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INFORMAL OPINION 2011 – 1

**Attorney's Obligations with regard to Settlement Agreements
with Confidentiality Provisions**

You regularly represent individuals in consumer protection matters, oftentimes representing multiple clients having similar claims against the same institutional defendants. You note that many defendants in these matters routinely require as a condition of settlement that your client(s) agree not to discuss (1) the terms of the settlement or (2) the facts and circumstances giving rise to their legal claim(s) (the "confidentiality provisions"). You have posed three questions for consideration:

1. Is an attorney ethically required to communicate to a client a settlement offer with the confidentiality provisions?
2. May an attorney ethically communicate to a client a settlement offer with the confidentiality provisions?
3. If the settlement agreement is not ethical, does the lawyer have a duty to report to an appropriate authority the conduct of the attorney who proffered the agreement, under Rule 8.3?

The committee begins the analysis by separating the confidentiality provisions into two pertinent parts: confidentiality as to (1) the settlement terms; and (2) the facts and circumstances giving rise to the client’s legal claims.

With regard to settlement terms, we opine that a lawyer must communicate a settlement offer to a client which includes a confidentiality provision regarding the terms of the settlement agreement itself. The committee is aware of no rule suggesting that settlement agreements with a confidentiality provision limited to the terms of the settlement are ethically impermissible.¹ Rule 1.2 requires that “a lawyer shall abide by a client’s decision whether to settle a matter.” A lawyer is required to promptly communicate a settlement offer to his client. *See* Rule 1.4 The client must make an informed decision whether to accept the terms of the settlement, including the confidentiality provision. Accordingly, with regard to confidentiality provisions concerning terms of a settlement, the answer to questions 1 and 2 are yes and 3 is not applicable.

We turn next to the second confidentiality provision which prohibits the plaintiff-client from discussing the facts and circumstances giving rise to his/her legal claim. A categorical yes/no response to the questions is not possible for the following reasons. In matters in litigation, Rule 3.4(6) provides, that a lawyer shall not: “[r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless: (A) The person is a relative or an employee or other agent of the client; and (B) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.” (emphasis added). In the context of the rule, which distinguishes between “person” and “party,” “another party” refers to a party to the litigation. Applying the rule to the facts posed, a defense lawyer may not request a “person,” including the plaintiff, to refrain from discussing relevant

¹ / The Committee considered and concluded that Rule 3.4(b) does not apply.

facts with other parties, which includes other plaintiffs and defendants to the litigation, as a condition to settling the litigation. S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993) (concluding that an attorney would violate South Carolina’s similar rule, 3.4(f), by proposing a settlement agreement conditioned on plaintiff not voluntarily testifying in pending consolidated cases in which plaintiff had been named as a witness). However, with regard to non-parties and settlement agreements pre-litigation, Rule 3.4(6) is not applicable in this instance.²

We now address question (3), limited to a potential violation of Rule 3.4(6) based upon the fact that an attorney offered a settlement agreement to a plaintiff in litigation which included a provision that the plaintiff shall not provide relevant information to other parties to the litigation. The duty to report arises when a lawyer “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. . . . Rule 8.3 (a) (emphasis added). The Rule does not require an attorney to report every violation of the Rules. See Official Commentary. The reporting obligation applies to violations which are “substantial” which is defined “by the seriousness of the possible offense....” Official Commentary.

² / We express no opinion whether a settlement agreement limiting a person’s ability to voluntarily cooperate with another present or potential litigant would be illegal, violate public policy or otherwise be unenforceable, or violate Rule 8.4(4), as these issues are beyond the scope of this request. Compare Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1 (2002) with Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyer’s Ethics*, 87 OR. L. REV. 481, 573 (2008).

While the committee offers this limited guidance, it declines to provide an opinion with regard to question (3) due to the limited facts presented.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
Wick R. Chambers, Chair