



Legal Ethics
Ethics Opinions

LEGAL ETHICS

OPINION 2012-1

ISSUE:

May a defense attorney demand a settlement agreement provision prohibiting plaintiff's attorneys from mentioning in communications or advertising materials public information regarding the fact they have handled a particular type of case against the defendant, or are experienced in that practice area?

DIGEST:

Defense counsel may not propose, and plaintiff's attorneys may not accept, a settlement provision which obligates the attorneys to take actions that will either directly or indirectly restrict their right to practice law. Prohibiting an attorney from disclosing public information regarding the attorney's handling of a particular type of case against the settling defendant is an impermissible restriction on the attorney's right to practice and deprives legal consumers of information important to their evaluation of the competence and qualifications of potential counsel. Prohibiting an attorney from disclosing that he or she has experience in a particular area of the law is also an impermissible restriction on the attorney's right to practice regardless of whether that information is otherwise public.¹

Although this opinion posits a factual scenario involving settlement of existing litigation, the Committee believes that the same issues would be raised with regard to the settlement of a non-litigation matter.

AUTHORITIES INTERPRETED:

Rules of Professional Conduct, Rules 1-500 – Agreements Restricting a Member's Practice.

ABA Model Rule 5.6(b) – Restrictions on Right to Practice

STATEMENT OF FACTS

Attorneys ("Attorneys") represent Client who is a member of the Lesbian Gay Bisexual and Transgender ("LGBT") community in a case against Client's employer ("Defendant") alleging harassment of LGBT employees. Defendant demands a settlement term prohibiting Attorneys from mentioning in communications or advertising materials that they have worked on an LGBT harassment case against the Defendant, or mentioning LGBT harassment as an area of expertise.

DISCUSSION:

A party's demand to include a provision in a settlement agreement that the opposing counsel refrain from representing future clients in litigation against the same defendant violates the California Rules of Professional Conduct, Rule 1-500. See Rule 1-500(A) ("A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law," with limited exceptions not applicable here). See also Rule 1-500, Discussion ("Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.")²

A prohibition against proposed settlement terms restricting an attorney's right to practice law is also set forth in Rule 5.6(b) of the ABA Model Rules of Professional Conduct and Disciplinary Rule 2-108(B) of the ABA Model Code of Professional Responsibility.

In the present scenario, the proposed settlement provisions do not bar Attorneys from representing other clients in similar litigation against the Defendant. Rather, they would prohibit Attorneys from (1) mentioning in their curricula vitae, website and other advertising materials, that they have worked on an LGBT case against the Defendant, or (2) that LGBT harassment cases are an area of expertise.

With regard to the first proposed settlement provision, while California courts have not opined directly on this subject, other organizations have concluded that this type of settlement provision is unethical. In its Opinion No. 335, the Legal Ethics Committee of the District of Columbia Bar concluded that a settlement agreement may not include proposed term(s) prohibiting opposing counsel from disclosing on his/her website or in promotional materials public information about the case, such as the parties' names, allegations in the complaint, or that the case has settled. The D.C. Committee reasoned that such settlement terms restrict an attorney's right to practice by preventing the attorney from informing potential clients of his/her qualifications to handle a particular type of case, and deprive clients of information necessary to evaluate the qualifications of the potential attorney.

In State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") Formal Opinion No. 1988-104, COPRAC reached a similar conclusion in response to an inquiry regarding the propriety of a settlement provision prohibiting plaintiff's counsel from representing parties in litigation or arbitration proceedings against the defendants. The plaintiff's attorney in that case represented the plaintiff against several financial institutions for unfair business practices in violation of the California Business and Professions Code. COPRAC opined that the settlement provision violated former California Rule of Professional Conduct 2-109(A), the predecessor of current Rule 1-500(A). COPRAC reasoned that the settlement provision gave the opposing party the ability to control opposing counsel's representation of subsequent clients, which directly violated former Rule 2-109(A). COPRAC further reasoned, and this Committee agrees, that an attorney's previous experience in pursuing a matter against a particular defendant is especially important to the attorney because such experience makes the attorney more attractive to potential clients.

The Committee believes these same principles are applicable even where the prohibition does not affirmatively bar representation against the settling defendant, but only the disclosure of public facts regarding the past representation. The prohibition still seeks to curtail an attorney's autonomy and to impair future clients' retention of the attorney by limiting disclosure of public information that might influence the retention decision. The proposed settlement provisions would therefore be unethical.

The same principles apply to the second proposed settlement provision, which would prohibit Attorneys from publicly disclosing that Attorneys have experience in the substantive area of LGBT harassment.³ Potential clients frequently assess the competence and qualifications of potential counsel based on counsel's experience in handling a particular type of matter. A general prohibition on an attorney disclosing or advertising his or her areas of experience is a substantial restraint on the right to practice and the ability to provide adequate information to the public regarding the attorney's qualifications. Even if information about the attorney's areas of experience is not otherwise public, a bar on disclosing such information would be an impermissible restraint under Rule 1-500.

In the instant inquiry, by seeking to prohibit Attorneys from mentioning public information regarding their work on an LGBT harassment case against the Defendant, and their general experience in handling that type of case, the proposed settlement provisions would in effect (1) "hand[] the opposing party the ability to control the attorney's representation of subsequent clients," and (2) "den[y] a potential client access to an attorney of their choice." (CA State Bar Comm. on Prof'l Resp. and Conduct, Formal Op. 1998-104.) These provisions unethically restrict, both directly and indirectly, the opposing counsel's right to practice and would deprive potential clients of important information regarding opposing counsel's qualifications.

CONCLUSION

Rule 1-500 prohibits defense counsel from demanding, and Attorneys from agreeing to, terms in a settlement agreement that would prohibit Attorneys from referencing in their resumes, website or other advertising materials, public information regarding the fact they have worked on a particular type of case against a specific defendant. Rule 1-500 would also prohibit a restriction that precludes Attorneys from disclosing that they have experience in a specific area of the law, regardless of whether that information is otherwise public.⁴

Footnotes

1. Although this opinion posits a factual scenario involving settlement of existing litigation, the Committee believes that the same issues would be raised with regard to the settlement of a non-litigation matter.

2. The three exceptions to California Rule of Professional Conduct 1-500(A)'s prohibition on agreements restricting a member's practice, as set forth in Rule 1-500(A)(1)-(3), are irrelevant to the present inquiry because the facts herein do not trigger such exceptions.
3. For restrictions pertaining to the manner in which an attorney describes his or her areas of experience or expertise, see CPRC 1-400, including 1-400(D)(6).
4. The Committee does not opine on issues relating to an attorney's right to free speech. This opinion addresses only the of public information, such as the names of parties, the type of case, allegations in the complaint, and whether the case has settled or is ongoing, in the context of an attorney's promotion of his or her practice, and/or disclosure of information about the attorney's general areas of experience which is not confidential as to any client.

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