AMERICAN CIVIL LIBERTIES UNION
NATIONAL BOARD OF DIRECTORS
MEMORANDUM

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TO: ACLU National Board

FROM: **Ad Hoc Committee on Separation Agreements and Nondisparagement Clauses**
Marc Beem, Madan Goyal, Calien Lewis, Alexandra McKay (Chair), Joseph Sweat
Staff: Terence Dougherty and Dorothy Ehrlich

DATE: April 15, 2014

RE: Report and Recommendations on Separation Agreements and Nondisparagement Clauses

INTRODUCTION

The ACLU Executive Committee agreed in March 2013 to create a Committee to determine whether revisions to Policy 528a on Separation Agreements and Non-disparagement Clauses were necessary. ACLU Board President Susan Herman appointed Calien Lewis, Joseph Sweat, Marc Beem, Madan Goyal, and Alexandra McKay (Chair) to the Committee to review Policy 528a on Separation Agreements and Non-disparagement Clauses.

An ad-hoc Committee had last reviewed these issues in 1997 and made a recommendation to the National Board which adopted the current policy in April 1997 [*See Attachment A*].

OVERVIEW

A separation agreement is the usual legal contract that describes the termination agreement between a departing employee and employer. It ordinarily includes the amount of any severance payment; describes benefits offered; how future references will be handled and requires a "release" of claims against the employer. A non-disparagement clause is an additional term of a separation agreement that can restrict both the departing employee and employer from making disparaging or negative remarks about each other.

Under current ACLU policy # 528a, (A) the existence of separation agreements and their financial terms are disclosed to the Executive Committee, (B) non-disparagement clauses binding an employee's speech or conduct are prohibited except in extraordinary circumstances and require prior notice and approval from the Executive Committee; and (C) each separation agreement requires review by legal counsel.

The prior notice and Executive Committee's approval requirement has made it difficult for Management to consider including such non-disparagement clauses in separation agreements due to the lack of authority to engage in such agreements without EC approval and the delay that results from convening a meeting of the Executive Committee.

The Committee met and discussed (1) the use of non-disparagement clauses, (2) unique issues for the ACLU, and (3) the prior notice requirement.

DISCUSSION

The Use of Non-Disparagement Clauses

Non-disparagement clauses are commonly used.

The Committee found that non-disparagement clauses are not unusual in separation agreements within the for-profit and non-profit world. Examples of non-disparagement clauses were considered, and the primary purpose was generally to prohibit a former employee from tarnishing the reputation of the organization and visa versa – prohibiting the employer from harming the reputation of an employee. (In fact the only non-disparagement clause that has been brought to the EC for approval was at the behest of an employee).

NON-DISPARAGEMENT OFTEN REQUESTED BY DEPARTING EMPLPOYEE.

The clauses usually state that an ex-employee is not prevented from testifying truthfully in connection with any litigation, arbitration or administrative proceeding when compelled by subpoena, regulation or court order to do so. There may be a liquidated damages clause that relieves the organization and the employee of the burden of demonstrating that he, she or it was damaged by a disparaging remark, and is automatically awarded a cash amount (e.g. $1,000, $2,500) for each proven disparaging remark.

Non-disparagement clauses raise unique issues given the ACLU's mission

The mission of the ACLU puts us in a unique position and it is important that we place a high value on diversity of viewpoints and the ability of employees to express their personal opinions.

The ACLU's use of a non-disparagement clause is a simple contract – a bargained for agreement between two parties about the terms of an employee's separation from the ACLU and we are not legally prohibited from including such a clause in a separation agreement. Ultimately, the Committee agreed that Management – or a departing employee – should be able to use a non-disparagement clause as one of its tools in the negotiation over the terms of an employee's separation from the ACLU as long as it is clear that the agreement does not prohibit the employer or employee from speaking publicly about civil liberties substantive policy issues.

Non-disparagement provisions raise practical enforcement issues.

It is difficult to enforce a non-disparagement clause and even more difficult to avoid the publicity that would accompany the request for a court order. That publicity could highlight the disparaging statements being made by the former employee and give rise to (incorrect) claims that the ACLU is acting hypocritically in seeking to quash speech in circumstances in which it would criticize others for acting improperly when they did the same thing.

