SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PAUL J. NAPOLI, Plaintiff, - against - MARC J. BERN, Defendant.	Index No. 159576/2014 MEMORANDUM AND ORDER

MARK C. ZAUDERER, REFEREE

This Memorandum and Order addresses important issues regarding the orderly transition of clients, raised by the parties and presented to me for resolution in my capacity as Referee. To provide context, I am setting forth some of the background that has occasioned the present dispute.

BACKGROUND

Beginning in the Fall of 2014, Paul J. Napoli and Marc J. Bern, the two principals of a highly successful plaintiff's personal injury and mass tort firm, engaged in acrimonious litigation against one another. The dispute spilled into the public press and created problems for them professionally and for their conglomerate of law firms (referred to here as Napoli Bern)[1]. In the aggregate, Napoli Bern was representing in excess of 20,000 clients. Under the umbrella of *Napoli v. Bern*, Index No. 159576/2014, the parties brought numerous motions before the Court[2], seeking rulings almost weekly on the many issues that arose as a consequence of their personal

[1] Two other lawyers, Hunter J. Shkolnik and Alan Ripka, were name partners in the firm, but not equity partners. Messrs. Napoli and Bern have remained the sole equity partners at all relevant times.

[2] The docket reflects that approximately 20 motions were filed as of August 17, 2015, when I was appointed Referee.

feud and the difficulties of administering a law firm under these circumstances. At one point, the trial judge appointed a Receiver to oversee the affairs of the Napoli Bern firm, but his appointment has been terminated.

In July 2015, with the parties unable to resolve their disputes and the litigation continuing, the trial judge suggested to the parties that they attempt to mediate their disputes under my supervision. The parties thereafter contacted me and engaged in a multi-day mediation process to attempt to resolve all issues.

The parties realized that the issues confronting them in the effort to unwind a firm of this size, with many clients and third parties having ongoing relationships with the firm, would be an enormous task that could not be accomplished quickly or easily. Represented by experienced and able counsel, the parties worked out the terms of a settlement agreement and a side letter agreement (collectively, the "Agreement") that is essentially a road map and operating manual for the issues that needed to be addressed, in what was envisioned to be a lengthy unwinding process. Central to that Agreement -- and incorporated in the Agreement -- were terms providing that for any issue as to which Messrs. Bern and Napoli disagreed, I would resolve the dispute. The Agreement, which was presented to the trial judge, expressly conditioned the settlement on the Court entering an order appointing me in the pending action as a Referee to hear and determine, "with all the powers of the Court."[3] The Court issued such an order on August 17, 2015. By its terms, the order incorporated by reference the parties' settlement agreement, which

[3] Under the CPLR, any appeals from orders of a Supreme Court referee to "hear and determine" are taken directly to the Appellate Division.

involved many unresolved issues, and which, as mentioned above, designated me as the person to determine the issue in each instance in the event of disagreement.[4]

From late August to the present, I have held dozens of meetings, either in person or by telephone, with the parties. Many issues -- including internal disputes and disputes with third parties -- have been resolved by me, either through forging agreement of the parties or by making rulings resolving disagreements. One of the issues successfully resolved involved mediation and settlement of a claim of a judgment creditor in excess of $20 million. Messrs. Napoli and Bern, on the one hand, and the creditor on the other, have appointed me by their separate agreement to be the decider of any issues that arise in connection with finalizing a long-form settlement agreement of that dispute, as well as its enforcement.

The foregoing background is important because it brings into focus the virtue of a party-forged settlement, with the participation of a neutral, as an alternative to what otherwise could be virtually endless litigation in the court system. Concomitantly, it is incumbent upon a referee placed in this situation to faithfully carry out the plan of settlement and unwinding of the law firm consistent with the parties' intent. I am mindful of that responsibility.

THE PRESENT DISPUTE

As made clear to me at the beginning of my involvement, the two principals of Napoli Bern would be starting their own firms to act as co-counsel to Napoli Bern during the process of winding down, with one of the named non-equity partners, Mr. Alan Ripka, to form a firm with Mr. Bern, and the other non-equity partner, Mr. Hunter Shkolnik, to form a firm (or join a firm or otherwise affiliate) with Mr. Napoli. As events evolved, Mr. Bern and Mr. Ripka formed Bern Ripka, LLP, while Mr. Napoli formed Paul Napoli Law PLLC and soon thereafter joined a

[4] The Agreement also assigned to me many other oversight and administrative powers, including the powers of enforcement and contempt.

firm formed by Mr. Shkolnik and Mr. Napoli's wife, Marie Napoli, in a firm now known as Napoli Shkolnik PLLC.

