

# Rule 5.6(2) and Confidentiality Agreements



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The Committee has been asked whether confidentiality agreements between parties that restrict the parties' lawyers from disclosing information that is publicly available in court files violate Rule 5.6(2) of our Rules of Professional Con-

duct because such agreements restrict "the lawyer's right to practice." For the reasons that follow, the Committee declines to opine that such confidentiality agreements violate Rule 5.6(2).

Rule 5.6(2) provides, in relevant part:

A lawyer shall not participate in offering or making:

\* \* \*

(2) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

The official commentary to Rule 5.6(2) states, in relevant part: "Subdivision (2) prohibits a lawyer from agreeing not

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to represent another person in connection with settling a claim on behalf of a client.”

Nothing in the Rule or the official commentary suggests that a confidentiality agreement restricting the disclosure of information was intended to fall within the prohibition set forth in Rule 5.6(2).

**“In general, however, you are required by Rule 1.6 to maintain confidentiality of all information relating to the representation of your client except as authorized by the client or as required by the Rules of Professional Conduct.”**

The requesting lawyer notes that the Ohio Board of Professional Conduct concluded in a recent opinion that confidentiality agreements that purport to restrict disclosure by one or more parties’ attorneys of information that is available in a public court file violate Rule 5.6(b) because they restricts the lawyers’ right to practice law.<sup>1</sup> Ohio Bd. of Prof’l Conduct Op. 2018-3. The Ohio Board observed that such confidentiality agreements “interfere with a lawyer’s ability to advertise and market his or her services ....” The opinion goes on to posit that “[t]he advertising of a lawyer’s services and the solicitation of clients is an integral part of the practice of law and may not be restricted through a private settlement agreement.” The Ohio Board concluded that when a lawyer’s client intends to enter into a confidentiality agreement restricting a lawyer from disclosing information available in a public court file, the lawyer must explain to the client that it would be unethical for the lawyer for either party to participate in negotiating or drafting such an agreement. If the client proceeds regardless, the lawyer must withdraw from representing his or her client in connection

with the agreement. The Ohio Board also recommended that its opinion “be applied prospectively.”

The Committee respectfully disagrees with the Ohio Board’s conclusions and similar conclusions of a number of ethics bodies. *See, e.g.*, Chicago Bar Ass’n Comm. On Prof’l Responsibility, In-

formal Ethics Op. 2012-10 (2013); Bar Ass’n of San Francisco Ethics Comm., Op. 2012-1 (2012); N. H. Bar Ass’n Ethics Comm. Op. 2009-10/6 (2011). As explained below, confidentiality agreements that merely restrict the *disclosure* of information by the clients’ lawyers do nothing more than ratify confidentiality obligations lawyers already have to their respective clients and former clients under Rules 1.6 and 1.9. Such agreements generally do not impermissibly restrict the lawyer’s right to practice under Rule 5.6(2) because they do not impinge upon the lawyer’s freedom to represent other clients. Such confidentiality agreements neither expressly restrict a lawyer’s ability to represent other clients, nor do they implicitly restrict the ability to represent other clients by, for example, restricting a lawyer’s *use of* (as opposed to *disclosure of*) information. *See, e.g.*, Fla. Bar Ethics Op. 04-2 (2005) (“To the extent this clause is merely a confidentiality agreement as to the terms of the settlement it does not pose an ethical problem, provided there is no legal prohibition against confidentiality of a particular settlement.”); Penn. Bar Ass’n Legal Ethics and Prof. Resp. Committee Formal Opinion 2016-300

(2016) (“Most ethics opinions conclude that negotiating for, agreeing to, and, ultimately, including a confidentiality provision precluding the dissemination of the fact of, or terms of, the agreement is not prohibited under the applicable Rules of Professional Conduct ... This is true primarily because a lawyer is obligated under Rule 1.6 of the ABA Model Rules of Professional Conduct and its state law counterparts to keep information relating to the representation of the client confidential unless the client gives informed consent.” (Citations omitted.)); N.Y. State Bar Ass’n Committee On Prof’l Ethics Opinion #730 (2000) (“The obligation to preserve the confidentiality of settlement terms does not effectively restrict the lawyer from representing other clients.... Since lawyers may not disclose confidential settlement terms without client consent, it is not an impermissible restriction on the right to practice law to require, as a condition of settlement, that the party’s lawyer will not disclose this information.”)

