WHEN SECRET SETTLEMENTS ARE UNETHICAL

By Patrick Malone and Jon Bauer *

Attorneys for injury victims are all too familiar with defendants’ demands for blanket secrecy as a sine qua non for settlement. The confidentiality provisions that defense lawyers insist on often go well beyond keeping the amount and terms of the settlement secret; they also require the plaintiff and the plaintiff’s lawyer to keep silent about the facts underlying the case. Pressured by powerful defendants and working with clients exhausted by litigation, many plaintiffs’ attorneys feel that they have no choice but to agree.

In fact, the binding ethics rules in most jurisdictions provide strong grounds for resisting such secrecy clauses. Secrecy provisions that prohibit voluntary disclosures of relevant evidence to other litigants, or prohibit further disclosure of the allegations made in publicly filed court documents, run afoul of two specific provisions of the Model Rules of Professional Conduct, Rules 3.4(f) and 5.6(b). Under these rules, a plaintiff’s lawyer not only has the ability to “just say no” – but an ethical duty to do so. As we explain in this article, the text and purpose of the rules, and decisions of bar ethics committees interpreting them, require just such a conclusion.

Why Keeping the Facts Secret Triggers Ethical Concerns

The organized plaintiffs’ bar has long been sensitive to the dangers secret settlements pose to society and the justice system. In 1989, ATLA, the predecessor of the American Association for Justice, issued a resolution denouncing settlements that hide the underlying facts of settled cases.¹ Secret settlements undermine the proper functioning of the adversary system by concealing evidence that may be crucial to other parties’ claims. For example, for decades lawyers for archdioceses routinely

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settled sexual abuse cases with gag orders that prevented other victims from learning that their abusers were serial offenders whose misdeeds were already known to church authorities.\(^2\) Settlements that prohibit any mention of the allegations raised in a lawsuit also interfere with the public’s ability to find the lawyer best qualified to handle a particular case, by making it impossible for plaintiffs’ lawyers to inform prospective clients of the identities of the defendants they have litigated against and what those cases were all about.

Despite these concerns, many lawyers faced with demands for blanket secrecy believe their hands are tied: they must present the offer to the client and abide by the client’s decision. While most plaintiffs have a strong desire to expose wrongdoing and help others similarly harmed, their pressing needs for cash or closure often lead them to reluctantly accept settlements with gag orders.

To be sure, abiding by a client’s decisions, including the decision whether to settle, is a central tenet of legal ethics.\(^3\) However, the Model Rules of Professional Conduct also contain many provisions that oblige lawyers to avoid certain conduct that undermines the effective functioning of our adversarial system of justice. Indeed, the chair of the committee that wrote the Model Rules noted that the truth-seeking function of adjudication depends on parties and their lawyers having a fair opportunity to gather and present competing versions of the facts, and thus requires that lawyers not be allowed to interfere with the other side’s ability to obtain relevant information.\(^4\)

Secrecy clauses in settlements frequently violate at least two provisions in the Model Rules designed to ensure the adversary system’s integrity. These ethics rules -- Rules 3.4(f) and 5.6(b) -- bar lawyers from requesting any person to refrain from voluntarily providing relevant information to other parties with claims against the same defendant, or to negotiate settlements that interfere with a lawyer’s right to practice.\(^5\)
Plaintiffs’ lawyers can use these rules to resist overbroad demands for settlement secrecy and convince defendants’ lawyers to withdraw objectionable clauses. They also provide an opportunity to explain to clients why it is wrong to agree to settlement terms that harm the public and the justice system. Armed with knowledge of these ethics rules, plaintiffs’ lawyers and their clients can structure fair settlement agreements that serve both the interests of the parties and the interests of justice.

The ethics rules do allow for keeping the amount and terms of the settlement agreement confidential, which is often the defendant’s biggest concern, and which many plaintiffs also desire to shield themselves from nosy friends and relatives. At the same time, the rules place off-limits some of the most pernicious, and all too common, forms of settlement secrecy.

**Safeguarding Other Parties’ Access to Relevant Evidence**

Rule 3.4(f) of the Model Rules prohibits a lawyer from requesting any person, other than a lawyer’s own client or the client’s relatives or employees, to refrain from voluntarily providing relevant information to another party. In the settlement context, this means that a defense lawyer cannot ethically ask that the plaintiff refrain from giving potentially relevant evidence to another party.

