

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

Formal Opinion No. 468
March 16, 1992

SUMMARY

RESTRICTIONS ON PRACTICE OF LAW; CONFLICTS OF INTEREST. It is unethical for an attorney representing a party in a lawsuit against multiple opposing parties to participate in the making of a settlement agreement with some of the opposing parties in which, as a condition of the settlement, either (a) the attorneys representing the settling opposing parties must agree not to assist the non-settling opposing parties in the same action, or (b) the settling opposing parties must agree to assert and pursue a conflict of interest claim against their attorneys if their attorneys attempt to represent any of the non-settling opposing parties in the pending action. It is also unethical for the attorneys representing the settling opposing parties to participate in the making of or be parties to any such settlement agreement.

AUTHORITIES CITED

Hoffman v. United Telecommunications, Inc.,
687 F. Supp. 1512 (D.Kan. 1988)

California Rules of Professional Conduct,
Rules 1-500, 3-310 (1989)

California Rules of Professional Conduct, Rule 2-109
(1975)

State Bar of California Committee on Professional
Responsibility and Conduct, Formal Opinion No. 1988-104
(April 1991)

Los Angeles County Bar Association Professional
Responsibility and Ethics Committee, Formal Opinion No. 243
(October 17, 1957)

Los Angeles County Bar Association Professional
Responsibility and Ethics Committee, Formal Opinion No. 445
(September 28, 1987)

Dallas Bar Association, Opinion No. 1982-5
(Nov. 22, 1982)

FACTS AND ISSUES PRESENTED

In the hypothetical fact situation presented to the Committee, P is a plaintiff in a complex litigation case involving multiple defendants. Each of the defendants is represented by separate counsel. The defendants' attorneys divide responsibilities for pre-trial and trial preparation among themselves. In practice, the attorneys for each defendant file all required documents and attend all meetings and depositions affecting their clients.

P and its attorney discuss the possibility of a settlement with several of the defendants, pursuant to which such defendants would be dismissed from the action without prejudice. P's attorney suggests that, as a condition of settlement, the attorneys for the settling defendants must agree that, due to disclosures made to them during the settlement process, they will not render services to any of the non-settling defendants in the pending action.^{1/} In addition (or as an alternative) to the foregoing, P's attorney suggests that, as a condition to the settlement, the settling defendants must agree to assert and pursue a conflict of interest claim against any of their attorneys who attempt to render services in the pending action to any of the non-settling defendants. The inquirer indicates that a conflict of interest could arise in such a case because the settling defendants would be dismissed without prejudice, and the interests of the settling defendants with respect to certain issues in the lawsuit are theoretically in opposition to those of the non-settling defendants, at least in part.

The inquirer has requested the Committee to determine whether it is a violation of Rule 1-500(A) of the California Rules of Professional Conduct if the attorney for the plaintiff or the attorneys for the settling defendants participate in or are parties to a settlement agreement containing either of these two provisions. The remainder of this Opinion considers each of the two provisions in turn.

DISCUSSION

1. It Would Be Unethical For Plaintiff's Attorney To Suggest Or For Settling Defendants' Attorneys To Accept A Settlement Agreement In Which Settling Defendants' Attorneys Agree Not To Represent Non-Settling Defendants.

The California Rules of Professional Conduct provide that:

A member shall not be a party to or participate in offering or making an agreement, whether in connection with the

settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law.

California Rules of Professional Conduct, Rule 1-500(A) (1989).^{2/} The Discussion accompanying Rule 1-500 states that:

the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Id., Rule 1-500 Discussion.

According to the text of Rule 1-500(A), an agreement must meet two criteria in order to fall within the prohibition of the Rule. First, an attorney must be a party to or participate in the offering or making of the agreement. Second, the agreement must restrict the right of an attorney to practice law. An agreement containing the first provision proposed by the inquirer clearly meets both of these criteria, since both P's attorney and the settling defendants' attorneys have participated in its making and the agreement would prevent the attorneys for the settling defendants from representing the non-settling defendants in the pending litigation. The participation of P's attorney and the settling defendants' attorneys in the settlement agreement therefore violates Rule 1-500. Indeed, it is exactly this type of conduct by attorneys which the Rule is intended to prohibit.

