A Crack in the Wall of Denial:  
Challenging Chicago’s Unethical Settlement Practices

By Craig B. Futterman, Jason E. Huber, and Pier Petersen

Introduction

On February 28, 2006, Carlos Salazar, a Latino construction worker in his early 40s, had just picked up his mother from a health clinic on the Southwest Side of Chicago when he saw the flashing blue lights of a police car approaching from behind. Mr. Salazar knew he had done nothing wrong. So did the police. The officers pulled him over at the request of Chicago Police Detectives who wanted to question him about a year-old murder—a cold case the police department had been unable to solve. Salazar wasn’t a suspect—he wasn’t even an eyewitness—but the detectives, several months earlier, learned that Salazar may have heard some guys in the neighborhood talking about the shooting. And the police wanted to know more.

Salazar was handcuffed, placed in a squad car, and driven to a local police station. Once there, detectives searched him, took his shoelaces, cigarettes, and driver’s license, and then locked him in a windowless interrogation room. The barren interrogation room, brightly lit 24 hours a day by fluorescent overhead lights, was furnished with only a narrow steel bench bolted to the floor, and metal rings for handcuffing prisoners hanging from a cement wall a few feet above the bench. Between bouts of aggressive police interrogation, the detectives left Salazar cuffed to the metal rings above the bench for

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2 Mr. Salazar’s name has been changed to avoid compromising his privacy.
several hours. The detectives isolated Mr. Salazar in this room, denying him access to his lawyer and family.

The detectives were not violating their own rules in detaining Mr. Salazar under these inhumane and unconstitutional conditions. They seized and detained him pursuant to standard practice of the Chicago Police Department. Detectives were trained to “force or compel” reluctant witnesses—people whom the police have no reason to believe have done anything wrong—to accompany them to police facilities. Before confining a witness in a police interrogation room, detectives “thoroughly searched” the witness from head to toe. They removed personal belongings, such as keys, identification, cell phones, belts, and shoelaces. They then locked the witness in a bleak interrogation room and held him incommunicado for extended periods of time—no family, no friends, and definitely no lawyers. If the witness’s lawyer requested to see her client, she was denied access, because her client was “only a witness.” As there were no toilets, running water, or food in police interrogation rooms, the witness was completely dependent upon the police for his basic needs. James Molloy, the former Chief of Detectives, testified that he would not be surprised if within the two year period leading up to Mr. Salazar’s detention, Chicago police confined more than a hundred witnesses under similar conditions.

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5 Id.
6 Id.
conditions for longer than 24 hours. Like Mr. Salazar, the victims of this practice were mostly Black and Brown residents of low-income communities in Chicago.

Twenty-six hours after they had first imprisoned Mr. Salazar in the interrogation room, the detectives got what they wanted: his testimony implicating the detectives’ desired suspect for the murder. After they compelled him to testify before a grand jury, the detectives told Mr. Salazar that he was free to go.

Mr. Salazar was one of hundreds of witnesses whom Chicago Police detained in violation of the Constitution, and one of several whom the Edwin F. Mandel Legal Aid Clinic of the University of Chicago and the MacArthur Justice Center based at Northwestern University School of Law represented in civil rights suits against the City of Chicago. Victims of this unlawful practice won a settlement in late 2007 that requires Chicago police to promptly inform witnesses in police facilities that they are free to leave whenever they want.

The Salazar litigation followed a common course: months of motion practice centered around the City’s repeated attempts to prevent discovery and any judicial scrutiny of police policies and practices. The City ultimately proposed a settlement that made sense for our client. But it was a problematic settlement for us, his lawyers, and for civil rights attorneys throughout Chicago and the country. The City demanded our stipulation to a stock clause that explicitly—and unethically—sought to impair our ability to represent future clients. At the time, this was a long standing practice on the part of

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7 Id.
the City in settling police misconduct cases and a key tactic in its larger strategy of burying problems of systemic police abuse.

The City’s Agreement provided that in contrast to any other lawyer in the world, we as Mr. Salazar’s attorneys could not use evidence of the settlement in any other litigation. Ever! The City’s boilerplate clause read as follows:

Plaintiff and his attorney agree that they or any firm with which said attorney is affiliated or with which said attorney may later become affiliated shall not use this settlement as notice of misconduct on the part of any defendant and/or the City of Chicago and/or its future, current or former officers, agents and employees, or for any other purpose in any other litigation, and that such use is inconsistent with the terms of this Release and Settlement Agreement.

This language goes far beyond the standard denial of liability and release of claims arising from the subject matter of the lawsuit. It requires plaintiff’s attorneys (and anyone with whom they would ever work) to renounce the use of evidence that might be relevant and admissible in future litigation on behalf of other present or future clients. In other words, it forces plaintiff’s attorneys to promise that they will be less diligent, less vigorous, and less effective in their representation of other clients. And that is not a promise that any attorney can ethically make, or ethically ask another attorney to make.

The City of Chicago had included similar language in its standard settlement agreements for several decades, and scores of plaintiffs’ lawyers—including the authors of this article—had signed off on it. Some had signed it without thinking much about it; others had signed because they did not think it was fair to jeopardize their client’s interests to stand on principle; still others had signed assuming—or hoping—that courts would never enforce such an obviously unethical provision.
But far from harmless, the City’s insistence on this clause in all of its settlement agreements operated as part of its larger pattern of suppressing evidence of police misconduct and City liability for that misconduct, and a broader strategy of “solving” the problem of police misconduct by concealing it from the courts, from the public, and even from elected officials responsible for the oversight of the police department. In this respect—in the great lengths to which it will go to cover up police misconduct—the City of Chicago is in a class of its own. It appears to have been the only city, town, or county in the country that insisted on including such blatantly restrictive language in its settlement offers.