A version of Rule 3.4(f) has been adopted by nearly every state. The rule’s rationale starts with the recognition that *ex parte* witness interviews are essential to the effective operation of the adversary system. Witnesses do not “belong” to either party, and for one party to try to cut off the ability of opposing litigants to interview people with relevant knowledge constitutes unfair interference with the truth-seeking function of adversary litigation. Despite the availability of depositions, courts have long recognized the crucial role played by witness interviews conducted in private, which are needed to secure an unvarnished version of the facts free of the intimidation that the presence of the opposing party and lawyer may create. Indeed, now that the Supreme Court, in its *Iqbal* and *Twombly* decisions,
has made cases vulnerable to dismissal prior to any discovery unless the complaint pleads specific facts that support its conclusions, unimpeded access to informal interviews is more important than ever.

When a defendant’s attorney proposes a settlement clause that would prohibit the plaintiff from voluntarily providing relevant factual information to other people with claims against the same defendant, defense counsel is doing exactly what Rule 3.4(f) prohibits. Settlements are not exempt from the rule’s requirements – indeed, if merely asking a person to withhold information from others suing the defendant is unethical, offering money in exchange for a promise not to make such disclosures is even worse.10 A South Carolina ethics advisory opinion found that a defense lawyer’s demand for a noncooperation clause as part of a settlement violated Rule 3.4(f), and that a plaintiff’s lawyer would be violating his or her own ethical obligations by agreeing to it.11 The Supreme Court of Kentucky recently disciplined a lawyer for violating this rule by requesting a no-voluntary-cooperation clause as part of a settlement.12

Proposed settlement clauses that would expressly bar the plaintiff from voluntarily cooperating with parties, agencies or lawyers who are suing or investigating the defendant clearly run afoul of Rule 3.4(f), even if they allow for disclosures in response to a subpoena. Equally important, blanket confidentiality clauses that bar any discussion of the underlying facts, and make no exception for disclosures of relevant information to other litigants, violate the rule as well.13

A defense lawyer might object that if there is no other “party” currently in litigation, the rule does not apply. But given the rule’s purposes, the word “party” should be construed broadly, to encompass any person with a current or future claim against the defendant. The ABA’s ethics committee, in a similar context, has given a broad meaning to the word “party.”14 It would be irrational to read Rule 3.4(f) in a way that would allow defense lawyers to hide relevant information from people with potential claims in order to impede their lawsuits. Several recent opinions have concluded, after
examining Rule 3.4(f)’s purposes that the rule applies to settlement agreements that have the effect of barring voluntary disclosures of relevant information to any person with an actual or potential legal claim—current or future.\textsuperscript{15}

Some restrictions on disclosure of factual information can be requested as part of a settlement without violating Rule 3.4(f). For example, if the plaintiff is a former employee of the defendant who had access to privileged attorney-client information, settlement terms that reaffirm the plaintiff’s pre-existing legal obligation to not disclose that information are permissible. Limitations on disclosure of legitimate trade secrets, if narrowly defined, are probably allowable as well.\textsuperscript{16} Restrictions on whether and how media attention will be sought also may be permissible under Rule 3.4(f), as long as relevant factual information can be disclosed to individuals, agencies and lawyers investigating or pursuing claims against the defendant.\textsuperscript{17} (However, as discussed in the next section, overbroad restrictions on publicity will sometimes violate Rule 5.6(b).)

But the main thrust of most defense demands for settlement clauses barring disclosure of the underlying facts is to prevent the plaintiff from sharing relevant information with other victims of the defendant’s misconduct. It is unethical for defendants’ lawyers to make that request, and plaintiffs’ lawyers have an ethical obligation to resist impermissible secrecy clauses that interfere with the proper functioning of our justice system.

