Provisions that should be prohibited in settlement agreements

Plaintiffs' attorneys have an ethical obligation to protect the civil justice system by opposing confidentiality, non-disparagement and non-participation clauses in settlement agreements

By James C. Sturdevant

The impetus for this article is a series of proposed settlement agreements presented to me as plaintiff's counsel in the past several years in cases ranging from duplicate accounts at Wells Fargo Bank to employment discrimination and identity theft involving credit card companies. In all these cases, defendants routinely drafted and proposed provisions in settlement agreements which included confidentiality provisions amounting to gag orders, non-disparagement clauses, non-participation in other litigation clauses and extremely broad releases.

Attorneys who represent plaintiffs in civil litigation need reminders about their rights and obligations to their clients and to the civil justice system generally. The clauses in general are attempts to muzzle the client, her family friends and attorneys, and to deny plaintiffs their essential First Amendment rights to communicate public information to others or to speak badly of any defendant despite publicly available information filed in court or given in deposition. They require promises not to assist others in any way with providing relevant factual information regarding pending or proposed litigation against the same defendant and seek to force the release not simply of the claims asserted, but any others that could have been asserted whether related to the incident that triggered the litigation or otherwise. This article focuses on each of these no-no's.

Confidentiality clauses[1]

Confidentiality clauses that amount to gag orders are now routine. When I began practicing law in the early 1970's, they were unheard of. If a case was publicly filed, the settlement agreement did not contain a confidentiality clause, and the facts and allegations available publicly were fair game for the attorneys, the client and the press. No longer.

Confidentiality clauses do not simply seek to make secret between the parties the *amount* and other specific provisions of the settlement which is permissible. Instead, they seek to conceal from the public and the press voluntary disclosures of relevant evidence to other litigants and prohibit a settling plaintiff from further disclosure of the allegations in the pleadings filed in public courts. Under two provisions of the Model Rules for Professional Conduct – Rules 3.4(f) and 5.6(b) – these attempts are prohibited. Plaintiffs' attorneys have an *ethical* duty not to agree to them.[2]

Rule 3.4(f) of the Model Rules prohibits an attorney from requesting that any person, except an attorney's client or the client's relatives or employees, refrain from providing relevant information voluntarily to another individual.[3] In the context of settlement agreements, then, a defense lawyer may not ethically request that a plaintiff refrain from disclosing or providing potentially relevant information to another person. The Rule's rationale begins with the recognition that ex parte witness interviews are essential to the effective and efficient operation of the civil justice system. Percipient witnesses do not belong to either party.

A defense attorney who attempts to interdict the ability of other individuals and parties to interview and communicate with individuals with relevant knowledge of facts and circumstances constitutes unfair interference with the "truth-seeking" function of our adversarial justice system. Courts have long recognized the value of

witness interviews conducted in private. They are crucial to securing an unvarnished version of the facts free of the intimidation created by the presence of opposing counsel and his/her client.

Because of heightened pleading requirements imposed by the United States Supreme Court in at least three cases,[4] many civil cases are now vulnerable to dismissal prior to any formal discovery. Complaints filed in or removed to federal court must allege sufficient specific facts to make the claim "plausible." Otherwise, those complaints are dismissed. While pleading standards are much more relaxed in California state courts,[5] a plaintiff must plead sufficient facts to state a valid cause of action based on the information she has through access to documents and other relevant information available to her client or publicly available.

When defense counsel proposes a settlement provision that would bar the plaintiff from voluntarily providing relevant factual information to others with claims against the same defendant or related entities, defense counsel is acting in derogation of Rule 3.4. Settlement agreements are not exempt from the rule's requirements. Indeed, merely requesting that a plaintiff conceal or withhold information from others suing or planning to sue the defendant is unethical. It is tantamount to offering money in exchange for a binding promise that the plaintiff not make such disclosures. That is much worse.[6]

Even if there is an escape provision in the confidentiality clause which permits a plaintiff to respond to a subpoena, with or without contemporary notice to defense counsel, that, in and of itself, unduly restricts a plaintiff's option to provide relevant information voluntarily. Blanket confidentiality provisions which prohibit any discussion or identification of the underlying facts – and make no exception for disclosures of relevant information to other litigants or individuals proposing to file suit – violate the Rule as well. Given the Rule's purposes and breadth, the word "party" should be construed broadly, to encompass any individual with a proposed, current or future claim against the defendant or related entity. The ABA's ethics committee has given broad meaning to the word "party." It would be nonsensical to interpret Rule 3.4(f) in any way that would permit or incentivize defense attorneys to conceal relevant information from individuals with potential claims in order to impede or prevent them from filing suit.[7]

