SECRET SETTLEMENTS: Truth and Consequences

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**Case Scenario**

We have all been asked by defense counsel for some form of confidentiality during settlement negotiations. Sometimes the request is just for confidentiality of the amount of the settlement, but in many or most of the cases we handle as crime victim attorneys, the request is for a gag order. Consider the provisions below from a settlement agreement entered into by a client of one of the presenters in a child sexual abuse case:

5. Confidentiality. All of the terms of this Settlement Agreement are strictly confidential. Neither PLAINTIFF nor DEFENDANT, or any of their attorneys, agents, or representatives, may disclose any term of this Settlement Agreement except to immediate family members, significant others, those with whom they have a legally privileged relationship, as required by law, as necessary in connection with reporting to taxing authorities, or as necessary in connection with insurance arrangements. In addition, DEFENDANT may disclose the terms of the Settlement Agreement to the United States Department of State, if required to do so. ***Furthermore, neither PLAINTIFF nor DEFENDANT, including their attorneys, agents, and representatives, may discuss, disclose, or communicate the facts, allegations, evidence, or other information alleged or obtained in this lawsuit except to immediate family members, significant others, those with whom they have a legally privileged relationship, or as required by law.*** Any person or entity to whom a permitted disclosure of the terms of the Settlement Agreement or the facts, allegations, evidence, or other information alleged or obtained in this lawsuit shall be advised that the disclosed information is confidential and not to be further disclosed. A party receiving any inquiry about the terms of the Settlement Agreement shall respond, if at all, by stating: “The case was resolved to the mutual satisfaction of the parties.” This confidentiality requirement shall be binding on PLAINTIFF only until September 30, 2016, at which time it shall cease to have any force or effect as to PLAINTIFF only, except that the Settlement Amount shall remain confidential. ***This confidentiality requirement shall remain in effect for all others except PLAINTIFF forever*.** The PARTIES acknowledge that PLAINTIFF’s parents, DAD and MOM, were present during the negotiation of this settlement and the in-chambers memorialization of the terms of this Settlement Agreement by Judge Doe and counsel for the PARTIES, and that they are aware of the settlement terms including this Confidentiality provision. The PARTIES further acknowledge that future litigation and/or administrative proceedings may occur that arises or arose from the lawsuit this Settlement Agreement resolves.

6. Liquidated Damages For Breach of Settlement Agreement. Because it is not practicable to quantify the damage that would be caused by breach of the Settlement Agreement, the PARTIES agree that ***any breach of the Settlement Agreement shall entitle the non-breaching party to a payment from the breaching party of liquidated damages in the sum of $500,000***. Whether a breach has occurred will be determined pursuant to paragraph C.8.

You may wonder, how can this gag order be legal or ethical? Those are very good questions.

**Civil Law Considerations**

The defendant was a California nonprofit corporation, and California law provides:

(a) Notwithstanding any other provision of law, a confidential settlement agreement is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense.

(b) Subdivision (a) does not preclude an agreement preventing the defendant or any person acting on his or her behalf from disclosing any medical information or personal identifying information, as defined in subdivision (b) of Section 530.5 of the Penal Code, regarding the victim of the felony sex offense or of any information revealing the nature of the relationship between the victim and the defendant. This subdivision shall not be construed to limit the right of a crime victim to disclose this information.

(c) Subdivision (a) does not apply to or affect the ability of the parties to enter into a settlement agreement or stipulated agreement that requires the nondisclosure of the amount of any money paid in a settlement of a claim.

Cal. Civ. Pro. Code § 1002. But the settlement was of claims brought in an Oregon case, and the provision above governs civil procedure in California state courts, so it was not binding on the parties to the settlement, and Oregon has no equivalent law.

Oregon’s only prohibition against secret settlements is for those by public bodies:

(1) A public body, or officer, employee or agent of a public body, who is a defendant in an action under [ORS 30.260](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c) to [30.300](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c), or who is a defendant in an action under [ORS 294.100](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c), may not enter into any settlement or compromise of the action if the settlement or compromise requires that the terms or conditions of the settlement or compromise be confidential.

