BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2019-F-167

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical propriety of a settlement agreement, in a products liability case, which contains as a material condition of the settlement that the subject vehicle alleged to be defective be destroyed within 180 days with certification to defendant's counsel of record of the destruction.

OPINION

It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients.

DISCUSSION

The inquiring lawyer has encountered a condition to settlement, in product liability cases against a certain defendant, which requires plaintiff to destroy the vehicle that was the subject of the claim.

The parties agreed on a settlement amount, and the requirement of the destruction of the vehicle was only brought up after the Plaintiff agreed to settle. The client simply wanted to be paid their settlement monies and the lawyer's objections to the requirement were discarded because the client is the ultimate decision-maker to accepting settlement.[1] This created a conflict between the lawyer and the client as well as other current and future clients. Such a provision indirectly restricts the lawyer's ability to fully and competently represent other current or future clients with similar claims against the Defendants.

RPC 5.6 (b) states "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."[2]

[1] Tennessee Rules of Professional Conduct, Rule 1.2 (a).
[2] Tennessee Rules of Professional Conduct, Rule 5.6 (b).

In complex product liability cases involving an allegedly defective vehicle, the physical vehicle itself is the most important piece of evidence in the case. The most compelling evidence when establishing the existence of a defect in a vehicle is the existence of other similar incidents. That is, instances in which a comparable vehicle or vehicle component has displayed evidence of the same failure or defect that is the basis of the present claim. The ability to review and re-inspect a similar vehicle, which had previously exhibited a similar defect, is extremely valuable in prosecuting a potential future case.

Vehicles, such as the one involved in the instant case, are routinely used in subsequent cases involving the same or similar vehicles or the same or similar components (such as seatbelts, airbags, seats, etc.) in otherwise dissimilar vehicles. The inquiring lawyer's firm catalogues and preserves defective vehicles in order to establish a physical information base to be used in subsequent cases.

The firm has a policy of acquiring possession of the subject vehicle as part of its initial investigation into the case. This is normally done by purchasing the vehicle directly from an insurance company that has possession of the vehicle post-accident. In the rare case that the firm's client has possession of the vehicle (and title), the firm requests that the client allow the firm to retrieve the vehicle from them. If the client is not in possession of the vehicle, and the firm is unable to purchase the vehicle directly from an insurer, the firm purchases the vehicle at auction if possible.

The firm covers the expense of securing the vehicle, and said expense is treated like any other case expense at that point. During the pendency of the case, the firm and the expert witnesses for the case or for any other case turning on the same defect/vehicle model inspect the vehicle, dissemble parts if need be, and catalogue the vehicle. It is the firm's practice at the end of the case to request from the client that the firm be allowed to retain ownership and possession of the vehicle.

RPC 3.4 (a) states: "A lawyer shall not obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act…" "Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen."[3] "Tennessee Courts have long applied a prerequisite of intentional misconduct in the context of spoliation of evidence. This prerequisite originated with the common law "doctrine of spoliation" which allowed a trial court to draw a negative inference against a party who destroys evidence."[4] Clearly, in the context of a product liability case, the alleged defective product is key evidence in other current or subsequent cases of a similar defect.

The firm has assured Defendant that the vehicle will not be placed back on the road, and that when the firm decides no longer to retain the vehicle, it will provide a certificate of destruction to Defendant, which should satisfy any safety concerns of Defendant. Given the nature of the Defendant's business and the practice area of the inquiring lawyer, demanding the

[3] Tennessee Rules of Professional Conduct, Rule 3.4 Comment [2].
[4] *Lea Ann Tatham v. Bridgestone Americas Holding, Inc., ET Al.*, 473 S.W.3d 734, 738 (Tenn. 2015).

destruction of key evidence can only be viewed as an attempt by the Defendant to disadvantage the firm in other current or future litigation. "Any type of restriction of a plaintiff's attorney on representing future claimants against the same defendant are ethically inappropriate and violates RPC 5.6(b) which pertains to impermissible restrictions on a lawyer's practice."[5]

ABA Formal Opinion 93-371 articulates the three policy considerations underlying RPC 5.6(b). First, there is a risk that the public's access to the best attorney for a particular case will be curtailed. Second, such a restraint could be motivated by an effort to "buy off" counsel rather than to resolve the dispute. Third, a restriction on an attorney's right to practice may place him or her in a position where the interests of the current client are in conflict with those of potential future clients.

The American Bar Association has opined that the rule applies not only to such an explicit limitation, [6] but also to other limitations that indirectly restricts a lawyer's right to practice.[7]

By requiring destruction of the alleged defective product after settlement in a products liability case, defense counsel would accomplish indirectly what they cannot accomplish directly by precluding the attorney from representing other plaintiffs with similar claims.

Further, the firm's file retention policy includes retaining material pieces of evidence as part of the file because it may be evidence in any subsequent malpractice suit against the firm. Without the ability to review the most important piece of evidence in the underlying products liability suit, the law firm would be left essentially defenseless if a former client brought a professional malpractice claim.

There is also a public policy consideration. 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.[8]

CONCLUSION

Settlement conditions are prohibited by Tennessee Rules of Professional Conduct 5.6(b), if such conditions will restrict the attorney's representation of other clients.

It is improper for an attorney to propose or accept a provision in a settlement agreement that requires an attorney in a products liability lawsuit to destroy the product alleged to be defective, as a material condition of settlement, if that action will restrict the attorney's representation of other clients.

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[5] Tennessee Formal Ethics Opinion 98-F-141 (Feb. 4, 1998) citing ABA Formal Ethics Opinion 93-371 (1993).
[6] ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993).
[7] ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).
[8] 49 U.S.C. Ch.301; 49 U.S.C. section 30103(e) (2010); TN Formal Ethics Opinion 2018-F-166 (2018).

This 15th day of April, 2019.

ETHICS COMMITTEE

Dana Dye, Chair

John D. Kitch

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APPROVED AND ADOPTED BY THE BOARD