9 See Craig B. Futterman, H. Melissa Mather, and Melanie Miles, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: Chicago Police Department’s Broken System, 1 DePaul J. Soc. Just. 251, 289 (2008) (“[N]ot knowing about police abuse in Chicago. . . . requires a deep commitment to the machinery of denial, including denying incidents of brutality, turning a blind eye to patterns of abuse, refusing to look at data that is just a key stroke or two away and passively encouraging a culture of silence in the face of abuse perpetrated by fellow officers.”) See also Jamie Kalven, Kicking the Pigeon 42 (2005–2006), http://www.viewfromtheground.com/wp-content/media/ktp/kicking_the_pigeon.pdf (“Taken together, the code of silence among officers on the ground, the OPS machinery for converting citizen complaints into findings of ‘not sustained,’ and the institutional resistance to effective monitoring form a single, unified system—a regime of not-knowing.”); Jennifer Chen, Kimbriell Kelly, and Jeff Kelly Lowenstein, Hidden From Public View, The Chicago Reporter, Nov. 2007, http://www.chicagoreporter.com/index.php/c/Web_Extras/d/Hidden_From_Public_View (describing the City’s fight to keep secret from the public and City Council the identities of the Chicago Police Officers charged with the most abuse in the City); Frank Main, “No One Is Above the Law”; Weis Apologizes for Delay, Hands Over Complaint List, Chicago Sun Times, Mar. 9, 2009, at 4 (describing City’s and Police Superintendent’s defiance of a routine federal court order to provide plaintiff’s attorneys, subject to a protective order, with a list of officers who were charged with repeated abuse). Also illustrative, Chicago pioneered obscurantist litigation techniques to prevent inquiry into the constitutionality, propriety, or wisdom of the police department’s policies, procedures, or customs by seeking, as a matter of practice, to bar discovery of and thwart litigation of municipal practices in almost every case involving constitutional claims of municipal liability in the police abuse context. See, e.g., Cadiz v. Kruger, No. 06 C 5463, 2007 WL 4293976, at *8 (N.D. Ill. Nov. 29, 2007). Then, when the City settled a police misconduct matter, it attempted to force feed a restrictive covenant upon settling attorneys, barring them from using evidence of the settlement in other cases.

10 In preparing this article, we surveyed civil rights and police accountability attorneys across the country by sending out a general inquiry on the National Police Accountability Project listserv, and by contacting individual lawyers in several states by e-mail and/or telephone. None outside Chicago reported encountering the same—or even similar—language in any settlement
In June 2009, the City agreed to strike the limiting language from its standard agreement, as a result of a campaign by local civil rights lawyers, including us, to put an end to these unethical settlement practices. Indeed, we originally conceived of and published this article as a part of our campaign.\textsuperscript{11} We are sharing our story now in the hope that it will serve as one example of how creative lawyering can facilitate social change. It is a story about trying out different tactics, coping with contingencies, making mistakes, and muddling through to make a change that, while modest, still matters.\textsuperscript{12}

The article proceeds in three parts, the first two more traditionally legal-argumentative, the final one more narrative. Part I explains how settlement evidence can be used under the federal and state rules of evidence, and provides examples of a few cases in which such evidence has proved crucial. Part II explores the ethical problems presented by the City’s standard settlement language, and demonstrates that the restrictive clause violates the standards of legal ethics. Part III tells the story of our campaign to change the city’s policy.

I. The Federal Rules and the Permitted Uses of Settlement Evidence

Evidence of prior settlements—the same evidence that the City sought to prevent settling attorneys from using—can be powerful in civil rights police misconduct cases. This evidence goes to the heart of one of the most contentious and challenging aspects of agreement. Many said that they would refuse to sign such an “unethical” or “obnoxious” settlement.


\textsuperscript{12} Our approach to lawyering has been heavily influenced by Professor Gerald López’s groundbreaking work. Gerald López, \textit{Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice} (Westview Press 1992).
a police policy and practice case—the municipality’s deliberate indifference. Prior settlements can be used to show the city’s notice of systemic problems and knowledge of those issues, both of which are key to proving deliberate indifference. Similarly, prior settlements in which the municipality paid out money for the charged misconduct of certain officers are evidence of the individual police defendants’ motive, bias, and interest to provide false testimony and cover up misconduct when charged with abuse again.

All too many practitioners mistakenly assume that Rule 408 of the Federal Rules of Evidence, and analogous state evidentiary rules, preclude effective use of prior settlements. They are wrong. While Rule 408 prevents litigants from using settlements as evidence of misconduct, it does not bar parties from using settlements as evidence of notice, bias, or a host of other purposes that may be pertinent in police misconduct litigation.

Rule 408, mirrored by state rules of the same number, prohibits the introduction of evidence of a settlement or settlement negotiations when such evidence is offered to prove “liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction.”\(^\text{13}\) The rule is designed to encourage settlement by ensuring parties feel free to discuss sensitive issues without concern that those frank discussions will be used against them in court if settlement talks fail. Rule 408 and the related state rules reflect a long-standing preference for settlement over costly litigation, and a concern that allowing settlement

\(^{13}\) Fed. R. Evid. 408(a). See also, e.g., Ind. Evid. R. 408.
offers or information into evidence to prove liability would undermine parties’
willingness to engage in future settlement negotiations.

