

October 2011

A Publication of Law Bulletin Publishing Company

Chicago Lawyer®

Volume 34 Number 10 • chicagolawyer magazine.com

We keep you in the loop about Chicago's legal community

feature < Both sides

Confidentiality: Strings attached to a settlement?

By Amanda Robert

Cook County Circuit Judge William D. Maddux follows a general rule when he considers requests for confidentiality in the courtroom — litigation is public record.

“The public has a right to know about what’s being handled at their expense,” he said. “If you don’t get (confidentiality), it’s because it’s not really necessary. It doesn’t promote anything that’s halfway decent.”

Maddux, who presides over the Law Division, must approve settlements involving plaintiffs who are minors, incompetent or deceased. He also grants or denies requests that involve keeping their terms confidential.

From Maddux’s perspective, settlements should be confidential when they involve isolated incidents that don’t affect the general public. For example, he said, in sexual abuse cases the court needs to protect the abused individual from the “idly curious” public.

On the other hand, Maddux said the court should prohibit confidentiality in cases that could harm the public, such as those involving product liability. He said some companies try to settle and keep quiet cases that reveal products that harm people who use those products.

“I think that’s an abuse of confidentiality and steps ought to be taken to ensure that products that people buy are not going to be devastatingly harmful to them,” he said.

Many plaintiff lawyers in the Chicago legal

community argue that requests for confidentiality increased in the last 20 years, making it more difficult to protect public interest. They also say it became more challenging to publicize successful settlements — their primary means of finding new clients and generating business.

According to the *Chicago Lawyer* 2011 Settlement Survey, these lawyers handled 57 settlements of \$2 million or more in Cook County, for a total of \$254.9 million. They handled 12 settlements of \$2 million or more outside of Cook County, for a total of \$51 million. Since only public settlements, or those not deemed as confidential, make it into this survey, personal-injury lawyers say their totals only tell half the story.

Todd Smith, a name partner at Power Rogers & Smith, a personal-injury firm that obtained nearly \$60 million for clients in settlements reported between July 1, 2010, and June 30, 2011, said the push for confidentiality keeps the public in the dark.

“These courts are public, and what happens in our courts and the information about that should be available and transparent for the citizens who pay for them,” he said. “The more information people get, the more they will appreciate the importance of their court system.”

Smith also said defendants and insurance

companies that subscribe to confidentiality keep plaintiff lawyers and their clients from fully evaluating proper compensation.

“I want people who are out there who have cases pending to have the information so they know what’s fair and reasonable in terms of solutions of cases,” he said. “If they’re allowed to hide the information, we’re allowing wrongdoers to escape the full compensation that should otherwise be paid to other people.”

Richard Donohue, a founding partner of Donohue Brown Mathewson & Smyth, represents defendants in professional negligence, product liability and general liability cases. In past years, he settled several medical cases, including those involving wrongful death and survival claims.

Donohue, who sees confidentiality in less than 10 percent of cases, said in his experience, plaintiff lawyers from personal-injury firms like Power Rogers & Smith and Corboy & Demetrio refuse to discuss confidentiality.

“I’m not saying they never do it, but the plaintiff mindset is they want to be able to advertise their successful results,” Donohue said. “I understand that’s how they get their business, mainly from other referring lawyers.”

Donohue said confidentiality often becomes important in high-profile cases where well-known plaintiffs or defendants attract attention. He said most defendants favor the pro-

Both sides > feature

vision since they prefer to avoid any publicity around litigation.

“The defendants don’t advertise the cases they settle, because it’s an acknowledgement, at least in part, that they must’ve done something wrong,” Donohue said. “It’s just inherently a dichotomy between the mindset of the plaintiffs, and their lawyers in particular, and the defense.”

The call for confidentiality

After 30 years of handling personal-injury cases, Michael Cogan still disagrees with clients over the issue of confidentiality.

