

**Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)**

**TRIAL MAGAZINE
DRUGS AND DEVICES**

August 1998, Volume 34, No. 8

Keeping secrets with confidentiality agreements

Maja Ramsey, Justine Durrell, and Timothy W. Ahearn

You have arrived at the end of the day in mediation and your client has agreed to accept opposing counsel's last offer. The defense now insists that the settlement agreement contain the "usual" confidentiality clause. Many plaintiff lawyers believe they have no option but to accept the provision, which should be viewed as anything but business as usual.

Many cases where confidentiality is demanded involve claims of sexual harassment, workplace discrimination, products liability, toxic torts, and bad faith--areas in which the public could surely benefit from having access to information the defense wants to keep confidential.

By aiding the defense in their secret-keeping efforts, plaintiffs can and do sacrifice the safety and well-being of others. Practitioners can avoid this common practice while still fulfilling their primary duty to clients.

We must recognize that confidentiality agreements can be essential vehicles for expediting discovery or bringing closure to delicate disputes. Both plaintiffs and defendants have legitimate reasons for wanting them.

Many plaintiffs desire confidentiality in cases involving minors, sexual assault, or harassment. Defendants are offered protection of proprietary interests as well as insulation from publicity generated by lawsuits that have no basis in fact. This is especially true in cases involving patent disputes, business practices, and defamation.

However, confidentiality agreements have been used over the years with alarming ease and regularity. Corporate or physician defendants may be financially motivated to keep aspects of their practices quiet. By denying liability and limiting access to documentation, defendants place obstacles in the path of other parties attempting to litigate similar cases. These types of agreements also keep public regulatory agencies in the dark, thus serving to shield defendants from fines or product suspension.

Defendants have come to expect secrecy agreements as standard litigation practice. This expectation may start early, and discovery may not begin until a protective order is signed by all parties and a judge. As a condition of settlement, defendants often also want court records sealed and parties and their experts gagged. In some instances, judges who are anxious to rid their dockets of another case agree.

We now know that confidentiality agreements have led to situations where people have been seriously injured or exposed to an unreasonable risk of injury. For example, a Xerox manufacturing plant leaked hazardous chemicals that contaminated the groundwater in a Rochester, New York, community. Xerox settled with two of the many families exposed, signed a confidentiality agreement with them, and relocated them. Court records regarding the agreements were ordered sealed.¹

Kransco, the manufacturer of dangerous backyard water slides that left numerous people paralyzed, used confidentiality agreements to keep the public in the dark about its product.² General Motors has also used these agreements to quell public debate and awareness of the dangerous placement of its fuel tanks in cars made before the 1980s.³

Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)

Dow Corning used confidentiality agreements in 1984 when it settled its first breast implant case. Eight years later, the FDA obtained discovery material covered by the agreement, including scientific studies that had not been submitted to the agency in Dow Corning's pre-market approval application. The FDA then ordered a moratorium on implants.⁴

Not keeping confidences

Basic lawyering skills such as working with your client, anticipating the defense strategy, and knowing the law can serve to avoid confidentiality agreements altogether. Also, there are steps every attorney can take to ensure that protective orders, if agreed to, apply only to information that truly warrants secrecy.

Prepare clients. The first step is to work with your clients, starting at the initial interview. Advise them that the defense may demand a confidentiality agreement as part of any settlement and that, as a matter of policy, you will not agree to one. Then discuss the reasons for your policy in depth.

Use the examples cited above--particularly those that parallel your clients' situation. Get a commitment that they will not submit to secrecy just as you would ask that they not jump at the first settlement offer. Remember that most people injured as a result of products liability, bad faith, employment discrimination, sexual harassment, or toxic torts often want more than just money.

They also seek justice and are concerned that others be spared the dangerous condition or behavior that caused their injury. Let clients know that when a settlement is being presented to them, their commitment may waver, but you will remind them of their desire to see justice done.

Be aware that their anger and hurt may be your best tool for keeping them on the track to do the right thing. Know also that helping clients help others can go a long way toward ending the lawsuit on an upbeat note, avoiding the "post-settlement letdown" that many of us and our clients face--even after a great result.