Defense counsel may properly insist in the settlement agreement that a former employee who had possession of protected or privileged information agree not to disclose it. This includes legitimate trade secrets, if narrowly defined.[8]

Confidentiality clauses in settlements frequently violate both of the rules named above. Those rules prohibit attorneys from requesting that *any* person refrain from voluntarily providing relevant information to other individuals with similar claims against the same defendant or to negotiate settlements that interfere, or attempt to interfere, with an attorney's right to practice law.

Rule 5.6[b] and the right to practice law

Finally, Rule 5.6(b) prohibits attorneys from participating in any settlement agreement which restricts an attorney's right to practice law. It clearly bars provisions which expressly prohibit a plaintiff's attorney from suing the same defendant again. But it has been, and should continue to be, interpreted to cover settlements which have the *indirect* effect of rendering an attorney's services unavailable to others who wish to pursue identical or similar claims. As an example, a provision in a settlement agreement which prohibits a plaintiff's attorney from using any information obtained during the case has been found to violate the rule. Such a promise would interfere with the attorney's ability to provide effective representation to others suing or proposing to sue the same defendant.[9]

Another recent opinion takes the point one step further. It concludes that it is unethical to enter into a settlement agreement that would require confidentiality for *any* of the *public* facts of a lawsuit. These include the allegations in the complaint, the identity of the defendant and other involved parties and entities and any other facts set forth in non-sealed papers and filings.[10]

In its Opinion, the Committee reasoned that a broad reading of the rule was required by its purpose and intent, which is to enhance public access to legal representation, and enable potential clients to obtain the information required to locate the right attorney with the right skills and experience to handle the case. The Committee emphasized:

> We believe that the purpose and effect of the proposed [secret settlement] condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer's ability to bring such an action, even against the same defendant if he is retained to do so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.

Client may insist on attorney's silence

A client may always insist that her attorney refrain from disclosing even publicly available information about a case, but a defendant may not make that request or condition a settlement agreement on it. "Gag orders" which bar the plaintiff

and/or her counsel from disclosing to the public or other attorneys the facts of the case they have litigated are pernicious on several levels. They not only permit defendants to conceal relevant evidence from others who may have valid, similar claims, but they also undermine efforts to preserve and protect the civil justice system in the face of ongoing "tort reform" propaganda and misinformation which relies on providing misleading or outright untrue facts of lawsuits to make them seem ridiculous. The "hot coffee case" filed and tried against McDonalds decades ago is but one example.

An argument could be made to limit the scope of disclosure under Rule 3.4(f) concerning discovery materials acquired during the course of the lawsuit. Although protective orders which prohibit the further dissemination of discovery materials do not violate a litigant's First Amendment rights, the Supreme Court reasoned that a party's access to those materials exists only by virtue of the court's discovery processes, and limitations on the use of the information may be imposed as a quid pro quo for access.[11]

"Rule 3.4(f), however, is not about the plaintiff's ownership of information or interest in disseminating it. Its purpose is to forbid adversarial interference with *other parties'* access to relevant information. . . . In the absence of a court-approved protective order, neither the text nor objectives of Rule 3.4(f) provides a basis for exempting information learned in discovery from the rule's requirement that a party's lawyer not interfere with an adversary's ability to seek relevant information from a person who has it."[12]

Non-disparagement clauses

Non-disparagement clauses are another unethical provision. Such a clause prohibits a plaintiff and her attorney from saying anything negative about the defendant and related entities in the future. Such statements may have to do with conduct which gave rise to the lawsuit that is being settled or conduct or statements which is unrelated. Such clauses interfere with First Amendment rights and seek to impose a "gag order" above and beyond any confidentiality clause.

These clauses are becoming more prevalent among defense counsel and need to be resisted, not only because they are unethical, but because they also impact the civil justice system and seek to conceal pivotal and relevant information from the public, including the press. By settling an existing lawsuit, a plaintiff does not, and cannot be asked to, surrender her First Amendment rights to make any statements about the defendant. The only governor on those statements is a potential action for defamation, but such actions are very difficult to win.

