Chicago Bar Association
Informal Ethics Opinion 2012-10
Committee on Professional Responsibility
Opinions Subcommittee

The Professional Responsibility Committee of the Chicago Bar Association has issued the following informal legal ethics opinion as a public service to aid the inquiring lawyer in interpreting the Illinois Rules of Professional Conduct. The opinion represents the judgment of a member or members of the Committee and does not constitute an official act of the Chicago Bar Association. The opinion is not binding upon the Attorney Registration and Disciplinary Commission or on any court and should not be relied upon as substitute for legal advice.

The Committee has received the following inquiry:

(1) Is the confidentiality provision of the proposed settlement agreement attached hereto as Exhibit A ethical under Illinois Rule of Professional Conduct 3.4(f)?

(2) Is the confidentiality provision of the proposed settlement agreement attached hereto as Exhibit A ethical under Illinois Rule of Professional Conduct 5.6(b)?

(3) May a defendant's lawyer, as part of settlement discussions, demand that the settlement agreement include a provision that prohibits plaintiff's counsel from disclosing publicly available facts about the case on plaintiff's counsel's website or through a press release?

Opinion

Inquiry 1: Settlement Agreement Non-Cooperation Provisions and Rule 3.4(f)

Illinois Rule of Professional Conduct 3.4(f) states that a "lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party" unless that person is a relative or agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from disclosure. ILL. R. PROF'L CONDUCT R. 3.4(f) (2010). As the comments to Rule 3.4 explain, the rule is based on the belief that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." *Id.* cmt. 1.

Settlement agreements are not exempt from Rule 3.4(f). S.C. Ethics Advisory Comm. Op. 93-20 (1993). Therefore, when negotiating a settlement agreement, a lawyer cannot ethically request that the opposing party agree that it will not disclose potentially relevant information to another party. *Id.* The Committee believes that "another party" in Rule 3.4(f) means more than just the named parties to the present litigation. Rather, it should be interpreted more broadly to include any person or entity with a current or potential claim against one of the parties to the settlement agreement. A more narrow interpretation would undermine the purpose of the rule and the

proper functioning of the justice system by allowing a party to a settlement agreement to conceal important information and thus obstruct meritorious lawsuits.

Here, the defendant has proposed a settlement provision that would prohibit the plaintiff from, among other things, disclosing the "existence, substance and content of the claims" and "all information produced or located in the discovery processes in the Action" unless "disclosure is ordered by a court of competent jurisdiction, and only if the other party has been given prior notice of the disclosure request and an opportunity to appear and defend against disclosure . . ." That proposed settlement provision therefore precludes the plaintiff from voluntarily disclosing relevant information to other parties. As a result, it violates Rule 3.4(f) and a lawyer cannot propose or accept it. ILL. R. PROF'L CONDUCT R. 3.4(f); S.C. Ethics Advisory Comm. Op. 93-20 (1993).

Inquiry 2: Settlement Agreement Confidentiality Provisions and Rule 5.6(b)

Illinois Rule of Professional Conduct 5.6(b) states that a "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." ILL. R. PROF'L CONDUCT R. 5.6(b). There are three main public policy rationales for Rule 5.6(b): (i) to ensure the public will have broad access to legal representation; (ii) to prevent awards to plaintiffs that are based on the value of keeping plaintiffs' counsel out of future litigation, rather than the merits of plaintiff's case; and (iii) to limit conflicts of interest.

By its own terms, Rule 5.6(b) plainly applies to direct restrictions on the right to practice law. Moreover, certain indirect restrictions on the right to practice law violate Rule 5.6(b) as well, namely, a lawyer agreeing not to bring future claims against a defendant, and a number of ethics authorities have determined that some confidentiality provisions in settlement agreements violate Rule 5.6(b).