Prepare yourself. Many arguments against confidentiality are supported by case law and common sense. Some arguments you might consider using with the defense or the judge are that secrecy

goes against the public policy of providing open access to court documents;

may keep regulatory agencies from protecting the public;

may allow criminals, such as child molesters, to continue felonious conduct;

may keep parties from implementing policies and procedures against unlawful conduct, as in sexual harassment or employment discrimination;

may prevent innocent victims from timely seeking medical or legal advice; and

may keep unsafe products on the market.

Know the law. Although the following only describes the law in a few jurisdictions, it includes information that may be helpful.

Florida has direct restrictions on confidentiality agreements. In 1990, it passed the Sunshine in Litigation Act, which states that

any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.⁵

Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)

Texas has attacked the problem in a different way. Rule 76a of the state Rules of Civil Procedure sets out a common law right to access judicial records.⁶ The rule states that court records "are presumed to be open to the general public and may be sealed" only after certain criteria are met.

Included in the definition of court records are settlement agreements and discovery not filed on record that seek to restrict disclosure of information "concerning matters that have a probable adverse effect upon the general public health or safety."⁷

Other states have adopted legislation that prevents judges from sealing records merely at the behest of the parties. Louisiana, for example, has passed a stringent law curbing a judge's discretion by requiring that a court cannot seal records "if the information or material sought to be protected relates to a public hazard or relates to information which may be useful to members of the public in protecting themselves from injury that might result from such public hazard."⁸

Other states that have passed similar legislation are Delaware, Georgia, Indiana, New York, North Carolina, Oregon, and Virginia.⁹ In addition, attorneys should check their local rules. In California, the counties of Los Angeles, San Diego, and San Francisco have promulgated rules that restrict secrecy.¹⁰

The U.S. Supreme Court has recognized a common law right of access to judicial records, although the Court noted there are times when record-sealing is necessary.¹¹ Some lower courts have held that all documents filed in court are covered by a common law right of access.¹² The general reasoning behind these decisions was to keep the courts open to the public, to make the judicial process more accountable, and to avoid creating a secret system of justice.

Thus, when a party files a motion containing material covered by a protective order or confidentiality agreement, or submits a confidentiality agreement for enforcement of its terms, these documents become part of the public record, triggering right of access provisions.

These provisions have enabled outside parties to have court records unsealed, especially where a court has abused its discretion in ordering them sealed in the first place.¹³ The law also allows third parties the right to intervene in suits to challenge the sufficiency of confidentiality orders.¹⁴

Some courts have allowed third parties to intervene more than three years after settlement.¹⁵ This can and has been used as a successful tactic in obtaining material that may have been sealed by a judge under a protective order or as a condition of a confidential settlement.¹⁶ Some courts require that certain criteria be met before sealed records will be reopened.¹⁷

Further, while a confidentiality order may be enforceable within the state where it was signed, the Supreme Court has recently ruled that the U.S. Constitution's Full Faith and Credit Clause does not mean that the confidentiality agreement is enforceable in a sister state.¹⁸

Opposing motions

Protective orders are generally the first documents presented in litigation that request plaintiff attorneys' participation in secrecy. Read the order carefully. Most are overbroad, covering many issues not subject to protection.

Federal Rule of Civil Procedure 26(c) requires that "good cause" be shown as to why a protective order should be granted. "Good cause" must be based on specific facts that show disclosure would cause significant harm, as in disclosure of trade secrets.¹⁹ Whether the information sought qualifies as a trade secret requires consideration of several factors, including whether it has a competitive value.²⁰

Make it easy on the judge. Submit your own proposed protective order in which you agree not to release documents containing bona fide trade secrets to competitors.²¹ You also might include in your order a requirement that the defendant--not the plaintiff--bear the burden of justifying any requests for confidentiality.²² You can help future plaintiffs by drafting a provision--based on a need to prevent

Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)

expensive, duplicative efforts--that will let you share discovery information from your client's case with plaintiffs who may later sue the same defendant.²³

Some practitioners prepare for settlement negotiations from the start--at the client interview. More commonly, however, both plaintiff and defense attorneys wait until they get to the first settlement conference--or just before it--to consider their negotiation tactics.

Waiting can present either a stumbling block or a stepping stone to the practitioner who wants a settlement without a confidentiality provision. What makes negotiating against confidentiality at this time particularly tricky is that it may be the one area where plaintiff lawyers find themselves lined up against everyone--the judge or mediator, the defense, and even the plaintiff.