Those same concerns do not, however, apply when settlement information is
offered to prove anything other than validity of a claim, and Rule 408 and its state
counterparts specifically permit the introduction of settlement evidence when it is offered
for any other purpose.\footnote{The explicit list of permitted uses outlined in Fed. R. Evid. 408(b) is meant to be illustrative, not exhaustive. \textit{E.g.}, \textit{United States v. Technic Servs., Inc.}, 314 F.3d 1031, 1045 (9th Cir. 2002).}

\subsection*{A. Proof of Notice, Knowledge, and Deliberate Indifference}

Evidence of a settlement agreement may be used to establish notice, knowledge,
and deliberate indifference when plaintiffs seek to hold municipalities accountable for
constitutional harm resulting from deficient supervisory, disciplinary, or training
practices. To prove municipal liability in these cases, a plaintiff must show more than
that the city’s training or supervisory practices caused his or her constitutional injuries.
The plaintiff must also show that the municipality’s failure to train or supervise “amounts
to deliberate indifference to the rights of persons with whom the police come into

Settlement evidence has proven invaluable in these cases. Take, for example, the
facts behind the Fourth Circuit’s decision in \textit{Spell v. McDaniel}.\footnote{824 F.2d 1380 (4\textsuperscript{th} Cir. 1987).} Henry Spell charged
that he was “brutally assaulted” by Fayetteville, N.C. police officer Charles McDaniel
after being arrested for drug possession.\footnote{\textit{Id.} at 1383–84.} Spell filed a § 1983 action against McDaniel,
police supervisors, and the city asserting, in part, that the city had a “condoned custom”
of allowing the use of excessive force against detainees. Spell sought, and the district court granted, the admission of the city’s settlement of an earlier police brutality claim to show that the city was sufficiently aware of the “developed practice or custom” of such conduct. The Fourth Circuit held that the district court properly admitted this evidence “as an essential element of Spell’s ‘condoned custom’ theory of liability.” It is worth noting that this “essential element” of evidence helped the plaintiff’s attorney secure a $900,000 jury verdict against the city.

Plaintiffs also successfully used settlement evidence to prove notice and deliberate indifference in several § 1983 cases challenging the “over-detention” practices of the Los Angeles County Jail. In 1997, former jail inmates filed a class action suit against the County, the Sheriff, and other jail supervisors, alleging that the jail’s sluggish procedure for processing releases resulted in a failure to timely release inmates who were legally free to go. In 2002, the County settled this suit, and several related suits, for $27 million. But the County did not settle every pending over-detention suit, and in at least two of those other cases, the plaintiffs were able to introduce evidence of that earlier

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18 Id. at 1384, 1391.
19 Id. at 1400.
20 Id.
21 Id. at 1385.
22 Green v. Baca, 226 F.R.D. 624, 642 (C.D. Cal. 2005) (admitting evidence of past settlements to show that “defendant was on notice that there was an over-detention problem at the facility”); Mortimer v. Baca, 478 F. Supp. 2d 1171, 1177 n.1 (C.D. Cal. 2007) (admitting evidence of settlement recommendations made by a county sheriff’s office because they were “not used to show liability, but rather a raw number of potentially unreasonably overdetained individuals”).
23 The case was originally filed in state court, but was removed to federal court and consolidated with several other cases as Williams v. County of Los Angeles, No. CV 97-03826-CW (C.D. Cal. Nov. 16, 2001).
24 Order Regarding Settlement and Order Awarding Class Counsel Attorneys’ Fees and Costs, Williams v. County of Los Angeles, No. CV 97-03826-CW (C.D. Cal. Nov. 27, 2002).
settlement to prove that the Sheriff had notice that over-detentions were occurring at the jail. For example, in *Green v. Baca*, the California district court recognized “that showing defendant [Sheriff] was aware of the number of alleged over-detentions is essential to establish liability under *Monell*” and held that evidence of the number of previous settlements into which the Sheriff had entered was admissible to prove that knowledge. Other federal courts have similarly allowed the use of prior settlements to prove notice, knowledge, or deliberate indifference.

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27 *Id.* at 642. It’s important to note, however, that the settlement evidence was admitted only to prove that the Sheriff had notice or knowledge that over-detentions were occurring, and not to prove that the Sheriff or the County had a policy or custom of over-detaining inmates. *Id.* at 640–41. This is a subtle, but important, difference.
28 E.g., *Bowers v. Philadelphia*, No. 06-3229, 2008 WL 5234318 at *6 (E.D. Pa. Dec. 12, 2008) (admitting evidence of earlier consent decree to prove that the city had notice of unconstitutional crowding at the municipal jail, and holding that Rule 408 permits the admission of settlement evidence “to show that defendants had notice and knowledge on the issue of deliberate indifference”); *Perri v. Daggy*, 776 F.Supp. 1345, 1349 (N.D. Ind. 1991) (admitting settlement evidence in excessive force case to show that police chief “would have had greater reason to know of, and to act upon, [the police officer’s] alleged misadventures” and holding that “Rule 408 does not prohibit the use of a settlement to show a defendant's knowledge...or to demonstrate the unreasonableness of (or deliberate indifference inherent in) subsequent conduct”). Settlement evidence has also been used successfully to prove notice or knowledge in non-civil rights suits. E.g., *United States v. Austin*, 54 F.3d 394, 400 (7th Cir. 1995) (holding that evidence that a defendant had entered into a settlement with the Federal Trade Commission, formalized in a consent decree, had been properly admitted in a criminal trial to prove that the defendant had notice that his subsequent conduct was wrongful); *United States v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994) (holding that the trial court properly admitted Rule 408 evidence to demonstrate that a criminal defendant had knowledge of the tax laws); *Breuer Elec. Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) (holding that settlement evidence was properly admitted to show that defendant had notice of plaintiff’s trademark infringement claims, and stating that defendant’s argument that admission of settlement evidence violated Rule 408 was “ridiculous”); *Gagliardi v. Flint*, 564 F.2d 112, 116 (3d Cir. 1977) (stating that evidence of settlement negotiations was properly admitted to show the defendant's knowledge regarding its employees’ past behavior); *Cerqueira v. Am. Airlines, Inc.*, 484 F. Supp. 2d 232, 237 (D. Mass. 2007) (consent order admitted pursuant to Rule 408(b) to show “motive, intent, and notice” in a suit alleging racial profiling on the part of the airline); *United States v. Jorgensen*, No. 04-cr-169, 2004 WL 1774529 at *3 (D. Minn. Aug. 8, 2004) (evidence of settlement properly admitted under 408(b) to prove defendant’s knowledge of claim even when defendant denied wrongdoing in settlement).
B. Proof of Bias, Motive, and Interest

