

Limiting Confidentiality in Mortgage Litigation

California
Homeowner
Bill of Rights
COLLABORATIVE



National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

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Leslie Bailey, Staff Attorney, Public Justice
Sarah Belton, Cartwright-Baron Attorney, Public Justice
Tara Twomey, Of Counsel, National Consumer Law Center

February 25, 2015

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Presenter – Jennifer Wagner

- Jennifer is Managing Attorney at Mountain State Justice, a non-profit, public interest law firm in West Virginia, and she has given numerous talks on consumer litigation.
- Jennifer litigates on behalf of low-income consumers, focusing on combatting predatory mortgage lending and abusive mortgage servicing. Jennifer also engages in other consumer and civil rights litigation, including access to appropriate medical care, worker's health and safety, and the humane treatment of prisoners.
- Prior to joining Mountain State Justice, Jennifer clerked on the U.S. Fourth Circuit Court of Appeals and worked at Partnership for the Homeless in New York City.
- She graduated with honors from New York University School of Law and Harvard College.





Presenter – Leslie Bailey

- Leslie is a Staff Attorney in Public Justice’s Oakland office. She currently serves on the Board of Directors of the National Association of Consumer Advocates (NACA).
- As the head of Public Justice’s Court Secrecy Project, Leslie has testified before Congressional subcommittees about how secret settlements and sealed court records threaten public health and safety, and has successfully blocked attempts by major corporations—including Cooper Tire Co. and Remington Rifle Co.—to hide evidence of wrongdoing through secrecy orders. She is currently counsel in court secrecy appeals against Chrysler Corp. and American Family Insurance.
- She argued *FIA Card Services v. Weaver*, a landmark decision in which the Louisiana Supreme Court held that a debt collector cannot enforce an arbitration award against a consumer without proving the consumer agreed to arbitration. She is also currently co-lead counsel in two putative class actions against payday lenders claiming that their affiliation with a Native American Tribe entitles them to immunity from liability under state law.
- Leslie received her J.D. cum laude from the New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow, and graduated from Claremont McKenna College.



Presenter – Sarah Belton

- Sarah joined the Public Justice Oakland office in June 2013 as the first Cartwright-Baron Attorney. While at Public Justice, Sarah has represented consumers in class actions against payday lenders and advocated to protect the rights of consumers and employees against abusive arbitration clauses. In spring 2014, she published *How the Arbitration-at-all-Costs Regime Ignores and Distorts Settled Law* in the *Berkeley Journal of Employment and Labor Law*.
- She was previously an Equal Justice Works fellow and a staff attorney at Legal Services for Children in San Francisco, California, where she managed an active caseload representing minors in a variety of civil legal proceedings. Sarah also served as a law clerk to Federal District Judge Algenon L. Marbley of Columbus, Ohio.
- Sarah received her J.D. from Harvard Law School in 2009, where she was the recipient of the James N. Snitzler Scholarship and Assistant Managing Editor of the *Harvard Civil Rights-Civil Liberties Law Review*. She received her B.A. in International Relations from Stanford University.





Moderator – Tara Twomey

- Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center.
- She previously lectured at Stanford, Harvard and Boston College Law Schools.
- She is a contributing author of several books published by the National Consumer Law Center, including Foreclosures and Bankruptcy Basics.



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The logo for Mountain State Justice, Inc. is located in the bottom left corner. It features a stylized black wave graphic above the text "MOUNTAIN STATE JUSTICE, INC." in a black, serif font. The text is flanked by horizontal lines on either side.

MOUNTAIN STATE
— JUSTICE, INC. —

The logo for Public Justice is located in the bottom right corner. It consists of the words "PUBLIC JUSTICE" in a bold, blue, sans-serif font, set against a white rectangular background.

PUBLIC JUSTICE

Overview

- **Discovery protective orders:** making the defendant meet its burden
- **Sealing court records:** making the defendant meet an *even higher* burden
- **Confidentiality in settlements:** unnecessary—and potentially unethical



Fighting secrecy in your cases: *3 basic rules*

1. The **burden** is always on the proponent of secrecy.
2. Evidence of wrongdoing is not a **trade secret**, and the defendant's desire to avoid future litigation is not "good cause" for confidentiality.
3. A **court record** cannot lawfully be sealed without meeting a higher burden, even if the same document was subject to a P.O.

Setting the Scene: *Rolling Stone* Reports

Invasion of the Home Snatchers

How foreclosure courts are helping big banks screw over homeowners

■ BY MATT TAIBBI | November 10, 2010



Case study – *Weiss v. Allstate Ins. Co.*



After jury verdict for plaintiffs, Allstate wanted to maintain secrecy over its internal process for illegally refusing hurricane-related claims...



