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One at a Time:
Restrictions on Future Representation in Settlement Agreements

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In a variety of practice areas, it is common for the same lawyer or firm to handle repeated claims against the same defendant. Employment, product liability and business tort claims provide ready examples. If a lawyer or firm is particularly effective, the defendant may be tempted to say to the lawyer: "We're tired of seeing you—how about including a provision in our settlement agreement prohibiting you from handling cases against us going forward?"

RPC 5.6(b) generally prohibits both offering or accepting such a proposal. At the same time, the economic pressure to settle cases sometimes leads to "creative" variants that are not as clear. In this column, we'll first look at the history of Oregon RPC 5.6(b)—which varies from its ABA Model Rule counterpart in a key respect. Next, we'll survey some "creative" variants that have also been found to violate the rule.

Oregon RPC 5.6(b)

Oregon's rule is simple on its face:

"A lawyer shall not participate in offering or making:

. . .

"(b) an agreement in which a direct or indirect restriction on the lawyer's right to practice is part of the settlement of a client controversy."

RPC 5.6(b) traces its lineage back to 1970 when Oregon adopted the former Code of Professional Responsibility including DR 2-108(B) that, with a slight change in 1986, read: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the lawyer's right to practice law." A 1991 Oregon State Bar ethics opinion—1991-47—clarified that the prohibition extended to both making and offering a restriction. A plaintiffs' lawyer in *In re Vanagas*, 8 DB Rptr 185 (Or 1994), was subsequently disciplined under DR 2-108(B) for offering to forego handling future employment claims against a company in return for a proposed payment of $25,000.

In *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000), two plaintiffs' lawyers handling a series of business tort cases against a franchisor reluctantly agreed as a part of a "global" settlement to advise the franchisor going forward on its business practices that had led to the lawsuits. The restriction, therefore, was indirect in the sense that the conflict rules would preclude the lawyers from handling a matter against the franchisor as long as they were representing it. The Oregon Supreme Court concluded that this indirect restriction also violated DR 2-108(B).

When Oregon moved to the Rules of Professional Conduct in 2005, DR 2-108(B) was replaced by RPC 5.6(b). Although patterned generally on its ABA

Model Rule counterpart, the Oregon rule includes an important nuance. Reflecting the Supreme Court's *Brandt/Griffin* decision, the Oregon rule was expressly expanded to include both "direct or indirect" restrictions. Consistent with the corresponding ABA Model Rule, Oregon RPC 5.6(b) also expressly prohibits both the "offering or making" of such restrictions. The related ethics opinion—2005-47—was updated to reflect the amended formulation. The comments to the ABA Model Rule explain that such restrictions are prohibited because they both limit the professional autonomy of the lawyer and the freedom of clients to choose their lawyer.

In sum, lawyers on both sides of the negotiating table are at disciplinary risk under RPC 5.6(b) if they venture into settlement discussions that would restrict the practice of one of the lawyers in the future. Moreover, the provisions may be unenforceable as well. In *Gray v. Martin*, 63 Or App 173, 663 P2d 1285 (1983), and *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or App 700, 683 P2d 563 (1984), the Court of Appeals concluded that analogous non-compete provisions in law firm partnership or shareholder agreements were unenforceable because they were against public policy.

"Creative" Variants

A seminal ABA opinion on this subject—Formal Opinion 93-371—highlighted the economic forces underlying "creative" variants to the outright prohibition in ABA Model Rule 5.6(b) and its state equivalents: "The pressure to find creative solutions to mass tort litigation has prompted an inquiry regarding the propriety of a lawyer entering into a settlement agreement with an opposing party pursuant to which the lawyer may be obligated to refuse to represent certain present clients as well as other similarly situated individuals against the same defendant in the future." ABA Formal Opinion 93-371 examined a settlement arrangement where a law firm would be obliged to refuse to represent claimants who opted-out of a global resolution formula. The opinion concluded that this variant would also violate ABA Model Rule 5.6(b).

The ABA returned to "creative" variants in Formal Opinion 00-417. This opinion was predicated on a hypothetical in which a plaintiffs' lawyer agreed not to use information gathered in a present case for the benefit of future clients involved in similar litigation against the same defendant. Again, the ABA concluded that this would violate ABA Model Rule 5.6(b) because it would interfere with the lawyer's ability to represent future clients. Formal Opinion 00-417 was careful to note that its conclusion did not preclude lawyers from entering

into confidentiality agreements—as long as they were limited to the case at hand and did not prevent the lawyer from using the information developed in one case in future litigation for other clients.

These ABA opinions underscore that lawyers should remain wary of "creativity" in this area.

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