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September 30,2002

The Honorable Joseph F. Anderson, Jr.
United States District Judge
P. O. Box 447
Columbia, SC 29202

Dear Judge Anderson:

At your request the District Court Advisory Committee has studied the proposed revisions (prohibiting the sealing of filed settlement agreements) to Local Civil Rule 5.03 as adnpted at the July meeting of the District Judges. After carefiil consideration, the Committee suggests a proposed alternative which we believe will adequately address any concerns with the current scope of Rule 5.03. Most particularly, the Committee's proposed amendment confirms that the procedures set forth for compliance with *In re Knight Publishing Co.,* 743 F.2d 231 (4th Cir. 1984), apply to all requests to seal filed documents. Other technical amendments are also included in our proposed draft.

Both a copy of the proposed modified rule as drafted by the DCAC and a redlined comparison to the existing rule are enclosed with this letter.

With best personal regards, I am

Sincerely yours,

H. Simmons Tate, Jr.

HSTjr:bb

Enclosures

cc: Virginia L. Vroegop, Esq.

PROPOSED REVISIONS TO LOCAL CIVIL RULE 5.03

5.03: Filing Documents under Seal. Absent a requirement to seal in the governing rule, statute, or order, which rule, statute or order shall be drawn to the court's attention at the time the documents are filed, any party seeking to file documents, including settlement agreements, under seal, or seeking to have previously filed documents placed under seal, shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request ~~or attempt~~ to seal filed documents. –Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court. *See* Local Civil Rule 26.08.

(1) A party seeking to file documents under seal or to seal previously filed documents shall file and serve a "Motion to Seal" accompanied by a memorandum. See Local Civil Rule 7.04. The memorandum shall: (1) identify, with specificity, the documents or portions thereof for which sealing is requested; *(2)* state the reasons why sealing is necessary; (3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; ~~and~~ (4) address the factors governing sealing of documents reflected in controlling case law~~. *E.g.*, *Ashcroft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984)~~;[1] and *(5)* address any public interest consideration that may be involved. A non-confidential descriptive index of the documents at issue shall be attached to the motion. Oral motions may be allowed only under extraordinary circumstances and must address all of the factors set forth above as well as the adequacy of public notice.

A separately sealed attachment labeled "Confidential Information to be Submitted to Court in Connection with Motion to Seal" shall be submitted with the motion. This attachment shall contain the documents at issue for the Court's *in camera* review and shall not be filed. The Court's docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for *in camera* review.–

@– (B) Non parties may intervene for the purpose of opposing sealing or to request unsealing of previously sealed documents

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[1] *E.g., Ashcroft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984).

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A separately sealed attachment labeled "Confidential Information to be Submitted to Court in Connection with Motion to **Seal"** shall be submitted with the motion. This attachment shall contain the documents at issue for the Court's *in camera* review and shall not be filed. The Court's docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for *in camera* review.

(B) Non parties may intervene for the purpose of opposing sealing or to request unsealing of previously sealed documents and shall, by such intervention, become subject to the jurisdiction of the court and bound by any orders relating to the subject matter of the intervention.

(C) The Clerk shall provide public notice **of** the Motion to Seal in the manner directed by the Court. Absent direction to the contrary, this may be accomplished by docketing the motion in a manner that discloses its nature as a motion to seal.

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[1] *E.g., Ashcroft* **v.** *Conoco, Inc.,* 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.***,** 743 F.2d 231 (4th Cir. 1984).

(D) Motions to close a courtroom shall, to the extent practicable, be made in accordance with the same procedures as set forth above for motions to seal filed documents.

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

02 SEP 30 PM 2:30
COLUMBIA, S.C.

September 25,2002

Larry W. Propes
Clerk of the Court
U.S. District Court
1815 Assembly Street
Columbia, South Carolina 29201

Re: Proposed Amendment to Rule 5.03

Dear Mr. Propes

Public Citizen submits these comments to express support for the spirit of the South Carolina District Court's proposed amendments to Local Rule 5.03, but to urge the Court to modify its proposal to provide more substantive disclosures of information concerning public health and safety.

Public Citizen is a nonprofit consumer advocacy organization with approximately 125,000 members nationwide. Throughout its 31-year history, Public Citizen has taken an active role in promoting consumer health and safety and ensuring that the public is well informed about the health risks of consumer products. Public Citizen has long been an advocate for keeping the judicial process open to the public and has frequently opposed overbroad protective orders that prohibit disclosure of information concerning consumer health and safety. See. e.g., Public Citizen v. Liggett, 858 F.2d 775 (1st Cir. 1988); In re Agent Orange Product Liability Litigation, 104 F.R.D. 559,574 (E.D.N.Y. 1985), aff'd, 821 F.2d 139 (2d Cir. 1987).

Public Citizen supports the intent behind the proposed rule change as an important step in opening up the judicial process to public view. Without question, the current policy of permitting secret settlements has caused injury and even cost lives. In the last few years alone, secret settlements have kept hidden the dangers of defective Firestone tires and the child sexual abuse scandal in the Catholic church. Secrecy delayed public awareness of the magnitude of these problems, permitting both Firestone and the Catholic church simply to pay off individual litigants without making substantive changes to put an end to the problems.

Individual litigants have no right to keep most of the health and safety information produced in the course of litigation secret. Courts are public institutions, paid for by tax dollars for the purpose of producing public goods such as court precedents, legal rules, and factual

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accounts of contested events. Although courts also serve the purpose of efficiently resolving individual disputes -- a purpose that secrecy, arguably, can sometimes promote -- they should not do so at the expense of depriving the public of information concerning health and safety.

The only way to prevent litigants from keeping information about dangerous products, working conditions, or other public hazards secret is for courts or legislatures to establish rules prohibiting secrecy. Defendants frequently insist on secrecy out of fear of that the settlement will harm their reputation and inspire additional lawsuits. Plaintiffs have no incentive to resist, particularly when they can extract larger settlements by promising not to talk about a lawsuit or the settlement. Nor can attorneys for the parties insist that the settlement remain public: The ethical rules governing lawyers' conduct actually require that lawyers enter into secrecy agreements when doing so is in the best interests of their clients. ***See,*** *e.g.,* Alan B. Morrison, "The Secrecy Scandal," Boston Globe E7, April 14,2002 (attached).

Although Public Citizen supports the intent of the proposed rule, it **does** not go far enough in protecting the public from falling victim to litigated public hazards. The proposed rule only applies to settlements filed with the Court, and thus will have no effect in the vast majority of cases that are settled in private agreements between the parties and then simply dismissed by stipulation. The only settlements that need be filed with the Court are settlements in class actions or with minors. Thus, the rule will not prevent the parties from agreeing to keep the fact and terms of settlement secret in the majority of cases. Moreover, even settlements filed with the Court may contain very little information about the truth of the allegations, or the underlying evidence produced in the course of the suit, and thus their disclosure may be of little value in alerting the public to health hazards.

To further promote the goal of informing the public about lawsuits concerning health hazards, we recommend that the court issue rules eliminating the common practice of secrecy in the discovery process. All too often, the parties obtain blanket protective orders that prohibit disclosure of most of the documents received in discovery, and bar plaintiffs' attorneys and their experts from discussing the health and safety hazards they learn about through discovery with anyone, including public officials and regulators. Eliminating secrecy of court-filed settlements alone will not provide the public with the information about the dangers identified in discovery.

For example, officials at the Department of Transportation stated that the sealing of documents in settled lawsuits was one reason that they did not become aware of the pattern of scores of rollover deaths in Ford Explorers equipped with Firestone Tires. ***See*** Matthew L. Wald & Keith Bradsher, "Judge Tells Firestone to Release Technical Data on Tires," N.Y. Times, Sept. 29,2002, at C2. For eight years before the public and government authorities learned about the dangers of combining Ford Explorer sport utility vehicles and Bridgestone/Firestone tires, Ford and Firestone had been settling lawsuits concerning the injuries and deaths caused by those products and requiring that plaintiffs keep secret the information they had learned through discovery. The problem only came to light when documents chronicling those accidents were leaked to journalists in violation of secrecy agreements and court orders. ***See*** Susan P. Koniak, "Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something

In Between?" **30** Hofstra L. Rev. 783, 784 (Spring 1992). A rule prohibiting the sealing of filed settlements would not have prevented the tragedy that arose from Ford and Firestone's practice of settling with plaintiffs on the condition that plaintiffs not disclose the information they had gathered through litigation about the dangers of Ford Explorers.

Several states have already adopted rules prohibiting secrecy agreements that prevent the public from learning of public health and safety problems. For example, Florida has adopted a statute providing that:

> Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any infomation which may be useful to members of the public in protecting themselves from injury which **may** result from the public hazard.

Fla. Ann. Stat. § **69.08**1(3). In addition, Florida permits any "substantially affected person," including representatives of the news media, to challenge any agreement that violates this provision. **A** copy of Florida's statute is attached.

We suggest that this Court adopt a rule presumptively prohibiting the sealing of *any* records containing information concerning public health or safety or raising other issues of significant public interest. In addition, the parties should be prohibited from requesting, as a condition of cooperating with discovery or the settlement of any action, secrecy in cases concerning these subjects. This rule could make allowances for secrecy regarding trade secrets, confidential commercial information, or private and personal information. In addition, there is no need to require disclosure of the *amount* that defendants pay in settlement, as this information has little value in protecting public health and safety.

In sum, we strongly support the intent behind the Court's proposed rule eliminating secrecy of settlements filed with the Court, and we urge the Court to go further by eliminating secrecy agreements in the discovery process as well.

Sincerely,

Amanda Frost

ATTACHMENT 1

The secrecy scandal

By Alan B. Morrison, 4/14/2002

IN RECENT WEEKS the media have been flooded with stories about pedophilia among Catholic priests and the failure of the Boston archdiocese to remove priests accused of child abuse. But there has been little attention given to the fact that it is lawyers and the secrecy agreements that they wrote that contributed to the scandal.

In many respects the lawyers themselves are not the real source of the problem; rather, the culprit is the "ethical" rules of the bar that effectively command this result. Not only don't the rules tell lawyers that secrecy agreements are wrong, but they encourage and in most cases require that lawyers put the wishes of the clients above any public interest in prosecuting criminal acts.

The public is now just learning about the number of cases that were filed against priests in the past Apparently far larger numbers of claims were resolved before a lawsuit was filed and the charges made public. Virtually every case was settled without a trial and with no disclosure of the amount paid. Supposedly, there were assurances that the offending cleric would receive "treatment," but it is obvious that this approach was a massive failure. The most serious problem, however, is that, to obtain a settlement, the victim, his family, and his lawyer had to promise not to tell anyone anything about the charges.

Secrecy clauses in settlement agreements are nothing new. They kept regulators in the dark and were responsible for the long delay in getting the Firestone tires that caused countless accidents and deaths off the road. But at least those harms were apparent when they happened, unlike the child who has been molested and is too frightened to tell anyone about what happened, let alone that his trusted priest was the perpetrator.

However, the church's lawyers who drafted and insisted on these secrecy agreements did not violate any ethical rules. Nor did the lawyers for the victims, who had a clear obligation to follow the wishes of their clients. If the families were willing to accept secrecy as the price of compensation, their attorneys had no choice but to go along with the deal. Even the lawyers who had grave misgivings about suppressing the facts could **do** nothing. Breaking the secrecy pledge would place at risk their license and their fee, and jeopardize their client's settlement.

Counsel for the church faced similarly tight restraints because lawyers are generally forbidden from disclosing confidential information learned while representing clients, unless the client consents.

Different states have different rules, and the rules have changed over the years, but the principal exception from the ban is if disclosure would prevent a crime where the result would be imminent death or serious bodily (not just

emotional) harm. This narrow exception would almost certainly not apply in these situations, and even if it did, it would only permit, not require, a lawyer to divulge these sexual abuses.

Especially after it became clear that the church was simply recycling pedophilic priests to other parishes, it is hard to understand how a lawyer could continue to represent a client who demanded secrecy that resulted in such harms. It is fair for an outraged public to ask, at what point can a lawyer no longer justify his conduct by saying that it does not violate the bar's ethics rules, even if it violates fundamental moral principles?

The real problem is that lawyers' ethical rules don't permit lawyers to tell the government about conduct that presents a real threat to the public, notwithstanding the basic duties of confidentiality and loyalty to one's client. No lawyer should be forced to choose between his obligations to his client and assuring that information about pedophilic priests and others who prey on the public is delivered to the proper authorities.

The American Bar Association is in the final stages of developing a new set of model rules that it will recommend to the states. The surest way for this change to become law is for the ABA to make it unethical for a lawyer to ask for or agree to a secrecy provision that prevents a lawyer or client from informing the government about conduct or products that are likely to cause death or serious physical or psychological harm to members of the public.

