Confidential Settlements

Kiss and Don't Tell

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Kiss and don't tell is a novel concept in this day and age. Nonetheless lawyers honor this notion in principle everyday when they negotiate confidential settlements that include promises to keep such things as names, financial terms, and discovery secret. An emerging professional responsibility issue is whether these confidential settlements are going too far in requiring secrecy. Are they improperly interfering with public safety and frustrating truth seeking?

Earlier this year in a program called "Settlement & Litigation Secrets: The Ethical Boundaries" the 24th National Conference on Professional Responsibility considered the ethics of confidential settlements and protective orders. The purpose of this article is to report to the Kentucky Bar on this program with the goal of outlining the issues and providing different points of view expressed by panelists and other sources.

The Nature Of the Problem

The program moderator, Richard Zitrin, framed the issue using a hypothetical of a heart valve manufacturer who is sued over a defective valve that caused a death. The manufacturer knew the valve had problems and was fearful of more litigation. Accordingly, the manufacturer offered to settle for $3,000,000 more than the plaintiff's lawyer knew the case to be worth. To enjoy this mountain of money, however, the plaintiff must give back all discovery documents and otherwise promise to remain silent on all matters learned in discovery. Zitrin then posed the question whether these facts raise a public protection interest that supersedes the plaintiff's right to settle on these terms. Correspondingly, does it involve the lawyers on both sides of the deal in unethical conduct. Specifically, he asked:

- Is it proper for a defendant's lawyer to request destruction or concealment of evidence?
- Is it proper for a plaintiff's lawyer to agree?
- Should courts enter protective orders or approve settlement agreements if there is a public interest that will be concealed?
- Should there be a professional responsibility rule that covers secret settlements that involve matters of public interest?
- Should courts enforce settlements with secrecy provisions that concern a public interest?

Real life examples of the issue are settlement agreements in breast implant, sleeping pill, and painkiller cases that kept litigants in related cases from using prior discovery.

Plaintiff lawyers argue that this causes unnecessary delay, is expensive, and keeps vital information secret from the public and government agencies. Others point out that revelation of justifiable confidential information stimulates frivolous litigation and gives an opponent unfair leverage when negotiating terms with a party concerned with protecting proprietary and sensitive information.

Considerations, Points of View, and Observations

Amount of settlement: Everyone agrees that confidentiality is OK for financial terms.

Names: There is general agreement that keeping names secret is appropriate if to do so serves justifiable privacy considerations and avoids embarrassing or sensitive implications. Objection, however, was raised by one commentator when names are concealed to "protect the guilty" such as a suit for child molestation in which the perpetrator's name is protected.

Trade secrets and proprietary information: There is considerable sympathy for protecting trade secrets including manufacturing techniques, product formulae, and operational data. Historically this has been acceptable. Over the last several years, however, product liability cases have created great concern with the public health and safety implications of protecting proprietary information. This has resulted in several states passing laws such as Florida's Sunshine In Litigation Act. This law provides "… no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard … or concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.[i]"

Evidence and discovery: Concealing or requiring the destruction of evidence and discovery by secret agreement is the hottest issue. The start point for those in favor of less secrecy is that this information is part of the public record and should almost never be sealed or kept secret. *A fortiori*, if the case involves public health and safety issues, there is even less of a basis for a court to enter a protective order or approve a secret settlement agreement. Those in favor of protection point out that discovery is compelled and, therefore, should not be available gratuitously to others for opportunistic use or misuse. They stress that the civil litigation system is not intended primarily to foster public safety – other government agencies have that responsibility. Finally, some say confidential settlements that concern significant public safety issues do not keep the public or government agencies from knowing of them. There are just too many ways serious safety issues become public knowledge outside the legal system.

Testimony: In Zitrin's hypothetical the plaintiff agreed to remain silent; i.e., not testify in other related trials. Agreements not to testify raise serious concerns about denying other parties their opportunity for a fair trial. Should or will courts enforce such agreements? A partial answer is found in the US Supreme Court case *Baker v. General Motors, Corp.*[ii] This case concerned an agreed Michigan court injunction between GM and a former employee that *inter alia* prohibited the former employee from disclosing trade secrets or

testifying as an expert witness in any litigation involving GM without GM's prior approval. The former employee testified in several trials without GM's approval. *Baker* arose out of the former employee's testimony in a Missouri case. The Supreme Court held that the former employee could testify in Missouri without violating the full faith and credit due Michigan's judicial proceedings. For purposes of this article *Baker* stands for the proposition that having a protective order that suppresses testimony in one jurisdiction is no assurance that it will not be used in another case in a different jurisdiction. There is a strong point of view that agreements that restrict testimony are wrong as a matter of public policy because they significantly frustrate the truth finding process of our adversarial system. A reading of *Baker* leaves the impression that, while the case was decided on an interpretation of the full faith and credit requirement, the Court was less than enthusiastic about orders and agreements that impede truth seeking.