Cogan, a founding partner of Cogan & McNabola, a personal-injury firm that showed \$14 million in settlements in the *Chicago Lawyer* 2011 Settlement Survey, said confidentiality appears in nearly 10 percent of his settlements. He said in most cases, his clients agree to grant the defense’s request for confidentiality.

and injured 16 in 2003. He said only 2 percent of his settlements include confidentiality, and in general, he attributes the low number to the corporate move toward transparency.

“Between Enron and Sarbanes-Oxley, we’re in a period of significant transparency involving publicly traded entities,” Boho said. “That has a bit of an effect as to how companies look at all aspects of their business, with litigation being one aspect of that.”

While corporate defendants see lawsuits as part of business operations, they often prefer settlements over adverse jury results that attract media attention and affect stock prices, Boho said. In these settlements, he follows the lead of his clients.

“Some companies are aggressive in wanting to try cases and establish that they’re serious about litigation and want that to be known,” he said. “Others would rather not have publicity at all.”

Despite Demetrio’s aversion to confidentiality, he does find it necessary in a small number of cases, including the Frank Thomas case that settled in January 2011. He said the provision benefited his client, a former White Sox baseball player who brought a lawsuit against team doctors for failing to diagnose a foot injury in 2004.

“The reason is for the protection of the plaintiffs’ privacy,” Demetrio said. “Especially if you’re a high-profile individual, when people read you successfully settled a case for a great deal of money, it causes not only politicians and charitable organizations to bombard you, but also family members.”

A problematic method

When Warren Wolfson served as a Cook County Circuit Court judge, he heard several requests for confidentiality, including one in a civil case involving Tylenol capsules laced

“These courts are public, and what happens in our courts and the information about that should be available and transparent for the citizens who pay for them.”

“Nine times out of 10, when we call our client, they will say, ‘We don’t want the world to know about our business, because we don’t want our neighbors and friends knocking on our doors asking for money,’” he said.

As Cogan represents victims of medical negligence and defective medical products, he runs into companies that request confidentiality to protect their bottom line. For example, he said, if a company manufactures a hip prosthesis that allegedly failed, that company could face an “avalanche of cases” after a public settlement.

“Whether their fears are real or imagined, they’re there,” he said. “In almost 100 percent of cases we’ve settled with big corporations, they make confidentiality a major issue.”

So who doesn’t want confidentiality clauses? Cogan and other plaintiff lawyers don’t because they want to publish their settlement results. He said those published reports get reviewed by lawyers who then send him business.

“Since we don’t reach out to the public and advertise, that’s probably one of our better forms of advertising to the lawyering public,” he said.

Dan Boho, a partner and defense lawyer at Hinshaw & Culbertson, represented the building management in the Cook County Administration Building fire that killed six people

Unlike a plaintiff lawyer who wants publicity as a result of a successful settlement, companies that choose confidentiality often want those provisions in both successful and unsuccessful litigation, Boho said. Those clients believe that being involved in lawsuits counteracts their corporate objectives, he said.

Thomas Demetrio, a name partner at Corboy & Demetrio, a personal-injury firm that reported \$23 million in settlements in this year’s Settlement Survey, said the public has a right to know when a manufacturer, construction company or hospital settles a lawsuit. He said public knowledge of these cases could deter others from similar conduct.

“The reality is in 98 percent of the cases, when defendants seek confidentiality, there’s really no justifiable reason,” Demetrio said. “In the case of hospitals, we have major hospitals in this community, and it’s a very competitive business. And so Hospital A doesn’t want to have publicized a massive settlement against it for a particular surgery, let’s say, because people read that and go to Hospital B instead.”

Demetrio refuses to agree to confidentiality in 99 out of 100 cases. He said it’s “better to disabuse everybody from the get-go,” often telling defense lawyers at pretrial or mediation that he will not even consider the provision.

with poison in the 1990s.

Wolfson, now a distinguished visiting professor at DePaul University College of Law, refused to grant confidentiality in the settlement until the defense showed that the provision would protect the public.