And if the organized bar does not do what's right, state legislatures should step in and protect unsuspecting victims and enable lawyers to do what is morally right, without jeopardizing their licenses when they follow the dictates of their consciences.

Alan B. *Morrison is the Irvine Visiting Fellow at Stanford Law School.*

This story ran on page E7 of the Boston Globe on 4/14/2002.
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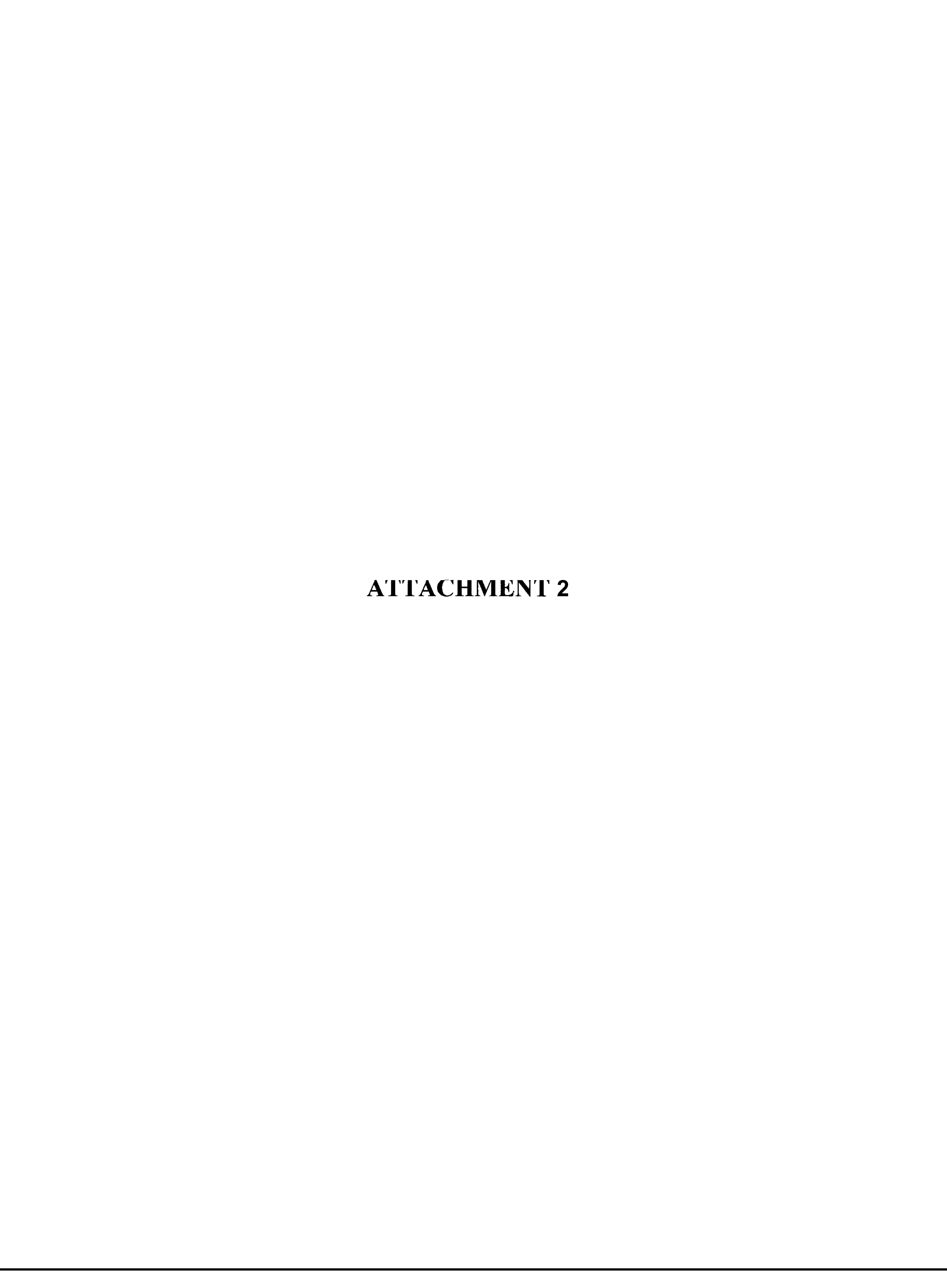

ATTACHMENT 2

WEST'S FLORIDA STATUTES ANNOTATED
TITLE VI. CIVIL PRACTICE AND PROCEDURE
CHAPTER 69. MISCELLANEOUS PROCEDURAL MATTERS

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Current through End of 2001 Special 'B' and 'C' Sessions, the End of 2002 Regular Session, and the End of **2002** Special E' Session

69.081. Sunshine in litigation; concealment of public hazards prohibited

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which ha3 the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter **688.**

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

(8)(a) Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced. Any person has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this subsection by motion in the court that entered such order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

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(b) Any person having custody of any document, record, contract, or agreement relating to any settlement as set forth in this section shall maintain said public records in compliance with chapter 119.

(c) Failure of any custodian to disclose and provide any document, record, contract, or agreement as set forth in this section shall be subject to the sanctions as set forth in chapter 119.

This subsection does not apply to trade secrets protected pursuant to chapter 688, proprietary confidential business information, or other information that is confidential under state or federal law.

(9) **A** governmental entity, except a municipality or county, that settles a claim in tort which requires the expenditure of public funds in excess of $5,000, shall provide notice, in accordance with the provisions of chapter 50, of such settlement, in the county in which the claim arose, within 60 days of entering into such settlement; provided that no notice shall be required if the settlement has been approved by a court of competent jurisdiction.

CREDIT(S)

2002 Electronic **Update**

Added by Laws 1990, c. 90-20, § 1, eff. July 1, 1990. Amended by Laws 1991, c. 91-85, § 1, eff. Oct. **1,** 1991; Laws 1996, c. 96-349, § 1, eff. Oct. 1, 1996.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2002 Electronic Update

Laws 1990, c. 90-20, § 2, provides:

"This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date."

Laws 1991, c. 91-85, § 1, eff. Oct. 1, 1991, added subsecs. (8) and (9).

Laws 1996, c. 96-349, § 1, eff. Oct. 1, 1996, in subsec. (9), inserted an exception relating to municipalities and counties.

AMERICAN LAW REPORTS

Restricting public access to judicial records of state courts, 84 ALR3d 598.

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September 24, 2002

Larry W. Propes
Clerk of Court
U.S. District Court fur the District of South Carolina
1845 Assembly Street
Columbia, South Carolina 29201

Re: Proposed Amendment to Local Rule 5.03;
ATLA's Support for Open Public Courts

Dear Mr. Propes:

On behalf of the 60,000 members of the Association of Trial Lawyers of America (ATLA), I write to convey ATLA's strong support for the Court's admirable initiatives to reduce the incidence of sealed files and secret settlements in its jurisdiction. These enhancements of the public's right to know and contributions to public health and safety are of great value.

ATLA is a private bar association, most of whose members represent plaintiffs in personal injury, civil rights, employment, and environmental litigation; the defense in criminal cases; and either side in business and family litigation.

Secrecy in our state and federal courts undermines every American's right to know. Secrecy denies American families vital health and safety information, and leads to needless injuries and deaths. American courts are public institutions and must operate under the presumption of openness. Secrecy is the antithesis of American justice. The United States Constitution requires open courts.

ATLA applauds the court's August 2001 action creating (through its Local Rule 5.03) a presumption against sealing documents and imposing strict requirements on the process by which documents might be sealed. The court now proposes appropriately to amend Local Rule 5.03 to clarify that settlement agreements filed with the court also will not be sealed.

Rather than comment specifically on the court's proposed addition of a section "c" to Local Rule 503, I would like to comment on the critical need to reduce secrecy in all our courts and on the several arguments that are frequently made against attempts to do so.

The Leonard M. Ring
Law Center

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Washington, DC
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ATLA Stands Against Court Secrecy

ATLA supports the concept of open courts. Civil litigation is not merely the private property of those in litigation. It affects the health and safety, ultimately, of all Americans. It is the people's business.

Accordingly, ATLA has long opposed all forms of secrecy in litigation unless a judge finds a compelling, specifically determined reason to deny the public access. In 1989, ATLA's Board of Governors adopted a resolution encouraging courts to limit or prohibit secret proceedings and agreements, require particularized proof in the limited circumstances in which secrecy is justified, and look favorably on petitions to change secrecy agreements.

Our resolution called on attorneys to resist requests for secrecy agreements that could impair anyone's future access to justice or reduce the effectiveness of public safety agencies. A copy of our resolution is attached. We have also published a significant body of information about court secrecy on the ATLA website, at http://www.atlanet.org/secrecy.

We believe an effective approach to the problem of secrecy should not only tell judges and attorneys what they must not do, but should also tell them what they should do. A rule-based approach should provide guidance to judges on how to weigh competing interests, e.g. legitimate privacy rights v. the public's right to be safe from hazards that are sometimes hidden by those who create them. It should also provide guidance to lawyers on both sides as to what they can expect courts to do – both to resolve the competing interests of parties and to protect the public against hidden dangers.

Competing Arguments on Court Secrecy

For more than ten years, frequent defense demands for sealed files and secret settlements have sparked a struggle over secrecy in litigation and what it means for public health and safety. ATLA has closely monitored this struggle and the trends in court responses to it. In doing so, we have observed several phenomena: (1) the ever-increasing desire of tort defendants for secrecy even under the most questionable circumstances; (2) the continual discovery of sealed files and confidentiality agreements that have obscured or hidden outright the facts behind serious hazards to the public (the recent examples of the Ford/Firestone cases and, especially, the reprehensible practice of concealing clergy abuse stand out); (3) the slow but steady growth in the number of federal and state judges, courts, and entire court systems that have resolved not to allow secrecy practices to become "business as usual" in their courts, but to have a presumption in favor of openness; and (4) the entirely predictable support for and opposition to attempts like those of your court to limit secrecy.

Any court contemplating restrictions on secrecy must expect to receive arguments both for and against its proposed action. There are some reasonable arguments on both sides, and they do not always contradict each other. The sealing of files in divorce and adoption cases, for instance, may be appropriate. But, in evaluating the arguments overall, here are several questions the court might care to ask:

(1) Is the court hearing any complaints against its efforts from individuals or civil liberties organizations, who see the proposed anti-secrecy action as a threat to privacy or from consumer protection organizations who see it as anti-consumer?

(2) Does local law confer any "privacy" rights on corporations that are akin to the privacy rights conferred by law on individuals?

(3) Can any advocate point to a concrete, documented instance when a court refused to allow secrecy in consumer litigation, which then led directly to a competitor's misuse of proprietary business information? (Stated more flippantly, is there a company that wants to steal the secret process for making defective tires that will explode and lead to lawsuits against that company?)

(4) Can anyone demonstrate factually that, in states with limits on secrecy in litigation, the settlement rate per capita has decreased significantly since the limits were implemented?

(5) Can anyone demonstrate factually that, in states with limits on secrecy in litigation, the trial rate per capita has increased significantly since the limits were implemented?

Florida's "Sunshine in Litigation" Statute – Proof of Success

Since July 1, 1990, Florida has had a "sunshine in litigation" statute that limits secrecy in matters that involve "public hazards." Larry Stewart, a prominent Florida litigator and a former president of ATLA, was recently quoted in the *Miami Daily Business Review* (Dan Christensen, "Federal Judges [in Florida] Ponder Future of Secret Settlements," September 12,2002) saying that he hasn't heard of any settlements that weren't achieved because of the effect of Florida's law, and that "this is not a big deal anymore."

The Florida legislature requires its state supreme court to maintain comprehensive statistics on court filings and dispositions in a number of different categories. The statistics are available from the Office of the State Court Administrator. I am attaching a chart that tracks the essential numbers from 1986 (before the Sunshine in Litigation Act took effect) through 1999 (the last year for which data were available).

The chart shows that the number of filings and dispositions of tort cases in Florida has varied little in that 14-year period. The ciucial comparison, however, is between filings and dispositions and the growing population of the state. When tort filings and dispositions are viewed on a per capita basis, it is clear that filings have actually decreased since 1986, and that dispositions per capita have tracked filings very closely.

Florida's statutory rejection of court secrecy has not led to more litigation per capita; nor has it curtailed the number of cases that are closed.

I hope these thoughts are useful to the court as it reviews public comments on the proposed amendment to Local Rule 5.03.

Thank you for your leadership in providing sunshine in the courts for the public good.

