

## DECIDING WHETHER TO INVOLVE THE COURT IN CONFIDENTIAL MATTERS

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In a litigated dispute, the court is the referee between the parties, and the lawyers will routinely submit matters for its official approval. Agreements between the parties – such as agreements regarding confidentiality or settlement – are much more easily enforced if entered as court orders rather than left as private contracts. Consequently, it is standard practice to reduce such agreements to orders.

There are times, however, when it is not in the interests of the parties (or at least not in the interests of *one* party) to involve the court in an agreement between the parties. You should always consider the competing interests at stake. If you involve the court, you will have an easily enforced order to which the court is already committed, at least to the extent of having placed its official authority behind it. Involving the court also provides a measure of protection against that court – or another one – subsequently finding something objectionable about your agreement and voiding it. Finally, it is possible that your judge may be displeased by being excluded from some aspect of the case that he or she is used to endorsing.

On the other hand, there are disadvantages to submitting your private agreements to the scrutiny of a private official. Like other official proceedings, lawsuits are at least partly a matter of public interest, and judges often find themselves under pressure to make things public that the parties may prefer to remain private. Revelation of details of a settlement or publication of documents produced in discovery are examples of the potential negative side of reducing agreements to court orders.

For example, in many jurisdictions a court-approved settlement cuts off the rights of various other parties to seek indemnification or contribution. Accordingly, to protect the client from such claims after a lawsuit has been settled, standard practice calls for the lawyer to have the court approve the settlement and enter an order finding it to be fair and reasonable. Many judges, however, will be reluctant to seal settlements or to review them only *in camera*. The parties may be confronted with a harsh choice:

forego protection from contribution and indemnification claims or forego a confidential settlement. In the former case, the parties would reach a private settlement and would simply submit to the court a stipulation of dismissal with prejudice. In the latter case, the *parties* will still be bound by their agreement to keep the settlement confidential, but the agreement will be in a publicly available court file.

Another example of a potential negative result involves confidentiality agreements. Many judges may be reluctant to agree to maintain documents as confidential. Simply not submitting a confidentiality agreement to the court may prevent some problems. Of course, this depends on mutual agreement between the parties: If the parties cannot agree to a confidentiality order, then the court's involvement is inevitable. The risks may be greater: A court in New Jersey recently ruled that *unfiled* discovery materials may be subject to disclosure to an intervening third party (which intervened solely to acquire, and publish, the documents) because they were placed within the judicial sphere by the parties seeking a protective order. The New Jersey Supreme Court reversed that decision on July 28, 2004, *see Frankl v. Goodyear Tire & Rubber Co.*, WL 1672354, but this battle is not over, and your client may be better off keeping out of it altogether. If you decide to go the route of keeping your dispute out of court as an initial matter, research the issue carefully. If there is a dispute over the agreement and you go to court to enforce it, you may find yourself in the same trouble that you wanted to avoid by not seeking a court order in the first place. Another potential stumbling block is that some jurisdictions may refuse to enforce a private agreement made to avoid judicial review. This is a difficult and emerging area of law, and you should be alert to the pitfalls on both sides of the issue.

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