A central feature of the party's Agreement is the construction of a method of sorting out approximately 24,000 clients, whose continuing representation in ongoing matters needed to be handled in a responsible way that would ensure a smooth transition of representation. Accordingly, as reflected in the Agreement, the parties provided that the legacy Napoli Bern firm would remain counsel of record for these clients, but that each of the new firms would offer their services as co-counsel to the clients. The allocation of any legal fees that resulted between the new firm handling the matter and the Napoli Bern firm matter would be made in a quantum meruit fashion, with the responsibility mine as referee to make the determination if the parties did not agree. The paramount concern in this arrangement was how to create a fair method to divide responsibility without interruption or creating uncertainty for the clients, while ensuring that clients would be advised of their unfettered right to select counsel of their choice.

As part of the mechanics envisioned by the Agreement, the parties, with the assistance of an accounting firm whose activities I oversaw, undertook tentatively to divide responsibility for the firm's cases in a fair and logical way, consistent with the clients' needs. First, the cases were separated into numerous categories and sub-categories. Second, within those categories and sub-categories, cases that were originated by either Mr. Shkolnik (and certain other attorneys) or Mr. Ripka were assigned to Mr. Napoli's law firm or the Bern Ripka firm, respectively. Third, the remaining cases were then numbered, and after a coin toss between the parties that I supervised, the winner selected either the odd or even numbered cases. The cases not selected by the winner of the coin toss were then automatically assigned to the other party. Finally, to the extent that one party received more cases than the other due to the automatic assignments, I had the

responsibility to transfer certain of the randomly assigned cases from the party with the higher total of cases to the party with the lower number of cases so that, in the end, each party would receive an equal number of cases.

The Agreement explicitly recognized that a client might exercise the right to continue with someone other than the assigned firm, and accordingly envisioned that at the end of the process, there could be an equitable "financial adjustment," in the discretion of the Referee, to take account of the unequal realization of legal fees that would have otherwise been effectively shared 50/50 by Messrs. Napoli and Bern in their old firm. While recognizing the rights of clients to go forward with whomever they chose, the parties also covenanted not to actively solicit clients tentatively assigned to another firm.

Following that process, the parties were to propose the form of a letter to be sent by the tentatively assigned firm to each client, advising of that firm's co-counsel relationship with the Napoli Bern firm, and offering to continue representing the client, together with the Napoli Bern firm. The letter also made clear that the client would be "free to select your counsel going forward." One of the responsibilities assigned to me was approving the form of letter to each group of clients in the event the parties could not agree on its content.

It was in the process of seeking agreement on the form of letter -- the substance of which was agreed to by Mr. Napoli and Mr. Bern -- that a complication was introduced by Mr. Shkolnik. Although he was a signatory to the Agreement made months before, and is working within the Napoli Shkolnik firm with Mr. Napoli as a partner, he now claims the right to *initiate* communications with (and thereby solicit) any of the Napoli Bern clients with whom he had had previous communications at the Napoli Bern firm, including clients tentatively assigned to the Bern Ripka firm.

The parties each advance a different position on the issue of solicitation of clients tentatively assigned to Mr. Napoli's or Mr. Bern's new firms.[5] No party has lodged an explicit ethics-based objection to the non-compete provision of the Agreement. In fact, Mr. Napoli and Mr. Bern have confirmed this on the record.[6] Mr. Napoli argues that breaches of the non-solicitation provision justifies some "financial adjustment" but objects to the imposition of any remedy that would amount to a "disgorgement" of the entire legal fee, leaving the firm that receives the client no fee at all.[7] Mr. Bern argues that a complete forfeiture of the fee (a "disgorgement") would be ethically permitted. Mr. Shkolnik initially limited his objection to the *remedy* for violations of the non-solicitation provision, arguing in his first letter[8] that "any order or directive that requires a lawyer to *disgorge or reduce fees* as a result of notifying his or her clients of the lawyers [sic] decision to exit a firm amounts to an unethical and illegal restriction on the practice of law..." (emphasis added). In his final reply letter of January 25, 2016, he advances a new argument: that despite the fact that he is a signatory to the Agreement, its commands only bind Mr. Napoli and Mr. Bern, and not him.[9]

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[5] All parties have been given an opportunity to brief this issue. We received submissions from Mr. Napoli and Mr. Shkolnik on January 18, 2016, an opposition from Mr. Bern on January 21, 2016, and a reply from Mr. Shkolnik on January 25, 2016. In addition, I heard argument on this issue on January 20, 2016.

[6] Transcript of Proceedings on January 15, 2016, 16:13-18, 17:18-18:3.

[7] The Agreement makes no reference to "disgorgement" of fees. It provides only for an "appropriate financial adjustment" if a client voluntarily seeks out a firm other than the suggested allocated firm or is solicited in violation of the Agreement. *See* Side Letter, ¶¶ 4(a)-(b). The issue characterized as "disgorgement" has been addressed because it was discussed between counsel and me at a meeting. I suggested that counsel brief the issue of remedies if they so desired.