Sincerely,

Mary E. Alexander, J.D., M.P.H.
President, Association of Trial Lawyers of America

Attachments: (1) ATLA Board of Governors Resolution
(2) Florida court statistics on per capita tort filings and dispositions

cc: Honorable Joseph F. Anderson,
Chief Judge, U.S. District Court, District of South Carolina
Honorable Jean H. Toal,
Chief Justice, Supreme Court of South Carolina
William Nicholson,
President, South Carolina Trial Lawyers Association
Linda Franklin,
Executive Director, South Carolina Trial Lawyers Association
Executive Committee,
Association of Trial Lawyers of America

Florida Tort Filings and Dispositions, 1986 to 1999

YEAR ---->	1986	1987	1988	1889	1990	1991	1992	1993	1994	1995	1996	1997	1998	1993
ALL TORT FILINGS	33640	33128	32573	33935	31186	36544	35416	34950	36520	38944	38174	38341	**36495**	**36745**
ALL TORT DISPOSITIONS	34242	33361	33451	33855	31828	36143	34651	32566	32485	33120	34160	34751	**36156**	**35136**
FLORIDA POPULATION*	I1667603	11997568	12307006	12638537	13016138	13254232	13470454	12668197	13949229	14212658	14484711	14784501	15079522	15394966

Florida Tort Filings and Dispositions per 1,000 Residents, 1986 to 1999

TORT FILINGS PER **1,000**	2.88	2.76	2.68	2.69	2.63	2.76	2.63	2.56	2.62	2.74	2.64	2.59	2.42	2.39
TORT DISPOSITIONS PER 1,000	2.93	2.78	1.72	2.68	2.68	2.73	2.57	2.38	2.33	2.33	2.36	2.35	2.39	2.28

NOTES

Florida Statutes 69.091 ("Sunshine in litigation; concealment of public hazards prohibited"), took effect on July 1, 1990.

Population figures represent the Florida population on July 1 each Year, and are provided by the Florida Legislature's Office of Economic and Demographic Research (OEDR), Demographic Estimating Conference Database, updated 612000.

Data on tort filings and dispositions were provided by Florida's Office of the State Courts Administrator from the Florida Supeme Court's Summary Reporting System (SRS] The SRS was developed by the Florida Supreme Court pursuant to statute, to provide a uniform means of reporting categories of cases, time required in the disposition of cases, and the manner of disposition of cases. Information about the Administrator's office is viewable at the Florida Courts Internet site: http://www.flcourts.org/.

RESOLUTION

ATLA BOARD OF GOVERNORS

MAY 6,1989

TAMPA, FLORIDA

PROTECTIVE ORDERS

WHEREAS, current judicial interpretation often deviates prejudicially from the mandate of the established Rule FRCP 26(c) impeding an efficient, just, and speedy resolution of disputes; and,

WHEREAS, defendants in personal injury actions, as a condition to discovery or settlement, often demand the execution of an agreement ("Secrecy Agreement") or the entrance of an order ("Secrecy Order") which includes provisions, inter alia, (i) prohibiting the dissemination of discovery materials; (ii) precluding the disclosure of the contents of pleadings, motions and discovery requests; (iii) forbidding any communication concerning the terms of the ultimate resolution of a claim; (iv) enjoining plaintiffs counsel's participation in other similar cases; (v) insisting on the return and/or destruction not only of discovery materials but counsel's personal notes; **and,**

WHEREAS, Secrecy Agreements and Secrecy Orders which ignore the interest of individual victims, the courts and the pubic have harmful effects including: (i) they make it difficult if riot impossible for plaintiffs counsel to fairly and properly prepare the victim's case; (ii) they guarantee an unfair advantage to defense counsel who retain full access to their collaborative mechanism; (iii) they inject collateral issues totally unrelated to the merits of the case; (iv) they greatly increase the time, effort and transactional costs associated with the preparation and presentation of a civil action; (v) they diminish the likelihood that the civil justice system will operate so as to secure the just, speedy and inexpensive determination of every action; (vi) they encourage the suppression and destruction of relevant documents by unscrupulous defendants and other discovery materials; (vii) they have a chilling effect on the right of persons to resort to the courts for redress of their grievances; and,

WHEREAS, the strong policy favoring openness in discovery, and public access to the materials which affect the decisions and the conduct of the civil Justice system is based on recognition that the free flow of information is vital to the safety, health and general welfare of the public and to exposing unsafe products and activities for investigation and to the proper operation of the civil justice system, the governmental regulatory system, and the professional disciplinary system;

NOW, THEREFORE, BE IT RESOLVED that The Association of Trial Lawyers of America:

1) Encourages courts to refuse to enter any Secrecy Order and/or refuse to enforce any Secrecy Agreement in the absence of a finding based on a good cause showing supported by a particularized proof of the following: (a) that the proponent of the Agreement or Order possesses a cognizable legal interest entitled to the protection of secrecy; (b) that the subject materials meet the rigorous legal criteria applicable to the trade secrets or privileged information or otherwise justify the court in exercising its judicial power to resmct the openness of discovery or public access to information; (c) that disclosure of the materials is, in fact, likely to result in a clearly defined and very serious harm.

2) Encourages courts in those rare instances in which a good cause showing supported by particularized proof would seem to justify the entrance of a Secrecy Order, to insist on the adoption of and the enforcement of such specific terms as are necessary and appropriate to protect such competing interest as the public's right to know, the rights of claimants involved in other similar actions, the public's concern for judicial economy, including: (a) provision for limited disclosure to counsel representing plaintiffs in similar cases, to government agencies or to professional disciplinary bodies who agree to bc bound by appropriate agreements or court orders against broader dissemination; (b) stringent safeguards surrounding any ordered return or destruction of documents to ensure that full and accurate copies of all documents will be available to the appropriate agencies or to other litigants in the future; (c) stringent safeguards that no Secrecy Agreement or Secrecy Order should prohibit an attorney from representing any other claimant in a similar action against the defendant or others; (d) stringent safeguards to the effect that no Secrecy Agreement or Secrecy Order should prohibit reporting to a governmental agency those facts reasonably necessary to prevent injuries to others.

3) Encourages courts to look favorably on and/or to freely grant petitions for modification which seek relief from Secrecy Agreements and/or Secrecy Orders which were entered into or obtained by a procedure which did not conform to the criteria stated in Resolution (1) above and/or which do not contain provisions similar to those contained in Resolution (2) above.

4) Discourages attorneys from agreeing to Secrecy Agreements and encourages attorneys to resist entry of Secrecy Orders that prevent disclosure of documents obtained during discovery to fellow attorneys handling similar cases, or to public agencies charged with enforcing safety.

American College of Trial Lawyers

National Headquarters
19900 MacArthur Boulevard, Suite 610
Irvine, California 92612

State Committee Chair
for: South Carolina

Please direct reply to: James B. Pressly, Jr.
P.O. Box 2048
Greenville, SC 29602
(864)240-3277
jpressl@hsblawfirm.com

02 SEP 30
COLUMBIA, S.C.

September 27, 2002

Larry W. Propes
Clerk of Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

Thank you for your invitation for public comment on the proposed amendment to Local Rule 5.03 Some time ago I sent a letter to Judge Joseph Anderson stating the position of the American College's Committee on the Federal Rules for Civil Procedure pertaining to the sealing of the records to protect confidentiality of settlements. I am herewith enclosing a copy of that letter.

The Committee's position is still, as stated in the enclosed letter, that further amendments to Local Rule 5.03 are not necessary and not appropriate. However, I now understand there may be a recommendation by the District Court Advisory Committee to the judges as to what it feels is a more appropriate amendment to Rule 5.03. If this recommendation comes about, this would be a more appropriate amendment to Rule 5.03.

The Advisory Committee's proposal would allay the concerns expressed about the current rule without eliminating the trial judge's discretion, and still allow the protection of privacy where desired and needed by the party.

Very truly yours,

Jim Pressly

James B. Pressly, Jr.

JBPjr/sph
Enclosure

American College of Trial Lawyers

National Headquarters
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State Committee Chair
for: South Carolina

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jpressly@hsblawfirm.com

July 25,2002

The Honorable Joseph F. Anderson, Jr.
Chief Judge
United States District Court
1845 Assembly Street
Columbia, SC 29201

Dear Judge Anderson:

Thank you for your letter of July 5, 2002. I have made some inquiries regarding this question and learned that the Federal Rules Committee of the American College of Trial Lawyers, a balanced committee of plaintiff and defense attorneys, has consistently opposed any change in the existing sealing and protective orders practices as being unnecessary and inappropriate.

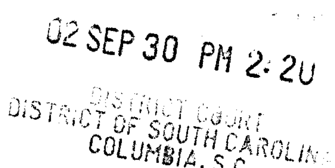
As you are probably aware, the Advisory Committee of the Judicial Conference often calls upon the College's Federal Rules Committee for input on issues involving the Federal Rules. The Advisory Committee of the Judicial Conference has called upon this committee for input on the sealing and protective orders issue on more than one occasion and has been provided with the same recommendation opposing any change.

I hope this is of some assistance in your considerations of the issue.

Sincerely,

James B. Pressly
James B. Pressly, Jr.

JBPjr/sph
cc: Professor John P. Freeman
H. Mills Gallivan
Richard S. Rosen
Kathryn Williams
Rebecca Lafitte



HUGH **STEVENS**
hugh@eghs.com

September 27, 2002

Hon. Larry W. Propes
Clerk, U. S. District Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Proposed Amendment to Local Rule 5.03.

Dear Mr. Propes:

I write to add my voice in support of the proposed change to Local Rule 5.03.

As an attorney who frequently represents news organizations I have been involved in numerous disputes arising out of situations in which judges have been placed in the crossfire between litigants who wish to use the courts as private forums for resolving disputes and reporters who wish to provide their readers and viewers with information that may affect their lives.

Judge Anderson's letters of June 24 and July 11 to his colleagues persuasively articulated the need and the rationale for the proposed rule. I would not presume to try to add to his eloquent explanation.

I hope that the proposed local rule will be adopted, and that it will become a model for other federal district courts.

Thank you for the opportunity to comment on this important proposed amendment.

Sincerely,

Hugh Stevens

Buist · Moore · Smythe · McGee · P.A.

FILED CLERK'S OFFICE
02 SEP 30 PM 2:3.
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA, S.C.

September 27,2002

WILLIAM C. CLEVELAND, III
ATTORNEY AT LAW
wcleveland@bmsmlaw.com
DIRECT DIAL 843-720-4606
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Larry W. Propes, Clerk of Court
United States District court
1845 Assembly Street
Columbia, South Carolina

Re: Proposed Rule Change to Rule 5.03

Dear Mr. Propes:

I am writing with regard to the Court's consideration of an Amendment to Rule 5.03 that would entirely prohibit the trial courts from sealing any settlement agreement filed with the Court. I have just completed my service as President of the International Association of Defense Counsel, have enjoyed practicing law in South Carolina for almost 25 years and respectfully urge the Court not to adopt the proposed rule.

My practice is primarily in the area of commercial litigation, in which I represent both plaintiffs and defendants. Although there are a number of important considerations relating to the proposed amendment, one that I find compelling is that the civil justice system provides an extraordinary mechanism for litigants to compel one another to disclose information that would otherwise be considered **by** all to be private and personal. The civil justice system brings all of the resources of our government to bear in requiring parties to make full, complete disclosure of all requested information. Furthermore, disclosure is not limited under our rules even by the doctrine of relevance.

I believe the privacy rights of civil litigants to be precious. I also believe that the rights of litigants, who are represented by competent counsel, to decide the course and outcome of their dispute to be precious. Finally, I believe that the district court judges in South Carolina do an extraordinarily effective job balancing the competing interests that come into play when the exacting scrutiny required by the civil justice system is at tension with the privacy rights of our citizens.

It is my understanding that the proposed rule would eliminate the discretion of the trial judges to balance the competing interests when the parties to a lawsuit desire the assistance of the court in sealing the terms of their settlement.

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843-722-3400 ▪ FAX *843-723-7398*
www.bmsmlaw.com

In my experience, it is exceedingly rare that the parties feel the need to request the Court to order sealing the terms of a settlement agreement. Therefore, although the proposed rule would probably have little effect on actual practice, it would prohibit the Court's assisting the parties in protecting the confidentiality of their agreement in those cases where the parties request it and the Court deems it appropriate.

Perhaps more importantly, South Carolina's adoption of such a rule could be read as a message that our Courts do not condone litigants' protecting confidentiality, regardless of the circumstances. This is an issue that has been studied in great detail over the years. The conclusion of most jurists and scholars is that rules should not preclude the trial courts from exercising judgment and discretion in balancing the competing interests that requests for court sanctioned confidentiality often involve. I believe the blanket rule under consideration does not appropriately account fui those competing interests.

Thank you for the opportunity of providing input on this issue.

Very truly yours,

BUIST, MOORE, SMYTHE & MCGEE, P.A.

William C. Cleveland, III

WCC:cac

(00454335.)

