PENNSYLVANIA BAR ASSOCIATION

LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY COMMITTEE

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FORMAL OPINION 2016-300

Settlement Agreements Containing Confidentiality Or Non-Disparagement Clauses And Their Effect On Lawyer Marketing For And Representing Future Clients

I. Issue

Are lawyers prohibited from asking for or agreeing to confidentiality and/or non-disparagement clauses in a settlement agreement?

II. Conclusion

Confidentiality agreements and non-disparagement agreements are not per se ethically prohibited, although in some instances, their use may be restricted or prohibited by substantive law. Moreover, confidentiality under Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct ("Pa. R.P.C.") is broad and requires lawyers to keep confidential information relating to the representation obtained from any source. This prohibition includes more than information considered "privileged." It is not the attorney's prerogative to release information related to representation publicly, even if it is otherwise available, and particularly not for his or her own purposes in advertising. Therefore, public release of specific identifying facts, whether or not in furtherance of personal marketing may violate the lawyer's duty of confidentiality irrespective of whether a formal confidentiality agreement or non-disparagement clause exists.

A lawyer is permitted under Pa.R.P.C. 7.4 to advertise that he or she has handled a certain type of matter, and a non-disparagement clause or confidentiality clause cannot preclude advertisement of areas of practice. Regardless of whether a confidentiality and/or non-disparagement clause exists, Pa.R.P.C. 7.1 precludes statements like "successfully litigated 30 cases involving Company and their law firm's unfair and unlawful practice of…" or "successfully defended Company in hundreds of frivolous employment matters," as statements such as these are not likely objectively verifiable. Non-disparagement clauses and/or confidentiality clauses limited to an attorney's public statements regarding the specifics of a case, not made in the context of legal advocacy for another client, are permitted. However, provisions which either explicitly interfere with or are intended to interfere with the handling of future clients' cases are prohibited by Pa.R.P.C. 5.6, and it is improper to ask for and for a lawyer to agree to such provisions.

III. Discussion

Parties in litigation have historically wanted to settle lawsuits, particularly highly disputed ones, without subjecting themselves to bad publicity. In the current social media age where information becomes viral in moments, this need is more acute. Lawyers want to be able to reach future claimants to advise them of their experience in handling certain types of matters and use information obtained in one lawsuit to effectively and efficiently advocate on behalf of other clients. This opinion addresses non-disparagement clauses and confidentiality clauses in settlement agreements and the effects of Pa.R.P.C. 3.4, 5.6, and 7.1.

When parties resolve disputed litigation, confidentiality provisions and non-disparagement clauses are often requested and included in a release. The language ranges from a preclusion of releasing the fact of and amount of the settlement to a broad prohibition on disclosing any information obtained during the course of the litigation. Ethical prohibitions applicable to both parties' counsel may apply in these situations, depending on the scope and interpretation of the particular clause. Whether such agreement is legally enforceable or violates First Amendment rights is beyond the scope of this opinion.

A. No Per Se Prohibition of Confidentiality or Non-Disparagement Clauses

As an initial matter, the Committee has long determined that there is no per se ethical prohibition against settlement agreements that include confidentiality agreements. *See, e.g.*, Inquiry 2000-24a ("It has always been ethically appropriate for counsel to engage in good faith settlement discussions in a contemplated civil action with a potential defendant where, as a part of the consideration for the settlement, a Confidentiality Agreement is incorporated into the settlement."). Most ethics opinions conclude that negotiating for, agreeing to, and, ultimately, including a confidentiality provision precluding the dissemination of the fact of, or terms of, the agreement is not prohibited under the applicable Rules of Professional Conduct. *See, e.g.*, N.Y. Comm. on Prof'l Ethics, Op. 730 (2000), ABA Formal Op. 00-417 (2000); Colo. Bar Ass'n Ethics Comm., Op. 92 (1993). This is true primarily because a lawyer is obligated under Rule 1.6 of the ABA Model Rules of Professional Conduct and its state law counterparts to keep information relating to the representation of the client confidential unless the client gives informed consent.

