



# Ohio Board of Professional Conduct

## OPINION 2023-13

Issued December 8, 2023

### **Settlement Agreement Prohibiting a Lawyer's Disclosure of Information Contained in a Public Record**

**SYLLABUS:** A settlement agreement that prohibits a lawyer's disclosure of a publicly accessible government record or the information contained therein 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 the same. However, due to the complexity of exemptions contained in state or federal law, not all requests to prohibit disclosure will be a violation of Prof.Cond.R. 5.6(b). 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:**

May a lawyer participate in the offer or acceptance of a settlement agreement that is conditioned on the restriction of a lawyer's post-settlement communications about publicly accessible governmental records, including information contained in documentary evidence or a settlement agreement, when that information is available through a public records request under Ohio or federal law?

**APPLICABLE RULES:** Prof.Cond.R. 1.2, 1.16, 5.6, 7.1, 7.2, 7.3.

**OPINION:***Background*

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). In Adv. Op. 2018-03 the Board addressed whether a lawyer may offer or accept a settlement agreement that is conditioned on the restriction of a lawyer's post-settlement communications about information contained in the court record. In Adv. Op. 2019-04, the Board provided guidance to lawyers when determining if a settlement provision imposes an impermissible restriction on the practice of the lawyer. The Board indicated that if a provision provides significantly less discretion for the lawyer in pursuit of future claims, the provision is an impermissible restriction on the practice of that lawyer under Prof.Cond.R. 5.6.

The requesting lawyer inquires whether the rationale of Adv. Op. 2018-03 applies to publicly accessible governmental records. The requesting attorney reports that despite the Board's prior guidance, some parties, including governmental entities, continue to 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 a public governmental record available pursuant to state or federal law. Potentially applicable law may include, but is not limited to, records accessible under the Ohio Public Records Act, the Freedom of Information Act, or the Rules of Superintendence.

*Question Presented*

Prof.Cond.R. 5.6(b) has been interpreted in at least one other jurisdiction to prohibit a lawyer from agreeing or asking another lawyer to agree never to use or disclose public information regarding a matter. Md. Ethics Op. 2016-07 (2016). The Maryland opinion observed that "complying with such a provision would necessarily limit an attorney's ability to develop or to discuss legal strategy and prior litigation with future clients, and therefore would require the attorney to either refuse to undertake particular

representations, or to undertake such cases with only a limited ability to communicate with a client, in potential violation of [Prof.Cond.R.] 1.4." *Id.*

Prohibiting the lawyer from using a governmental public record 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.<sup>1</sup> *See* Adv. Op. 2018-03 and 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).

Similar to the question presented in Adv. Op. 2018-03, the apparent intent of a settlement agreement provision prohibiting communication of information contained in a governmental public record is to limit the plaintiff's 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. Adv. Op. 2018-03 and Adv. Op. 2019-04, *citing* Colo. Bar Ethics Op. 92 (1993). More importantly, the prohibition contained in Prof.Cond.R. 5.6(b) serves to protect the public's unfettered ability to choose lawyers who have the requisite background and experience to assist in pursuing their claims. This provision 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 or former clients and those of prospective clients. ABA Op. 93-171.

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 of information in publicly accessible governmental records, including documentary evidence or a settlement agreement that is available through a public records request under Ohio or federal law. A settlement agreement under which a lawyer is prohibited from disclosing information contained in

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<sup>1</sup> 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].

a public 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. There are multiple exemptions to the Ohio Public Records Act contained in R.C. 149.43 and in other chapters of the Revised Code. The Freedom of Information Act, 5 U.S.C. § 552, also has multiple exemptions that prohibit release of certain documents and information to protect interests such as personal privacy, national security, and law enforcement. Whether and under what circumstances a particular piece of documentary evidence, information contained in a record, or a settlement agreement may be properly protected from disclosure pursuant to the Ohio Public Records Act or the Freedom of Information Act is a question of law that the Board is without authority to address. Counsel must recognize that reasonable lawyers may disagree as to which records or information is a proper exemption limiting disclosure pursuant to a public records request under applicable law. Not every request for a settlement provision preventing disclosure of information contained in a public record will be a violation of Prof.Cond.R. 5.6(b). The Rules are rules of reason and are not meant to be invoked by opposing parties as procedural weapons. Prof.Cond.R., *Scope*, cmt. [14] and [20].

#### *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. As in Adv. Op. 2018-03, the Board reiterates that 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].

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 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.)