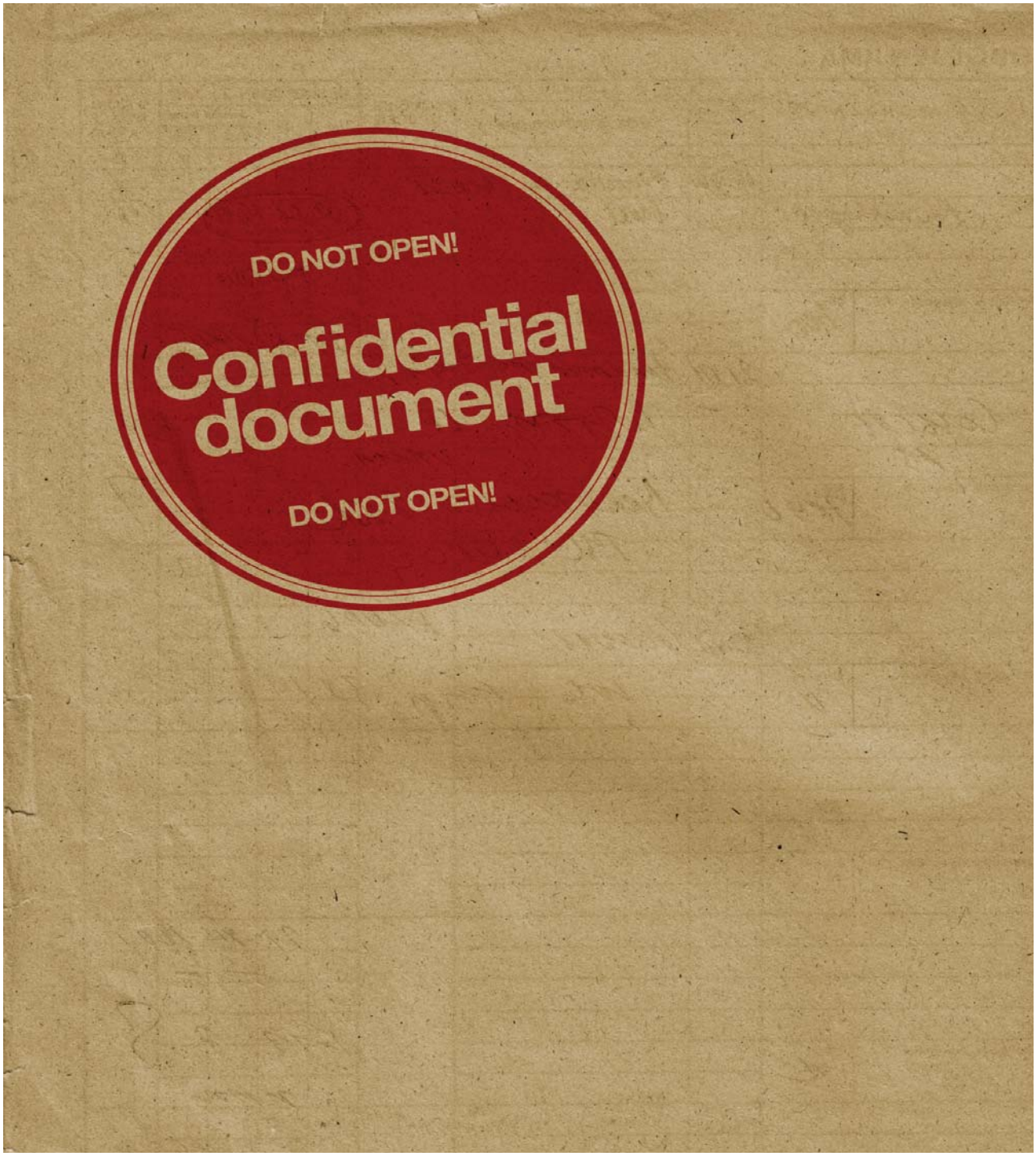
By Dmitry N. Feofanov

From the Perspective of the Plaintiff's Lawyer

Just Saying "No" to Confidentiality Clauses



There have been many times when I would settle a case on an assumption (and sometimes an explicit representation by the opposing counsel) that "there will be a standard release."