Under Pa.R.P.C. 1.6(e) confidentiality requirements continue after the client-lawyer relationship has terminated. Further, the confidentiality obligations under Pa.R.P.C. 1.6 and corresponding rules in other states are broad and apply to "information relating to the representation" and have been construed to include any information, even that which is otherwise publicly available. *See, e.g.*, Ca. State Bar Standing Cmte. on Prof'l Resp. & Cond., Formal Op. Interim No. 13-005. ("A lawyer's duty of confidentiality is broader than the attorney-client privilege, and any information learned during the representation must be protected as a client secret even if the information is publicly available."). Comment [3] to Pa.R.P.C. 1.6 provides that the Rule applies to "all information relating to the representation, whatever its source." Therefore, absent client consent, a lawyer is prohibited, even without being a signatory to a confidentiality agreement, from revealing information related to the representation of the client. *See also* ABA Formal Op. 00-417

(2000) ("A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the use of information relating to the opposing party in the matter."). A client has the right to ask for and insist upon the lawyer's keeping the information related to his representation confidential. The lawyer's rights to solicit future clients do not trump the client's rights in this respect.

B. Provisions Restricting Counsel From Representing Future Clients Or Prohibiting Any Use of Client Information in Future Litigation Are Prohibited

Counsel cannot agree to a provision in a settlement agreement that restricts the right of a lawyer to represent future clients in litigation. Pa.R.P.C. 5.6(b) provides:

> **Rule 5.6 Restrictions on Right to Practice**
>
> A lawyer shall not participate in offering or making:
>
> . . .
>
> (b) 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 Pa.R.P.C. 5.6 provides that the Rule "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." In Opinion 93-371, the ABA Comm. on Ethics & Prof'l Responsibility considered a restriction on the lawyer's ability to represent future clients in toxic tort litigation. The Opinion concluded that an agreement prohibiting counsel from representing future clients violates Model Rule 5.6 because the Rule is meant to protect the lawyer's right to practice and to protect the public's access to lawyers, "who, by virtue of their background and experience, might be the very best available talent to represent these individuals." The opinion also states:

> [T]he use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel… . [T]he offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is a conflict between the interests of present clients and those of potential future clients.

Id. Therefore, any provision which prohibits a lawyer from representing future claimants is per se prohibited by Pa.R.P.C. 5.6(b).

The question is, then, whether the clause can, under Pa.R.P.C. 5.6(a), properly preclude Plaintiff's counsel from using information obtained in a previous representation in connection with a future matter.

A non-disparagement or confidentiality clause which precludes any use of information obtained in a former representation in future actions would violate Pa.R.P.C. 5.6(b). ABA Comm. on

Ethics & Prof'l Responsibility, Op. 00-417 (2000) addressed the issue of whether a confidentiality provision in an agreement was proper when it precluded the subsequent use of information gained in the representation of the client. The ABA Committee determined that such a broad provision would create a material limitation on the lawyer's representation of future clients due to the lawyer's inability to use confidential information learned in the prior representation, effectively restricting the lawyer's right to practice law in violation of Model Rule 5.6(b). The ABA Committee there found that a lawyer may not agree to a confidentiality agreement if that meant the lawyer could not ever oppose the other party. *See also* Philadelphia Bar Association Professional Guidance Committee Opinion 95-13. ("This Committee agrees with the American Bar Association that the injunction of Rule 1.2, to abide by the client's decision regarding settlement, must be read as limited by Rule 5.6(b), given the important public policies reflected in Rule 5.6. Accordingly, a lawyer cannot agree to refrain from representing other clients as a condition of settlement of present cases."). Similarly, Colorado Bar Op. 92 (1993) advised that a settlement agreement may not prevent counsel from subpoenaing records or fact witnesses or using a certain expert in future cases. Recently, in Op. 16-02, the S.C. Bar Ethics Advisory Comm. found appropriate a clause that agreed "to forego disclosure, [but contained] no language that would limit the individual attorneys' use of information gained in the course of the representation for development of legal strategy or other similar purposes."

As noted in ABA Op. 00-147, Rule 5.6(b) does not proscribe a lawyer from agreeing <u>not to reveal</u> client information, consistent with the lawyer's duties under Rules 1.6(e) and 1.9(c).

