GAG ORDERS – ARE THEY EVER A GOOD IDEA?

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The vast majority of civil lawsuits end up in a negotiated settlement, rather than an adversarial trial. Settlements avoid the risk and cost of a trial. In a civil trial the only thing a Court can do is award damages. Of course, after winning a trial, an abuse survivor may feel that he or she was acknowledged, heard, and may feel the satisfaction of having come forward and experience some vindication after which some healing and closure may follow. But again, the only thing the survivor gets from the court is an award of damages if they are successful.

In a settlement, anything is possible. Settlements are only limited by the parties' creativity. Some settlements include things like apologies or information about how an institutional defendant has taken steps to ensure that further abuses do not occur, in addition to a monetary payment. Settlements often provide the best outcome for both parties. However, confidentiality agreements or "gag orders" are often requested by defendants as part of a civil settlement.

Confidentiality agreements have been part of standard form settlement documentation since long before sexual abuse cases were being brought in the civil courts. In personal injury settlements, it has been a standard practice to use a "boiler plate" confidentiality agreement. In car accident cases, the typical settlement agreement includes a provision that the parties agree to keep the terms of the settlement confidential.

Years ago when survivors started suing for sexual abuse, it was not uncommon for defendants to ask for very broadly worded confidentiality agreements. Such agreements would go much further than keeping the terms of the settlement confidential and, in fact, some agreements prevented the abuse survivor from ever again disclosing or discussing their abuse. Obviously such agreements are offensive in a sexual abuse context As recognized by the recommendations

coming out of the Cornwall Inquiry, "for survivors of sexual abuse, where secrecy and shame are part of their injury, having to maintain silence in return for a payment can have very negative consequences."

It is important to realize, that like all of the other terms of a civil settlement, the specifics of a confidentiality agreement can be negotiated. A survivor may not object to agreeing to keep the amount of the monetary payment confidential, but he or she should give very careful thought before agreeing to keep the details of the abuse confidential. In some cases the survivor may at a future time, wish to speak publically in order to help other abuse victims. In this context disclosing the particular identity of the perpetrator or the institution which he or she is affiliated may not be an important issue to the survivor, however, when talking to counsellors, family members or close personal friends, providing all the details of the settlement may be important.

Over the last 20 plus years of litigating civil sexual abuse cases, I have come to find that more and more institutional defendants are recognizing that abuse survivors need to keep their voice. Some institutions have established a policy of not requiring any confidentiality agreements at all. In other cases, institutions have agreed to waive confidentiality agreements previously signed. In any case where a confidentiality agreement is requested, it should be carefully reviewed to ensure that a survivor's current interests as well as future interests and rights are protected.