(2) Notwithstanding subsection (1) of this section:

(a) A public body, or officer, employee or agent of a public body, may enter into a settlement or compromise that requires the terms or conditions to be confidential if federal law requires terms or conditions of that settlement or compromise to be confidential. Only terms and conditions that are required to be confidential under federal law may be confidential in the settlement or compromise.

(b) A court may order that the terms or conditions of a settlement or compromise that reveal the identity of a person be confidential if:

(A) The person whose identity is revealed is a victim of sexual abuse or is under 18 years of age; and

(B) The court determines, by written findings, that the specific privacy interests of the person outweigh the public’s interest in the terms or conditions.

(3) Any public body, or officer, employee or agent of a public body, who is a defendant in an action under [ORS 30.260](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c) to [30.300](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c), or who is a defendant in an action under [ORS 294.100](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c), shall file with the court a full and complete disclosure of the terms and conditions of any settlement or compromise of the claims against the public body, its officers, employees or agents. The disclosure shall be filed prior to the dismissal of the action.

(4) For the purposes of this section:

(a) “Action” means a legal proceeding that has been commenced as provided in [ORCP 3](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c); and

(b) “Public body” has that meaning given in [ORS 30.260](https://advance.lexis.com/search/?pdmfid=1000516&crid=4139c707-3b63-4c83-8950-f1aaadecef30&pdsearchterms=ors+17.095&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=35cb7a1b-be86-4214-83bb-e36f76494c9c).

ORS 17.095. While some nonprofits qualify as “public bodies,” the California nonprofit being sued in our case did not.

**Criminal Law Considerations**

Oregon does have a law prohibiting compounding a crime, as do most states. Oregon’s version reads:

(1) A person commits the crime of compounding if the person accepts or agrees to accept any pecuniary benefit as consideration for refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) Compounding is a Class A misdemeanor.

ORS 162.335. This statute did not apply because the victim had already reported the crime to law enforcement, and his assailant had been convicted of felony child sexual abuse.

**Ethical Considerations**

But didn’t the agreement also gag the attorney, effectively preventing her from representing clients against the same company, and didn’t that violate RPC 5.6? The answer is “yes.” Oregon’s version of RPC 5.6 states in relevant part:

A lawyer shall not participate in offering or making:

\* \* \*

(b) an agreement in which a direct or indirect restriction

on the lawyer's right to practice is part of the

settlement of a client controversy.

Oregon RPC 5.6. This is how the judge addressed the lawyer’s objection to the settlement term that gagged the when the settlement was put on the record:

[S]ince part of the settlement involves what his lawyer may or may not say or do in the future, we -- in accordance with Rule 5.6, the court will be ordering based on the wishes from the Plaintiff here, ordering, then, that Ms. [Lawyer] would agree to accept the settlement on behalf of her client and abide by its terms, then, so that's meant to protect the lawyer from any alleged ethical violation that you can't do this, that you can't enter this kind of agreement, so the court says you need to do this and that your client is agreeing to this, then the court can order that, and that's why we're doing that.

Does a court’s order of a violation of the Rules of Professional Conduct vitiate the violation?

One commentator makes a strong argument that secret settlements also violate Rule 3.4 of the Rules of Professional Conduct, which generally prohibits requesting someone other than the lawyer’s own client to withhold relevant information from another party, and Rule 8.4, which prohibits conduct “prejudicial to the administration of justice.” Jon Bauer, “Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics,” 87 Or. L. Rev. 481 (2008). *See also* Stephen Gillers*, Speak No Evil: Settlement*

*Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 Hofstra L. Rev. 1 (2002); Conn. Bar. Ass’n Informal Opinion 2011-1 (Jan. 19, 2011), S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993).