Additionally, depending on the circumstances, a non-disparagement provision may not be enforced if it conflicts with workers' rights (*e.g.*, right to organize under the National Labor Relations Act) or contravenes public policy (*e.g.*, exposing discrimination or danger to the public).

Despite the difficult issues relating to enforcement, the Committee believes that these clauses should be available to the Management Team to use when appropriate because employees often request them and further they establish guidelines for behavior on the part of both parties. Even if the ACLU would elect not to seek to enforce a non-disparagement agreement, the inclusion of the clause would be read by the departing employee, and would reinforce the understanding that the employee would not to go public with his/her gripes about the ACLU as an institution and the ACLU would also agree to protect the reputation of the employee.

Requiring prior notice from the Board before using a non-disparagement clause is unusual.

There is a move within non-profit circles toward greater transparency, including the terms of separation agreements, but it is unusual to require a board's prior approval. The Committee agreed that transparency in the use of separation agreements and non-disparagement clauses is important, but did not believe that prior notice should be required. The use of a non-disparagement clause should be within the Management Team's prerogative, and the requirement of prior notice involves the board in management decisions at a level that is unnecessary.

With respect to transparency, the use of a non-disparagement clause should be reported to the proper entity designated by the Board on an annual basis. Currently, the Executive Committee receives an annual report on separation agreements, any associated costs and the level of the position, without specific names.

The Committee acknowledges that use of a non-disparagement clause is within the Management Team's prerogative, but for purposes of ensuring transparency would recommend a requirement that use of the clause be reported specifically to the Audit Committee on an annual basis.

As a final matter, the Committee felt that part C of Policy 528a was unnecessary. While Management indicates it generally does consult with counsel prior to entering into a separation agreement, this is something that is properly delegated to Management's judgment.

RECOMMENDATIONS

The Committee proposes the modifications reflected in Draft Policy 528a [*See ATTACHMENT B*] based on the following recommendations:

- To continue to provide annual reports to a designated group (currently that is the EC, but recommendation is that it be delegated to the Audit Committee which has responsibility for various institutional compliance matters as well as the Audit). The annual report would continue to list terms of each individual agreement without names.

- To revise current policy #528a so that we delete the last two sections, but add a clause that states that if separation agreement includes a non-disparagement clause that such a clause would not apply to any disagreement about or discussion of substantive policy.

ATTACHMENT A

CURRENT Policy #528a

Separation Agreements and Nondisparagement Clauses

A. Separation Agreements

Separation agreements as described in the report of the Ad Hoc Committee on Nondisparagement/Confidentiality Agreements considered at the April 1997 Board meeting should continue to be available to management, provided that they are modified so as to ensure that their existence and their financial terms are to be disclosed to the Executive Committee, because the Executive Committee functions as the Board's management committee and has to exercise oversight of the Executive Director in connection with the performance of his duties as Chief Executive Officer. The Board recommended a modification in the "confidentiality" provision's language such that the phrase does not mean more than is intended or could be construed by the employee to curtail speech that would not be prohibited.

B. Nondisparagement Clauses

Nondisparagement clauses binding an employee's speech or conduct should be prohibited except in extraordinary circumstances. Their use in any specific instance should be approved by the Executive Committee.

C. Advice of Counsel

Management is urged to further investigate this legal framework and each separation agreement should continue to be executed only with advice of legal counsel. [Board Minutes, April 5-61997.]

ATTACHMENT B

DRAFT NEW Policy #528a

Separation Agreements

In its discretion and in accordance with applicable law, Management may enter into separation agreements in connection with the termination of employment of members of ACLU staff. Management shall report to the Audit Committee no less than once each year regarding the financial terms of separation agreements entered into since the prior report.

Management shall ensure that any confidentiality and non-disparagement provisions included in a separation agreement are drafted in such a manner that makes clear that these provisions do not prohibit the terminated employee from expressing an opinion regarding the ACLU's positions on a civil liberties or other substantive policy matter.