Settlement Agreement Terms May Cause Ethical Trouble

We've all seen or heard of them: Agreements that terminate litigation where one side, usually the defendant, wants the plaintiff and plaintiff's counsel to agree to one or more of the following:

- Keeping the amount of the settlement confidential
- Restricting plaintiff's counsel from representing another client in a similar case against the defendants
- Restricting use or disclosure of any information learned during the case in any future representation against the defendants

As a practical matter, defendants may have an incentive to ask for restrictions on plaintiffs and their lawyers to avoid unfavorable publicity, to lessen the chances of being sued by others, and to make it more difficult for other plaintiffs to prove their cases. Plaintiffs, on the other hand, if they think they are getting more money in exchange for the restrictions, are happy to agree. But practicalities aside, there can be ethical problems involved, depending on the nature of the restrictions being sought.

Defendants may have an incentive to ask for restrictions on plaintiffs and their lawyers. But practicalities aside, there can be ethical problems involved.

The first ethical rule that must be considered is ER 3.4(f),[1] which states that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to third parties. So when defendant's counsel insists that the plaintiff and her lawyer agree to not disclose relevant information concerning the case to another potential claimant, isn't that exactly what the Rule prohibits? And if the plaintiff's lawyer goes along with the scheme, isn't he assisting the defendant's lawyer in violating an ethical rule, an act which is itself an ethical violation?[2]

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, a current Co-Chair of the State Bar Member Assistance Committee, and practices at David D. Dodge, PLC in Phoenix.

Also requiring consideration is ER 5.6(b), which states that a lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of a settlement. It seems well settled that agreeing, or insisting that opposing counsel agree, on not representing another client against one of the settling parties on similar claims would be a violation of the Rule.[3] What isn't as clear is if the settlement agreement attempts to restrict the use or disclosure of any relevant information by a party or its lawyer in future litigation against the settling defendant. Authorities have pointed out that by limiting what a lawyer can use in other cases, a settlement agreement can effectively impair a lawyer's ability to represent other clients and may thus constitute a restriction on her right to practice in violation of the Rule.[4]

Fine distinctions here can sometimes cause confusion, as demonstrated by the headnote summary in an ABA Formal Opinion on the subject:

> A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of the controversy. Thus, a lawyer may not seek or agree to a settlement term that would prohibit the lawyer from using any of the information learned during the current representation in any future representation against the same or a related opposing party. A lawyer may, however, seek or agree to a settlement term limiting or prohibiting disclosure of information obtained during the representation.[5]

The distinction seems to be between later "use" of what the lawyer has learned and the apparently more troubling "disclosure" of the same information. This would allow the prevention of a "disclosure" of the amount of the settlement, generally accepted as something upon which lawyers and their client can ethically agree, but it is not clear the extent to which the authorities are in accord beyond this limited category.[6]

Variations on the settlement terms outlined above were described and discussed in Arizona Ethics Opinion 90-06 (July 18, 1990), where the settling franchisor–defendant wanted the franchisee–plaintiffs' counsel to agree to (1) provide a list of

every franchisee who had contacted them, and who they had contacted, concerning potential claims against it, (2) not solicit or contact any franchisee concerning potential claims against the franchisor, (3) not "participate" in any way in any legal action brought by a franchisee against the franchisor–defendant, and (4) dismiss any and all bar complaints currently pending concerning the lawyers in the case. The opinion found the terms of the proposed settlement to be in violation of ER 1.6 (Confidentiality of Information) because the identity of a lawyer's clients and potential clients is "information relating to" a representation that is protected by the Rule, and in violation of ER 5.6 because it attempted to restrict the plaintiffs' lawyers' rights to represent other clients. Finally, it was pointed out that it was not within the power of counsel to dismiss a bar complaint in view of what is now Arizona Supreme Court Rule 48(g) (Non-abatement), providing that the State Bar is not bound by any settlement between a complainant and a respondent.

There are a few unsettled issues in this area,[7] but to be forewarned is to be forearmed. If confronted with a questionable term in a settlement agreement that your client really wants to sign, remember that occasionally there are limits to what we can agree to do in order to advance a client's cause.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. ER 8.4(a) provides that it is professional misconduct for a lawyer to knowingly assist or induce another lawyer in violating the Rules of Professional Conduct, or to do so through the acts of another.
3. ABA Formal Op. 93-371 (Restrictions on the Right to Represent Clients in the Future) (April 16, 1993).
4. Chicago Bar Association Informal Ethics Op. 2012-10 (Feb. 12, 2013).
5. ABA Formal Op. 00-417 (Settlement Terms Limiting a Lawyer's Use of Information) (April 7, 2000).
6. *Cf.* S.C. Ethics Adv. Op. 93-20 (1993) (not improper if agreement intended to simply request that plaintiff not volunteer to testify in other cases. But if it is attempting to prevent plaintiff and counsel from providing relevant information, Rule 3.4(f) is violated) *with* Ct. Bar Ass'n Inf. Op. 2011-1 (Jan. 19, 2011) (settlement confidentiality provision that prohibits plaintiff from discussing facts and circumstances giving rise to her claim violates Rule 3.4(f)).
7. For an excellent discussion on these issues, *see* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 480 (2008).