

## Advocate's VIEW

# Settlement agreements: Enforceability under the CPLR and new laws pertaining to settlement of sexual harassment claims

Confidentiality clauses are routinely included in written settlement agreements, but are they always enforceable?

### Generally under CPLR 2014

CPLR 2014, entitled "Stipulations," generally provides that agreements between parties or their attorneys are not binding unless they are in writing subscribed by the party or the party's attorney. But CPLR 2014 includes the following amendment, which became effective July 14, 2003:

With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Does this amendment to CPLR 2014 require the terms of every settlement agreement to be filed, thereby prohibiting confidential settlement agreements in New York? There do not appear to be any published cases interpreting this clause directly, or requiring the disclosure of the terms of all settlement agreements.

The legislative history of the amendment does not indicate an intent to require full disclosure of settlement agreements. Instead, this amendment was enacted at the same time as CPLR 8020(d), to require the defendant to pay the County Clerk \$35 with the filing of a stipulation of settlement, and it is widely



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notes that there is "nothing whatsoever" in the background of the amendment to suggest that it was designed to accomplish the filing and disclosure of all settlement agreements and their terms, "[t]he legislature wanted the state treasury to collect an extra \$35. That was all." Quoting § 204.Stipulations, Siegel, N.Y. Prac. § 204 (6th ed.) (Dec. 2018).

Since the amendment of CPLR 2014, courts have continued to routinely enforce confidentiality clauses contained in written settlement agreements according to their terms. See e.g. *Kash v. Jewish Health Care System of Rochester, Inc.*, 98 A.D.3d 1275 (4th Dept 2012) (holding plaintiff in medical malpractice action breached unambiguous confidentiality clause in settlement agreement where plaintiff publicly disclosed terms of the settlement agreement).

accepted that the purpose of the amendment was to generate revenue. (See *Haig's 4 N.Y.Prac., Com. Litig. in New York State Courts § 36:25* (4th ed.)) While recognizing that there has not been a definitive ruling on the interpretation of this amendment, *Siegel's New York Practice*

The issue of disclosure of the terms of a confidential settlement agreement also arises when some of the defendants to an action settle, and the remaining defendants request disclosure of the terms of the agreement. The First Department has held that the terms of a confidential settlement agreement should only be disclosed to non-settling defendants where the terms are "material and necessary" to the non-settling party's case, but such terms are not discoverable where the terms of the settlement agreement have no bearing on the issues in the case. See e.g. *Mahoney v. Turner Const. Co.*, 61 A.D.3d 101 (1st Dept 2009).

### New sexual harassment protections

Effective July 11, 2018, under CPLR 5003-b, employers are prohibited from entering into a confidential settlement agreement of any claim "the factual foundation for which involves sexual harassment," with the caveat "unless the condition of confidentiality is the plaintiff's preference." (This prohibition is also codified in General Obligations Law § 5-336, expanding applicability to settlement agreements reached prior to a lawsuit being filed.) The courts have not yet interpreted or provided guidance on the determination of "the plaintiff's preference," and it is anticipated that there will be litigation on this point in the future.

There are other specific types of claims for which a confidential settlement agreement is not enforceable. For example, in a settlement made on behalf of a minor, CPLR Article 12 requires disclosure of the terms of settlement to the court.

Prior to including a confidentiality

clause in your settlement agreement, it would be prudent to make sure that any statutory claims resolved therein are not covered by similar disclosure requirements. Otherwise, per the above authorities, written confidential settlement agreements are generally enforced by New York courts pursuant to their terms.

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