CHICAGO LAWYER

Lawyerport

Confidentiality agreements undermine justice

By Robert A. Clifford
Chicago Lawyer
December 1, 2007

I'm writing this upon my return from a significant conference at UCLA.
For the first time, the RAND Institute for Civil Justice has partnered with UCLA School of Law to present a program on transparency in the civil justice system.

As a member of a panel of presenters, I spoke on "Transparency and Privacy: The Growth of Private Dispute Resolution and Confidentiality Agreements."

My distaste for these agreements is no secret, particularly in tort cases, yet we have seen their exponential growth in the last few years, as defendants apparently get more concerned with their public image and other selfish concerns to keep injured people in the dark.

Transparency allows cases involving product design defects that jeopardize public safety to be brought to the attention of consumers, regulators, and lawmakers.

For instance, the Consumer Product Safety Act requires manufacturers to report to the Consumer Product Safety Commission (CPSC) whenever a product is the subject of three verdicts or settlements arising out of claims of death or serious bodily injury.

When this reporting requirement began in 1991 to 2002, only 551 reports were filed with the CPSC, even though more than 150,000 product-liability lawsuits were filed in federal court alone.

Transparency of results allows similarly situated litigants to ensure they are being treated equally and fairly. Consumers can make more informed and rational decisions on important issues like health care if they have sufficient information about the safety of products, drugs, or available treatment.

Transparent settlements also allow lawmakers to see where problems lie so they can more fairly allocate tax dollars in supporting the civil justice system. For example, the CPSC has been arguing that its understaffing hurts its ability to evaluate and regulate the safety of toys.

Confidentiality agreements also can leave unredressed the social harms that led to the lawsuit itself, such as discrimination, pollution, defective manufacturing, sexual abuse, and chronic negligent conduct.

I argue that on many levels the less transparent the settlement, the greater the risk to the public. The bottom line is that allowing litigants and the public to better understand the civil justice process promotes confidence in the system.

Certainly, national security, trade secrets, and threats of potential harm to others are the types of information that give courts reason to go through a balancing process to determine if public access to judicial records outweighs privacy concerns.

But many mass disasters and claims involving recidivist negligent doctors or faulty products involve the public's health, safety, and right to know.

Think of Dow Corning's silicone gel breast implants, Firestone tires on SUVs that were linked to more than 250 deaths over eight years (in which cases were kept secret under agreed protective orders and confidential settlements), General Motors' side-mounted gas tanks, the Dalkon shield, lead poisoning, environmental hazards, doctors sexually assaulting their patients, and, most recently in the news, pedophile abuse of the clergy.

Although some of these issues may be sensitive, the public should be made aware of these dangers.

Privacy interests are even less important when civil litigation is brought against public agencies or officials. Some states have passed "sunshine" laws that restrict confidentiality in litigation.

Florida enacted one of the broadest sunshine statutes in 1990 (Fla. Stat. Ann. Sect. 69.081(2), (4) (West 2004)). It prohibits settlements from "concealing ... information concerning a public hazard" and "that has caused and is likely to cause injury."

The act defines a "public hazard" as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, procedure or product, that has caused and is likely to cause injury."

In 2002, the U.S. District Court in South Carolina amended Local Rule 5.03 to provide that "[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule."

At the very least, sunshine laws give judges a reason to examine the public interest involved, rather than to routinely grant a request to seal.

From time to time, Illinois legislators have sponsored sunshine litigation that would prohibit courts from entering orders or voiding agreements that have the effect of concealing a public hazard.

As I've said in the past, it is difficult to imagine anyone voting against such a public-minded bill, but it has died in Springfield at the hands of lobbyists for manufacturers and corporations.

Confidentiality agreements recently were in the news when Michael Jordan's paramour broke her silence about an affair and filed a paternity suit.

In that case, the court reiterated the strong public policy favoring freedom to contract and found "there is a presumption of validity and enforceability attaching to settlement agreements which include confidentiality provisions." *Jordan v. Knafel*, 355 Ill.App.3d 534, 540, 823 N.E.2d 1113 (1st Dist. 2005).

The court went on to say, "However, we also recognize that there are contracts for silence that are unenforceable. For example, they may suppress information about harmful products or information about public safety, they may conceal criminal conduct, or they may constitute extortion or blackmail." *Id*.

The stakes appear to be much higher and motives appear to be less than honorable in some of today's litigation.

No longer do courts just agree with a request for confidentiality. They insist on demonstrating justification for such a request in order to ensure justice, as well as to protect injured consumers in future cases.

Litigants should not be entitled to seal court records simply because they reached an agreement. Parties should be made to state the reasons for confidentiality if that is a priority, and judges need to examine those reasons and be held accountable for their decisions to allow sealing.

I am certainly in favor of settlement, arbitration, and mediation of cases, but not for the sake of making cases go away.

Attorneys need to insist on the same, pointing out the deleterious effect this conspiracy of silence creates for the next injured victim, as well as for the entire system itself.

Confidentiality cannot be allowed to foster this culture of secrecy that can disproportionately burden those with less legal sophistication or power, particularly when an inexperienced individual is up against a repeat offender or a self-serving corporate defendant.

If attorneys do not take this societal duty seriously, they should not be surprised when their expectations and demands are improperly characterized as exorbitant because relevant precedents have been kept out of the public eye.

Robert A. Clifford is the name partner in Clifford Law Offices. He can be reached at rclifford@cliffordlaw.com.

Practice Areas: Litigation