Impermissible Restrictions on a Lawyer's Right to Practice in Settlement Agreements

By: Elie A. Maalouf & Jared R. Green

I. Introduction

Our firm recently represented multiple clients in a series of medical malpractice cases against a hospital. All of the cases involved the same defendant-physician, however, each case comprised separate and distinct acts of medical negligence. After reaching a settlement in one case, the defense attorneys proposed as a condition of settlement for all the remaining cases that the plaintiff prohibit the use of his or her medical records in any subsequent cases against the defendant hospital. We promptly rejected the proposed settlement provision because, in our view, agreeing to such a condition would violate Rule 5.6(b) of the New Hampshire Rules of Professional Conduct, which prohibits an attorney from agreeing to a settlement term that would directly or indirectly restrict his or her right to practice.[1] This article will explain the applicability of Rule 5.6(b) to this situation and it will discuss an advisory opinion issued by the New Hampshire Bar Association Ethics Committee that squarely supports our position.

II. Background

Among the many duties imposed on lawyers by the Rules of Professional Conduct, perhaps the most well-known and fundamental duty is that an attorney must abide by his or her client's "decision[s] concerning the objectives of representation…"[2] Indeed, Rule 1.2(a) obligates an attorney to adhere to the client's wishes throughout his or her representation, particularly during settlement negotiations when the client's settlement goals may differ from those of the attorney. A lawyer may not, however, enter into a settlement agreement that would violate another Rule of Professional Conduct.[3]

Rule 5.6(b) is one such rule attorneys need consider. According to the American Bar Association Standing Committee on Ethics and Responsibility ("ABA"), "Rule 1.2 must be read as limited by the provisions of Rule 5.6(b)" in the context of settlement discussions.[4] New Hampshire's Rule 5.6(b)—which is identical to Model Rule 5.6(b)—provides:

> 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.[5]

Thus, even though a client may want to accept a settlement offer which impermissibly restricts his or her lawyers' future right to practice, and the lawyer may feel obligated to do so pursuant to Rule 1.2(a), Rule 5.6(b)'s proscription precludes the lawyer from complying with the client's instructions under these circumstances.[6]

The ABA has articulated three policy consideration underlying Rule 5.6(b)'s mandatory prohibition. First, restricting an attorney's right to practice denies the public access to counsel who, "by virtue of their background and experience," may be the most qualified for a representation.[7] Second, the restriction may be driven by the goal of "buying off" counsel rather than resolving a particular controversy on the merits.[8] Third, the restriction may place the lawyer in a conflict between the objectives of the present client and the interests of other existing or future clients.[9]

III. NHBA Ethics Committee Advisory Opinion #2009-10/06

In 2010, the New Hampshire Bar Association Ethics Committee ("NHBA Ethics Committee") issued an advisory opinion, which concluded that Rule 5.6(b) prohibits settlement provisions that directly and indirectly limit an attorney's right to practice.[10]

A settlement provision that explicitly limits an attorney's right to represent clients with similar claims against the same settling defendant constitutes a direct restriction on the attorney's right to practice in violation of Rule 5.6(b).[11] A defendant may well fear that a plaintiff's lawyer, having developed specific knowledge and expertise, will represent other clients with similar claims. "While it is understandable that the defendant would prefer to be opposed in the future by counsel who must get up to speed anew, and thus want to use the settlement documents to restrict the right of the plaintiff's counsel to represent other plaintiffs in like matters, this is strictly forbidden by Rule 5.6(b)."[12] Consistent with the policy considerations identified by the ABA, the NHBA Ethics Committee explained that Rule 5.6(b)'s bar on such direct restrictions "protects the rights of as-yet unknown claimants by preventing defense counsel from buying off plaintiff's counsel, thus ensuring that settlement agreements do not reduce the pool of experienced attorneys available to the public." [13]

Settlement agreements that indirectly prevent an attorney from representing future clients in similar claims also violate Rule 5.6(b). As the NHBA Ethics Committee explained, "a settlement agreement that prohibits plaintiff's counsel from **using any information** learned during a current controversy, especially against the same defendant, may prevent the attorney from representing future claimants in similar controversies."[14] Prohibiting the

use of information learned during the representation would effectively "bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client, and, further, may adversely affect that representation."[15] Rule 1.7 of both the New Hampshire Rules of Professional Conduct and the Model rules would forbid the representation of the future client, thereby restricting the attorney's right to practice.[16] Finally, an attorney who agrees to a ban on the use of information may create a conflict of interest between the interests of the lawyer's current clients and both existing and future clients with similar claims.[17]

The NHBA Ethics Committee also pointed out the "practical problems" associated with restricting the attorney's right to use information:

> It would be difficult, if not impossible for any attorney to compartmentalize or disregard all that has been learned during such representation or recall with any precision when the information was obtained. As a result, a bar on the use of information gained during a representation would expose an attorney to potential violations of the settlement agreement in virtually every subsequent representation involving similar legal or factual issues.[18]

Certainly, a lawyer cannot simply pull the plug on the knowledge he or she obtained during the course of representing a client and it would be challenging, if at all possible, to refrain from using this knowledge in his or her representation of other clients in similar situations, particularly against the same defendant.

