

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2018-F-166

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion on the ethical propriety of a settlement agreement which contains a confidentiality provision that prohibits any discussion of any facet of the settlement agreement with any other person or entity, regardless of the circumstances; and which prohibits the requesting attorney from referencing the incident central to the plaintiff's case, the year, make, and model of the subject vehicle or the identity of the Defendants.

OPINION

It is improper for an attorney to propose or accept a provision in a settlement agreement that requires the attorney to be bound by a confidentiality clause that prohibits a lawyer from future use of information learned during the representation or disclosure of information that is publicly available or that would be available through discovery in other cases as part of the settlement, if that action will restrict the attorney's representation of other clients.

DISCUSSION

The inquiring lawyer has encountered a condition to settlement, in product liability cases against a certain defendant, which prohibits plaintiff's counsel from discussing any facet of the settlement agreement with any other person or entity, regardless of the circumstances; and which prohibits the requesting attorney from referencing the incident central to the plaintiff's case, the year, make, and model of the subject vehicle or the identity of the Defendants.

The parties agreed on a settlement amount, and the requirement of the confidentiality clause was only brought up after the Plaintiff agreed to settle. The client simply wanted to be paid their settlement monies and the lawyer's objections to such clauses were discarded because the client is the ultimate decision-maker to accepting settlement which creates a conflict between the lawyer and the client. Such provisions actively restrict the lawyer's ability to advise other current or future clients with similar claims against the Defendants.

RPC 5.6 (b) states “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.”¹

“As to existing clients, inclusion of such a clause in a release could be construed as the settlement of one client’s case to the detriment of another client’s case. Such a clause would constitute representation of differing interests in violation of RPC 1.7.”²

ABA Formal Opinion 93-371 articulates the three policy considerations underlying this rule. First, there is a risk that the public’s access to the best attorney for a particular case will be curtailed. Second, such a restraint could be motivated by an effort to “buy off” counsel rather than to resolve the dispute. Third, a restriction on an attorney’s right to practice may place him or her in a position where the interests of the current client are in conflict with those of potential future clients.

It is not uncommon for there to be settlement conditions of nondisclosure of the amount and terms of the settlement. “A settlement condition providing for nondisclosure of the amount and terms of a settlement is not only proper, but should be recognized where the details are not a matter of public record.”³

“Many jurisdictions concur with the ABA that settlement agreements containing indirect restrictions on the lawyer’s right to practice violate those jurisdictions’ respective equivalents of Rule 5.6(b). Examples of similar provisions found to constitute unethical restrictions under the rule include those that require counsel to keep confidential public information concerning the case, such as the identity of the defendant, the allegations of the complaint, and the fact of settlement.”⁴

“Such conditions have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases.”⁵ Such conditions violate RPC 5.6(b) which prohibits lawyers from offering or making a settlement agreement that restricts the lawyer’s right to practice. “A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential.”⁶

“Some ethics committees have interpreted RPC 5.6(b) to prohibit settlement clauses that restrict a lawyer from publicly naming the particular parties against whom their client has settled.”⁷

¹ Tennessee Rules of Professional Conduct 5.6(b).

² Tennessee Formal Ethics Opinion 98-F-141, (Feb. 4, 1998) citing ABA Formal Ethics Opinion 93-371.

³ State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985).

⁴ See D.C. Bar Legal Ethics Comm., Op. 335 (2006).

⁵ D.C. Bar Legal Ethics Committee, Opinion 335 (2006).

⁶ D.C. Bar Legal Ethics Committee, Opinion 335 (2006).

⁷ Pennsylvania Bar Association, Formal Opinion 2016-300 (November 2016); 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. Bar Legal Ethics Committee, Opinion 335 (2006).

Other ethics committees have interpreted RPC 5.6(b) to prohibit settlement provisions that restrict a lawyer from disclosing publicly available information, or that would be available through discovery in other cases.⁸

“The underlying rationale for all these opinions is that the prohibited provisions restrict the lawyer’s right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party.”⁹

If an attorney is bound by a confidentiality clause that prohibits him or her from discussing any facet of the settlement agreement with any other person or entity, regardless of the circumstances; and which prohibits the attorney from referencing the incident central to the plaintiff’s case, the year, make, and model of the subject vehicle or the identity of the Defendants, defense counsel would accomplish indirectly what they cannot accomplish directly by precluding the attorney from representing other plaintiffs with similar claims.

There is also a public policy consideration. A confidentiality agreement in long-running personal injury litigation “does not create a ‘compelling interest’ that overcomes the strong presumption” in favor of public access to the data.¹⁰ The ability for plaintiffs’ firms to act as industry watchdogs is both good public policy and was specifically addressed as a vested responsibility during Congress’s enactment of the Federal Motor Vehicle Safety Standards.¹¹

This does not mean that all confidentiality clauses are prohibited. 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 settlement agreement (provided that information is not publicly known) is not prohibited under the applicable Rules of Professional Conduct.¹²

There is no ethical prohibition under the Tennessee Rules of Professional Conduct against the most common confidentiality provisions, which prohibit disclosure of the terms of a specific settlement, including the amount of the payment.

⁸ D.C. Bar Legal Ethics Committee, Opinion 335 (2006); N.Y. State Bar Ass’n Comm. On Prof’l Ethics, Op 730 (2000); State Bar Ass’n of N.D. Ethics Comm. Op. 1997-05 (1997).

⁹ D.C. Bar Legal Ethics Committee, Opinion 335 (2006).

¹⁰ Estate of Haeger v. Goodyear Tire & Rubber Co., Ariz. Super. Ct., No. CV 2013-052753, 4/4/18.

¹¹ 49 U.S.C. Ch.301; 49 U.S.C. section 30103(e)(2010).

¹² Pennsylvania Bar Association, Formal Opinion 2016-300 (November 2016); N.Y. State Bar Ass’n Comm. On Prof’l Ethics, Op 730 (2000); ABA Formal Op. 00-417 (2000); Colo. Bar Ass’n Ethics Comm. Op.92 (1993); N.M. Eth. Op. 1985-5 (1985).

CONCLUSION

To the extent settlement provisions which contain confidentiality agreements which prohibit attorneys from discussing any facet of the settlement agreement with any other person or entity, regardless of the circumstances; and which prohibits the requesting attorney from referencing the incident central to the plaintiff's case, the year, make, and model of the subject vehicle or the identity of the Defendants, such provisions are prohibited by Tennessee Rules of Professional Conduct 5.6(b), if such confidentiality agreements will restrict the attorney's representation of other clients.

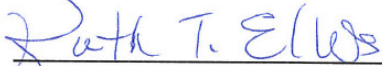
It is improper for an attorney to propose or accept a provision in a settlement agreement that requires the attorney to bound by a confidentiality clause that prohibits a lawyer from future use of information learned during the representation or disclosure of information that is publicly available or that would be available through discovery in other cases as part of the settlement, if that action will restrict the attorney's representation of other clients.

This 8th day of June, 2018.

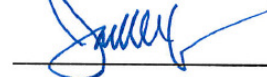
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