

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 512
February 23, 2004

CONFIDENTIALITY OF FACT AND AMOUNT OF SETTLEMENT
IN SETTLEMENT AGREEMENT

SUMMARY

A settlement agreement that is otherwise agreeable to the parties may contain a confidentiality clause that prohibits a lawyer from disclosing the fact and amount of the settlement to the lawyer's other current or future clients without violating the Rules of Professional Conduct, although the lawyer's duties to multiple clients in the same matter may limit such a clause.

AUTHORITIES CITED

Cal. Rules Prof. Conduct, Rule 1-500
Cal. Rules Prof. Conduct, Rule 3-110
Cal. Rules Prof. Conduct, Rule 3-510
Cal. State Bar Formal Opin. 1988-104
Los Angeles County Bar Assn., Formal Opin. 468
Los Angeles County Bar Assn., Formal Opin. 505
ABA Model Rule 5.6
ABA Formal Opin. 00-417
ABA Formal Opin. 95-394
ABA Formal Opin. 93-371
Anderson v. Eaton (1930) 211 Cal. 113
Calvert v. Stoner (1948) 33 Cal.2d 97
Cho v. Superior Court (1995) 39 Cal. App. 4th 113

Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1

Gilbert v. National Corp. for Housing Partnerships (1999) 71 Cal. App. 4th 1240

McPhearson v. The Michaels Company (2002) 96 Cal. App. 4th 843

People v. Davis (1957) 48 Cal.2d 241

Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d

1058

State Compensation Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644

Business and Professions Code section 6092.5(i)

Business and Professions Code section 6093

Evidence Code section 1119

Evidence Code section 1123

Evidence Code section 1152

Fed. R. Evid. 408

FACTS AND ISSUES PRESENTED

The parties to a lawsuit desire to settle. The defendant seeks to include in the settlement agreement a confidentiality clause that would prohibit disclosure of the fact and amount of the settlement by the plaintiff and his or her representatives, including lawyers. The plaintiff does not object to the confidentiality clause.

The Inquirer seeks the Committee's opinion whether it is permissible to require, as a condition of the settlement, a confidentiality clause that would prohibit the opposing party's lawyer from disclosing the fact and amount of the settlement to the lawyer's other present or future clients, and whether it is permissible for the lawyer to accept such restriction, under the Rules of Professional Conduct, specifically Rule 1-500. There is no pending litigation in which this issue is being adjudicated.

DISCUSSION

The Inquiry acknowledges that there is nothing improper about confidentiality provisions that are routinely bargained for in the course of settling contested actions. The Inquirer does not seek to challenge the right of parties to settle their cases by entering into confidentiality provisions that would prohibit the parties and their counsel from disclosing settlements to the media, trade journals, or the public in general. Therefore, this Inquiry does not implicate the on-going debate over whether confidential settlements in certain kinds of cases, e.g., involving defective products, should be prohibited as a matter of public policy, a debate which would be beyond the role of this Committee. Instead, the Inquirer questions whether a confidentiality clause that prohibits the opposing party's lawyer from disclosing the fact and amount of the settlement to his or her other current or future clients would violate Rule 1-500.¹

Rule 1-500(A) (Agreements Restricting a Member's Practice) states, in pertinent part:

“(A) A member shall not be 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.”

The express exceptions to the Rule, which include employment, shareholders', or partnership agreements among Bar members, an agreement to pay a member upon retirement, or an agreement authorized under Business and Professions Code Sections 6092.5, subdiv. (i), or 6093, are not applicable here.

The Discussion to Rule 1-500 states:

¹ The Committee recognizes that it will not be possible to keep the fact, and possibly the amount, of a settlement confidential in every lawsuit. Settlement terms ordinarily are not confidential when there are multiple parties on the same side in a lawsuit, especially when an attorney represents more than one client in the suit. Similarly, the fact and amount of the settlement will not be confidential when the settlement requires notice to a class or court approval.

“Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited.”