Evidence of prior settlements also provides officers with a substantial motive, bias, and interest to cover up their abuse and provide false testimony to avoid increased scrutiny, discipline, and job loss. Bias and interest evidence is plainly admissible under the express terms of Rule 408.29

Many police abuse cases turn on a swearing contest between witnesses. Who is the jury going to believe in most wars of credibility—the police or alleged victim of abuse? Settlement evidence that highlights police bias can alter that calculus. Presumably, municipal employers do not like having to pay out large sums money to settle cases alleging police abuse. Settlements against officers impose financial and legal burdens on their employers and possibly themselves, jeopardize their jobs, insurance and reputations, invite unwanted scrutiny or job discipline, and more generally discredit police departments and peer officers. An adverse judgment against an officer who previously settled a case could compound these negative consequences. Thus, a police officer, in light of the earlier settlement, has a strong incentive to cover up abuse in the instant case. Admission of the settlement evidence would therefore allow the jury to fully assess the officer’s credibility by considering his or her bias, motive and interest in

29 Fed. R. Evid. 408 (“[E]xamples of permissible purposes include proving a witness’s bias or prejudice.”) (emphasis added).

30 Indicative of the pro-government bias in these credibility contests, the United States Department of Justice found that of the tiny percentage of civil rights plaintiffs who are lucky enough to earn their right to a jury trial, fewer than one in three succeed at trial. Tracey Kyckelhahn and Thomas H. Cohen, Civil Rights Complaints in U.S. District Courts, 1990-2006, Bureau of Justice Statistics Bulletin No. NCJ 222989 (Aug. 2008).
avoiding these enhanced consequences. And in a swearing contest, credibility is everything.  

C. Prejudice v. Probity—Where the Real Action Lies

Because Rule 408 operates as a bar to evidence of a settlement only when used to show the validity or value of the underlying claim, plaintiffs’ lawyers can use settlement evidence for any other relevant purpose. Be creative. If the evidence is relevant to some other issue in a police abuse case, Rule 408 poses no barrier to its introduction.

Of course, just because settlement evidence may be admitted under Rule 408 does not mean that it will be. As with any evidence, it must also be relevant under Rule 401 and pass the Rule 403 balancing test. Three questions govern the court’s inquiry into the admissibility of settlement evidence. First, is the settlement evidence offered to prove liability for the settled claim (in which case it is inadmissible under Rule 408), or is it offered for some other purpose? Second, if offered for some other purpose, is the evidence relevant to any matter at issue? Third, is the probative value of the evidence substantially outweighed by the dangers of unfair prejudice? The real action around the admissibility of settlement evidence tends to be focused on the third question—the Rule

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31 The authors acknowledge that convincing courts to admit settlement evidence to show that a witness testimony is biased can sometimes be an uphill battle, especially when that witness is a defendant in the case. Because parties are already presumed to be biased, some courts have excluded settlement evidence under Rule 403 as cumulative or as more prejudicial than probative. E.g., Wallis v. Carco Carriage Corp., Inc., No. 95-7176, 96-7002, 1997 WL 580498 at *6 (10th Cir. Sept. 19, 1997) (noting that courts can exclude, under Rule 403, settlement evidence offered to prove bias if the danger of prejudice outweighs the relevance of the evidence).

32 The California District Court moves relatively carefully, if quickly, through these steps in Green v. Baca, 226 F.R.D. 624, 641–42 (C.D. Cal. 2005)
403 balancing of interests. In other words, admission of settlement evidence is a discretionary call for the trial judge.

Because evidence of prior settlements can be so powerful, ethical and zealous plaintiffs’ lawyers should make every effort to persuade the court to admit this evidence in their cases. Whether it be to establish notice and deliberate indifference in a municipal liability case, to discredit an officer’s testimony by exposing his or her motive, bias or interest, or for some other purpose relevant to the plaintiffs’ theory of her case, persuading the court to admit this evidence can make the difference between winning and losing. Win or lose, it is a fight worth having.

II. The Ethics Rules and Chicago’s Unethical Settlements

A. Ethics Rules Prohibit Settlements that Restrict an Attorney’s Right to Practice.

Chicago’s stock settlement agreement sought to prevent plaintiffs’ lawyers from using settlement evidence in representing victims of police abuse. Interestingly, it did not prohibit all lawyers from using the settlement as evidence. Only the particular plaintiff’s lawyer, and anyone associated with that lawyer, were barred from doing so. Thus, the City’s settlement tactic was not only malign, it was also patently unethical, because it unlawfully restricted the settling attorneys’ right to practice.

33 See, e.g., Spell v. McDaniel, 824 F.2d 1380, 1400 (4th Cir. 1987) (holding that the relevance of evidence of the defendant city’s settlement of earlier police brutality suit to establish notice “substantially outweighed the risk of any unfair prejudice within contemplation of Fed.R.Ev. 403”). Cf. Kinan v. Brockton, 876 F.2d 1029, 1034–35 (1st Cir. 1989) (upholding lower court’s decision to exclude evidence that the defendant city had settled two earlier lawsuits alleging excessive force on the part of police officers because “whatever remote relevancy” such evidence had to prove that the city had notice that police officers received inadequate training in dispatching and reporting crimes was “outweighed by the potential for prejudice”).
Among the basic ethical tenets governing lawyers are that they are free to practice their profession and bound to provide the most effective representation for all their clients. Any limitation of this right constitutes an unethical restrictive covenant. It is unethical to condition a settlement on a stipulation that restricts an attorney’s right to practice law. And it is equally unethical for an attorney to sign such a restrictive covenant.

