

DON'T SETTLE YOUR LICENSE AWAY

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So you are negotiating settlement of a difficult case brought by a strong plaintiff's counsel who discovered facts that makes the filing of future similar cases likely. As part of the settlement, your client wants to take plaintiff's counsel out of the ball game. Can it be done? What if instead you are representing two plaintiffs, and on the eve of trial a defendant offers you full payment for the claims of one, so long as you agree not to represent the other at trial? In any of these circumstances, does it matter whether plaintiff's counsel would be happy to get a good result for his current client and never prosecute another case against this defendant? Does it matter if all of the clients – defendants and plaintiffs – consent to the arrangement after full disclosure by their respective counsel?

This article explains why all of these arrangements are unethical and potentially worse. The Texas Disciplinary Rules of Professional Conduct (the "Texas Rules")¹ prohibit both "offering" and "making" as part of a settlement any agreement that restricts the right of a lawyer to represent clients in the future – and that is precisely what these settlement agreements would do – even if the client consents. Even indirect attempts to restrict the right of a lawyer to practice law – even with the consent of all clients – are fraught with danger for both plaintiff's and defendant's counsel. Offering or making

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¹ The Texas Disciplinary Rules of Professional Conduct are based upon the American Bar Association Model Rules. Texas Rule 5.06(b) is essentially identical to Model Rule 5.6(b). There has been substantial recent criticism of these rules, but they remain on the books in most jurisdictions. See, e.g., Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 Geo. J. Legal Ethics 291 (2005).

settlement agreements that restrict the right of a lawyer to practice law can be unethical, unenforceable, and create malpractice liability.

The Rule Against Restricting the Right to Practice and Its Purpose

Like most states, the Texas Rules prohibit even attempting to make agreements which restrict the right of a lawyer to practice law. Specifically, Texas Rule 5.06(b) prohibits lawyers from participating “in offering or making... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy” with a narrow exception applicable when settling disciplinary proceedings. The pertinent comment explains that the rule “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”²

The rule serves at least three distinct purposes.

First, it prevents counsel offering the agreement from placing opposing counsel in a situation where his interests conflict with the client. For example, a plaintiff may want to accept a settlement offered at a premium because it includes an agreement by the lawyer not to be adverse to the defendant in the future, but the lawyer may want the freedom to undertake such representations.³ Defense counsel is precluded by the rule from creating this conflict of interest in opposing counsel.

Second, the rule prevents payment of a “buy-off premium” -- consideration to a plaintiff unrelated to the merits of the claim. The amount a plaintiff might be offered will reflect not the value of the claim, but the desire of the defendant to buy off plaintiff's counsel.⁴ The rule thus prevents a plaintiff's lawyer from enhancing the value of a

² Tex. R. 5.06(b).

³ *Adams v. Bellsouth Telecomm., Inc.*, 2001 WL 34032759 (S.D. Fla. Jan. 29 2001), *dism'd*, 45 Fed. Appx. 876 (11th Cir. Jun 28, 2002).

⁴ *Id.*

particular plaintiff's claim at the expense of eliminating her ability to represent future plaintiffs.

Finally, the rule ensures that the right of access by the public to lawyers who are, by virtue of knowledge, background, and experience most qualified to bring such claims. In litigating a specific claim against a defendant, a lawyer gains an understanding of facts, strategy, and other information that makes that lawyer better-equipped to bring the same type of claim again.⁵ The rule thus ensures that future clients with similar claims will have access to lawyers who are able to deliver efficient legal services.

The Rule Prohibits Indirect Restrictions, Too.

The rule clearly prohibits direct agreements to restrict practice. For example, one Texas ethics opinion applied the rule to the question of whether a lawyer could agree not to solicit clients against a current-adversary as part of settlement.⁶ The opinion concluded that the agreement not to solicit clients in the future would violate the rule. Even though plaintiff's counsel did not directly agree to forego representations, the agreement's indirect effect would be to do so. Defense counsel may not offer such agreements, and plaintiff's counsel may not accept them.