Non-participation in other lawsuits

Another provision that is gaining favor with defendants and their counsel is one that requires a plaintiff to agree not to participate in other pending or proposed litigation. Some of these provisions are cabined by language such as "unless a subpoena is issued" and that a plaintiff must give contemporaneous notice to defense counsel. Once again, these provisions adversely impact First Amendment rights with the goal of concealing relevant information from others with pending or proposed lawsuits. No defendant has a right to insist upon such a provision and one can strongly argue that it is antithetical to a functioning adversarial system in which the sharing of relevant information furthers the objective of truth.

To a great extent, such a request tramples on an attorney's role as an "officer of the court," "with special responsibility for the quality of justice."[13] Model Rule 3.4(f) provides that "[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party."[14] The rule has its roots in the influential and widely accepted formal ethics opinion issued by the American Bar Association in 1935.[15] "It rests on the idea that the fair and efficient functioning of the adversary system requires that litigants and their lawyers have an unfettered opportunity to seek information relevant to their claims, and that the decision whether to cooperate should be a voluntary one made by the witness. When lawyers try to obstruct voluntary cooperation, they are interfering with the proper functioning of the adversary system by making informal witness interviews, an essential tool of case preparation, unavailable to their adversaries, requiring them to resort to more costly and often less effective [and reliable] means of gathering evidence."[16]

With respect to the issue of a subpoena, there is no legal requirement that a settling plaintiff agree to give a settling defendant contemporaneous notice that one has been issued or served. By requesting the inclusion of such a provision, a defendant seeks to be kept informed of future developments to which he is not entitled absent agreement which has no legal basis. Every individual, including every party in litigation, has a right to participate to the maximum extent to provide relevant information about an incident or course of conduct. By settling a given case, a plaintiff does not forfeit her right to participate and it is unethical to request that she do so.

Scope of the release language

In drafting settlement agreements, defense counsel propose the broadest possible language. They frequently seek to release not only claims alleged and litigated in the case, but claims which *theoretically could have been* litigated as well. I do my best to push back against such a proposal since the negotiations and settlement sum are limited to the claims alleged. If defense counsel desire that a plaintiff waive her rights to unexpired claims that might have been brought, but weren't, the settlement sum should be increased in an amount sufficient to monetize the value of such claims. Of course, one's position has

to be consistent with the client's best interests and desires.

Even in cases venued and litigated outside California, it is frequently the case that defense counsel will propose, in addition to that broad language, the provision of California Civil Code section 1542. Section 1542 provides that a plaintiff shall release all claims, even ones *unknown to exist*. Here again, plaintiffs' counsel need to be vigilant that the scope of the release does not exceed the claims actually alleged and litigated. Defense counsel should not be permitted to cherry-pick provisions for state or federal law which are not germane to the contractual language or law of the state where the lawsuit is filed.

Responding to unethical settlement proposals

When a defense attorney demands that a settlement include language that would prohibit the plaintiff from sharing relevant factual information with other individuals or public agencies who are pursuing or investigating claims against the same defendant, or would prevent the plaintiff's attorney from disclosing public record factual information about the case to prospective clients, the lawyer is engaging in conduct which is prohibited by Model Rules 3.4(f) and/or 5.6. Model Rule 8.4(a) prohibits an attorney from knowingly assisting another to violate any rule.[17] Plaintiff's counsel should politely, but firmly, explain to the defense attorney why specific terms or language is unethical and hope, in this way, to convince him to withdraw the objectionable language.

It goes without saying that plaintiff's counsel should also fully advise her client and explain the legal background of her position. Most clients will readily agree unless there are unusual circumstances.

Conclusion

As the foregoing demonstrates, plaintiff's counsel is armed by Model Rules 3.4(f) and 5.6 with strong reasons to resist attempt and language proposed by defense counsel to impose unfair – and unethical – terms in a settlement agreement. In addition to protecting the client's rights, paying attention to the specific language in proposed settlement agreements is absolutely necessary to preserve and protect our increasingly fragile civil justice system.


