ETHICS ADVISORY OPINION

16-02

Factual Background:

Lawyer A, in an effort to settle a case, proposes the following terms to opposing counsel Lawyer B:

All terms of this Agreement are and shall remain confidential and shall not be disclosed to any person or entity by any party hereto, or by the attorney of any party, except as permitted herein. Each party expressly represents and warrants that it will not publicize in any manner, either personally or through an agent or representative, or undertake to or aid or assist any third party in publicizing or exploiting in any form whatsoever, by any means whatsoever, in any medium whatsoever, the terms of this Agreement.

Notwithstanding the foregoing, the parties may disclose solely that the matters described herein have been "amicably resolved." Disclosure of the terms of this Agreement to a third party may occur, to the minimum extent necessary, in the following situations: (i)insofar as disclosure is required pursuant to a subpoena issued by a court of competent jurisdiction or legislative body or otherwise required by law; (ii) as reasonably required for purposes of complying with state and federal tax laws, or (iii) if necessary to enforce the terms of this Agreement in any proceeding.

Question Presented:

May a SC lawyer agree to a confidentiality clause in the settlement of claims against the proposing firm's client?

Summary: A lawyer may accept the proposed terms of settlement, provided that they are permitted by Rule 41.1 of the SC Rules of Civil Procedure, as the terms do not restrict use of information gained in the course of representation, but instead are limited to a prohibition of disclosure and publication of the settlement.

Discussion:

While this Committee typically limits opinions to discussions solely on the Rules of Professional Conduct, initial reference should be made to rule 41.1 of the South Carolina Rules of Civil Procedure (SCRCP). A SC –licensed lawyer must comply with Rule 41.1, SCRCP if negotiating a court-ordered settlement. Rule 3.4(c) of the SC Rules of Professional Conduct (SCRPC) is the

companion, stating that "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal…"

In addition to compliance with Rule 41.1, SCRCP and Rule 3.4(c), SCRPC, Bar members must be mindful of Rule 5.6(b), which prohibits agreements that restrict a lawyers' right to practice as part of the settlement of a client controversy. For example, an agreement as part of a civil settlement that plaintiff's attorney will not later represent other parties is a violation of Rule 5.6, and a request by counsel for such an agreement violates Rule 8.4(a). ABA Formal Op. 93-371. An additional ABA formal opinion offers a valuable distinction applicable to this inquirer: ABA Formal Op. 00-417 says that a lawyer may participate in a settlement agreement that prohibits the lawyer from revealing information relating to the representation, but may not participate in an agreement that prevents the lawyer from using such information in later representation (emphasis added). To agree that use of such information gained in a representation may not be used would be a violation of Rule 5.6. In the agreement language here, parties are agreeing to forego disclosure, and no language is included that would limit the individual attorneys' use of information gained in the course of the representation for development of legal strategy or other similar purposes.

Finally, the committee suggests that an analysis of the settlement agreement as a whole is warranted to ensure that these provisions, in context with the remainder of the agreement, are in the best interest of the client.