



# Fighting onerous confidentiality clauses in settlement agreements

*Many proposed confidentiality clauses conflict with counsel's right to practice and the public's right to know*

BY ANNE RICHARDSON

Congratulations! You've just negotiated a sum to settle your client's case. Now the fun begins. Your opposing counsel sends you a proposed settlement agreement with terms that make you squirm. They want a gag order that not only makes the terms of the settlement confidential, but prevents your client from talking about what happened to her. They want to prevent the lawyers from mentioning the public facts of the case on websites. You don't mind keeping the terms of the settlement confidential, but the rest of the provisions stick in your craw. Still, your client wants to settle. So what leverage do you have?

A lot, actually. Some terms that are commonly proposed are unenforceable, contrary to public policy, even unethical. Here are a few ways you can push back against some of the most onerous requests for confidentiality.

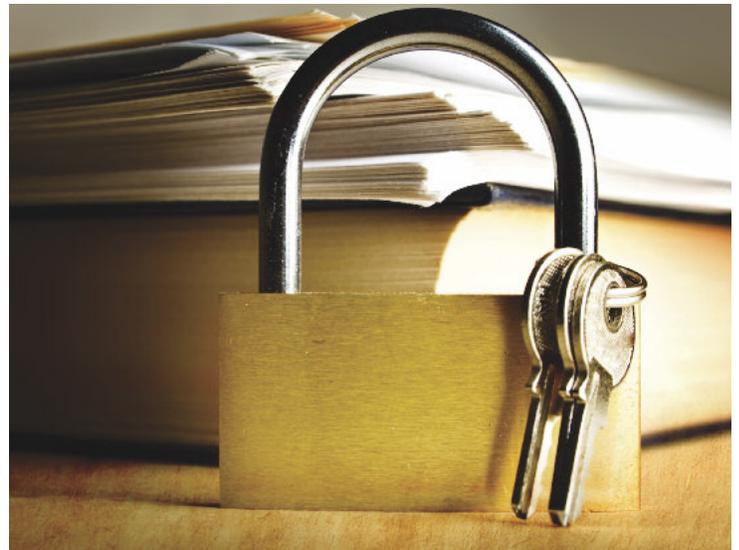
This article does not challenge the principle that settlement agreements may restrict disclosure of settlement *terms*. There are differing views on such clauses, with some saying that confidentiality of terms can lead to greater incentive to settle, and others saying that confidentiality makes it harder for third parties to learn about conduct that violates the law.

There can be strong reasons at times to oppose confidentiality of terms, particularly when the parties seek to seal court records that have no basis for privilege other than the parties' mutual request. (See, e.g., *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992) [Due to the public's right of access to public trials, a member of the public has standing to view documents that have not been sealed, and to move the court to unseal documents which have been sealed improperly even if part of a settlement agreement].)

Nor does this article address the debate over whether confidential settlements in certain kinds of cases should be prohibited as a matter of public policy. Finally, this article does not discuss the extent of confidentiality of settlement *negotiations* whether during mediation or otherwise.

## **(1) Restrictions on counsel's right to practice**

Rule 5.6(b) of the ABA Model Rules of Professional Conduct prohibits a lawyer from making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a



controversy between private parties." Similarly, subject to certain exceptions, Rule 1-500 of the California Rules of Professional Conduct provides that:

A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law . . . .

This provision prohibits a party from demanding a provision in a settlement agreement that the opposing party refrain from representing future clients in litigation against the same defendant. (See Los Angeles County Bar Association Formal Opinion 468 (January 1993) (settlement agreement in which the settling defendants' attorneys would have agreed not to represent other settling defendants against the plaintiff was barred by Rule 1-500); Standing Committee on Professional Responsibility and Conduct (COPRAC) Formal Opinion 1988-104 (a settlement agreement that would have precluded plaintiff's attorney from representing any person or entity in any litigation or arbitration proceeding against defendant or its affiliated entities limited the autonomy of attorneys and the ability of clients freely to choose



an attorney and therefore restricted the right of the attorney to practice law.)

But these same rules have been interpreted to apply to certain requests for confidentiality in settlement agreements as well. In D.C. Ethics Op. 335, the D.C. Bar Committee opined in 2006 that it is unethical for an attorney to condition a settlement agreement on a requirement that counsel keep public information about a case confidential and not make any further disclosures about the case in promotional materials or on law firm websites, even when both clients were willing to agree to such a provision.

The Opinion noted that this inquiry went beyond the usual confidentiality of the *terms* of the settlement agreement and “raises questions whether, as part of a settlement, one lawyer may prohibit another from further disclosure of already public information, including the name of the defendant and the allegations of the complaint, and well as information that can readily be inferred from the public record, such as the fact that the litigation settled.”

The Opinion noted that while normally a lawyer has a duty to abide by his or her client’s decision whether to accept an offer of settlement, this duty can come into potential conflict with the rule against agreements that restrict a lawyer’s right to practice.

There are some important limitations discussed in this Opinion. First, the line drawn by the Committee was about publicly available information. A settlement agreement can require that non-public information be kept confidential, such as when a settlement occurs pre-filing, or pursuant to private arbitration. Second, it noted that requests by clients to keep public information confidential are not prohibited by this Opinion. “If a client wishes her lawyer not to disclose public information, she does not need the mechanism of a settlement agreement to enforce her instructions. The only reason to make confidentiality a provision of the settlement agreement is to give the

opposing party a mechanism to enforce confidentiality. We believe such opponent-driven secrecy clauses are restrictions on the lawyer’s right to practice in violation of Rule 5.6(b).

