

Are Restrictive Practice Agreements Fair Game After *Feldman*?

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Negotiating the settlement of an on-going or threatened litigation is a complex task, demanding the thoughtful exercise of written, oral, and interpersonal skills. The parties' lawyers must strive to get the best possible deal for their clients, even if it means sacrificing their own interests to some degree. A 1997 decision of the Appellate Division, First Department, has further complicated settlement negotiations. In *Feldman v. Minars*,¹ the Court examined DR 2-108(B) in the context of an appeal from an order denying a motion for disqualification. DR 2-108(B) reads as follows:

In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.²

Prior to *Feldman*, the consensus among most authorities was that the prohibition applied to both sides. The plaintiffs' lawyers could not consent to a restrictive practice agreement. Nor could the defendants' lawyers offer one.³

Clarity of DR 2-108(B) Discourages Questions

Until *Feldman*, DR 2-108(B) had generally escaped the attention of the New York courts and ethics committees. The most likely explanation for their inattention was the clarity and directness of the language employed in DR 2-108(B) prohibiting restrictive practice agreements. Rule 56(b) of the Model Rules of Professional Conduct contains nearly identical language. However, and both the ABA and state-bar ethics committees have vigorously interpreted the rule.⁴ Their opinions leave very little "wiggle room" for avoiding the prohibition against restrictive practice agreements.

DR 2-108(B) and Rule 5.6(b) reflect three inter-related public policy determinations: (1) that the allowance of such a restriction would deny the public access to highly qualified lawyers whose experience and learning in a given area might make them the ideal lawyers to assume a particular representation; (2) that its inclusion generally represents an attempt to "buy off" the plaintiff's counsel and has no rational relationship to the plaintiff's claims or damages; and (3) that the offering of a settlement including such a restrictive agreement creates a conflict between the interest of present and potential future clients.⁵

Feldman Facts Make For Bad Law

The *Feldman* case may be a prime example of bad facts making bad law. In 1990, a group of investors settled an action in Illinois alleging that the defendants had breached various federal and state laws. As part of the settlement, the law firm representing the plaintiffs agreed not to "assist or cooperate" in any future related actions involving the settling defendants. It also agreed not to "encourage any other parties or attorneys to commence such actions or proceedings." The law firm subsequently solicited new clients in anticipation of filing such an action and ultimately commenced one in New York.

The lower court denied the defendants' motion to disqualify the law firm on the ground that the restrictive practice agreement violated DR 2-108 and was therefore unenforceable.⁶ The Appellate Division, First Department, reversed, holding that the law firm's conduct constituted solicitation in violation of its agreement. Obviously dismayed by the firm's disregard of what it pointedly characterized as "a freely entered into agreement", the Court relied upon the "clean hands" doctrine to "preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them."⁷

Does the *Feldman* decision mean that lawyers are now free to bargain for, and consent to, restrictive practice agreements as part of a settlement in New York? Acting on an affirmative response to that question entails serious risk.⁸ To begin with, the Court's decision is based on its interpretation of the contractual commitment of the law firm not to solicit clients. It specifically noted "[e]ven if it is against the public policy of this State, the 'violation' can be addressed by the appropriate disciplinary authorities." Until the disciplinary committees and the courts speak clearly to this issue, a lawyer acts at his or her peril.

Gillers Questions Rule

Moreover, any attempt to read *Feldman* as suggesting that the ethical proscription in DR 2-108(B) is valid rests on shaky grounds. The court's opinion relies principally on an article in the AGA Journal by Professor Stephen Gillers in which he criticizes both Rule 5.6(b) and an opinion of the ABA ethics committee interpreting it.¹⁰ In writing that article, however Professor Gillers chose his words quite carefully. He did not say that the opinion was wrong. He said the Rule was wrong. The Court's decision ducks the tough public policy issues, especially the "buy out" objection. Professor Gillers discounts the objection, asserting "the market will produce a replacement."¹¹ But he offers no supporting evidence. The Court's decision also ignores the vast weight of authority across the country that finds similar restrictive practice agreements unethical.¹²

The reaction of the bar to *Feldman* is surprising in some respects. Plaintiffs' lawyers, of course, are disturbed.