The American Bar Association (ABA) Model Rules of Professional Conduct Rule 5.6(b), adopted by 43 states and the District of Columbia, mandates that 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.” The ABA Model


35 Model Rules of Prof'l Conduct R. 5.6(b) (2008) (emphasis added). Most states and the District of Columbia have adopted a version of the Model Rule. See Ala. Rules of Prof'l Conduct R. 5.6(b); Alaska Rules of Prof'l Conduct R. 5.6(b); Ariz. Rules of Prof'l Conduct R. 5.6(b); Ark. Rules of Prof'l Conduct R. 5.6(b); Colo. Rules of Prof'l Conduct R. 5.6(b); Conn. Rules of Prof'l Conduct R. 5.6(b); Del. Rules of Prof'l Conduct R. 5.6(b); D.C. Rules of Prof'l Conduct R. 5.6(b); Fla. Rules of Prof'l Conduct R. 5.6(b); Ga. Bar R. 4-102, 5.6(b); Haw. Rules of Prof'l Conduct R. 5.6(b); Idaho Rules of Prof'l Conduct R. 5.6(b); Ill. Rules of Prof'l Conduct R. 5.6(b); Kan. Rules of Prof'l Conduct R. 5.6(b); Ky. Rules of Prof'l Conduct R. 5.6(b); La. Rules of Prof'l Conduct R. 5.6(b); Me. Code of Prof'l Responsibility R. 3.2(g)(2); Md. Rules of Prof'l Conduct R. 5.6(b); Mass. Rules of Prof'l Conduct R. 5.6(b); Mich. Rules of Prof'l Conduct R. 5.6(b); Minn. Rules of Prof'l Conduct R. 5.6(b); Miss. Rules of Prof'l Conduct R. 5.6(b); Mo. Rules of Prof'l Conduct R. 4-5.6(b); Mont. Rules of Prof'l Conduct R. 5.6(b); Nev. Rules of Prof'l Conduct R. 190(2); N.C. Code of Prof'l Conduct R. 5.6(b); N.H. Rules of Prof'l Conduct R. 5.6(b); N.J. Rules of Prof'l Conduct R. 5.6(b); N.M. Rules of Prof'l Conduct R. 16-506(B); N.D. Rules of Prof'l Conduct R. 5.6(b); N.Y. Rules of Prof'l Conduct R. 5.6(a)(2); Okla. Rules of Prof'l Conduct R. 5.6(b); Pa. Rules of Prof'l Conduct R. 5.6(b); R.I. Rules of Prof'l Conduct R. 5.6(b); S.C. Rules of Prof'l Conduct R. 5.6(b); S.D. Rules of Prof'l Conduct R. 5.6(b); Tex. Rules of Prof'l Conduct R. 5.06(b) (permitting restrictive settlement
Code of Professional Responsibility requires that, “[i]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.”\(^{36}\) The Restatement of the Law Governing Lawyers explains that “[i]n settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.”\(^{37}\)

This rule against restrictive settlements serves three stated purposes. First, the rule seeks to protect and promote attorney and client autonomy, both of which are compromised when an attorney refuses to represent a potential client in order to comply
with the terms of a settlement agreement. Restrictive settlements undermine attorney autonomy by restricting lawyers’ future employment and limiting their professional mobility. They undermine client autonomy by “restrict[ing] the access of the public to lawyers who, by virtue of their background or experience, might be the very best available talent.” Second, the rule seeks to ensure that settlement agreements reflect the merits of a plaintiff’s claims rather than the defendant’s desire to “buy off” plaintiff’s counsel. Third, the rule seeks to forestall potential conflicts of interest between lawyers, their present clients, and potential future clients.

Restrictive settlement provisions like the ones long-employed by the City of Chicago thus violate fundamental ethics principles—and the purposes of the ethics rules—by forcing attorneys to choose from one of three bad options. A lawyer faced with the City’s stock settlement provision could sign the settlement, then refuse to take any future cases that might require that settlement to be introduced into evidence. This is a direct attack on the lawyer’s professional autonomy that undermines both the lawyer’s freedom to represent whomever she pleases, and any potential client’s freedom to choose whichever attorney he thinks can best represent his interests. Alternately, the lawyer could sign the settlement, and refrain from seeking to introduce it into evidence in future cases, even if it might prove to be relevant or even crucial in those other matters. This is a direct violation of the attorney’s duty to provide her client with zealous

42 Id.
Finally, the lawyer could simply refuse to sign the offending settlement. But this creates a conflict of interest between the lawyer and her current client, who might very well wish to accept a favorable settlement at the expense of his lawyer, and his lawyer’s future clients.  

At bottom, Chicago’s boilerplate settlement restricted the right of civil rights attorneys to practice law by impairing their ability to provide vigorous representation to their clients and creating conflicts of interest between those lawyers and their clients.

B. Any Restrictions, However Broad or Narrow, Are Ethically Prohibited.

Unethical restrictive covenants come in many forms. For example, ethics rules prohibit attorneys from entering agreements that preclude them from representing particular clients or types of clients, pursuing particular claims or types of claims, or suing particular defendants or types of defendants.

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43 Model Rules of Prof’l Conduct Preamble 9 (2008) (noting that a basic principle underlying the ethics rules is “the lawyer's obligation zealously to protect and pursue a client's legitimate interests”).

44 ABA Formal Op. 93-371. A lawyer in this situation must also mediate the conflict between her current client, who might want to accept a favorable settlement, and potential future clients, who would want to be represented by the most effective counsel.


46 See, e.g., N.C. State Bar Ethics Comm., 2003 Formal Ethics Op. 9 (2004) (An agreement not to represent potential clients with claims similar to settling client's claim “denies members of the public access to the very lawyer who may be best suited, by experience and background, to represent them.”)

47 See, e.g., N.M. Bar Ethics Advisory Comm., Op. 1985-5 (1985) (plaintiff’s counsel may not agree, as a condition of settlement, to forego future representation of any future claims arising out of the same incident that gave rise to the claim being settled).

