

Ethical Limitations on Attempting to Prevent or Restrict an Attorney from
Bringing Future Claims as Part of a Settlement Agreement

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A defendant in a mass tort contemplating settlement is generally focused on a few seemingly simple but often very hard to achieve goals: closure, a “global deal,” some assurance that new cases will not arise and most -- if not all -- existing cases will be captured, an affordable price tag, and a deal that will withstand legal scrutiny. In an ideal world, the mass tort defendant would like to achieve a settlement that resolves all (or all of the significant) existing cases, prevents future cases, and does not “break the bank.” There are, of course, many tactical, legal and financial issues that often arise to prevent a mass tort defendant from achieving some or all of these goals. But there can be ethical obstacles as well. This paper attempts to explore some of the ethical issues that may arise in connection with settling mass tort cases in such a way as to achieve maximum closure.

I. Ethics Rules Prohibit Settlement Agreements from Including an Explicit Agreement Not to Pursue Future Plaintiffs

In an ideal world (for mass tort defendants), the defendant would be able to ask each plaintiffs’ counsel as a condition of settlement to agree not to take on future cases, and in that ideal world, the plaintiffs’ lawyer would be at liberty to agree to those terms. Indeed, such a world might even be of benefit to plaintiffs’ lawyers, and especially their clients, because in that situation they could demand higher amounts in settlement in exchange for the promise of declining future cases. However, it is clear that defense counsel cannot ask, and plaintiffs’ counsel cannot agree, to such an arrangement under the applicable ethics rules.

Rule 5.6 of the Model Rules of Professional Conduct (“Model Rule 5.6”) states that “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.” A lawyer’s right to practice is restricted when an agreement expressly prohibits a lawyer from agreeing not to represent other plaintiffs in the future, as a lawyer is prohibited “from agreeing not to represent other persons in connection with settling a claim on behalf of a client.” Model Rule of Prof’l Conduct R. 5.6(b) cmt. 2 (2002). This prohibition is not limited to the Model Rules. Disciplinary Rule 2-108(B) of the Model Code of Professional Responsibility states that, “In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.” Similarly, Rule 1-500(A) of the California Rules of Professional Conduct states that, “A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement or a lawsuit or otherwise if the agreement restricts the right of a member to practice law.”

The ethical prohibition against foregoing future representation in explicit exchange for consideration is generally accepted in non-binding ethics guidelines as well as the formal ethics rules. The American Bar Association’s Section of Litigation prohibits a lawyer from “propos[ing], negotiat[ing] or agree[ing] upon a provision of a settlement agreement that precludes one party’s lawyer from

representing clients in future litigation against another party.” Ethical Guidelines for Settlement Negotiations § 4.2.1 (Aug. 2002). Section 13(2) of The Restatement (Third) of Law Governing Lawyers contains a similar prohibition on a lawyer’s right to practice law, stating, “In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.”

The language in the various versions of the rule suggests that an agreement to restrict opposing counsel *might* not be ethically prohibited by Model Rule 5.6(b) and its equivalents if the agreement were not made “as part of” or “in connection” with the settlement of a case or controversy. This, of course, begs the question of whether such restrictive agreements could ever be not “part of” or “in connection with” the settlement of a plaintiff’s case, claim or controversy. Agreements made between counsel have generally been deemed to be made “in connection with” or “as part of” settlement agreements where the terms of the agreements were negotiated concurrently with the terms of the settlement of the clients’ controversies. In one instance, an agreement made by plaintiffs’ counsel with the defendant to receive fees in exchange for not pursuing similar litigation in the future was determined to be a violation of Rule 5.6(b) of the District of Columbia Rules of Professional Conduct, even though one of the plaintiffs’ lawyers argued that this deal was made in their capacity as individual lawyers, not as lawyers for a group of potential claimants. *See In re Hager*, 812 A.2d 904 (D.C. 2002). In another instance, the plaintiffs’ counsel negotiated a retainer agreement for them to represent the defendant concurrently with the negotiation of the plaintiffs’ claims. *In re Conduct of Brandt*, 10 P.3d 906, 917-19 (Or. 2000). Even though the retainer agreement was held in escrow until the settlement of the plaintiffs’ claims was finalized, the Oregon Supreme Court found that the restriction on the plaintiffs’ counsel’s ability to practice law was made “in connection” with the settlement of the plaintiffs’ claims in violation of Disciplinary Rule 2-108(B) of the Oregon Code of Professional Responsibility. *Id.* at 917 n. 10.

