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# When the Price of Settlement Is Ethically Prohibitive: Non-Disparagement Clauses That Apply to Lawyers

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# Ethical Compass
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By Elayne E. Greenberg

## Introduction

At last! You have lived with this case for many years, and you are now on the verge of finalizing the terms of a settlement agreement. All the contentious issues have finally been resolved, so you thought, when the defendant leans over the table and says, "Just one more thing. We want you and your client to sign a non-disparagement clause as part of the settlement." Yes, non-disparagement clauses have been frequently used as a controversial reputational shield in high-conflict divorces, sensitive employee terminations and contentious consumer actions. However, barely discussed is whether lawyers are ethically able to suggest or be bound by disparagement clauses. This column will address the ethical considerations that lawyers should consider before suggesting or agreeing to sign a non-disparagement clause.

## Ethical Underpinnings

Whether or not a lawyer is ethically permitted to sign a non-disparagement clause or suggest one to another lawyer depends on whether the scope of the non-disparagement clause "restricts a lawyer's right to practice law" and restricts the lawyer's ability to represent both current clients and future clients.

The New York Rules of Professional Conduct Rule 5.6 (a)(2) (Restriction On Right to Practice) provides:

> A lawyer shall not participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.[1]

The ABA Formal Op. 00-417 (April 7, 2000) *Settlement Terms Limiting A Lawyer's Use of Information* explains the rationale for the Model Rule 5.6 and its New York counterpart Rule 5.6 (a)(2) that proscribe agreements such as non-disparagement clauses for lawyers.[2] As explained in the opinion, there is a strong public policy "favoring the public's unfettered choice of counsel."[3] Non-disparagement clauses interfere with that public policy in three main ways. First, such restrictive agreements limit the public access to lawyers.[4] A second rationale for disfavoring disparagement agreements is that they are considered to actually be veiled attempts to "buy off" plaintiff's counsel.[5] Third, disparagement clauses create potential conflicts for lawyers between the interests of representing current clients and the interests of potential future clients.[6]

The ABA Formal Op. further clarifies that Model Rule 5.6 is not a blanket proscription, but rather there are limits to the Rule's reach. For example, Rule 1.6 (Confidentiality of Information) safeguards the attorney-client communications that are privileged.[7] Then, Rule 1.9(c) (Conflict of Interest: Former Client) requires permission of the former client to reveal relevant information about the past representation.[8] In another exception to Rule 5.6(a)(2), Rule 3.3 (Candor towards the Tribunal) may require disclosing information that might otherwise be silenced by a non-disparagement clause.[9]

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For those lawyers who are advocating that the attorney on the other side sign a non-disparagement clause, you too may be in ethical peril for making such a demand. Beyond Rule 5.6(a)(2)'s deep waters, you may also be violating Rule 8.4. Rule 8.4 provides in relevant part that " A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly." Thus whether a lawyer demands that opposing counsel sign a non-disparagement clause as an expression of his or her client's wishes or as part of a broader settlement strategy, the attorney making the request is violating the Rules of Professional Conduct.

Although in real life we may all know colleagues who report that non-disparagement clauses for lawyers are a regular part of settlement, I have been unable to locate any recent New York Ethical Opinions that address this issue on point.[10] A related, and unresolved, issue was raised in *Mandell v. Mandell*[11] when the Court questioned the enforceability of a Collaborative Law Participation Agreement.[12] In *Mandell*, the Court reinforced the importance

of Rule 5.6(a)(2) to assess whether the proscriptions in a settlement agreement were ethically permissible but left open the issue of whether non-litigation clauses as part of Collaborative Agreements were an abridgement of a lawyer's Rule 5.6 (a)(2) ethical rights to practice law.[13]

## Bridging Ethical Considerations with Realistic Suggestions

So you now understand the ethical rationale against broad non-disparagement clauses for attorneys. You are still sitting at the table trying to finalize the settlement. The other attorney still has the non-disparagement clause there waiting for your signature. Your client is urging you to get this deal done, and the non-disparagement clause is the last unfinished business. You cannot be the deal breaker. What do you do?

Now is the time to artfully apply your dispute resolution skills. Ask clarifying questions, focus on prioritized interests, educate about the permissible ethical parameters for your actions based on the Professional Rules of Conduct, and explore feasible options to address the interests in having a non-disparagement clause for the attorney. What does the client mean by the term non-disparagement? What interest(s) are the client trying to achieve with a non-disparagement clause? How might you satisfy those interests other than with a non-disparagement clause in a way that allows both attorneys to still comply with the relevant New York Rules of Professional Conduct?

By way of illustration, let's assume you are a lawyer who has successfully represented vulnerable plaintiffs against exploitive financial institutional practices, and in this case, had successfully waged war for your client over a five-year period. As part of your litigation strategy, you had repeatedly used the media to publicize these unfair practices and expose larger systematic problems, publicly disparaging the financial institution. Just saying "no" to the signing of a non-disparagement clause may bring the long-desired settlement to a halt.

Instead, at this juncture in settlement, you could pause, breathe and apply your dispute resolution skills. Ask the financial institution's lawyer precisely what he or she means by non-disparagement. Question and understand what the lawyer and financial institution are actually trying to achieve with such a clause. Remind the lawyer for the financial institution about your shared ethical obligations under the New York Rules of Professional Conduct proscribing lawyers to offer or sign non-disparagement clauses that interfere with a lawyer's right to practice.

Even though the financial institution may be dreaming about putting lawyers like you out of business and preventing you from ever disparaging them again in future cases you may have, the financial institution's focused concern may be to stop you from using the media to disparage the financial institution about the particulars of this case. As we have been discussing, the financial institution can't ethically have you sign anything that will interfere with your ability to represent future clients. Given the interests of each side and the permissible ethical contours of any remediation, what are the ethically permissible options to resolve their concern about this case? One option to address these concerns is to agree to keep the terms of the case confidential and memorialize that understanding in a confidentiality agreement. Of course, you, in collaboration with the lawyer on the other side, might develop other creative, ethical options to help overcome the non-disparagement clause impasse.

## Conclusion

On the eve of settlement, attorneys may suggest or be required to sign a non-disparagement clause. Broad non-disparagement clauses directly contravene the New York Rules of Professional Conduct. However, lawyers who apply their dispute resolution skills may still figure out how to ethically get past no, get to yes and reach an ethical settlement.

## Endnotes

1. NY Rules of Prof'l Conduct R. 5.6 (a)(2).
2. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 00-427 (2000).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Cf.* NYC. Assn. B. Comm., Formal Op. 1999-03(March, 1999) affirming that an agreement that prohibits a lawyer from representing the same client or different clients in disputes against the defendant is unenforceable; NYSBA Comm. on Prof'l Ethics, Op. 858 (March 17, 2011) stating that in-house attorney's confidentiality agreement is not enforceable after the termination of employment if it restricts the lawyer's right to practice law.
11. 36 Misc.3d. 797, 949 N.Y.S.2d 580. 2012 N.Y. Slip Op. 22172.
12. *Id.*
13. *Id.*

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