Connecticut
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Professional Ethics Committee

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September 26, 2011

INFORMAL OPINION 2011- 08 Confidentiality Provisions In Settlement Agreements

The Committee's advice is requested on the question of the propriety of including two confidentiality provisions in an agreement settling a medical malpractice case. The inquiring lawyer claims that defense lawyers who have insisted on the inclusions of these clauses have violated Connecticut Rules of Professional Conduct 1.2(d), 3.4(6), 5.6(2), 8.4(2) and 8.4(4). The Committee 's purposes do not include evaluating the past conduct of lawyers. The Committee chief puipose is to offer advice to lawyers seeking to practice in conformity with the Connecticut Rules of Professional Conduct. The Committee will treat the inquiry as a request for advice on the propriety of the inclusion of the confidentiality clauses in settlements of medical malpractice cases.

Because the use of confidentiality clauses is of significant interest to lawyers representing plaintiffs and defendants in health care settings, the Committee has welcomed the comments and materials submitted by the inquiring attorney, the Connecticut Trial Lawyers Association, and by the Connecticut Defense Lawyers Association. The Committee also invited and has received comments from the Connecticut Department of Public Health on the effect of confidentiality clauses on the Department's regulatory responsibilities.

The confidentiality provisions are:

> "Releasors will not initiate contact with or authorize or encourage others to initiate contact with any state or federal administrative agency, including the State of Connecticut Department of Public Health, or any successor to these departments, or any agency, bureau, division of board thereof, with regard to this matter."

> "The plaintiffs and their attorneys further agree that they will not disparage the Defendants in any public form, nor publically discuss any of the services provided by the Defendants, or their agents, to the Plaintiffs."

Connecticut Rule of Professional Conduct 3.4(6) prohibits lawyers from requesting another person to agree to provisions that limit voluntary disclosures of factual claims to other persons who are parties in the proceeding, subject to exceptions:

> 3.4 Fairness to Opposing Party and Counsel A
> lawyer shall not:
> (6) request a person other than a client to refrain from
> voluntarily giving relevant information to another party unless:
> (1) the person is a relative or an employee of other agent of the client; and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

A lawyer should not request of an another person that a provision be included in a settlement that prevents that person from initiating contact with and volunteering relevant factual information to another party in the same case. Conn Bar Assoc. Informal Op. 2011-1. The first confidentiality provision does not violate Rule 3.4(6).

The second provision restricts the claimant and counsel in two ways. It prevents the claimant and counsel from publically disparaging the medical provider. Non-disparagement clauses are not uncommon and the first limitation does not suppress information which should be available to other parties in the litigation. The second limitation would prevent the claimant or counsel from publically discussing the services of the medical provider. Rule 3.4(6) does not prohibit a lawyer from making a request that these limitations be included in a settlement. This limitation could also be interpreted to prevent the claimant or counsel from testifying about the claimant's experience before a public body. Elsewhere, however, the settlement agreement exempts from its confidentiality provisions disclosures required by law. Because the meaning and application of this portion of the second limitation is not clear to us, and our role does not include interpreting contract language, we decline to offer an opinion on its propriety.

We are also asked to consider whether the use of confidentiality clauses prohibiting voluntary disclosures of factual claims of medical malpractice to health authorities is prejudicial to the administration of justice. The Committee has not issued any opinions construing Rule 8.4(4) in this context. The Comment to Rule 8.4 does not reference subsection (4).

Construing the Rule requires us to consider first the conduct of the lawyer, second the activities

constituting the administration of justice, and third, to consider the degree of prejudice to the justice function. *Cf., In Re Coggins,* 338 Ore. 480 (2005) [Code of Professional Responsibility provisions contains three elements.] The conduct in question is the conduct of the lawyer who offers or signs an agreement containing confidentiality clauses. The administration of justice is carried on by legal institutions empowered by law to wield jurisdiction over persons, to find facts, to apply law, and to issue orders that bind the parties before the institution. We assume that the Connecticut Department of Public Health in exercising statutory authority regulating medical providers engages in the administration of justice.

