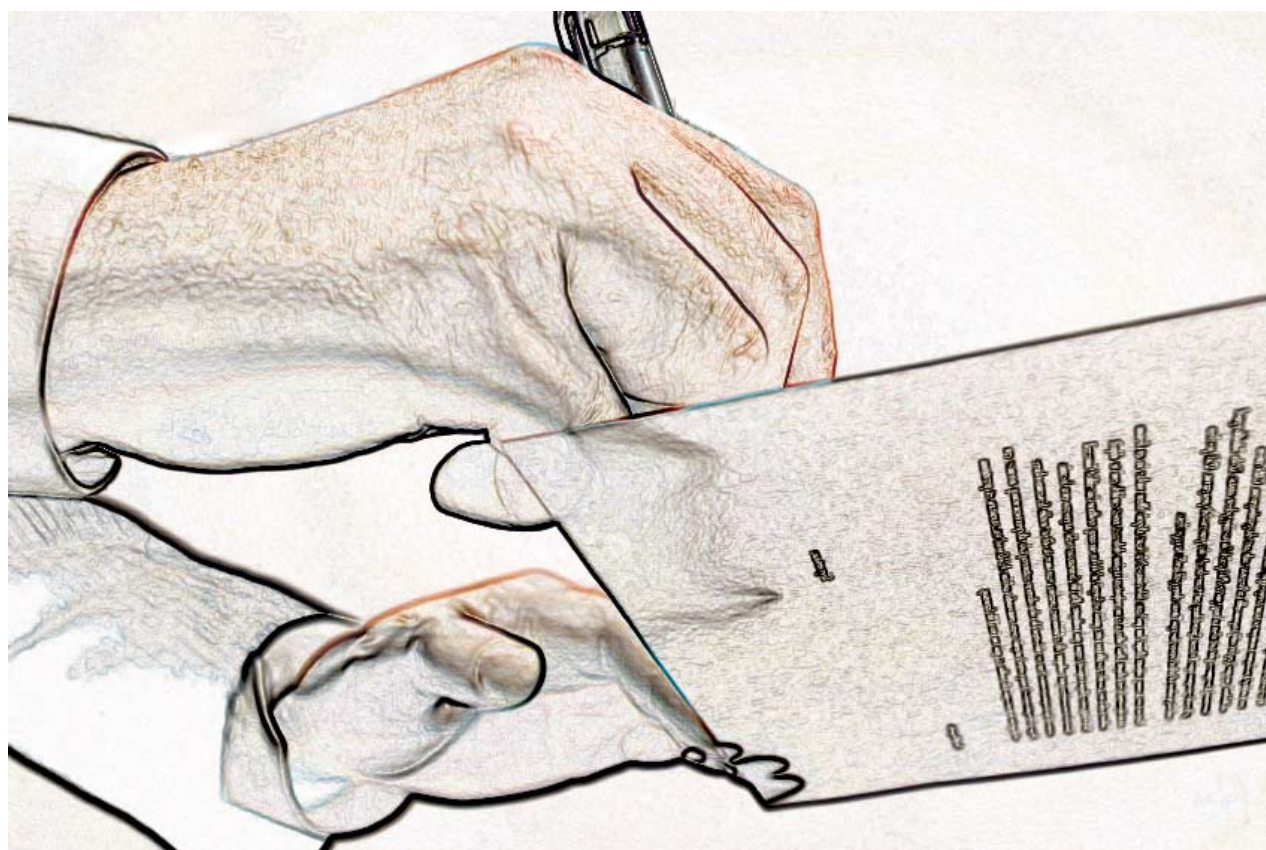




Agreements That Restrict an Attorney's Practice

Grace M. Giesel



May an attorney enter into an agreement settling a client's matter if that agreement in some way restricts the attorney's right to practice? For example, as part of a settlement of a client's legal claim, could an attorney agree to not represent other clients against the same defendant? Could an attorney agree to not use information gained in the representation? Could an attorney agree not to solicit clients who might have a claim against the defendant? Could an attorney agree to represent or serve as a consultant to the defendant in the future?