Whether one could ethically negotiate an agreement not to take additional cases in a separate, subsequent transaction is an open question for which we have found no authority. Given the substantial authority disfavoring such agreements, it seems like a risky proposition even to try. However, as discussed below, there may be other ways ethically to attempt to achieve similar goals.

II. Are There Ways Permissibly to Limit/Restrict the Bringing of Future Claims?

Ethics guidelines indicate that provisions in settlement agreements that are indirectly calculated to achieve the result of prohibiting plaintiffs’ counsel from representing future plaintiffs against the same defendant “are also impermissible when they serve as partial consideration for a settlement, notwithstanding that the

same arrangement might be permissible if it were made independently of a settlement.” Ethical Guidelines for Settlement Negotiations § 4.2.1 Comm. Notes (Aug. 2002). Are there other ways that plaintiffs’ and defense counsel can structure an agreement to give the defendant the closure and certainty it seeks or at least something closer to it and not run afoul of ethical prohibitions? There are some steps that defense counsel can probably take, and plaintiffs’ counsel can probably agree to, although they are not without ethical risk and they may or may not have any practical value.

A. Hiring Plaintiffs’ Counsel/Consulting Agreements

One possible means of preventing future litigation, at least from a particular plaintiffs’ lawyer, would be for the defendant to hire that plaintiffs’ lawyer as a consultant once a settlement has been achieved. This might be an effective way of preventing a particularly talented or experienced plaintiffs’ lawyer from becoming counsel to other plaintiffs in the future. While this approach may raise some practical and, shall we say, “cultural” issues, it generally has been found not to violate ethical prohibitions.

There is a strong argument that a defendant is not *per se* prohibited from employing a former plaintiffs’ attorney as a consultant on the same subject matter for which the attorney previously represented an adverse plaintiff. Ethics rules and the case law do, however, limit the manner in which a consulting relationship may be appropriately negotiated and impose other limitations on the retainer of a plaintiffs’ attorney by the defendant. (It also has been suggested in academic literature that a defendant could potentially incur civil liability for such agreements. See George M. Cohen & Susan P. Koniak, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996) (arguing such behavior, if intended to “buy out” plaintiffs’ counsel, could give rise to liability under antitrust and unfair competition laws). The theoretical possibility of antitrust issues arising under such agreements is beyond the scope of this paper.)

1) Consulting Agreements Between a Defendant and a Former Plaintiff’s Attorney are Probably Not *Per Se* Prohibited

As a general principle, consulting agreements effectively restrict an attorney’s right to practice and are therefore likely subject to the limitations of Model Rule 5.6(b). The Committee Notes to Section 4.2.1 of the ABA’s Ethical Guidelines for Settlement Negotiations cites a consulting agreement as an example of an arrangement calculated indirectly to achieve the desired result of conflicting out a plaintiffs’ attorney from representing similarly situated plaintiffs in the future. However, agreements that restrict an attorney’s right to practice are not *per se* prohibited. As discussed above, Model Rule 5.6(b) only prohibits such restrictive agreements “as part of” or “in connection with” the settlement of a client’s claims. Restrictive agreements that are “calculated to achieve [the result

of a plaintiffs' lawyer being unable to represent future plaintiffs in litigation against the defendant] are also impermissible when they serve as partial consideration for a settlement, notwithstanding that the same arrangement might be permissible if it were made independently of a settlement." Ethical Guidelines for Settlement Negotiations § 4.2.1 Comm. Notes (Aug. 2002).

A defendant creates the conflict of interest between a plaintiff's former attorney and future claimants arising out of the same transaction by hiring the former plaintiff's attorney to advise the defendant on the suit's subject matter after the attorney has finished representing the plaintiff. See Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 Sw. U. L. Rev. 1, 9 (2003). In a leading treatise, it was noted that a consulting agreement, while having the same preclusive effect in practice as a restrictive provision in a settlement agreement due to the operation of conflict of interest rules, is in a form consistent with the ethics rules. See Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering* § 47.6, at 47-10 (2d ed. Supp. 2002).