All the more reason for early, careful consideration. How will you approach the judge? The defense? How will you handle your own client if he or she wants to fold? As with any aspect of negotiation, timing and considered use of the right tools can make all the difference.

Waiting until later to look at negotiating strategies can be a stepping stone to success in this respect: Defendants generally assume that plaintiffs will agree to keep quiet. In fact, the subject is often not discussed until after the parties have hammered out the underlying settlement agreement.

This assumption puts the plaintiff attorney in the driver's seat with the judge and the defendants who, by then, are intellectually and emotionally committed to settling the case. We find this to be true even if confidentiality is requested before the defense has presented its best offer. The ball, as they say, is rolling. For this reason we do not bring up confidentiality issues, and we ask the judge or mediator not to either unless and until the defense does.

The single biggest disadvantage in negotiating confidentiality is the fear that, without agreeing to secrecy, the case will not settle. In the past seven years since our law office stopped accepting these agreements, not one case has failed to settle or has settled for less as a result of this policy.

In fact, as the result of the respect and trust generated by taking an open, reasoned, and consistent stance, we have come to believe that this approach to settlement has actually enhanced the settlement value in a number of cases. It also has resulted in easier and quicker resolution with defense attorneys and insurance companies with whom we have worked in case after case.

Naturally, you may encounter resistance. Although most clients with whom you have developed trust will support you in this aspect of negotiation, once an acceptable settlement amount has been offered, some may just want to end the case. Again, this illustrates the importance of preparing clients from the beginning of the lawsuit.

Consider how you might negotiate with your own client. It might be through a sense of right and wrong, a need for empowerment, or a simple concern for the welfare of others. Once, a client really just wanted to settle immediately. In that situation, \$500,000 was offered in a tenuous liability case with confidentiality as a condition of acceptance.

The client said, "How much of that is for keeping it secret?" His attorney replied, "How much would you take to keep it secret?" The client answered, "Another \$25,000." "Well then, I'll reduce my fees by \$25,000 so that we can stick to our principles." The client, knowing then that his attorney was willing to adhere to principles, agreed to the settlement--\$500,000, no confidentiality, and no reduction in attorney fees.

Predictably, most resistance comes from the opposition and sometimes the judge. They may need to understand that confidentiality agreements do not necessarily promote settlements. You might remind them that allowing cases to go to trial provides for even more avenues of disclosure.

If your case presents some issues discussed previously, you may argue that confidentiality, even if you agreed to it, would not be enforceable because of state or local law. Or worse, you can argue, if an attorney

Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)

in a subsequent case should discover it, the consequences could be dire for the defendants, as in the Dow Corning case.

If you have a products case that has been preceded by other suits against this defendant, confidentiality would be inappropriate. Manufacturers have a duty to report to the Consumer Product Safety Commission if a product is the subject of at least three civil actions involving death or grievous injury.²⁴ Also, public entities have a duty to inform the public of their expenditures, including settlement money paid.²⁵

In the right case, the defense may need to be reminded that the press and the public would not take it kindly if they knew that an agreement to settle included the injured party's promise of secrecy.

To position yourself adequately for this type of bargaining, you may want to get the settlement offer and defendant's request for confidentiality in writing so that you don't violate the sanctity of settlement conferences. Then you'll have the evidence to back up your assertions to the press.

Better yet, consider how to make open disclosure of the settlement a "win-win" situation. Developing this option takes time and a real understanding of the underlying interests of the defense. For example, in one case where an infant was abducted from a

hospital maternity unit and the hospital wanted to ensure continued business, we offered to draft a joint press release--one in which both sides appeared victorious.

The defendants looked good (and did good) because they implemented new policies to prevent future abductions. The plaintiff was pleased for being compensated--and for aiding in a process that would help protect other mothers and newborns.

Litigation can have a disruptive effect on many businesses. A jointly drafted e-mail or memorandum sent to workers at the end of litigation could help create a "win-win" atmosphere in the workplace--say, for example, where there have been numerous charges of sexual harassment.

Whether a joint statement is for public or private distribution, notice of a positive outcome can serve to relieve parties of pressures they have had to face as the result of litigation. Knowing what those pressures have been and how you can help alleviate them is the creative part of this aspect of negotiation. Developing an understanding of the defense's needs and acting in a mutually beneficial way can foster a good settlement in the case at hand and forge relationships that facilitate easier settlements for future cases.