“Tylenol manufacturers wanted confidentiality because on the one hand, they didn’t want everyone knowing they were settling these cases,” he said. “But two, they were afraid of copycat people doing more of this stuff. That might’ve been a legitimate claim. I bought it.”

But, Wolfson said, in the majority of his other cases, he found confidentiality to be inconsistent with his view that courts belong to the public and not to any individual.

“The public has the right to know how their courtrooms are being used,” he said. “I think just because someone might be embarrassed or discomforted by a settlement should not be a reason to do away with the importance of public interest.”

Smith, of Power Rogers & Smith, agreed that he never wants to deprive the public of vital information.

“A lot of the underlying philosophy there is that our courts be open and available for people to observe and understand what’s going on,” he said. “It’s all very inconsistent with the

underlying principles of our Constitution and the way we govern ourselves.”

When defendants or insurance companies offer to settle a case but insist on confidentiality, it places plaintiffs in a difficult position, Smith said. Some plaintiffs want to reveal and punish wrongdoing, but they also want to receive proper compensation for their losses, he said.

Plaintiff lawyers who want to resist confidentiality also sometimes find themselves in a tough spot, Smith said.

“You’re working for that significant individual, and their case isn’t about the greater good of the community and the country,” Smith said. “That poses a bit of a problem.

“But often clients are sufficiently frustrated, disappointed and upset about what’s happened that they likewise resist confidentiality. They don’t want what’s happened to them to be hidden either.”

Robert Clifford, founder of Clifford Law Offices and president of The Chicago Bar Association, who had \$12.4 million in the *Chicago Lawyer* 2011 Settlement Survey, said lawyers run into trouble when they are unable to compare confidential cases.

“You come to me and you say, ‘Mr. Clifford, my leg has been horribly mangled in a crash. What do you think my case is worth?’” he said. “I may have an opinion based on my experience, but the fact is that it would be helpful to my judgment about the value of your case to know the outcome of similar cases.”

For example, Clifford currently represents a man who suffered severe injuries in the Turkish Airlines crash in Amsterdam in 2009.

He wants to know what other plane crash victims received as compensation, but many of the industry’s settlements are confidential, he said.

“In many ways, the victim is put into a system where there’s no transparency,” Clifford said. “We can point to one anecdote after another where the lack of transparency works against the public good and this is one of them.”

Clifford said the large number of lawyers who try to represent personal-injury victims without any experience exacerbates the problem.

They face even more danger of undervaluing a client’s case if they can’t compare it to other cases.

Another growing concern involves tax exemptions of personal-injury settlements. Plaintiffs in those cases don’t pay taxes, so it could be argued that a portion of their settlement includes an incentive to keep quiet, Clifford said.

“The question is, are you being paid separately for confidentiality?” he said. “If you are, why is that tax-free? There is no good test case out there. We see that as an issue somewhere down the line.”

A tool for managing risks

Cook County Circuit Judge Thomas Hogan practiced as a defense lawyer for nearly 18 years, and while he handled large cases, he said he never felt strongly about confidentiality.

As a judge, Hogan said he sees confidentiality come up in less than 5 percent of the cases. He said requests to keep the amount of a settlement confidential should be made in only a small percentage of cases.

“I don’t think that confidentiality agreements should be enforced by the court in situations where the parties have utilized public money and public buildings to arrive at a resolution of their dispute,” he said.

Hogan sometimes sees situations where plaintiffs acquire a large sum of money, but might not have much experience with finances. He said it might be necessary to call on confidentiality in those situations so the plaintiffs can learn how to use their money.

Brian Bell, name partner of Swanson, Martin & Bell, who primarily represents major manufacturers of automotive and industrial equipment in product liability cases, said the majority of significant settlements become confidential.

Clients who invest in developing a product seem most interested in confidentiality, Bell said. Since parties to a lawsuit become most affected by their dispute, their wishes should come before those of the general public.

As an example, Bell compared product liability issues to adoption or matrimonial issues, which typically attract little public interest.