Consistent with these ethical principles, courts and commentators have suggested in recent years that consulting agreements are becoming more prevalent. See David A. Dana & Susan P. Koniak, *Secret Settlements & Practice Restrictions Aid Lawyer Cartels & Cause Other Harms*, 2003 U. Ill. L. Rev. 1217, 1223 n.12. In *Adams v. BellSouth Telecomm, Inc.*, the court, while lamenting that "the use of *ex post* 'consulting' agreements between Plaintiffs' attorneys and former opposing parties are becoming more common," applied a bright line rule against "contemporaneous negotiations over settlement and consulting agreement terms" on the public policy ground of preventing plaintiffs and their counsel from being put in a direct conflict of interest. No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001). We have found no empirical data, however, to support the proposition that such agreements are becoming more prevalent, and indeed, in our experience, they are rarely used.

2) Ethics Rules Probably Restrict the Timing in Which Parties Negotiate a Consulting Agreement

As indicated *infra*, Model Rule 5.6(b) prohibits an attorney from entering into an agreement that restricts the lawyer's right to practice when the agreement is in connection with the settlement of a client's controversy. Exactly what "in connection with" or "as part of" a settlement means is a matter of debate. As a general rule, however, defense counsel should refrain from raising the possibility of entering into such consulting agreements until after the settlement of the plaintiff's claims is agreed upon and all parties have fulfilled their obligations under the settlement agreement. In one case, after the defendant made a final offer to settle, but before all of the plaintiffs approved their settlement agreements, the plaintiffs' attorneys and the defendant agreed that plaintiffs' attorneys would provide consulting services to the defendant after all the plaintiffs had settled their claims against the defendant. *In re Conduct of Brandt*, 10 P.3d at

910-17. The Oregon Supreme Court found this to be a violation of Disciplinary Rule 2-108(B) of the Oregon Code of Professional Responsibility. It found that it did not matter whether the agreement to provide consulting services was itself a condition of the settlement of a client's claims; making an agreement to provide consulting services in any way in connection with the settlement of a client's claims was a violation. *Id.* at 917 n.10.

Even if the practice restrictions are imposed only on the plaintiffs' counsel, ethics rules are implicated for the defendant's counsel who participates in making a restrictive agreement in connection with or as part of the settlement of the underlying claims. In an ethics opinion, the ABA Committee on Ethics and Professional Responsibility found that the scope of the prohibition in Model Rule 5.6(b) extends to attorneys who offer or require a restriction on a lawyer's right to practice in connection with the settlement of a client controversy because Rule 5.6(b) operates in conjunction with Model Rule 8.4(a). Formal Op. 371 (1993); *see also* Joanne Pitulla, *Co-Opting the Competition: Beware of Unethical Restrictions in Settlement Agreements*, 78 A.B.A. J. 101 (Aug. 1992). In *Adams v. BellSouth Telecomm, Inc.*, the court found that the defense counsel violated the applicable ethics rules by negotiating and agreeing to a consulting agreement concurrently with the settlement of all the plaintiffs' claims, even though the consulting agreement only restricted the right to practice law of the opposing party's attorneys. 2001 WL 34032759 at *2-9.

There is a scarcity of decisional law or persuasive analysis applying Rule 5.6(b) of the Model Rules of Professional Conduct where attorneys preliminarily discuss the prospect of entering into a consulting agreement concurrently with the settlement of the pending controversy, but do not affirmatively offer to enter into a consulting agreement or discuss the details of any such agreement until after all clients' claims are settled. Even if a particular jurisdiction's equivalent of Model Rules of Professional Conduct Rule 5.6(b) is interpreted as not prohibiting such discussions, an attorney is probably required to inform every present client during the settlement negotiations of the concurrent consulting agreement discussions and obtain all the present clients' informed consent in writing. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 400 (1996). By pursuing employment with a party that the attorney is concurrently opposing for present clients in a matter, an attorney risks materially limiting the representation of every client adverse to the defendant in violation of Model Rule 1.7(a). Under Disciplinary Rule 5-105 of the Model Code of Professional Responsibility, a lawyer is permitted to represent multiple clients even if his independent professional judgment on behalf of a client is likely to be adversely affected by representing multiple clients if the clients consent after full disclosure.

An attorney should obtain the informed consent of every present client adverse to the defendant "before that point in the discussions when such discussions are reasonably likely to materially interfere with the lawyer's professional judgment." ABA Comm. on Ethics and Prof'l Responsibility,

Formal Op. 400 (1996). Discussions about the terms of employment, an attorney's profit potential, an attorney's professional skills, and similar substantive employment terms trigger the ethics duty to obtain the present clients' informed consent because there is a substantial risk that the pursuit of employment with the client's adversary will adversely affect the attorney's judgment in considering alternatives or not pursuing courses of action for those present clients. *See id.*

In addition to ethical concerns, consulting agreements and underlying settlement agreements may be subject to attack in a legal proceeding seeking to void enforcement. Courts differ on the enforceability of consulting agreements when Model Rule 5.6(b) is violated. At least one court has found that the failure to inform the settling plaintiffs of the consulting agreement required setting aside a settlement agreement and giving plaintiffs the right to opt-out because the plaintiffs lacked sufficient information when agreeing to the settlement agreement. *See Adams*, 2001 WL 34032759 at *12.

