speaking of ethics

By Hope C. Todd

Settling Matters

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At times it can be difficult for a lawyer to determine whether certain conduct falls within the scope of a specific rule of professional conduct. Determining whether certain conduct is ethical within the context of a settlement agreement can be one of those times. Recently released D.C. Bar Legal Ethics Committee Opinion 335 (2006) addresses the question of "whether a lawyer may, as part of a settlement agreement, prohibit the other party's lawyer from disclosing publicly available information about the case."

In Opinion 335 the defendant in a settlement sought to compel the plaintiff and her attorney to keep confidential not only the terms of the settlement, but also the fact of the settlement, the identity of the defendant, and the allegations of the complaint. The opinion concludes that such a settlement provision violates Rule 5.6(b) of the D.C. Rules of Professional Conduct because it is, at bottom, an impermissible agreement that restricts a lawyer's right to practice.

Although Rule 5.6 (restrictions on right to practice) appears to be direct evidence of a profession's self-interest, the rule and its predecessor, Disciplinary Rule 2-108, seek to protect consumers of legal services (clients) at least as much as they do lawyers. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 371 (1993); D.C. Bar Legal Ethics Comm. Ops. 35 (1977), 130 (1983), 181 (1987), 221 (1991), 241 (1993).

Indeed, preserving a client's right to choose counsel is central to the rule. *See* D.C. Rules of Prof'l Conduct R. 5.6 cmt. 1; *see also* D.C. Bar Legal Ethics Comm. Op. 35 (1977) (finding "[it] is an assurance of the public's right to counsel through the lawyer's right to practice").

On several occasions the Legal Ethics Committee has addressed inquiries about Rule 5.6(a) interpreting agreements restricting the right to practice after termination of employment. *See* D.C. Bar Legal Ethics Comm. Ops. 221 (1991), 241 (1993), 291 (1999), 325 (2004). Opinion 335, however, interprets Rule 5.6(b), which prohibits certain attorney conduct in the context of settlements. Specifically, Rule 5.6(b) states, "A lawyer shall not participate in offering or making . . . [a]n agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties."

Rule 5.6(b) is generally understood to prevent lawyers, as part of settlements, from agreeing not to represent specific persons or parties in future matters, often against the same defendant. D.C. Bar Legal Ethics Comm. Op. 335 at 3 (2006) (citing D.C. Rules of Prof'l Conduct R. 5.6 cmt. 2). The underlying public policy consideration of Rule 5.6(b) is to ensure that consumers, and specifically future clients, will have access to those lawyers who may, because of their former experience, possess the most knowledge and skill in particular matters. D.C. Bar Legal Ethics Comm. Op. 335 (2006); *see also id.* Ops. 35 (1977), 130 (1983).

The case in Opinion 335 had received substantial media attention, and the inquiring firm had reported developments of the litigation on its Web site. The settlement agreement required removal of that published information, and an assurance not to further disclose otherwise public information in any promotional materials. The conduct at issue was not, therefore, an explicit agreement not to represent specific persons in connection with settling a claim on behalf of a client. Nonetheless, the opinion concludes that settlement conditions prohibiting a lawyer from disclosing such public information fall within the scope of Rule 5.6(b) and run afoul of the rule's consumer protection purposes.

Opinion 335 reasons that a lawyer's ability to communicate his or her relevant experience to the public, including the fact of former representations, is fundamental to a potential client's ability to locate a lawyer who has experience in a particular matter. Thus, restricting a lawyer's ability to communicate such public information in fact restricts a lawyer's right to practice. "Such [settlement] conditions have the purpose and effect of preventing counsel from informing potential clients of their expertise and experience, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases." *Id.* Op. 335.

Of course, settlement agreements often contain provisions requiring parties and their attorneys to keep the terms and other information about a settlement, such as the amount, confidential. The opinion acknowledges this common practice and directs only that pursuant to D.C. Rule 5.6(b) "a settlement agreement may not require that *public* information be kept confidential" (emphasis added).

The opinion also illustrates the apparent tension between Rule 5.6(b) and Rule 1.6, which requires lawyers, absent limited and enumerated exceptions, to hold inviolate client confidences and secrets. Opinion 335 should not be interpreted to limit a lawyer's ethical obligation under Rule 1.6. "If a client withholds permission for her lawyer to disclose public information, we agree that the lawyer must keep the information secret and Rule 1.6 applies." *Id.* Such a demand, however, cannot be made as a condition of settlement. "The line that we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees such a provision be included." *Id.*

Opinion 335 reminds us that sometimes the purpose of a rule informs its application. Here, within the context of a settlement agreement, certain conduct is proscribed pursuant to a rule's broader public purposes. Such a reading of Rule 5.6(b) is consistent with the District of Columbia's longstanding approach to both protecting the public's access to lawyers and the lawyers' right to practice.

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