UNETHICAL SECRET SETTLEMENTS: Just Say NO

By || **Patrick Malone and Jon Bauer**

Defendants often convince plaintiffs to agree to secrecy clauses in settlements, but their implications extend far beyond the parties involved.

Attorneys for injury victims are all too familiar with defendants' demands for blanket secrecy as a sine qua non for settlement. The confidentiality provisions that defense lawyers insist on often go well beyond keeping the amount and terms of the settlement secret; they also require the plaintiff and his or her lawyer to keep silent about the facts underlying the case. Pressured by powerful defendants and working with clients exhausted by litigation, many plaintiff attorneys believe they have no choice but to agree.

But most jurisdictions' ethics rules provide strong grounds for resisting such secrecy clauses. Agreements that prohibit voluntary disclosures of relevant evidence to other litigants, or prohibit further disclosure of allegations made in publicly filed court documents, run afoul of provisions in the Model Rules of Professional Conduct. These rules give plaintiff lawyers both the ability and the ethical duty to "just say no."

The organized plaintiff bar has long been sensitive to the dangers

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secret settlements pose to society and the justice system. In 1989, AAJ (then ATLA) issued a resolution denouncing settlements that hide a case's underlying facts.[1] Such settlements are pernicious on many levels. They undermine the proper functioning of the adversary system by concealing evidence that may be crucial to other parties' claims. For example, for decades, in clergy sex abuse cases, defense lawyers routinely settled cases with gag orders that prevented other victims from learning that their abusers were serial offenders whose misdeeds were already known to church authorities.[2]

Settlements that prohibit any mention of the allegations raised in a lawsuit also interfere with the public's ability to find the lawyer best qualified to handle a particular case. They make it impossible for plaintiff lawyers to tell prospective clients the identities of the defendants they have litigated against and what those cases were about.

Secrecy clauses also undermine efforts to rebut tort "reform" propaganda that twists the facts of lawsuits to make them seem ridiculous. Stella Liebeck, the woman whose McDonald's coffee spill became perhaps the most famous tort suit of all time, cannot defend herself against the parodies of her case because she signed a secrecy agreement when she reached a posttrial settlement with McDonald's.[3] Similar agreements frequently frustrate malpractice victims who cannot explain the realities of medical errors to legislators who are fed notions of frivolous lawsuits by the medical industry.

Despite these concerns, many lawyers faced with demands for blanket secrecy believe their hands are tied: They must present the offer to the client and abide by the client's decision. While most plaintiffs have a strong desire to expose wrongdoing and help others similarly harmed, their pressing need to resolve the case often leads them to reluctantly accept secret settlements.

To be sure, abiding by a client's decisions is a central tenet of legal ethics.[4] But the Model Rules of Professional Conduct also contain many provisions that oblige lawyers to avoid certain conduct that undermines the effective functioning of the adversary system. Indeed, the chair of the committee that wrote the model rules noted in 1983 that the truth-seeking function of adjudication depends on parties and their lawyers having a fair opportunity to gather and present competing versions of the facts.[5]

Secrecy clauses in settlements frequently violate at least two provisions in the model rules designed to ensure the adversary system's integrity: Rules 3.4(f) and 5.6(b).[6] You can use them to resist overbroad demands for settlement secrecy and convince defense lawyers to withdraw objectionable clauses. The rules also can be used to explain to clients how secrecy clauses harm the public and the justice system. Armed with a solid understanding of the rules, you can structure fair settlement agreements that serve both the interests of the parties and the interests of justice.

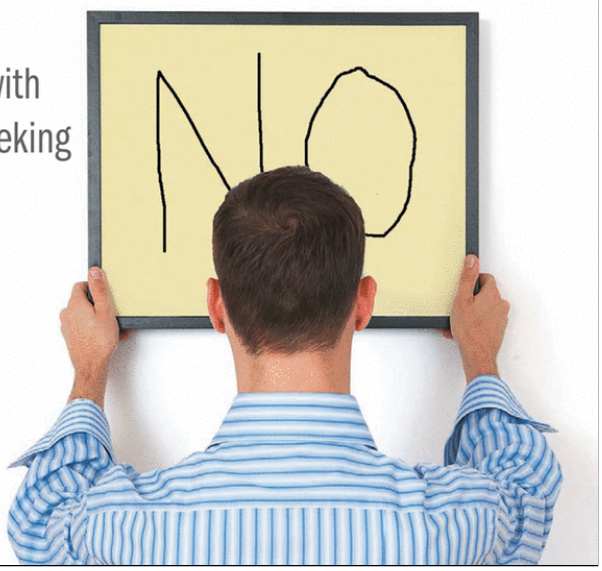
The ethics rules do allow parties to keep the settlement amount confidential, which is often the defendant's biggest concern and which many plaintiffs also desire to shield themselves from requests for money from friends, relatives, or salespeople. But the rules place off limits some of the most pernicious, and all too common, forms of settlement secrecy.

Access to Relevant Evidence

Rule 3.4(f) prohibits a lawyer from requesting that any person, other than a lawyer's own client or the client's relatives or employees, refrain from voluntarily providing relevant information to another party.[7] In the settlement context, this means a defense lawyer cannot ethically ask the plaintiff not to give potentially relevant evidence to another party.