3) Consulting Agreements May Trigger the Ethical Duty to Obtain a Former Client's Consent

Even after the attorney completes representation of the client in the matter, the attorney may still be required to obtain the consent of the former client in order to enter into a consulting agreement with the defendant. A lawyer is prohibited from disclosing confidential information acquired from the representation of a former client. Model Rule 1.9(c)(2) states that "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter... (2) reveal information relating to the representation except as [Model] Rule 1.6 or 3.3 would permit or require with respect to a client." If not disclosing the former client's confidential information would pose a "significant risk" that the consultant's representation of the defendant would be materially limited, then a concurrent conflict of interest may exist. *See* Model Rules of Prof'l Conduct R. 1.7(a)(2). The former plaintiff's attorney can still represent the defendant if informed consent is given, by both the former and the present clients, and the attorney reasonably believes competent and diligent representation can still be provided. *See* Model Rules of Prof'l Conduct R. 1.7(b)(1) and (4). The application of Model Rule 1.7(a)(2) rule does not appear to have been addressed in the context of a consulting relationship. This will necessarily depend on the specific type of work performed by the consulting attorney and the risk that knowledge of confidential factual information of the former client could be used to the defendant's benefit. Consulting attorneys should carefully examine under applicable ethics rules to determine whether their representation of the defendant is materially limited and therefore they must withdraw unless the former plaintiff will give consent.

One commentator has suggested that the former client's consent to his counsel's subsequent representation of the defendant may always be required before the plaintiffs' lawyer enters into the consulting relationship on the same or substantially related matter, implying that there may be a positional conflict caused by the change of sides. *See Golan*, 33 Sw. U. L. Rev. at 9. There is strong authority, however, that this interpretation overstates the rule. A comment to the rule points out that even a lawyer who routinely handles a type of problem for a client is not later precluded from representing another client in a similar, though factually distinct, matter even if the subsequent position is adverse to the prior client's position. Model Rules of Prof'l Conduct R. 1.9, cmt. 2. A leading treatise suggests that adverse consequences from a positional conflict of interest are rarely sufficient to preclude later representation. Hazard, Jr. & Hodes, 1 The Law of Lawyering § 13.3, at 13-7 n.5 (2d ed. Supp. 2003). Accordingly, there is a reasonably strong argument that – unless non-disclosure of confidential information would limit the attorneys' representation of his or her new client – consent of the former client is unnecessary.

4) The Consulting Relationship Must be a Valid Attorney-Client Relationship to Minimize Ethical Concerns

Consulting agreements between a defendant and a former plaintiff's attorney must result in a valid attorney-client relationship or such an agreement would risk violation of applicable ethics rules. An attorney is prohibited from collecting unreasonable or clearly excessive fees. Model Rule 1.5(a) states that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Disciplinary Rule 2-106(a) states that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Arrangements that merely add members of the plaintiffs' bar to a defendant's payroll without any requirement of performing legal services for the defendant would therefore raise serious questions about the agreements' validity and ethical propriety. *See Golan*, 33 Sw. U. L. Rev. at 45.

Moreover, consulting agreements may not restrict the right of a lawyer to practice law after the employment relationship ends. Model Rule 5.6(a) prohibits a lawyer from participating in the offering or making of an employment agreement "that restricts the right of a lawyer to practice after termination of the relationship." Disciplinary Rule 2-108(a) of the Model Code of Professional Responsibility prohibits a lawyer from being part of an employment agreement with another lawyer "that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement." A wholesale prohibition in employment agreements that prevent an attorney from ever suing the employer in relation to any action on behalf of any client violates Model Rule 5.6(b). *See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 400 (1996).*

Provisions in consulting agreements that seek to expand by contract existing legal and ethical responsibilities, such as confidentiality and privilege,

would also restrict a lawyer's right to practice in violation of Rule 5.6(a) of the Model Rules of Professional Conduct. *See id.* The Colorado Bar Association Ethics Committee found the following are examples of provisions that restrict a lawyer's right to practice by impairing the lawyer's independent judgment in future cases against the other party: forum and venue limitations, agreements not to subpoena certain records or witnesses, and obligations to turn over attorney work-product to opponent's counsel. Formal Op. 92 (1993). On the other hand, contractual provisions that merely codify ethical or legal duties, such as a nondisclosure provision of a settlement agreement, have been held not to restrict a lawyer's right to practice. *See* N.M. Ethics Comm. Adv. Op. 1985-5.