Confidentiality agreements can and do leave the public vulnerable to harmful and even life-threatening situations. If you have a strategy for defeating defense attempts at confidentiality, you can just say no.²⁶

Notes

1. Benjamin Weiser, Forging a 'Covenant of Silence,' WASH. POST, Mar. 13, 1989, at A1.
2. Benjamin Weiser, Lawsuits Spur a Debate Over Secrets vs. Safety, WASH. POST, July 26, 1994, at A1.
3. General Motors Responds, WASH. POST, Oct. 23, 1988, at A1.
4. See Dorothy J. Clarke, Court Secrecy and the Food and Drug Administration: A Regulatory Alternative to Restricting Secrecy Orders in Product Liability Litigation Involving FDA-Regulated Products, 49 FOOD & DRUG L.J. 109 (1994); see also John Schwartz, Dow Corning Revises Plan to Settle: Former Implant Maker Offers \$2.4 Billion, WASH. POST, Aug. 26, 1997, at D1.
5. FLA. STAT. ANN. 69.081(4) (West 1997). There have been some state constitutional challenges to this law in Florida. See, e.g., E.I. Du Pont De Nemours & Co. v. Lambert, 654 So. 2d 226 (Fla. Dist. Ct. App.

Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)

1995), which remanded a case to the district court to examine the constitutionality of the act. No decision on the remand has been published; no other cases questioning the constitutionality of the statute have been reported.

6. See Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 646-84 (1991).

7. *Id.* at 659.

8. LA. CODE CIV. PROC. ANN. art. 1426 (West 1998).

9. DEL. SUPER. CT. CIV. R. 5(g); GA. UNIF. SUPER. CT. R. 21; IND. CODE ANN. 5-14-3-5.5 (Michie 1997); N.Y. COMP. CODES R. & REGS. tit. 22, 216.1 (1998); N.C. GEN. STAT. 132-1.3 (1972); OR. REV. STAT. 30.402 (1996); VA. CODE ANN. 8.01-420.01 (Michie 1997).

10. See L.A. SUP. CT. R. 7.19; SAN DIEGO SUP. CT. R. 6.9; and S.F. SUP. CT. R. 6.10.

11. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978); see Anthony J. Basinski, 'Sunshine' Laws Bar Secret Settlements, NAT'L L.J., Mar. 24, 1997, at B10.

12. See, e.g., *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161-65 (3d Cir. 1993).

13. See, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1986); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994).

14. See, e.g., *Pansy*, 23 F.3d 772, 779, where court allowed newspaper to intervene about six months after case settled because there was no showing of good cause when the case was sealed.

15. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

16. See, e.g., *Pansy*, 23 F.3d 772; *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); *United Nuclear Corp.*, 905 F.2d 1424.

17. See, e.g., *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993).

18. *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998); see also *Smith v. Superior Court*, 49 Cal. Rptr. 2d 20 (Ct. App. 1996).

19. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 389-90 (Iowa 1983); *United States v. International Bus. Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

20. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 n.15 (1984), later proceeding, 753 F.2d 649 (8th Cir. 1985); *International Bus. Mach. Corp.*, 67 F.R.D., 40, 46-57 (citing RESTATEMENT OF TORTS 757).

21. See, e.g., *Garcia v. Peebles*, 734 S.W.2d 343, 348 (Tex. 1987).

22. *Cipollone*, 785 F.2d 1108, 1121-22.

23. See generally Thomas M. Fleming, Annotation, Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation, 83 A.L.R. 4th 988 (1996).

24. 15 U.S.C. 2084 (1994).

**Reprinted with permission of TRIAL (October 2002)
Copyright American Association for Justice, formerly Association of
Trial Lawyers of America (ATLA®)**

25. Copley Press, Inc. v. Superior Court, No. D029986, 1998 Cal. App. LEXIS 347, at *8 (Ct. App. Apr. 20, 1998).

26. For sample briefs or other information on opposing confidentiality orders, contact Trial Lawyers for Public Justice, 1717 Massachusetts Avenue, N.W., Suite 800, Washington, DC, 20036, (202) 797-8600.

Justine Durrell practices law in Susalito. She can be reached by e-mail at jd@durrell-law.com.