Shhhh, Be Quiet – Ethical Considerations in Agreeing to Confidentiality Terms in Settlement Agreements

By Ben Lebsack

In settlement negotiations, the client's desires generally reign supreme. But some settlement provisions violate the Colorado Rules of Professional Conduct, and an attorney may not participate in offering or agreeing to such terms. For instance, even if the client wants to agree to a term that prohibits the attorney from representing another client against the same defendant or prohibits the attorney from using information gained in one case in another case, the attorney cannot participate in agreeing to such a term under Colorado RPC 5.6(b).

Settlement negotiations over nondisclosure provisions may implicate Rule 5.6(b) depending on the scope of the information is subject to the provision. Colorado Bar Association Ethics Committee Formal Opinion 92 seemingly guides the analysis. A quick reading of the opinion suggests that an attorney may not agree to keep confidential any publicly filed information. But the sentence on which that conclusion is based lacks analysis and is based on outdated legal opinions from other jurisdictions.

More than rely on Opinion 92, Colorado attorneys should be mindful of recent opinions from other jurisdictions on whether nondisclosure provisions violate the rules. And more than examine whether the provision restricts an attorney's practice under Rule 5.6(b), attorneys should consider whether the provision prevents one party from voluntarily disclosing relevant information to another party in violation of Rule 3.4(f).

Colorado's Rule 5.6(b)

Colorado Rule of Professional Conduct 5.6(b) prohibits an attorney from 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." Comment 2 notes that the rule extends to prohibit "a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."

While the rule and comment do not provide much analysis as to what type of provisions unethically restrict a lawyer's right to practice, Colorado Formal Opinion 92 provides guidance. Generally, restrictions that impede "the lawyer's ability to represent effectively other claimants against the settling party defending the claim may also be unethical."[1] These restrictions include "conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel."[2]

The Ethics Committee's test for "the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation."[3]

But not "all settlement arrangements affecting a lawyer are improper."[4] Regarding non-disclosure provisions, Opinion 92 notes that a "lawyer may enter into a settlement agreement conditioned upon nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record." Put differently, this statement means that if information is a matter of public record, it may be unethical to condition settlement on non-disclosure of the public information.

Unfortunately, though, this statement is not based on any current rules of professional conduct, but is premised on prior versions of the client confidence rule. Indeed, the Colorado opinion from 1993 cites a New Mexico opinion[5] from 1985 that cites a New Jersey opinion from 1982.[6] The New Jersey opinion focuses on whether an attorney may disclose a non-public settlement to the media, concluding

that the New Jersey rule prohibiting an attorney from revealing a secret of a client and the rule prohibiting an attorney from making misleading representations about the attorney's services prohibits an attorney from disclosing a non-public settlement to the media. The New Mexico opinion also cites the ABA/BNA *Lawyer's Manual on Professional Conduct*, which I cannot locate, but feel confident saying the 1985 edition is outdated.

The age and lack of analysis leading to the conclusion in Opinion 92 about nondisclosure provisions requires a new look at whether nondisclosure provisions violate the Colorado Rules of Professional Conduct.

Prohibitions on Use of Information Violate Rule 5.6(b)

A settlement provision that restricts an attorney's ability to use information, whether a settlement term, publicly filed information, or even proprietary business information subject to a protective order, violates Colorado Rule 5.6(b) because "it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation."[7]

Model and Colorado Rule 1.9 do not prohibit an attorney from using information related to the representation of a former client unless the attorney uses the information to the disadvantage of the former client. Even this limit on using information to the disadvantage of a client does not apply when the information is generally known, or the rules would require or allow disclosure as to a current client. While a client or former client may direct an attorney not to reveal information by agreeing to a settlement agreement that includes a confidentiality provision, a former client may not generally direct the attorney not to use the information by agreeing to a settlement with a term prohibiting the lawyer from using the information. So as "long as the lawyer does not disclose information relating to the representation of the former client to a third party, the lawyer may use that information in subsequent representations, subject to the limited restrictions of Rule 1.9(c)(1)."[8]

While Some Nondisclosure Provisions Do Not Violate the Rules, Other Jurisdictions Conclude that Prohibitions on Disclosure of Certain Types of Information May Violate Rule 5.6(b)

ABA Formal Op. 00-417 concludes that a lawyer may agree not to reveal information as part of a settlement agreement. The ABA's conclusion turns on Model Rule 1.6 and 1.9, which are identical to Colorado's rules for purposes of this analysis. Those rules prohibit an attorney from revealing information related to the representation of a client or former without the client or former client's consent. The Committee explains, "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 . . . Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision." Guideline 4.2.6 of the ABA Litigation Section's Ethical Guidelines for Settlement Negotiations reiterates this position, "Except where forbidden by law or disciplinary rule, a lawyer may negotiate and be bound by an agreement to keep settlement terms and other information relating to the litigation confidential."