[8] *See* January 18, 2016 letter from Mr. Shkolnik to the Referee.

[9] In his letter, Mr. Shkolnik seeks to renew his request that Mr. Ross, one of Mr. Bern's attorneys, be disqualified, and requests further that resolution of the instant dispute should await a decision on the request for disqualification. Because I believe this dispute needs prompt resolution and the new disqualification request needs to be made on a proper, updated, factual record, I will not defer ruling. However, Mr. Shkolnik is invited to renew his motion, with any supporting exhibits, not later than February 8, 2016; Mr. Ross may answer the motion by February 19, 2016; and Mr. Shkolnik may submit a reply, if any, by February 26, 2016.

Mr. Bern and Mr. Napoli have each accused the other of violating the parties' "no solicitation" clause.[10] However, I have not yet taken evidence or made any finding of a breach of the Agreement. Therefore, I have no reason at this juncture to opine or rule on what would be a permissible and appropriate remedy, if any, for a breach of the non-solicitation provision. The only issue needing resolution at the moment is Mr. Shkolnik's new contention, set forth in his reply, that the non-compete provisions of the Agreement do not bind *him*. Although, as noted above, no party specifically objects to the specific non-solicitation arrangement which he subscribed to in the Agreement, I am setting forth my views on the enforceability of the non-solicitation agreement the parties have made here, to which, for the reasons set forth below, I believe Mr. Shkolnik is bound.

ANALYSIS

Any arrangements by which lawyers arguably restrict their right to practice have to be scrutinized in light of the pertinent rules of professional conduct and case law. This authority lays down general principles that have to be applied in specific factual situations, and it has occasionally produced results that may seem inconsistent. The thread that runs through the jurisprudence in New York is that as professionals, lawyers should not make arrangements that unjustifiably fetter the client's choice of counsel by restrictions that make it difficult or impossible for the lawyer to handle the client's matter. The courts also recognize that an improper restriction can disadvantage not only the client, but the lawyer, whose right to practice his or her profession must be respected.

The most common type of situation -- but by no means the only one -- in which these principles are applied is when a lawyer leaves a firm that, pursuant to an agreement the lawyer

[10] Mr. Bern's complaint of Mr. Napoli's conduct extends to Mr. Shkolnik, who, like Mr. Napoli, is practicing with the Napoli Shkolnik firm.

has been a party to, seeks to impose a financial penalty on the lawyer for continuing with a client or even practicing law elsewhere. *See, e.g.*, *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 551 N.Y.S.2d 157 (1989). As the Court said in this 1989 seminal case:

> A law firm partnership agreement which conditions payment of earned but uncollected partnership revenues upon a withdrawing partner's obligation to refrain from the practice of law in competition with the former law firm restricts the practice of law in violation of [the ethical rules] and is unenforceable in these circumstances as against public policy.

Cohen, 75 N.Y.2d at 96, 551 N.Y.S.2d at 157. In at least one other case, the court had proscribed an arrangement which is at least superficially similar to the one at hand. *See Matter of Silverberg (Schwartz)*, 75 A.D.2d 817, 427 N.Y.S.2d 480 (2d Dep't 1980). However, I think it has little applicability here.[11]

Moreover, as acknowledged by the New York Court of Appeals in slightly different contexts, other values to be protected include "attorney mobility," which favors both client and lawyer (*In re Thelen LLP*, 24 N.Y.3d 16, 32, 995 N.Y.S.2d 534, 543 (2014)), and "a law firm's legitimate interest in its own survival and economic well-being" (*Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 381, 604 N.Y.S.2d 900, 904 (1993) (Kaye, C.J.)).

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[11] In *Silverberg*, the Second Department deemed unenforceable a provision in the parties' partnership agreement that provided that, upon termination of the partnership, (i) the firm's clients would be represented by the partner who originated the matter; (ii) neither party would solicit the clients of the other for a period of eighteen months following the termination of the firm; and (iii) in the event a client represented by one party subsequently switched to the other party during that eighteen month period, the party benefiting from the switch would pay to the other eighty percent of the gross fees received. 75 A.D.2d 818-19, 427 N.Y.S.2d at 481-82. These terms are distinguishable from the arrangement in this case in at least one material respect: while the parties in *Silverberg* agreed to a rigid arrangement whereby one party would pay eighty percent of fees to the other without regard to the circumstances, here, the parties agreed that the Referee would determine whether an "appropriate financial adjustment" was warranted where a client switches from one party to the other, based on the facts of the particular situation that is presented to the Referee. Moreover, the challenged provision in *Silverberg* was contained in the parties' partnership agreement -- not in a settlement agreement, as is the case here. *See* the discussion, *infra*, of *Denburg*.

