

**LEGAL AND ETHICAL  
CONSTRAINTS ON SETTLEMENT  
AGREEMENTS**

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**WHO WANTS TO KNOW HOW  
LITIGATION (OR ARBITRATION) IS  
RESOLVED?**

▶ Plaintiff	▶ Regulators
▶ Defendant/Respondent	▶ Legislators
▶ Counsel	▶ Broker-dealers
▶ Future plaintiffs and defendants.	▶ Other salespersons
▶ Lawyers with similar cases	▶ Insurance companies
▶ News media	▶ Law professors and academics
▶ Judges/arbitrators	▶ Industry newsletter writers
▶ FINRA	▶ General public

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**BALANCING COMPETING  
INTERESTS:**

- ▶ Persons other than the parties may have an interest in or desire to know the outcome of settlements.
- ▶ Generally, the defendant wants to keep settlement terms—and case information—confidential.
- ▶ Most plaintiffs will sell their silence.
- ▶ If the settlement cannot be kept confidential, some defendants might not settle.

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**POP QUIZ!**

1. Can a defendant condition settlement on the plaintiff agreeing to keep case information confidential?
2. Can the defendant condition a generous settlement on you (as plaintiff's attorney) agreeing not to bring similar cases?
3. Can opposing counsel demand a return of discovery documents at the end of the case?
4. Can settlement terms remain confidential?

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**1. SEEKING TO BUY PLAINTIFF'S SILENCE ON CASE INFORMATION**

- ▶ Do settling parties have the flexibility to agree to keep case information confidential?
- ▶ What if:
  - ▶ The defendant wants to hide safety hazards or the theft of funds?
  - ▶ The defendant wants to restrict your client from volunteering to help government agencies?
  - ▶ Your client wants to accept a higher settlement amount to not expose defendants' misconduct?

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**SHOULD CONFIDENTIALITY OF CASE INFORMATION EXTEND TO:**

- ▶ Allegations of sexual abuse by clergy?
- ▶ Bridgestone tires failing on Ford SUVs?
- ▶ Health risks from the Dalkon shield?
- ▶ Health risks from silicone breast implants?
- ▶ Exploding fuel tanks on GM pickup trucks?
- ▶ Hidden environmental hazards?

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**ENVIRONMENTAL SILENCE?**

- ▶ In 1989, Xerox settled two cases alleging it allowed hazardous chemicals to seep into groundwater, causing cancer. The settlements were confidential.
- ▶ Neighbors and health officials wanted information on the settlements and underlying facts, so they could determine the extent of the risks.
- ▶ *What should the court have said?*

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**MALPRACTICE SILENCE?**

- ▶ In 2012, plaintiff sued two physicians for misdiagnosing her mother's medical condition, leading to her mother's death.
- ▶ In a pre-trial settlement, plaintiff agreed to not discuss the case or identify the physicians.
- ▶ Plaintiff later changed her mind and maligned the physicians.
- ▶ *Does plaintiff forfeit her settlement payment?*

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**REGULATORY SILENCE?**

- ▶ A securities brokerage firm agrees to settle your client's arbitration claim by paying a substantial settlement amount to your client.
- ▶ The firm demands a confidentiality clause, prohibiting voluntary reporting of the facts to a securities regulator, but allowing response to a court order or subpoena.
- ▶ *Can a defendant contract for plaintiff's agreement not to report conduct to regulators?*

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**PUBLIC INFORMATION SILENCE?**

- ▶ Even though some information used in your case came from public sources, defendant offers a higher settlement amount if you and your client agree to not publicize information that is already public.
- ▶ *Since you are not suppressing information that is otherwise unavailable, can your client agree to remain silent?*

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**RULE 3.4(F):**

- ▶ "A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; *and* (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."
- ▶ Requests for confidentiality violate the Rule

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**2. RESTRICT CASES COUNSEL CAN ACCEPT IN THE FUTURE?**

- ▶ After you successfully proved significant misconduct in a sales practice arbitration, the defendant offers a large settlement to your client, but requires your agreement not to use the information you learned to solicit new clients with the same claims.
- ▶ Does the client's interest in getting a large settlement trump your hope for more cases like this?
- ▶ Is the answer different if the defendant offers to pay you for not bringing cases?

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**RULE 5.6:**

- ▶ **Rule 5.6: A lawyer shall not participate in “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”**
- ▶ **Comment: The rule “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”**

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**OTHER RULES THAT MIGHT APPLY:**

- ▶ **5.4(c): Lawyers shall not permit a person who employs the lawyer to regulate the lawyer’s professional judgment**
- ▶ **1.1: Competent representation requires allowing the lawyer to use his skills and knowledge**
- ▶ **1.3: Lawyer must act with diligence in representing client, including, presumably, using knowledge and information gathered from other cases.**

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**IS ANY CONFIDENTIALITY PERMITTED?**

- ▶ **What are the “take-aways” of these rules?**
  - ▶ **Clients can share “relevant” information with other persons (under Rule 3.4(f)).**
  - ▶ **Most case facts learned in discovery cannot be publicized, so long as justice is not being impaired.**
  - ▶ **A lawyer is allowed to discuss with future clients information learned during litigation.**
  - ▶ **A lawyer cannot be prohibited from using information learned in a settled case to bring future cases.**

