

Opinion No. 1 of 2014

This formal opinion is disseminated in accordance with the charge of the ISBA Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the State Bar and does not have the force of law.

The Indiana State Bar Association's Standing Committee on Legal Ethics ("the Committee") has received an inquiry concerning the ethics issues implicated when an attorney for a party is asked to assume obligations to an adverse party as a condition to a settlement that is agreeable to the attorney's client. The particular inquiry concerns "non-disparagement" clauses that are sometimes contained in settlements of various types of civil matters. For the reasons discussed in further detail below, the Committee believes that ethical prohibitions applicable to counsel for both parties come into play, depending on the scope and interpretation of the particular clause. More specifically, the Committee believes that clauses that would extend to the attorney's advocacy on the part of other

Settlement agreements that contain non-disparagement clauses restricting attorney conduct

clients or that would prohibit the attorney from providing information to the public concerning the attorney's experience in the particular type of case or other matters are prohibited by Ind. R. Prof. Cond. 5.6(b), and that such agreements also raise issues under Ind. R. Prof. Cond. 3.4(f). Whether such provisions are enforceable in light of the applicable ethics rules, the First Amendment to the Constitution of the United States of America, or Article 1, §§ 9 and 10 of the Constitution of Indiana, are beyond the scope of this opinion.

Facts

Parties to a dispute who have decided to resolve the dispute by way of a settlement agreement often wish to protect their reputational interests and to minimize the prospects of future litigation against them. There are a variety of provisions by which the parties may seek to protect these interests. By far the most common is a clause

requiring the parties to maintain the confidentiality of the terms and amount of a settlement.

With increasing frequency, however, parties have attempted to negotiate broader protections and have attempted to extend the provisions creating such protections to the attorneys who provided representation in the dispute. One type of provision used for this purpose is a "non-disparagement clause." Two examples of such clauses appear below:

Example 1

Plaintiffs and their counsel will not, directly or indirectly, make any negative or disparaging statements against the Company maligning, ridiculing, defaming or otherwise speaking ill of the Company and its business affairs, practices or policies, standards or reputation (including but not limited to statements or postings harmful to the Company's business interests, reputation or good will) in any form (including but not limited to orally, in writing, on social media, Internet, to the media, persons and entities engaged in radio, television or Internet broadcasting, or to persons and entities that gather or report information on trade and business practices or reliability) that relate to this Agreement and the factual allegations made in the litigation or any matter covered by the release within this Agreement. Nothing in the Agreement shall, however, be deemed to interfere with each party's obligation to report transactions with appropriate governmental, taxing and/or registering agencies.

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Example 2

Plaintiffs and their counsel agree that they will not criticize, denigrate or otherwise disparage or cause disparagement of Defendants or anyone else released herein.

The requester has asked whether such provisions violate the Indiana Rules of Professional Conduct.¹

Analysis

I. Ind. R. Prof. Cond. 5.6(d)

The primary ethics rule that is implicated by an attorney's agreement to restrictions that a settlement agreement imposes limits on an attorney's conduct is Ind. R. Prof. Cond. 5.6, which states:

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Paragraph (b) is the subpart of the Rule implicated by the request that this opinion addresses. Paragraph (b) prohibits an attorney from agreeing not to represent future clients in bringing claims against another party. Ind. R. Prof. Cond. 5.6, Comment 2; ABA Formal Op. 93-371 (1993); *see also Cardillo v. Bloomfield 206 Corp.*, 988 A.2d 136, 139 (N.J. App. Div. 2010). The Rule also prohibits attorneys from entering into non-compete agreements, unless they are part of agreements sanctioned by Rule 5.6(a), which pertains to agreements concerning retirement benefits. *Coffman v. Olson & Co.*, 906 N.E.2d 201, 208

(Ind. Ct. App. 2009) (*dicta*); ABA Formal Op. 06-444.

The Indiana Supreme Court also recently held that paragraph (a) of the Rule prohibits other, less direct, means of restricting competition. *In re Truman*, 7 N.E.3d 260 (Ind. 2014). In *Truman*, the Court held that provisions that prohibited a departing associate from notifying clients that he had left a law firm and from soliciting their business violated the Rule. *Id.* at 261. The Court similarly held that provisions providing a strong economic disincentive for the departing associate to continue the representations violated the rules. *Id.* As the Court observed, the Rule exists "for the protection of both lawyers and clients." *Id.* The Court found a violation because the "[a]greement hampered both Associate's right to practice law and Associate's clients' freedom to choose a lawyer by restricting Associate's ability to communicate with the clients and creating an unwarranted financial disincentive for Associate to continue representing them." *Id.* Quoting from an earlier opinion on a similar issue from the Ohio Supreme Court, the Indiana Supreme Court observed that "[a] client's 'absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge[,] ... would be hollow if the discharged attorney could prevent other attorneys from assuming the client's representation.'" *Id.* (quoting *Cincinnati Bar Assn. v. Hackett*, 950 N.E.2d 969, 970 (2011)).

Rule 5.6 as a whole, including paragraph (b) relating to settlement agreements, is directed at agreements that limit the professional autonomy of attorneys and "also limit[] the freedom of clients to choose a lawyer." Ind. R. Prof.

