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Silence is Not Always Golden

by Richard A. Huver

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Movie theaters, libraries, standing over a putt on the green -- these are places where silence is appropriate and appreciated. Defective products such as the Bridgestone/Firestone tires, widespread harmful conduct like the abuse of children by Catholic priests, and government hearings held behind closed doors are things that should not be kept silent.

Often times as civil litigators, we are faced with an uncomfortable struggle between zealously representing our clients and publicly exposing wrongful conduct. We are required to sign expansive protective orders simply to obtain documents in discovery and then must destroy the very documents that exposed the defective product or widespread harmful conduct. Or after vigorously prosecuting an action, we find ourselves faced with a settlement offer that is in the best economic interests of our client but one that requires the facts and circumstances surrounding the lawsuit to remain confidential.

Protective orders and confidentiality agreements were originally reserved solely to protect real trade secrets and highly proprietary rights -- a secret formula, patented designs or complex computer software. The use and requirement of confidentiality agreements and secret settlements, however, has exponentially expanded over the years to all aspects of civil cases, from product liability lawsuits to insurance bad faith lawsuits to sexual abuse cases. Recognizing that about 95% of all civil cases settle, how many widespread defects and other threats have been buried beneath confidential settlements?

Consider these two examples. A lawsuit filed in Oregon alleged a major insurance company systematically cheated its policyholders. Yet, not only were extensive records sealed during litigation, but when the lawsuit settled, the entire case was wiped from the court's computers and the original file was removed from the courthouse -- with approval. And there were numerous cases involving defective tires that settled with records sealed, documents destroyed, and litigants sworn to secrecy before the tire defects came to light. Almost 10 years later, millions of potentially defective tires were recalled -- but this was too late for many victims.

Secrecy regarding the amount paid to settle a case is one thing. Frankly, there are situations in which keeping that information confidential protects both sides. But cloaking defects in an automobile or a drug in secrecy or requiring a matter involving the safety of the public to remain "confidential" is potentially dangerous on many fronts. For one, it prevents access by the public and the media into matters of broad interest and concern. It also exposes others to harm that might be preventable. Moreover, it creates unnecessary hurdles for the next lawyer representing a victim of the same wrong to prove the case from scratch and needlessly increases the costs and burdens on courts to rule on matters already resolved elsewhere.

So how do we balance our responsibilities and sworn oath to do what is in our client's best interests with the moral and social issue of protecting the public at large and perhaps preventing further harm? The best avenue, of course, is for policymakers to enact rules and procedures that address these issues on the front end so that secrecy orders again become the exception rather than the rule. While numerous county courts, including San Diego, have adopted rules which discourage confidential settlements, unnecessary protective orders and the sealing of records, they do not establish mandatory criteria and thus can only go so far. **More needs to be done.**

Trial Lawyers for Public Justice, a Washington, D.C.-based group of lawyers and scholars committed to protecting the public and the environment, launched Project ACCESS in 1989 to fight secrecy agreements nationwide, seek access to records deemed "confidential", and expose hidden facts regarding widespread wrongful conduct. Trial Lawyers for Public Justice has recommended approaches to help us strike an acceptable balance in our daily practice between doing what we legally must and doing what is morally right. The answers are not easy and there are no steadfast rules. Individual circumstances will ultimately dictate how we should respond, but here are a few of their suggestions:

First, when presented with a demand for a confidentiality agreement to obtain documents in discovery, remember the defendant must establish "good cause" to justify imposition of a protective order. Stress the right of the public to have access to discovery materials and learn the facts surrounding the purported need for confidentiality. Perhaps what the defendant contends is proprietary is already in the public domain elsewhere or is standard practice and common knowledge. If you are still pressed to sign the order, ask the court to weigh the public's interest in disclosure of the information before deciding the necessary scope of the order.

Next, if a protective order is inevitable, there are still things you can do. Demand a sharing provision that allows you to disclose the documents to other litigants and their lawyers who file similar lawsuits. Force the defendant to make an evidentiary showing of good cause to obtain the protection requested if you believe some of the records are not truly proprietary. Make sure the order contains a provision allowing you to challenge any confidential designation that appears questionable. Ask that any protection be limited to the discovery phase of the case and not automatically require the sealing of documents filed with the court. And resist any provision that requires the destruction or return of the materials at the conclusion of the case.

Finally, if the case ultimately resolves and involves issues of public health and safety or widespread wrongful conduct, do all you can to resist a secret settlement that locks the facts

away from the public light. Remember that secret settlements in cases involving the Bridgestone/Firestone tire defects and sexual abuse cases against the Catholic church allowed those devastating injuries, acts and conduct to remain hidden for years. If you need help, please contact Trial Lawyers for Public Justice at (510) 622-8150 or log on to their website at **www.tlpj.org**. Together, we can make a difference.