02 SEP 30 PM 2:33
DISTRICT OF SOUTH CAROLINA
COLUMBIA, S.C.

SCHOOL OF LAW

September 26,2002

Larry W. Propes, Esq.
Clerk of Court
U.S. **District** Court
1845 Assembly Street
Columbia, SC 29201

Re: *Proposed Amendment to Local Civil Rule 5.03*

Dear Mr. Propes:

Enclosed please find a copy of my letter to Chief Justice Toal, dated August 21,2002. This letter expressed my opposition to the proposed amendment to Local Rule *5.03,* which if adopted would preclude the sealing of any settlement agreement filed with the district court. The letter outlines my reasons for opposing a blanket prohibition on sealing settlement agreements.

Since the date that I wrote to Chief Justice Toal, the District Court Advisory Committee has **proposed** revisions to Local Civil Rules 5.03 and 26.08. I agree with the proposal of the Advisory Committee, and believe it should be adopted with a few minor modifications.

I understand that the District Court Advisory Committee is scheduled to meet on October 17, to discuss comments to its proposal. I plan to provide my comments to the committee prior to that date.

Please let me know if I can be of any further assistance to the Court.

Very truly yours,

Howard B. Stravtiz

Enclosure
cc: The Honorable Joseph F. Anderson, Jr.
Chief Judge, United States District Court

UNIVERSITY OF SOUTH CAROLINA ■ COLUMBIA, SOUTH CAROLINA 29208 ■ 803/777-4155

AN AFFIRMATIVE ACTION / EQUAL OPPORTUNITY INSTITUTION

SCHOOL OF LAW

August 21,2002

BY HAND
The Honorable Jean Hoefer Toal
Chief Justice
South Carolina Supreme Court
P.O. Box 12456
Columbia, SC 29211

Re: ***Settlement Agreements***

Dear Chief Justice Toal:

I have been following with academic and professional interest accounts in the news media and legal periodicals concerning sealed settlement agreements in our state and federal courts. Warren Wise of ***The Post and Courier*** interviewed me in early August for an article that appeared on Monday, August 12, 2002, entitled: "Legal Community Weighs Ban on Secret Settlements." In fact, our federal judges have proposed an amendment to their Local Civil Rules prohibiting the sealing of any settlement agreement filed with the federal district court. The court is accepting public comment on the proposal through September 30,2002. In my view, there is ***no*** need to adopt ***any*** amendment to Federal Local Civil Rule 5.03 and, I plan to write Chief Judge Anderson to express my opposition to the recent proposal prior to that date.

It has also been reported that you plan to discuss the possibility of proposing a similar outright prohibition on sealed settlement agreements for our state courts at a meeting of state judges later this week. I believe a blanket prohibition on sealed settlements is not in the best interest of our state judicial system because it will have a "chilling effect" on the inclination of parties — both plaintiffs and defendants — to settle civil litigation in certain instances and is likely to have other untoward, unintended consequences as well.

I have been on the faculty at the Law School for nineteen years. I teach Civil Procedure, Advanced Civil Procedure, and Federal Courts every year. Prior to joining the Law School faculty, I practiced law in New York City with the firm of Cleary, Gottlieb, Steen & Hamilton, and before that I was law clerk to the late Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York. Accordingly, my views on sealed settlement agreements are expressed not only from an academic perspective, but also from the perspectives of a practicing lawyer and former federal court law clerk.

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There are two circumstances in which the parties to civil litigation might ask a court to seal documents: (1) during discovery, for good cause shown, a court may issue a protective order, pursuant to SCRCP 26(c); and (2) when parties reach a settlement agreement mandating performance by both sides, the agreement may be made part of the judgment, and the parties may request that it be sealed. Although the parties are not generally required by statute or rule to file such agreements with a court, they occasionally opt to do so in order to obtain a consent decree that will enable them to enforce the agreement by use of a court's contempt power without filing an entirely new lawsuit.

Professor Arthur R. Miller has written extensively regarding the importance of maintaining judicial discretion to seal Settlement agreements. Because he is perhaps the leading expert in privacy and procedure, I thought it would be useful for you to have his views. He wrote as follows:

> One aspect of the confidentiality debate concerns agreements to keep the monetary terms of a settlement confidential. In most circumstances such agreements should be allowed. It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement of a court dispute or its terms of payment. These subjects have no relationship to a potential public hazard or matters of public health, and unless official conduct is at issue, matters of proper governance are not involved. Thus, there is simply no legitimate public interest to be served by disclosing this information.
>
> The parties, however, often have a compelling interest in keeping the settlement amount confidential to avoid encouraging nuisance claims and harassment of the recovering party by unscrupulous free riders. For example, when a plaintiff — particularly a minor or other noncompetent person — receives a substantial monetary settlement, confidentiality protects that individual from being preyed upon by hucksters and long-lost relatives or friends. Also, information that plaintiff had settled with one defendant for a very small sum might compromise the plaintiffs ability to pursue its claims against nonsettling defendants. From the defendant's perspective, confidentiality ensures that the settlement amount will not be used to encourage the commencement of other lawsuits that never would have been brought or as unfair leverage to extract a similar payment in subsequent suits that may be meritless.
>
> Settlement agreements also often include provisions concerning private documents or information. These may involve the return of documents produced in the course of the litigation (which may or may not have been under a protective order), the transfer of information not disclosed prior to Settlement, or obligations limiting the use of certain information in certain ways. When these settlement terms impose confidentiality on matters concerning personal privacy or commercially valuable data, no reason exists to disregard the wishes of the parties.
>
> Nevertheless, because the public interest in disclosure of other aspects of a settlement agreement may sometimes be particularly compelling and the importance of maintaining confidentiality may be reduced, an absolute prohibition on access would be unwise. For example, public access may be important when one of the settling litigants is **a** governmental agency, public entity, or official, when the settlement is a court-approved

> class settlement, or when there has been some other significantjudicial participation in the process. *These considerations can be accommodated best, however, by leaving discretion with the trial court to weigh the competing interests inparticular cases.*
>
> Furthermore, whatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement. Settlement not only reduces the need for further governmental involvement, but also reduces the cost of dispute resolution to the litigants and helps free valuable judicial resources and thereby promotes more efficient operation of the courts. Our civiljustice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved.
>
> Thus, absent special circumstances a court should honor confidentialities that are bargained-for elements of settlement agreements. Moreover, when a confidentiality agreement facilitates settlement, a later court should hesitate to undermine the bargain, for if the effectiveness of the protective order cannot be relied on, its capacity to motivate settlement will he compromised. The presumption in favor of the continued operability of a protective order is already supported by current law, and its continued vitality should be reaffirmed.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 HARVARD L. REV. 427, 484-88 (1991) (emphasis added) (footnotes omitted).

In my experience, and that of many other practitioners and academics, there have been few problems with either the sealing order or protective order process in state or federal courts. I understand that although there are no specifically delineated standards for sealing court records, the South Carolina courts make such decisions in particular cases for good cause shown based on an even balancing of the interests of protecting privacy and confidentiality against the interest in public disclosure. For the reasons stated above, I respectfully submit that there is no compelling need to upset the balance one way or another by adopting any rule that would inhibit the exercise of a judge's discretion to protect the privacy of litigants in individual cases. The present practice that permits judges to exercise a balanced discretion to seal settlement agreements or other court records only for good cause seems to me to reflect the necessary flexibility that our common law system requires while at the same time more than adequately protecting the public interest in an open court system.

Please let me know if I may be of any further assistance to the Court in this matter.

Very truly yours,

Howard B. Stravitz

Howard B. Stravitz

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September 30, 2002

Hand Delivered

The Honorable Larry **W.** Propes
Clerk of Court
United States District Court
1845 Assembly Street
Columbia, SC 29201-2455

Dear Mr. Propes:

This letter is in response to your invitation for public comment on the proposed amendment to Local rule 5.03. I have previously written a letter to Judge Joseph Anderson providing my comments on the sealing of the records to protect confidentiality of settlements and I have attached a copy of that July 24, 2002 letter. I am responding both as a practicing attorney and as a member of the Board of Directors of DRI, a national organization of lawyers involved in the defense of civil litigation. In my practice and through my national organization work, I have had the opportunity to assess the practical impact of proposed rulemaking and legislation that would have the effect of restricting the discretion of the Court to protect confidential information.

It remains my view that adopting any change that would restrict the discretion of Judges to protect confidential personal and proprietary information in civil litigation is not necessary and would be counterproductive. Therefore, I **do** not believe that any further amendments to Local Rule 5.03 are necessary.

However, it has been brought to my attention that there may be a recommendation by the District Court Advisory Committee to the Judges regarding what the Advisory Committee believes is a more appropriate amendment to Local Rule 5.03. If the Advisory Committee recommendation is submitted, I am in agreement that, if the Court is going to amend Rule 5.03, the recommendation of the Advisory Committee would be preferable, subject to two comments:

1) Any proposed reference to the "public interest" in Rule 5.03 should be clearly understood to preserve the Judge's discretion to evenhandedly balance the interest of private litigants in privacy and confidentiality against any public interest in disclosure; and

2) Any provision permitting non-parties to intervene in proceedings to seal or unseal court records should require a showing of good cause to intervene and should be permissive, not mandatory.

It appears that the Advisory Committee's proposal would preserve the discretion of the trial judge and also address the concerns that have been expressed by some about the current rule.

I appreciate your consideration of these comments.

With highest regards, I am

Very truly yours,

'bavid E. Dukes

DED:ns
Enclosure: July **24,** 2002, letter to Judge Anderson

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MUNICH, GERMANY

July 24, 2002

Honorable Joseph F. Anderson, Jr.
Chief Judge
United States District Court
1845 Assembly Street
Columbia, SC 29201

Re: In Re: Court Ordered Secrecy Agreements

Dear Judge Anderson:

I appreciate the opportunity to provide input on the proposed local rule change to either prohibit or at least strongly discourage Court sanctioned confidentiality agreements in cases that implicate public safety. Both as a practicing attorney and as a member of the board of directors of DRI, the national organization of lawyers involved in the defense of civil litigation, I have had the opportunity to assess the practical impact of proposed rulemaking and legislation that would have the effect of restricting the discretion of the Court to protect confidential information.

It is my view that adopting any change that would restrict the discretion of Judges to protect confidential personal and proprietary information in civil litigation is not necessary and would be counterproductive.

This view is supported by the study and conclusions of the Judicial Conference Rules Advisory Committee. While the information that was gathered was extensive, it is succinctly summarized by Judge Paul V. Niemeyer, then Chair, Civil Rules Advisory Committee of the Judicial Conference in his attached March 23, 1998 letter to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary. As Judge Niemeyer stated, "[t]he Advisory Committee has determined that the instances when protective orders impede access to information that affects the public health or safety are not widespread. A number of experts on the subject have examined the commonly cited illustrations and have concluded that information sufficient to protect public health and safety has always been available from other sources. The Advisory Committee has studied this matter carefully and concluded that no change to the present protective order practice is warranted." (emphasis added).

If our local rules are changed to prohibit or further restrict the ability of judges to balance the legitimate privacy and property interests of parties, witnesses and third parties, it will as a practical matter be more difficult to counsel clients to compromise and settle disputed cases. Many settlements in civil cases from the defendant's perspective are based, at least in part, on an assessment of the economics of pursuing the particular case. It is not unusual for a defendant to correctly believe that it did nothing wrong, but to be willing to settle the case based on an economic assessment of the costs and risks of the litigation. Injecting the loss of personal or proprietary information into the settlement dynamics understandably undermines the ability to resolve many cases prior to trial.

Moreover, we already have in place through D.S.C. Local Rule 5.03 uniform, mandatory procedures that must be complied with before any document is filed under seal. See Vroegop, Sealed Documents & Protective Orders in District Court, *South Carolina Lawyer* (May/June 2002). Local Rule 5.03 requires the Court to exercise its judgment to balance the public interest with legitimate privacy and property interests and to resolve confidentiality issues based on the facts and arguments that are actually before the Court. I have confidence that in our District sound judgment will be used when applying the current local rule to strike the proper balance. However, I am deeply concerned that a blanket prohibition or further restriction on the Court's ability to exercise its discretion in this very important area of protecting private and personal information, while well intended, will inevitably have unintended consequences that interfere with the smooth functioning of the civil litigation process.

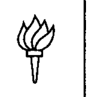
I appreciate the opportunity to provide these comments to the Court on this very important issue. I would be glad to provide any additional information that would assist the Court as it continues to evaluate this issue.

With highest regards, I am

Very truly yours,

David E. Dukes

DED:db
Enclosure



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Stephen Gillers, Vice *Dean and Professor of Law*

VIA FEDERAL, EXPRESS

September 27,2002

Mr. Larry Propes
Clerk of the Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

I am submitting the enclosed statement of my views on the Court's proposed amendment to Local Rule 5.03.