Cond. 5.6, Comment [1]. As ABA Formal Op. 93-371 states:

The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

Several other bar associations have considered whether other restrictions on an attorney's conduct in a settlement agreement violate Rule 5.6(b). For example, both the ABA and several state and local bar associations have opined that a portion of a confidentiality clause prohibiting an attorney from "using" any information gained from a case in the future violates the Rule because such a provision "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." ABA Formal Op. 00-417; *accord* D.C. Bar Legal Ethics Committee Opinion No. 35 (1977); Arizona Opinion No. 90-6 (1990); Colorado Bar Ethics Committee Opinion No. 92 (1993). Some have opined that settlement provisions that prevent an attorney from advertising that the attorney has handled a particular type of case or cases against a particular opponent also violate the Rule. South Carolina Opinion 10-04 (2010); San Francisco Bar Association Opinion 2012-1. Other opinions conclude that agreements forbidding an attorney from disclosing publicly available facts about litigation against a defendant in law firm promotional materials violate the Rule. D.C. Bar Legal

Ethics Committee Opinion 335 (2006). The Indiana Supreme Court has left open the question of whether agreements to restrict advertising may violate Rule 5.6. *Blackburn v. Sweeney*, 659 N.E.2d 131, 133 (Ind. 1995).

The propriety of a non-disparagement clause that is binding on the attorney depends on how broadly such a clause is interpreted. If the clause is interpreted to ban either the filing of a new action against the defendant or statements made in the course of such an action, on the ground that a complaint or other statements made in the course of the litigation are “disparaging,” then the agreement would clearly violate Rule 5.6(b). If, on the other hand, the provision applies only to statements that the attorney might make outside the context of a future action against

the defendant, the issue is more nuanced.

The Committee does not agree with the South Carolina Bar Association that Rule 5.6(b) prohibits an attorney from agreeing not to advertise that the attorney has represented clients against a particular defendant. Until quite recently, Indiana law severely restricted a attorney’s use of “information based on past performance” in attorney advertising. *In re Benkie*, 892 N.E.2d 1237, 1240 (Ind. 2008) (interpreting former Ind. R. Prof. Conduct 7.2(d)(2)). While the use of such information is no longer categorically banned, it remains subject to a general provision that an attorney’s communications about the attorney or the attorney’s services not be false or misleading. Ind. R. Prof. Cond. 7.1. In addition, the comments to Rule 7.1 single out

information based on past performance as potentially false or misleading, absent “special circumstances that serve to protect the probable targets of a communication from being misled or deceived.” *Id.*, Comment 2. Even though statements concerning past representations are now permissible in some circumstances, it is unlikely that Rule 5.6(b) was intended to require attorneys to retain a right to make statements that were banned at the time the Rule was written.

The application of a non-disparagement clause to an attorney’s one-on-one statements to a client or prospective client stands on a different footing than statements in public advertisements. In the private context, the client or

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prospective client's interest in retaining an attorney based on the attorney's past experience becomes paramount. An attorney must be able to truthfully tell the client or prospective client whether the attorney has relevant experience, and in the course of the representation, the attorney must be free of material limitations on the representation that would prevent the attorney from providing competent and diligent representation. Ind. R. Prof. Cond. 1.7(a)(2) and 1.7(b)(1). In making such statements, the attorney must be cautious to avoid revealing information about prior representations in a manner that would violate Rule 1.6.²

An agreement not to make statements that an attorney handles or has handled a particular type of matter would also likely violate Rule 5.6(b). Unlike information about specific past representations, attorneys have been permitted to describe "one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations" for quite some time. Ind. R. Prof. Cond. 7.2, Comment 2; former Ind. R. Prof. Cond. 7.1(b)(2). As with Rule 5.6(b), one of the policies behind Rule 7.2 is "[t]o assist the public in obtaining legal services." As the ABA observed in its Formal Opinion 93-371, one of the policies behind Rule 5.6(b) is to avoid agreements that restrict "the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals." An agreement that would prohibit an attorney from stating that the attorney had handled a particular type of case would create a situation that the policy of Rule 5.6(b) is designed to avoid. Accordingly, such an agreement likely violates Rule 5.6(b).

II. Ind. R. Prof. Cond. 3.4(f)

Depending on how the non-disparagement clause is interpreted, such a clause may also be a violation of Ind. R. Prof. Cond. 3.4(f). That rule provides:

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

* * *

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment [1] to the Rule provides that "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the

contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." While the text of Rule 3.4(f) technically applies only to an attorney who asks for an agreement to refrain from voluntary cooperation, Rule 8.4(a) provides that it is professional misconduct to "knowingly assist" another attorney in violating any of the Rules of Professional Conduct, so an attorney that agrees to refrain from such cooperation likewise has violated the rules.