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**3. RETURN OF DISCOVERY DOCUMENTS?**

- ▶ As part of a settlement agreement, the opposing party insists that all documents obtained from that party be returned to it.
- ▶ **Variation:** Before delivering discovery, a party demands a protective order requiring that all documents obtained from the party be returned at the conclusion of the case.
- ▶ *Are these requests unethical?*

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**ETHICS CONSIDERATIONS:**

- ▶ Rule 1.16 says a lawyer must provide the case file to a client on request.
  - ▶ How do you do this if some of the case file has been returned to the other party?
- ▶ What if the client sues for malpractice?
- ▶ What if the bar commences an inquiry?
  - ▶ How will you defend yourself?
- ▶ NM Bar Opinion 1985-5:
  - ▶ Settlement clause requiring plaintiff's counsel to deliver file to be sealed violated ethics rules.

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**LAWYERS' DUTIES TO THE ADVERSARIAL SYSTEM?**

- ▶ Certain types of conduct are so harmful to the judicial system that attorneys cannot keep that conduct confidential—even if a client agrees to confidentiality.
  - ▶ Comment 1 to Rule 3.4(f) provides: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. *Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.*"

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**4. CONFIDENTIALITY OF SETTLEMENT TERMS.**

- ▶ **If a settlement agreement requires your client to keep the existence and terms of a settlement confidential, how does that affect you as counsel?**
- ▶ **What constraints apply to your ability to discuss your phenomenal skills in litigating and settling a case?**

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**FOREGO MARKETING OPPORTUNITIES?**

- ▶ **The case that your client settled involves an issue of great public interest. You want to discuss your role in the case with the news media and want to feature the case on your website for marketing purposes.**
- ▶ **If you did not sign the settlement agreement, can you post information about the case on your website or blog?**
  - ▶ Rule 3.6 provides guidance on the balance between prejudice and benefits of disclosure.

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**OPPONENT WANTS YOU TO SIGN SETTLEMENT AGREEMENT**

- ▶ **In a settlement of a personal injury case, the defendants insist that you, as the lawyer, sign the settlement agreement, to show your obligation to comply with the confidentiality requirement.**
- ▶ **Do you have a duty to sign the agreement in order to get the settlement for your client?**
- ▶ **Even if you don't sign, are you still bound by the terms agreed to by your client?**

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**DISCLOSURE OF CONFIDENTIAL SETTLEMENT TERMS:**

- ▶ A private school declined to renew the contract of its headmaster, who sued for age discrimination.
- ▶ A settlement payment of \$80,000 was conditioned on plaintiff not disclosing the existence or terms of the settlement.
- ▶ A few days later, a Facebook posting by his college-age daughter said her father won his suit. She was going to Europe!
- ▶ *Can the school withhold payment?*

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**CAN'T I TELL MY TAX PREPARER?**

- ▶ If a confidentiality clause prohibits disclosure to family members and others, how does a plaintiff disclose the receipt of settlement income to his tax preparer?
- ▶ If a settlement amount is extremely large, would not a client be wise to seek help from a professional money manager or wealth advisor?
- ▶ What should be done when the agreement does not allow such disclosure?

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**PRACTICE TIP:**

- ▶ The headmaster's problem arose from bad execution, not bad planning.
  - ▶ Confidentiality. . . [T]he plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, *except his attorneys or other professional advisors or spouse* any information whatsoever regarding the existence or terms of this Agreement. . . ."
- ▶ **Tip:** Negotiate the ability to disclose information to necessary persons.

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**SPECIAL RULES FOR GOVERNMENT**

- ▶ Settlement agreements by which government agencies agree to not disclose the amount of a settlement or disciplinary charges may be unenforceable as against public policy.
- ▶ Courts explain that where a confidentiality clause subverts public policy, it is unenforceable.
- ▶ Confidentiality clauses cannot trump the public's right to expenditure information
- ▶ Exemptions relating to personnel actions might not apply.

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**OTHER NON-MONETARY SETTLEMENT CONDITIONS?**

- ▶ As a condition of paying a higher settlement amount to your client, a broker-dealer requires that your client consent to expungement of the record from the broker disciplinary database.
- ▶ Your client prefers the higher settlement payment.
- ▶ *What do you tell your client?*

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**CLIENT INSISTS ON SETTLEMENT:**

- ▶ Notwithstanding the ethical rules, the opposing lawyer puts a specific price tag on a non-cooperation clause (or other prohibited term) in a settlement agreement.
- ▶ You recommend that your client refuse the extra money, but your client insists on taking it. *You are shocked!!*
- ▶ *What should you do?*

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**CONCLUSION:**

- ▶ **Confidentiality clauses *can* keep:**
  - ▶ Settlement terms confidential, and
  - ▶ Non-public discovery from public disclosure.
- ▶ **Confidentiality clauses *cannot*:**
  - ▶ Prevent parties from sharing “relevant” case information;
  - ▶ Prohibit assistance to government or cause omissions from regulatory databases;
  - ▶ Limit future work by the plaintiff’s attorney;
  - ▶ Require the return of litigation documents.
- ▶ **Retainer agreements may need revising.**

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