WITNESSES DO NOT BELONG TO EITHER PARTY.

If one party cuts off opposing litigants from interviewing people with relevant knowledge, it is unfairly interfering with the truth-seeking function of litigation.



A version of Rule 3.4(f) has been adopted by nearly every state.[8] The rule's rationale starts with the recognition that ex parte witness interviews are essential to the adversary system. Witnesses do not belong to either party. If one party cuts off opposing litigants from interviewing people with relevant knowledge, it is unfairly interfering with the truth-seeking function of litigation.

Despite the availability of depositions, courts have long recognized that witness interviews conducted in private are crucial—they are needed to secure an unvarnished version of the facts free of the intimidation that the presence of the opposing party and lawyer may create.[9] Now that the Supreme Court's *Iqbal* and *Twombly* decisions have made cases more vulnerable to dismissal before discovery,[10] unimpeded access to informal interviews is more important than ever.

When a defendant's attorney proposes a settlement clause that would prevent the plaintiff from giving relevant factual information to other people with claims against the same defendant, defense counsel is doing exactly what Rule 3.4(f) prohibits. Settlements are not exempt from the rule. Indeed, if merely asking someone to withhold information from others suing the defendant is unethical, offering money in exchange for a promise to do so is even worse.[11] A South Carolina ethics advisory opinion found that a defense lawyer's demand for a noncooperation clause as part of a settlement violated Rule 3.4(f)—and that a plaintiff lawyer would be violating his or her own ethical obligations by agreeing to it.[12]

Proposed settlement clauses that would expressly bar the plaintiff from voluntarily cooperating with parties, agencies, or lawyers who are suing or investigating the defendant clearly run afoul of Rule 3.4(f), even if they allow for disclosures in response to a subpoena. Equally important, blanket confidentiality clauses that bar any discussion of the underlying facts and make no exception for disclosures of relevant information to other litigants violate the rule as well.

A defense lawyer might object that if there is no other party in litigation, the rule does not apply. But given the rule's purposes, the word "party" should be construed broadly, to encompass anyone with a current or future claim against the defendant. The ethics committee of the American Bar Association (ABA) has given a broad meaning to the word "party" in a similar context, and it would be irrational to read Rule 3.4(f) in a way that would allow defense lawyers to hide relevant information from people with potential claims so as to impede their lawsuits.[13]

Parties can request some restrictions on disclosing factual information as part of a settlement without violating Rule 3.4(f). For example, if the plaintiff is a former employee of the defendant who had access to privileged attorney-client information, terms that reaffirm the plaintiff's obligation not to disclose that information are permissible. Limitations on disclosing trade secrets, if narrowly defined, are probably allowable as well.[14] Restrictions on giving information to the media generally will not violate Rule 3.4(f), but may run afoul of Rule 5.6(b).

Most defense demands for secrecy clauses sweep more broadly—they prevent the plaintiff and his or her attorney from sharing relevant and nonprivileged information with other victims of the defendant's misconduct and their attorneys. Such demands are unethical, and plaintiff lawyers should resist them.

Once Public, Always Public

Rule 5.6(b) provides another weapon against defense demands for blanket secrecy. This rule prohibits lawyers from participating in any settlement agreement that restricts a lawyer's right to practice. It has been adopted, with some variations, in every U.S. jurisdiction.

Rule 5.6(b) clearly bars "lawyer buyout" provisions that expressly prohibit a plaintiff lawyer from suing the same defendant again. But the rule has been—and should be—interpreted to also cover settlements that have the indirect effect of making a lawyer's services unavailable to others who wish to pursue similar claims. For example, settlements that prohibit a plaintiff lawyer from using any information obtained during the case have been found to violate the rule, because such a promise would interfere with the lawyer's ability to provide effective representation to others suing the same defendant.[15]

An important but little-known opinion from the D.C. Bar Legal Ethics Committee takes this reasoning a step further. It concludes that it is unethical to enter into a settlement that would require confidentiality for any of the public facts of a lawsuit—the allegations in a complaint, the name of the defendant, and other facts set out in motions and other filings that are not sealed.[16]

The committee reasoned that a broad reading of the rule was required by its purpose, which is to enhance public access to legal representation and enable potential clients to obtain the information they need to find a lawyer with the right skills and experience to handle their dispute. The committee wrote:

> We believe that the purpose and effect of the proposed condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. [It restricts the inquiring lawyer's] ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them.

The committee noted that a client can, of course, always ask his or her lawyer

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not to disclose even publicly available information about a case, and that a lawyer should abide by such wishes. But the ethics opinion makes it clear that a settlement cannot require public facts that may be relevant to a lawyer's representation of future clients to be kept confidential. This opinion can serve as a powerful weapon against defendants' attempts to impose such secrecy.

How to Respond

When a defense lawyer demands that a settlement include language that would bar the plaintiff from sharing relevant information with others who are pursuing or investigating claims against the same defendant, or would prevent you from disclosing public facts about the case to prospective clients, what should you do?