The Chicago Bar Association has addressed the Rule 3.4(f) issues raised by provisions in settlement agreements that restrict an attorney's statements concerning a settled case. Chicago Bar Association Informal Ethics Opinion 2012-10

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(2012). The opinion concluded that a settlement provision violated Rule 3.4(f) by precluding a party from “disclosing the existence, substance and content of the claims and all information produced or located in the discovery processes in the Action unless disclosure is ordered by a court of competent jurisdic-

tion, and only if the other party has been given prior notice of the disclosure request and an opportunity to appear and defend against disclosure.” *Id.* (Internal quotation marks omitted.) The Chicago Bar Association reasoned that Rule 3.4(f) reached beyond parties to the settled litigation and that an agree-

ment that “precludes the plaintiff from voluntarily disclosing relevant information to other parties. ... violates Rule 3.4(f).” The prohibition was sufficiently broad, according to the Chicago Bar Association, that it would be violated by a clause prohibiting the attorney from disclosing information on his website or in a press release.

Again, the Committee does not believe that such a broad interpretation of the Rule is appropriate. The title of the Rule is “Fairness to Opposing Party and Counsel,” which seems to indicate some connection to a dispute of some sort, though perhaps short of actual litigation, rather than a rule relating to an attorney’s public statements. In addition, as discussed in the analysis of Rule 5.6(b), it is unlikely that Rule 3.4(f) was designed to require an attorney to retain the right to make public statements concerning past cases when, at the time Rule 3.4(f) was drafted, former Rule 7.2(d)(2) would have prohibited such statements.

However, to the extent that such a provision could be interpreted as prohibiting an attorney from privately and voluntarily providing evidence to third parties for their use in litigation, upon request, then such a provision is likely a violation of Rule 3.4(f), unless the information is otherwise subject to a protective order or other valid confidentiality obligation. Recently, the Kentucky Supreme Court disciplined an attorney under its version of Rule 3.4(f) for including a provision in a private settlement agreement that prohibited a complaining client from voluntarily assisting in a disciplinary case against the attorney’s client. *Kentucky Bar Association v. Unnamed Attorney*, 414 S.W.3d 412 (Ky. 2013).

A proper balance under Rule 3.4(f) can be reached by interpreting the phrase “another party” in

the Rule. The Chicago Bar Association appears to read the term “another party” as synonymous with “another person.” As stated above, such a reading is too broad, in light of other rules existing at the time Rule 3.4(f) was adopted. However, as the Kentucky Supreme Court opinion shows, reading the term “another party” to mean only parties to the dispute that is being settled is too narrow. The Committee believes that the appropriate balance is struck by adopting, in part, the definition proposed in J. Bauer, “Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics,” 87 *Ore. L. Rev.* 481 (2008). Prof. Bauer proposes that the term should mean any “person with a potential claim against the lawyer’s client, regardless of whether suit has actually

been filed.” *Id.* at 547. He also proposes that the Rule “should be construed to cover future parties as well as current ones.” *Id.*

The Committee believes that Prof. Bauer’s definition should be modified, so that it is not limited to parties adverse to the client of the attorney proposing the provision. Rather, consistent with the purposes of Rule 3.4(f) and the principle that parties should have free access to third-party evidence provided voluntarily, the Committee believes that the definition of “any party” should extend to “any person requesting evidence for the purpose of investigating or asserting a claim or defense, whether in litigation or otherwise.”

Again, an attorney must be mindful of the obligations imposed by Rule 1.6 in providing any information about the representation

to third parties, and the attorney’s obligations in that regard may require that the attorney either secure client consent or insist upon compulsory process.

Conclusions

As discussed in greater detail above, the Committee has reached the following conclusions:

1. To the extent a non-disparagement clause binding on an attorney would be interpreted to apply to statements made in the course of the attorney’s legal advocacy on behalf of a future client, such a provision would violate Ind. R. Prof. Cond. 5.6(b).
2. To the extent a non-disparagement clause binding on an attorney would be interpreted to apply to the attorney’s private

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statements to clients or prospective clients to permit them to gauge the attorney's relevant experience, such a provision would violate Ind. R. Prof. Cond. 5.6(b).

3. A non-disparagement clause that is limited to an attorney's public statements made not in the context of legal advocacy for a client, *e.g.*, advertising and promotional statements, does not violate Ind. R. Prof. Cond. 5.6(b) or Ind. R. Prof. Cond. 3.4(f).

4. To the extent that a non-disparagement clause binding on an attorney would prevent the attorney from voluntarily giving evidence to a party to litigation or a person otherwise seeking to investigate or assert a claim or defense, such a provision would violate Ind. R. Prof. Cond. 3.4(f) in the absence of a protective order or other valid confidentiality obligation that covers the evidence. ⚖️

1. The requester raises no issue concerning more traditional confidentiality clauses protecting the terms and amount of settlements. The Committee believes that such provisions do not violate the Rules because they protect both clients' legitimate privacy interests that would also be protected under Ind. R. Prof. Cond. 1.6.
2. In general, Rule 1.6 would prohibit an attorney from describing prior representations in a manner that identifies the specific prior representation or client, or that would permit a reasonable person to identify the specific representation or client, without the prior clients' consent. Ind. R. Prof. Cond. 1.6, Comment [4] ("A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."). The fact that some of the information may be a matter of public record does not alter this obligation. See *In re Anonymous*, 932 N.E.2d 671, 674 (Ind. 2010).