According to the American Bar Association's Ethics Opinion 00-417, a provision in a settlement agreement that prohibits a lawyer's future "use" of information learned during the litigation violates Rule 5.6(b), because preventing a lawyer from using information is no different than prohibiting a lawyer from representing certain persons. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000). That same opinion further determined that a settlement provision that prohibits a lawyer's future "disclosure" of such information generally is permissible, because without client consent the lawyer already generally is foreclosed from disclosing information about the representation. *Id.*

However, not all limitations on the disclosure of information are ethical. Rather, as several authorities have stated, whether a settlement provision restricting a lawyer's "disclosure" of information violates Rule 5.6(b) depends on the nature of the information. Numerous ethics authorities have determined that settlement provisions may prohibit a party's lawyer from disclosing the amount and terms of the settlement (provided that information is not otherwise known to the public), because that information generally is a client confidence and consequently is required by the rules of professional conduct to be kept confidential absent client consent. D.C. Bar Ethics Op. 335 (2006); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 730 (2000); N.D. State Bar Ass'n Ethics Comm Op. 97-05 (1997); Col. Bar Ass'n Ethics Comm. Op. 92

(1993); N.M. Bar Ass'n Advisory Ops. Comm. Op. 1985-5 (1985). On the other hand, ethics authorities have found that a settlement agreement may not prohibit a party's lawyer from disclosing information that is publicly available or that would be available through discovery in other cases. D.C. Bar Ethics Op. 335 (2006); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 730 (2000); N.D. State Bar Ass'n Ethics Comm. Op. 97-05 (1997).

Based on the foregoing authority, the Committee believes that under Rule 5.6(b), a settlement agreement may not prohibit a party's lawyer from *using* information learned during the instant litigation in the future representation of clients. The Committee agrees with the American Bar Association that prohibiting a lawyer from using such information essentially is no different than prohibiting a lawyer from representing certain clients in the future, and thus such a settlement provision is an impermissible restriction on the practice of law in violation of Rule 5.6(b).

In addition, the Committee believes that pursuant to Rule 5.6(b) a settlement agreement may not prohibit a party's lawyer from *disclosing* publicly available information or information that would be obtainable through the course of discovery in future cases. The Committee agrees with the District of Columbia Ethics Committee, and other ethics authorities cited above, that drawing such a line strikes an appropriate balance between the genuine interests of parties who wish to keep truly confidential information confidential and the important policy of preserving the public's access to, and ability to identify, lawyers whose background and experience may make them the best available persons to represent future litigants in similar cases.

Applying those principles here, the Committee believes that the settlement provision as currently drafted does not comply with Rule 5.6(b). While it is permissible for the settlement agreement to prohibit the disclosure of the "substance, terms and content of" the settlement agreement (assuming that information is not otherwise publicly known), the settlement agreement violates Rule 5.6(b) because it broadly forecloses the lawyer's disclosure of information that appears to be publicly available already, such as the fact that a lawsuit was filed and certain claims were asserted, as well as other information that could be obtained (and in fact was obtained) in discovery. The settlement agreement therefore should be re-written to permit the lawyer's use of information learned during the dispute and to permit the lawyer's disclosure of publicly available information and information that would be available through discovery in other litigation.

Inquiry 3: Settlement Agreement Restrictions on Attorney Advertising and Rule 5.6(b)

Based on the principles discussed above, the Committee believes that under Rule 5.6(b), a settlement agreement may not prohibit a party's lawyer from disclosing publicly available facts about the case (such as the parties' names and the allegations of the complaint) on the lawyer's website or through a press release. *See, e.g.,* D.C. Bar Ethics Op. 335 (2006).

Dated: February 12, 2013

CHICAGO BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY COMMITTEE
OPINIONS SUBCOMMITTEE

EXHIBIT A – Proposed Confidentiality Provision in Settlement Agreement

8. Plaintiff and his counsel agree that the existence, substance and content of the claims of the Action, as well as all information produced or located in the discovery processes in the Action shall be completely confidential from and after the date of this Agreement. Similarly, the existence, substance, terms and content of this Agreement shall be and remain completely confidential. Plaintiff shall not disclose to anyone any information described in this paragraph, except: (a) if disclosure is ordered by a court of competent jurisdiction, and only if the other party has been given prior notice of the disclosure request and an opportunity to appear and defend against disclosure and/or to arrange for a protective order; (b) Plaintiff may disclose the contents of this Agreement to his attorneys, accounting and/or tax professionals as may be necessary for tax or accounting purposes, subject to an express agreement to become obligated under and abide by this confidential and non-disclosure restriction; and (c) Plaintiff may disclose that the Action has been dismissed.