First, politely but firmly explain to your opponent why these settlement terms are unethical and cannot be included in the agreement. Such an explanation often will be enough to convince defense counsel to withdraw the objectionable language. If it isn't, consider filing a grievance or seeking an advisory opinion from an ethics committee.

A thorough discussion with the client also is important. Explain why the defendant's proposed settlement terms are unethical and why you cannot accept them as a matter of your own professional obligations.[17] Once clients understand that ethics rules have prohibited such settlement provisions because of their harmful effects on other litigants, the justice system, and the public interest, most will fully back up their lawyers in resisting them. You should consider putting something in your retainer agreements making it clear in advance that these types of settlement terms are unethical and must be rejected.[18]

When defendants propose unethical settlements, plaintiff attorneys must to be willing to reject them—and prepared to explain why they are required to do so. The public and the legal profession will be better off for it.

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Notes

1. Assn. Trial Laws. Am., *Resolution on Protective Orders* (May 6, 1989), *reprinted in* James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. Law Rev. 859, 876 app. A (2004).
2. *See* Walter V. Robinson et al., *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye*, Boston Globe A1 (Jan. 31, 2002).
3. *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 Ariz. L. Rev. 717, 731–33 nn. 71 & 72 (1998).
4. *See* Model R. Prof. Conduct 1.2(a) (ABA 2004).
5. *See* Robert J. Kutak, *The Adversary System and the Practice of Law*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, 172, 175–76 (David Luban ed., Rowman & Allanheld Publishers 1983).
6. Settlement gag orders sometimes also violate a provision the ABA added to Model Rule 1.6 in 2002, which has been adopted in most states. Model R. Prof. Conduct 1.6(b)(1) (ABA 2004). In situations where a defendant's ongoing conduct presents a reasonably certain risk of serious injury to others, entering into a settlement agreement that would prevent the lawyer from disclosing that information undermines the rule's purposes and is probably unethical. *See* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?*, 30 Hofstra L. Rev. 783, 808 (2002).
7. *See* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 Or. L. Rev. 481 (2008). The exemption that allows a lawyer to ask a client's employees not to cooperate with adversaries applies only to current—not former—employees. *See id.* at 553–56.
8. California is the only remaining state whose ethics code is not based on the model rules, but a proposal to adopt many provisions of the rules, including Rule 3.4(f), has been endorsed by the California State Bar and is awaiting judicial approval. Among other states, only Kentucky, New York, Oregon, and Washington do not include Rule 3.4(f) in their versions. In some of those states, conduct that would violate Rule 3.4(f) may be considered unethical under rules that prohibit lawyers from secreting witnesses or engaging in conduct prejudicial to the administration of justice. *See id.* at 519 n. 139, 543 n. 247.
9. *See e.g.* ABA Formal Ethics Op. 131 (1935); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Gregory v. U.S.*, 369 F.2d 185, 188–89 (D.C. Cir. 1966), *aff'd*, 410 F.2d 1016 (D.C. Cir. 1969). Courts have also held settlement agreements that bar a plaintiff from voluntarily providing relevant information to others suing or investigating the same defendant to be void as a matter of public policy. *See e.g. EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744–45 (1st Cir. 1996).
10. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell A. Corp. v. Twombly*, 550 U.S. 544 (2007).
11. Under certain circumstances, settlement agreements that bar voluntary disclosures to public agencies, law enforcement authorities, or other litigants may even be criminal. *See* John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. Law Rev. 829, 835–37 (2004); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 Hofstra L. Rev. 1 (2002).
12. S.C. B. Ethics Advisory Comm., Op. 93-20 (1993).
13. *See* ABA Formal Ethics Op. 95-396 (1995); Bauer, *supra* n. 7, at 549–53.
14. *See* Bauer, *supra* n. 7, at 560-63, 562 n. 312 (citing authorities).
15. *See* ABA Formal Ethics Op. 00-417 (2000); Colo. Bar Assn. Formal Ethics Op. 92 (1993); N.Y. St. B. Assn. Formal Ethics Op. 730 (2000); Bd. Prof. Resp. Sup. Ct. Tenn., Formal Ethics Op. 98-F-141 (1998).
16. D.C. B. Leg. Ethics Comm., Ethics Op. 335 (2006); *see also* N.Y. St. B. Assn., *supra* n. 15.
17. Rule 8.4(a) prohibits a lawyer from knowingly helping another to violate any rule. A plaintiff lawyer therefore cannot ethically agree to a defense lawyer's settlement request made in violation of Rule 3.4(f). In the case of Rule 5.6(b), a plaintiff lawyer's acquiescence is a direct violation of the rule, which applies not only to offering, but also to any participation in making, settlements that restrict a lawyer's right to practice. Because Model Rules 3.4(f) and 5.6(b) are designed to safeguard the integrity and proper functioning of the justice system, a plaintiff lawyer who agrees to settlement demands prohibited under these rules likely also violates Rule 8.4(d). *See* Bauer, *supra* n. 7, at 546–49.
18. *See* Maja Ramsey et al., *Keeping Secrets with Confidentiality Agreements*, Trial 38, 40–41 (Aug. 1998); *see also* Bauer, *supra* n. 7, at 569 n. 333.