ABA Formal Op. 00-417 does not analyze the scope of protected information that Rules 1.6 and 1.9 may protect in the context of various nondisclosure provisions. Some ethics committees have concluded that publicly filed information is not protected under Rules 1.6 and 1.9 and it is unethical to condition settlement on nondisclosure of "such public information as the name of the defendant, the public allegations, and the fact of settlement."[9] The D.C. Bar Ethics Committee explains

> the purpose and effect of the proposed condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer's ability to bring such an action, even against the same defendant if he is retained to do so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.[10]

The Chicago Bar Association "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."[11]

Despite Colorado's Broad Scope of Confidential Information Under Rules 1.6 and 1.9, Some Nondisclosure Provisions May Violate the Colorado Rules

Some of the opinions concluding that nondisclosure provisions violate Rule 5.6(b) are from jurisdictions where the confidentiality rules[12] only prohibit a lawyer from revealing a "confidence or secret" of the client, which does not inherently include public information, but not the broader information related to the representation of a client. Colorado and the Model Rule's broad "information related to the representation of a client" includes publicly filed information, so an attorney's vicarious agreement not to disclose public information is in line with an attorney's general duty not to disclose public information related to the representation of a client absent consent.

The South Carolina Bar Ethics Advisory Committee, which has the same Rules 1.6 and 1.9 as Colorado, however, has concluded that despite the broad reach of these confidentiality rules, it is "improper for a lawyer to become personally obligated in a client's settlement agreement to refrain from identifying the defendant as a part of the lawyer's business."[13] Like the ABA Opinion, the South Carolina one approaches the ethics of nondisclosure provisions from 1.6 and 1.9, noting "[a]ny prohibition on a lawyer's disclosure of information should come from the client's rights under 1.6 and 1.9 to instruct the lawyer not to reveal information protected by those rules."[14] Reconciling the broad scope of 1.6, the Committee explains

> Although Rule 1.6 broadly refers to any "information relating to the representation," the commentary discloses that that concept is not boundless. For example, Comment 5 states that it aimed at both client-specific information and other information that could lead a reasonable person to infer client-specific information. The Comment further states that discussing cases as hypothetical scenarios, for example, does not require client consent provided the hypothetical is not so specific or unique that the audience might recognize the specific matter being discussed.[15]

More than concluding that settlement terms prohibiting disclosure of public information like the defendant's name violate the rules, the South Carolina opinion generally disfavors any provision requiring an attorney to agree to a settlement term:

> lawyers generally should not become parties to their clients' settlement agreements because it creates contractual obligations or rights for the lawyer individually. This conflict puts the lawyer in the untenable position of evaluating obligations not arising from the lawyer's engagement agreement with the client for the benefit of the client, but conferred by the lawyer directly to the opposing party. Such agreements are unnecessary because, to the extent they obligate the lawyer not to reveal information protected by Rule 1.6-terms of the settlement and circumstances of the case-the same can be accomplished by obligating the client to neither reveal the information nor consent to anyone else's revelation of it. For Rule-1.6-protected information, the lawyer's participation in the agreement is unnecessary. For unprotected information, the lawyer's participation is improper.[16]

Aside from the statement in Opinion 92 under the former confidentiality rules, the Colorado Bar Association Ethics Committee has not opined on whether nondisclosure provisions violate Rule 5.6(b). Neither has the Colorado Supreme Court, though it

broadly interprets "client information."[17]

However, the South Carolina approach finds support in Colorado Formal Op. 130, Online Posting and Other Sharing of Materials Relating to the Representation of a Client (2018). While that opinion reaffirms the scope of the information Rule 1.6 protects, it explains that "a lawyer may be able to redact the materials sufficiently to share or post the materials in compliance with Colo. RPC 1.6(a) and 1.9(c). The redactions must be sufficient to ensure that the disclosure no longer provides 'information relating to the representation of a client.'"

Conceivably, if a lawyer can redact a pleading so that it no longer provides information related to the representation of a client, a lawyer can disclose publicly filed information about a case without the information being related to the representation of a client. Settlement provisions that restrict an attorney's ability to post a defendant's name, general description of a case, or even a redacted version of a deposition may violate Colorado Rule 5.6(b).