48 See, e.g., ABA Formal Op. 93-371 (lawyer may not offer, and opposing counsel may not accept, settlement agreement obligating latter not to sue defendant in the future); State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 1988-104 (1988) (settlement agreement prohibiting attorney from representing "any person or entity in any litigation or arbitration proceeding against [defendant] or its affiliated entities” is unethical).
Different jurisdictions have formulated slightly different tests for determining when a settlement provision violates the rule against restrictions on the right to practice. The New York bar, for example, asks whether a settlement provision imposes restrictions on the lawyer’s conduct that his or her current client would not be entitled to insist upon.\(^49\) For the Colorado Bar, 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.”\(^50\) The Florida Bar looks to several factors to determine whether a settlement provision violates ethics rules, including whether the provision benefits the lawyer’s client or the opposing party instead.\(^51\) In all states, however, the “essential question” remains the same: does the questionable provision negatively affect the attorney’s ability to represent a future client?\(^52\) If so, the provision violates the ethical bar on settlements that restrict the right to practice.

The City of Chicago’s standard settlement agreement unquestionably failed the test described above by impairing signing attorneys’ ability to represent future clients.

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\(^{52}\) \textit{Id. See also, e.g.,} ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 417 (2000) (noting that the question is whether, “as a practical matter, [the] proposed limitation effectively would bar the lawyer from future representations” by “materially limit[ing] his representation of the future client...[or] adversely affect[ing] that representation”); Ill. State Bar Ass’n., Advisory Op. 00-01 (2000) (attorneys may not agree to keep interpretations of the law confidential because doing so would “impede the lawyer's ability to perform legal services for [future] clients”); Bd. of Prof’l Responsibility of the Sup. Ct. of Tenn., Ethics Op. 97-F-141 (“[S]ettle[ment] of one client’s case to the detriment of another client’s case” violates ethics rules); N.M. Ethics Op. 1985-5 (settlement agreement that required plaintiff’s attorney to turn over the complete case file, including attorney work product, to the defendant violated ethics rules because doing so might inhibit the lawyer’s ability to represent future clients).
The wholesale exclusion of potentially damning settlement evidence from the lawyer’s arsenal burdens the zeal and effectiveness with which the attorney must approach each client’s cause. A lawyer, shackled by a restrictive covenant, stymied in her ability to even consider attempting to admit settlement evidence, is left with two equally distasteful options, when facing the choice of assuming representation: she could either refuse to represent that potential client, or unethically choose to provide that potential client with inadequate and inhibited representation. Either option is unacceptable.

C. What About Confidentiality Provisions?

Police misconduct settlements are a matter of public record in Illinois, just as they are virtually everywhere else in the nation.53 Many jurisdictions, however, allow some aspects of a negotiated settlement to remain confidential, and attorneys may ethically

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agree to keep any such provisions secret.\textsuperscript{54} Attorneys may not, however, agree to any settlement that would prevent them from revealing otherwise public information.\textsuperscript{55}

The public nature of the settlement agreements made Chicago’s regime of information control all the more absurd. Every lawyer other than the attorney signing the agreement (and anyone ever associated with the signing attorney) had the right of access to and lawful use of all settlements involving the City and its officers. Importantly, other lawyers were not bound by the City’s restrictive covenant and could therefore use settlement evidence to the benefit of their clients for any purpose permitted by law.

But even if § 1983 civil rights settlements were not public records, ethics rules would still prohibit lawyers from offering or accepting any settlements that contained restrictive language like that long urged by the City of Chicago. In a formal opinion issued in 2000, the American Bar Association’s Committee on Ethics and Professional Responsibility considered whether Rule 5.6(b) bars a lawyer from agreeing to a settlement conditioned on the lawyer not using any of the information learned during the

\textsuperscript{54} See, e.g., ABA Formal Op. 00-417 (noting that all “information relating to the representation of the attorney’s present client”—like the particular terms of a settlement agreement—is already protected by confidentiality rules, and that any settlement provision requiring such information to be kept confidential does “no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice”). See also, e.g., L.A. County Bar Ass’n. Prof’l Responsibility and Ethics Comm., Formal Op. 512 (2004) (approving agreement that “would prohibit the plaintiff’s lawyer from revealing the terms of the settlement, but \textit{would not} ban the lawyer’s use of information from the case in future representations”) (emphasis added); N.M. Ethics Op. 1985-5 (“A settlement condition providing for nondisclosure of the amount and terms of a settlement is not only proper, but should be recognized where the details are not a matter of public record.”)

\textsuperscript{55} E.g., N.Y. State Ethics Op. 730 (Settlement agreement in employment discrimination case prohibited by ethics rules because it included confidentiality "provisions [that] would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret under [the ethics rules] but was nevertheless covered by the settlement terms.”); Colo. Ethics Op. 92 (“A lawyer may enter into a settlement agreement conditioned upon nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record.”).
current representation in any future representation against the same opposing party.\textsuperscript{56} The ABA Committee concluded that lawyers may not agree to settlements that limit the future use of information—even otherwise confidential information—gained during the course of representation or litigation. Such settlement terms, according to the ABA, “effectively...bar the lawyer from future representations because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation.”\textsuperscript{57}

\textbf{D. Don’t Count on Courts to Save You}

Although restrictive settlements are unethical, they are not necessarily unenforceable. While the law in this area is far from clear, it is clear that no lawyer can count on the court to undo her decision to sign a settlement that restricts her ability to practice. On the one hand, the Restatement of Law Governing Lawyers declares provisions that restrict an attorney’s right to practice to be “void and unenforceable.”\textsuperscript{58} And some courts have indeed held that such provisions are void as a matter of public

\textsuperscript{56} ABA Formal Op. 00-417.

\textsuperscript{57} Id. These settlements can be distinguished from attorney agreement to a protective order, which may be entered to keep confidential private or sensitive material that is exchanged between the parties in pretrial discovery, when “good cause” is demonstrated to the Court. Fed. R. Civ. P. 26(c). Unlike Chicago’s attempts to prohibit attorneys from the use of public settlements in other cases, if information governed by a protective order is relevant in another matter, attorneys may seek independent access to such information. For example, counsel may request the same or similar information from the municipality in the other case, subject to an independent judicial evaluation of its discoverability and use in that case. See Hu-Friedy Manufacturing Co., Inc. v. General Electric Co., No. 99 C 0762, 1999 WL 528545 at *2–3 (N.D. Ill. July 19, 1999) (explaining that while protective orders can legitimately regulate the use of information in a given case, they cannot bar “future use of confidential information that is independently relevant and discoverable in a subsequent action” because doing so would place “a restriction on an attorney’s right to practice law.”)