5) How To Ethically Negotiate a Consulting Agreement

In sum, consulting agreements can probably be used ethically to limit the involvement of former plaintiffs' counsel in future litigation. To be safe,

- negotiations about a consulting agreement should not occur until the settlement has been fully consummated;
- consideration should be given to whether consent of former clients is necessary;
- the amount paid must be reasonable, and actual services must be provided; and
- the consulting agreement should not include restrictions on future practice.

B. Requesting That, As A Condition Of Settlement, Plaintiffs' Lawyers Revise Their Websites To Delete Mention Of The Product In Question

Today, many plaintiffs find counsel by surfing the internet, and within days of newspaper reports of an issue with a particular product, hundreds of plaintiffs' lawyers begin soliciting clients through their internet websites. When negotiating an inventory settlement with a plaintiffs' counsel, a defendant may wish to request that the plaintiffs' counsel remove the information about the product in question from its website. This, however, may raise ethical issues.

Rule 5.06(b) of the Texas Disciplinary Rules of Ethical Conduct was interpreted as prohibiting counsel, as part of the settlement of a lawsuit, from agreeing not to solicit third parties to pursue lawsuits against the defendant. *See* Texas Ethics Opinion 505 (1995). The rationale behind this rule is that solicitation of potential clients is part of the practice of law (to the extent permitted under applicable laws and ethics rules), and thus an agreement not to solicit. *See id.* Websites are not generally forms of "solicitation," as they have

been deemed in ethics opinions to be more closely akin to advertisements. *See* Utah State Bar Ethics Adv. Op. 97-10; *see also* II. Adv. Op. 96-10. However, although subject to different ethics rules regarding the permissibility of communications, in this day and age it can be argued that the right to advertise through a website is just as much a part of the practice of law as more directly soliciting clients. Thus the rationale in Texas Ethics Opinion 505 could arguably apply to websites as well as other forms of solicitation.

Even before the widespread use of the Internet, this issue was still murky. In a state court case in New York, the Appellate Division of the New York Supreme Court reversed the lower court's decision and granted a motion to disqualify plaintiffs' attorneys who violated a provision in a previous settlement agreement with the defendants in which the plaintiffs' attorneys agreed not to solicit other plaintiffs against the defendant. *See Feldman v. Minars*, 230 A.D.2d 356 (June 12, 1997). It should be noted, however, that *Feldman v. Minars* did not definitively decide that no violation of the New York equivalent of Model Rule 5.6(b) occurred. Instead, the decision was premised on equitable concerns (that allowing the plaintiffs' counsel to pursue the new claims would be inequitable since the plaintiffs' counsel voluntarily entered into the agreement), and the court suggested that whether or not such conduct violated the ethics rules could be addressed by the appropriate disciplinary authorities. *See id.*

Is there any way in which an agreement to remove information regarding a product from a website advertisement may be ethically permissible when it is done in connection with a settlement agreement? There may be an argument that, in connection with or as part of a settlement, an agreement to remove "false or misleading" information from the plaintiffs' counsel's website does not violate Model Rule 5.6(b). Lawyers must adhere to certain ethical rules when advertising. Model Rule 7.1 states that, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." As noted in Texas Ethics Opinion 505, a settlement agreement should not restrict the right to represent future plaintiffs "[t]o the extent that such is permitted under the State Bar Rules, and other applicable state and federal statutes..." Thus, a condition of a settlement agreement in which a plaintiffs' lawyer agrees to remove from his or website(s) materials that may be "false or misleading" might not be deemed to be a restriction of a lawyer's ability to practice law.