Pa.R.P.C. 1.1 provides that "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In order to represent a client competently a lawyer needs to be able to discuss with the client what that client can reasonably expect in a lawsuit and needs to be able to use information obtained from past representations in order to request evidence or subpoena witnesses. Further, counsel may need to use the information obtained in one representation to represent future clients in other matters. It is ethically problematic to interpret confidentiality or non-disparagement clauses in a manner that would prohibit any use of the information in the representation of future clients (so long as counsel does not reveal information in violation of Pa.R.P.C. 1.6(e) and 1.9(c)) and impede the independent judgment of counsel. Counsel should be permitted to use information that does not reveal the specific details of the former client's settlement or otherwise violate client confidentiality. Comment [4] to Pa, R.P.C. 1.6 is instructive, providing that "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible…." Further, the lawyer can use the information without revealing the specific details in planning strategy for discovery and formulating discovery requests. Therefore, a lawyer cannot ask for and opposing counsel cannot agree to any provision which completely precludes the use of any information learned in a representation in future cases.

Pa.R.P.C. 3.4(d) Fairness to Opposing Party and Counsel, provides that a lawyer shall not:

> Request a person other than a client to refrain from voluntarily giving relevant information to another party….

On its face, Pa.R.P.C. 3.4(d) prohibits a lawyer from convincing witnesses or others not to talk to opposing counsel and is designed as Comment [1] explains to keep fair competition in the

adversary system by prohibiting inter alia improperly influencing witnesses. Pa.R.P.C. 3.4(d) is not, on its face, a Rule designed to allow lawyers to advertise their services and seek clients. Some authorities addressing the issue have concluded that other "parties" whose access to relevant information cannot be obstructed under other states' counterparts to Pa.R.P.C. 3.4(d) include not only the "parties" to the particular dispute or controversy being settled, but can also include other people to whom the information sought to be concealed might be relevant in connection with other pending or potential future controversies. *See, e.g*. Chicago Informal Ethics Op. 2012-10. These authorities find that giving the word "party" a narrower interpretation would render Pa.R.P.C. 3.4 essentially meaningless. Therefore, these opinions conclude that the Rules of Professional Conduct could preclude a lawyer from accepting or proposing any agreement which prohibits the disclosure of relevant information to future claimants. Indiana Legal Ethics Committee Opinion No. 1 of 2014, found it "unlikely that Rule 3.4(f) [similar language to Pa.R.P.C. 3.4(d)] was designed to require an attorney to retain the right to make public statements concerning past cases when at the time Rule 3.4(f) was drafted, former Rule 7.2(d)(2) [related to advertising] would have prohibited such statements." The Indiana Committee went on to say that a non-disparagement provision should not be interpreted to prevent a lawyer from voluntarily giving evidence to third parties for their use in litigation unless the evidence was subject to a protective order or other valid confidentiality obligation. Further, Kentucky's counterpart to Pa.R.P.C 3.4(d) has been interpreted to preclude a lawyer from demanding silence from a disciplinary grievant as part of a settlement. *Ky. Bar Ass'n v. Unnamed Attorney*, 414 S.W.3d 412 (Ky. 2013).

Some ethics committees have interpreted Rule 5.6(b) to prohibit settlement clauses that restrict a lawyer from publicly naming the particular parties against whom their client has settled. *See, e.g*., S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-04 (2010); Bar Ass'n of San Francisco Ethics Comm., Op. 2012-1 (2012); D.C. Legal Ethics Comm., Op. 335 (2006).

Other ethics committees have concluded that lawyers may not agree to settlement provisions that prohibit them from disclosing publicly available information. *See e.g.,* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 730 (2000) (agreement not to reveal "any information concerning any matters relating directly or indirectly to the settlement agreement" would be too broad and would violate New York's then-current counterpart to Pa. R.P.C. 5.6(b)); State Bar Ass'n of N.D. Ethics Comm., Op. 1997-05 (1997) (lawyers may not agree to keep confidential information that does not constitute confidential client information, including information that is public record).

There is, however, no ethical prohibition, under Pa.R.P.C. 3.4(d) or otherwise, against the most common confidentiality provision, which prohibits disclosure of the terms of a specific settlement, including the amount of the payment. This information is unique to each particular claim, and is generally not "relevant" within the meaning of Pa.R.P.C. 3.4(d), at least from a strictly evidentiary perspective, to strangers to the settlement agreement.

C. Confidentiality and Non-Disparagement Clauses May Limit A Lawyer's Interests In Self-Promotion

The analysis is different when lawyers (typically plaintiff's counsel) wish to use the information obtained in a prior representation for personal advertising. To the extent the client wishes the lawyer to sign an agreement prohibiting disclosure of information regarding the engagement, this

creates a potential conflict between the lawyer's interest in self-promotion and the client's interest in settling pursuant to a confidentiality / non-disparagement clause. Pa.R.C.P. 1.7(a)(2) provides that a concurrent conflict of interest exists if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. If, while representing the client's interests in settling the matter, counsel has an eye as to how he or she is going to "leverage" this success in marketing to obtain similar clients against the same defendant, that would appear to be at the very least a potential concurrent conflict of interest.

