

## REPORT OF THE COMMITTEE ON ETHICS<sup>1</sup>

The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued several formal opinions that are relevant to lawyers who work in the executive branch, to private lawyers who deal with them, or to both. These opinions address ethical issues relating to settlement agreements that restrict a lawyer's right to represent other clients against a government agency, the government agency subpoenas of a lawyer's files, the disclosure of client files by a government lawyer to non-lawyer supervisors, and the obligation of lawyers to disclose to an opposing party that the Statute of Limitations has run. While these opinions provide useful and important guidance to lawyers who encounter these problems, a lawyer should also consult the ethics rules and opinions in the jurisdiction(s) he/she practices. This will help the lawyer determine whether the ABA's approach has been followed or modified.

### ABA FORMAL OPINION 95-394: SETTLEMENT AGREEMENT RESTRICTING LAWYER'S RIGHT TO UNDERTAKE OTHER REPRESENTATION AGAINST A GOVERNMENT AGENCY (JULY 24, 1995)

This opinion addressed whether a lawyer who has been litigating against a government agency may accept a settlement agreement favorable to the client, but conditioned on the lawyer's agreeing not to represent any similarly situated parties against the same agency in the future. Rule 5.6(b) of the Model Rules of Professional Conduct expressly prohibits such a settlement condition in "a controversy between private parties,"<sup>2</sup> but it was not clear whether government agencies engaged in civil litigation are subject to the same prohibition.

The ABA Committee concluded that Rule 5.6(b) prohibits such a condition in a settlement agreement involving a government agency. Thus, it is improper for the lawyer representing the private party to agree to such a condition, and it is improper for the government lawyer to make such an offer. The ABA Committee noted that the drafting history of the rule yields no explanation why the concluding phrase refers only to "private parties." This limitation did not appear in the predecessor provision of the Model Code, nor did the Committee find any rationale for the limitation in scholarly or decisional authority.

Given the powerful policy considerations that support the prohibition—such settlement conditions restrict public access to lawyers with the best background and experience, and place lawyers in a conflicting position

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1. The Committee gratefully acknowledges the assistance of Jacqueline Gerson, Esq. of Sidley & Austin in the preparation of this report.

2. Model Rule 5.6 provides in part:

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 controversy between private parties.

between the interests of present clients and those of potential future clients—the ABA Committee concluded that if the drafters of the rule had intended an exception for government agencies, “they would clearly have said so.” Thus, they interpreted the private party language to be merely descriptive of the circumstances in which such settlement conditions are most likely to be proposed, rather than as prescriptive of the kinds of settlement agreements to which the prohibition applies.

While this opinion does not necessarily square with the plain language of the rule, it provides both government lawyers and private practitioners with a bright-line rule. Neither party may propose, or agree to, a condition in a settlement agreement that would limit the private practitioner’s ability to represent other clients before the agency. The only exception is where the agency has some disciplinary authority over the lawyer’s practice. The ABA Committee cited the example of a highly publicized lawsuit by the Office of Thrift Supervision (OTS) against a private law firm. Two partners agreed to be suspended from practice before OTS and be barred from representing any savings associations and banks that carry federal deposit insurance. Aside from such disciplinary conditions, agencies may not attempt to restrict private lawyers’ right to practice.

ABA FORMAL OPINION 95-393: DISCLOSURE OF CLIENT FILES TO NON-LAWYER SUPERVISORS (APRIL 24, 1995)

In this opinion, the ABA Committee opined on whether a lawyer in a government elder care office may allow his non-lawyer supervisor to have access to his client files for the purpose of collecting demographic information about the agency’s clients. The concern is that such files likely contain confidential client information within the meaning of Rule 1.6 of the Model Rules of Professional Conduct.<sup>3</sup>

The ABA Committee concluded that disclosure of the information is permissible as long as the information will be used to carry out the client’s representation or the disclosure otherwise will help the lawyer in representing the client. Prior to disclosure, however, the lawyer must inform the supervisor of the confidential nature of the information and assure that the supervisor understands the limited purpose for which it may be used. The foregoing also applies to the disclosure of client information to non-lawyer subordinates.

The ABA Committee gave several examples of how a non-lawyer supervisor might assist a lawyer in representing the client, such that disclosure of client information to the non-lawyer would be permissible. The supervisor might, for example, assist the lawyer by giving advice on how to deal with the client or with third parties, such as other agencies or officials. The supervisor also might deal directly with the client or with the third parties. It also might be necessary for the supervisor to deal with superiors in the office to get expenditure authorizations or other approvals.