Protective orders: *the basics*

Rule 26(c)(1)

A party or any person from whom discovery is sought may move for a protective order in the court

The court may, ***for good cause***, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including:

(G) requiring that a ***trade secret or other confidential research, development, or commercial information*** not be revealed or be revealed only in a specified way . . .

..

Protective orders: *proponent of secrecy bears burden*

- Without a P.O., parties can publicly disseminate material produced in discovery*
- Proponent of secrecy (producing party) has burden of showing good cause for each document or category of documents
 - Any other approach “would turn Rule 26 on its head.” *Cipollone*, 785 F.2d at 1122 (3d Cir. 1987).

*Model Rule of Prof. Conduct 3.6 *may* limit what you can say about evidence before trial – *but* First Amendment protects some attorney speech.

Protective orders: *what is “good cause”?*

YES:

- Sworn testimony from person with knowledge of development/maintenance
- Evidence of ***specific harm*** that would result from disclosure
- Proof of what company does to restrict access
- Proof of ***precise value*** of the information and how much \$\$ loss of confidentiality would cost

NO:

- ***Stipulation by both parties***
- Convenience (speed litigation)
- Vague, speculative, or conclusory statements
- Unsworn statements by counsel
- Desire to avoid more litigation
- Desire to avoid looking bad (“embarrassment” under Rule 26 means significant harm to competitive/financial position)

Protective orders: *what is legitimately confidential?*

YES:

- Consumers' personal info such as SSNs and bank account #s (this can be redacted)
- Trade secret: a formula, pattern, compilation, program, device, method, technique or process that (i) derives \$ value from not being known to competitors; and (ii) is the subject of reasonable efforts to maintain secrecy

NO:

- Publicly available info
- Documents obtained outside discovery *in this case*
- Stale business information
- Info that has been widely disseminated, even *within* co.
- General knowledge within industry
- Evidence of wrongdoing or hazardous product, even if exposure is likely to lead to further litigation

Protective orders: *tricks defendants play*

1. Blanket P.O. that allows them to designate entire document production “confidential”
2. Trying to reverse the burden by saying the *receiving* party must file a motion to challenge confidentiality designations
3. Applying P.O. to everything under the sun, even documents you got from outside discovery
4. Affidavit from random corporate employee stating that everything is “internal and proprietary”
5. Bootstrapping court records into discovery P.O.

Protective orders: *propose your own P.O. with the right terms*

1. Challenge provision:

- Party receiving documents can object to confidentiality designation
- Once receiving party notifies designating party of dispute, burden is on designating party to file a motion to retain confidentiality within (14) days of notice
- Motion must set out specific basis for good cause for confidentiality under each document or category
- If no motion filed within X days – or court denies – documents automatically lose confidential status

2. Sharing provision

3. No return-or-destroy provision (ABA resolution)

Protective orders: *the law favors sharing provisions*

- Only reason for no-sharing provision is to avoid producing responsive documents in the next case
- Avoiding litigation is not “good cause” for confidentiality – lawsuits are not a ***competitive*** harm
- Sharing reduces cost of litigation (Fed. R. Civ. P. 1)

Protective orders: best practice for filing confidential documents with court

- Party filing brief submits “confidential” material provisionally under seal and notifies designating party that documents will be placed in public court file unless motion to seal is granted
- Any party then has X days to move the court to seal the court records
 - Must meet higher legal standard (check law in your jurisdiction) – compelling reasons for secrecy that outweigh public interest
 - If no motion is filed, then the records become immediately available to the public

Protective orders: modifying a protective order in another case

- The majority of federal circuits apply a presumption in favor of access where intervening party involved in bona fide collateral litigation seeks access to protected discovery materials.
- But, courts evaluate motions to modify differently:
 - The Third Circuit uses the same balancing test applied when deciding to grant protective orders in the first instance, while taking into account the reliance of the original parties on the order.
 - The Fifth Circuit permits modification to obviate the need for repetitive discovery, and denies the motion only where it would prejudice the substantial rights of the party opposing modification.
 - The Second Circuit requires a showing of extraordinary circumstance or compelling need

“Confidential” Documents in Mortgage Cases

- Pooling & Servicing Agreement
- Designate whole file b/c identifies Plaintiff’s financial info
- Loan officer compensation policy
- Personnel files of loan officers, etc.
- Rate sheets
- Underwriting or servicing guidelines
- Internal training materials
- Lists of pattern witnesses

Fighting defendants' efforts to seal court records

Even if Defendant demonstrated good cause for confidentiality during discovery, a new standard applies once that same document is:

- Filed with court
- Attached to dispositive motion
- Used as trial exhibit

Fighting defendants' efforts to seal court records

1. Common-law right of access

- Applies to civil cases in all jurisdictions
- Presumption of access can be overcome only by “compelling reasons” for secrecy that are supported by “specific factual findings.”

