

# N.Y. City Bar Nixes Restrictive Agreements

BY ROY SIMON

Two years ago, in a decision called *Feldman v. Minars*, 230 A.D.2d at 359, 658 N.Y.S.2d at 616 (1st Dep't 1997), the First Department surprised a lot of people by enforcing a restrictive settlement agreement. The relevant provision of the settlement agreement provided that neither the settling plaintiffs' lawyer, nor his law firm, agents, employees, or representatives:

will assist or cooperate with any other parties or attorneys in any... action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants... nor shall they encourage any other parties or attorneys to commence such action or proceeding.

In violation of the settlement agreement, the plaintiffs' lawyer nevertheless began representing new plaintiffs in similar litigation against the settling defendants. The settling defendants, citing the settlement agreement, promptly moved to disqualify the plaintiffs' firm. The trial court, per Justice Herman Cahn, agreed that the plaintiffs' firm was clearly violating the settlement agreement, but refused to enforce it on grounds that it violated the public policy expressed in DR 2-108(B), which provides 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."

## Second Department Reverses

The First Department reversed, on two grounds. First, the court thought it would be "unseemly" to permit the offending attorneys (for the settling plaintiffs) to use "their own ethical violations as a basis for avoiding obligations undertaken by them." Second, citing a 1993 ABA Journal article entitled *A Rule Without A Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, in which Professor Stephen Gillers described DR 2-108(B) and its equivalent in the ABA Model Rules as "anachronisms," the First Department said that DR 2-108(B) "is an anachronism, illogical and bad policy," and therefore "an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York." However, hedging its bets, the court added that if such an agreement was against public policy, the violation "can be addressed by the appropriate disciplinary authorities."

Taking up this invitation, the New York City Bar's Committee on Professional and Judicial Ethics said: "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. We therefore join numerous other bar committees in concluding that such agreements are improper." The Committee took no position on whether such an agreement was enforceable, which was "a matter of law, which is beyond the purview of this Committee." Nor did the Committee take a position on whether DR 2-108(B) ought to be "revised or eliminated" — but "the rule's clear command must be followed so long as it remains part of the Code."

## Citing History Of Provision

In reaching its conclusion, the Committee noted an interesting bit of history. As originally adopted by the ABA House of Delegates in 1969, DR 2-108(B) of the Model Code of Professional Responsibility provided:

In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that broadly restricts his right to practice law, *but he may enter into an agreement not to accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.* [Emphasis added.]

The next year, however, the ABA voted to delete the italicized exception. The Chair of the ABA Committee on Ethics and Professional Responsibility explained that the italicized provisions were deleted because “a covenant of that type would, in effect, restrict., a lawyer’s ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients.”

New York eventually adopted the revised version of DR 2-108(B), without the exception for agreements not to accept future representations relating to the settled case, and that remains New York’s version of DR 2-108(B) today. Thus, the New York City Bar Ethics Committee had no trouble concluding that “settlement agreements that restrict the right of a lawyer to represent other plaintiffs violate DR 2-108(B).” Lawyers who thought *Feldman v. Minars* had effectively repealed DR 2-108(B) should take note. Restrictive settlements made in the past might still be enforceable on “unclean hands” grounds, but restrictive settlements in the future, after the New York City Bar’s opinion, may very well attract the attention of the disciplinary authorities.

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