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3. Model Rule 1.6 provides that a lawyer “shall not reveal information relating to representation of a client unless the client consents after consultation.”

When disclosure of information to a non-lawyer supervisor will not help the lawyer in the representation, the disclosure is prohibited absent consent of the client. The consent must be obtained after full consultation regarding the nature of the information that will be disclosed and the possible uses of it. The lawyer must be mindful of the special requirements and prescriptions set forth in Model Rule 1.14 that apply to clients who may have an impaired ability to make informed decisions in connection with representation.

In the absence of client consent, the lawyer may still compile and then disclose demographic or statistical information that does not compromise the confidentiality of individual client files. Similarly, the general statistical information may be provided to outside agencies when it is requested for a legitimate purpose.

Insofar as the ABA Committee has approved the disclosure of client information to non-lawyers as necessary to conduct the representation, it has given broad deference to the needs of executive branch lawyers who work with non-lawyers. Indeed, this opinion essentially endorses the approach that most agencies already take with respect to client information. Where the disclosure advances the purposes of the representation, and the non-lawyer is aware of the need to preserve the confidentiality of the information, it is permissible to disclose client information to non-lawyers.

ABA FORMAL OPINION 94-385: SUBPOENAS OF A LAWYER'S FILES  
(JULY 5, 1994)

In this opinion, the ABA Committee commented on the ethical obligations of a lawyer who receives a subpoena or court order from a government agency seeking the lawyer's files relating to a current or former client, including time and disbursement records. The ABA Committee noted, however, that the same considerations apply with respect to subpoenas issued by any party.

The ABA Committee concluded that a lawyer's ethical obligation to maintain client confidences, embodied in Rule 1.6 of the Model Rules of Professional Conduct, requires that the lawyer not remain a "passive bystander" in the face of a subpoena directed at client files. Instead, the lawyer has a professional obligation "to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply." Only if the lawyer's efforts are unsuccessful, and the court specifically orders privileged material to be turned over, may the lawyer do so. Even then, a protective confidentiality order may be appropriate to protect client confidences. The ABA Committee further opined that if the client consents to the lawyer producing privileged documents, after discussion and disclosure of the client's rights, the lawyer need not seek to avoid production under the subpoena.

Because the reach of Rule 1.6 is very broad—*i.e.*, broader than the attorney-client privilege because it extends not only to information communicated in confidence by the client, but also to “all information relating to the representation, whatever its source,” Comment to Rule 1.6—this Opinion in most cases would require a lawyer to seek to avoid production of the bulk of the material in a client file. Even time records, as the ABA Committee specifically noted, fall within the attorney-client privilege “to the extent that they indicate the substance of attorney-client communications.” Accordingly, if this Opinion is widely adopted and followed, subpoenas directed at lawyers’ files routinely will be met with motions to quash or other motions to limit their scope.

ABA FORMAL OPINION 94-387: DISCLOSURE TO OPPOSING PARTY AND  
COURT THAT STATUTE OF LIMITATIONS HAS RUN  
(SEPTEMBER 26, 1994)

This opinion addressed whether a lawyer is obligated to disclose to the opposing party or the court that the statute of limitations has run on his client’s claim. Significantly, it also addressed whether a government lawyer is held to a higher standard in these circumstances.

In a rather surprising decision, the ABA Committee concluded that the ethics rules do not preclude a lawyer from negotiating over a claim without informing the opposing party that the statute of limitations on that claim has run. Indeed, the ABA Committee opined that a lawyer may not, consistent with his duty to represent the client diligently,<sup>4</sup> refuse to negotiate merely because the claim is or has become time-barred. Of course, the lawyer may not make affirmative misrepresentations about the statute of limitations or about the facts controlling whether the claim is time-barred. But, the Committee concluded, failing to disclose the defect does not violate a lawyer’s duty to disclose material facts in order to avoid assisting a client in perpetuating fraud because expiration of the limitations period for filing suit does not affect the validity of the underlying claim or make it improper for the client to try to persuade the other party to settle voluntarily.

While there is no obligation to disclose to the opposing party that the claim is time-barred, the client must be advised of this fact. The client is entitled to be advised in order to make an informed decision as to whether to continue to negotiate, in light of the likelihood that there will be no recovery if the opposing party discovers that the limitations period has run and asserts that defense.

