THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 708
May 2025

QUESTIONS PRESENTED

1. May a Texas lawyer agree to be bound by a non-disparagement clause in a client settlement agreement?

2. May a Texas lawyer agree to be bound by a non-disclosure clause in a client settlement agreement, whereby the lawyer agrees not to reveal confidential information related to the representation for marketing purposes?

STATEMENT OF FACTS

A lawyer represents a plaintiff in a personal injury lawsuit. The defendant makes a settlement demand that requires both the plaintiff and the plaintiff's lawyer to agree to a broad non-disparagement clause regarding the defendant. The settlement demand also requires the plaintiff's lawyer to agree not to reveal confidential information related to the representation for the lawyer's marketing purposes, such as the facts of the matter and the terms of the settlement. The restriction would expressly prohibit disclosure of any such information on the lawyer's website, social media accounts, or advertisements.

The plaintiff wishes to accept the settlement demand.

DISCUSSION

Rule 5.06(b) of the Texas Disciplinary Rules of Professional Conduct says that a "lawyer shall not participate in offering or making … an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy … ." Comment 2 explains that Rule 5.06(b) "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." But Rule 5.06(b) is not limited to explicit agreements not to represent or sue a particular party; it applies to any "restriction on the lawyer's right to practice" as part of a settlement. This is a broad concept that extends to virtually all aspects of the practice of law and excludes only restrictions that already appear in the Rules.

For example, Texas Professional Ethics Committee Opinion 505 (Aug. 1994) applied Rule 5.06(b) to a settlement agreement that would have required the plaintiff's lawyer not to solicit clients in future cases involving the defendant and not to share fees in such cases. In discussing whether the agreement would violate Rule 5.06(b), the Committee said the "key issue is whether or not a settlement agreement … would in any way prevent a lawyer from representing another person." The Committee observed the intent of the proposed clauses was "to limit an attorney from representing a client similarly situated in a matter against the opposing party." Applying Rule 5.06(b), the Committee first noted that "solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement than it is restricted in the Rules and applicable law." The Committee concluded that an agreement not to solicit clients for future cases against the same defendant would exceed the current limitations on solicitation provided by the Rules and would restrict a lawyer's right to practice in violation of Rule 5.06(b). The Committee similarly noted that fee sharing is part of the practice of law and is also "somewhat regulated." It therefore concluded that, "[t]o the extent that fee sharing is not in violation of the applicable laws and rules, such cannot be further limited by settlement agreements."

Thus, in analyzing whether a lawyer may agree to be bound by a provision in a client's settlement agreement, the dispositive question is whether the provision in any way restricts the practice of law beyond the existing restrictions in the Rules.

1. A Texas lawyer may not agree to be bound by a non-disparagement clause in a client settlement agreement.

Generally, a non-disparagement clause is a "contractual provision prohibiting the parties from publicly communicating anything negative about each other." BLACK'S LAW DICTIONARY 305 (10th ed. 2014); *see also KLN Steel Products Co., Ltd. v. CNA Ins. Companies,* 278 S.W.3d 429, 438 (Tex. App.—San Antonio 2008, pet. denied) (relying on dictionary definition when interpreting non-disparagement clause; noting "disparage" means "to lower in rank or reputation; DEGRADE" or "speak slightingly about") (citing Merriam-Webster's Collegiate Dictionary 360 (11th ed. 2003)).

Using this broad definition, the Committee is of the opinion that a lawyer may not agree to be personally bound by a non-disparagement clause in a client settlement agreement that applies to statements the lawyer might make in the course of

practicing law. A broad non-disparagement clause would effectively prohibit the lawyer from representing another client adverse to the same opposing party by preventing the lawyer from making allegations of misconduct by the opposing party. Likewise, a broad non-disparagement clause would restrict a lawyer's right to practice by limiting the lawyer's ability to consult freely with current or prospective clients about claims they may have against the opposing party. The American Bar Association's Standing Committee on Ethics and Professional Responsibility noted "a claimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000) ("Settlement Terms Limiting a Lawyer's Use of Information") (quoting Colo. Bar Ethics Comm. Op. No. 92 (1993)). We conclude the ABA's statement accurately describes the restriction imposed by Rule 5.06(b). A term in a client settlement agreement that forbids a lawyer from disparaging an opposing party is a restriction on the lawyer's ability to practice law that is prohibited by Rule 5.06(b).

Under Rule 5.06(b), therefore, a lawyer may not participate in offering or making a client settlement agreement under which a lawyer for one of the parties agrees to a general non-disparagement clause. We do not, however, suggest a lawyer may never be a party to a non-disparagement clause. If, for example, the clause does not restrict statements made within the lawyer's law practice, but only limits the lawyer's personal speech or conduct outside the practice of law, it would not violate Rule 5.06(b).

