

Confidential Settlements and Restrictive Settlement Agreements

BY ROY SIMON

Litigators enter into confidential settlement agreements every day. But if the First Department's recent decision in *Bassman v. Fleet Bank* is correct, defendants have suddenly gotten a windfall, because many plaintiffs' lawyers are going to be disqualified from representing similarly situated plaintiffs against all similar defendants in the future. I think *Bassman* is wrong. This article explains why.

A few years ago, an attorney and businessman named David Schick allegedly used his attorney escrow account to run a massive fraud scheme. An investor who lost money in the scheme contacted the law firm of Feinzeig & Jaskiel, which soon filed a suit on his behalf. The suit, *Diller v. Schick*, named Sterling National Bank as a co-defendant. When the Diller suit settled, the settlement agreement contained a confidentiality provision that provided as follows:

Each party and their counsel agree to keep the amount of this Settlement Agreement and any prior specific dollar amounts offered or demanded confidential and... such amounts may not be divulged to any party. Each Party represents that neither they nor their counsel will disclose the amount of this Settlement Agreement.

After the Diller case settled, Feinzeig & Jaskiel took on other actions arising out of Schick's fraud scheme. In one action, a man named Bassman and others sued Republic National Bank, Sterling National Bank, and Fleet Bank. Citing the confidentiality provision in the Diller settlement, Sterling moved to disqualify Feinzeig & Jaskiel. Feinzeig & Jaskiel opposed the motion on two main grounds.

First, the confidentiality provision did not prohibit Feinzeig & Jaskiel from using settlement information, much less from representing other similarly situated plaintiffs - it merely prohibited the disclosure of settlement amounts or offers.

Second, if the confidentiality provision were interpreted to prohibit Feinzeig & Jaskiel from representing similarly situated plaintiffs, it would violate DR 2-108(B), which provides: "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." The New York City Bar ethics committee, in N.Y. City Bar Op. 1999-03 (1999), explained the meaning of DR 2-108(B) as follows: "We believe that this rule is unambiguous in its application to agreements not to represent present or future clients in litigation against a settling defendant."

Lower Court Rejects Arguments

On July 25, 2000, in *Bassman v. Fleet Bank*, Judge Charles Ramos of the Supreme Court of New York County rejected both arguments and granted the motion to disqualify Feinzeig & Jaskiel. Judge Ramos

brushed off the argument that the agreement did not prohibit representation of similarly situated plaintiffs, saying:

[I]t is clear and unambiguous that the parties as well as the attorneys agreed to keep confidential the terms of the settlement. Feinzeig & Jaskiel's contention that the confidentiality provision only prohibits disclosure of the settlement amounts and not the use of settlement information is based upon an overly narrow interpretation of the agreement. Obviously, any contract must be interpreted in context. By entering the agreement, counsel agreed to keep confidential, meaning not reveal or give others access to, the terms of the settlement. It is implausible that counsel could use, yet somehow not reveal or give plaintiffs in this lawsuit access to, the Diller settlement information, without being in breach of the terms of the confidentiality provision. Since the possibility of settlement is a part of any litigation, counsel's obligations under the Diller agreement conflicts with its ability to freely contemplate settlement strategies in the instant litigation. Plaintiffs' ability to retain competent legal representation of their choice is not significantly impaired since, except for the experience and confidential information Feinzeig & Jaskiel obtained in the Diller action, counsel does not possess, and this lawsuit does not require, any specialized legal expertise.

Judge Ramos then gave equally short shrift to the public policy argument based on DR 2-108(B), saying:

Contrary to counsel's allegation, enforcement of the provision is permissible and does not violate DR 2 -108(B)...Here, the express language of the settlement does not restrict Feinzeig & Jaskiel from practicing law. It merely prohibits disclosure or use of the settlement information. Even if the Diller agreement does restrict counsel from practicing law, it is not against public policy in violation of DR 2-108(B) (*See, Feldman v. Minars*, 230 A.D.2d 356 [1st Dept. 1997] where the Appellate Division upheld a settlement agreement which barred an attorney from assisting or cooperating with other parties or attorneys in any similar action against the settling defendants).

When I read the opinion, I was stunned. First, I disagreed with the court's interpretation of the confidentiality provision. If Sterling National Bank had intended to prohibit Feinzeig & Jaskiel from merely using the information, or from representing similarly situated plaintiffs in the future, it could have said so — but it didn't. Second, because I serve on the New York State Bar Association's Committee on Professional Ethics, I knew that the Committee was about to release a new ethics opinion broadly interpreting DR 2-108(B) to prohibit not only express restrictions on a lawyer's right to sue a settling defendant in the future, but also settlement terms whose "practical effect is to restrict the lawyer from undertaking future representations ..." N.Y. State Bar Op. 730 (2000). (The opinion was released on July 27, 2000, two days after Judge Ramos' decision.)

The decision in *Bassman* turned the reasoning of the ethics opinions on its head. The court read a fairly narrow settlement provision as if it barred not only all future actions by similarly situated plaintiffs against the settling defendant but also against any other similar defendant, such as Fleet Bank — and then the court said that such a provision did not violate DR 2-108(B) or public policy. *The New York Law Journal* picked up the case in an article by Tamara Loomis entitled, "Ethical Dilemma? Confidentiality Agreements Create Predicament," N.Y.L.J., at 5, col. 3 (Oct. 12, 2000).