Opinion No. 1988-104 of the State Bar of California Committee on Professional Responsibility and Conduct supports this conclusion. In that Opinion, the State Bar construed Rule 2-109, the predecessor of Rule 1-500. Rule 2-109(A) was substantially similar to Rule 1-500(A).^{3/} In its Opinion, the State Bar decided that it would be a violation of Rule 2-109(A) if a defendant's attorney prepared, and a plaintiff's attorney signed, a settlement agreement which precluded the plaintiff's attorney from representing "any person or entity in any litigation or arbitration proceeding against [defendant] or its affiliated entities . . ." The State Bar based its decision on the fact that the agreement limited "the autonomy of attorneys and the ability of clients to freely choose an attorney." State Bar of California Committee on Professional Responsibility and Conduct, Formal Opinion No. 1988-104 (April 1991).

Given the substantial similarity between Rule 2-109(A) and Rule 1-500(A), this Committee believes Opinion No. 1988-104 remains applicable to restrictive covenants among attorneys. The first provision proposed by the inquirer would limit the autonomy of the settling defendants' attorneys and the ability of the non-settling defendants to choose those attorneys to represent them. Opinion No. 1988-104 therefore indicates that Rule 1-500(A) prohibits the participation of P's attorney and the settling defendants' attorneys in an agreement containing such a provision.^{4/}

The inquirer argues that Rule 1-500(A) does not apply to an agreement containing the first provision for two reasons. First, the inquirer notes that the provision would prohibit the attorneys representing the settling defendants from representing other parties in the same litigation, not similar litigation as contemplated by the Discussion accompanying Rule 1-500. We find no merit in this argument. The language of the Rule itself does not differentiate between the two situations. Furthermore, we find no principled basis for supporting this argument, since the provision would still restrict a client's ability to retain the counsel of his or her choice, the very problem the Rule was designed to prevent. We believe that the Discussion's reference to "similar" litigation was simply an attempt to apply the Rule to the most commonly presented scenario.

Second, the inquirer contends that, in this situation, no client would be restricted in its selection of counsel because all of the parties to the litigation are already represented. In support of this contention, the inquirer cites Hoffman v. United Telecommunications, Inc., 687 F. Supp. 1512 (D.Kan. 1988). In Hoffman, a plaintiff sued her employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging discrimination against herself and a class of females. The Equal Employment Opportunity Commission (the "EEOC") assumed the responsibility of litigating the class claims, leaving the plaintiff to litigate her own claims. When the plaintiff subsequently settled with the defendant, the settlement agreement prohibited the plaintiff from cooperating with the EEOC and also prevented her counsel from participating in the EEOC class action. The EEOC objected, claiming that the agreement should be held void as against public policy.

With regard to the prohibition imposed on plaintiff's counsel, the court noted:

In agreeing not to participate in this litigation, plaintiff's counsel is in no way restricting any right to practice law. All potential plaintiffs in this lawsuit are

represented by the EEOC, by the EEOC's own choice. There will be no opportunity for plaintiff's counsel to advocate the interests of any other person . . .

Hoffman, 687 F. Supp. at 1514.

This Committee is, of course, not bound by rulings of out-of-state courts. The Committee also notes, however, that the Hoffman court stated that:

Today's decision rests solely on the peculiar facts of this lawsuit, and even a slightly different factual situation could greatly affect the court's disposition on the merits.

Id. at 1515. The hypothetical situation presented by the inquiry is quite different from the facts in Hoffman. In the facts presented to the Committee, the defendants' attorneys divided the responsibilities for pre-trial and trial preparation among themselves. The remaining defendants might therefore wish to employ as co-counsel the attorneys of the settling defendants. Such employment would be prohibited by the provision in question.

The hypothetical facts contained in the inquiry present the unusual situation of a plaintiff seeking to prohibit the settling defendants' attorneys from representing other defendants. It is worth noting that neither Rule 1-500(A) nor the accompanying Discussion makes any distinction between a settlement agreement designed to preclude a plaintiff's attorney from representing other clients against the defendant and a settlement agreement designed to preclude a defendant's attorney from representing other clients against the plaintiff. It is the Committee's opinion that the Rule applies equally to both situations.

2. It Would Be Unethical For Plaintiff's Or Settling Defendants' Counsel To Participate In The Making Of A Settlement Agreement In Which The Settling Defendants Are Obligated To Assert A Conflict Of Interest Claim Against Their Attorneys If Their Attorneys Attempt To Represent A Non-Settling Defendant In The Same Case.

