Utah State Bar

Ethics Advisory Opinion Committee

Opinion Number 25-01

Issued August 14, 2025

ISSUES

¶ 1 As counsel to Parties A/B/C, may Attorney A participate in offering a settlement agreement that asks opposing counsel Attorney D to agree to a non-disparagement clause where disparage is construed to include any negative communication about Parties A/B/C and/or Attorney A?

¶ 2 May Attorney D agree not to disparage Parties A/B/C and/or Attorney A as part of settling a controversy between Parties A/B/C and Party D, Attorney D's client, where disparage is construed to include any negative communication about Parties A/B/C and/or Attorney A?

OPINION

¶ 3 Issue 1: No. Utah Rule of Professional Conduct 5.6(b) prohibits an attorney from "participat[ing] in offering" to resolve a client controversy that includes a non-disparagement clause that restricts an attorney's right to practice.

¶ 4 Issue 2: No. Utah Rule of Professional Conduct 5.6(b) prohibits an attorney from "making" an agreement to resolve a client controversy that includes a non-disparagement clause that restricts an attorney's right to practice.

BACKGROUND

¶ 5 Attorney A represents Parties A/B/C. Attorney D represents Party D.

¶ 6 As part of a settlement of a controversy between Parties A/B/C and Party D, Attorney A proposed an agreement that read: "[Party D] and his/her counsel agree that they will not defame, disparage, or impugn [Parties A/B/C and/or Attorney A] in any communications, written or verbal, with any third-party or entity."

¶ 7 The agreement defined disparage to mean "to make any statement, written or oral, that casts [Parties A/B/C and/or Attorney A] in a negative light of any kind, or implies or attributes any negative quality to those entities, including, but not limited to, any negative references regarding the methods of conducting business."

¶ 8 An exception allowed Party D to make "truthful statements to government agencies or authorities, or as a witness in a deposition, hearing or trial, if necessary to comply with applicable law." The exception did not explicitly include Attorney D, as counsel to Party D.

ANALYSIS

¶ 9 Utah Rule of Professional Conduct 5.6(b) provides: "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."

¶ 10 A non-disparagement agreement may constitute a restriction on a lawyer's right to practice law. See, e.g., Texas Ethics Opinion 708 (2025) (opining that "a lawyer may not agree to be personally bound by a non-disparagement clause in a client settlement agreement that applies to statements the lawyer might make in the course of practicing law"); North Carolina 2023 Formal Ethics Opinion 2 (noting that "Rule 5.6 prohibits . . . settlement terms whose practical effect is to restrict the lawyer from undertaking future representations"); Maryland

Committee on Ethics Docket No. 2021-03 (stating that "[i]t is not ethically proper for an attorney to sign a client's settlement agreement . . . if the document broadly obligates the attorney to maintain confidentiality and non-disparagement such that it could act to restrict the attorney's right to practice"); Connecticut Professional Ethics Committee Informal Opinion 2013-10 (declaring that "a non-disparagement clause may not restrict a lawyer's use of information gained in one case in another case and cannot bar a lawyer from accusing the defendant of wrongdoing in that other litigation"); ABA Comm. On Ethics & Professional Responsibility, Formal Op. 00-417 (2000) (quoting Colorado Bar Ethics Opinion No. 92 that "a claimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have").

¶ 11 The proposed non-disparagement agreement would restrict Attorney D's right to practice law in various ways. Three examples illustrate. First, the preclusion of negative communication with a third party would restrict Attorney D from resolving pending controversies clients other than Party D have with Parties A/B/C and/or Attorney A. Second, the preclusion would restrict Attorney D from advising clients and potential clients who may have future controversies involving Parties A/B/C and/or Attorney A. Third, the preclusion would restrict Attorney D from bringing future claims against Parties A/B/C and/or Attorney A or defending clients against claims Parties A/B/C and/or Attorney A may bring against those clients.

¶ 12 Allowing Attorney D the same exception as Party D would still restrict Attorney D's right to practice law. The practice of law is much broader than the exception allows to make

"truthful statements to government agencies or authorities, or as a witness in a deposition, hearing or trial, if necessary to comply with applicable law."

¶ 13 Where, as here, a non-disparagement clause in a client settlement agreement would restrict an attorney's right to practice law, Utah Rule of Professional Conduct 5.6(b) prohibits Attorney A from participating in offering that agreement and Attorney D from making it.

¶ 14 Utah Rules of Professional Conduct 8.3(a) and 8.4(d) also bear on the agreements an attorney may make.

¶ 15 Under Utah Rule of Professional Conduct 8.3(a) an attorney must "inform the appropriate professional authority" when the attorney "knows that another legal professional has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that legal professional's honesty, trustworthiness or fitness as a legal professional." An attorney may not agree to do otherwise.

¶ 16 Under Utah Rule of Professional Conduct 8.4(d), an attorney may not enter into any agreement that would inhibit the lawyer's ability to cooperate with the Office of Professional Conduct. *See also* Utah Ethics Opinion 16-02.