

ADVISORY ETHICS OPINION 95-11

SYNOPSIS:

A restriction on the right of plaintiff's attorney to represent future claimants against a defendant as part of a settlement of the attorney's existing client's claims against that same defendant represents an impermissible restriction on the right to practice which may not be demanded or accepted without violating DR 2-108(B).

FACTS:

Defendant's attorney has proposed a settlement agreement with plaintiff's attorney pursuant to which the latter would be obligated to refuse to represent similarly situated potential claimants against the same defendant in the future.

QUESTION:

The question presented is whether the attorney may accept as a condition of the settlement a restriction on his right to represent those individuals who, in the future, might seek to become his clients against the defendant.

CONCLUSION:

The proposed settlement agreement, which contains a covenant that the plaintiff's attorney will not represent other plaintiffs against the defendant, imposes an undue restriction upon the plaintiff's attorney and also affects the right of the other potential clients to obtain the benefit of the services to which they are entitled from their own attorney. It is clearly improper for plaintiff's attorney to abandon the interests of other clients who may have depended upon the attorney's services in the past. This subject matter has been carefully considered by the Committee on Ethics and Professional Responsibility of the American Bar Association in its Formal Opinion 1039 and, more recently, in Formal Opinion 93-371, the latter citing Model Rule 5.69b) which 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 controversy between private parties.”

DR 2-108(B) contains the same provision which reads as follows:

“B. In connection with the settlement of a controversy or suit, the lawyer shall not enter into an agreement that restricts his right to practice law.”

ABA Formal Opinion 93-371 makes reference to Model Rule 8.4(a), which is identical DR 1-102(A)(2) states that a lawyer shall not circumvent a Disciplinary Rule through actions of another. Consequently, when Disciplinary Rule 2-102(B) is considered together with Disciplinary Rule 1-102, the scope of the prohibition applies not only to a lawyer agreeing to the restriction but also to a lawyer offering or requiring the restriction.