2. A Texas lawyer may agree to be bound by a provision in a client settlement agreement that prohibits the lawyer from revealing client confidential information for marketing purposes, so long as the provision does not prohibit communication of the lawyer's general experience.

Marketing, like solicitation, is part of the practice of law. *See* Opinion 505. A lawyer may not participate in offering or making a settlement agreement that restricts the lawyer's ability to reveal or use confidential information for marketing purposes beyond the limitations already found in the Rules and applicable law. A lawyer may, however, agree to a non-disclosure agreement that does not expand the existing restrictions on revealing confidential information.

A lawyer's ability to reveal or use information acquired during a representation is governed by Rules 1.05 and 1.09. Rule 1.05(b) provides that a lawyer shall not knowingly reveal "confidential information" of a current or former client, or use such information to the disadvantage of the client, without the client's consent after consultation or in other specified circumstances described in Rule 1.05. "Confidential information" comprises not only information subject to the attorney-client privilege but also unprivileged "information relating to a client or furnished by the client … acquired by the lawyer during the course of or by reason of the representation of the client." Rule 1.05(a). This definition is broad and, depending on the circumstances, may extend to information in public pleadings or that third parties can discover on their own. *See Phoenix Founders, Inc. v. Marshall,* 887 S.W.2d 831, 834 (Tex. 1994) ("virtually any information relating to a case should be considered confidential"); *In re Liebbe,* No. 12-19-00044-CV, 2019 WL 1416637, at *5 (Tex. App.—Tyler Mar. 29, 2019, no pet.) (finding that former client's marital status was "confidential information" under Rule 1.05 even though it could be discovered by a third party); *Sealed Party v. Sealed Party,* No. CIV.A. H-04-2229, 2006 WL 1207732, at *10–15 (S.D. Tex. May 4, 2006) (finding that the definition of "confidential information" in Rule 1.05 may extend to information available in public court pleadings); *see also* Opinion 595 (February 2010) (stating that client confidential information under Rule 1.05 includes information that a lawyer obtains from public records during representation of a former client).

Rule 1.09(c) addresses the use or disclosure of information relating to a former representation:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Thus, if no exception applies and the client has not consented, both Rules 1.05 and 1.09 already prohibit a lawyer from revealing information obtained during a representation. A contract that prohibits a lawyer from revealing such information for marketing purposes does not violate Rule 5.06(b) if the prohibition does not exceed

the existing scope of Rules 1.05 and 1.09. *See* ABA Formal Op. 00-417 (discussing ABA Model Rules 1.6 and 1.9 and noting "[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 … .").

On the other hand, a non-disclosure provision in a client settlement agreement violates Rule 5.06(b) if it extends to communication of the lawyer's general experience gained in handling the settled matter. The Rules do not prohibit lawyers from sharing their general experience and qualifications with prospective clients. *See* Rule 7.01, comment 10 (discussing what constitutes a misleading communication concerning a lawyer's experience); Rule 7.02(b) and comment 3 (providing that lawyer advertisements may communicate that the lawyer "does or does not practice in particular fields of law" and commenting that advertisements "must be objectively based on the lawyer's experience … ."). An agreement preventing the disclosure of a lawyer's general experience with certain types of matters or certain categories of clients or parties would undermine the purpose of Rule 5.06 by reducing the ability of prospective clients to select the lawyer best suited for their matter. *See* Rule 5.06, comment 1 (noting restrictions on right to practice "limit[] the freedom of clients to choose a lawyer"); Opinion 699 (Feb. 2024) (noting that Rule 5.06 promotes the client's right to choose counsel); ABA Formal Op. 00-417 (noting Model Rule 5.6 helps ensure "access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent" them); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371 (1993) ("Restrictions on the Right to Represent Clients in the Future") (discussing the rationale behind Model Rule 5.6, which is functionally identical to Rule 5.06). A settlement agreement that prohibits a lawyer from discussing the lawyer's general experience gained in the settled matter impermissibly restricts the lawyer's right to practice in violation of Rule 5.06(b).

CONCLUSION

A Texas lawyer may not participate in offering or making a client settlement agreement whose terms would impose greater restrictions on the lawyer's right to practice law than those imposed by the law and Rules. For this reason, a lawyer may not participate in offering or making a client settlement agreement that commits a settling party's lawyer not to disparage the opposing party within the context of the lawyer's practice.

A Texas lawyer may participate in offering or making a client settlement agreement that commits a settling party's lawyer not to reveal confidential information related to the matter for marketing purposes, provided the restriction applies only to confidential information that, under the Rules, a lawyer may not reveal without client consent.