Confidentiality Agreements Cannot Restrict a Lawyer's Right to Practice

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CONFIDENTIALITY AGREEMENTS CANNOT RESTRICT A LAWYER'S RIGHT TO PRACTICE

By David E. Gottlieb and Hilary J. OrzickConfidentiality and non-disclosure provisions in settlement agreements are among the most typical components in the resolution of many disputes. However, these confidentiality provisions have recently come under public scrutiny because of the perception that they "silence" those who have experienced sexual harassment and mistreatment, particularly in light of the growing #MeToo and #TimesUp movements.

Many people on the other side of the debate would argue that confidentiality provisions can be helpful to all parties in resolving disputes, and in many instances confidentiality is requested by all sides. Moreover, not all people accused of unlawful conduct would ultimately be found liable by a jury, and one can hardly fault someone for wanting confidentiality to ensure that his or her career or life will not be damaged by the surfacing of a potentially untrue allegation.

Nonetheless, there is no doubt that confidentiality provisions prevent many sexual harassment victims from disclosing their experiences, and that in many instances it is solely for the benefit of the harasser. As a result, when future victims of the same harasser come forward with claims, previous victims may be unable to step forward and tell their stories in support. Consequently, sexual harassment victims who might otherwise have stronger claims—including corroborating evidence of similar experiences by others—may be left with a more difficult he-said/she-said dispute. This reality, of course, may have a chilling effect on future victims from coming forward in the first place.

Naturally, those who settle claims brought against them will try to obtain the broadest possible confidentiality protections, which often will prevent the claimant from speaking about the settlement, discussing the underlying claims or saying anything at all negative about adverse party. Generally, the only mechanism in which a future victim can learn about a previous victim's story is by filing an action, hoping to learn about the previous victim's identity through discovery and then subpoenaing that person for a deposition.

To provide even further confidentiality protection, sometimes a settling party will ask that the complainant's counsel be bound to a confidentiality agreement as well. This raises an important issue: Under the ethical rules, can a claimant's counsel agree to hold information regarding a publicly filed litigation as confidential?

The answer lies in Rule 5.6 of the New York Rules of Professional Conduct (RPC). Rule 5.6 limits the restrictions on attorneys' right to practice:

> Restrictions on Right to Practice. (a) A lawyer shall not participate in offering or making [] (2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client's controversy.

On its face, Rule 5.6 may not appear to implicate an agreement by counsel to be bound to confidentiality provisions. However, Rule 5.6 has been interpreted broadly to prevent even covert or subtle limitations on an attorneys' right to practice or the public's access to counsel. Per the New York State Bar Association (NYSBA) and the American Bar Association (ABA), Rule 5.6,

> [I]s intended to (1) preserve the public's access to lawyers who, because of their background and experience, might be the best available talent to represent these individuals, (2) to prevent parties from "buying off" the opposing lawyer, and (3) to prevent a conflict between a lawyer's present clients and the lawyer's f*uture ones. NYSBA Op. 730 (2000); ABA Formal Ethics Opinion 93-371 (1993).*

For these reasons, it is well known that it would violate Rule 5.6 for an attorney to agree not to represent future employees against a particular defendant as a condition of a settlement agreement. See, e.g., NYSBA Op. 1006 (2014) ("no lawyer may 'participate in offering or making' a settlement agreement that restricts any lawyer's right to practice"); Op. 730 (Rule 5.6 would "prohibit an agreement by the employee's lawyer not to represent other employees in claims of discrimination against the defendant employer); ABA Formal Ethics Opinion 00-417 (2000) ("a lawyer may not, as a part of settlement of a controversy on behalf of a client, agree to a limitation on the lawyer's right to represent other clients against the same opposing party").

An attorney's agreement to maintain information regarding a publicly filed litigation as confidential may not as "directly" interfere with the attorneys' ability to represent clients in the same way as an express agreement not to do so, but it certainly tampers with the intent behind Rule 5.6. That is, if an attorney agrees to maintain previous case information as confidential, such attorney would effectively be prevented from representing future clients for whom the use of that information would be beneficial—it would interfere with the attorney's ability to provide to the potential client the same zealous advocacy as other attorneys.

This scenario is precisely what Rule 5.6 was intended to prevent. As stated in Op. 730, a settlement agreement that "calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients—precisely the problem at which the [ethical rule] is aimed." See also Op. 00-417 (lawyers "may not participate or comply with a settlement agreement that would prevent him [or her] from using information gained during the representation in later representations against the opposing party").

Other judicial and ethics opinions follow the same rationale. See, e.g., *Tradewinds Airlines v. Soros*, No. 08 Civ. 5901 (JFK), 2009 WL 1321695, at *9 (S.D.N.Y. May 12, 2009) ("The Court declines to interpret a standard confidentiality provision as an implied restriction on a counsel's ability to represent other clients, as such a restrictive covenant would itself violate the ethical rules."); *Hu-Friedy Mfg. Co. v. Gen. Elec. Co.*, No. 99 Civ. 0762, 1999 WL 528545, at *2 (N.D. Ill. July 19, 1999) (refusing to interpret agreement as restriction on counsel's future use of information as contrary to Rule 5.6); Tenn. Bd. Prof. Resp., Formal Op. 98-F-141 (1998) ("[a]s to existing clients, inclusion of such a clause in a release could be construed as the settlement of one client's case to the detriment of another client's case. Such a clause would constitute representation of differing interests in violation of DR 5-105.").

The crux of these opinions is the principle that even provisions of a settlement agreement,

> would not "directly" restrict the [attorney's] right to practice law or to represent similar clients, they would nonetheless violate the rule "if their practical effect is to restrict the lawyer from undertaking future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose." NYSBA Op. 1006 (2014).

As stated in Op. 335, "[u]nderlying each of the opinions disapproving restriction on the future conduct of lawyers [] is the intent to preserve the public's access to lawyers who, because of their background and expertise, might be the best available talent to represent future litigants in similar cases, perhaps against the same opponent."

This issue was recently addressed in *Sunaz v. Despont Studios*, No. 17-cv-01979 (GBD) (BM) (S.D.N.Y. Nov. 28, 2017), an employment discrimination and sexual harassment action. There, the plaintiff's lawyer had previously represented a different employee in a discrimination claim which had been resolved with a confidentiality provision running from the former employee to the company, and the company sought to prevent the plaintiff's lawyer from seeking discovery as to the previous claim of discrimination. While the plaintiff's lawyer was not a party to the previous confidentiality agreement, the court held that whether that were the case or not, federal courts "generally refuse to enforce provisions that violate Rule 5.6" and "decline to construe settlement agreements in a manner that brings them into tension with Rule 5.6." The court held that any attempt to interfere with the plaintiff's counsel's ability to take discovery would act as a limitation on the ability to practice under Rule 5.6.

Given the current climate, creative attempts by defendants and their counsel to secure the broadest possible level of confidentiality are likely to continue. However, for counsel, the answer that emerges is abundantly clear—an attorney cannot ethically agree to maintain information in connection with a publicly filed litigation as confidential, as it would act as a restriction on the attorney's right to practice, in violation of Rule 5.6. Even if such an agreement were entered into by counsel, such an agreement would almost certainly be unenforceable.

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