Sincerely **yours,**

Stephen Gillers

SG:sg
Enc.

cc: Hon. Joe Anderson w/enclosure [via Federal Express]

STATEMENT OF STEPHEN GILLERS
REGARDING THE PROPOSED AMENDMENT TO RULE 5.03
OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

My name is Stephen Gillers. I am Professor of Law and Vice Dean of New York University School of Law. I have taught Regulation of Lawyers and Professional Responsibility ("legal ethics") at NYU and at other schools since 1978 and am author of a leading casebook in the field, now in its sixth edition, and of articles on legal ethics for academic, professional and popular audiences.

Thank you for this opportunity to comment on a proposed local rule amendment with important public policy implications. I conclude that the proposal's goals are salutary but that greater clarity is needed. For the reasons that follow, I suggest alternate language.

The proposal in light of current law and rules

The proposed amendment states: "No settlement agreement filed with the Court shall be sealed pursuant to the terms of this rule." Rule 5.03 is the "rule" to which the amendment refers. It lays out a procedure that a party must follow in asking the court to seal documents. Among other things, the party must "address the factors governing sealing of documents reflected in controlling case law," including Ashcroft v. Conoco, Inc., 210 F.3d 288 (4th Cir. 2000). *Ashcroft* set out criteria for sealing court documents. It did this to honor the common law presumption of public access to judicial records. Although the *Ashcroft* Court was divided on certain issues, it was unanimous on the following criteria:

> Accordingly, before a district court may seal any court documents, we held that it must (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives. *Id.* at 302.

In addition to *Ashcroft*'s requirements, this court's local rule currently imposes burdens on a party seeking to seal documents. The party must identify the documents (or portions of them) "with specificity," must "state the reasons why sealing is necessary," and must "explain . . . why less drastic alternatives" are inadequate. To ensure that interested persons are heard on the motion, the rule states that the Clerk of the Court "shall provide public notice of the Motion to Seal in the manner directed by the Court." As quoted, *Ashcroft* also requires courts to "provide public notice of the request to seal and allow interested parties a reasonable opportunity to object." "Interested parties" should be understood to include non-profit organizations working in the relevant field.

All in all, then, *Ashcroft* and Rule 5.03 now impose a substantial burden on efforts to seal any court document, including settlement agreements in the court's file.

The public policy objective and threats to it

Before proceeding to a discussion of the proposed amendment, let me identify what I consider to be the underlying public policy and threats to it.

A plaintiff may have or in litigation discover (perhaps with the aid of court process) information that provides reason to believe that others have claims for the alleged harm or may be at risk of suffering that harm thereafter. The harm may be physical, financial, or both. The basis for liability may be a dangerous product, a dangerous person, a financial fraud, or an environmentally unhealthy condition. A defendant may wish to limit discovery of this information in order to limit claims against it. The defendant may be willing to make a higher settlement offer to achieve this goal. The plaintiff may be willing to sell the promise of secrecy for a larger settlement. While the plaintiff and defendant may share an interest in buying and selling secrecy, others whom the information might benefit, either because they are unaware of the danger or because the information can alert them to (or help them prove) their own claims, have an opposite interest.

This is where public policy comes into it. Sound public policy requires that courts not use their power to assist the secrecy objectives of private parties under these circumstances.

Litigants might attempt to achieve secrecy in three ways. Two of them require a court's cooperation. First, litigants can privately contract for secrecy. For example, the plaintiff can promise to refrain from *voluntay* cooperation with other prospective claimants or with law enforcement officials. (The plaintiff could not legally promise to refuse to honor a subpoena.) Violation of the promise might be deemed a breach of contract and subject the plaintiff to damages, perhaps in a liquidated sum identified in the contract itself. I have argued, in an article to be published in the Hofstra Law Review as part of a symposium, that contractually binding confidentiality promises in settlement agreements may be obstruction of justice under federal law. Stephen Gillers, "Speak No Evil: Settlement Agreements Conditioned on Non-Cooperation Are Illegal and Unethical," 31 Hofstra L. Rev. ___ (2002) (forthcoming). However, nothing in the court's proposed rule is aimed at or would affect these private efforts. While a court can adopt legal ethics rules to frustrate this strategy, that is not the subject of the court's proposal and I will not address it here.

Second, the parties may ask the court to "so order" a settlement agreement containing a confidentiality promise. If the agreement is "so ordered," violation is contempt of court. A defendant may desire this remedy as a further disincentive to breach. Unlike the first strategy, a private agreement, "so ordering" requires court acquiescence.

Third, the parties may seek to seal a court file, which also requires the court's cooperation. If the settlement agreement is part of the file, then sealing the file will also seal the agreement. But doing so will not insure secrecy for the agreement. It will only insure that persons who try to inspect the file will not discover it. Nevertheless, a party may wish to seal a court file because it contains information that would alert others to possible claims or that could

serve as the basis for a news story. A request to seal a court file will often be part of a broader strategy that includes a confidentiality agreement and "so ordering." The several ways in which secrecy can be encouraged can work in tandem.

My recommendation for amending Rule 5.03

I suggest that the proposed amendment should be rewritten as follows:

> No settlement agreement will be sealed except pursuant to the procedures described in this rule and in *Ashcroft* and other precedent. No document contained in the Court file, including a settlement agreement, will be sealed if the document contains information that (1) reveals a significant risk of physical or financial injury to any person or **(2)** tends to prove the liability of any person for physical or financial injury already suffered. No confidentiality promise will be "so ordered" if it purports to protect such information.

I offer this language in lieu of the proposed amendment for several reasons. In part, the proposal goes too far. On a proper showing, a settlement agreement should be amenable to sealing pursuant to Rule 5.03 and ***Ashcroft.*** For example, some settlement agreements contain trade secrets, purely private information, or the settlement amount. This information will not ordinarily reveal a significant risk of future harm or tend to establish liability for harm already suffered. At the same time, the proposed amendment does not go far enough because it addresses only sealing. It does not identify the circumstances under which a court will refuse to "so order" a confidentiality promise. The rule should address these orders using the same criteria. Finally, the proposed amendment is inconsistent with ***Ashcroft*** because it would entirely exclude settlement agreements from the language of Rule 5.03. *Ashcroft* itself concerned a settlement agreement. Its standards were written with those agreements in mind.

By citing *Ashcroft* and elaborating on its standards, and given the important notice requirements, an amended Rule 5.03 will give judges appropriate direction for evaluating requests to seal settlement agreements and whether to "so order" confidentiality promises. The rule will not be so general as to lack guidance nor so detailed as to deny a district judge discretion in passing on these requests.

Respectfully submitted,

Stephen Gillers

September 27, 2002

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- SANDRA PEDDIE *Newsday*
- DAN RATHER *CBS News*
- DAVID ROSENBAUM *The New York Timer*
- CRISTINE RUSSELL *The Washington Part*
- TIM RUSSERT *NBC News*
- CAROLE SIMPSON *ABC News*
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Affiliations appear only for purposes of identification

September 27,2002

Mr. Larry W. Propes
Clerk of Court
U.S. District Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

Please find enclosed public comments to Proposed Rule 5.03 submitted by The Reporters Committee for Freedom of the Press, the National Press Club, The Radio-Television News Directors Association, and the Society of Professional Journalists.

Thank you for your attention in this matter.

Sincerely,

Lucy Dalglish, Esq.

BEFORE THE U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

In the Matter of
Request for Comment
on Proposed Local
Rule 5.03

COMMENTS OF

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

NATIONAL PRESS CLUB

THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

SOCIETY OF PROFESSIONAL JOURNALISTS

TABLE OF CONTENTS

Introduction

The Signatories

Purpose of these Comments

Discussion

I. Banning secret settlements greatly benefits the public.

A. **Information contained in settlements is of vital public interest.**

B. Secret settlements are used as an unfair bargaining chip that deprives the public of crucial information.

II. The proposed local rule is consistent with the notion that the presumption of openness should not be easily overcome.

A. Current law supports open access to settlements.

B. Most of the arguments used to defend secret settlements do not heavily outweigh the public's interest in access.

1. Privacy interests and the parties' consent to secrecy are insufficient to overcome the presumption of openness.

2. Promoting settlements is insufficient to overcome the presumption of openness.

C. Open access is vital due to the nature of the federal judiciary and necessary to instill confidence in the judicial process.

Conclusion

Introduction

The Reporters Committee for Freedom of the Press, the National Press Club, The Radio-Television News Directors Association, and the Society of Professional Journalists submit these comments in response to Proposed Rule 5.03 banning secret settlements. We urge the Judiciary to adopt this Proposed Rule without modification. If the Judiciary decides to amend the Proposed Rule, we request the opportunity to address these modifications and the opportunity to testify at the public hearing if and when such a hearing is held.

The Signatories

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association established in 1970 by news editors and reporters to defend the First Amendment and freedom of information rights of the print and broadcast media. The Reporters Committee assists journalists by providing free legal information via a hotlinc and filing *amicus curiae* briefs in cases involving the interests of the news media. The Committee produces several publications to inform journalists and media lawyers about media law issues, including a quarterly magazine, *The News Media & The Law,* a bi-weekly newsletter, *News Media Update,* as well as several informational guides and reports.

Established in 1908, the National Press Club is an organization of journalists and communicators with 4,000 members in Washington, D.C. and around the world. Created in part to promote the ethical standards of journalists, the National Press Club serves as a center for the advancement of professional standards and skills and the promotion of free expression.

The Radio-Television News Directors Association, based in Washington, D.C., is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of more than 3,000 news directors, news associates, educators and students in radio, television, cable and other electronic media in over 30 countries.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization,

dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Purpose of these Comments

We have reviewed the Proposed Local Rule 5.03 and support its adoption. We explain below why a ban on secret settlements would benefit the public and how the Proposed Rule is consistent with the notion that the presumption of openness to court documents should not be easily overcome.

Discussion

I. Banning secret settlements greatly benefits the public.

A. Information contained in settlements is of vital public interest.

As secret settlements become routine, the public is left in the dark -- deprived of vital health and safety information that could prevent needless injury, death and suffering. Recent events, including exposing years of sexual abuse of children by Catholic priests, injuries from medical malpractice, deaths caused by defective tires, and suffering by victims of asbestos, beg the question: Why didn't the public know sooner?

In January 2002, *The Boston Globe* reported that over the last 10 years the Archdiocese of Boston secretly settled child molestation claims against at least 70 priests.[1] Although it is difficult to identify the number of victims involved due to the secrecy surrounding these settlements, *The Boston Globe* estimates that the number of

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[1] Walter V. Robinson, "Scores of Priests Involved in Sex Abuse Cases Settlements Kept Scope of Issue Out of Public Eye," BOSTON GLOBE, January 31, 2002.

abuse victims exceeds 200.[2] After *The Boston Globe* published its investigative report, hundreds of new victims came forward and reports across the country surfaced of priests' sexual abuse and misconduct.[3]

Because these settlements were secret, the public had no way of knowing that sexual abuse of children by priests was a national problem. Even judges and attorneys who handled these cases were unaware of the extent of the harm and may have reconsidered permitting secret settlements.

"If I had been aware of how widespread this issue was, I might have had a very different reaction to it [sealing the case.]," Superior Court Judge Margot Botsford told *The Boston Globe* regarding her 1995 order sealing the records of a clergy sex abuse case in Suffolk County, Massachusetts.[4]

Because the use of secret settlements was routine, it took years before the public knew of the numerous accounts of sexual abuse of children by priests. By then, many more children suffered at the hands of priests.

Even high-ranking priests who were aware of these secret settlements acknowledge that secrecy allowed abuse of children to continue.

"Ultimately, there is nothing to be gained by secrecy except avoidance of scandal," wrote Roman Catholic Cardinal William Keeler of Baltimore in a letter to 180,000 registered families of his archdiocese. "And rather than shrinking from this scandal -- which too often, has allowed it to continue -- we must address it with humble contrition, righteous anger and public outrage. Telling the truth cannot be wrong."

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[2] *Id.*

[3] Walter V. Robinson, "Hundreds Now Claim Priest Abuse Lawyers Report Flood of Alleged New Victims," BOSTON GLOBE, February 24, 2002; Brooks Egerton and Reese Dunklin, "Bishops' Record in Cases of Accused Priests," DALLAS MORNING NEWS, June 12, 2002 (reporting accusations of pedophilia, sexual abuse or harassment by priests in 41 states).

[4] Walter V. Robinson and Sacha Pfeiffer, "Priest Abuse Cases Sealed by Judges," BOSTON GLOBE, February 16, 2002.

On September 25,2002, Cardinal Keeler disclosed that in the last 20 years, the Baltimore Archdiocese and its insurance carriers have spent $4.1 million on settlements paid to victim-survivors and more than 1.5 million for living expenses, psychiatric and medical treatment for suspended priests, counseling for victim-survivors, and legal expenses for accused priests.

