view in a 1997 decision, the Appellate Division made no change to DR 2-108(B) when it amended the Code, effective June 30, 1999.