The next issue addressed by the ABA Committee was whether it is unethical for a lawyer to file a time-barred claim in court. The Committee concluded that it is not unethical, so long as it does not violate the law of the relevant jurisdiction. The Committee reasoned that filing a time-barred

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4. Rule 1.3 of the Model Rules of Professional Conduct provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

claim does not violate a lawyer's duty not to file "frivolous" lawsuits<sup>5</sup> because expiration of the limitations period creates an affirmative defense that must be asserted by the opposing party, but does not oust the court of jurisdiction to enforce the claim. Filing such a lawsuit also does not violate a lawyer's duty of candor toward the tribunal,<sup>6</sup> as long as the lawyer does not make any oral or written misrepresentations to the court or opposing counsel.

The ABA Committee further opined that there is no basis to impose any different obligation on a lawyer who represents a government agency as opposed to a private party. While acknowledging that some courts have held that ethical codes impose different requirements on government attorneys, the Committee concluded that it found "no basis in the Model Rules for doing so, at least in the context of a noncriminal matter."<sup>7</sup> The government attorney has no less a duty to zealously represent his client within the bounds of the law, and no greater or lesser duty to be candid with the court and fair to third parties. The ABA Committee acknowledged that the government entity itself may have additional duties to members of the public and the justice system generally, but noted that such duties do not derive from the ethical rules applicable generally to lawyers, and should not be enforced as such.

One of the Committee members vigorously dissented to the Opinion. He felt that it encourages lawyers to engage in sharp litigation practices that are plainly impermissible under Model Rule 8.4(c), which prohibits a lawyer from engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation." He further noted that the "worst part" of the Opinion is its statement that "government lawyers do not owe a greater duty to the public." While acknowledging that the Model Rules are silent on this issue, he stated his view that government lawyers indeed have a greater duty that "transcends those in the Model Rules" because of their "great power" and

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5. Rule 3.1 of the Model Rules of Professional Conduct provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

6. Rule 3.3(a) of the Model Rules of Professional Responsibility provides that a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

7. The ABA Committee noted that parties often cited Ethical Consideration 7-14 of the predecessor Model Code of Professional Responsibility (1980) for the proposition that government lawyers are held to a higher standard. This consideration provided in part that "[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." The ABA Committee noted, however, that EC 7-14 has no counterpart in the more recent Model Rules, which contain no suggestion that rules generally applicable to all lawyers should be interpreted to impose different requirements on government lawyers.

involvement in political and constitutional areas. He noted that a proposed ethical rule to that effect was suggested during the Watergate investigations, but never adopted. To his mind, the need for such a rule "is still there" and the Committee should adopt such a rule.

The views expressed in the dissent are noteworthy because they echo the sentiments of Chief Judge Abner Mikva of the United States Court of Appeals for the District of Columbia Circuit in *Freeport-McMoRan Oil & Gas Company v. FERC*.<sup>8</sup> In that decision, the Court admonished the FERC for not vacating certain orders that clearly had been rendered moot by a superseding order, where doing so would have settled the case. The Court expressed its "displeasure with [the] FERC counsel's failure to take easy and obvious steps to avoid needless litigation."<sup>9</sup> It also took issue with "FERC counsel's remarkable assertion at oral argument that government attorneys ought not be held to higher standards than attorneys for private litigants."<sup>10</sup>

In expressing the Court's view that government lawyers are held to higher standards, Judge Mikva specifically noted that government lawyers should "refrain from continuing litigation that is obviously pointless, that could easily be resolved, and that wastes Court time and taxpayer money."<sup>11</sup> Government lawyers should set an example for private litigants and attempt to settle cases wherever possible. In addition, the Court quoted from a Supreme Court decision holding that a government lawyer "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done."<sup>12</sup> While the Court did not attempt to fully describe the "higher obligations" that government lawyers are subject to, it plainly took the position that government lawyers should take affirmative steps to discontinue or settle litigation that is not in the public interest.

COMMITTEE ON ETHICS

Carl W. Ulrich, Chair

Eugene R. Elrod, Vice Chair

George F. Bruder

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Toni Marie Sutliff

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8. 962 F.2d 45 (D.C. Cir. 1992).

9. *Id.* at 46.

10. *Id.*

11. *Id.* at 47.

12. *Id.* (quoting *Berger v. United States*, 295 U.S. 78 (1935)).