Ethics and the Bill O'Reilly Settlement Agreement

Most of us are familiar with the Bill O'Reilly saga involving several women at Fox News who claimed he sexually harassed them while they were employed there. The claims and the confidential settlements go back quite a few years, and eventually they led to Mr. O'Reilly and Fox News parting ways.

Then, in December 2017, everything became big news again when two of the women involved filed suit against Mr. O'Reilly and the network, claiming that Mr. O'Reilly had defamed them and breached a non-disparagement clause in their settlement agreements by stating publicly that the women had not actually complained about his conduct and that they were essentially "liars and extortionists." When the judge hearing the case ordered—over Mr. O'Reilly's and his lawyers' objections—that the settlement agreements at issue become evidence and be made public, the case really got interesting.

The terms of the Confidential Settlement Agreement[1] apparently used in both the women's cases could be the basis for the final exam in the legal ethics course. Consider the following:

1. Section 7(h) of the agreement provides that neither the women's lawyer, Benedict Morelli, nor any member of his firm will "represent, assist or cooperate with any other parties or attorneys in any action against O'Reilly [or] Fox News … arising out of actual or alleged sexual harassment issues."
2. The same Section 7(h) provides that Mr. Morelli would agree to provide legal advice to Mr. O'Reilly regarding "sexual harassment matters," and that Mr. O'Reilly would not seek to disqualify the Morelli firm in "any proceeding to enforce the terms of this Agreement." It is important to note that nowhere in the agreement or elsewhere did the attorney agree or attempt to terminate his ongoing representation of the women involved in the settlements.
3. Section 4(b) of the agreement provides that if any of the documents or recordings ("Materials") that formed a part of the women's complaints or Mr. O'Reilly's defense thereto (the description of the term is quite broad, and includes letters, notes, diaries, recordings, etc.) became public by any means including third parties after the date of the Agreement, all parties (including Mr. Morelli) would disclaim them as "counterfeits or forgeries."

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

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This isn't the first time an attempt has been made to settle a lawsuit conditioned on an agreement by opposing counsel not to represent other clients against the party paying the money or to use or disclose any information the lawyer learned during the course of the dispute in other claims against that party. The problem, of course, is that ER 5.6 (Restrictions on the Right to Practice) in Arizona's Rules of Professional Conduct[2] specifically prohibits it. ER 5.6(a) applies to partner, shareholder and other similar agreements between lawyers and their employers that attempt to restrict a lawyer's practice after termination of the relationship.[3] ER 5.6(b) covers settlement provisions. It states: "A lawyer shall not participate in offering or making … (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

Note that the rule applies only to restrictions imposed as part of a "settlement of a controversy." Accordingly, it wouldn't apply to agreements restricting a lawyer's use or disclosure of information on behalf of a client where the agreement is entered into as a condition of simply receiving the information. It also wouldn't apply to protective orders imposed in a lawsuit.

The rule has been applied to many forms of restraint attempted on opposing counsel, like refraining from using certain expert witnesses or subpoenaing certain records or fact witnesses in future actions against a defendant,[4] or having the opposing lawyer be retained, as part of the settlement, by the defendant.[5] If this last example seems familiar, it's exactly what the lawyers in the O'Reilly settlements agreed to.

Arizona's Committee on the Rules of Professional Conduct has weighed in on this issue, as have their counterparts at the ABA.[6] If presented with questions whether a given settlement agreement might violate the rule, you'd do well to read these opinions.

The remaining provisions of the settlement agreement described above are just as troublesome. The first provides that Mr. Morelli, as Mr. O'Reilly's newly engaged lawyer, can represent Ms. Mackris (one of the women involved in the settlements) if she sues Mr. O'Reilly to enforce the terms of the agreement and that Mr. O'Reilly in effect waives any conflict that might ensue. This would result in Ms. Mackris, Mr. Morelli's ongoing client, asserting a claim against Mr. O'Reilly, Mr. Morelli's new client, a clear conflict of interest. ER 1.7(b)(3) makes it quite clear that any representation involving a concurrent conflict of interest cannot be waived if it involves the assertion of a claim by one current client against another current client represented by the

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same lawyer in the same litigation. In short, it appears that the lawyers in the Mackris/O'Reilly settlement attempted to waive a non-waivable conflict.

But it gets worse: The agreement requires the parties (including Mr. Morelli) to disclaim to the public any Materials, as broadly defined, that appear in the case as exhibits or otherwise as "counterfeit or forgeries." It would be one thing if a document's authenticity were at issue in the case, but no such distinction was made in the agreement. ER 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent, like perjury. ER 3.3(a)(1) and (3) prohibit a lawyer from making a false statement of fact to a court or to offer evidence known to the lawyer to be false. And as if that weren't enough, ER 8.4(a), (c) and (d) make it "professional misconduct" to violate the Rules of Professional Conduct or assist another lawyer to do so, to engage in conduct involving dishonesty, fraud, deceit or misrepresentation or to engage in conduct prejudicial to the administration of justice. Knowingly misrepresenting a document as counterfeit or forged, especially before a court, would certainly qualify as misconduct under any of these provisions.

At last report, the women's defamation case is still pending. In the meantime, there's a severance clause in the agreement as well as a few other provisions throughout the agreement that state that if any of its provisions are found to be unenforceable or against public policy, the rest of the agreement will still be valid—making it fairly certain that we can expect a judicial resolution of any ethical issues raised in the litigation.

endnotes

1. *See* www.washingtonpost.com/blogs/erik-wemple/files/2018/04/mackris diamond.pdf. This is the agreement for Andrea Mackris, one of the complaining women.
2. Rule 42, ARIZ.R.S.CT.
3. *See Post-Departure Fee Spitting Agreements*, ARIZ. ATT'Y (April 2007) at 6.
4. Colo. Ethics Op. 92 (1993).
5. *In re Brandt*, 10 P.3d 906 (Or. 2000). Other examples of attempts to get around the rule are found at *Annotated Model Rules of Professional Conduct*, ABA Center for Professional Responsibility 543-547 (8th ed. 2015).
6. Ariz. Ethics Op. 90-06, *Confidentiality of Information; Restrictions on Right to Practice* (July 1990); ABA Formal Op. 00-417, *Settlement Terms Limiting a Lawyer's Use of Information* (April 7, 2000).