



Don't Tie Your Settlement Hands

Late last year, an article in *The Wall Street Journal*¹ told us about a proposed settlement in the painkiller Vioxx litigation reached between Merck & Co. (the defendant) and the lawyers representing the plaintiffs. In accordance with a settlement term, the plaintiffs' lawyers were required to recommend the proposed settlement to their clients. If any clients elected not to take the deal, then his or her lawyer had to take steps to withdraw from representation of the non-settling clients. In other words, "Take this settlement or find yourself another lawyer."

This was not a term initially agreed upon between the lawyer and the client. It was injected by an outside party into an existing lawyer-client relationship; it was more of a deal between the lawyers and Merck rather than between Merck and the injured parties.

Changing lawyers in a case that has been ongoing for years is not easy, with masses of documents and large amounts of time spent climbing "the learning curve" by the plaintiffs' lawyers, all of whom are part of this settlement deal. And these restrictive and conditional settlement terms put those lawyers in a conflict between finally getting paid their enormous out-of-pocket expenses and diligently and loyally representing their clients.² It threatens to prevent them from giving the independent professional judgment and objective advice required by our ethical rules.³


But there is a bigger problem. Rule 5.6(b) of the American Bar Association's Model Rules of Professional Conduct, adopted in nearly all jurisdictions, including Arizona,⁴ states that a lawyer "shall not participate in offering or making ... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." Comment 2 to the rule states that it prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client. This would appear to describe the Vioxx settlement.

The *WSJ* article stated that the proposed settlement agreement had been vetted by ethics professors and permitted withdrawals only to the extent allowed by applicable ethical rules. One professor opined that in mass tort litigation, the usual "notions of individualized justice are totally unrealistic." This is because the "real" client in large class action cases is the "aggregate client," not the individual client, and the ethics rules should be relaxed accordingly (though the Vioxx case is not a class action). Another pointed to cases that allegedly hold that clients are entitled to counsel, but not necessarily to a particular counsel. The article does not mention the authorities that held otherwise, including an ABA ethics opinion on the precise point, and it is advisable for you to review them before entering into or offering a settlement agreement restricting your right to represent anybody.⁵

Is there a chance that a court might enforce such an agreement under accepted notions of contract law? A review of the cases discloses that at least in New York, Florida and Texas, the courts view the contracts as enforceable but that they still subject the lawyers involved to discipline by state bar authorities.⁶ Two suits have been filed by plaintiffs' lawyers objecting to the terms of the Vioxx settlement; both have been unsuccessful.⁷ Every other jurisdiction, as well as the *Restatement* and other respected authorities, has concluded that the agreements are or

should be void and unenforceable *and* subject the lawyers involved to discipline.⁸

With these as the only alternatives available to you, it would probably be wise to think twice about agreeing to or offering any settlement that could arguably restrict your ability (or some other lawyer's ability) to represent a present, potential or future client. Though a lawyer must always abide by a client's decision regarding settlement,⁹ there is authority to the effect that that injunction is limited by the provisions of ER 5.6(b), and that one client's decision to settle on questionably unethical terms should not affect the rights of another client to have counsel of her choice and the right of that lawyer to provide it.¹⁰

The careful lawyer will not look for narrow exceptions to settle a case. The ethical problems and later civil liability are not worth it. 

endnotes

1. Marketplace Section, Nov. 16, 2007, at 1.
2. See ER 1.7(a)(2), Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.Ct. (lawyer shall not represent a client if there is a significant risk that representation will be limited by personal interest of the lawyer).
3. ER 2.1.
4. ER 5.6.
5. ABA Formal Ethics Op. 93-371 (1993); Alabama Ethics Op. 92-01 (1992); L.A. Ethics Op. 468 (1992).
6. *Feldman v. Minars*, 658 N.Y.S. 2d 614 (App. Div. 1997); *Shebay v. Davis*, 717 S.W.2d 678 (Tex. Civ. App. 1986); *Lee v. Florida Dep't of Insurance*, 586 So. 2d 1185 (Fla. Dist. Ct. App. 1991).
7. See *Stratton Faxon v. Merck & Co.*, 2007 WL 4554190 (D. Conn. 2007). Another suit in the Eastern District of Louisiana was also apparently unsuccessful after the settlement agreement was amended to recite simply that plaintiffs' counsel had used "independent judgment" in deciding whether to recommend settlement to their clients. See Adam Liptek, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, Sidebar, N.Y. TIMES, Jan. 22, 2008.
8. Annotated Model Rules of Professional Conduct, p. 496 (ABA 5th ed. 2005) (collecting cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13(2) (2000); see also Dana & Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217 (2003). Arizona would probably hold such agreements unenforceable. *Valley Med. Specialists v. Faber*, 982 P.2d 1277 (Ariz. 1999).
9. See ER 1.2(d).
10. ABA Formal Ethics Op. 93-371, *supra* note 5.

Ethics
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