This Committee has addressed similar issues in the past. For example, in Informal Opinion 2011-08, the Committee concluded that confidentiality provisions in settlement agreements “do not prevent the lawyer from representing future clients having similar claims against the same [defendants].”<sup>2</sup>

More recently, in Informal Opinion 2013-10, the Committee concluded that a settlement agreement containing a non-disparagement clause prohibiting an attorney from making future disparaging statements about the opposing party did not violate Rule 5.6(2). There we noted: “So long as such clauses do not restrict the lawyer’s ability to vigorously represent other clients, they may validly restrict the attorney’s right to disparage the defendant outside of that sphere — such as for advertising or publicity purposes.” Here, we drew a clear distinction between restrictions on representing other clients (not permitted under Rule 5.6(2)) versus restricting advertising and publicity (permitted under Rule 5.6(2)).

Our prior decisions are in accord with the ABA's Standing Committee on Ethics and Professional Responsibility's Formal Opinion No. 00-417. There, the ABA Committee stated:

[I]t generally is accepted that offering or agreeing to a bar on the lawyer's disclosure of particular information is not a violation of 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. This information, after all, is information relating to the representation of the attorney's present client, protected initially by Rule 1.6 (Confidentiality of Information) and, after conclusion of the representation, by Rule 1.9(c) (Conflict of Interest: Former Client). With respect to former clients, a lawyer may reveal information relating to the representation only with client consent or in certain limited circumstances not relevant here. 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.<sup>3</sup>

In other words, confidentiality agreements, including those that restrict a lawyer's disclosure of information contained in a public court file, have the same practical effect as if the parties agreed not to provide their respective lawyers with consent to disclose information about their matters pursuant to Rule 1.6 (or 1.9). The Committee sees no reason to deprive willing clients wishing to engage in such a lawful arrangement of representation by the clients' chosen

counsel, especially when nothing in the text of Rule 5.6(2) or its commentary suggests such a prohibition.<sup>4</sup>

Rule 1.6 provides that lawyers have an obligation not to "reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d)" (none of which subsections apply in this circumstance). Rule 1.9 extends the same confidentiality obligations to information about a lawyer's former clients. Except as noted, therefore, it is up to the client or former client to determine whether and how a lawyer may disclose information related to a lawyer's representation of the client, regardless of whether the information is public or non-public. Rule 5.6(2) has, in this State, never been interpreted to override a client or former client's wish to keep information the lawyer possesses confidential. Yet, that is the practical effect of the Ohio Board's opinion and those similar to it. Clients are told by their lawyers "if you want me or any lawyer to represent you in negotiating this settlement agreement, you cannot include a confidentiality agreement that restricts my right to use public information about your matter in my advertising." The Committee does not believe Rule 5.6(2) was ever intended to dictate such a result.

Further, the Ohio Board's opinion does not, to this Committee's satisfaction, explain why the supposed prohibition in Rule 5.6(2) applies only to information in a public court file and not also to non-public information. A confidentiality agreement that applies to non-public information restricts a lawyer's ability to advertise and market his or her services in the same way that a confidentiality agreement applying to public information does. Yet neither the Ohio Board nor any other authority has explained why confidentiality agreements that apply to non-public information do not violate 5.6(2), but agreements restricting disclosure of publicly filed information

somehow do. No rule of professional conduct distinguishes between public and non-public information. No rule's official commentary does so either. On the contrary, Rule 1.6 applies to "information relating to the representation" regardless of whether the information is public or non-public. See Informal Op. 05-01(2005) ("In general, however, you are required by Rule 1.6 to maintain confidentiality of *all* information relating to the representation of your client except as authorized by the client or as required by the Rules of Professional Conduct." (emphasis added)). The Committee declines to engage in line-drawing between public and non-public information that does not have a sound basis in the Rules of Professional Conduct.

The Committee's role is not to make the rules; it is to interpret the rules as written, informed by the official commentary adopted by the judges of the Superior Court. Accordingly, the Committee views the invitation to expand the reach of Rule 5.6(2) as more appropriately directed to the Superior Court Rules Committee.

## NOTES

1. In Ohio, the subsection at issue is Rule 5.6(b). In Connecticut, the same subsection is codified at Rule 5.6(2).
2. The Committee further noted that, pursuant to Rules 1.6(a) and 1.9(c), "a lawyer's desire to reveal confidential information obtained from past representations to pursue new matters is subject to the consent of the former client whom the lawyer represented." *Id.*
3. ABA model rule 5.6(b) is identical to Connecticut Rule 5.6(2). The respective rules' relevant official commentary is also identical.
4. An expanded view of the prohibition in Rule 5.6(2), such as set forth by the Ohio Board, would mean that lawyers could not participate in drafting settlement agreements with confidentiality agreements that restrict lawyers from disclosing information in public court files. This would, in the Committee's view, unreasonably deprive clients, who only wish to engage in a lawful pursuit of their interests, of the benefits of being represented by counsel.