In California, a strong public policy favors the settlement of lawsuits, and maintaining the confidentiality of settlement terms is recognized as a valuable tool in facilitating settlements. *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 124; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal. App. 3d 1058, 1076-77. Thus, for example, in Chapter 3 of the Evidence Code (“Other Evidence Affected or Excluded by Extrinsic Policies”), section 1152 provides that offers to compromise, as well as any statements or conduct made in negotiation thereof, are not admissible to prove liability. The policy is similar under federal law. *See*, Fed. R. Evid. 408. Furthermore, Evid. C. section 1119 provides that settlement communications during a mediation shall remain confidential, and Evid. C. section 1123 states that a settlement agreement prepared pursuant to a mediation may be disclosed only if one of several conditions are met, including agreement by all of the parties. *See generally, Foxgate Homeowners’ Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal. 4th 1, 14 (“confidentiality is essential to effective mediation”). Whether or not a settlement agreement contains an express confidentiality clause, the settlement of most lawsuits is a private arrangement between the parties, and the terms usually are not filed with or disclosed to the Court and do not become part of the public record. The practice of permitting the parties to settle their dispute in private, and to maintain the confidentiality of the terms, also recognizes that parties may settle to avoid the uncertainty and expense of litigation, without admitting liability, and that exposure would likely deter such settlements by implying guilt.

The law draws a distinction between settlement agreements that impose confidentiality on the terms of the settlement, and agreements that would directly restrict a lawyer from representing other clients in violation of Rule 1-500(A). This Committee opined in L. A. County Bar Association Formal Opinion 468 (January 1993) that a settlement agreement in which the settling defendants’

attorneys would have agreed not to represent other non-settling defendants against the plaintiff was barred by the Rule. It made no difference that it was the plaintiff who had proposed the restriction, or that the restriction would apply to the same litigation and not a future lawsuit. The opinion expressly noted, however, that it did not address the question “whether an attorney may participate in a settlement agreement containing confidentiality provisions precluding the attorney from disclosing information obtained during the settlement negotiations.” *See*, Opinion 468 fn. 1. The Committee relied in part on Formal Opinion 1988-104 by the Standing Committee on Professional Responsibility and Conduct (COPRAC) construing the predecessor to Rule 1-500(A), Rule 2-109, which we found was substantially similar. In Opinion 1988-104, COPRAC opined that a settlement agreement prepared by the defendant’s attorney that would have precluded the 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. Both the plaintiff’s and the defendant’s attorneys were prohibited from offering or accepting such a provision as a condition of settlement. *Id.*

A similar prohibition is contained in the American Bar Association Model Rules of Professional Conduct, and has been affirmed in ABA Formal Opinions. Though not binding in California, the Model Rules may provide guidance when there is no California rule directly applicable. *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644, 655-56. ABA Model Rule 5.6 provides: “A lawyer shall not participate in offering or making: . . . (b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” *See also*, ABA Formal Opinion 93-371 (lawyer may not offer, and opposing counsel may not accept, settlement agreement obligating latter to limit representation of present or future clients); ABA Formal Opinion 95-394 (improper for government lawyer to condition settlement on opposing lawyer’s agreement not to represent others against same agency).

A different conclusion is reached when the settlement agreement merely restricts disclosure of the settlement terms. We are not aware of any California authority directly on point, but ABA Formal Opinion 00-417 is instructive. The ABA ethics committee was asked whether a lawyer may agree to a proposal that settlement be conditioned on his “not *using* any of the information learned during the current representation in any future representation against the same opposing party.” (Emphasis added.) Though the proposed settlement would be favorable to the lawyer’s client, the ABA committee noted that the lawyer’s duty to represent his client’s interests diligently and to abide by the client’s instructions conflicted with the lawyer’s duty not to agree to a limitation on his right to represent other clients. It concluded that the proposed limitation on the “use” of any information learned during the representation, while not a direct ban, would “[a]s a practical matter, . . . effectively bar the lawyer from future representation because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation.” *Id.* The prohibition against using all such information was a restriction upon the lawyer’s right to practice. The present Inquiry focuses on a similar perceived tension between confidentiality and the right to represent future clients.

In reaching its conclusion in Formal Opinion 00-417, however, the ABA committee drew a key distinction between a ban on *using* information learned during the lawsuit, and a settlement agreement that merely prohibited *disclosure* of the terms of the settlement:

“On the other hand, it is generally accepted that offering or agreeing to a bar on the lawyer’s disclosure of particular information is not a violation of the Rule 5.6(b) proscription. For example, Rule 5.6(b) does not proscribe a lawyer from agreeing *not to reveal* information about the facts of the particular matter or the terms of its settlement. . . . A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the

representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the *use of information* relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision." *Id.* (Emphasis in original.)

Therefore, the settlement agreement that is the subject of the Inquiry is distinguishable from the settlement in ABA Formal Opinion 00-417 because it would prohibit the plaintiff's lawyer from revealing the terms of the settlement, but would not ban the lawyer's use of information from the case in future representations.

