

Tips for Handling the Issue of Confidentiality in Settlement

Confidentiality agreements are bad for consumers and advocates. These tips will help you discuss confidentiality with your clients and address common scenarios involving opposing counsel.

Discussing Confidentiality Agreements with Clients

It is very important to discuss confidentiality **before** you begin settlement negotiations. The best time to discuss it is before signing the fee agreement. Give potential clients the handout entitled *Should You Agree to Secrecy?* Or leave copies in your waiting room.

1. Explain that the other side will ask for a confidentiality agreement as part of the settlement and that a confidentiality agreement will make the client to keep their case secret.
2. Explain the pitfalls of confidentiality agreements.
3. Explain that you would like to have the client's permission, in advance, to reject any request for secrecy in the settlement agreement.
4. If the client consents, memorialize that authorization in the fee agreement. You will still have the flexibility to recommend confidentiality if you later determine that it is appropriate. And your client will still have the right to change her mind.

A sample script for talking with your client:

If we can convince [the defendant] to settle your case, they'll probably want to keep it a secret. In return for the settlement, they'll probably ask you to promise to keep what happened to you, what they did to you, and this entire case a secret.

I think secrecy agreements are a very bad idea. If you sign one, you won't be able to warn anyone about problems with this company. If they do this to somebody else, you won't be allowed to speak up.

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You're doing the right thing by fighting them. We're taking your case to help you stand up and say, "What you did was wrong and it has to stop!" So don't let them silence you.

Agreeing to confidentiality means you can't tell anyone about the case. Even if your family or your best friend asks "what happened with that thing you went to the lawyer for?" you'll have to say "I can't tell you. I promised [the defendant] that I'd keep it a secret."

And, if you do tell someone, [the defendant] could sue you. It has happened to other people before.

My advice, as your lawyer, is that you let me tell [the defendant's lawyer] that they can't gag you, and that you won't agree to a secrecy agreement. Is that OK with you?

Discussing Confidentiality Agreements with Opposing Counsel, Judges, and Mediators

Opposing counsel (OC) will probably request confidentiality as a condition of settlement. This may be a narrow agreement limited to the amount of the settlement or something much broader that may include a non-disparagement clause. Whatever the scope, it may be broached in a variety of ways. The tips below should help you respond.

- **In your initial offer or counter-offer.** Include a phrase clearly stating that "these are all the material terms of the agreement." For higher-value cases, consider adding "this offer can only be accepted by performance." These terms will give you leverage if opposing counsel attempts to insert a confidentiality clause into the agreement later. The first phrase allows you to say the clause is not part of your agreement because it is material. The second allows you to continue litigation and say you have not yet reached an agreement until your opponent signs and pays.
- **When OC first brings it up.** Firmly reject it and say "I've already discussed confidentiality with my client and she has adamantly rejected it. She won't agree to it as part of any settlement."
- **Educate OC when you reject it.** Explain why a confidentiality agreement would be detrimental to your client, such as the potential for being sued, the need to discuss the settlement with financial advisors, and the need to

discuss the case with family or friends for emotional reasons. Depending on the case and OC, it may also be helpful to explain the public policy arguments against confidentiality and the ethical issues. It is best to have this discussion early, before OC becomes adamant. Doing so early will make it easier for OC to back down.

- **OC inserts a confidentiality clause in the draft settlement agreement.**

This often occurs after the parties have reached a tentative agreement on the material terms of settlement. It is the most common way corporate defendants “request” confidentiality. In response:

- Simply cross it out and see how OC responds.
- Tell OC in advance that your client has rejected it (see above).
- Remind OC that you have already reached an agreement and confidentiality wasn’t part of it:
 - “I’m sorry, we already have an enforceable oral settlement agreement and this clause is not part of it.”
 - “We already have an agreement. And waiving my client’s First Amendment right to free speech wasn’t part of it.”
 - “If confidentiality was important to your client, you should have brought it up sooner.”
 - “We already have a binding agreement and we’re not reopening it.”

Alternatively, for bigger cases, point out that you will continue litigation because you do not have a final agreement until you have a signed document.

- **If OC is insistent.**

- Offer to ask for a settlement conference but make clear that the only settlement term still unresolved is confidentiality.
- “We’re happy to take this to trial and that won’t be confidential.”
- “My client has already told everyone and her uncle. So there’s no way she can honor a confidentiality agreement.
- “Don’t worry, it’s not like she’s going to take out a billboard. She’s a 90-year-old lady. She doesn’t have a Facebook account. I just don’t want her exposed to liability because she tells a friend at the community center.”

- **Responding to “But it’s a standard term...”**
 - “Not in my cases. I never recommend it.”
 - “It’s a [material term/a gag order] that exposes my client to never ending liability.”
- **OC wants you to sign the agreement too.** Even if you have decided that some degree of confidentiality is appropriate or acceptable to your client, you should adamantly refuse to sign the agreement yourself. A number of jurisdictions have issued ethics opinions stating that this is a violation of the rules of professional conduct. If your jurisdiction has not already issued such an opinion (which you should send to OC), sending copies of similar opinions from other jurisdictions will often be sufficient to quash this request.
- **A judge or mediator wants your client to agree.**
 - Educate the judge or mediator on why confidentiality agreements are a bad idea. Be prepared to give examples of cases in which the client and the public were harmed by confidentiality agreements. And be able to cite any relevant ethics opinions from your jurisdiction.
 - Make clear that you have explained to your client the meaning and risks of a confidentiality agreement and that the client does not want to sign (so it is clear that you, as the attorney, are not the barrier).
- **Consider a preemptive step in mediation.** If the mediator asks you privately what settlement terms you will accept, consider specifying that you will not agree to confidentiality and explain why.



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