

ETHICAL PITFALLS IN SETTLEMENT NEGOTIATIONS

Restrictions on Future Representation

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ABA Model Rule 5.6(b)

“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.”

Direct Restrictions

- Can't directly condition settlement on the lawyer promising not to take on cases against the settling party
- Based on public policy considerations

“Indirect” Restrictions

- *In re Brandt/Griffin*,
10 P.3d 906 (Or. 2000)
- *Florida Bar v. St. Louis*,
967 So.2d 108 (Fla. 2007)
- *Florida Bar v. Rodriguez*,
959 So.2d 150 (Fla. 2007)

Other Restrictions

- ABA Formal Ethics Opinion 93-371 & settlement “opt out” restrictions
- ABA Formal Ethics Opinion 00-417 & restrictions on use of information

Whose Problem?

- Not just the claimant's lawyer
- Model Rule 5.6(b) prohibits both making *and offering*
- *Adams v. Bellsouth*,
2001 WL 34032759 (S.D. Fla. Jan. 29,
2001)

What Kinds of Problems?

- Regulatory Discipline
- Civil Liability Claims
- Enforceability Problems~Restatement (Third) of the Law Governing Lawyers (2000), §13, Comment c: “void and unenforceable”

For Further Reading

- February 2009 DRI *For the Defense* article included with program materials (reprinted with permission)
- ABA Center for Professional Responsibility web site~www.abanet.org/cpr