EXCERPTS FROM THE MODEL RULES OF PROFESSIONAL CONDUCT

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Rules That Affect the Permissibility of Certain Kinds of Secret Settlements:

Rule 3.4    Fairness to Opposing Party and Counsel

A lawyer shall not:

. . . . . . .

(f) 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 or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Excerpt from official Comment to Rule 3.4:

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 5.6    Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

. . . . .

(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.

Excerpt from official Comment to Rule 5.6:

An agreement restricting the right of lawyers to practice after leaving a firm [which is prohibited by paragraph (a) of the rule] not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. . . .

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
Rule 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not 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 paragraph (b).

Excerpt from official Comment to Rule 1.6:

. . . Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to so do, or do so through the acts of another;

(d) engage in conduct that is prejudicial to the administration of justice;
Other Rules Relevant to Counseling Clients About Settlement:

Rule 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client’s decision whether to settle a matter . . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . .

Rule 1.4 Communication

(a) A lawyer shall:

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Rule 1.16  Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . .

. . . . .

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 2.1  Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
EXAMPLES OF ETHICALLY QUESTIONABLE SETTLEMENT CLAUSES

Plaintiff will not encourage, assist, or provide information to any person or agency in connection with any lawsuit, charge, claim or complaint against the defendant unless plaintiff is required to render such assistance pursuant to a lawful subpoena or other legal obligation.

*Violates Model Rule 3.4(f) by prohibiting the voluntary disclosure of relevant information to other parties.*

Plaintiff and her attorneys will not make any statements concerning or respond in any way to any inquiry whatsoever with regard to the facts surrounding the case and the plaintiff’s claim.

Plaintiff shall refrain from doing or saying anything which disparages or denigrates the defendant.

*These clauses violate Rule 3.4(f) to the extent that they prohibit the voluntary disclosure of relevant information to other parties. Also may violate Model Rule 5.6(b) by barring plaintiff’s counsel from using publicly available information about the lawsuit to inform potential clients of the lawyer’s relevant experience. If information obtained through the lawsuit implicates issues of public safety, these clauses also may violate Rule 1.6(b)(1) by barring plaintiff’s counsel from disclosing information when necessary to prevent reasonably certain death or substantial bodily harm to others.*

Before submitting to an interview with or providing any information to any lawyer, law enforcement official, agency investigator, or party investigating or pursuing a claim against defendant, plaintiff shall provide advance written notice to the defendant and shall, upon defendant’s]request, agree to allow any attorney or representative designated by defendant to attend such interview.

*May violate Rule 3.4(f) by interfering with the ability of other parties to obtain relevant information from the plaintiff through ex parte witness interviews.*
Plaintiff’s counsel will not represent any future clients in any lawsuit, claim or complaint against the defendant.

*Directly violates Rule 5.6(b).*

Plaintiff’s counsel will not use any information learned as a result of this litigation in any subsequent action against the defendant.

*Violates Rule 5.6(b) by impairing counsel’s ability to represent future clients.*

Plaintiff and plaintiff’s counsel will not publicize or disseminate to the public at large, through any media whatsoever, any statements or information that relate to the facts and information underlying this action, or otherwise disparages or denigrates the defendant.

*May violate Rule 5.6(b) by preventing plaintiff’s counsel from disseminating publicly available information about the lawsuit for the purpose of informing potential clients of the lawyer’s relevant experience.*

**EXAMPLES OF PERMISSIBLE SETTLEMENT CLAUSES**

Except as may be specifically required by law, plaintiff will not disclose the terms or this Agreement or the amount of the settlement contained herein to anyone except her attorney, her immediate family and her tax advisor. To any questions regarding the status of this case, plaintiff may communicate only that it has been resolved.

Plaintiff shall not encourage or solicit litigation against the defendant, but may voluntarily disclose relevant information to a person or agency that has filed, is investigating, or is known to have the basis for a claim against the defendant.
Nothing in this agreement shall be interpreted to prohibit plaintiff’s counsel from disclosing matters of public record relating to this case for the purpose of informing potential clients of her experience.

Nothing in this agreement shall be interpreted to prohibit counsel for either party from exercising discretion to disclose information, to the extent permitted by Rule 1.6(b)(1) of the Rules of Professional Conduct, if circumstances arise in which counsel reasonably believes such disclosure is necessary to prevent reasonably certain death or substantial bodily harm.