**Tax Considerations**

Some of you are thinking, “Aren’t there potential tax consequences when a settlement agreement includes confidentiality or nondisclosure terms?” There might be, if you’re not careful. Consider Dennis Rodman’s settlement with the TV cameraman he assaulted in 1997:

For and in consideration of TWO HUNDRED THOUSAND DOLLARS ($200,000), the mutual waiver of costs, attorneys' fees and legal expenses, if any, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Eugene Amos [petitioner], on behalf of himself, his agents, representatives, attorneys, assignees, heirs, executors and administrators, hereby releases and forever discharges Dennis Rodman, the Chicago Bulls, the National Basketball Association and all other persons, firms and corporations together with their subsidiaries, divisions and affiliates, past and present officers, directors, employees, insurers, agents, personal representatives and legal counsel, from any and all claims and causes of action of any type, known and unknown, upon and by reason of any damage, loss or injury which heretofore have been or heretoafter may be sustained by Amos arising, or which could have arisen, out of or in connection with an incident occurring between Rodman and Amos at a game between the Chicago Bulls and the Minnesota Timberwolves on January 15, 1997. . .

\* \* \*

It is further understood and agreed that the payment of the sum described herein is not to be construed as an admission of liability and is a compromise of a disputed claim. ***It is further understood that part of the consideration for this Agreement and Release includes an agreement that Rodman and Amos shall not at any time from the date of this Agreement and Release forward disparage or defame each other***.

After a discussion of relevant authority and the underlying facts, the Internal Revenue Service determined that $120,000 of Amos’s consideration was “on account of personal physical injuries,” and the rest was for Amos’s agreement not to “(1) defame Mr. Rodman, (2) disclose the existence or the terms of the settlement agreement, (3) publicize facts relating to the incident, or (4) assist in any criminal prosecution against Mr. Rodman with respect to the incident[.]” *Amos v. Commissioner of Internal Revenue*, 2003 TC Memo 329, 15 (U.S. Tax Court 2003). Thus, $80,000 of the settlement was taxable income.

Tax consequences are avoidable. As noted by the Tax Court in *Amos*, “Where there is a settlement agreement, [the determination of the nature of the claim] is usually made by reference to it,” and “[i]f the settlement agreement lacks express language stating what the amount paid pursuant to that agreement was to settle, the intent of the payor is critical to that determination.” *Id.* At 11.

Consider the following provision:

9. Nature of Consideration. The Settlement Amount shall constitute damages on account of personal physical injuries arising from an occurrence within the meaning of Section 104(a)(2) of the Internal Revenue Code. No part of the Settlement Amount is on account of any claim for punitive damages, lost income, wages or earning capacity, or emotional distress damages other than as may have arisen from a battery, although all such claims are being released herein.

Is this language sufficient when there is a non-disparagement or “gag” provision? Why risk the IRS’s interpretation? If you are agreeing to confidentiality or a “gag” provision, make it mutual, and include a stipulation that the mutuality is the only consideration for that provision.

**Public Policy Considerations**

The #MeToo movement has made secret settlements a subject of general interest. The legislatures of at least 12 states passed laws prohibiting some form of secret settlements during the last legislative session, and more are in the works. *See* Elizabeth A. Harris, “Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short,” *New York Times* (June 14, 2019). But lawyers representing crime victims have been discussing speech-limiting settlement provisions for decades.

Child molestation charges against Michael Jackson evaporated in 1993 after he reached a settlement with his victim, who then “chose” not to testify against Jackson. *See* Joel Cohen and James L. Bernard, “Buying Victim Silence,” *New York Law Journal* (July 28, 2004) and Maureen Orth, “Neverland’s Lost Boys,” *Vanity Fair*, at 384.

A few states have limited settlement agreements that conceal “public hazards,” including Florida’s “Sunshine in Litigation Act” of 1990:

Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

As used in this section, “public hazard” means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

Fl. Stat. § 69.081(4), (2). Recidivist sex offenders indisputably being “public hazards,” Florida’s approach shows promise.