However, that conflict may not present a problem in circumstances where the advertising that the lawyer wishes to do is already precluded by the Rules. A statement such as "successfully litigated 30 cases involving Company and their law firm's unfair and unlawful practice of…." or otherwise negative statements regarding a defendant's conduct may be precluded. Lawyer advertising is governed by Pa.R.P.C. 7.1 *et seq*. Pa.R.P.C. 7.1 provides:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment [2] provides that truthful statements can be misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or lawyer's services for which there is no reasonable factual foundation. A member of this Committee described what is appropriate for advertising as follows:

> Advertising by lawyers is intended to convey objective and verifiable information that will assist a prospective client in making an informed decision about selecting a lawyer for representation. In evaluating whether an advertisement is misleading, the Comment makes clear that it is to be viewed from the perspective of a "reasonable person."

PBA Informal Op. 2005-188. In cases where a settlement agreement contains no admission of liability and there is substantial dispute as to the claims asserted, a statement such as "successfully litigated" could be construed to violate the Rules related to advertising. Parties have many reasons to resolve matters and the defendant may equally feel that it had a successful outcome. Success in litigation can be defined in many ways. The statement "successfully litigated" and "company and their law firm's unfair and unlawful practice of….." is likely misleading as it is neither objective nor verifiable and could lead a reasonable prospective client to come to an unsubstantiated conclusion about the lawyer's services. Negative commentary regarding another party, particularly that which is disputed, can fairly be construed as neither objective nor verifiable. Further, a member of this Committee has previously found that Pa.R.P.C. 7.1 "would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts." Inquiry 93-158. Therefore, the Rules of Professional Conduct, even apart from the non-disparagement clause, may well preclude making particular claims in advertising based upon past results.

Advertising which simply provides areas of practice that the lawyer engages in would not violate the Rules of Professional Conduct. Pa.R.P.C. 7.4 allows a lawyer to advertise the fact that the lawyer practices in a particular field. Clients have an interest in knowing which lawyers handle which types of matters. Comment [1] to Pa.R.P.C. 7.2 provides that the advertising rules are designed to assist the public in learning about and obtaining legal services and states that "lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising." A confidentiality clause or non-disparagement clause which prohibits a lawyer from advertising in general that he or she practices in a particular area or handles certain types of matters, which is unrelated to a particular client or matter, would be too broad and would appear to be designed to prevent the lawyer from representing future clients and/or from providing relevant information to future parties and would violate Pa.R.P.C. 5.6 and perhaps Pa.R.P.C. 3.4.

D. A Confidentiality Or Non-Disparagement Clause Which Prohibits Releasing Information In A Non-Advocacy Context Is Permissible

Ethics opinions have found that a clause that restricts the right to criticize the defendant in a non-litigation context – such as for publicity purposes – does not violate Rule 5.6(b). For example, Connecticut Informal Ethics Op. 2013-10 provides:

> "Accordingly, a non-disparagement clause may not restrict a lawyer's use of information gained in one case in another case and cannot bar a lawyer from accusing the defendant of wrongdoing in that other litigation…. However, non-disparagement clauses can be drafted in such a manner so as to not violate Rule 5.6(2). So long as such clauses do not restrict the lawyer's ability to vigorously represent other clients, they may validly restrict the attorney's right to disparage the defendant outside of that sphere – such as for advertising or publicity purposes."

The Indiana Legal Ethics Committee stated that broadly framed non-disparagement clauses may violate Rule 5.6(b), but concluded that a settlement provision prohibiting a lawyer from advertising to the general public that he or she has represented clients against a particular defendant would not violate Indiana Rules 5.6(b) or 3.4(f) (Indiana's counterpart to Pa.R.P.C. 3.4(d)). Therefore, a non-disparagement clause or confidentiality clause that is limited to an attorney's public statements regarding the specifics of a particular case, made not in the context of legal advocacy for another client, are generally permissible under the Rules. A non-disparagement clause or confidentiality clause which broadly prohibits the lawyer from advertising that he or she practices in a certain area or prohibits the use of the information in the context of legal advocacy on behalf of a client would violate the Rules.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.