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BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2024-F-171

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical propriety, in a products liability case, of a non-disparagement clause in a settlement agreement which makes the lawyers in Firm A parties to the settlement agreement proposed by Firm B.

OPINION

It is improper for an attorney to propose or accept a provision in a settlement agreement that requires the attorney to become a party bound by a non-disparagement clause that prohibits the lawyer from future use of information, learned during the case, which may shed a negative light on the defendants.

DISCUSSION

The inquiring lawyer has encountered a condition to settlement, in a product liability case against a certain defendant, which makes lawyers from the inquiring lawyer's law firm parties to the Settlement Agreement which includes a non-disparagement clause prohibiting them from taking any action or making any statements, verbal or written, to any third party that disparage or defame Defendants.

An immediate conflict has arisen between the client who wants the settlement funds and the inquiring lawyer's ethical concerns.

It has long been held in Tennessee that "the attorney's signature on a release should vouch only for the fact that the client releases the defendant. A requirement that a plaintiff's attorney become a party to a release might cause a conflict of interest between the plaintiff's attorney and the plaintiff in violation of DR 5-101(a), [Now RPC 1.7]. Therefore, these clauses are prohibited except in cases where the plaintiff's attorney releases a claim for attorney fees."[1]

[1] Tennessee Formal Ethics Opinion 2010-F-154 (Sept. 10, 2010); Tennessee Formal Ethics Opinion 98-F-141 (Feb. 4, 1998)

Notwithstanding the earlier Tennessee Formal Ethics Opinion's guidance on this issue, there is also a basis in the Rules of Professional Conduct to find non-disparagement clauses improper in a products liability case.

Tennessee Rule of Professional Conduct 5.6 (b) says "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 client controversy."

ABA Formal Opinion 00-417 (April 7, 2000) explains the rationale for Model Rule 5.6 (b) and its Tennessee counterpart Rule of Professional Conduct 5.6 (b). The opinion explains that there is strong public policy "favoring the public's unfettered choice of counsel."[2]

Non-disparagement clauses interfere with that public policy in three ways. Such restrictive agreements limit the public's access to lawyers.[3] A second rationale for disfavoring disparagement agreements is that they are considered to actually be veiled attempts to "buy off" plaintiff's counsel.[4] Third, disparagement clauses create potential conflicts for lawyers between the interests of representing current clients and the interests of potential future clients.[5]

"Many jurisdictions concur with the ABA that settlement agreements containing indirect restrictions on the lawyer's right to practice violate those jurisdictions' respective equivalents of Rule 5.6(b)."[6]

A non-disparagement clause as part of a settlement agreement requiring the firm's lawyers to become parties would restrict the plaintiff's firm from using or discussing any information learned during the case that sheds a negative light on the Defendants, thereby indirectly restricting the plaintiff's counsel from informing potential clients of their experience and expertise, making it difficult for future clients to identify well-qualified counsel.

There is also a public policy consideration. A non-disparagement clause in a settlement agreement in a product liability case would deny public access to the data. "The ability for plaintiffs' firms to act as industry watchdogs is both good public policy and was specifically addressed as a vested responsibility during Congress's enactment of the Federal Motor Vehicle Safety Standards."[7] A non-disparagement clause would interfere with that responsibility to the public.

CONCLUSION

Requiring a plaintiff's attorney to become a party entering into a settlement agreement containing a non-disparagement clause in a products liability case raises ethical concerns and creates a conflict between the interests of the plaintiff's attorney and those of their client.

[2] ABA Formal Opinion 00-417 (April 7, 2000).
[3] ABA Formal Opinion 00-417 (April 7, 2000).
[4] Id.
[5] Id.
[6] D.C. Bar Legal Ethics Committee, Opinion 335 (2006).
[7] Tennessee Formal Ethics Opinion 2018-F-166 citing 49 U.S.C. section 30103 (e) (2010).

Consistent the Tennessee Rules of Professional Conduct and with Tennessee Formal Ethics Opinions 97-F-141 and 2010-F-154, an attorney cannot ethically agree to become a party to such agreements or clauses.

This _____ day of _____, 2024.

ETHICS COMMITTEE

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Ginger Buchanan, Chair

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Jimmy Dunn

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Senator Richard Briggs

APPROVED AND ADOPTED BY THE BOARD