Other jurisdictions have held that the rule prohibits varied forms of indirect restrictions, even those that may also serve legitimate purposes. For example, a defendant settling a case may want to retain plaintiff's counsel to consult on future similar cases brought against the defendant: a plaintiff's lawyer who was highly effective in suing a defendant may be a valuable consultant in defending similar claims. While that does not sound like a restriction on practice, it has that effect: because the defendant

⁵ *Id.*

⁶ Texas Ethics Opinion 505 (1995).

would become a client, plaintiff's counsel would be disqualified from being adverse to the defendant.⁷ An Oregon court suspended plaintiffs' counsel who had entered into a settlement agreement that provided that the defendant would retain them after the settlements were final. The court held that the settlement violated Oregon's equivalent to Texas Rule 5.06(b), and further found that the provision violated Oregon's conflict of interest rules. The lawyers were suspended for one year.⁸ In addition, the client sued for malpractice.⁹

Post-suit retention is not the only form of indirect restriction that has been found to be unethical. Various agreements have been held by courts and bar associations around the country to constitute indirect restrictions that violate the prohibition:

- Agreement by lead counsel in consolidated multidistrict litigation to withdraw from representing nonsettling plaintiffs;¹⁰
- Agreement by counsel not to subpoena certain records or fact witnesses in future cases;¹¹
- Agreement by counsel that plaintiff's counsel would receive a consulting fee from the defendant – taken out of the already-tendered settlement amount;¹²

⁷ See Tex. R. 1.06 (describing when lawyers may not be adverse to current clients); see, e.g., *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992) (holding that in federal court in Texas, a lawyer may not be adverse to a current client, even in unrelated matters, absent exceptional circumstances).

⁸ *In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000) (suspending attorneys for 12 and 13 months for, among other things, agreeing to consult with the opposing parties).

⁹ *Bramel v. Brandt*, 79 P.3d 375 (Or. App. 2003).

¹⁰ Ala. Ethics Op. 92-01 (1992). See also L.A. Ethics Op. 468 (1992) (finding unethical agreement by which lawyers for settling defendants would not represent nonsettling defendants).

¹¹ Colo. Ethics Op. 92 (1993).

¹² *Adams v. Bellsouth Telecomm., Inc.*, *supra* (agreeing in settlement agreement to be retained by opposing party violated ethical rules, particularly where it also resulted in a conflict between lawyer and client over settlement fund allocation).

- Requests by defense counsel for plaintiff’s counsel to return work product to opposing counsel at the close of the case where doing so will restrict plaintiff’s counsel’s ability to represent future clients;¹³ and
- Agreements sought by defense counsel whereby plaintiff’s counsel would not use information learned about the defendant in future cases.¹⁴

Can Clients Consent?

The authorities so far have held that a client may not consent to allow a settlement agreement to contain a restriction on practice.¹⁵ In part, this is because the rule protects more than the client’s interest: it also protects the right of the public to have access to competent, efficient counsel. As a result, even full disclosure to and consent by every affected client will not insulate an agreement that violates the rule. Defense counsel should not seek such consent to make an offer, and plaintiff’s counsel should not seek consent to accept one.

Consequences of a Violation Can be Severe

Bar associations have brought grievances against lawyers who offered or accepted settlement agreements that violated Rule 5.06(b).¹⁶ In addition, clients have brought malpractice suits based upon the conflict of interest which they can create.¹⁷ It may also

¹³ N.M Ethics Op. 1985-5 (1985) (even at client’s request, lawyer may not agree to do so); N.D. Ethics Op. 1997-05 (1997) (same).

¹⁴ Am. B. Ass’n. Formal Op. 00-417 (Apr. 7, 2000); *see Hu-Friedy Mfg. Co. v. Gen’l Elec. Co.*, 1999 WL 528545 (N.D. Ill. July 19, 1999) (reasoning that it could not construe prior protective order that prohibited “use” of information in other proceedings to preclude plaintiffs’ counsel from representing subsequent plaintiffs in related lawsuit without violating Rule 5.6).