In California, the client, not the lawyer, ultimately controls the terms of any settlement. *People v. Davis* (1957) 48 Cal.2d 241, 256-57, citing *Anderson v. Eaton* (1930) 211 Cal. 113, 116. Thus, under Rule 3-510 of the Rules of Professional Conduct, the lawyer has a duty promptly to communicate all written settlement offers and all significant oral settlement offers to the client. The Supreme Court long ago held that authority to settle a case resides exclusively with the client. Any agreement that prohibits the client from settling the action without the lawyer's consent is against public policy and void. *Calvert v. Stoner* (1948) 33 Cal.2d 97, 103. A confidentiality clause that merely prohibits disclosure of the fact and amount of the settlement does not constitute a restriction on the right to practice law, and therefore does not create any conflict between the lawyer's duty to represent his or her client competently under Rule 3-110 by facilitating a favorable settlement, and his or her duty to avoid restrictions on the right to practice under Rule 1-500(A).

Although not expressly articulated, implicit in the Inquiry is the notion that imposing confidentiality on the lawyer also may create a conflict of interest between the client whose case is being settled, and the lawyer's other current or potential future clients who have an interest in making similar claims against the same opposing party. Information regarding the settlement

arguably would be material to the latter's claims. However, this argument misconstrues the lawyer's obligation, and would create a conflict where none exists. If the lawyer's obligation not to reveal the terms of the settlement were deemed to create a conflict of interest, it would not be cured by obtaining the informed written consent of both clients because the attorney would still be bound by the confidentiality clause. Furthermore, in this hypothetical example, any supposed conflict between the duties owed to different clients would arise from the confidential settlement itself, and would not depend on whether the confidentiality clause applies to the lawyer. In fact, it would undermine the public policy favoring settlements if every confidential settlement were deemed to create a conflict of interest with a prospective client possessing a claim against the same opposing party.

We are aware of no reported California cases addressing confidentiality clauses that apply to attorneys. Moreover, the courts that have considered the effect of confidential settlements on a lawyer's ethical duties are divided. In *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal. App. 4th 1240, the court affirmed the disqualification of the plaintiff's attorney after he sought to offer testimony by a former client who had settled a similar case against the same defendant. The previous settlement agreement contained a confidentiality clause binding on the parties, but not the lawyer, and a penalty clause under which the plaintiff would forfeit her settlement if the confidentiality clause were breached. The court held that the lawyer had a conflict of interest because his former client risked forfeiting her settlement if she testified in support of his current client's case. *Id.* at 1252-54. The court noted there was no evidence that the lawyer had obtained informed written consents from his clients. *Id.* at 1255.

The *Gilbert* decision was criticized in *McPhearson v. The Michaels Company* (2002) 96 Cal. App. 4th 843, which reversed a disqualification. *McPhearson* also considered a situation in which a plaintiff's attorney sought to introduce evidence concerning a previous lawsuit against the same defendant. As in *Gilbert*, the confidentiality clause in the previous settlement agreement applied to the terms of the settlement only, and did not bind the lawyer. The court held that the confidentiality

clause could not preclude the former client from testifying as a percipient witness to events concerning the current client, and that the “perceived conflict is more apparent than real.” *Id.* at 848. Also, both clients had filed written waivers of the conflict. *Id.* at 850.

The argument that a confidentiality clause is impermissible because it would give rise to a conflict of interest may simply mask the attorney’s self-interest in advertising his success. However, the lawyer’s duty of undivided loyalty obligates the lawyer not to put his or her own personal interest in revealing the terms of a favorable settlement above the client’s interest in maintaining the confidentiality of the settlement. This Committee opined in Formal Opinion 505 (August 2000) that an attorney may include terms in an engagement agreement that are intended to induce the client not to accept a confidentiality clause in any settlement agreement, by reducing his normal fee, but only so long as the client retains the ability to settle the case without the lawyer’s consent and without the imposition of any penalty that would constitute an unconscionable fee. We saw no reason to question the existence of confidentiality clauses in settlement agreements then, and do not believe that it would be unethical for an attorney to agree to the confidentiality clause described in the Inquiry.

CONCLUSION

A settlement agreement that prohibits a lawyer from disclosing the fact or amount of the settlement does not violate the Rules of Professional Conduct, and specifically, Rule 1-500(A).

This opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the Inquiry submitted.