



Professional Ethics Committee

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INFORMAL OPINION 2013-10

PERMISSIBILITY OF NON-DISPARAGEMENT CLAUSES UNDER RULE 5.6(2)

According to your inquiry, you represent and advise homeowners facing foreclosure. Most of the cases you handle end in settlement. The defendants in these cases typically demand as a condition of settlement that the settlement agreements contain non-disparagement clauses that bind both the homeowner plaintiff and his or her counsel from making disparaging comments about the defendant mortgage lender or servicer.

The mortgage lenders or services demanding the non-disparagement clauses usually have a large volume of borrowers. Thus, you are likely to represent multiple current or future clients against the same defendant. You are concerned about the impact of agreeing to such non-disparagement clauses on your future representation of clients against the same defendants.

You ask whether a settlement agreement containing a non-disparagement clause prohibiting the attorney from future disparaging statements about the opposing party violates Rule 5.6(2) of Connecticut's Rules of Professional Conduct. Rule 5.6, entitled "Restrictions On Right To Practice," states 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 Committee concludes that non-disparagement clauses do not necessarily violate Rule 5.6(2). However, a clause that restricts an attorney's ability to represent other clients would violate Rule 5.6(2).

In Informal Opinion 2011-08, this Committee addressed the applicability of Rule 5.6(2) with respect to the inclusion of confidentiality clauses in settlements of medical malpractice cases. In that opinion, the Committee cited ABA Formal Opinion 00-417 (2000) for the proposition that a lawyer should not agree to a settlement that restricts his or her use of information gathered in one case on behalf of his or her other clients. A lawyer must remain free to use information from previous representations in current or future matters as long as that use is not detrimental to the former client, or if the information is not confidential. Also, the disclosure of confidential information requires client consent.

Accordingly, a non-disparagement clause may not restrict a lawyer's use of information gained in one case in another case and cannot bar a lawyer from accusing the defendant of wrongdoing in that other litigation. For example, if a non-disparagement agreement that restricts a lawyer from drafting a complaint for another client against the same defendant that accused the defendant of wrong-doing, such a clause would clearly violate Rule 5.6(2).

However, non-disparagement clauses can be drafted in such a manner so as to not violate Rule 5.6(2). 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.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
John R. Logan, Chair