As Laurence E. Hardoon, a Boston attorney who represents victims of clergy sex abuse noted, "If we had any inkling whatsoever of the magnitude of harm that was out there, maybe we, as a joint group of plaintiff lawyers, would have tried to encourage our clients to be outspoken in many cases. It is hard not to look back and say the greater good would really have been served by the lack of secrecy earlier on."[5]

Secret settlements not only hide child abuse, they hide defects in numerous well-known products. A survey of news databases reveals that over the years secret settlements have concealed hundreds of injuries and deaths caused by the following products:

- Asbestos
- Dow Corning silicone gel breast implants
- Dalkon Shield intra-uterine device
- DES synthetic estrogen
- Firestone tires
- Ford pick-up trucks
- General Motors trucks (with side-saddle gas tanks)
- Halcion anti-anxiety drug
- Miracle Recreation Merry-go-Round
- Pfizer heart valve
- Prozac antidepressant
- Zomax painkiller

Manufacturers of all of these products have benefitted from secret settlements, while the public suffered. For example, in 1933, the Johns-Manville Co. secretly settled a

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[5] Sacha Pfeiffer, "Critical Eye Cast on Sex Abuse Lawyers Confidentiality, Large Settlements Are Questioned," BOSTON GLOBE, June 3,2002.

case brought by 11 employees for asbestos related injuries.[6] According to a report by the Coalition for Consumer Rights, this secret settlement was not disclosed until 40 years later. During this time, thousands of workers contracted respiratory diseases as a result of asbestos. Had the public been aware of the original 1933 suit, it could have been alerted to the dangers surrounding asbestos sooner.

More recently, the public learned of secret settlement agreements between the Ford Mntnr Co., Bridgestone/Firestone Inc., and the victims of defective Firestone tires. The National Highway Traffic Safety Administration estimates that Firestone tires caused more than 100 deaths and 500 injuries.[7] Even though approximately 100 lawsuits were filed over 10 years, until recently, the public was left in the dark about the dangers posed by these defective tire. Meanwhile, lives were lost.

As former Texas Supreme Court Justice Lloyd Doggett noted, "I think there are lives being lost every week in America, due to hazardous products and hazardous activities, as a result of secrecy agreements."[8]

Even the size of the settlement is critical to understanding the severity of risk to the public. Often corporations will settle cases for relatively small amounts of money in order to avoid the cost of litigation. However, the larger the settlement payment, the more likely the corporation perceives itself at risk for liability. The public can thereby discern the severity of the risk posed by a particular product.

The Proposed Local Rule enables journalists to alert the public to possible safety and heath risks posed by consumer products or organizations – information that the public has a right to know.

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[6] Coalition for Consumer Rights, "Secrets that Kill: Dangers Buried in the Courthouse," March 2000.

[7] Ken Paulson, "Inside First Amendment: Secret Settlements Undermine Public Safety," Gannett News Service, August 26, 2002.

[8] Bob Van Voris and Matt Fleischer, "Critics: Sealed Tire Deals Can Kill But Clients' Needs Often Require Them, Trial Lawyers Say," NATIONAL LAW JOURNAL, September 25, 2000.

B. Secret settlements are used as an unfair bargaining chip that deprives the public of crucial information.

The secrecy of settlement agreements is bought and sold at the expense of the public. Sometimes referred to as "hush money," plaintiffs are often pressured into agreeing to secrecy as a condition of settlement.

"I'm ashamed I took their money now I should have gone and reported it to the police or filed a lawsuit and called a press conference to announce it. If we had done that, this problem would have been exposed long ago," said Ray Sinibaldi who was abused by a priest more than 30 years ago.[9]

Plaintiffs' attorneys and the victims themselves are torn between obtaining the largest settlement possible and exposing these public threats. By banning secret settlements, defendants could not sell secrecy as a condition of settlement.

II. The proposed local rule is consistent with the notion that the presumption of openness should not be easily overcome.

A. Current law supports open access to settlements.

The presumptive right of access to judicial proceedings and records is beyond dispute. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984). As the Supreme Court noted, "For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil *as well as* criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386, n. 15 (1979). Open access to settlement agreements provides greater assurance that public will discover when defendants may be exposing the public to harm and encourages discussion of public affairs. In addition to promoting heightened public awareness, "[d]isclosure of settlement documents serves as a check on the integrity of the judicial process." *Bank of America Nat. Trust & Savings Ass'n v. Hotel Rittenhouse*

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[9] Walter V. Robinson, "Scores of Priests Involved in Sex Abuse Cases Settlements Kept Scope of Issue Out of Public Eye," BOSTON GLOBE, January 31, 2002.

Assocs., *800* F.2d 339, 345 (3rd Cir. 1986).

The Proposed Local Rule banning secret settlements is consistent with current law establishing a presumptive right of access to court documents of all types. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Publicker*, *733* F.2d at 1066-67 (common law right of access extends to "civil trial and records"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (stating that there is a long-standing presumption in the common law that the public may inspect judicial records); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983)(finding a First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. Federal Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984) (noting a First Amendment and common law right of access); *United States v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980) (strong presumption of a right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system).

Courts have also extended this presumptive right of access to unseal secret settlement agreements. *See Hotel Rittenhouse, 800* F.2d at 346 (granting motion to unseal settlement agreement between bank and developer); *St. Vincent's Hosp. & Med. Ctr. v. Greenville Hosp. Sys.*, 1989 WL 205624 (D.S.C. Dec. 11, 1989) (granting application to unseal settlement agreement and documents in case involving hospital and the Secretary of Health and Human Services); *Boone v. Suffolk*, 79 F.Supp.2d 603 (E.D.Va. 1999) (unsealing settlement agreement in back pay dispute under the Fair Labor Standards Act where "federal common law and Virginia common law and public policy support disclosure of settlement agreements approved by courts"); *In re Johnson,* 598 N.E.2d 406 (Ill. App. 1992) (holding "the right of access extends to the documents filed with the court, including settlement agreement in the dissolution case"). The Proposed Rule codifies this presumption of open access to court documents and prevents secrecy in an institution historically open to public view.

B. Most of the arguments used to defend secret settlements do not heavily outweigh the public's interest in access.

1. Privacy interests and the parties consent to secrecy are insufficient to overcome the presumption of openness.

Parties seeking secret settlements often claim their civil dispute is a "private matter." However, "[t]he presumption favoring disclosure reflects public interests that are independent of the parties' status as private persons." *C.L. v. Edson,* 409 N.W.2d 417,422 (Wis. App. 1987) (unsealing settlement agreement between minor patients and medical personnel involving sexual and psychological abuse).

When a private party commences a civil suit in a forum that is traditionally open to the public, any expectation of privacy is diminished. *Id.* By filing suit in a public form, private parties acknowledge that private remedies have not worked. Once parties request the full power of the state to assist them in resolving their dispute, the process is no longer a private matter and open access is required.

The parties' simple desire to make their suit private by agreement never rises to the heightened interest necessary to overcome the presumption of openness. See, *e.g.*, *In re Johnson*, 598 N.E.2d at 411 ("The parties' desire and agreement that the court records were to be sealed falls far short of outweighing the public's right of access to the files. . . . Courts cannot honor such requests without seriously undermining the tradition of an open judicial system."). The Proposed Rule strengthens the presumption of open access and prevents parties from contracting out of this common law right.

2. Promoting settlements is insufficient to overcome the presumption of openness.

Claims that secret settlements promote increased settlements is speculative at best. *Edson,* 409 N.W.2d at 423. If parties enter into secret settlements to avoid publicity, these same parties will again seek to settle cases to avoid the publicity surrounding a lengthy trial. This "general interest in encouraging settlement" is not enough to overcome the presumption of openness. *Hotel Rittenhouse*, 800 F. 2d at 346.

Even assuming that secret settlements encourage the quick resolution of cases and free court dockets, as one court held, "[w]e cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders." *Id.* at 345. The public's interest in the preservation of open access to the judicial system greatly outweighs any general claims of efficiency.

C. Open access is vital due to the nature of the federal judiciary and necessary to instill confidence in the judicial process.

Maintaining the presumption of openness regarding judicial records is particularly important given the institutional nature of the judiciary itself. Openness is necessary for both the peace of mind of the public at large and the sanctity of our judicial system. When secret settlements occur under the auspices of the court, the judiciary contributes to the cloak of secrecy that conceals health and safety risks from the public. This gives the appearance that courts prefer to shield defendants from public scrutiny rather than alert the public to life-threatening harm, abuse or injury. The Proposed Rule banning secret settlements would increase confidence in the judiciary as courts would no longer be able to assist defendants in hiding their actions from public view.

Conclusion

We greatly appreciate the Judiciary's consideration of these Comments and respectfully request that the Judiciary adopt Proposed Rule 5.03 to protect the public, promote open access to the court documents, and preserve the integrity of the judicial system.

Respectfully submitted,

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September 27, 2002

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September 26,2002

Larry W. Propes
Clerk of Court
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Re: Comment on proposed local rule 5.03

Dear Mr. Propes:

I am Director of our law school's Center for Applied Legal Ethics. I have a particular interest in the issue of secret settlements, and have written several papers and spoken at several conferences about this subject. Those matters are referenced on an attachment to this letter.

South Carolina's federal judges have taken a courageous first step by moving to ban secret settlements in their courts. They should be accorded credit not just for proposing the rule but for the forthright comments of Chief Judge Joseph F. Anderson Jr. and for raising the consciousness of other courts, attorneys, and the press on this important issue. Already, the Florida federal court has responded in kind.

Unfortunately, however, the proposed court rule is just a first step. It stops well short of including the vast majority of settlements and the vast majority of "secretized" information.

Chief Judge Anderson was right when he wrote that "arguably, some lives were lost because judges signed secrecy agreements " But many more lives are lost when the parties and their attorneys sign secrecy agreements that *don't* require court approval. In most cases, approval is neither required nor sought.

Agreements settling lawsuits often involve returning all documents obtained through the legal discovery process. Thus, the "smoking gun," whether it concerns a tire, toxic dump, or pedophile, is buried while more people get hurt. The courts are still involved, because they oversee the discovery process. Without an open discovery fight, however, these private agreements fly beneath the court's radar.

Moreover, it is most important for courts to prevent not merely the "secretization" of the settlement, but of the *discovery* that led to that settlement. It is that vital information that tells **others** what **is** truly going on.

Opponents of openness claim that cases wouldn't settle without secrecy. There is no evidence for this proposition. In three judicial seminars I have been privileged to speak at on this subject, I did not find a single judge who believed cases would not settle. The *amount* of settlement may be lower, but only because no premium is paid for silence.

While underinclusive in this important procedural aspect, the rule -- if expanded to include all information from all settlements -- would be overinclusive if not limited in some way to matters concerning the public interest. Where this line should be drawn -- the public health and safety vs. a broader public interest including financial and fiscal fraud in these post-Enron times -- is of course up to chis court.

I have enclosed for the court's convenience an article I wrote specifically for judges at the 2000 Pound Institute national forum. It more fully sets forth my views on this important subject. I would be more than happy to be contacted by you if I can be of any further assistance on this extremely important issue. I am best reached at 415-864-5959 or by e-mail at zitrinr@usfca.edu. Again, I commend the court for its vision and courage.

Richard Zitrin
Director, Center for Applied Legal Ethics
and Adjunct Professor of Law

WRITINGS on SECRET SETTLEMENTS

Book Chapters

Legal Ethics in the Practice of Law, Second Edition, Problem 24, pp. 626-633 on secret settlment issues (LexisNexis, 2002)

The Moral Compass of the American Lawyer, Chapter 9, "Keeping it Secret, Or What You Don't Know *Can* Hurt You," (Ballantine/Random House 1999)

Articles

Time to End the Secrecy, San Francisco Chronicle, August 21,2001

Why Lawyers Keep Secrets About Public Harm, The Professional Lawyer, American Bar Ass'n, Summer 2UU1

The Fault Lies with the Ethics Rules, National Law Journal, July 6,2001

Overcoming Secrecy With Judicial Power, Trial, November 2000

What Judges Can and Should Do About Secrecy in the Courts, Roscoc Pound Institute, July 2000

It's Time to Question How Our Legal System Can Afford to Allow Secret Settlements (w/ C. Langford), Voir Dire, American Board of Trial Advocates, Spring 2000

The Case Against Secret Settlements (Or What You Don't Know Can *Hurt You),* 2 J. Inst. for Study of Legal Ethics 115 (1999)

Hide and Secrets II (w/ C. Langford) "The Moral Compass" column for Law News Network on-line magazine and American Lawyer Media dailies, April 1999

Hide and Secrets (w/ *C.* Langford) "The Moral Compass" column for Law News Network on-line magazine and American Lawyer Media dailies, March 1999

SPEAKING on SECRET SETTLEMENTS

Speaker, Class action ethics and secrecy agreements, Louisiana Judicial College, December 2001

Panelist, New rules on sealing documents and discovery, Bar Association of San Francisco, November 2001

Speaker and Panelist, Secrecy in the courts, Society of Professional Journalists national conference, Seattle, October 2001

Speaker, Why secrecy in the courts is a judicial ethics issue, ABA continuing education conference for state appellate judges, Vancouver, B.C., July 2001

Speaker/Paper Presenter, Open courts with sealed files -- secrecy's impact on American justice: What judges can and should do about secrecy in the courts, The Roscoe Pound Institute Annual Forum for State Court Judges, Chicago, July 2000

Speaker, ABA Ethics 2000: Lawyers' duties to society vs. lawyers; duties to clients, State Bar of California Fourth Annual Statewide Ethics Symposium, June 2000

Speaker/Moderator, Plenary session: Settlement and litigation secrets: the ethical boundaries, American Bar Association Center for Professional Responsibility National Conference, Montreal, May 1998

Speaker, Secret settlements: what you don't know can hurt you, Hofstra University 2nd National Ethics Conference, April 1998

Open Courts with Sealed Files: Secrecy's Impact on American Justice

What Judges Can and Should Do About Secrecy in the Courts

-- Richard A. Zitrin

I. Introductory Issues and Biases

The purpose of this paper is to augment and complement rather than duplicate Professor Doré's work. Accordingly, I will attempt to minimize revisiting both her overview of the issues and her review of specific law in the area. I will focus instead, in essay format, on what choices are available to judges as they deal with a variety of issues relating to secrecy in the courts, as well as what suggestions I have for the choices courts and judges *should* make in addressing secrecy vs. openness.