When the "standard release" came, though, I would often find provisions I did not consider "standard"—such as waivers of construction against the drafter, indemnity clauses, and the like. Chief among such surprises would be the confidentiality clause.

For a lawyer who does not want to be a part of such unbargained-for, and unpaid, provisions, the choices are not good. One option is to go to court attempting to enforce the settlement. Often, though, judges, in addition to becoming angry at a plaintiff's lawyer for "sabotaging" settlement, find that there has been no meeting of the minds, and therefore no settlement. Thus, going to court may torpedo the settlement.

Another option is to attempt to negotiate the clause away, although the chances for that are not good either–an hourly-paid defendant's lawyer has no incentive to agree to delete the clause.

A third option–attempting to preempt the issue, by informing both opposing counsel and courts in advance, even before settlement negotiations, that confidentiality is off the table–is not likely to succeed either. Despite unequivocal warnings, defendants still attempt to impose confidentiality, and judges may not understand why such a "standard" practice engenders resistance.

Frustrated with the judiciary's apparent reluctance to enforce settlements and with defendants who would not take "no" for an answer, I looked for a better way. After substantial research into opinions of multiple bar associations across the country, I have concluded that most confidentiality clauses are in fact prohibited by the applicable ethics rules.

Thus "Plan B" was born. I made an ethics inquiry to the Chicago Bar Association's Committee on Professional Responsibility, which provides the invaluable service of responding in writing. In less than two months, I had Informal Ethics Opinion 2012-10, three single-spaced pages from the Opinions Subcommittee.

CBA Professional Responsibility Subcommittee Opinion

At issue was a confidentiality clause drafted as follows:

> Plaintiff and his counsel agree that the existence, substance and content of the claims of the Action, as well as all information produced or located in the discovery process in the Action shall be completely confidential from and after the date of this Agreement. Similarly, the existence, substance, terms and content of this Agreement shall be and remain completely confidential. Plaintiff shall not disclose to anyone any information described in this paragraph, except: (a) if disclosure is ordered by a court of competent jurisdiction, and only if the other party has been given prior notice of the disclosure request and an opportunity to appear and defend against disclosure and/or to arrange for a protective order; (b) Plaintiff may disclose the contents of this Agreement to his attorneys, accounting and/or tax professionals as may be necessary for tax or accounting purposes, subject to an express agreement to become obligated under and abide by this confidential and non-disclosure restriction; and (c) Plaintiff may disclose that the Action has been dismissed.

The opinion answered "yes," "yes," and "no" to the following three questions:

(1) whether this confidentiality clause violated Rule of Professional Conduct 3.4(f);

(2) whether it violated Rule of Professional Conduct 5.6(b); and

(3) whether a lawyer, as part of settlement discussions, may demand that the settlement agreement include a provision that prohibits plaintiff's counsel from disclosing publicly available facts about the case on plaintiff's counsel's website or through a press release.

Rule of Professional Conduct 3.4(f)

Rule of Professional Conduct 3.4(f) states that a lawyer "shall not *** request a person other than a client to refrain from voluntarily giving relevant information to another party" unless that person is a relative or agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from disclosure. After quoting the Rule, the subcommittee also quoted Comment 1 to the Rule that the Rule is based on the belief that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

After noting that settlement agreements are not exempt from Rule 3.4(f), the subcommittee concluded that, "when negotiating

a settlement agreement, a lawyer cannot ethically request that the opposing party agree that it will not disclose potentially relevant information to another party." The subcommittee explained that the term "another party" means "more than just the named parties to the present litigation," and that the term 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." The subcommittee explained that a contrary 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."