\textsuperscript{58} Restatement (Third) Law Governing Lawyers §13(2) (2000).
But other courts have held that the agreements are enforceable, even if they are unethical. And they have done so in sweeping language that suggests that contract law always trumps ethics rules. A New York appeals court, for example, reversed the trial court’s refusal to enforce a restrictive settlement, arguing that a “failure to enforce a freely entered into agreement would appear unseemly, and the ‘clean hands’ doctrine would preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them.” The court went on to hold that “an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York….Even if it [were] against the public policy of this State,” the court continued, “the ‘violation’ can be addressed by the appropriate disciplinary authorities.” A Florida appeals court took a similar tack in disqualifying a plaintiff’s attorney who had signed an earlier settlement agreeing not to participate in a suit against the defendant. Again, the court used wide-ranging language: “To use rule 4-5.6 as the basis for invalidating a private contractual provision,” the court declared, “is manifestly beyond the stated scope of the Rules and

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59 E.g., Jarvis v. Jarvis, 758 P.2d 244 (Kan. Ct. App. 1988) (holding that a settlement agreement that purported to bar a party from retaining a particular lawyer violated Kansas DR 2-108 and was thus void as a matter of public policy).

60 E.g., Shebay v. Davis, 717 SW.2d 678, 682 (Tex. App. 1986) (reasoning that presence of clause that might violate rule was irrelevant to whether settlement should be approved, but was a matter for the state bar grievance committee); Feldman v. Minars, 658 N.Y.S.2d 614, 617 (1st Dept. 1997); Lee v. Florida Dept. of Ins. & Treasurer, 586 So.2d 1185, 1188 (Fla. Dist. Ct. App. 1991).

61 Feldman, 658 N.Y.S.2d at 617. It’s important to note, however, that New York is one of the small number of states that had adopted Rule 2-108 of the Model Code of Professional Ethics. That rule, unlike the similar provision in the ABA Model Rules, places the ethical onus squarely—and solely—on the shoulders of the attorney who agrees to accept an unethical restriction on the right to practice. However, as of April 1, 2009, New York adopted revised Rules of Professional Conduct, which, like most states following the ABA Model Rules, make it unethical for an attorney either to offer or to accept an unethical practice restriction.

62 Id.

63 Lee, 586 So.2d at 1188.
their intended legal effect.”64 Here in Chicago, the City’s restrictive settlements have come back to haunt some signing attorneys. One experienced civil rights lawyer, for example, was prevented from introducing potentially relevant settlement evidence in a federal police misconduct case because he had signed off on the earlier settlement, which included the City’s standard restrictive clause.65

In addition to being bound by restrictive covenants, lawyers who accept them may also be subject to disciplinary proceedings and penalties, including suspension from practice.66 Thus attorneys who accept settlement agreements that restrict their right to practice may find themselves faced with the worst of both worlds: limited in their ability to represent potential clients and faced with disciplinary sanctions.

### III. Who Says You Can’t Fight City Hall?

Thanks to the courage of people like Carlos Salazar, Chicago eventually stopped locking up witnesses and holding them incommunicado against their will. Of course, the City did so only after five years of litigation, and only when faced with the prospect that a federal judge would change their policy for them if they didn’t do it themselves. The City’s unethical settlement practices, however, continued, despite occasional challenges from a number of Chicago’s civil rights attorneys, including us.

64 Id. The court had no need to make such a broad statement of policy, since it found that the attorney in question faced an unethical conflict of interest that would have barred him, under other ethics rules, from litigating the case at bar.

65 Confidential interview with a Chicago civil rights and police accountability attorney (Mar. 19, 2009).

66 E.g., In re Brandt, 331 Or. 113 (Or. 2000) (suspending attorneys who agreed to a settlement provision that indirectly limited their right to practice law). See also Shebay, 717 SW.2d at 682 (noting that attorneys who violated rule against restrictive settlements would be subject to bar discipline); Lee, 586 So.2d at 1188 (noting that “[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process”).
Our struggle to change the City’s settlement policy dates back at least a decade. Though we had signed off on the City’s boilerplate restriction a few times, it was always with misgivings, and generally in cases in which our clients could not afford the delay of prolonged settlement negotiations, or in which further negotiations threatened to derail an already complex and fragile agreement. Whenever the opportunity arose, we sought to negotiate changes in the language. Often, this resulted in knock-down, drag-out fights, some of which had to be resolved by the presiding judge, and many of which wore on for months. Sometimes we won the ideal settlement; other times, we had to settle for changes in the language that improved the agreement, but left objectionable vestiges of the limiting clause intact. Even in victory, our experience was far from satisfactory, because the inevitable delay put our clients in a tight spot, and put us in an ethical bind, caught between our duty to secure our current client’s settlement, and our obligation to do our best to win our future client’s lawsuit. Moreover, each victory was limited to the individual case, while the City’s pernicious practice persisted. The fundamental ethical dilemma endured: lawyers were placed in the untenable position of being forced to choose between their duty to their current client and their duty to future clients.

It is always difficult to explain to a client that something is holding up their long-awaited settlement, especially when that something likely looks to a layperson like little more than a lawyer’s technicality. In the Salazar case, however, we were lucky to have a client whose primary interest was to achieve justice for all Chicagoans—to make sure police never again treated anyone else as they had treated him. When we explained to him how the restrictive provision might make it more difficult to hold the City
accountable for any future violations of its new witness treatment policy, Mr. Salazar agreed that it was worth fighting to remove the objectionable clause.