They argue in favor of the public policies discussed earlier and view the defendants' "buy-out" demands as creating an irreconcilable conflict between their own interests and those of their clients. The reaction of the defense bar is more nuanced. Some of its members are quietly expressing discomfort with the decision, expressing unhappiness about the pressure they are now receiving from their clients to demand restrictive-practice concessions from the opposing parties' lawyers. They prefer the pre-*Feldman* understanding of DR 2-108(B) in which the lawyers for both sides regarded such restrictions as unethical.¹³ Other members are concerned that failure to demand a restrictive practice agreement may open them up to a malpractice charge at a later date.

Other Departments May Not Follow

The *Feldman* decision adds a new element of uncertainty to settlement negotiations. The Second, Third, and Fourth Departments may not adopt the contract-law approach of the First Department. Lawyers who practice outside the First Department, therefore, should hesitate to demand or accept a restrictive practice agreement since such an agreement remains suspect both as a matter of contract law and professional

responsibility. Lawyers who practice within the First Department must be mindful that Feldman did not resolve the question of the ethical propriety of offering or accepting a restrictive practice agreement. In sum, restrictive practice agreements are not yet fair game.

¹ *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept 1997).

² 22 NYCRR 1200.13(b).

³ JoAnne Pitulla, *Co-Opting the Competition. Beware of Unethical Restrictions in Settlement Agreements*, A.B.A.J., Aug. 1992, at 101.

⁴ American Bar Association, Model Rules of Professional Conduct R.5.6 (1983). See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993). For a more complete list of the ABA and state authorities, see American Bar Association, Annotated Model Rules of Professional Conduct 456-57 (3d ed. 1996) and Charles W. Wolfram, *Modern Legal Ethics* 885 (1986).

⁵ See Formal Ops. 95-394 and 93-31. .*cnpra* ~.ote

⁶ *Minars v. Feldman*, N.Y.U., Aug. 30, 1995, at 22. The court's opinion contains an exhaustive list of cases and ethics opinions supporting its holding that the agreement was unenforceable.

⁷ 230 A.D.2d at 360; 658 N.Y.S.2d at 617. New York courts have adopted a similar rationale in enforcing fee-sharing agreements between attorneys even though the agreements arguably violated DR 2-107. See e.g., *Carter v. Katz, Shandell, Katz & Erasmous*, 120 Misc.2d 1009, 1018, 465 N.Y.S.2d 991, 997 (Sup.Ct. 1983).

⁸ Both the National Law Journal and the New York Times recently reported that an administrative law judge for the Commodity Futures Trading Commission criticized a settlement containing a restrictive practice agreement as unethical. See Cynthia Cotts, *May a Lawyer Deal Away Right to Practice? Pmmlse Never to Take on Suits Against N-MEX Produces Conflicting Views*, NAT'L U., Mar. 30, 1998, at A1; Melody Peterson, *Settlement By Exchange Is Questioned. Judge Balks at Deal Made with Lawyer*, N.Y. TIMES, Mar. 12, 1998, at D4.

⁹ 230 A.D.2d at 360; 658 N.Y.S.2d at 617. Other state courts have taken a similar view. See Annotated Model Rules, *supra* note 4 at 458.

¹⁰ Stephen Gillers, *A Rule Without A Reason: Let the Market, Not the Bar Regulate Settlements that Restrict Practice*, A.B.A.J., Oct. 1993, at 118.

¹¹ *Id.* at 118.

¹² See Annotated Model Rules for Professional Conduct, *supra* note 4; Wolfram, *supra* note 4.

¹³ Defendants' lawyers experience this same discomfort if their clients demand a fee-waiver from a plaintiff's attorney in a civil rights action. See e.g., *Kevin McMunigal, Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 832, 865-68 (1992); see also *Evans v. Jeff D.*, 475 U.S. 717 (1986).