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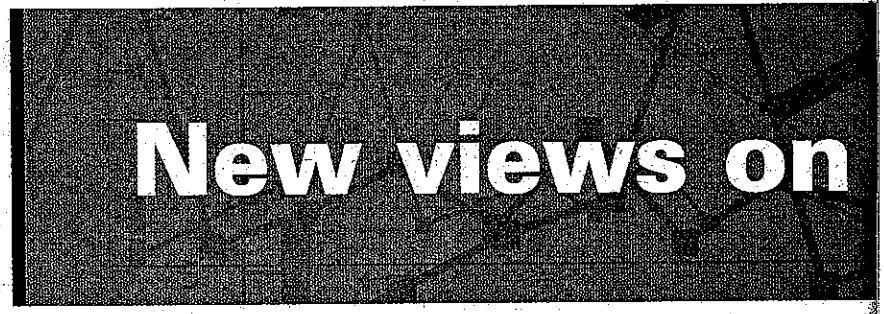

Disclosure backlash: the use and abuse of confidentiality agreements

SARAH BOULBY

As family law courts push financial disclosure requirements to ever further limits, separating spouses and their new spouses, partners, business associates and family members caught in the web are increasingly concerned about the confidentiality of the materials now routinely requested or ordered to be produced.

The existing protection offered by sealing orders and the deemed undertaking rule do not provide sufficient solace to the aggrieved document producers. There is an increasing fashion for these parties to demand that the requesting party sign a freestanding confidentiality agreement.

The legislative authority, if any, for such agreements is murky and the pitfalls for parties entering into them manifold. Despite the increasing popularity of these agreements, there has been little commentary on whether they should be used and, if they are, what are reasonable terms to include in them.

Financial disclosure requirements under federal and provincial family law statutes and regulation are far-reaching. To calculate income for child support purposes or determine what a spouse owns and its value for property settlements requires detailed and specific information from bank account statements and cancelled cheques to corporate financial statements, ledgers and records, mortgage applications, employment agreements, trust deeds and estate documents.

The extent of financial disclosure required by the legislation and enforced with readiness by our courts draws in information concerning third parties who may understandably have little desire to be dragged into another individual's divorce.

The deemed undertaking rule in its various forms across provincial regulatory regimes provides some protection as it requires disclosure be kept confidential and only used for the purpose of the lawsuit in which it was obtained. There are exceptions, however — most notably, this confidentiality ends if the evidence is filed with the courts.

> **Confidentiality agreements are being proposed... that place lawyers in conflict with duties to their clients.**

Once in court, the party seeking confidentiality may apply for a sealing order, but that also has its limitations as a confidentiality tool. Our courts are presumed to be public and the burden of persuading a court to seal a court file is borne by the applicant. The burden to obtain a sealing order is a high one, even if both parties before the court consent to the application. Members of the media may be given intervenor status on an application.

Given these limited tools for preserving confidentiality, an increasing number of parties are asking for private confidentiality agreements as a precursor to making voluntary disclosure. Although parties cannot consent to a sealing order, a confidentiality agreement provides some reassurance to a reluctant party to cooperate in disclosure. A third party may insist on such an agreement to be willing to participate in the process at all.

In family cases, the parties often have a high desire for privacy given the intimate information that may have to be disclosed in a proceeding or negotiation. There is no real legislative basis for these agreements, however, which must rely on the law of contract. But what could be consideration for these contracts, in which the recipient of information to which he or she is presumably entitled to by right in any event agrees to keep the information confidential?

Another troubling aspect to confidentiality agreements is the standard terms that are circulating, at least amongst the Toronto family law bar, with some frequency. Confidentiality agreements are being proposed, and presumably executed, that include terms that place lawyers in conflict with duties to their clients.

Examples are terms that the client may not see the disclosure directly, but must rely on counsel having reviewed the material, and that counsel may not release the documents directly to the client if he or she ends the retainer. Other common terms include provisions that require other counsel or experts retained by counsel to sign on to the confidentiality agreement with notice. This undermines the right of a party to obtain a second opinion on a legal issue or an expert opinion as to value without notifying the other side.

Terms requiring that documents be returned at the time of settlement with no copies kept may cause difficulties later if there is a subsequent review or variation application. Furthermore, counsel may have difficulty in defending a client assessment or negligence claim without the documents.

The most pernicious terms are those that impose liability on the parties to the agreement as well as counsel or experts retained by the party. Such extended liability may prevent a party from finding counsel or experts willing to act in his or her cause.

There has been little comment or debate about the growing prevalence of confidentiality agreements. The motivation for them, given the broad reach of financial disclosure, is understandable — but they should be approached with caution. ■

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