



# Ohio Board of Professional Conduct

## **OPINION 2019-04**

Issued June 13, 2019

### **Practice Restrictions in Proposed Settlement Agreements**

**SYLLABUS:** A lawyer may not offer or agree to a direct or indirect restriction on the lawyer's right to practice as part of a proposed settlement agreement. A settlement provision that gives a lawyer significantly less discretion in the prosecution of future claims than a lawyer who is not subject to the agreement is an impermissible restriction on the lawyer's right to practice law. A lawyer may not offer or agree to a settlement agreement that requires a lawyer to affirm that that he or she does not represent any other individuals with similar claims against the defendant, prohibits the lawyer from the solicitation of clients with similar claims against the same defendant, or requires the lawyer keep confidential all information obtained during litigation. A lawyer may offer or agree to a narrowly drafted settlement provision to not publicly disparage the defendant if it permits the filing of additional civil complaints against the defendant, the advertising of the lawyer's previous experience with the defendant, and the consultation with prospective clients about the lawyer's experience with the defendant.

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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### QUESTIONS PRESENTED:

- (1) Whether a lawyer may affirm as part of a settlement agreement that he or she does not represent any other individuals with similar claims against the defendant;
- (2) Whether a lawyer may agree as part of a settlement agreement that he or she will not solicit, nor seek, new clients with similar claims against the defendant;
- (3) Whether a lawyer may agree as part of a settlement agreement to keep all information obtained during litigation confidential;

- (4) Whether a lawyer may agree as part of a settlement agreement that he or she will not “disparage” the defendant.

**APPLICABLE RULES:** Prof.Cond.R. 1.2, 1.4, 1.6, 1.7, 1.16, 5.6

**OPINION:** It is common for a lawyer to seek as part of a settlement agreement terms and conditions that will limit a client’s exposure to future litigation. For example, a lawyer might attempt to limit a client’s exposure by drafting a settlement agreement that will prevent the plaintiff’s lawyer from bringing the same or similar claims against his or her client in the future. However, a lawyer is prohibited from either “offering or making” an agreement that includes a provision that places restrictions on a lawyer’s right to practice. Prof.Cond.R. 5.6(b). Therefore, as a condition of settling a client’s case, a lawyer may not agree to restrict his or her own practice of law or propose that opposing counsel restrict the lawyer’s future practice. This prohibition equally applies to settlement provisions that seek to restrict outright the future practice of a lawyer as well as less obvious provisions that have the practical effect of limiting the lawyer’s right to practice. ABA Op. 00-417.

The requesting lawyer has asked for the Board’s consideration of four settlement provisions routinely encountered when representing plaintiffs. In addition to analyzing the provisions under various Rules of Professional Conduct, the Board considered whether the proposed provisions give the plaintiff’s lawyer significantly less discretion in the prosecution of claims on behalf of future clients than a lawyer not subject to the agreement. If the provision provides significantly less discretion for the lawyer in the pursuit of future claims, the Board concludes that the provision imposes an impermissible restriction on the practice of that lawyer under Prof.Cond.R. 5.6. *See* Colo. Bar Ethics. Comm. No. 92 (1993).

*Restriction on representation of individuals with similar claims*

A proposed settlement agreement provision offered to avoid future exposure for a client requires the plaintiff’s lawyer to affirm that he or she “does not represent any other person who is contemplating filing the same or similar claims against defendant as those asserted in the lawsuit.” While the provision does not directly prohibit the lawyer from representing future clients, it could lead to a situation where the lawyer cannot affirm the proposed statement and is eventually compelled to reveal the existence or

identities of undisclosed current clients. Consequently, the settlement provision implicates two Rules of Professional Conduct.

A disclosure during settlement negotiations by a lawyer of the existence of other, undisclosed clients invariably implicates the confidentiality provisions of Prof.Cond.R. 1.6. In some instances, an undisclosed client may not have directed the lawyer to proceed with the filing of a claim, and the premature disclosure of the client's existence or identity to the defendant to effectuate the settlement of the claim of another client would be improper as a breach of confidentiality. *Id.* Az. Adv. Op. 1990-06.

In addition to confidentiality issues, if the lawyer presented with the settlement provision has an undisclosed client with similar claims against the defendant, the provision immediately raises the potential for a material limitation conflict for the lawyer with respect to both clients. If the lawyer chooses to disclose the existence of other clients even with their consent, then defense counsel may attempt to use the information as leverage so that all claims on behalf of all clients may be resolved at the same time. However, the bringing of all claims on behalf of multiple clients may have a detrimental effect on the value of each individual client's claim when not filed and settled independently. By revealing the existence of other clients, there is a substantial risk that the lawyer's ability to consider, recommend or carryout an appropriate course of action for the client who is the party to the agreement will be materially limited by the lawyer's responsibilities to the previously undisclosed clients. Prof.Cond.R. 1.7(a)(2). Absent the consent of the current client and all undisclosed clients, the provision places the lawyer in an unavoidable conflict.

