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Restrictions on Disclosure of Case Information in Settlement Agreements

Congratulations. You've settled a difficult case by arriving at a settlement amount with plaintiff's counsel. All that remains is to draft a settlement agreement and release with standard terms including a confidentiality provision. That shouldn't be too difficult, right?

It depends. It is generally accepted that a settlement agreement can require parties keep confidential the amount and terms of settlement. Further, the ethical decisions generally agree that a settlement agreement also can restrict disclosure of non-public information regarding the lawsuit. However, the ethical decisions are mixed on whether a settlement agreement can restrict disclosure of public information regarding the lawsuit, such as the contents of filings made in the public court file, even where the settling plaintiff agrees to a restriction on any future disclosure by its attorney.

These restrictions are assessed under Rule 5.6(b) of the Illinois Rules of Professional Conduct, which states that a lawyer "shall not participate in offering or making . . . an agreement in which a restriction on the lawyers' right to practice is part of the settlement of the controversy." ILL. RULES OF PROF'L CONDUCT R. 5.6. Comment 2 to Rule 5.6 states, "Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."

Rule 5.6(b) also prohibits agreements that would adversely affect the plaintiff's attorney's ability to represent future clients with similar claims against the settling defendant. As the American Bar Association explained in its Formal Opinion 00-417, a restriction that "would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant . . . effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his represention of the future client and, further, may adversely affect that representation." AM. BAR ASS'N, *Settlement Terms Limiting A Lawyer's Use Of Information*, ABA Formal Op. 00-417 (Apr. 7, 2000).

In its Formal Opinion 00-417, though, the ABA drew a distinction between the plaintiff's attorney's *use* of information related to the case and the attorney's *disclosure* of information related to the case. An attorney's ability to *disclose* information relating to his representation of a current client is governed by Rule 1.6(a) of the Illinois Rules of Professional Conduct, Confidentiality of Information, which states, in relevant part, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." ILL. RULES OF PROF'L CONDUCT R. 1.6.

Regarding the duties owed to a former client, Rule 1.9(c) of the Illinois Rules of Professional Conduct permits an attorney to *use* confidential information from the representation where such use would not be "to the disadvantage of the former client" or where "the information has become generally known." ILL. RULES OF PROF'L CONDUCT R. 1.9. With respect to the *disclosure* as opposed to *use* of such information, however, Rule 1.9(c) still requires the former client's informed consent or one of the permitted exceptions under Rule 1.6.

As the ABA states:

> [I]t generally is accepted that offering or agreeing to a bar on the lawyer's disclosure of particular information is not a violation of the Rule 5.6(b) proscription. For example, Rule 5.6(b) does not proscribe a lawyer from agreeing *not to reveal* information about the facts of the particular matter or the terms of its settlement. This information, after all, is information relating to the representation of the attorney's present client, protected initially by Rule 1.6 (Confidentiality of Information) and, after conclusion of the representation, by Rule 1.9(c) (Conflict of Interest: Former Client). With respect to former clients, a lawyer may reveal information relating to the representation only with client consent or in certain limited circumstances not relevant here. 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. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision.

ABA Formal Op. 00-417 (emphasis in original; footnotes omitted).

The New York State Bar Association (NYSBA) takes a similar approach, recognizing that "[s]ince lawyers may not disclose confidential settlement terms without client consent, it is not an impermissible restriction on the right to practice to require, as a condition of settlement, that the party's lawyer will not disclose this information." N.Y. ST. BAR. ASS'N COMM. PROF'L. ETH., *Topic: Settlement Agreements; Restrictive Covenants*, 2000 WL 1692770, NY Eth. Op. 730 (July 27, 2000). The NYSBA continued, "Likewise, other restrictions on disclosure of information covered by the confidentiality rule would ordinarily be permissible." NY Eth. Op. 730.