In the factual situation presented to the Committee, P's attorney has also suggested that, as a condition of settlement, the settling defendants must agree to assert and pursue a conflict of interest claim against any of their attorneys who attempt to render services to any of the

non-settling defendants in the pending action. The Committee has been unable to discover any relevant ethics opinion or case reviewing such a provision, nor does Rule 1-500 or the accompanying Discussion refer to an agreement which indirectly restricts an attorney's right to practice law.

In our Opinion No. 445, however, this Committee considered whether it is ethically permissible for defense counsel to condition a settlement proposal relating to civil rights litigation on plaintiff's counsel's agreement to waive court-awarded fees. The Committee based its opinion that such conduct is unethical in part on former Rule 2-109. The Committee noted that:

Should defendants be permitted to condition settlement upon a waiver of fees, the effect would be to eliminate the practice of those lawyers who are currently willing to take such cases. The effect could be as dramatic and as complete as if the defendant had extracted an agreement explicitly restricting their future practice of law.

Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion No. 445 (September 28, 1987). Thus, this Committee has in the past interpreted the prohibition against restrictive covenants among attorneys to apply to provisions which would indirectly restrict the right of an attorney to practice law.

The Committee is of the opinion that the participation of attorneys in an agreement containing the second provision proposed by the inquirer violates Rule 1-500. The agreement would effectively (albeit indirectly) prevent the settling defendants' attorneys from representing potential clients, and P's attorney has participated in the making of the agreement. The hypothetical agreement therefore satisfies the two elements set forth in Rule 1-500(A) necessary to fall within the Rule's purview. Similarly, the hypothetical agreement "limits the autonomy of attorneys and the ability of clients to freely choose an attorney," thereby meeting the criteria set forth in State Bar Opinion No. 1988-104.

The inquirer contends that this second provision merely ensures that the attorneys for the settling defendants do not represent the non-settling defendants in violation of the conflict-of-interest rules contained in Rule 3-310 of the California Rules of Professional Conduct.^{5/} The inquirer also points to the specific facts set forth in the inquiry, which indicate that a conflict of interest between the settling and non-settling defendants could exist.

It is certainly true that the settling defendants could, by withholding their consent, prevent their attorneys from representing the non-settling defendants (or any other clients) if such representation met the criteria set forth in Rule 3-310. The effect of the provision proposed by the inquirer, however, would be to require the settling defendants to claim that a conflict of interest existed regardless of whether the representation of the non-settling defendants met those criteria. The provision would also preclude the settling defendants from giving their informed written consent to the representation by their former attorneys of the non-settling defendants in the event an actual conflict of interest did arise. Thus, the provision proposed by the inquirer is not an attempt to ensure that the settling defendants' attorneys comply with their ethical obligations, but rather an attempt to ensure that such attorneys do not represent the non-settling defendants. The participation of P's attorney and the settling defendants' attorneys in an agreement containing this provision therefore violates Rule 1-500(A).^{6/}

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts as are set forth in the questions submitted.

1/ This opinion does not address whether an attorney may participate in a settlement agreement containing confidentiality provisions precluding the attorney from disclosing information obtained during the settlement negotiations.

2/ Rule 1-500(B) sets forth two exceptions to Rule 1-500(A). Neither exception is relevant to the hypothetical facts presented by the inquirer.

3/ Rule 2-109(A) provided that "A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with a settlement of a law suit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law."

4/ In our Opinion No. 243, which was issued in 1957, this Committee opined that it was ethical for an attorney representing Company A to agree not to represent Company B in upcoming negotiations with the Labor Union in return for the Labor Union's agreement not to picket Company A. Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion No. 243 (October 17, 1957). Opinion No. 243 was issued before Rule 1-500 or its predecessor, Rule 2-109, were adopted in California. Opinion No. 243 therefore has no application to conduct governed by Rule 1-500.

5/ Rule 3-310 provides in relevant part:

(A) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.

(B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent . . .

(D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.

6/ The inquirer cites an opinion of the Dallas Bar Association to the effect that the Texas rule which is analogous to Rule 1-500(A) "does not prohibit a lawyer from agreeing as part of the settlement not to accept future employment where accepting such employment itself would be unethical." Dallas Bar Association, Opinion No. 1982-5 (Nov. 22, 1982). Dallas Bar Association opinions are not binding in California, and the Committee also notes that the rule interpreted in the Dallas opinion differs significantly from Rule 1-500. Furthermore, the Dallas opinion would not apply to the agreement in question here, since employment of the attorneys for the settling defendants by the non-settling defendants would not be unethical if no conflict of interest existed or if the settling defendants gave their informed written consent to such employment.