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New York State Bar Association
Committee on Professional Ethics

Opinion 1006 (4/2/14)

Topic: Settlement agreements; restrictive covenants; prohibiting solicitation of new clients having similar claims; prohibiting the referral of such claims to other counsel

Digest: A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will thereafter (a) refrain from soliciting clients for the purpose of bringing similar claims against the settling party, or (b) refrain from referring potential claimants with similar claims to other counsel.

Rules: 5.6(a)(2); 1.6; 1.9(c)

FACTS

1. The inquiring attorney represents an organization against which one of its employees has asserted certain claims. The matter is in the process of being settled. The organization fears that similarly situated employees may assert additional claims. As part of the settlement negotiation, the inquirer proposes to seek assurances from the claimant's lawyers that they will not solicit or refer further clients from among those similarly situated employees, although the inquirer accepts that if a further employee approached the attorney without being solicited, the attorney would have the right to represent that individual.

QUESTIONS

2. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party?

3. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter refer prospective clients to other lawyers for the purpose of bringing similar claims against the settling party?

OPINION

4. Rule 5.6(a)(2) of the New York Rules of Professional Conduct (the "Rules") states: "A lawyer shall not participate in offering or making … an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." Policies cited as underlying this rule include enhancement of the public's access to lawyers and avoidance of

conflicts.[1] In interpreting Rule 5.6, we are guided also by interpretations of its predecessor rule, DR 2-108 of the former Code of Professional Responsibility (the "Code"). Although DR 2-108 was controversial, its essential terms were carried forward into Rule 5.6.[2]

5. The lawyer whose "right to practice" is at issue here is the lawyer representing the settling claimant, rather than the inquirer who represents the organization that is the target of the actual and potential claims. This distinction, however, is not important to our inquiry, because Rule 5.6 provides that no lawyer may "participate in offering or making" a settlement agreement that restricts *any* lawyer's right to practice. *See* N.Y. State 730 (2000) (predecessor rule applied "equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it").

6. This Committee last examined restrictive settlement agreements in N.Y. State 730 (2000), which construed DR 2-108. The question there was whether an attorney for an employment discrimination plaintiff could agree as part of a settlement not to disclose broad categories of information, including facts about the business and operations of the defendant corporation and "any matters relating directly or indirectly" to the settlement agreement. We concluded that such terms would violate DR 2-108. We reasoned that although the terms would not "directly" restrict the inquirer's right to practice law or to represent similar clients, they would nonetheless violate the rule "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."[3]

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[1] According to ABA 93-371 (1993), which we cited in N.Y. State 730 (2000):

> 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 individuals. 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.

[2] *See* N.Y. City 99-03 (citing sources arguing that the rule is justified, and others arguing that it is not); Proposed Rules and COSAC Commentary, September 30, 2005, Reporter's Notes at 373 (noting "considerable controversy" about DR 2-108 in that "both the breadth of the prohibition and the public policy benefits of the Rule have been subject to debate," citing court cases, and reporting that Committee on Standards of Attorney Conduct "considered many various possible alternatives to the language of this Rule, but determined to retain the language of the current New York Disciplinary Rule"), available at http://www.onbar.org/news/COSAC_Rules/Rule5.6.pdf; Reporter's Notes, NYSBA Proposed Rules of Professional Conduct at 185 (Feb. 1, 2008) (explaining that Rule 5.6 was intended to be "substantively identical" to the former DR 2-108).

[3] *Accord* D.C. Opinion 335 (2006) (surveying ethics opinions, including N.Y. State 730, in which an "underlying rationale … is that the prohibited provisions restrict the lawyer's right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the

7. We recognized in N.Y. State 730 the permissibility of standard agreements not to disclose settlement terms, reasoning that such agreements bolster the client's independent right to require that the lawyer keep information confidential, and do not "effectively restrict the lawyer from representing other clients." In contrast, we found the more sweeping nondisclosure terms at issue in N.Y. State 730 to be impermissibly overbroad in that they "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 … but was nevertheless covered by the settlement terms."[4] The scope of information protected as a "confidence or secret" under the prior Code is largely carried forward under the Rules as "confidential information," which is protected for current clients under Rule 1.6 and for former clients under Rule 1.9(c). This category of confidential information is broad enough to give the parties considerable leeway in extending the reach of permissible nondisclosure clauses.[5]

Agreements Barring Solicitation

8. Solicitation of clients, once prohibited as an ethical matter, is now permitted subject to various constraints including those of Rule 7.3. Solicitation of clients in compliance with the Rules is an aspect of law practice that may be important or even crucial to a lawyer's ability to

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settling party"); Colorado Opinion 92 (1993) (stating that the rule may be violated by restrictions "less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim," and citing ethics opinions recognizing "impropriety of practice restrictions that fall short of an out-right bar to future or ongoing representation").

[4] *Accord* D.C. Opinion 335 (2006) ("A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential."); South Carolina Opinion 10-04 (stating that Rule 5.6 "prohibits settlement agreements that reach information not reached by [Rule] 1.6," and suggesting that lawyers generally should not become parties to their clients' settlement agreements); ABA 00-417 (distinguishing agreements not to reveal confidential information from agreements not to use it, and concluding that Rule 5.6 does not prohibit the former because a "settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, 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 in the matter"); Colorado Opinion 92 (1993) (agreement conditioned upon "nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record … [does] not materially restrict a lawyer's ability to practice law").