Even if the removal of the "false or misleading" information on a website might be appropriate to include in a settlement agreement, defense counsel must be careful not to negotiate such an agreement in an extortionate or threatening manner. *See* Ethical Guidelines for Settlement Negotiations § 4.2.3 Comm. Notes (Aug. 2002). What constitutes a "threat" would be a highly fact-specific inquiry. As a matter of practice, defense counsel should not suggest that they will report

the “false or misleading” advertisements to the applicable disciplinary committee during negotiations. *Id.* Beyond this obvious example, however, the defense counsel must be cognizant that by interjecting this element in the negotiations, they are potentially opening themselves to retaliatory complaints by plaintiffs’ counsel if settlement falls apart. While such a plaintiffs’ counsel still has many practical reasons not to allege that such a discussion was extortion, including their desire to settle their claimants and get paid, it is nonetheless an element of risk interjected into negotiations when defense counsel raises the possibility of an agreement regarding the removal of an offensive website advertisement.

As a practical matter, it is unclear just how beneficial such an agreement would be to the defendant. In the situation where the plaintiffs’ lawyer’s website’s reference to the product in question is rife with false or misleading statements, an agreement which is tailored to remove the “false or misleading” material but has the effect of removing the entire product, may not violate the ethics rules. However, such an agreement, if ethically permissible, would still not prohibit the plaintiffs’ counsel from continuing vigorously to advertise, so long as the information is not false or misleading under the ethics rules.

C. Confidentiality Agreements: Limiting Sharing Of Work Product/Limiting Use of Information Obtained in The Litigation

Another possible means of limiting litigation in the future is for defense counsel to request that plaintiffs’ counsel, as a condition of settlement, agree not to share its work product with other plaintiffs’ counsel or otherwise limit its use of information received in the litigation. Thus, by settling with the more experienced/talented plaintiffs’ counsel and limiting the dissemination of its work product or use of materials obtained in the litigation, the defendant may be able to, if not curtail, at least limit, future litigation. While such an agreement would obviously have some practical limitations, as, in this day and age, a document once shared with anyone is pretty much fair game on the internet, there are ethical concerns as well.

As indicated above, indirect restrictions on a lawyer’s ability to practice law that are made in connection with settlement agreements have been interpreted as violating Model Rule 5.6(b) and its equivalents. The ABA Committee on Ethics and Professional Responsibility considered the propriety of a provision in a settlement agreement in which the plaintiffs’ lawyer was prohibited from using information learned during the representation of the plaintiff in future litigation against the settling defendant. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 417 (2000). The Committee found that such a restriction on the use of information would be a violation of Model Rule 5.6(b). *Id.* It explained that, “[a]s a practical matter, however, this proposed limitation effectively would 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.” *Id.*

State bar ethics opinions have generally tracked the interpretation of the ABA’s Committee on Ethics and Professional Responsibility. The Tennessee Board of Professional Responsibility addressed, among other provisions, the ethical propriety of a clause in a settlement agreement that restricted the plaintiff or plaintiffs’ counsel from “using case information to assist other litigants or claimants.” Formal Op. 98-F-141. The Board found that such a provision would create an impermissible conflict of interest between the lawyer’s current settling clients and other current non-settling clients, and thus, the plaintiffs’ lawyer could not enter into such an agreement. *Id.* With regard to potential future clients, the Board, citing ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-371, indicated that such a confidentiality provision is prohibited as an ethical violation of the Tennessee ethics rule prohibiting restrictions on the right to practice law. *Id.*

The New Mexico Bar Ethics Advisory Opinions Committee was one of the first state bar ethics panels to address such an issue in an ethics opinion. Adv. Op. 1985-5. The proposed settlement considered by that Committee involved, among other questionable provisions, the provision that the plaintiffs’ counsel must give her entire file to the defendant so it could be sealed upon settlement. *Id.* The Committee noted that the client owns the client’s file, not the attorney, and thus the client controlled the decision whether the file could be sealed as a condition of settlement. *Id.* However, the Committee found that the attorney could not abide by the client’s decision regarding turning over the file to the defendant if the attorney decided that the work product that would be turned over would restrict the attorney’s ability to represent another plaintiff against the defendant in the future. *Id.* This opinion leaves open the possibility that some of the plaintiffs’ counsel’s work product could be restricted as part of a settlement agreement if the settling client were to agree. However, as a practical matter, the work product the defendant is interested in subjecting to a confidentiality agreement would most likely be the work product that could affect the ability of the plaintiffs’ attorney to pursue in future litigation against the defendant, and thus probably cannot ethically be the subject of a confidentiality agreement.