Sturdevant

James C. Sturdevant is the principal of The Sturdevant Law Firm, Inc., *in San Rafael, California. He and his firm represent plaintiffs in class and individual actions involving consumer protection, financial services pricing and fraud, predatory lending and deposit banking, fraudulent mortgage practices, employment discrimination, wage and hour, disability discrimination, Title IX and other unlawful, unfair and fraudulent business acts and practice cases. He has been in practice for more than forty-five years.*

Endnotes:

1 In this section I have relied extensively on the excellent research and summary of the two pertinent Model Rules in the article by Patrick Malone and John Bauer, *When Secret Settlements are Unethical*, which appeared in the September, 2010 issue of *Trial,* published by the American Association of Justice.

2 The State Bar of California has recently adopted comparable versions of Model Rules 3.4(f) and 5.6 discussed below which will become effective November 1, 2018. They are available from the State Bar's website.

3 See Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics,* 87 Ore. L. Rev. 481 (2008) which explores in detail the principles underlying this provision of the Model Rules and how it applies to secret settlements. See also generally, *Symposium: The Future of Judicial Transparency, Secrecy in the Courts; At the Tipping Pont*, 53 Vill. L. Rev. 811 (2008)

4 *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, *on remand, Robins v. Spokeo, Inc.* (9th Cir. 2017) 867 F.3d 1108; *Ashcroft v. Iqbal* (2009) 556 U.S.662; *Bell Atlantic Corp. v. Twombly* (2007) 540 U.S. 544.

5 The pleading standard to survive demurrer in California courts is as follows: "the trial court examines the pleading to determine whether it alleges facts sufficient to state a cause of action under any legal theory, with the facts being assumed true for purposes of this inquiry." *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 904. Conclusory assertions are not facts that the court must accept as true at the pleading stage. *Serrano v. Priest,* 5 Cal.3d 584, 591 ("We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.")

6 In some circumstances, settlement agreements which prohibit voluntary disclosures to public agencies, law enforcement authorities, or other litigants may even be criminal, violating statutes which prohibit obstruction of justice, witness tampering or compounding. See Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical,* 31 Hofstra L. Rev. 1 (2002); John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing,* 55 S.C. L. Rev. 829, 835-37 (2004); Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?,* 30 Hofstra L. Rev. 783,793-95 (2002); Bauer, *supra,* note 2, at 573-79.

7 See ABA Comm. On Ethics and Prof. Responsibility, Formal Op. No. 93-396 (1995); Bauer, *supra* note 4, at 549-53.

8 See Bauer, *supra* note 4, at 560-63. Importantly, information about an employer's illegal or tortious conduct does not qualify as a trade secret. *Id*., at 562 and authorities cited.

9 See ABA Comm. On Ethics and Prof. Responsibility Formal Op. no. 00-417 (2000): N.Y. State Bar Asss'n Comm. On Prof. Ethics, Formal Op. No. 730; Colo. Bar Ethics Comm., Formal Ethics Op. No. 92 (1993).

10 D.C. Bar legal Ethics Comm. Op. No. 335 (2006), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion335.cfm. The New York State Bar Association's ethics committee has similarly concluded that the rule against practice restrictions is violated when a settlement agreement prohibits the disclosure of information about the defendant that is a matter of public record. N.Y. State Bar Ass'n Comm. On Prof. Ethics, Forma Op. No. 730 (2000).

11 See *Seattle Times v. Rhinehart* (1984) 467 U.W. 20, 32-33. The Court has given more stringent First Amendment protection to the dissemination of information obtained independently of the judicial process. See *Butterworth v. Smith* (1990) 494 U.S.624, 631-32 (holding that a state statute that was used to prohibit a grand jury witness from ever disclosing the facts about which he testified – information that he already possessed and did not learn about as a result of his participation in the grand jury process – was unconstitutional.)

12 Bauer, *supra* note 4, at 554-55 (emphasis in original) (footnote omitted).

13 Model Rules of Professional Conduct, preamble para. 1 (2008).

14 The *Restatement* recognizes this duty as well. See Restatement (Third of The Law Governing Lawyers § 116(4) (2000).

15 See ABA Comm. On Prof. Ethics and Grievances, Formal Op. No. 131 (1935), discussed in Bauer, supra, note 4, at 511-12.

16 Bauer, supra, note 4 at 507. The Bauer article contains addition information and authorities, at 507-09.

17 Rule 8.4(d) prohibits attorneys from engaging in "conduct that is prejudicial to the administration of justice." See Bauer, *supra*, note 4, at 569 n. 333 (discussing relevant ethics authorities).