In the Board's view, a settlement provision requiring a lawyer's disclosure of all clients with similar claims against the defendant is an indirect and prohibited restriction on the practice of the lawyer and therefore prohibited by Prof.Cond.R. 5.6(b). The provision may require the disclosure of confidential client information, give rise to a material limitation conflict, and force the lawyer to relinquish his or her discretion and independent professional judgment concerning when to bring forward the claims of the other clients. Moreover, a lawyer agreeing to the provision has significantly less discretion in pursuing future claims against the defendant than a lawyer who is not subject to the same provision. While a lawyer without additional clients with similar claims does not have the same ethical concerns, the Board advises against the use of the provision in the settlement of any matter or case.

*Agreement not to solicit new clients with similar claims against the defendant*

The solicitation of clients is permissible when conducted pursuant to the limitations set forth in the Rules of Professional Conduct. Prof.Cond.R. 7.1-7.3. While a settlement provision prohibiting a lawyer from soliciting clients with similar claims would not preclude the representation of clients obtained without direct solicitation, the provision would have the practical effect of substantially and impermissibly restricting the lawyer's ability to practice law. Prof.Cond.R. 5.6. N.Y. St. Bar Ass'n Adv. Op. 1006 (2014). *See also* Adv. Op. 2018-03.

*Requirement to keep all information from the lawsuit confidential*

During litigation a plaintiff's lawyer learns a considerable amount of information about a defendant through investigation and formal discovery. This information may be useful in subsequent suits brought by future clients against the same defendant. Information is also generated from plaintiff's lawyer's own clients in the context of the attorney-client relationship or may be contained in an unsealed court record. A lawyer's use of information contained in a court record cannot be restricted by the terms of a settlement agreement. Adv. Op. 2018-03.

While a broad requirement to keep all information in a lawsuit confidential is not necessarily an outright restriction on the practice of a lawyer, it may have the practical effect of limiting the effective representation of future clients against the same defendants. ABA Op. 00-417. For example, if the lawyer learns key information about certain business practices of the defendant during discovery that is relevant to the claim of one client, there is a strong likelihood that the information may be beneficial to the claims of future clients. Because such a broad provision unduly restricts a lawyer's pursuit of future claims using the same information obtained during the regular course of litigation, the Board concludes that it is prohibited by Prof.Cond.R. 5.6(b). However, a requirement to keep the terms and conditions of the settlement agreement and its existence confidential, with the exception of those facts that are available in a court record, is permissible because it does not restrict the lawyer's practice. *See* Adv. Op. 2018-03.

*Non-disparagement clauses*

Parties who have settled a matter often seek to protect their interests by negotiating a non-disparagement clause that prevents the lawyers and parties from making negative statements about either party based on the allegations made or information gathered during the litigation. Whether the non-disparagement clause is permissible under Prof.Cond.R. 5.6(b) depends on how broadly it is drafted. If the provision prevents the filing of a new action against the defendant, prohibits the advertising of the lawyer's previous experience, or forbids the lawyer from sharing his or her experience with a prospective client, the provision indirectly restricts the practice of the lawyer and is prohibited by Prof.Cond.R. 5.6(b). However, a provision that only prevents the lawyer and his or her clients from publicly making post-settlement malicious or disparaging statements relative to the practices or acts of the defendant does not impermissibly restrict the lawyer's ability to prosecute future claims against the defendant on behalf of other clients, and the lawyer would not be prohibited from agreeing to it.

*Other considerations*

As previously discussed, a party's lawyer may never offer to settle a case conditioned on a restriction of the right to practice that is prohibited by Prof.Cond.R. 5.6(b), but if the opposing lawyer is faced with an impermissible offer, the lawyer's obligation to abide by a client's decisions concerning settlement is invariably implicated. Prof.Cond.R. 1.2(a). While a lawyer is ordinarily 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 a client's instructions to accept the offer. In such a situation, a lawyer should advise the client that he or she is ethically prohibited from participating in the acceptance of an offer that includes a provision that restricts his or her right to practice. Prof.Cond.R. 1.4(a)(5) (consult with client about limitation on lawyer's conduct prohibited by the Rules of Professional Conduct.) 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 Rules of Professional Conduct).

**CONCLUSION:** The Rules of Professional Conduct prohibit a lawyer from offering or agreeing to a provision in a settlement agreement that restricts the lawyer's right to

practice law. While a provision in a settlement agreement may not directly bar the future representation by the lawyer, it may have the practical effect of limiting the lawyer's right to practice. An analysis of less obvious restrictions under Prof.Cond.R. 5.6 requires a determination of whether the lawyer is given significantly less discretion in pursuing future claims than a lawyer not subject to the agreement. In those instances, the provision constitutes an impermissible restriction on the practice of the lawyer. Applying this analysis and considering the implication of other Rules of Professional Conduct leads to the conclusion that provisions requiring the lawyer to affirm that he or she does not represent individuals with similar claims, prohibiting solicitation of clients with similar claims, and requiring a lawyer to keep all information obtained during litigation confidential are impermissible restrictions on the right to practice law. A settlement provision prohibiting the disparagement of the defendant is generally permissible, but cannot be drafted to prevent the filing of a new cause of action against the defendant, prohibit the advertisement of the lawyer's prior experience, or prevent the lawyer's consultation with a prospective client regarding the lawyer's experience with the defendant. 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 a settlement agreement with an impermissible restrictive provision, the lawyer is obligated to withdraw from the representation.