\textbf{Once Public, Always Public}

Another weapon against defense demands for blanket secrecy is provided by Model Rule 5.6(b). This rule, which has been adopted, with some variations, in every U.S. jurisdiction, prohibits lawyers from participating in any settlement agreement that restricts a lawyer’s right to practice. It clearly bars “lawyer buy-out” provisions that expressly prohibit a plaintiff’s lawyer from suing the same defendant again. But the rule has been, and should be, interpreted to also cover settlements that have the indirect
effect of making a lawyer’s services unavailable to others who wish to pursue similar claims. For example, settlements that prohibit a plaintiff’s lawyer from using any information obtained during the case have been found to violate the rule, because such a promise would interfere with the lawyer’s ability to provide effective representation to others suing the same defendant.\textsuperscript{18}

An important recent opinion from the D.C. Bar Legal Ethics Committee takes this reasoning a step further, and concludes that it is unethical to enter into a settlement that would require confidentiality for any of the public facts of a lawsuit – the allegations in a complaint, the name of the defendant, and other facts set out in non-sealed motion papers and other filings.\textsuperscript{19}

The Committee reasoned in its opinion that a broad reading of the rule was required by its purpose, which is to enhance public access to legal representation, and enable potential clients to obtain the information they need to find the right lawyer with the right skills and experience to handle a dispute. The Committee wrote:

We believe that the purpose and effect of the proposed [secret settlement] condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer’s ability to bring such an action, even against the same defendant if he is retained to do so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.

The Committee notes that a client, of course, can always ask her lawyer to refrain from disclosing even publicly available information about a case, and that a lawyer should abide by such wishes. But the ethics opinion gives a powerful weapon against attempts by defendants to impose such secrecy, by making it clear that a settlement cannot require that public record facts which may be relevant to a
lawyer’s representation of future clients be kept confidential. Several other state and local ethics committees have agreed with the D.C. Committee’s approach.20

**How to Respond to Unethical Settlement Proposals**

In sum, when a defense lawyer demands that a settlement include language that would bar the plaintiff from sharing relevant factual information with other people (or public agencies) who are pursuing or investigating claims against the same defendant, or would prevent the plaintiff’s lawyer from disclosing public record facts about the case to prospective clients, the lawyer is engaging in conduct that is prohibited by Model Rules 3.4(f) and/or 5.6(b). What should a plaintiff’s lawyer do when faced with such demands? Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any rule.21 Plaintiff’s counsel should politely but firmly explain to the requesting lawyer why these settlement terms are unethical, and cannot be included in the agreement. Such an explanation will often be enough to convince defendant’s counsel to withdraw the objectionable language. If it isn’t, consideration should be given in appropriate circumstances to filing a grievance or seeking an advisory opinion from an ethics committee.

A thorough discussion with the client is also important. You should explain why the defendant’s proposed settlement terms are unethical, and why, as a matter of your own professional obligations, you cannot accept them. Most clients, after receiving a good explanation as to why such settlement provisions have been prohibited under the ethics rules because of their harmful effects on other litigants, the justice system, and the public interest, will fully back up their counsel in resisting them. Plaintiffs’ lawyers should consider putting something in their retainer agreements making clear in advance that these types of settlement terms are unethical and must be rejected.22

“Gag orders” that bar the plaintiff and plaintiff’s counsel from telling the public or other attorneys about the facts of the cases they have prosecuted are pernicious on many levels. Not only do
they allow defendants to hide relevant evidence from others who may have valid claims and prevent other victims from finding the best lawyers to represent them, but they also undermine efforts to preserve the civil justice system in the face of “tort reform” propaganda that relies on twisting the facts of lawsuits to make them seem ridiculous. Stella Liebeck, the Albuquerque woman whose McDonald’s coffee spill became perhaps the most famous tort suit of all time, cannot defend herself against the parodies of her case because she signed a secrecy agreement when she reached a post-trial settlement with McDonald’s.23 The same kind of hush agreements frequently frustrate malpractice victims who cannot explain the realities of medical errors to legislators who are fed notions of frivolous lawsuits from the medical industry. Plaintiffs’ attorneys need to “just say no” when unethical provisions are proposed for settlement agreements. The public and the legal profession will be better off for it.

ENDNOTES:


3 See Model Rules of Prof’l Conduct R. 1.2(a).

4 Robert Kutak, who chaired the Commision that drafted the Model Rules, wrote that the Rules rest on a “competitive theory” which posits that the legal system best serves justice if it relies on lawyers, who owe their clients strong duties of loyalty and zeal, to prepare and present competing versions of the truth. At the same time, Kutak explained, in order for this system to work there must be ground rules that prevent lawyers from engaging in conduct on behalf of clients that would undermine the effective operation of the adversary system. For this reason, conduct such a lying to a tribunal, or concealing evidence for the purpose of preventing its availability, is prohibited. See Robert J. Kutak, The Adversary System and the Practice of Law, in The Good Lawyer: Lawyers’ Roles and Legal Ethics 172, 175-76 (David Luban, ed. 1983). The two rules that are the focus of this article, Model Rules 3.4(f) and 5.6(b), are examples of numerous provisions in the Model Rules that place limitations on advocacy in order to preserve the adversary system’s effective functioning.