Other Ethics Committees have come to similar results. In Opinion 2012-1 of the Ethics Committee of the Bar Association of San Francisco, the Committee concluded that Rule 1-500 prohibits defense counsel from demanding, and attorneys from agreeing to terms in a settlement agreement that would prohibit attorneys from referencing in their resumes, websites or other advertising materials, public information regarding the fact they have worked on a particular type of case against a specific defendant.

The Committee also held that the same rule prohibits an agreement that forbids attorneys from disclosing that they have experience in a specific area of the law, regardless of whether that information is otherwise public. The Committee reasoned that “[p]rohibiting an attorney from disclosing public information regarding the attorney’s handling of a particular type of case against the settling defendant is an impermissible restriction on the attorney’s right to practice and deprives legal consumers of information important to their evaluation of the competence and qualifications of potential counsel.”

In Opinion 730 of the New York State Bar Association, the Committee on Professional Ethics opined that broad confidentiality terms of a settlement agreement may violate its rule against agreements that restrict the right of a lawyer to practice law “if their practical effect is to restrict the lawyer from undertaking future representations.” The Opinion concluded that a settlement agreement in an employment matter cannot be conditioned on a provision that the attorney representing the plaintiff agree *not* to disclose any information concerning 1) any matters relating directly *or indirectly* to the settlement agreement or its terms; 2) the business or operations of

the defendant corporation and 3) the termination of the client’s employment with the defendant corporation.

While the Committee did not object to narrow confidentiality regarding settlement *terms*, the Opinion concluded that any provision that may apply to public information would restrict the lawyer’s right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence but was nevertheless covered by the settlement terms. The Committee concluded: “A settlement proposal 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.” See also Colorado Formal Opinion 92 (June 19, 1993) (test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation; provision prohibiting a lawyer from subpoenaing certain records or fact witnesses in future actions prohibited).

#### **(2) Prohibition against restricting the use of case information**

Another way in which the above principles operate to prohibit confidentiality clauses broader than simply the terms of the settlement, is the substantial body of law regarding restrictions on an attorney’s use of case information in future cases. Courts have found that attorneys cannot be prevented from using information that they obtained in a prior case, even if some of that information derives from confidential documents.

For example, in one case, *Hu-Friedy Mfg. Co., Inc. v. General Electric Co.*, 1999 U.S. Dist. LEXIS 11213 (N.D. Ill. 1999), defendant Company brought a motion to enforce a protective order from a related case. The plaintiff was represented by the



same counsel in both cases and the court had entered a protective order in the prior case that provided: "All confidential materials shall be used and disclosed solely for purposes of the preparation and trial of this case and shall not be used or disclosed for any other purpose."

Notwithstanding this language, the court held that the plaintiff's counsel should not be precluded from seeking in discovery and using in the subsequent case the same documents that were deemed confidential information in the prior case. The court reasoned that there was no evidence that the allegations in the subsequent case were premised on the confidential information previously produced. The company also conceded that the discovery requests were broad and that any reasonably competent lawyer would have requested the same categories of documents as those requested by plaintiff's counsel in that case. The court concluded that "GE's argument turns any protective order barring future use of confidential information that is independently relevant and discoverable in a subsequent action into a restriction on an attorney's right to practice law." (*Id.* at \*7.)

Numerous ethics opinions have come to the same conclusion. See, e.g., ABA Formal Ethics Opinion 00-417 ("An agreement not to use information learned during the representation would effectively restrict the lawyer's right to practice and hence would violate Rule 5.6(b)); Tennessee Formal Ethics Opinion 98-F-141 (same).

### (3) Public's right to access of judicial documents

In *EEOC v. The Erection Co., Inc.*, 900 F.2d 168 (9th Cir. 1990), the Ninth

Circuit reversed a trial court's granting of a motion to seal a consent decree that was sought as a result of a settlement agreement. The court remanded, requesting that the district court note its reasoning and findings so that review of its order could be based on the articulated reasons. (*Id.* at 170.)

Dissenting, Judge Reinhardt stated that he believed the Order should be reversed based on the record before the panel. Both the panel opinion and the dissent cited *Valley Broadcasting v. United States District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986), in which the court discussed the strong presumption in favor of public access to judicial documents. The court held that when access to judicial documents is denied, a court must articulate the factual basis for the denial without relying on hypothesis or conjecture. Judge Reinhardt also pointed out that the public has a right to know how the EEOC as a federal agency "is carrying out its mandate to protect civil rights, and whether it is obtaining appropriate remedies when the law is violated." (See also *FTC v. Standard Financial Managements Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party; in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of citizenry to appraise the judicial branch."). "Similarly," he wrote, "the public has a right to know whether the courts are properly resolving discrimination claims." (See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)

(noting that civil cases frequently involve issues crucial to the public such as discrimination claims, and the remedies and penalties "imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court.")

So next time you are presented by provisions in a settlement agreement that purport to (1) make confidential facts beyond the terms of the agreement; (2) make restrictions on the attorney's right to mention the case on her website or other public materials; (3) prevent the attorney from representing other clients against the same defendant or seeking discovery of protected documents in any subsequent lawsuit; or (4) make confidential judicial documents that are not otherwise subject to any privilege or protection, you should push back. It not only may benefit you, but it advances the cause of all consumer attorneys and the general public's right to know.



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