[5] Subject to certain exceptions, the category includes all information which the client has requested be kept confidential. *See* Rule 1.6(a). As to a related rule prohibiting employment agreements that restrict the right of a lawyer to practice after termination of the employment, we have noted that "as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules." N.Y. State 858 ¶10 (2011).

engage meaningfully in the profession. On that premise, the reasoning of N.Y. State 730 guides the resolution of this inquiry as well. While a lawyer's agreement not to solicit further clients would not "directly" restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations. Accordingly, it is impermissible for any lawyer to settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party.[6]

9. The contrary result was reached in *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997), but that opinion is of limited weight here. In *Feldman*, the court held that plaintiff's law firm should be disqualified, based in part on the firm's solicitation of the plaintiffs in violation of a prior settlement in which the firm had agreed not to "encourage any other parties or attorneys to commence such action or proceeding." The firm sought to be relieved from that prior agreement on the ground that it violated public policy as expressed in DR 2-108. The court rejected that argument on a number of grounds, most of which do not apply here.[7] However, the court also briefly addressed the ethical issue at hand:

> Even assuming, arguendo, that a settlement agreement that forbids an attorney to represent other clients against the settling defendants in similar litigation is against public policy, as expressed in the Code of Professional Responsibility, an agreement not to *solicit* clients is not likewise against public policy.

Feldman, 230 A.D.2d at 359 (original emphasis). The basis for that conclusion was suggested in the sentence that followed: "In fact, until recently, solicitation of clients, even without an agreement, was barred by applicable disciplinary rules." *Id*. But as noted above, solicitation of clients, when done in accordance with applicable rules, is no longer ethically suspect. A

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[6] Other jurisdictions have reached similar results. *See* Texas Opinion 505 (1994) ("To the extent that [solicitation] is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement [than] it is restricted in the Rules and applicable law."); South Carolina Opinion 10-04 ("Rule 5.6(b) protects a lawyer's access to the legal market, and that protection is implicated by advertisements and solicitations equally.").

[7] The court reasoned that "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." *Feldman*, 230 A.D.2d at 361. It continued that even if the settlement agreement were against public policy of the State, the violation could be addressed by the appropriate disciplinary authorities rather than by invalidating the agreement. *Id*. For both these reasons, an agreement may be enforceable even if it violates a rule of legal ethics. *See* N.Y. City 1999-3 (settlement agreement restricting practice ethically impermissible "even if such an agreement may be enforceable as a matter of law"). Also the *Feldman* court approvingly cited an article calling the relevant ethics rule "an anachronism, illogical and bad policy." *Feldman*, 230 A.D.2d at 360 (citing Gillers, *A Rule Without A Reason, Let the Market, Not the Bar, Regulate Settlements that Restrict Practice,* 79 ABA J 118 [Oct. 1993]). But as noted above, New York later adopted Rule 5.6 despite such policy criticisms.

settlement agreement effectively restricting the right to practice is impermissible, and it does not matter that the restriction would be achieved only through limits on otherwise appropriate solicitation. *See* N.Y. State 730 at n.2 (noting that *Feldman* decision had been strongly criticized insofar as it found "that an agreement not to solicit clients would not violate the rule").

Agreements Barring Referral

10. The second question concerns potential claimants whom the claimant's lawyer has not solicited, but who have on their own volition approached the claimant's lawyer for representation, information or guidance. The inquirer recognizes that it would be improper for a settlement agreement to provide that the lawyer may not *represent* such a person, but nonetheless asks whether an agreement could provide that the lawyer may not *refer* the person to be represented by another lawyer.

11. Referral of prospective clients to other lawyers is, like solicitation of clients, integral to the practice of law. If a lawyer who is approached by a prospective client does not, for whatever reason, end up representing that person, the lawyer can nonetheless perform an important service by referring the prospective client to some other lawyer appropriate to the task. To perform this service well, the lawyer may need to ask the prospective client for information that will give rise to certain duties of legal ethics. *See* Rule 1.18 (duties as to confidentiality and conflicts). Then the lawyer will need to exercise legal judgment in assessing which other lawyers would be well suited to provide the representation. All of this helps achieve what Comment [1] to Rule 7.1 calls the "important functions of the legal profession … to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." Accordingly, a settlement agreement precluding future referrals would impermissibly restrict the lawyer's right to practice law. *See* Colorado Opinion 92 (1993) (stating that improper restrictions in settlement agreements may include prohibiting settling lawyer's "referral of potential clients to other counsel"); D.C. Opinion 35 (1977) (unethical for lawyer to agree to settlement term prohibiting referral to other lawyers of potential clients with claims against settling defendant).

CONCLUSION

12. The questions are answered in the negative. A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will thereafter (a) refrain from soliciting other clients for the purpose of bringing similar claims against the settling party; or (b) when contacted by potential claimants, refrain from referring such persons to other counsel.

(40-13)