Owen in Law Week Colorado: Repeat Litigants, What Is This Settlement Even Worth?

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PRACTICES Litigation

Haynes Boone Partner Brent Owen authored an article for *Law Week Colorado* exploring the ethical and legal challenges attorneys face under Colorado Rule 5.6(b) when a client requests restrictions on opposing counsel's future practice as part of a settlement.

Read an excerpt below.

After three years of grueling litigation, you are finally able to settle a high-exposure product defect claim for your client, a large manufacturing company. The settlement is with a single individual for a single product; but your client sold millions of the same product to millions of other individual consumers. Late one Friday afternoon — as you finalize the draft settlement agreement — your phone rings.

The CEO is on the line, and he launches into it:

Great work on the case. Glad we can put this one behind us. I thought of something. I don't want to deal with these guys again — not ever again. Get rid of this lawyer and her whole firm.

With that, the CEO hangs up. Suddenly, as sometimes happens practicing law, you are trapped between a client's demand and the Colorado Rules of Professional Conduct. Rule 5.6(b) prohibits you from any involvement in an agreement that restricts a lawyer's right to practice as "part of the settlement of a client controversy." Clients don't like to hear "no," and lawyers do not like to violate the Colorado Rules of Professional Conduct.

So is there a solution?

What is Rule 5.6(b)?
Attorneys, "as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system." According to the 2002 opinion in In re Pautler, "The Rules of Professional Conduct, when properly applied, serve to define that relationship."

Rule 5.6(b) exists for three reasons.

1. Ensures members of the public have access to the very best available talent to represent them, including those with experience and success in similar, prior cases.
2. Ensure settlements reflect the value of claims and not just a "buy off" of plaintiff's counsel.
3. Just offering the agreement creates a conflict between the interests of present clients and those of potential future clients. This contradicts strong public policy favoring the public's unfettered choice of counsel.

There is no published Colorado appellate opinion interpreting or applying Rule 5.6(b). But the Colorado Bar Association Ethics Committee's Formal Opinion 92 provides context and guidance.

Formal Opinion 92 explains that certain agreements other than a wholesale bar on future representation may violate the rule: “other restrictions impeding the lawyer’s ability to represent effectively other claimants against the settling party defending the claim may also be unethical.”

Also, the Colorado Supreme Court in Calvert v. Mayberry held that “when an attorney enters into a contract without complying with Rule 1.8(a), the contract is presumptively void as against public policy; however, a lawyer may rebut that presumption by showing that, under the circumstances, the contract does not contravene the public policy underlying Rule 1.8(a).” The same rationale likely applies to an agreement that violates Rule 5.6(b).

It follows that a lawyer who ignores the rule will not only face discipline but may not even achieve the client’s goal: the contractual provision prohibiting the opposing counsel or law firm from representing future clients is likely void as a matter of public policy.

To read the full article from *Law Week Colorado*, click here.