However, the NYSBA stated that a settlement agreement that would prohibit disclosure of "*any* information concerning *any* matters related *directly or indirectly* to the settlement *or* its terms" would be overbroad. *Id*. A restriction of such broad scope would encompass matters for which the attorney would have no confidentiality obligation to its client, such as: (i) "information about the business or operations of the defendant corporation that is public information;" (ii) "information about the defendant's business [that] was learned by the lawyer prior to the representation;" and (iii) information that the client and the lawyer both "understood at the outset of the representation that the lawyer could use" when representing other clients in the future. *Id.* (internal quotations omitted).

Notably, the NYSBA does not draw any bright-line distinction between material that is in the public court file and material that is not. Instead, the NYSBA indicates that a permissible restriction would extend as far as an attorney's confidentiality obligation would extend under New York's version of Rule 1.6, pertaining to confidentiality of information. *See* NY RULES OF PROF'L CONDUCT R. 1.6; *compare* ILL. RULES OF PROF'L CONDUCT R 1.6.

The District of Columbia Bar Association (DCBA) takes a different approach. *See* THE DIST. OF COLUMBIA BAR, *Whether a Lawyer May, as Part of a Settlement Agreement, Prohibit the Other Party's Lawyer From Disclosing Publicly Available Information About the Case*, DCBA Ethics Op. 335 (May 26, 2006), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion335.cfm. It recognizes that material in a public court file for litigation may include material that the attorney cannot disclose without client consent under Rule 1.6. DCBA Ethics Op. 335.

This is consistent with the legal authority stating that an attorney may not disclose information without client consent under Rule 1.6 merely because it is publicly available. *See,* e.*g.*, *Sealed Party v. Sealed Party*, No. Civ.A H-04-229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (lawyer violates fiduciary duty to former client by revealing public information about a case without obtaining the client's consent); St. Bar of Ariz., *Confidentiality; Subpoenas*, St. Bar of Ariz. Ethics Op. 00-11 (11/2000), https://www2.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=268 (citing LAWS. MAN. ON PROF'L. CONDUCT (ABA/BNA) 55:304) ("lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record"); *In re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (lawyer may not disclose information without client consent under Rule 1.6 "that was readily available from public sources and not confidential in nature"); *In re Bryan*, 61 P.3d 641, 657-58 (Kan. 2003) (lawyer may not disclose existence of defamation suit against former client); *In re Disciplinary Proceedings Against Harman*, 244 Wis. 2d 438 (Wis. 2001), *reinstatement granted*, 282 Wis. 2d 199 (Wis. 2005) (lawyer may not disclose former client's medical records that were made part of former client's medical malpractice action); *Law. Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 789 (1995) ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it").

The DCBA concludes that, even though the attorney cannot disclose information protected by Rule 1.6 without client consent, such continued nondisclosure of otherwise public information still cannot be made a condition of a settlement agreement under Rule 5.6(b). DCBA Ethics Op. 335. "The line we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees that such a provision be included." *Id.*

According to the DCBA, the intent of Rule 5.6 is to "preserve the public's access to lawyers who, because of their background and experience, might be the the best available talent to represent future litigants in similar cases, perhaps against the same opponent." *Id.* As the DCBA views it, then, "if the parties can agree to keep all public information about all cases confidential, clients' ability to identify qualified lawyers would be greatly restricted." *Id.*

The State Bar Association of North Dakota (NDSBA) arrives at a similar result but by way of somewhat different reasoning. At one point, it recognizes that "Rule 5.6(b) does not prohibit an agreement to keep the existence of a lawsuit and settlement confidential if those facts constitute confidential information" under Rule 1.6. ST. BAR ASSOC. OF N.D. ETH. CMTE., NDSBA Op. No. 97-05, at 8 (June 30, 1997), https://cdn.ymaws.com/www.sband.org/resource/resmgr/docs/for_lawyers/97-05.pdf. It then states an attorney "may *not* enter into an agreement restricting his use of any information that would *not* constitute protected client information under Rule 1.6 if that restraint would restrict his ability to represent other clients." NDSBA Op. 97-05, at 8 (emphasis original). It then concludes that a proposed settlement agreement therefore would violate Rule 5.6 if it prohibited an attorney "from disclosing information that is a public record." *Id.* at 8-9.

