

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2016-F-161**

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The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion on the ethical propriety of a settlement agreement that requires the release of lawyer work product.

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**OPINION**

To the extent settlement provisions require attorneys to turn over documents protected by the lawyer work product doctrine, the provisions may be prohibited by Tennessee Rule of Professional Conduct 5.6(b). That is, a lawyer may not propose or agree to a settlement agreement that requires a lawyer to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients.

**DISCUSSION**

The inquiring lawyer has encountered a condition to settlement in product liability cases against a certain defendant that requires plaintiff's counsel to release his work product.

Plaintiff's counsel received from Defendant 541,927 pages in image form and had to electronically convert every single page to a pdf document. Plaintiff's counsel then processed the 541, 927 pages with optical character recognition to make each document searchable. The documents were then organized by relevant subtopics and incorporated into demonstrative exhibits. Creating this work product was the only way to understand the complex issues in the case, articulate the product defects, depose experts, present claims, and ultimately reach a successful settlement for the client. Plaintiff's counsel relied on the produced materials to cut a full-size vehicle into parts for use in explaining complex engineering, vehicle dynamics, and safety mechanisms to the jury. This demonstrative evidence is useless without the underlying work product.

The parties agreed on a settlement amount, and as a condition precedent to signing the settlement agreement Defendant demanded return of **all** documents produced which included Plaintiff counsel's work product.

Work product has been defined as “tangible material or its intangible equivalent” that is collected or prepared in anticipation of litigation.<sup>1</sup> The United States Supreme Court in a unanimous decision recognized that the work-product doctrine includes information obtained or produced by or for attorneys in anticipation of litigation.<sup>2</sup>

The work product doctrine acts as a shield to protect the client’s position for settlement or at trial. Releasing work product papers as a condition for settlement may be distinguishable from the protection afforded to an attorney and client during discovery. It is not uncommon for attorneys to retain files and review portions of those files for use in later cases.<sup>3</sup>

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) and pertains to impermissible restrictions on a lawyer’s practice.<sup>4</sup> Other types of restrictions that are less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim may similarly violate RPC 5.6(b) which says “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.”

ABA Formal Opinion 93-371 articulates the three policy considerations underlying this rule. 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.

Ethics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.<sup>5</sup>

The test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation.<sup>6</sup> The tests formulated by other jurisdictions are useful. “While these tests are worded differently, they all boil down to one essential question: how does a particular settlement provision affect an attorney’s ability to represent another client in a matter involving the same or a related opposing party?”<sup>7</sup> If the provision has no effect, it will not violate Rule 5.6(b). On the other hand, if a provision does affect a lawyer’s ability to represent another client and that effect is negative, the provisions would be impermissible under Rule 5.6(b).<sup>8</sup>

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<sup>1</sup> Black’s Law Dictionary (Abridged 7<sup>th</sup> ed.) St. Paul, Minn : Westgroup p. 1298.

<sup>2</sup> Hickman v. Taylor, 329 U.S. 495 (1947).

<sup>3</sup> State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985).

<sup>4</sup> Tennessee Formal Ethics Opinion 98-F-141,(Feb. 4, 1998) citing ABA Formal Ethics Opinion 93-371.

<sup>5</sup> State Bar Association of North Dakota Ethics Committee, Opinion No. 97-05 (June 30, 1997).

<sup>6</sup> Colorado Ethics Opinion 92 (June 19, 1993).

<sup>7</sup> Florida Bar Ethics Opinion 04-2 (January 21, 2005)

<sup>8</sup> Florida Bar Ethics Opinion 04-2 (January 21, 2005)

Although some jurisdictions have found that the returning of documents obtained in discovery as a condition for settlement is not unethical in proper circumstances<sup>9</sup>, attorney work product materials raise a separate but related question.<sup>10</sup>

The State Bar Association of North Dakota Ethics Committee addressed the return of documents produced in discovery as a condition of settlement and concluded that Rule 5.6(b) does not prohibit the agreement to return documents produced in discovery if the documents in question do not constitute work product. “However, to the extent the provisions are interpreted to require Attorney B to turn over documents protected by the attorney work product doctrine, the provisions may be prohibited by Rule 5.6(b). That is Attorney B may not agree to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients. Whether providing the opposing side access to or losing his or her own access to work product materials would restrict the attorney’s representation of other clients is a factual question the attorney must decide based on the documents involved and the facts and circumstances of the case.”<sup>11</sup>

The State Bar Association of North Dakota Ethics Committee concluded in their Ethics Opinion 97-05 “Under Rule 5.6(b) an attorney may not agree—even at a client’s request: To turn over to opposing party or counsel documents protected by the attorney work product doctrine if that action would restrict the attorney’s representation of other clients...”.

If an attorney is required to disclose his/her entire work product, it may inhibit representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims.<sup>12</sup> Further, it appears to create a conflict between the lawyer who has an interest in preserving work product to aid in the representation of future clients and the lawyer’s current client who has an interest in obtaining the settlement funds.

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<sup>9</sup> Colorado Ethics Opinion 92 (June 19, 1993).

<sup>10</sup> State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985)

<sup>11</sup> State Bar Association of North Dakota Ethics Committee, Opinion No. 97-05 (June 30, 1997).

<sup>12</sup> State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985).

**CONCLUSION**

It is improper for a lawyer to propose or accept a provision in a settlement agreement that requires release of work product which would restrict the lawyer's representation of other clients as prohibited by Tennessee Rules of Professional Conduct 5.6(b).

ETHICS COMMITTEE

John Kitch

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APPROVED AND ADOPTED BY THE BOARD