In my last article in *Bar Briefs*, I discussed the general ethical prohibition on partnership or other employment agreements restricting an attorney's right to practice.¹ In contrast, today's article is about the more specific issue of a restriction on an attorney's right to practice that accompanies a settlement of a client's matter. Rule 5.6(b) of the Kentucky Rules of Professional Conduct (Kentucky Supreme Court Rule 3.130 (5.6(b))) states:

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 controversy between private parties.²

The rule's defenders claim that the rule is necessary to prevent depriving the market for legal services of the attorneys most skilled at handling a particular type of claim. For example, if an attorney who has handled, successfully, a claim against a pharmaceutical company is prohibited from handling other such actions, the market for such services is detrimentally limited. Some argue that the expertise that the attorney garners is, in some respects, a public good. The judicial system has assisted in the development of that expertise, and the public should have the benefit of it. Private parties should not be able to closet such expertise. A second argument in support of Rule 5.6(b) is that the client in such a settlement may receive rewards that do not truly correlate to the value of the claim but rather to the defendant's desire to eliminate the plaintiff's counsel from the game. Another rationale is that the rule prevents the creation of a conflict between the attorney and the client on the issue of settlement and its terms.³

Rule 5.6(b)'s prohibition of settlement agreements that restrict an attorney's right to practice has been criticized by some commentators.⁴ A few courts have also expressed disfavor. For example, in *Feldman v. Minars*,⁵ the New York court decided to enforce an agreement entered into as part of a

settlement of the claims of clients. In that agreement the attorneys representing certain plaintiffs agreed not to "assist or cooperate" in the pursuit of claims of other persons against the original defendants. Later, those attorneys did just that. The court held that the earlier agreement precluded the later representation even though the attorneys involved with that earlier agreement might be subject to professional discipline. The *Feldman* court stated: "[W]e find persuasive the reasoning of Professor Gillers, who contends that 'Rule 5.6(b) ... is an anachronism, illogical and bad policy.'"⁶

In re Conduct of Brandt

This disapproval of Rule 5.6(b) is not widespread, however. States discipline attorneys for violating this rule. Malpractice liability as a result of entering into such an agreement is very real as well. A typical case is the disciplinary action of *In re Conduct of Brandt*.⁷ Over the years Brandt and Griffin, two attorneys in Oregon, represented hand tool distributors in matters against the manufacturers of the tools. In so doing, these attorneys developed an expertise in this area. In 1992, these attorneys agreed to represent the Bramels, former hand tool distributors, in a matter against Mac Tools, a manufacturer.

The attorneys pursued settlement with Mac Tools and also participated in settlement strategy conversations with other lawyers representing clients with claims against Mac Tools or its parent company, Stanley. In settlement negotiations with Mac Tools, Mac Tools insisted that any settlement include an agreement by the plaintiffs' attorneys to work for Mac Tools or Stanley in the future. If the plaintiffs' attorneys were retained by Mac Tools or Stanley, they would be unable to represent other plaintiffs with claims against Mac Tools or Stanley.

In an attempt to get around the ethical prohibition in the Oregon rule stating the same principle as Kentucky's Rule 5.6(b), the attorneys signed a settlement agreement and had it held in escrow. Attorneys on both sides also signed a document stating that the plaintiffs' attorneys did not solicit employment by Mac Tools or Stanley and that retention of the plaintiffs' attorneys by Mac Tools or Stanley was not a term of the settlement agreement. On the same day, Griffin signed an agreement stating that he would provide legal services to Stanley. Brandt signed a similar agreement the next week. The retainer agreements were held in escrow. Griffin told the Bramels, his clients, about the terms of the settlement and some information about the retainer arrangement. The Bramels agreed to the settlement. The settlement agreement and the retainer agreements then were released from escrow. The Bramels received the settlement funds but then filed a bar complaint against Griffin and Brandt.

Agreements

(continued from front page)

The Oregon Supreme Court held that the attorneys entered into the retainer agreements in connection with a settlement of a client's matter. In response to the argument that the arrangement did not violate the ethical prohibition because the retainer agreements were not direct restrictions on the practice of law, the court noted that the rule prohibited both direct and indirect restrictions on the practice of law if those restrictions were in connection with a settlement of a client's matter. Looking to substance over form, the court noted that "no one disputes that one of the reasons that [Mac Tools/ Stanley] insisted that the retainer of counsel provision be incorporated into the settlement agreement was to prevent the [attorneys] from representing other plaintiffs against Stanley in the future."⁸ The court also found that the attorneys failed to avoid conflicts of interest and failed to be candid with the Bramels about the retainer arrangement. Oregon suspended the attorneys from the practice of law for 12 and 13 months respectively.

