



Ohio Board of Professional Conduct

OPINION 2018-3

Issued June 8, 2018

Settlement Agreement Prohibiting a Lawyer's Disclosure of Information Contained in a Court Record

SYLLABUS: A settlement agreement that prohibits a lawyer's disclosure of information contained in a court record is an impermissible restriction on the lawyer's right to practice. A lawyer may not participate in either the offer or acceptance of a settlement agreement that includes a prohibition on a lawyer's disclosure of information contained in a court record. A lawyer is not required to abide by a client's decision to settle a matter if the settlement is conditioned on a restriction to practice and must withdraw from the representation.

The Board recommends that the holding in this opinion be applied prospectively.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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The Board recommends that the holding in this opinion be applied prospectively.

QUESTION PRESENTED: Whether a lawyer may participate in the offer or acceptance of a settlement agreement that is conditioned on the restriction of a lawyer's post-settlement communications about information contained in a court record.

APPLICABLE RULES: Prof.Cond.R. 1.2, 1.6, 1.9, 1.16, 5.6, 7.1-7.3.

OPINION:

Background

Agreements to settle pending litigation may include confidentiality provisions that prevent each party from disclosing the existence of the settlement agreement, the

terms and conditions of the agreement, any monies paid to the plaintiffs, and other confidential or non-public information. In turn, the lawyers in the case are obligated to their clients to maintain the confidentiality of the settlement agreement. *See* Prof.Cond.R. 1.6 and 1.9. Some parties may seek additional confidentiality provisions that prevent opposing counsel, most often the plaintiff's lawyer, from making any public announcement, comment, or communications to the media or through lawyer advertising concerning the case, including information that may be contained in a court record.¹

Restriction on the Right to Practice

A lawyer is prohibited from participating in the offering or making of a settlement of a claim or controversy through the use of a written agreement that contains a restriction on the lawyer's right to practice. Prof.Cond.R. 5.6(b). This rule has been interpreted in at least one jurisdiction to prohibit a lawyer from participating in a settlement agreement that restricts the lawyer's representation of future clients in similar matters against the opposing party. Az. Ethics Op. 90-06 (July, 1990).

Turning to the question presented, a court record will typically include information concerning allegations and defenses raised, the names of the parties and lawyers, the date the case was filed, and the date of any voluntary dismissal in the case. Potential clients have the ability to search court records for lawyers who have brought similar lawsuits against the same defendants. However, prohibiting the lawyer from using the same information directly interferes with the lawyer's ability to advertise and market his or her services in a manner consistent with the Rules of Professional Conduct.² Prof.Cond.R. 7.1 - 7.3. The advertising of a lawyer's services and the solicitation of clients is an integral part of the practice of law and may not be restricted through a private settlement agreement. Tex. Ethics Op. 505 (August, 1994). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977).

The apparent intent of a settlement agreement provision prohibiting communication of information contained in a court record is to limit the plaintiff's

¹ For purposes of this advisory opinion "court record" has the same meaning as "case documents" filed with a clerk of court or submitted with a court as those terms are defined in Sup.R. 44(B)-(C)(2).

² A lawyer must obtain the consent of a client whose name appears in the style of a case before it is used in the lawyer's marketing or advertising. Prof.Cond.R. 1.6., Prof.Cond.R. 7.2, cmt.[2].

lawyer's ability to attract new clients based on the lawyer's prior experience against a particular defendant. This type of settlement provision also gives the lawyer less discretion in pursuing claims on behalf of clients than a lawyer who is not subject to a similar agreement. Colo. Bar Ethics Op. 92 (1993). More importantly, the prohibition contained in the rule serves to protect the public's unfettered ability to choose lawyers who have the requisite background and experience to assist in pursuing their claims. Prof.Cond.R. 5.6(b). It also prevents settlement agreements from being used to "buy off" plaintiff's counsel through an offer of a higher settlement amount in exchange for the lawyer foregoing future litigation against the same defendant. Lastly, the rule prevents the creation of conflicts between the interests of current clients and those of potential future clients. ABA Op. 93-371.

For the foregoing reasons, the Board concludes that Prof.Cond.R. 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. A settlement agreement under which a lawyer is prohibited from disclosing information contained in a court record via the media or otherwise permissible advertising constitutes an impermissible restriction on the lawyer's right to practice.

When engaging in settlement negotiations lawyers should be particularly mindful of the prohibition against both *making* and *accepting* a settlement on a condition restricting the practice of lawyers or law firms in the case. Prof.Cond.R. 5.6. Simply because the terms were offered by the other party or opposing lawyer and are intended for inclusion in a confidential agreement, a lawyer is not relieved from his or her ethical obligations under the rules. Lawyers should not be lured by the confidential nature of the settlement agreement to include provisions that violate Prof.Cond.R. 5.6. The integrity and self-regulatory nature of the profession requires lawyers to voluntarily comply with the rules of professional conduct even when their conduct is not subject to public review or scrutiny. See Prof.Cond.R., *Preamble*, cmt. [16].

There may be instances where a lawyer, prior to issuance of this opinion, participated in the making or acceptance of a settlement agreement that contains a provision restricting the practice of a lawyer. Recognizing the myriad of factors that are

involved in the negotiation and acceptance of pre-existing settlement agreements, the Board recommends that the holding of this opinion be applied prospectively.

Abiding by a client's decision to settle a matter

The offer by a party to settle a case conditioned on a restriction of the right to practice necessarily involves the lawyer's obligation to abide by a client's decisions concerning settlement. Prof.Cond.R. 1.2(a). A lawyer may be faced with a situation where a client's willingness to settle may be heightened when a larger settlement is conditioned on inclusion of a restriction on the lawyer's right to practice. While a lawyer is required to abide by the client's decision to settle, the prohibition in Prof.Cond.R. 5.6(b) makes it impossible for the lawyer to comply with the client's instructions. A lawyer should advise the client that he or she is ethically prohibited from participating in the acceptance of an offer that includes a condition that restricts his or her right to practice. If the client insists upon accepting the settlement with the condition, the lawyer must withdraw from the representation in order to avoid a violation of Prof.Cond.R. 5.6(b). Prof.Cond.R. 1.16(a)(1) (a lawyer shall withdraw from the representation if it will result in violation of the Ohio Rules of Professional Conduct.)

CONCLUSION: Parties routinely enter into settlement agreements that contain confidentially provisions that prevent the disclosure of the settlement, the terms and conditions, and any amounts paid in exchange for the dismissal of a case. Lawyers for the parties are ethically obligated to their clients to maintain the confidentiality of the agreement. However, certain facts about the case – the names of parties, allegations, defenses, and the lawyers involved are information contained in court records. Requiring lawyers in the litigation to limit their future communication of information contained in court records, including their participation in a case, serves as a restriction on their right to practice law and advertise their services prohibited by Prof.Cond.R. 5.6(b). A lawyer is ethically obligated to refuse to participate in the finalization of the written settlement agreement when his or her client is presented with an offer to settle that includes a provision that will operate as a restriction on the lawyer's right to practice. While lawyers are required to follow their client's direction whether to accept a settlement offer, the lawyer may not violate other Rules of Professional Conduct when doing so. If the client

insists on accepting the agreement with the restrictive provision, the lawyer is obligated to withdraw from the representation.