The NDSBA seems to conflate the very distinct matters of *use* of information and *disclosure* of information, which the ABA went to great lengths to distinguish. The NDSBA also appears to overlook that information in a public record nevertheless can be confidential client information protected by Rule 1.6, as shown by the authorities referenced above. It does not cite to any contrary North Dakota authority on that point.

The Chicago Bar Association (CBA) has issued an informal opinion that rejects the ABA and New York approach and endorses the D.C. approach to Rule 5.6(b) and settlement agreements. *See* CHI. BAR ASSOC. COMM. ON PROF'L. RESP., CBA Informal Ethics Op. 2012-10, at 3 (Feb. 12, 2013), https://www.chicagobusinesslitigationlawyerblog.com/files/2014/05/CBA-Advisory-Opinion.pdf. The CBA states, "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." CBA Informal Ethics Op. 2012-10 (emphasis in original). The CBA appears to consider anything in the public court file "publicly available information" because it references "information that appears to be publicly available already, such as the fact that a lawsuit was filed and certain claims were asserted." *Id.*

Although the CBA cites to the NYSBA opinion for the proposition "a settlement agreement may not prohibit a party's lawyer from disclosing information that is publicly available . . . ," *id*. at 8, this appears to misstate the NYSBA's position, which appears tethered to the attorney's obligations of confidentiality to the attorney's client, as discussed above. The CBA also does not address Rule 1.6 and the interplay between Rules 1.6 and 5.6 that the ABA considered and discussed at length.

No Illinois court has addressed the propriety of the CBA approach. However, it bears noting that a plaintiff's counsel who republishes allegations from a public court file may not enjoy a defense of privilege to a defamation claim. *See Missner v. Clifford*, 393 Ill. App. 3d 751 (1st Dist. 2009), *appeal denied*, 234 Ill. 2d 525, *cert. denied*, 560 U.S. 939 (2010).

Ohio recently issued an opinion that contains a similar conclusion to the ones announced by the NDSBA and CBA. *See* OHIO BD. OF PROF'L CONDUCT, *Settlement Agreement Prohibiting a Lawyer's Disclosure of Information Contained in a Court Record*, OBPC Op. 2018-3, at 3 (June 8, 2018), https://www.ohioadvop.org/wp-content/uploads/2018/06/Adv.Op_.2018-03.pdf (concluding that Rule 5.6(b) "prohibits a lawyer from participating in the offer or acceptance of a settlement agreement that includes a prohibition on the disclosure by a lawyer of information contained in a court record.")

The ethical opinions therefore are mixed. Under the ABA and New York approach, nothing should prohibit defense counsel from proposing a settlement agreement where the plaintiff and the plaintiff's attorney agree not to disclose confidential client information regarding the facts of the lawsuit, even where that information is reflected in filings contained in the public court file. If the plaintiff is willing to agree to the provision, the plaintiff merely is not giving its attorney permission to disclose that information under Rule 1.6. The settlement agreement therefore holds the plaintiff's attorney only to that conduct to which the plaintiff's attorney already is being held under Rule 1.6.

Under the contrary D.C. approach, though, defense counsel would be ethically prohibited from proposing a settlement agreement where the plaintiff and the plaintiff's attorney agree not to disclose public information regarding the lawsuit.

Therefore, when drafting a confidentiality provision for a proposed settlement agreement, it is important to confirm the existing approach or rule, if any, in your jurisdiction.

Prospectively, to avoid this pitfall in the future, either in cases where the plaintiff is unwilling to agree to a broader restriction than for just the settlement terms and amount, or in cases in jurisdictions where the D.C. approach is employed, it may be worthwhile to consider the use of protective orders to the fullest extent possible during the pendency of any litigation. Even this, though, may not be sufficient to prevent future disclosure following settlement of any public information by a plaintiff's attorney or plaintiff where that information was not obtained from the defense in discovery.

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