D. Ethics Rules Restrict the Ability to Limit or Eliminate the Fees a Settling Plaintiffs’ Lawyer Can Obtain in Future Litigation Against the Defendant

Although plaintiffs’ lawyers may have multiple reasons to bring lawsuits against a defendant, one of the principle reasons plaintiffs’ attorneys bring suit is for their own financial gain. Limiting or eliminating the fees that the plaintiffs’ lawyer could recover in the future would be of great benefit to the defendant in achieving its settlement goals. While it is unlikely that a plaintiffs’ lawyer would voluntarily agree to reduce or limit future fees at the present, they might do so for

the right price. If a plaintiffs' counsel was willing to entertain such an offer, could this be done within the ethics rules?

The Professional Ethics Committee of the Texas Supreme Court considered the issue of whether a law firm can, as part of a settlement of a lawsuit, agree "not to share fees with anyone in the future with respect to lawsuits or claims brought against the opposing party." The Committee held that such an outright agreement would be a limitation on the practice of law and would be in violation of Rule 5.06(b) of the Texas Disciplinary Rules of Professional Conduct. *See Texas Ethics Op. 505*. Can a defendant indirectly reduce the ability of the plaintiffs' counsel to profit from bringing future cases in an ethical manner? While technically possible, it is unlikely that such indirect methods are going to be successful in achieving the defendant's goals.

Defendants may wish to include provisions in settlement agreements which require the plaintiffs' lawyers to affirm that they are not taking more than x percentage of fees from the settlement, or require the plaintiffs to waive attorneys' fees as part of a settlement. While this would seem to put the plaintiffs' counsel in an impermissible conflict with their clients, such provisions have been allowed in settlement agreements of cases where the underlying statutes require that the defendant pay the plaintiffs' lawyer reasonable fees. *See Golan, Restrictive Settlement Agreements*, 33 Sw. U. L. Rev. at 15-16, citing *Evans v. Jeff D.*, 475 U.S. 717, 730 n.19 (1986). In these circumstances, the plaintiffs' lawyers ethically can prohibit their client from accepting such a settlement if they choose to include such a provision in their contingency fee agreement. Defendants can then choose whether to settle with lawyers with these provisions. As a practical matter this type of enforcement has limited value because it would be difficult to provide this information to prospective clients, and thus they are not likely to be able to gravitate towards the plaintiffs' counsel who take the least amount of fees at the time they choose their representation.

III. Capturing All Current Cases

Obtaining closure also depends on capturing all the relevant existing cases so that they will not be litigated in the future. One of the concerns faced by a mass tort defendant in doing inventory settlements is that a plaintiffs' lawyer will "cherry pick." In other words, the concern is that the plaintiffs' lawyer will recommend settlement to the plaintiffs who have weaker, lower value claims, but will hold out to litigate in the future those claims that are stronger or of higher value. There are a number of ways that defendants have attacked this concern.

A. Walk Away Rights If Specified Percentages Are Not Met

In a number of recent inventory settlements, defendants have retained a right to walk away: (i) if each plaintiffs' counsel does not obtain releases from a specified (high) percentage of its clients and/or (ii) if the overall number of claims

participating is not a certain (again, quite high) percentage, the defendant retains the right to walk away. Concerns have been raised that allowing a defendant to walk away from a proposed settlement if insufficient numbers of claimants, overall and/or in specific subgroups, participate provides the participating plaintiffs' lawyer an incentive to coerce rejecting plaintiffs into participating. It is mere speculation, however, that the ability to walk away from a settlement if a threshold of participating plaintiffs is not met would induce a plaintiffs' lawyer to act unethically to induce a "hold out" to participate in order to meet the threshold. If defense counsel had to structure every settlement tactic on the assumption that the plaintiffs' counsel would choose to act unethically if given any incentive to do so, then settlement discussions would never take place.

As a practical matter, when engaging in inventory settlements, defendants should attempt to provide some provisions to ensure a minimal comfort level that the plaintiffs' lawyers are acting ethically with regard to both settling and non-settling clients. One approach might be public notice of the "walk-away" right, which minimizes the ability of the plaintiffs' counsel to conceal this information from clients who may attempt to "hold out" in order to obtain a higher share of the settlement amount. Another example is including language in the individual releases and settlement documents provided to plaintiffs that provides notice to the plaintiffs that they have the right to consult with counsel and that they are making a voluntary decision to settle their claims.