2. First Amendment right of access

- Court proceedings have historically been open to press and general public.
- Public right of access can be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”

Office of U.S. Courts

Judicial Conference Policy on Sealed Cases

Judicial Conference Policy on Sealed Cases

An entire civil case file should only be sealed when consistent with the following criteria:

- a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;
- b. A judge makes or promptly reviews the decision to seal a civil case;
- c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and
- d. The seal is lifted when the reason for sealing has ended.

Check the rules of the jurisdiction

- **Arkansas Statue Section 16-55-122(a)** (“Any provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of this state and therefore void.”)
- **Louisiana Code Civ. P. Art. 1426(D)** (“Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard, or any information which may be useful to members of the public in protecting themselves from injury that might result from a public hazard is null and shall be void and unenforceable as contrary to public policy, unless such information is a trade secret or other confidential research, development, or commercial information.”)
- **Montana Code 2-6-112** (“Any portion of a final order or judgment entered or written final settlement agreement entered into that has the purpose or effect of concealing a public hazard is contrary to public policy, is void, and may not be enforced.”)
- **South Carolina Rule of Civil Procedure Rule 41.1** (prohibiting parties from proposing settlement agreements for court approval conditioned on filing agreement under seal)
- **Texas Rule of Civil Procedure 76a** (establishing presumption of public access to unfiled settlement agreements that involve matters that have probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government).

Fighting defendants' efforts to seal court records

- Atmospherics can't hurt – tell the judge about the defendant's history & practice of secrecy
- Court records must be unsealed immediately once secrecy is no longer warranted – default is public.
- Don't agree to protective orders that require you to file under seal

Opposing Confidentiality in Settlements

Different types of settlement confidentiality

- Confidential settlement amount/terms
- Render court documents or orders confidential
- Facts of case confidential (and/or non-disparagement)

Legal restrictions

- Court filed settlement agreements are presumptively public like any other court document.
- Public interest in judicially-approved settlements is strong.
- Mere fact of settlement is not grounds for sealing.

Harms of Settling for Confidentiality

- Not feasible
 - Settlement terms are recorded or reported (mods, lien release, credit repair)
 - If losing house, need to discuss with loan officers, home buyers or sellers
 - Approval by bankruptcy court
 - Plaintiff has already spoken to others about negotiations and case
- Risk & cost to plaintiff
 - Potential future litigation—whether or not your client breaches
 - Eliminates finality
 - Future interference & control by defendant & fear for client

Harms of setting for confidentiality cont.

- Borrower can't help others in future
 - Referrals for help
 - Pattern witness testimony
 - Legislative advocacy
 - Public pressure through rallies or news stories
- Counsel can't help other advocates

Educating Opposing Counsel & Mediators

- This is a *material & substantive* term
- Negotiate separate consideration
- Threat of trial, which won't be confidential
- Discuss your client with defense counsel
- “I never recommend it”
- Reduce preliminary agreement to writing & enforce this agreement

Discussion with your client

- **Ethical Rule 1.4(b):** “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”
- Clients don't agree when apprised of the risks

More ethical restrictions

Rule 1.2(a) - Scope of Representation and Allocation of Authority Between Client and Lawyer

“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation

A lawyer shall abide by a client's decision whether to settle a matter.”

Rules 3.4(f) – Fairness to Opposing Party and Counsel

“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.”

Secret settlements – ethical restrictions

cont'd

Rule 5.6(b)

“A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”

- **D.C. Bar Ethics Adv. Op. 335** (May 16, 2006): “A settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled.”
- **South Carolina Bar Ethics Adv. Op. #10-04**: “It is improper for a lawyer to become personally obligated in a client’s settlement agreement to refrain from identifying the defendant as a part of the lawyer’s business. . . .”

NACA Consumer Class Action Guidelines

Third Edition, 2014

GUIDELINE 10 - CONFIDENTIALITY

Class counsel should vigilantly oppose overly-broad and unnecessary confidentiality in class action cases. . . . Except where the exigencies of the case and the interests of the class demand it, class counsel should not agree to . . . overly-broad confidentiality terms . . . merely to avoid the effort required to litigate the merits of the confidentiality question or to obtain earlier discovery. . . .

“Class action settlement documents must remain open and available to the public in virtually all circumstances, including pre-certification. . . . [U]nder no circumstances may the amount of the settlement, the amount of attorney fees sought or awarded, or the scope of the release of claims of either the class representatives or the class members be kept confidential. . . .”

Agreeing to Confidentiality in Settlements

- When may it make sense?
 - Significant additional consideration
 - Client doesn't want the settlement disclosed
 - Terrible case – but be careful!
- Limit the clause
 - Side letter with counsel only re: website, etc.
 - Limit to settlement *amount*
 - Limit to *method* of disclosure
 - Limit *who* disclosures cannot be made to
- This is the *EXCEPTION* not the *RULE*

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- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!



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