As a result, the opinion concluded that "the proposed settlement provision therefore precludes the plaintiff from voluntarily disclosing relevant information to other parties," and as a result "it violates Rule 3.4(f) *and a lawyer cannot propose or accept it"* (emphasis added). The breadth of this conclusion should give pause to anyone who contemplates either proposing or accepting any confidentiality clause.

Rule of Professional Conduct 5.6(b)

Rule of Professional Conduct 5.6(b) states 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 client controversy." In analyzing the rule, the subcommittee pointed out that it is based on three main public policy rationales: (i) to ensure the public will have broad access to legal representation; (ii) to prevent awards to plaintiffs that are based on the value of keeping plaintiffs' counsel out of future litigation, rather than the merits of plaintiff's case; and (iii) to limit conflicts of interest.

The subcommittee relied on the American Bar Association's Ethics Opinion 00-417 in pointing out a distinction between a lawyer's future "use" of information learned during litigation and a lawyer's future "disclosure" of such information. A provision prohibiting "use" of information violates Rule 5.6(b), because preventing a lawyer from using information is no different than prohibiting a lawyer from representing certain persons. However, a provision prohibiting "disclosure" is generally permissible, because a lawyer is already prohibited from disclosing such information without client consent.

However, the subcommittee also pointed out that "not all limitations on the disclosure of information are ethical." Rather, such litigation depends on the nature of the information. The subcommittee observed that, while authorities agree that prohibitions for disclosing "the amount and terms of the settlement" (assuming the information is not otherwise known to the public) are permissible, because that information generally is a client confidence; information that is publicly available or that would be available through discovery in other cases may not be prohibited from disclosure.

On the basis of this analysis, the subcommittee determined that, generally, a settlement agreement may not prohibit a party's lawyer from *using* the information learned during litigation. The agreement also may not prohibit a lawyer from *disclosing* publicly available information, or information that would be obtainable through the course of discovery in future cases. The subcommittee articulated a public policy rationale for striking "an appropriate balance between the genuine interests of parties who wish to keep truly confidential information confidential and the important policy of preserving the public's access to, and ability to identify, lawyers whose background and experience may make them the best available persons to represent future litigants in similar cases." Thus, the subcommittee concluded that the settlement provision "as currently drafted" did not comply with Rule 5.6.(b). While recognizing that it would be permissible to prohibit the disclosure or the "substance, terms and content of" the settlement (assuming it was not already publicly known), the settlement agreement violated Rule 5.6(b) because it "broadly forecloses the lawyer's disclosure of information that appears to be publicly available already."

Restrictions on Attorney Advertisement

Based on the same analysis, the subcommittee concluded that, under Rule 5.6(b), a settlement agreement may not prohibit a party's lawyer from disclosing publicly available facts about the case, "such as the parties' names and the allegations of the complaint," on the lawyer's website or through a press release. The subcommittee cited the seminal D.C. Bar Ethics Opinion 335 (2006) in support of its conclusion.

Practical Results of the Opinion

There is only one practical result of the Opinion for my practice—I no longer enter into confidentiality agreements. Ever. Setting aside my ideological zeal, from a practical standpoint, it simply takes too much time to draft around the ethics rules, and even then it's difficult to be sure there has been no violation. Thus, the most practical solution to the problem is to just say "no" (of course, after bringing the client on board).

I anticipate that such an uncompromising position might torpedo some settlements, and I am resigned to live with this. On the other hand, I save considerable time and effort that I would otherwise have spent either arguing the issue or trying to find an acceptable compromise. So it evens out in the long run.

My uncompromising position also has the salutary effect of convincing opposing counsel that I mean what I say. Too often, a lawyer's "no" may mean "maybe," and vice versa, all part of the complicated back-and-forth of negotiations. For those of us who have not mastered the psychological intricacies of negotiating, a direct approach could be a viable alternative. ■

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