“In my experience, the information produced in lawsuits generally does not include the type of smoking guns that you sometimes hear about in the movies or in the media,” Bell said. “More common is information that is relevant to the marketing or the design that just doesn’t have the same interest with the public.”

Parties in a significant dispute should also decide whether they want the public to know the details of that dispute, Bell said.

Donohue, of Donohue Brown Mathewson & Smyth, said confidentiality also becomes a factor in cases involving “very private, not terribly sophisticated plaintiffs.”

“They are immediately seized on by all sorts of financial planners, used car salesman and people who want to sell them swampland in Florida,” he said.

“I’m being facetious, but I think sometimes you do get plaintiffs who want confidentiality.”

Donohue said it could be more difficult to keep these cases confidential in the future. Gov. Pat Quinn signed legislation in August that requires hospitals and insurance companies to report any payments made in settlements or verdicts. The Illinois Department of Financial and Professional Regulation can list those payments online without much explanation about the case or reason for its settlement, he said.

“There are bad doctors and their track records should be a matter of public record,” Donohue said. “I don’t have any problem with that concept.

“But I represent a lot of very good doctors who may have a case that they need to settle for one reason or another and it’s the only settlement they’ve ever had.”

Room for compromise

Even though Cogan and other plaintiff lawyers benefit from publicizing public settlements, they still need to discuss confidentiality with their clients.

“I think it’s rather obvious that the canons of ethics under which we function require us to call our client with the question,” Cogan said.

“If our client has no problem with it and thinks it’s a wonderful idea, then do we really have the right to argue with the defense lawyer against the language? The purest answer is, of course not.”

Cogan said he represented one client who was a “muckety-muck” for a large commercial real estate company. He surprised the defense by requesting confidentiality since his client wanted the provision in his settlement.

After obtaining a large award for his client, he listed the settlement on his website. He said

Both sides > feature

his client went “absolutely ballistic.”

“Confidentiality is confidential in all respects,” Cogan said. “It extends beyond the written document. It should be treated by the party who has asked for the protection as if the court file is sealed. That’s the healthiest way to think about it.”

Hogan often hears of disagreements between plaintiff and defense lawyers when the request for confidentiality comes up late in negotiations, he said. As he conducts settlement conferences from the bench, he avoids conflict by asking the defense if they want the provision before they begin tendering and accepting final demands and offers.

“I think it becomes a huge stumbling block if the defendant says we’ll settle, but it has to be confidential,” Hogan said. “That’s too late. Confidentiality is a term of a settlement agreement and assuming that it’ll be acceptable to the court, it should be negotiated and bargained for just like any other term.”

Boho, of Hinshaw & Culbertson, said defense lawyers need to discuss confidentiality at the right time.

He broaches the issue early because it’s easier for parties to consider the provision before they tackle the award amount.

“You can have an outstanding issue that is harder to get agreement on, and sometimes it draws a request for additional compensation, which doesn’t work,” Boho said. “If you attack it earlier in the process, you usually get that one out of the way and everyone focuses on the money.”

When Clifford represents clients who refuse to agree to confidentiality, he sees mediation break up and they go to trial, he said.

“At some point in time, someone’s going to blink,” he said. “My experience has been those who want confidentiality blink more often than not. In the end, it’s either a public settlement or a public trial.”

In recent years, plaintiff and defense law-

yers began to more often negotiate the disclosure of settlement terms, Clifford said. In some cases, he said he agrees not to send a news release or hold a news conference if he can send details to the settlement reporter or post them on his website.

“That’s the compromise,” Clifford said. “You try to find some middle ground and that tends to be what happens more often than not.”

Donohue said in most cases he allows plaintiffs to publish a settlement result in the *Illinois Jury Verdict Reporter*, but not disclose the name of the defendant or the name of the insurance company that made the payment.

“If a plaintiff attorney says, ‘I got a really good result for my client, and I’d like to get this out in the legal media so other lawyers might send me other work,’ even though I’m a defense lawyer, I understand that,” Donohue said. “I know most of the good plaintiff attorneys in town and I understand the business realities of the modern legal practice.” ■