Restrictions on identifying a defendant or posting a pleading on a website restrict an attorney's ability to inform the public of the attorney's experience. There is a distinction between advertising the practice of law and practicing law. But the New York State Bar Association's Committee on Professional Ethics explains "While a lawyer's agreement not to solicit further clients would not "directly" restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations."[18] The San Francisco Bar Association reached the same conclusion, explaining that

> Prohibiting an attorney from disclosing public information regarding the attorney's handling of a particular type of case against the settling defendant is an impermissible restriction on the attorney's right to practice and deprives legal consumers of information important to their evaluation of the competence and qualifications of potential counsel. Prohibiting an attorney from disclosing that he or she has experience in a particular area of the law is also an impermissible restriction on the attorney's right to practice regardless of whether that information is otherwise public.[19]

The Chicago opinion, based on the Illinois rules, which include the broader 1.6 and 1.9 confidentiality rules, agrees that restrictions on advertising implicated Rule 5.6(b), explaining that "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."[20]

Nondisclosure Provisions That Prevent a Party from Providing Relevant Information to Another Party May Violate Rule 3.4(f)

Beyond potentially violating Rule 5.6(b), a settlement provision that prohibits a party, and therefore the party's attorney, from disclosing information related to a case may also violate Colo. RPC 3.4(f). Rule 3.4(f) prohibits an attorney from

> request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The Chicago Bar Association broadly interprets Rule 3.4(f)'s "another party" to mean parties outside of a current dispute. Under this interpretation, "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."[21] The provision at issue in the Chicago opinion prohibited the plaintiff from "disclosing the 'existence, substance and content of the claims' and 'all information produced or located in the discovery processes in the Action.'"[22] But the Indiana Bar Association Standing Committee on Legal Ethics disagrees that these type of nondisclosure provisions violate Rule 3.4(f), opining that "it is unlikely that Rule 3.4(f) was designed to require an attorney to retain the right to make public statements concerning past cases."[23] Of course, not all information possibly subject to a nondisclosure provision will be "relevant information" under Rule 3.4(f). But even the Indiana Committee agrees that "to the extent that such a provision could be interpreted as prohibiting an attorney from privately and voluntarily providing evidence to third parties for their use in litigation, upon request, then such a provision is likely a violation of Rule 3.4(f), unless the information is otherwise subject to a protective order or other valid confidentiality obligation."[24] The Indiana Committee also "does not agree with the South Carolina Bar Association that Rule 5.6(b) prohibits an attorney from agreeing not to advertise that the attorney has represented clients against a particular defendant."[25]

Conclusion

Reasonable bar association ethics committees may disagree. Absent direction from the Colorado Bar Association Ethics Committee or Supreme Court, attorneys should not assume that settlement provisions that restrict their ability to disclose public information about a case violate the Colorado Rules of Professional Conduct. It would be unfortunate to torpedo a settlement agreement because of such a provision only for the client to grieve the attorney for interfering with the client's right to settle under Colo. RPC 1.2(a). But the opinions from other jurisdictions suggest that overly broad nondisclosure provisions, like provisions barring naming a defendant on a website or providing information to a plaintiff in a similar case, may violate Rules 5.6(b) and 3.4(f). ▲▲▲

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Endnotes:

[1] Colo. Bar Ass'n Formal Op. 92 (1993).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] N. Mex. Ethics Comm. Op. No. 1985-5 (1985).

[6] N.J. Adv. Comm. on Prof. Ethics Op. No. 500, 110 N.J.L.J. 325 (1982).

[7] Colo. Bar Ass'n Formal Op. 92 (1993).

[8] ABA Formal Op. 00-417 (2000).

[9] D.C. Bar Legal Ethics Comm. Op. No. 335 (2006); *see also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000).

[10] D.C. Bar Legal Ethics Comm. Op. No. 335 (2006).

[11] Chicago Bar Ass'n Informal Ethics Op. 2012-10 (2012).

[12] D.C. RPC 1.6; N.Y. RPC 1.6.

[13] S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-04 (2010).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *People v. Hohertz*, 102 P. 3d 1019, 1022 (Colo. 2004).

[18] N.Y. State 858 (2011).

[19] Bar Ass'n of San Francisco Legal Ethics Comm., Op. 2012-1

[20] Chicago Bar Ass'n Informal Ethics Op. 2012-10 (2012).

[21] *Id.*

[22] *Id.*

[23] Ind. State Bar Ass'n Legal Ethics Comm. Op. 1 of 2014.

[24] *Id.*

[25] Ind. State Bar Ass'n Legal Ethics Comm. Op. 1 of 2014.