After Michael Jackson’s successful curtailment of criminal charges in the early 1990s using a civil settlement agreement with his victim, the next wave of debate over such agreements came with the clergy abuse litigation after the Catholic Church’s widespread practice of paying victims to remain silent while moving child-molesting priests to other parishes or dioceses to avoid scandal and prosecution was exposed. The outcry over these practices eventually led the United States Conference of Catholic Bishops to approve the “Charter for the Protection of Children and Young People” in 2005, which included the following provision:

**ARTICLE 3.** Dioceses/eparchies are not to enter into settlements which bind the parties to confidentiality unless the victim/survivor requests confidentiality and this request is noted in the text of the agreement.

But it was a confluence of celebrity sexual misconduct, led by the likes of Bill Cosby, Harvey Weinstein, Matt Lauer, Bill O’Reilly, R. Kelly, and dozens of others, that has recently brought the subject of secret settlements to the forefront of popular media. The wave of legislation and policy changes that has followed is likely to make it more difficult – and even illegal in some states – to strong-arm crime victims into keeping quiet as a condition of settlement. And that is as it should be. Secret settlements serve as a mechanism for preventing wrongdoing from coming to light, and they limit victims’ free speech. They prevent the public from knowing that a person or institution is dangerous to others. They prevent or interfere with the prosecution of criminal acts. They allow dangerous persons to continue their predatory behavior. And, when public officials’ criminal acts are concealed by secret settlements, a fraud is perpetrated on the public they serve.

**Bios:**

**Erin K. Olson** is a sole practitioner in Portland, Oregon, where she specializes in the representation of victims of child sexual abuse and elder abuse in both civil and criminal courts.  She is also a National Certified Guardian who serves as a guardian *ad litem* for children.

Ms. Olson spent the first ten years of her legal career as a prosecutor, working for the Multnomah County District Attorney’s Office, the United States Attorney’s Office for the District of Oregon, and the Massachusetts Attorney General’s Office.

She is a co-founder and board member of the Oregon Crime Victims Law Center, and is a past president and member of the Advisory Board of the National Crime Victim Bar Association.

Ms. Olson was raised in Madras, Oregon, and has a B.A. from Stanford University (1986), an M.S. in Criminal Justice from Northeastern University (2000), and a J.D. from the University of Connecticut (1993).

**Jerry O’Neill** is a partner with the law firm of Gravel & Shea in Burlington, Vermont.  His practice areas include crime victim representation include sexual abuse victims, general business litigation, and products liability and personal injury litigation. He was admitted to the District of Columbia Bar in 1971. After a period of service in 1971-1972 as an active duty U.S. Army Officer, he was a law clerk to the Honorable Sylvia Bacon, a Judge of the District of Columbia Superior Court in 1972. He then clerked for Vermont U.S. District Court Judge Albert W. Coffrin in 1972-73. In 1973 he joined the U.S. Attorney’s Office for the District of Vermont in Rutland as an Assistant U.S. Attorney. He became the First Assistant U.S. Attorney in 1975, moving to Burlington to open the office there in 1976. He served as First Assistant U.S. Attorney until May 1981 when the U.S. District Court Judges for the District of Vermont appointed him U.S. Attorney for the District of Vermont. Since 1981 he has been in private practice in Burlington and was the senior partner of O’Neill Kellner & Green for 26 years. He teaches on trial advocacy topics for the American Association for Justice throughout the United States.

Jerry is a past president and member of the Advisory Board of the National Crime Victim Bar Association; a member of the American Association for Justice, Chair of its Child Sex Abuse Litigation Group, and Co-Chair of its Jury Bias Litigation Group; past president and board member of the Vermont Association for Justice; member of the U.S. District Court Advisory Committee; board member of the Vermont Center for Crime Victim Services; and a member of the Chittenden County, Vermont, and American Bar Associations. He is a 1968 graduate of Georgetown University and a 1971 graduate of Georgetown University Law Center.