¹⁵ Am. B. Ass’n. Formal Op. 00-417 (Apr. 7, 2000) (concluding that it is “impossible” for lawyer to acquiesce in client’s decision whether to accept a restriction on practice).

¹⁶ *E.g., In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000).

¹⁷ *E.g., Bramel v. Brandt*, 79 P.3d 375 (Or. App. 2003). In *Franklin v. Fasack*, 2002 WL 596813 (Cal. App. April 17, 2002), plaintiffs’ lawyers had negotiated a settlement for their clients at the same time they had negotiated a two-year consulting agreement with the defendant for themselves. The consulting agreement was in lieu of an earlier request by defense counsel that plaintiffs’ counsel agree not to sue

be that, even if the bar doesn't find out or the client doesn't care, that the opposing party won't pay and a court won't enforce the agreement: a plaintiff's lawyer who seeks to enforce an agreement to retain the plaintiff's lawyer may find that a court will not enforce it because it is unethical. On that question, however, there is some disagreement.¹⁸

Limits and Exceptions

Although the prohibition is broad, it is not unbounded. The principle limitation on the rule is the fact that it only prohibits offering or making restrictions on practice as a "part of the settlement of a suit or controversy." There is, as a result, nothing unethical where, *after settlement is concluded*, defense counsel offers, or plaintiffs' counsel agrees, to represent a former adversary, and *vice versa*.¹⁹

Counsel should be careful to ensure that these activities truly remain post-settlement, however. Defense counsel who even broach the subject before conclusion of settlement could violate the rule. Likewise, plaintiff's counsel who try to "wire around" the rule by having agreements in principle prior to settlement, or nod and wink type arrangements, could create potential problems. For example, a former plaintiff could

defendant for two years. The court held that plaintiffs' malpractice complaint against their lawyers stated a cause of action.

¹⁸ Courts from Florida have held agreements enforceable even if they violate Rule 5.6, reasoning that "invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect." *Lee v. Florida Dept. of Ins.*, 586 So.2d 1185, 1188 (Fla. App. 1991). In contrast, the Restatement of Law Governing Lawyers holds they are "void and unenforceable." Restatement (Third) Law Governing Lawyers § 13(2) (2000); see *Jarvis v. Jarvis*, 758 P.2d 244 (Kan. App. 1988) (holding provision in divorce settlement agreement that prohibited wife from ever using a certain lawyer against her husband was void). Texas courts have, so far, provided little guidance on this specific issue. See *Shebay v. Davis*, 717 S.W.2d 678, 682 (Tex. App. – El Paso 1986, no writ) (reasoning that presence of clause that might violate rule was irrelevant to whether settlement should be approved, but was a matter for the state bar grievance committee); *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (court based disqualification on a lawyer's agreement not to sue a party without mentioning Texas Rule 5.06(b)). It may be that an agreement will be enforced, but will subject the lawyer to discipline for having entered it.

¹⁹ Restrictions have been upheld in other narrow circumstances. *E.g.*, *Blue Cross & Blue Shield v. Philip Morris, Inc.*, 53 F. Supp.2d 338 (E.D.N.Y. 1999) (upholding agreement by plaintiff's counsel not to disqualify defendant's counsel in exchange for defense counsel's promise not to appear in three suits plaintiffs were filing did not violate the rule).

later contend that the lawyer accepted a too-low a settlement in order to ensure that she would obtain lucrative future work from the former defendant.

Conclusion

Defendants may want to take effective plaintiff's counsel out of the game, or may, in truth, actually desire to obtain the wisdom of highly effective opposing counsel to defend similar cases in the future. While a plaintiff's lawyer who does a good job litigating a case against a defendant may such offers as a compliment, and may even genuinely be interested in representing the defendant in the future, both parties need to proceed with extreme caution. Offering, negotiating, or making such provisions while settlement is pending may be a way for both counsel to settle their licenses away.