Settlement restrictions on lawyers taking similar or related cases: Some parties have attempted a back door way to keep sensitive information as much under control as possible by including settlement terms that prohibit the opposing lawyer from taking related or similar cases against them. Agreements of this nature are a clear violation of Kentucky Rule of Professional Conduct 5.6 Restrictions On Right To Practice. This rule forbids "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

Where Are We?

The line in the sand on secret agreements is deep. Those who believe that secrecy in settlement agreements should be left to the parties argue to do otherwise goes to the very heart of our adversarial system. A lawyer represents a client, not the public. To require a lawyer to consider the interest of the general public dilutes the lawyer's loyalty to her client and creates a conflict of interest when none need exist. Other government agencies with extensive investigative resources have the mission of protecting public safety. Clients have privacy and confidentiality interest that deserve protection. Failure to provide this protection exposes them to unnecessary embarrassment, loss of important business secrets, and frivolous litigation.

Those on the other side of the line say that the question is a fundamental one of what is the purpose of private litigation. They argue that the public has a right to know information concerning public safety that is produced in private litigation. To do otherwise is to elevate individual rights above the public's need to know and cope with potentially catastrophic situations. There is room in this approach to keep secret settlement financial terms and individual privacy matters. But once the litigation produces information revealing a public hazard, public policy overrides traditional lawyer-client duties and requires open access to the information.

In addition to Florida, 27 other states have enacted laws or court rules that in varying degrees limit confidential settlements and protective orders. There is a pending bill in Congress dealing with protective orders and public safety in the federal courts.[iii] I can find nothing recent in Kentucky law or rules that address this issue. Our Civil Procedure

Rule 26.03 Protective Orders was most recently amended in 1971 so it is doubtful that its legislative history will show consideration of the more recent public safety issue and protective orders. It appears that in Kentucky we are not actively evaluating the issue.

What about secret settlements that are not under the supervision of a court? Are they free of any inhibitions on their scope of secrecy and reach in controlling evidence and discovery? The first thing that comes to mind is not to forget criminal laws covering fraud and conspiracy. Then there is Kentucky Rule of Professional Conduct 1.2 (d) Scope of Engagement that provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

To be sure that private as well as court approved settlements are agreed under the same standards Zitrin proposes this change to the Rule of Professional Conduct 3.2 Expediting Litigation:

> A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns substantial danger to the public health or safety, or to the health or safety of any particular individual(s).

I'm not sure a professional responsibility rule change is the best way to address such a significant issue as public safety and secrecy in settlements. But the proposal does put the issue in bold relief and covers both in-court and out-of-court agreements.

A final thought on the question of "Where are we?" is related to the problem for lawyers when they know confidential information concerning client conduct such as child abuse and law requires that anyone having such information report it to the authorities. Does keeping this information confidential in spite of the law, but consistent with a lawyer's professional responsibility, expose the lawyer to liability if the client subsequently injures a child? Similarly, does a settlement agreement that conceals a public hazard expose the lawyers negotiating the settlement to liability to those subsequently injured by the hazard? I do not know of a case when a lawyer has been held liable for aiding in the concealment of a public hazard via a settlement agreement, but keep your eye on the tobacco litigation. Chances are we're going to break new ground on lawyer liability and confidential agreements before it's over.

Conclusion

I try to close these articles with some sort of synthesis or practical application. As you can see, however, in terms of professional responsibility and risk management the subject

of secret settlements is as wild and wooly as is the whole negotiating process. In making your own assessment of the issue of public safety and secret settlements read the article "Confidentiality Agreements Become Increasingly Illusive" by Richard A. Rosen in the July 20, 1998 edition of The National Law Journal. The article is a good brief overview with useful citations for further research. Rosen points out that there is increasing judicial skepticism about broad confidentiality agreements. He advises that counsel when litigating or negotiating a protective order "… must decide whether it is crucial to try to bar discovery altogether, or only limit access to the documents produced. It is a good idea to craft a position that gives maximum protection to the smallest universe of documents and less – or no – protection to other categories of documents." This strategy sounds like a good overall approach whenever lawyers negotiate the terms of any confidential agreement in or out-of-court.

Endnotes

[i]Florida Sunshine In Litigation Act, Fla. Stat. Ann. Sec. 69.081.
[ii]118 S. Ct. 657(1998).
[iii]S. 225, 105th Cong., 1st Sess. (1997).