Advisory Opinion 1985-5

An attorney has requested guidance from the Advisory Opinions Committee in responding to a settlement offer from a group of attorneys. The attorney represents the Plaintiff in a wrongful death case arising out of the New Mexico penitentiary riot. The group of attorneys (hereinafter "defense counsel") who made the settlement offer represent the various defendants in that lawsuit.

THE SETTLEMENT OFFER
Defense counsel offered a monetary settlement to the attorney with three conditions attached. The conditions are:

1. That the attorney and her client not disclose the amount or terms of the settlement.
2. That upon settlement the attorney must give defense counsel her entire file to be sealed.
3. The attorney must personally agree not to handle any more cases arising out of the penitentiary riot on behalf of any other plaintiff.

THE RESPONSE
A. The First Condition
The first condition imposed by defense counsel is not uncommon. A settlement condition providing for nondisclosure of the amount and terms of a settlement is not only proper, but should be recognized where the details are not a matter of public record. ABA/BNA *Lawyer's Manual on Professional Conduct,* § 801.5808, Opinion 500 (N.J. 1982). The amount and terms of a settlement are the secrets of the client which may not be disclosed by the attorney. N.M. Code of Professional Responsibility, Rule 4-101(A), 4-101(B)(1). If a client agrees to such a settlement condition, the attorney must not disclose the amount or terms of the settlement.

B. The Second Condition
The second condition imposed by defense counsel requires that the attorney give her entire file to defense counsel to be sealed. The decision whether to agree to this condition rests with the client because the file is the property of the client. E.g., ABA/BNA *Lawyer's Manual on Professional Conduct, §* 801:5854, Opinion CI-845 (Mich. 1982); *In Re: Grand Jury Proceedings* (Vargas), No. 84-1058 (10th Cir. 1984); EC 7-7. The attorney here apparently holds the file in a representative capacity for the client. The attorney is obligated to maintain confidences and secrets of the client which may be found in the files.

In her request to the Committee, the attorney notes that releasing the file to defense counsel may threaten the attorney-client privilege. The client, however, may waive the privilege. The attorney should fully explain the condition to her client, its threat to the attorney-client privilege, and all other ramifications of having the file sealed in the manner requested by defense counsel. It is the client's decision whether to accept this condition of the settlement.

A separate but related question is whether the attorney may keep her work product, irrespective of the client's consent to the condition. The attorney points out that the file contains her work product, and if the file is sealed with defense counsel, she will lose access to it. The work product doctrine prevents the disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney preparing for litigation. *Hickman v. Taylor,* 329 U.S. 495 (1947). it acts as a shield to protect the client during discovery from undue and needless interference by opposing counsel which could damage the client's position for settlement or at trial. It is not uncommon for attorneys to retain files and review portions of those files for use in later cases.

Releasing work product papers as a condition for settlement may be distinguishable from the protection afforded to an attorney and client during discovery. It is not necessary to explore the distinction. It is the Committee's position that if the attorney is required to disclose her entire work product, it may inhibit her representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims. *See* Section C, *infra.* The attorney cannot agree to any condition which restricts his or her right to practice law. N.M. Code of Professional Responsibility, Rule 2-108(B).

The attorney's work product papers may reveal her client's position which could affect her representation of future clients whose weaknesses and settlement positions are similar to those of the settling client. Also, the attorney may not be able

to recreate her work product if it is sealed by defense counsel. Therefore, with regard to work product, the attorney must first determine whether the condition will restrict her right to practice law. If it will, the attorney cannot agree to the condition. If it will not, the attorney may agree to the condition. One method of making this determination may be to consider what the attorney will discard or keep in closing her file. If the client consents to sealing and delivering the files to defense counsel with the stipulation that they remain sealed and if the attorney believes that the absence of her work product *will not* restrict her future practice of law, the attorney should keep the work product in the file for sealing as part of the stipulation. If the attorney believes that the absence of her work product *will* restrict her future practice of law, the attorney should keep the work product in her own files as part of the stipulation, and not seal it with the file.

A. The Third Condition

The third condition is directed at the attorney and requires her to forego representation of clients with claims arising out of the penitentiary riot. The Code of Professional Responsibility does not expressly proscribe defense counsel from proposing conditional settlements that restrict another attorney's right to practice law. The Code, however, does prohibit an attorney from agreeing to such a condition. Rule 2-108(B) requires:

> 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.

Model Rule 5.6(b) of the Model Rules of Professional Conduct (August 2, 1983) also provides that a lawyer shall not participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a controversy between private parties.

The opinions of other ethics committees are in agreement. For example, in ABA Informal opinion 1039 (1968), a lawyer cannot ethically sign an agreement that settles a client's litigation when the settlement contains a covenant that the lawyer will not represent other plaintiffs against the defendant. According to the Ohio ethics committee, a lawyer may not agree as part of a settlement that the lawyer will not participate in any other litigation related to the subject cases. ABA/BNA *Lawyer's Manual on Professional Conduct,* § 801:6827, opinion 81-10 (Ohio, 1981); accord; § 801:8406, opinion 1982-5 (Dallas Bar Association, 1982) (an attorney may not be a party to a settlement agreement whereby the attorney for the plaintiff agrees not to represent anyone wishing to make the same claim against the defendant at any time in the future). The Committee concludes that the attorney cannot agree to the third condition which defense counsel wish to impose as a requirement for settlement of the case without committing an ethical violation. *N.M. Code of Professional Responsibility,* Rule 1-102(A)(1).

The Code approaches conflicts arising with this type of condition by providing a lawyer with an aid to resisting objectionable conduct rather than prohibiting the conduct itself.

> The Code, however, fails to shield counsel from pressures -- such as conditional settlement offers -- that could impair disinterested representation. For instance, DR 2-108(B) requires an attorney to decline from entering into 'an agreement that restricts his right to practice law.' Thus, plaintiff's counsel, as a condition of settlement, cannot agree to refrain from representing other plaintiffs in future actions similar to the one being settled. The Code seeks to bar such agreements because they would induce a conflict between plaintiff's counsels interest in his own practice and the client's interest in an adequate settlement. Yet, the Code does not bar opposing counsel from making such settlement offers; it merely bars plaintiff's counsel from agreeing to them.

Comment, *Settlement Offers Conditioned Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations,* 131 U. Pa. L. Rev. 793, 809 (1983).

Although there is no express prohibition in the Code of Professional Responsibility, several opinions have found conduct similar to that of defense counsel in the instant case unethical. *E.g.,* ABA Informal opinion 1039 (1968). The District of Columbia ethics committee has concluded that lawyers are prohibited from *making* or *entering* into agreements in which a restriction on the lawyer's right to practice is part of the settlement of the controversy between private parties. ABA/BNA *Lawyer's Manual on Professional Conduct, §* 801:2309, opinion 130 (D.C. 1983). Likewise, the Maryland ethics committee has concluded that recommendation of settlement provisions to a client which prohibit opposing counsel from rendering future services to potential clients in pending, parallel or future litigation is highly suspect and, in effect,

constitutes circumventing a disciplinary rule through the actions of another. ABA/BNA *Lawyer's Manual on Professional Conduct,* § 801:4339, Opinion 82-53 (Md. 1982).

While the Committee is not called upon to evaluate the ethical basis of defense counsels' request to forego future representations, standing alone, it requests that very close scrutiny be given to conditional settlement offers which might restrict an attorney's right to practice in view of the ethics committee determinations on this question from the District of Columbia and Maryland bars.