B. Requiring Each Plaintiffs' Counsel To Recommend The Settlement To All Clients

A seemingly straight-forward way to avoid cherry-picking is simply to require that each plaintiffs' counsel recommend that all of his or her clients participate in the settlement. Whether this raises ethical issues has been the topic of much discussion. Some plaintiffs' counsel and commentators have argued that the requirement of recommending participation to all participants can coerce plaintiffs' counsel to recommend a settlement offer to an individual claimant who would be better off pursuing a separate settlement negotiation or litigation, and that this impairs their duty to exercise independent judgment and render candid advice pursuant to Model Rule 2.1.

In the diet drug global settlement process, in which Wyeth settled the "downstream" opt-outs and other remaining cases in the second round of the Diet Drug litigation, letters signed by plaintiffs' counsel who agreed to participate in the deal contained language requiring the firm to "agree[] to recommend participation to all Claimants in its Entire Claims Group." This global settlement involved a published grid on which Wyeth valued the majority of claimants, while the most serious cases were individually negotiated. Despite the valuation of claims by Wyeth on the grid, each plaintiffs' counsel was responsible for allocating a total settlement amount to each of the plaintiffs based upon whatever methodology they chose.

The original Vioxx deal required a similar recommendation to participate in the settlement: “[T]he Enrolling Counsel affirms that he has recommended...to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Enrolling Claimants enroll in the Program.” After complaints from numerous plaintiffs’ counsel, including filings before Judge Fallon, the terms of the settlement agreement were revised instead to require:

Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program. By submitting an Enrollment Form, the Enrolling Counsel affirms that he or she has exercised such independent judgment and ... has recommended to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program....

This change, however, simply reiterated that each plaintiffs’ counsel is required to act ethically in regard to the settlement, and not subordinate their clients’ interests to their own financial interest. It did not, however, change the alleged coercive pressure on the plaintiffs’ lawyer to recommend participation in the Vioxx settlement even if it is not in an individual plaintiff’s best interests. Is this really a concern, however? That is subject to debate. There is, of course, no “sure thing” in mass tort litigation, and the possibility of recovering a dollar amount for an alleged injury, even in the strongest of cases, may very well be in a client’s interest. Further, the plaintiffs’ counsel still must comply with the ethics, and other, rules regarding informing their clients of the offers of settlement and providing sufficient information to make informed decisions whether to settle.

C. Requiring Plaintiffs’ Lawyers to Withdraw from Representing Non-Settling Plaintiffs

One of the provisions in some settlements that is sometimes subject to criticism is the requirement that plaintiffs’ lawyers, to the extent permissible, withdraw from representing plaintiffs who chose not to participate in the settlement, or do not submit proper documentation by the deadline, to withdraw from representing these clients. Although this may appear to be problematic, there is an argument that this provision merely codifies the existing ethics rules. The ethics rules clearly allow for the representation of multiple plaintiffs by the same attorney, even where a conflict of interest may arise. *See, e.g.*, Model Rule of Prof’l Conduct R. 1.7. When such a conflict does arise, the plaintiffs’ counsel can continue to represent both plaintiffs when the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing.” Model Rule of Prof’l Conduct R. 1.7(b)(1) and (4). When the plaintiffs whose objective is to settle cannot be achieved because their lawyer represents other plaintiffs for whom the objective is to reject the settlement and

litigate their claims to verdict, there is a good argument that an incurable conflict of interest under Model Rules 1.7(b)(1) and (4) arises at that time. When such a conflict arises, there is nothing in the ethics rules that requires the withdrawal from all clients. It is thus permissible for the lawyer to continue to representing the plaintiffs for whom the objective of their representation is the settlement of their claims.

IV. Conclusion

In sum, the ethical rules and their interpretation by the relevant authorities do not leave a defendant much room to effectuate limits on future litigation. Of course, trying to capture as many cases as possible in any deal is perhaps the best way to reduce future litigation. Consulting agreements are a reasonably safe avenue -- if done properly -- but in our experience, for a variety of reasons, they are rarely done. More commonly, there are no formal agreements and as a practical matter, future litigation is more likely to be prevented by a recognition by the settling parties that a good-faith settlement should end the matter. It is not uncommon for the same plaintiffs' counsel and defense counsel to be sitting across the table from each other on multiple occasions. If in connection with a particular settlement, a plaintiffs' lawyer represents that he or she "is out of the business," but then turns up months or years later with more cases, it would undoubtedly affect both the defendant's view of that lawyer's credibility and the defendant's willingness to settle the lawyer's new cases. It will likely spill over to dealings with that lawyer by other defendants. At the end of the day, good faith of the counsel involved in settlement discussions may be the most effective avenue to limit future litigation.