With Mr. Salazar’s blessing, we rejected the settlement as written, and demanded that the City remove the offending clause. The City’s lawyers agreed at first, balked when rebuked by their superiors in the Law Department, then agreed to consider making some minor changes to the language. During the course of those negotiations, we had the opportunity to do some basic research into the ethical issues involved, and to develop our argument against the clause beyond our gut sense that it just was not right. A quick look into some of the foundational texts on legal ethics and a brief consultation with the general counsel at the Illinois Attorney Registration and Disciplinary Commission confirmed our intuition: the City’s clause was an unethical restriction on our right to practice. Armed with our research, we eventually reached agreement on a version of the restrictive clause that was better than the original, but still far from ideal.

The Salazar settlement negotiations revealed a crack—if a small one—in Chicago’s wall of institutional denial, and an opportunity to change City policy. Perhaps hoping to get the stalled Salazar settlement moving again by throwing us a bone, City lawyers offered to discuss the larger problems with the City’s restrictive settlement provision in more detail later, outside the context of any particular case. We considered ways to take advantage of this opening and brainstormed about strategies to change the City’s settlement policy once and for all. How could we turn our individual victories into lasting change?

We began to build our case against the restrictive settlement provision with several weeks of legal research—gathering information and citations from case law,
treatises, ethics opinions, and evidentiary and other court rules to show both that there are valid and accepted uses of settlement evidence, and that settlements that purport to limit the use of otherwise valid evidence are widely agreed to be unethical restrictions on the right to practice.

We then turned to police accountability and civil rights lawyers, our natural allies in this fight. We benefited from the fact that they were already organized, both locally and nation-wide, through the National Lawyers Guild’s National Police Accountability Project (NPAP). The Guild had already done the hard organizing work in bringing together these lawyers, making our task that much easier. Over several weeks, we surveyed civil rights lawyers in Chicago and across the country—most of them drawn from the ranks of NPAP—about their experiences with Chicago’s restrictive settlement clause or other similar provisions. We hoped both to get a sense of the scope of the restrictive settlement problem, and to explore possible strategies and solutions.

Our interviews proved fruitful in ways that both confirmed and challenged our thinking on the issue. On the one hand, civil rights lawyers across the country agreed that the City’s settlement provision was an odious one that would, in theory at least, put any lawyer faced with it in an ethical bind. But they disagreed about how serious that ethical dilemma would be in practice, and about how a lawyer should respond if offered a restrictive settlement. Some insisted that they would never sign such an agreement under any circumstance. These tended to be lawyers from outside Chicago who had never been offered such a settlement, and had not grown used to restrictions on their right to practice. Others said that they would feel forced to sign, after weighing the pressing needs of their often-poor clients against the remote chance the settlement evidence might later prove
useful in another case. These were often Chicago lawyers, who spoke eloquently about how they felt they could not subject their clients to the delay or risk of loss resulting from a refusal to sign. Some reported that they would sign grudgingly, sure that a court would never uphold the restriction. Still others said that they would sign without much worry, since they couldn’t imagine how settlement evidence would ever prove useful, much less necessary, in any future litigation.

Our survey of civil rights lawyers revealed that we had an organizable issue—one that many lawyers were concerned about, and thought something should be done about—and an organizable community. But it also made clear that educating the civil rights bar had to play a key role in our campaign. We had to alert them to the nature and scope of the problem, convince some of them that it really was a problem, and explore with them ways to confront the problem that were consistent with their keenly felt duties to their clients.

An earlier version of this article, originally published in the Police Misconduct and Civil Rights Law Report, was a centerpiece of that educational effort. Even before it was published, we embarked on two-way educational outreach in Chicago’s civil rights legal community. Members of the Chicago NPAP chapter were important partners in this effort. In a pizza-fueled meeting at the University of Chicago Law School, we presented the results of our research to them, brainstormed possible strategies and tactics, and planned our next steps.

That meeting generated many ideas, each of which had advantages and disadvantages. By the end of the meeting, we had decided to pursue several stratagems

67 Futterman et al., supra note 11.
simultaneously, while holding others in reserve. We sent a letter to Corporation Counsel, demanding that the City scrap its unethical settlement provision, and backed up our demand with a short version of the legal and ethical findings presented in Parts I and II of this article. That same day, we submitted an ethics inquiry to the State Bar, summarizing the ethical argument against the City’s restrictive clause, and seeking an advisory opinion. Many lawyers in the meeting agreed to reject, or at least protest, any settlement that included the standard limiting language. We began to spread the word to other lawyers not present at the meeting. Working with Chicago NPAP members, we drafted a model letter that civil rights and plaintiffs’ attorneys could send to City lawyers explaining that they could not sign off on a provision that unethically restricted their right to practice law. And over the following several weeks, a number of NPAP attorneys did indeed reject City settlements,

Meanwhile, we began to lay the groundwork for “stage two,” should it come to that. We contacted local legal bigwigs—legal ethicists and well-respected, well-connected practitioners in other fields—to see if they would be willing to sign on to a letter or petition condemning the City’s unethical settlement clause. We also approached the local and legal press, to explain the issue to them, and to prepare for the possibility that negative publicity might move the City to action if other methods failed.

In response to our demand letter, the City resumed negotiations with us, this time with an eye toward the reform of its standard settlement practices across the board. Within two months, the City agreed to change its policy, and drop the restrictive language from its standard settlement agreement.68

What caused the City to change its ways? The threat of legal or disciplinary sanction? The power of an organized civil rights bar? The fear of bad press or public resentment? Whatever the reason or reasons, we know that the change is real.

**Conclusion**

For at least two decades, Chicago’s practice of requiring plaintiff’s attorneys to accept restrictions on their right to practice law as a condition of settlement was one brick in the City’s wall of institutional denial. Years of police misconduct litigation and attendant settlement negotiations made a small crack in that wall. Using a variety of flexible strategies, and building on the broad base of expertise and power of interested players, we forced that crack open, wide enough to let some of the disinfecting light of truth shine through.