ETHICS ADVISORY OPINION

10-04

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A lawsuit is filed in a SC Court. After over a year and a half of litigation, a settlement is reached whereby the defendant agrees to pay the plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires confidentiality of the settlement amount and further desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for "commercial or commercially-related publicity purposes." Lawyer A may identify generally "a settlement was achieved against an industry" - ie: trucking or retail store. The fact that Lawyer A has sued the defendant is a matter of public record and nothing filed in the case was under seal.

Question Presented:

Would Lawyer's agreement to the confidential settlement on behalf of his client be ethical under the current rules?

Summary:

It is improper to condition a settlement on the relinquishment of a right which is inherent in the right to practice law. The United States Supreme Court has held that lawyer advertising is a First Amendment right. Rule 5.6(b) prohibits settlements which contain restrictions on the right to practice law.

Opinion:

The issue of secret settlements has been addressed by Rule 41.1 of the South Carolina Rules of Civil Procedure. Initially, it should be noted that although this is not a disciplinary rule, this rule

has strong ethical overtones; therefore, it should not be disregarded for purposes of an Ethics Advisory Opinion simply because of its inclusion in the rules of Civil Procedure, as opposed to the Rules of Professional Conduct.

The question presented in this case states that "after over a year and a half of significant litigation, just prior to trial, a settlement is reached whereby the defendant agrees to pay plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires confidentiality of the settlement amount and further desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for 'commercial or commercially-related publicity purposes.'" Since this settlement does not require court approval, Rule 41.1 does not directly apply, although it expresses a clear public policy in favor of public access to settlement information where, as here, the public resources of the judicial system have led to it. Rule 41.1(a) states that the enforceability of private settlement agreements wherein the parties agree to have the matter voluntarily dismissed under Rule 41(a)(1) without court involvement is governed by general legal principles and not by Rule 41.1.

Rule of Professional Conduct 5.6(b) states that a lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a client controversy." Comment [2] to this Rule states that a lawyer is prohibited from agreeing not to represent other persons in connection with settling a claim on behalf of a client. The purpose of the proposed limitation in this settlement is aimed at preventing Lawyer A from advertising for clients in cases involving alleged similar conduct by this defendant. Even though parties contracting among themselves may often waive certain rights, Rule 5.6(b) precludes contracting away rights associated with the practice of law, among them the right to advertise one's services pursuant to *Bates v. Arizona* 433 U.S. 350, 383-84 (1977). A settlement conditioned on the relinquishment of this right would therefore violate Rule 5.6

South Carolina Rule 5.6(b) is identical to the ABA Model Rule. ABA Formal Opinion 93-371, *Restriction on the Right to Represent Clients in the Future* (1993), explained the rationale behind Rule 5.6 as follows:

> The rationale of Model Rule 5.6 is clear. First, permitting such

> agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the countervailing policy favoring the public's unfettered choice of counsel.

Texas Ethics Opinion 505 (August 1994) involved the same issue. In interpreting Rule 5.6(b), Texas adopted Comment 2 stating that a lawyer is "prohibited from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The same language appears in a South Carolina comment. Texas discussed the very issue of whether solicitation is a part of the right to practice law in Opinion 505:

> Is 'solicitation' protected under the umbrella of 'a lawyer's right to practice law?' Solicitation generally describes conduct by an attorney or a third person acting for an attorney, which specifically targets potential clients, with the intent of pecuniary gain. To the extent that such is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement than it is restricted in the Rules and applicable law.

Nearly all authorities prohibit a settlement which would preclude a lawyer from handling future cases, which is admittedly not the exact same issue. For example, the Colorado Bar in its Opinion 92 (1993) discussed a variety of indirect restrictions that could run afoul of its Rule 5.6(b), including "barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimant's lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants." The Opinion

formulated a test to use to help determine whether a given provision in a settlement provision improperly restricted a lawyer's right to practice. As stated by the Opinion, "the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such limitations." This seems to be the crux of the issue in the advertising scenario.

Another example of a restriction which would violate Rule 5.6 serves to illustrate the above point. There is no dispute that Rule 5.6 prohibits a non-competition agreement (other than a retirement agreement) prohibiting a lawyer who leaves a particular law firm from practicing within a certain radius of the other law firm's office. Such an agreement is prohibited even though it is clear that the lawyer would still have the right to practice law in some fashion.

Note: The Committee reminds Bar members that all attorney advertising must be in compliance with the Rules of Professional Conduct, including Rules 7.1, 7.2 and 7.3.