A. Personal Perspective

Because I intend to be prescriptive (or perhaps more accurately "suggestive," since it is those in my audience who wield the gavels while I -- as any lawyer appearing before members of the bench -- have only words), I must confess my biases before going further. First, I believe in "sunshine in litigation" and openness of both court records and discovery. I reason that arguments about the privacy of disputes should generally be outweighed by the public's right to know. Some have strongly argued that civil courts exist to serve "private parties bringing a private dispute."[1] I believe, however, that even if the dispute began as a private one, once the courts are involved it is at most a private dispute *in a* public *forum.* The public nature of the forum is, to me, generally more compelling than what once was the private nature of the dispute. I suppose this makes me, in Professor Doré's terminology, a "public access advocate."

Second, although I have been a trial lawyer since my bar admission, I come to my position not primarily from the perspective of a litigator with either a plaintiffs' or defense perspective, but rather from my involvement in the field of legal ethics. Having evaluated what is and what I believe *should* be the ethical behavior of lawyers, and after seeing my views evolve substantially over more than two decades in the field, I have come to believe that the traditional model of the "zealous" advocate, who does everything within the bounds of the law for his or her client almost without regard to consequences, is both inappropriate and unnecessary to being an excellent lawyer.

Yet, those lawyers -- whether for plaintiffs or the defense -- who might otherwise agree with this perspective too often feel they have no choice but to accept and even argue for secrecy. Because the rules of ethics generally (with narrow exceptions) require putting the interests of the client ahead of those of society, lawyers are bound to settle cases in ways that serve the needs of specific clients even if they potentially harm the interests of society as a whole. Unless counsel are operating in one of the very few states with strong "sunshine in litigation" laws (and sometimes even then, see *infra),* they may feel that there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of obtaining information or

[1] Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," 105 *Harvard Law Review* 427 (1991)

resolving a case.

Accordingly, in 1998, I proposed a new ethics rule that would prohibit lawyers from "prevent[ing] or restrict[ing] the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety...."[2] Such an ethics rule would give counsel an opportunity (and, indeed, require them) to take the high road of openness, notwithstanding the needs of individual clients.

One assumption made in drafting this rule was that courts had little power, inclination, or resources to investigate the facts behind stipulations entered into by all counsel, much less the many agreements about secrecy that routinely occur outside the court's field of vision. I understand, of course, that most judges are ordinarily loathe to interfere with agreements made by counsel, particularly those that occur outside their purview. Nevertheless, having been asked to examine what courts might themselves do in the interests of openness, I have come to believe that judges have several viable, even reasonably practical, alternatives.

B. Practical Limitations on What Courts Are Able to Do

It would be foolish to comment on what courts can and should do about openness and secrecy without recognizing the limitations some -- perhaps most --judges face in dealing with anything beyond the everyday business on their dockets. Resources available to courts in general and trial courts in particular vary widely from state to state, even from venue to venue within states. Among these variations (there are undoubtedly many others) are:

* the availability of research attorneys and/or law students and the extent to which research can be done on line;

* the extent to which the court can utilize magistrates, commissioners, special masters, or "private judges";

* the extent of both system-wide and individual case and calendar management problems, including the extent of overall court backlog and length of each court's docket; and

* whether courts are segregated into issue-specific departments or at least have separate criminal and civil departments.

These limits on resources present a particular problem to courts concerned with openness and secrecy. Since much of what occurs that affects openness happens outside the court's ordinary purview, see *infra*, taking the time to examine these occurrences almost certainly means extra time and work for both the judge and his or her staff beyond the ordinary functions of the court. Given the press of ordinary court business, this can be a daunting obstacle.

C. Two Important Variables: The Involvement of the Court and the Agreement of Counsel

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[2]This proposed rule, originally presented at Hofstra University's symposium "Legal Ethics: Access to Justice," was published at 2 Hofstra J. Inst. Stud. Leg. Eth. 115 (1999). The text of the proposed rule is attached hereto as Appendix A.

One can divide issues of openness and secrecy in two broad, general categories: those that involve lawyers interacting with the bench, and those that do not. This is undoubtedly an oversimplification, but one that I believe is useful to look at this issue from the point of view of the judge. That is because there will be a considerable difference in the allocation of judicial resources depending on whether or not the court is already involved in the substantive issue.

Court "Involved". Among others, the following matters that commonly require court involvement may raise the issue of openness vs. secrecy:

* motions to compel discovery and for sanctions for discovery failures;
* protective orders;
* rulings about privilege, including attorney-client and work product;
* requests or motions to seal documents or testimony;
* motions in limine and other motions affecting trial evidence;
* motions to compromise claims where the court's approval is necessary (e.g., minors, bankruptcy, probate, class actions, etc.)
* stipulations regarding any of the above;
* stipulations regarding post-trial settlement (including waivers of motions for new trial or appeal, stipulated reversals of judgment, etc.)

It is obvious that the extent of judicial resources necessary to deal with any of these matters will depend directly on whether the parties come to the court in dispute or in agreement. For the most part, the court's decision or series of decisions is required where the parties are in dispute, while if the parties agree or stipulate, all they seek is the court's ratification. It is much easier -- and far less time-consuming and resource-intensive -- to sign a stipulation and order than to make a decision on the merits. But while the judicial resources needed to decide the substance of the disputed matter may be vastly greater than the resources needed to ratify a stipulation, the issues concerning secrecy and openness may be identical. A court that elects to make an inquiry, ***ab initio***, about the validity of such a stipulation will usually be engaged in a time-consuming, **resource-intensive** process that **it** could have avoided.

Court "Uninvolved". Jurisdictions vary in the extent to which they require, or even permit, lawyers to make the court aware of their progress in litigation, both procedurally and substantively. In the last generation, the interests of judicial economy, the allocation of precious court resources, the effect of technology, and the institution of "meet and confer" requirements and the like have materially diminished courts' record-keeping about cases -- and issues within cases -- resolved outside the courthouse corridors. To the extent that document production requests, for example, are no longer even filed with a court unless there is a dispute, a court's ability to acquaint itself with a particular case, even if it wanted to, is considerably less than it was a generation ago.

Nevertheless, many matters beyond the court's purview or knowledge may have an important impact on the question of openness vs. secrecy. Most of these relate to how discovery -- interrogatories, deposition testimony, and perhaps most significantly, document production -- is handled by the parties. In exchange for discovery, there may be private agreements to return documents or not disseminate deposition transcripts. In exchange for ***settlement,*** there may be these and other requirements to maintain a veil of silence. If these agreements do not require judicial intervention or even ratification, courts will ordinarily never learn of them.

In light of the foregoing, in discussing what courts can and should do, I have broken down the analysis into three general areas: (1) where the court is involved and the parties disagree; (2) where the court is involved and the parties agree; and (3) where the court is ordinarily not involved at all.

II. What Can Courts Do? What Options Are Available to Judges?

To an extent, the options available to some judges will be significantly affected by the laws in each jurisdiction. Civil procedure rules and statutes may be as important, or more important, than anti-secrecy measures. For example, the standards for protective orders vary significantly among jurisdictions.

A. Maintaining the Status Quo, or a "Hands Off" Policy

(1) Bench involved, parties disagree. Most judges favoring a "hands off" approach will resolve contested issues presented to them in relatively traditional ways. For example, protective orders are likely to be viewed more broadly, seen as a way to move the process of discovery along in a manner that avoids costly court fights and may enhance the chances of settlement.

(2) Bench involved, parties agree, Traditionally, most courts have taken the view that so long as the parties agree, especially on discovery, they have neither the time nor inclination to interfere. There are sound public policy reasons for this, most tellingly courts' limited resources and the difficulty if not impossibility of reevaluating the merits of matters already agreed on. Judges who take this view are most likely to accept the stipulations offered by counsel, including those that limit access to discovery by persons not involved in the litigation.

The only likely significant limitation on courts with a "hands off" policy is a particular jurisdiction's "sunshine in litigation" requirement that would limit the court's ability to accept secrecy. Currently, only a few jurisdictions have requirements that are strong enough to either preclude courts from ratifying what they choose to, or create clear presumptions of openness that can only be overcome by specific showings of necessity.[3]

(3) Bench not involved. Courts would not inquire into the private agreements among the parties and their counsel respecting limitations on disseminating information, Even in states with the broadest "sunshine in litigation" approaches, there exists no affirmative duty on the part of courts to make inquiries *sua sponte* into parties' agreements made outside of court.

(B) Evaluative, or Information-Gathering

(1) *Bench involved, parties disagree.* As part of the decision-making process, these courts would evaluate the extent to which secrecy is a necessary or appropriate condition of

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[3] *See, e.g.,* Texas Rule of Civil Procedure 76a, which requires not only that the presumption of openness has been overcome, but that there is "no less restrictive means" than allowing secrecy. See, also, Florida Statute 69.081 ("Sunshine in Litigation Act"); Washington Revised Code, §§ 4.24.601 and 4.24.611, and Los Angeles (Calif.) County Local Superior Court Rule 7.19 requiring a "particularized showing" as to each document involved. Illinois's proposed Code of Civ. Proc. S2-1306 is very similar to the Florida statute.

resolution of the dispute. This evaluation could include making active inquiry to the parties, through counsel, regarding the extent to which secrecy is actually appropriate, rather than merely desired. Courts acting in this way will, for example, tend to regard claims of trade secrets, work product, or other reasons for protective orders with some degree of skepticism.

Courts evaluating the showing made in support of such claims will decide on the merits, **rather than granting *pro forma* acceptance of such** orders **(or other secrecy devices) as the path of** least resistance to resolving contested issues. Such courts will also be more inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

(2) *Bench involved, parties agree.* Notwithstanding the agreement of the parties, some courts would be interested in making an independent evaluation of the legitimacy of the proposed agreement, at least to the extent it "secretizes" information or issues related to the litigation. This means that instead of merely accepting the stipulations of the parties, these courts would require an actual showing that the limitations on access or dissemination of information are actually warranted under the circumstances.

Although stipulations for protective orders may be the most common form of proposed agreement, there are many others, including stipulations regarding privilege or a privilege log, post-judgment stipulations including stipulated reversals or vacatur, and various agreements relating to case settlement, from filings under seal where court approval is necessary to stipulations to change the name of the parties so that they would be unrecognizable to anyone going to the court file to examine the case.[4]

(3) Bench not involved. Many (and likely most) courts, including those that may have a substantial interest in making inquiries about the necessity for secrecy in matters that come before them, will nevertheless be unlikely to create inquiry into matters resolved by the parties and counsel outside their purview. In federal court, or where state and local judicial rules permit, courts may have options available such as standing orders that require counsel to inform them when agreements involving secrecy are entered.[5] In reality, of course, such orders may be problematic: difficult to implement from a procedural point of view, and even more difficult to enforce. The principal salutary effect of such standing orders may be to enable counsel from one side to point to the order as the reason why a secrecy agreement must be refused.

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[4] I know of no reported cases directly addressing the propriety of such name change stipulations, but during the course of research for chapter 9 of *The Moral Compass of the American Lawyer* (Ballantine, 1999), we learned anecdotally of several such circumstances involving professionals who did not want their names sullied by being found in the court record and conditioned settlement on such 'sanitization." Two of these instances are personally known to us, though the attendant umbrella of confidentiality makes it impossible to cite to them. Indeed, the very nature of the attendant confidentiality makea such name-change situations extremely difficult to uncover, as anyone connected with the matter who disclosed information would be breaching a confidentiality order or agreement.