First Department Affirms

Feinzeig & Jaskiel appealed the disqualification order, citing N.Y. State Bar Op. 730 and a similar ABA ethics opinion, ABA Formal Op. 00-417 (2000), as expressions of public policy, but the appeal failed. On January 9, 2001, in a one-page opinion that did not even cite DR 2-108(B), the First Department said:

The motion court correctly held that the confidentiality provisions of the settlement agreement in another action in which F&J represented the plaintiffs prohibited F&J from accepting future representations of similarly situated plaintiffs. Such a prohibition is necessarily implicated in the agreement's prohibition against disclosure of the settlement amount and any prior specific dollar amounts offered or demanded. As the motion court aptly put it, since it is not apparent how F&J "could use, yet somehow not reveal or give plaintiffs in this lawsuit access to," such information, its confidentiality obligation "conflicts with its ability to freely contemplate settlement strategies" in this action.

In February, Feinzeig & Jaskiel petitioned either for reargument in the First Department or for leave to appeal to the Court of Appeals. I felt so strongly about the issue that I offered, pro bono, to write an affidavit in support of Feinzeig & Jaskiel's petition. In my view, if the rulings of the Supreme Court and the First Department stand, they may have a major adverse impact on lawyers in the First Department and across the State of New York. An issue of this magnitude should be decided by the Court of Appeals.

I would probably agree with Judge Ramos's ruling on the motion to disqualify if the settlement provision at issue had expressly prohibited Feinzeig & Jaskiel from "using" any information relating to the settlement amount or the negotiations leading up to it. I would probably even agree with the Supreme Court's ruling if the agreement had expressly prohibited Feinzeig & Jaskiel from bringing any similar action against the settling defendants. An explicit prohibition on later representation would plainly violate DR 2-108(B), but it would probably be enforceable in the First Department under *Feldman v. Minars*, 230 A.D.2d 356 (1st Dept. 1997).

In fact, however, the agreement at issue did not expressly prohibit Feinzeig & Jaskiel from bringing similar actions against the settling defendants in the future. It was an ordinary, garden variety confidentiality provision. And that creates the ethical dilemma. If lawyers who sign garden variety confidentiality agreements are prohibited from representing similarly situated clients against any similar defendants in the future, many plaintiffs will find their choice of counsel to be severely restricted. That would seriously undermine the policy behind DR 2-108(B), which is to ensure that the public has widest possible choice of counsel. In other words, the courts in *Bassman v. Fleet Bank* have construed the settlement agreement in a way that violates DR 2-108(B) even though the express language of the agreement does not violate the rule. The effect is that agreement to a routine confidentiality provision is equivalent to an agreement not to represent similarly situated plaintiffs against similar defendants exactly what DR 2-108(B) aims to forbid. This reasoning seems wrong to me. One may argue that courts should enforce freely made agreements among lawyers even if they are unethical, but courts should not go out of their way to stretch agreements to the point where they violate a Disciplinary Rule.

Ruling Harmful To Profession

Even if the First Department's interpretation is correct, I believe it is harmful to the legal profession to have one interpretation of DR 2-108(B) in the First Department and a different interpretation in the rest of the state. The *Bassman* case makes the problem especially serious by holding, in essence, that all

settlement agreements containing confidentiality provisions automatically prohibit lawyers from representing similarly situated plaintiffs against the settling defendants — or against similar defendants — in the future. The First Department may prevail, but its decision marks a radical departure from the way most lawyers, courts, and ethics committees have interpreted DR 2-108(B) for a generation.

The *Bassman* decision will force lawyers and disciplinary authorities to make a stark choice. Either routine confidentiality provisions in settlement agreements violate DR 2-108(B) by restricting a lawyer's right to practice, or else DR 2-108(B) has been written out of the Code and lawyers may safely ignore it. Neither choice seems right. On the one hand, routine confidentiality provisions serve legitimate purposes, and lawyers should be allowed to use them. On the other hand, DR 2-108(B) remains in the New York Code of Professional Responsibility and should be taken seriously by lawyers and courts. (Even though the Code was extensively amended in 1999, not a word of DR 2-108(B) was changed.)

If DR 2-108(B) is outdated and no longer belongs in the Code, the courts should follow the usual process for amending the Code. Appropriate bar committees should review DR 2-108(B) and issue public reports to the profession; the New York State Bar Association House of Delegates, which represents all segments of the bar in New York, should debate any recommended changes and forward a formal proposal to the four Appellate Divisions; and the four Appellate Divisions should discuss the proposal and act on it in a unified way once they reach a consensus.

In short, *Bassman v. Fleet Bank* is likely to have a far-reaching impact on how lawyers settle cases and whether plaintiffs' lawyers remain available to future clients. From my perspective as a teacher and scholar in the field of professional responsibility, the Court of Appeals should be given the opportunity to review the case. Review by the Court of Appeals will at least insure a uniform interpretation of the Code of Professional Responsibility throughout the State of New York on an important and sensitive issue.

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