5 Settlement gag orders sometimes also violate a provision the ABA added to Model Rule 1.6 in 2002, which has been adopted in most states. The rule provides that a lawyer may reveal information when necessary to protect third parties from substantial bodily harm. Model Rules of Prof’l Conduct R. 1.6(b)(1). In situations where a defendant’s ongoing conduct presents a reasonably certain risk of serious injury to others, entering into a settlement agreement that would take away the lawyer’s ability to disclose that information undermines the rule’s purposes and is probably unethical. See Susan P. Koniak, Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?, 30 Hofstra L. Rev. 783, 808 (2002).
One of the co-authors of this article has published an article that explores in greater detail the principles underlying this provision of the Model Rules and how it applies to settlement secrecy. Jon Bauer, Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics, 87 Oregon L. Rev. 481 (2008). The article can be downloaded at http://ssrn.com/abstract=1159748. With respect to the exemption in the rule allowing a lawyer to ask a client’s employees not to cooperate with adversaries, it is important to note that the exception applies only to current, not former, employees. Thus, a defense lawyer cannot ethically ask a plaintiff who is an ex-employee of the defendant to refrain from voluntarily giving relevant information to other parties. See id. at 553-56.

California is the only remaining state whose ethics code is not based on the Model Rules. Among other states, only New York, Oregon, and Washington do not include Rule 3.4(f) in their versions of the Model Rules. In some of those states, conduct that would violate Rule 3.4(f) may be considered unethical under rules that prohibit lawyers from secreting witnesses or engaging in conduct prejudicial to the administration of justice. See Bauer, supra note 6, at 519 n.139 and 543 n.247.

See, e.g., ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 131 (1935); Hickman v. Taylor, 329 U.S. 495, 511 (1947); Gregory v. United States, 369 F.2d 185, 188-89 (D.C. Cir. 1966); IBM Corp. v. Edelstein, 526 F.2d 37, 41-44 (2d Cir. 1975); Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990). Courts have invalidated settlement agreements that bar a plaintiff from voluntarily providing relevant information to others suing the same defendant or public agencies investigating the defendant’s conduct, finding such agreements void as a matter of public policy because of their interference with the proper administration of justice. See, e.g., EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996); In re JDS Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127 (N.D. Cal. 2002).


Under certain circumstances, settlement agreements that bar voluntary disclosures to public agencies, law enforcement authorities, or other litigants may even be criminal, violating statutes that prohibit obstruction of justice, witness tampering, or compounding. See Stephen Gillers, Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical, 31 Hofstra L. Rev. 1 (2002); John P. Freeman, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C. Law Rev. 829, 835-37 (2004); Koniak, supra note 5, at 793-95, 802; Bauer, supra note 6, at 573-79.


Kentucky Bar Ass’n v. Unnamed Attorney, 414 S.W.3d 412 (Ky. 2013).

See Indiana State Bar Ass’n Legal Ethics Comm., Formal Op. No. 1 of 2014 (finding that a settlement provision prohibiting plaintiffs and their counsel from making any negative or disparaging comments about the defendant company violates Rule 3.4(f) to the extent that it prevents the plaintiffs and their attorneys from voluntarily providing evidence to third parties for their use in litigation, upon request); Chicago Bar Ass’n Comm. on Prof’l Responsibility, Informal Ethics Op. 2012-10 (2013) (finding that a settlement clause prohibiting all disclosures concerning claims made in the case and information obtained in discovery, unless under court order, violates Rule 3.4(f) by preventing voluntary disclosures of relevant information to other parties with potential claims against the defendant); Conn. Bar Ass’n Prof’l Ethics Comm., Informal Op. 2011-1 (2011) (finding that a settlement confidentiality provision prohibiting the plaintiff from discussing the facts and circumstances giving rise to her claim violates Rule 3.4(f) by preventing the plaintiff from voluntarily discussing relevant facts with other parties to the litigation).

ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995) (interpreting Rule 4.2’s reference to “a party” to include any represented person, regardless of whether they are a party to litigation); see Bauer, supra note 6, at 549-53.

