Secrecy in Settlements: A Counterpoint

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Secrecy in Settlements: A Counterpoint

IN COUNTERING ARGUMENTS MADE IN SUPPORT OF A SUNSHINE IN LITIGATION ACT THAT APPEARED IN THE OCTOBER VIEWPOINT COLUMN, THESE AUTHORS SAY THAT A BRIGHT LINE RULE PROHIBITING CONFIDENTIALITY REMOVES JUDICIAL DISCRETION AND IS NOT IN ANYONE’S BEST INTEREST.

by J. Ric Gass, Thomas K. Mullins & Melissa L. Greipp

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MOST PEOPLE WHO HAVE SEEN the movie “Erin Brockovich” cheer the main character when she uncovers a scheme by the local power company to hide hazardous groundwater contamination. Protecting the public from hazardous materials, unsable products, and dangerous vehicles—championing the rights of innocent consumers—these are noble ambitions that every individual can relate to. All lawyers also have another goal in common: to protect their clients. It is tempting to think that laws restricting confidentiality in lawsuits and settlements will protect the public from inherent dangers. Proponents of “sunshine in litigation” laws try to play into this desire to protect the public. The reality is, however, that restricting confidentiality in the course of a lawsuit or in a settlement does not achieve the goal of protecting the public. At the same time, it tramples civil litigants’ legitimate right to privacy. A restriction on confidentiality in lawsuits and settlements is a threat to the balance of civil justice in Wisconsin.

Laws restricting confidentiality have been overwhelmingly disfavored across the nation. Yet the proponents of sunshine in litigation persist in their attempts to persuade the public that attacking litigants’ right to privacy will somehow benefit our civil litigation system. The following text examines some of the standard arguments set forth by the proponents.

Why Restricting Confidentiality is a Bad Idea

The proponents’ main argument is that sealed court records keep information about harmful products and environmental hazards a “secret,” preventing consumers from learning about threats to their health and safety. This simply is not true. Generally, all documents filed with a court are open to the public and the press. Courts seal records only after it has been shown that confidentiality is needed to protect highly sensitive information, or both parties agree the information should be sealed, and the court approves the agreement. Information about product safety is not limited to court records and proceedings, or settlements. On the contrary, the same information is usually available from other sources, including the press, consumer advocacy groups, and regulatory agencies. Product manufacturers are required to report information relating to public safety to regulatory agencies, and courts also have the power to disclose hazards to the public.

Another argument made by proponents is that since courts are public institutions, the public has a right to all information courts have. Certainly the public has a certain right to court access. But that does not give the public a right to know confidential information about litigants. Being a public institution means a court must adjudicate disputes fairly. Fair adjudication includes protecting litigants’ privacy.

Proponents also claim that decreased confidentiality will enable litigants to share information in related lawsuits, thereby reducing costs and making the system more efficient. However, courts already frequently exercise their authority to require sharing of information in related lawsuits. Statutory restriction on confidentiality would only increase litigation costs and court workloads. Litigants will resist exchanging information freely, for fear of its escape into the public domain, subjecting courts to more frequent discovery disputes.

Parties also will be far less likely to settle their cases, knowing their reputations are at stake. Even now, the (continued on page 58)
confidentiality of a settlement agreement does not mean the facts of the underlying suit are protected from disclosure in another case. The only thing generally not disclosed under confidential settlement agreements is the amount of monetary compensation. When those in favor of decreased confidentiality say it will facilitate the sharing of information, what they really mean is it will make it easier for them to sell the private information they obtain through the courts. The groups advocating public access to all court records benefit financially by establishing fee-based information exchange networks. Far from reducing the volume of litigation, this practice is intended to encourage the filing of more lawsuits.

The Judiciary Can Balance Litigant Privacy and Public Welfare Interests

Litigants' private information must be protected at all stages of litigation. We must recognize litigants' legitimate right to privacy and support the role of the judiciary in balancing this privacy right with the goal of promoting public welfare. A balance needs to exist between the general principle that the public has a right to know about matters involving the judicial process and the need to maintain and protect the privacy of litigants in a civil suit. The openness of judicial proceedings exists primarily to ensure the appropriate functioning of our courts, not to disclose private information litigants have agreed to protect.

At the pleading stage, defendants are at the mercy of plaintiffs. The truth about hazards or wrongdoing alleged in a complaint emerges only after trial. The liberal rules for filing lawsuits with the release of information contained in the allegations of a complaint, before they have been verified and substantiated at trial, can cause irreparable and needless harm. Protective orders are needed to prevent unsubstantiated allegations from causing personal or corporate ruin.

The information sought in discovery from defendants in products liability and other corporate litigation commonly includes trade secrets and other confidential or proprietary information, the disclosure of which traditionally has been and should remain strictly limited. In litigation between individuals, usually highly confidential, often potentially embarrassing and intimate information is discoverable. The sole purpose of liberal discovery is to assist in the preparation and trial, or the settlement, of litigated disputes. It is therefore necessary for a trial court to have authority to protect the privacy of litigants and their confidential information. Without safeguards, all litigants are threatened again by disclosure of information that will cause great hardship.

Settlements by their very terms are mutual resolutions of disputed claims. A settlement is not an admission by a defendant that its product or behavior was in any way defective, negligent, or wrong. By eliminating confidentiality, the terms of a settlement will be made public, eviscerating any protection from
assumed liability that normally exists with voluntary settlements. A defendant is then forever clouded with perceived liability in the court of public opinion.

As such, it will be more difficult to counsel clients to compromise and settle disputed cases. For one, restricting confidentiality undermines settlement communications. For another, many settlements in civil cases from a defendant's perspective are based, at least in part, on an assessment of the economics of pursuing the particular case. It is not unusual for a defendant to correctly believe that it did nothing wrong, but to be willing to settle a case based on an economic assessment of the costs and risks of the litigation. The fear that private information cannot be kept confidential in litigation also may have a chilling effect on the commencement of claims.

Disclosure should therefore only be required after a thoughtful consideration of litigants' privacy interests versus public welfare. To regulate by a rigid rule or statute, with no judicial safeguard of privacy interests, creates a real potential for abuse of the litigation process.

Courts are already skilled in weighing private and public interests in the course of litigation or settlement. The judiciary is sensitive to the need for appropriate scrutiny to ensure that public safety is considered part of the equation in matters relating to confidentiality. Again, these are not issues that can be handled through bright line rules. Judges need wide discretion to protect both individuals and the public as necessary. To inhibit the exercise of that discretion with a hard and fast rule, that leans one way or the other, would not be in anyone's interest. Furthermore, do we want to send a message to our courts that they cannot be trusted to exercise their own discretion?

Confidentiality in civil litigation must be protected, because as Professor Arthur R. Miller has stated, "once confidentiality is destroyed, it can never again be restored." That is a detriment to us all.

Endnotes

1See Andrew J. Schweba, Secret Settlements: Do We Need a Sunshine in Litigation Act?, 76 Wis. Law. 10 (Oct. 2003).