We next address the question of what sort of conduct may be prejudicial to the administration of justice. Many provisions of the Rules of Professional Conduct prohibit forms of conduct that have no other lawful purpose than that of subverting the administration of justice, *e.g.,* Connecticut Rules of Professional Conduct Rules 3.3, 3.4, 3.5, 3.6, and 3.8. The Rules do not contain a provision that speaks directly to confidentiality agreements generally prohibiting voluntary disclosures of relevant information to government agencies.

We are asked to look to general considerations of public policy for guidance in defining conduct prejudicial to the administration of justice in the context of the regulatory functions of the Department of Public Health. We are informed that though Connecticut law does not require patients to report incidents of malpractice to the Conn. Department of Public Health, any person may file a complaint with the Department. Conn. Gen. Stat. sec. 20-13 d(a). The legislature has required malpractice insurers or physicians to report malpractice claim settlements and judgments to the Dept. of Public Health. Conn. Gen Stat. 19a-17a. It follows that the legislature has determined that the Dept. of Public Health has an important interest in receiving information about medical malpractice settlements that may trigger regulatory action. The Connecticut Department of Public Health states that confidentiality clauses may have a "deleterious effect on the Department's ability to effectively conduct practitioner investigations in furtherance of the Department's responsibility to protect the public health and safety." The Department also states that confidentiality provisions may discourage a patient from discussing the services of the settling physician with the patient's attending physician who may be a mandated reporter under Conn. Gen. Stat. sec. 20-13(d), and thereby impede the Department's ability to protect the public health. The Department also states that health practitioners are

sometimes dismissed from malpractice cases prior to settlement to avoid the reporting requirement of Conn. Gen Stat. 19a-17a and in such cases the Department relies on reports from patients.

Other well-established public policies encourage parties to settle litigation, and courts have long enforced confidentiality clauses in settlements of essentially private matters that have little bearing on the pubic interest. *Perricone v. Perricone,* 292 Conn. 187 (2009). The Connecticut Supreme Court noted in *Perricone* that there might be public interests such as public health or safety which might outweigh the interests of individuals who wish to keep confidential the details of their dispute in order to reach a settlement. *Id.* at 220 citing *Equal Employment Commission* v. *Astra,* 94 F.3d 738, 744 (1st Cir. 1996) [confidentiality provision prohibiting employee from communicating with the EEOC violates public policy.]

The Committee is ill suited to declare public policy or to balance the interest in the effective regulation of medical providers against the interest in policies facilitating settlement of litigation. In this context we decline to offer an opinion on whether the use of the confidentiality agreements presented in this inquiry prejudices the administration of justice within the meaning Rule 8.4(4).

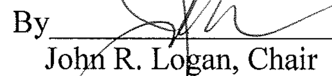
We are asked to consider whether the confidentiality provisions restrict or limit the claimant's lawyer right to practice in violation of Connecticut Rules of Professional Conduct 5.6(2). The confidentiality provisions do not prevent the lawyer from representing future clients having similar claims against the same healthcare providers. A lawyer must remain free to use information from previous representations in current matters as long as that use does not harm a former client. ABA Formal Opinion 00-417 (2000) [Lawyer should not agree to a settlement agreement that restricts use of information gathered in the matter on behalf of other clients]. 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. Connecticut Rules of Professional Conduct 1.6(a) and 1.9(c)

We have been asked to consider arguments calling upon us to interpret criminal statutes. The Committee believes that these arguments do not provide a sufficient basis for us to offer advice, and invite us to interpret law. We decline to go beyond the Rules of Professional Conduct. Accordingly, we have no basis for opining on the application of Connecticut Rules of Professional Conduct 1.2(d) or 8.4(2).

In summary, it is the Committee's opinion that Rule 3.4(6) permits lawyers to propose to an opposing party a settlement of a medical malpractice case containing a confidentiality provision only if the provision permits the claimant to voluntarily share relevant factual claims with other parties in the case, subject to the exceptions in subsection (1) and (2). The Committee declines to offer an opinion on the propriety of a confidentiality clause that prohibits a claimant from initiating a report to the Connecticut Department of Public Health.

Sept. 21,2011

THE COMMITTEE ON PROFESSIONAL ETHICS

By

John R. Logan, Chair