See Indiana State Bar Ass’n Legal Ethics Comm., Formal Op. No. 1 of 2014 (defining the phrase “another party” in Rule 3.4(f) to mean “any person requesting evidence for the purpose of investigating or asserting a claim or defense, whether in litigation or otherwise”); Chicago Bar Ass’n Comm. on Prof’l Responsibility, Informal Ethics Op. 2012-10 (2013) (“[A]nother party” in Rule 3.4(f) means more than just the named parties to the present litigation. Rather, it should be interpreted more broadly to include any person or entity with a current or potential claim against one of the parties to the settlement agreement. A more narrow interpretation would undermine the purpose of the rule and the proper functioning of the justice system by allowing a party to a settlement agreement to conceal important information and thus obstruct meritorious lawsuits”); see also Kentucky Bar Ass’n v. Unnamed Attorney, 414 S.W.3d 412 (Ky. 2013) (Abramson, J.,
concurring) (acknowledging that the phrase “another party” in Rule 3.4(f) “can and does have broader application” than “another party to the proceeding for which the request was made”); but see Conn. Bar Ass'n Professional Ethics Comm., Informal Ops. 2011-1 and 2011-08 (2011) (interpreting “another party” in Rule 3.4(f) narrowly to include only formal parties to the same litigation).

16 See Bauer, supra note 6, at 560-63. It is important to note that information about an employer’s illegal or tortious conduct cannot qualify as a trade secret. See id. at 562 (citing authorities).

17 See Bauer, supra note 6, at 564-66.


20 See Chicago Bar Ass’n Comm. on Prof’l Responsibility, Informal Ethics Op. 2012-10 (2013) (finding that a settlement provision prohibiting plaintiff’s counsel from disclosing publicly available facts about the case and information obtained in discovery on a website or in a press release violates Rule 5.6(b)); Bar Ass’n of San Francisco Ethics Comm., Op. 2012-1 (2012) (concluding that a defense attorney violated California’s version of Rule 5.6(b) by demanding a settlement clause that would prohibit plaintiff’s attorneys from mentioning in communications or advertising materials that they had worked on an LGBT harassment case against the defendant); N.H. Bar Ass’n Ethics Comm., Op. 2009-10/6 (2011) (interpreting Rule 5.6(b) to prohibit settlement clauses that forbid a lawyer from disclosing publicly-available information if that information is relevant to informing the public of the lawyer’s expertise); S.C. Bar Ethics Advisory Comm., Op. 10-04 (2010) (settlement that bars plaintiff’s lawyer from identifying the defendant in advertising materials violates Rule 5.6(b)); but see Indiana State Bar Ass’n Legal Ethics Comm., Formal Op. No. 1 of 2014 (Rule 5.6(b) not violated by a settlement that bars lawyer from mentioning the defendant in advertisements, as long as the lawyer is free to communicate relevant experience to prospective clients one-on-one); Conn. Bar Ass’n Prof’l Ethics Comm., Informal Op. 2013-10 (2013) (settlement clause that prohibits plaintiff’s counsel from disparaging the defendant in advertising or publicity does not violate Rule 5.6(b) as long as it does not interfere with the lawyer’s ability to use information when representing other clients).

21 Because Model Rules 3.4(f) and 5.6(b) are designed to safeguard the integrity and proper functioning of the justice system, a plaintiff’s lawyer who agrees to settlement demands prohibited under these rules likely also violates Rule 8.4(d), which prohibits lawyers from engaging in “conduct that is prejudicial to the administration of justice.” See Bauer, supra note 6, at 546-49. In the case of Rule 5.6(b), acquiescence by a plaintiff’s lawyer is a direct violation of the rule, which by its terms applies not only to offering, but to any participation in making, settlements that restrict a lawyer’s right to practice.

22 See Maja Ramsey et al., Keeping Secrets with Confidentiality Agreements, Trial, Aug. 1998, at 38, 40-41 (describing a plaintiffs’ firm’s success in getting clients to reject objectionable secrecy clauses when the firm explains, starting with the first client interview, why such settlements are unacceptable). Although retainer agreements restricting a client’s ability to accept or reject a settlement offer have been found ethically impermissible, there is nothing wrong with an agreement that explains to the client what the ethics rules require of a lawyer, and commits the client to reject settlement provisions that violate the rules. See Bauer, supra note 6, at 569 n.333 (discussing relevant ethics authorities).