In re Hager

Another example of bar discipline is *In re Hager*,⁹ a case that definitely should leave most attorneys shaking their heads and muttering, "What was that guy thinking?" In *Hager*, a tenured law professor at American

University entered into a settlement agreement for several clients' claims against the manufacturer of a lice treatment product. The agreement provided that the clients would receive refunds, that the defendant manufacturer would pay \$225,000 to the attorney and co-counsel, that the attorneys would not disclose the payment to the clients, that the attorneys would not represent anyone with similar claims against the manufacturer, and that the attorneys would not disclose any information discovered during the litigation. Finding a violation of several ethics rules including the D.C. rule which is the equivalent of Kentucky's Rule 5.6(b), the court suspended the lawyer for one year with an explicit statement that disgorgement of the fee could be a condition of reinstatement. The attorney is no longer a member of the American University faculty.

Conclusion

Let's return to the questions in the introductory paragraph. If an attorney enters into the described agreements in conjunction with a settlement of a client's matter, which of these agreements violate Rule 5.6(b)?

Rule 5.6(b) is clear that an attorney cannot agree to refrain from representing clients against the same defendant. ABA Formal Op. 00-417 states that "a lawyer may not, as part of settlement of a controversy on behalf of a client, agree to a limitation on the lawyer's right to represent other clients against the same opposing party."¹⁰ Cases like *Brandt* and *Hager* make this clear as well.

It is also clear that in conjunction with a settlement of a client's claim, an attorney cannot agree to forego use of information gained

in the representation against the same defendant. ABA Formal Op. 00-417 states: "An agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)."¹¹ The rule is implicated only if the attorney agrees not to disclose or use information that otherwise he or she is free to disclose or use.¹²

Could an attorney agree not to solicit clients who might have a claim against the defendant? Texas, following the same reasoning as the use of information opinions, has stated that any settlement agreement that limits the attorney's right to solicit clients beyond the restrictions in the state's ethics and advertising rules, is a violation of the Texas equivalent of Kentucky's Rule 5.6(b).¹³

The final question posed in the introductory paragraph is whether an attorney might ethically agree, in connection with the settlement of a client's claim, to represent or serve as a consultant to the defendant in the future. The *Brandt* case makes clear that such an agreement may very well be a violation of the prohibition of Kentucky Rule 5.6(b) that an attorney "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."¹⁴

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Endnotes

¹ See Grace M. Giesel, *Restrictions on an Attorney's Right to Practice*, **Louisville Bar Briefs**, Vol. 6, No. 11 (Nov. 2006).

² Kentucky Supreme Court Rule 3.130 (5.6(b)). See **Restatement (Third) of the Law Governing Lawyers** § 13(2) (2000).

The American Bar Association, in Formal Opinion 95-394 (1995), clarified that the rule applies when one of the parties is a government entity. The new version of Model Rule 5.6(b), which has been adopted by many jurisdictions and is under consideration in Kentucky, does not contain any reference to "private parties."

³ See ABA Formal Op. 93-371 (1993).

⁴ See, e.g., Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-sue Promises in Settlement Agreements*, 18 **Georgetown J. Legal Ethics** 291 (2005).

⁵ 658 N.Y.S.2d 614 (N.Y. App. Div. 1997).

⁶ *Id.* at 617 (quoting Stephen Gillers, *A Rule Without A Reason: Let the Market, Not the Bar, Regulate Settlements That Restrict Practice*, **ABA Journal**, Oct. 1993, at 118).

⁷ 10 P.3d 906 (Or. 2000).

⁸ *Id.* at 918.

⁹ 812 A.2d 904 (D.C. Ct. App. 2002).

¹⁰ ABA Formal Op. 00-417 (2000).

¹¹ *Id.*

¹² See *id.* See also D.C. Op. 335 (2006).

¹³ See Texas Prof'l Ethics Comm., Op. 505 (1995).

¹⁴ Kentucky Supreme Court Rule 3.130 (5.6(b)).