The Court of Appeals also has made clear that "unlike outright prohibitions on the practice of law, agreements involving financial disincentives are not per se illegal but depend on the particular terms and circumstances." *Denburg*, 82 N.Y.2d at 385, 604 N.Y.S.2d at 907; *see also Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 156-57, 630 N.Y.S.2d 274, 280 (1995) (finding the "financial disincentive" provision enforceable under the circumstances).

One circumstance in particular where a financial disincentive-to-solicit provision may be enforceable is where the parties have included it as part of a settlement agreement. Recognizing that "strong policy considerations favor the enforcement of settlement agreements," the Court of Appeals in *Denburg* made clear that certain provisions in a partnership agreement that might otherwise be unenforceable, such as a "forfeiture-for-competition" provision, may be perfectly justified in a settlement agreement resolving partnership disputes. 82 N.Y.2d at 383, 385, 604 N.Y.S.2d at 905, 906-07. I view this distinction to be of particular relevance here.

I have concluded that the essential arrangement that the parties have made in their good faith effort to unwind their firm and promote the orderly transition and future handling of client matters, does not, *per se*, violate any rules, which might warrant a declaration that the agreed mechanics are illegal or unenforceable. Considering the entire arrangement as a whole, the parties' Agreement provides for continued representation of clients by lawyers familiar with the matter and competent to process them, while leaving clients free to choose whatever lawyer they wish -- as an alternative to likely chaos and confusion as well as delay in the processing of their cases, which would disadvantage clients, rather than advance their needs. Moreover, the parties' Agreement in no way restricts the right of a client to select counsel of choice; nor does it discourage it. In short, unlike with the judicially proscribed arrangements in circumstances that *disadvantaged* the attorney, this arrangement *advantaged* the Napoli Bern attorneys (and thereby

the firm's thousands of clients) by offering clients the continuity of their representation while affording them the opportunity to select counsel of their choice.

Having concluded that the parties' agreement is enforceable, I address Mr. Shkolnik's new argument that paragraphs 4(a) and 4(b) of the Side Letter are inapplicable to him. These paragraphs provide for agreement on the form of client letter to be sent by Messrs. Napoli and Bern, and prohibit either from soliciting clients tentatively allocated to the other. Mr. Shkolnik argues that these proscriptions do not bind him. I reject this contention for several reasons.

First, the entire structure of the Agreement is to set forth a mechanism for proposed allocation of clients to either Mr. Napoli or Mr. Bern, and it refers to the fact that Mr. Shkolnik would be joining Mr. Napoli, and Mr. Ripka would be joining Mr. Bern.[12] Therefore, Mr. Shkolnik, like Mr. Ripka, would benefit from the successful allocation of cases to the person he would be joining. Mr. Shkolnik's position is that his affixed signature does not bind him to any restraint; it merely signifies his approval of Mr. Bern and Mr. Napoli's agreement not to solicit each other's allocated clients -- an arrangement that directly benefits Mr. Shkolnik as a partner in Napoli Shkolnik. That hardly makes for a compelling argument that the Agreement should be read to give him all of its benefits but none of its burdens.

Second, paragraph 1(c) of the Side Letter provided additional benefits to Shkolnik, as it provides that "... all cases originated by Shkolnik, Avelino, Joe Napoli, and Maria Marinello will be allocated to Napoli;" (emphasis supplied). Accordingly, Mr. Shkolnik benefited not only by the general assignment of cases to Mr. Napoli, but secured additional protection that the cases he personally originated at Napoli Bern would be allocated to Mr. Napoli.

Third, although Mr. Shkolnik claims that he is not an "agent" of Paul Napoli, he is *de facto* acting for Mr. Napoli's benefit by seeking to solicit clients tentatively allocated to Mr.

[12] *See* Side Letter, ¶¶ 1(c), 1(b), 4(a), 4(b).

Bern, and to bring them to the firm in which Mr. Shkolnik is a partner (Napoli Shkolnik) and Mr. Napoli is a partner (or is otherwise affiliated with the firm).

For the reasons set forth above, I decline to declare the non-solicitation provision unenforceable. Accordingly, should any party to the Agreement violate its terms, I will consider, upon appropriate proof, such remedy as the Agreement specifically contemplates and the circumstances may dictate, consistent with applicable ethics rules and case law.[13]

IT IS SO ORDERED.

Dated: New York, New York
January 28, 2016

MARK C. ZAUDERER,
REFEREE

[13] The parties are now free to send letters to clients in the form agreed to (*see* Referee Exhibits 3 and 4 at the hearing on January 15, 2016), consistent with the terms of the Agreement and this Memorandum and Order.