Like the ABA, the NHBA Ethics Committee recognized that Rule 5.6(b)'s prohibition on direct and indirect restrictions "serves the important policy consideration of protecting the right of non-settling clients to identify and hire qualified counsel whose judgment and expertise remains free from restrictive, private settlement arrangements."[19] Moreover, Rule 5.6(b) preserves "the ability of attorneys to utilize the legal experience and substantive knowledge gained during their practices in a manner that does not risk materially limiting responsibilities to a client under Rule 1.7 (Conflicts of Interest), nor disadvantage a former client under Rule 1.9 (Duties to Former Clients)."[20]

IV. Applying 5.6(b) to Our Cases

In our cases, it was our position that defense counsel's proposed restriction proscribing the use of each of our client's medical records in subsequent cases against the same defendants constitutes an indirect restriction on our right to practice akin to the prohibition against the use of information discussed in the NHBA Ethics Committee advisory opinion. First of

all, such a restriction would deprive our other existing clients, as well as future clients, of the knowledge and experience we obtained through our representation of the first client, which would contravene one of the policy reasons underlying rule 5.6(b)—protecting clients' right to retain attorneys who "by virtue of specific knowledge and experience" may be the most qualified to represent them.[21] This policy mandates that existing and future clients have access to the benefit of the knowledge we obtained in the course of representing all of our clients involved in this matter.

Secondly, a prohibition on the use of our client's medical records in subsequent cases could materially impact our ability to represent our existing clients and future clients because we would not be able to use previous clients' records or the information learned from them to their benefit. Since the first client's (and our other clients') medical records are beneficial and relevant to the other cases because they establish a pattern of negligent conduct, using them in any subsequent case could only serve to strengthen the merits of those cases. Thus, prohibiting the use of the records or information therein would adversely affect our representation of our existing and future clients. Agreeing to defense counsel's proposed condition would have put us in a conflicted position under rule 1.7(a)(2) which forbids representing a client if doing so would materially limit the lawyer's responsibility to another client.[22] We would no longer have been able to represent our other clients, which is an impermissible restriction on our right to practice under rule 5.6(b).[23] This would also have denied qualified representation to our other clients.

Finally, accepting a settlement agreement barring the use of the medical records in other cases could have created a conflict between the interests of the first client and our existing and future clients with claims against the same defendants. It is possible that the first client would have wanted to accept the settlement offer with the restrictive term in order to cash out and put the lawsuit behind him or her. Our non-settling clients, however, undoubtedly would have wanted to use the first client's records because of their potential to enhance the non-settling clients' claims. Rule 5.6(b) does away with this dilemma by prohibiting the proposed restriction outright.

V. Conclusion

Although it may be tempting to agree to a restrictive settlement term in order settle a case and appease a client, the NHBA Ethics Committee has made clear that certain limitations may violate Rule 5.6(b). More specifically, restrictions on the use of information gleaned through the representation of a client, such as the proposed bar on the use of our clients' medical records, constitute indirect restrictions on a lawyer's right to practice. Plaintiff's lawyers should keep Rule 5.6(b)'s prohibition in mind when engaged in settlement

negotiations in cases involving multiple clients against the same defendant or when representing clients with similar claims.

---

[1] *See N.H R. Prof. Conduct* 5.6(b); *see also* NHBA Ethics Committee Advisory Opinion #2009-10/06 (recognizing Rule 5.6(b)'s prohibition of direct and indirect restrictions on a lawyer's right to practice).
[2] *N.H R. Prof. Conduct* 1.2(a). Rule 1.2(a) provides "a lawyer shall abide by a client's decision concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."
[3] *See* New Hampshire Bar Association Ethics Committee Advisory Opinion #2009-10/06 (explaining that an attorney's obligation to abide by his or her client's decision "does not permit the attorney to engage in conduct that would violate another Rule of Professional Conduct."
[4] American Bar Association Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993).
[5] *N.H R. Prof. Conduct* 5.6(b).
[6] American Bar Association Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000) (noting "[a]lthough a lawyer normally would be required, pursuant to Rule 1.2 (Scope of Representation), to abide by the client's instructions to accept a settlement offer, the proscription in Rule 5.6(b) (Restrictions on Right to Practice) makes it impossible for the lawyer to comply with a client's instructions…").
[7] ABA Formal Op. 93-371 (acknowledging that Rule 5.6(b) protects the rights of "non-settling clients to identify and hire qualified counsel whose judgment and expertise remains free from restrictive, private settlement arrangements."
[8] *See id.*
[9] *See id.*
[10] *See* NHBA Ethics Committee Advisory Opinion #2009-10/06.
[11] *See id.*; *see also* Vermont Bar Assoc. Advisory Ethics Op. 95-11 (1995) (finding that defense counsel could not propose a settlement term that would require plaintiff's counsel to decline to represent future clients against the same defendant); New Mexico Advisory Op. 1985-5 (1985) (concluding that plaintiff's counsel could not agree to a settlement condition that would prevent counsel from representing clients with claims arising out of the same incident).
[12] Hazard and Hodes, *The Law of Lawyering* (3rd Ed. 2012), at 47-5.
[13] NHBA Ethics Committee Advisory Opinion #2009-10/06.
[14] NHBA Ethics Committee Advisory Opinion #2009-10/06 (emphasis added); *see also* ABA Formal Op. 00-417 (interpreting 5.6(b)'s prohibition to extend to indirect restrictions on attorney's right to practice).
[15] ABA Formal Op. 00-417.
[16] *See N.H R. Prof. Conduct* 1.7(a)(2). The rule provides "a lawyer shall not represent a client if…there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client [or] a former client[.]"
[17] NHBA Ethics Committee Advisory Opinion #2009-10/06.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] NHBA Ethics Committee Advisory Opinion #2009-10/06.
[22] *See N.H R. Prof. Conduct* 1.7(a)(2).
[23] *See* ABA Formal Op. 00-417 (finding that a prohibition against the use of information is a restriction on the lawyer's right to practice).