[5] We have become aware anecdotally of such orders, including a few in Northern California. To my knowledge, no study of such orders has been conducted.

(C) Presumed Open, or "Access-Proactive"

(1) ***Bench involved, parties agree or disagree.*** Courts can take the "evaluative" process a step further by presuming, as do those states with strong "sunshine in litigation" standards, that openness will be the order of the day unless there is a specific, particularized showing of the necessity for secrecy. In addition to skepticism about the reasons for secrecy, this presumption would **generally be based in part on a** public policy **perspective that information** likely **to** materially affect the public welfare should be available to the general public. If this "openness presumption" were uniformly applied, it would operate for all matters involving the courts, **whether** the **parties were in dispute or evinced agreement.**

This presumption of openness could apply to all those matters involving the court that are listed in part I(C) above. On the appellate level, this could include both stipulated reversals[6] and the somewhat counterintuitive process in a few states of "depublishing" opinions -- particularly controversial and potentially erroneous ones -- to avoid having them stand as precedent.[7] Both standing orders and case-specific orders could be used. Orders, even if broad, would almost certainly be enforceable; almost all courts have recourse to a variety of sanctions, including monetary and issue sanctions and contempt powers, to enforce their orders.

(2) Bench uninvolved. Obviously, judges have a limited ability to monitor the activities of parties whose secrecy agreements or understandings are never before the court. This is particularly true on a case-by-case, or microcosmic level, Moreover, even among states with sunshine in litigation laws that favor openness[8] only Texas specifically deals with "discovery, not filed of record,"[9] and only Florida, arguably, has language sufficiently broad to cover discovery and other matters not filed with the court.[10] Accordingly, outside of the possibility of the standing orders referred to above, there is little judges in the vast majority of states can do on a case-by-case level.

(3) Macrocosmic solutions. There is, however, a great deal courts can do, even when a

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[6]*See, e.g., Neary v. Regents of Univ. Of California, 3* Cal.4th 273 (1992).

[7]*See, e.g.,* California Rules of Court 976-979, especially Rule 979.

[8]While it is beyond the scope of this paper, it is worth noting briefly that some of the measures described as "favoring openness" or "anti-secrecy" may actually foster secrecy, either by ratifying exceptions to openness such as the traditional broad definition of what is appropriate for protective orders (including "annoyance," and "embarrassment"), *see, e.g.,* New Jersey Rule of Court 4-10.3 and New York Rule 3103(a), or by seeming to actually favor a presumption or secrecy, see, e.g., Mass. Rules or Impoundment Procedure.

[9]Texas Rule 76a(2)(c).

[10]"Any portion of any agreement or contract which has the purpose or effect of concealing a public hazard...." Fla. Stat. §69.081(4). Note the contrast with the language of Wash, Code S4.24.611, limiting the agreement to those "settling, concluding, or terminating" a relevant claim. The proposed Illinois statute has language similar to Florida's on this question.

particular case's secrecy issues are not before them, if they choose to look at the larger landscape. Here are some of the most important possibilities:

They can implement court rules, locally and statewide, that actively promote openness. If they choose, such rules can include a bar on secrecy even for those matters, like much discovery, that are part of a case but not filed or lodged with the court.

They can adopt a scheme of sanctions or discipline for those lawyers who don't abide by such court rules. With the cooperation of the state's disciplinary authorities, they can develop ethical requirements for attorneys along such as the proposal **suggested in Appendix A.**

Both trial and appellate courts can adopt policies of openness with respect to their own proceedings. For trial courts, these might include revisiting and revising broad definitions currently considered adequate justification for protective orders, sealing documents, and the like. For appellate courts, these might include reexamining and revising the rules on unpublished opinions, partial publication, and depublication. Appellate courts could also examine the informal or semi-formal practice in many states of avoiding mentioning the names of certain offending attorneys or others when a written opinion is issued. Although this practice appears most common in opinions about prosecutors found to have committed misconduct," other sanitizations also occur.

III. Conclusion
What Courts *Should* Do: The Case For Openness

(A) What Courts Should Do

It will surprise no one that I believe courts should do what they can by taking the "access-proactive" approaches I have described immediately above. The suggested "macro"solutions can reach the four corners of civil cases, whether before the courts or not, For the most part they can only he implemented by a cooperative effort among members of the bench, with input from lawyers and other interested persons. Some practices, like sanitizing or depublishing court opinions, may be within the power of individual courts to change, Those solutions that relate to cases where the court is directly involved are easier to deal with case by case and court by court. But it is apparent that the resources of a proactive court will surely be taxed, particularly where the parties agree and the court declines to accept that agreement without examination.

(B) Why Courts Should Favor Openness

In addition to those perspectives with which I began this paper, there are three important additional reasons why courts should favor openness. The first relates to the claim of Professor Arthur R. Miller and others that there exists only "anecdotal evidence," or what Miller calls "stories," that secrecy **has ever prevented the** public **from learning vital information on issues of** health and safety. It is true, of course, that allegations in a lawsuit -- even an occasional jury verdict -- don't prove anything. But there is no evidence that openness actually encourages frivolous lawsuits. More significantly, an examination of specific cases shows that many were

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[11] See, for example, the informal survey of this issue undertaken by journalist Edward Humes in *Mean Justice* (Simon & Schuster, 1998).

far more than mere "anecdotes," several involving products that were eventually removed from the market.[12] Moreover, even if legal and scientific experts argue whether something is truly dangerous, this argument begs the more fundamental question: Does the public have a right to know what the risks are -- and what the evidence is?

Second, while there have been numerous claims that secrecy is necessary for settlement, these claims do not appear to have even strong "anecdotal" support. I know of no studies demonstrating this, nor of any such claims from the states with the strongest anti-secrecy laws.

Third, I believe that one of the natural consequences of permitting secrecy is to foster the art of lying to or misleading the court. Perhaps the best example of this is the Fentress case, which I hope to discuss in my oral remarks, in which the Kentucky Supreme Court found that lawyers who engaged in an ongoing trial after a secret settlement had already been reached showed "a serious lack of candor with the trial court, and there may have been deception, bad faith conduct, abuse of the judicial process or perhaps even fraud."[13]

C. One Judge Can Make a Difference

Faced with limited resources and time, no judge can take on the job of "secrecy cop" lightly. Nevertheless, it seems there have increasingly been instances in which a single jurist acted alone in a way that helped maintain openness in our courts. I close with the brief mention of three such examples, which I hope to address more fully in my oral remarks.

In early 1995, Kentucky judge John Potter, suspicious of the actions of the lawyers in the aforementioned Fentress case, changed his minute order on his own motion from recording a dismissal after verdict to 'dismissed as settled." This act set off a controversy that resulted in the discovery that the 28-plaintiff case had indeed been settled, though the judge was never told.

In December 1997, California appeals court justice J. Anthony Kline filed a dissent in which he said that "as a matter of conscience," he would refuse to follow the California Supreme Court's decision allowing stipulated reversals of court judgments as a condition of case settlement.[14] Although Kline wrote that he would obey a direct order to implement a stipulated

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[12] There is no space here to document what Carol M. Langford and I have articulated elsewhere on several previous occasions. *See, e.g., The Moral Compass of the American Lawyer, supra,* note 4, Chapter 9, and, most recently, "It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements," 7 [ABOTA] *Voir Dire* No. 1, at 12 (Spring 2000). Among the examples of secrecy involving what appear to be circumstances of clear potential danger were the drugs Halcion and Zomax, the Shiley heart valve, the Dalkon Shield intrauterine device, and General Motors side-mounted gas tanks. (Note that such dangers are not limited to products, but include environmental toxins, serial child molesters, and other circumstances.)

[13] *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449 (Ky. 1996). We have commented on *Fentress* at length elsewhere (see note 12.)

[14] *Morrow v. Hood Communications, Inc.*, 59 Cal.App.4th 924 (1997). Kline was commenting on the *Neary* case, *supra*, note 6. His interesting defense of his dissent can be found in *California Lawyer,* September 1998, at 25.

reversal, he nevertheless was accused by the state's Commission on Judicial Performance of "willful misconduct in office [and] conduct prejudicial to the administration of justice." The case created a political firestorm as well as front page news and lead editorials. A year and a half later, the charges against Kline were dismissed, but stipulated reversals remain.

Finally, the tobacco industry's wall of secrecy crumbled in April 1998 when the House Commerce Committee opened its files and unsealed 39,000 documents after the Supreme Court refused to overturn judge Kenneth J. Fitzpatrick's broad December 1997 disclosure order in Minnesota's suit against the industry. But much of the most explosive and shocking documents, including evidence of the Council for Tobacco Research's so-called "special projects" unit, supervised and run by lawyers in order to use the attorney-client privilege, had already been disclosed in 1992 in a published opinion written by federal judge H. Lee Sarokin.[15] Sarokin's opinion, overruling many of the tobacco companies' privilege claims, was reversed and he himself was removed from the case. But the opinion remained, providing the outlines of a road map for those, including many states' attorneys general, to use in the years that followed,

The architect of Texas Rule 76a, Texas Supreme Court Justice Lloyd Doggett, now a congressman, is another judge who made a difference. As he put it, "To close a court to public scrutiny of the proceedings is to shut off the light of the law."[16]

APPENDIX A

ABA MODEL RULE 3.2 -- EXPEDITING LITIGATION *AND LIMITATIONS*

(A) **A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.**

(B) A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).

Comment

1. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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[15] *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), *rev'd* 975 F.2d 81 (3rd Cir. 1992).

[16] Lloyd Doggett and Michael Mucchetti, "Public Access to Public Courts," 69 *Texas L. Rev.* 643, (February 1991).

2. *Some settlements have been facilitated by agreements to limit the public's access to information obtained both by investigation and through the discovery process. However, the public's interest in being free from substantial dangers to health and safety requires that no agreement that prevents disclosure to the public of information that directly affects that health and safety may be permitted. This includes agreements or stipulations to protective orders that would prevent the disclosure of such information. It also precludes a lawyer seeking discovery from concurring in efforts to seek such orders where the discovery sought is reasonably likely to include information covered by subsection (B) of the rub. However, in the event a court enters a lawful and final protective order without the parties' agreement thereto, subsection (B) shall not require the disclosure of the information subject to that order.*

3. *Subsection (B) does not require the disclosure of the amount of any settlement. Further, in the event of a danger to any particular individual(s) under Subsection (B), the rule is intended to require only that the availability of information about the danger trot be restricted from any persons reasonably likely to be affected, and from any governmental regulatory or oversight agencies that would have a substantial interest in that danger. In such instances, the rule is not intended to limit disclosure to persons not affected by the dangers.*

Public ***Health Advocacy Institute***
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September 27,2002

To: Clerk of Court
U.S. District Court
Columbia, **S.C.**

From: Ben **Kelley**

VIA FAX: **Page one of** three

Dear Mr. Propes:

As we discussed in our phone **conversation, attached** are **the comments of the Public** Health **Advocacy Institute** in *the* **matter of** the **proposed change to** Local Rule 5.03. **We** strongly support the change.

If it is **possible to receive copies of other comments filed in this matter, we** will **be most appreciative. Of course,** we will **defray** any **copying or** other **costs.**

Sincerely,

Ben Kelley
Executive Director
Public Health **Advocacy** Institute
PKAIonline.org

Public Health Advocacy Institute
102 The Fenway
Boston, MA 02115
617-373-5214
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September 27, 2002

To the **Clerk**
U.S. District Court for the
District of South Carolina

The Public Health Advocacy Institute submits these comments in support of the proposal by the United States District Court for *the* District **of South** Carolina to amend Local Rule 5.03 as **follows:**

"(C) No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule."

The *Court's* proposed rule change can make an important contribution to achieving our nation's public health objectives. It can provide public notice of otherwise undisclosed litigation concerned with disease and injury outcomes of product and other health hazards, and can increase the likelihood of timely public access to hazard information revealed in such litigation. The availability of such information is critical to the effective operation of public health systems, which depend on early-warning indications of emerging problems of human harm before they impact wider populations.

The proposed rule change also can strengthen informed consumer choice in product purchase and use. In short, what is learned in litigation concerned with human harm can trigger early preventative measures if the lessons are made widely available.

We commend the Court for proposing this rule change, which it is hoped will encourage other jurisdictions to adopt similar measures to encourage the disclosure of vitally important health information revealed to or by the parties in injury lawsuits.

The Institute is a non-profit public service organization dedicated to supporting and enhancing *the* role of the law in achieving public health objectives. A detailed description of our work and our participants, including faculty members from Tufts University School of Medicine and Northeastern University School of Law, may be found at PHAIonline.org.

09/27/2002 11:14 0000000000 BK PAGE 02

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Thank you for considering these comments.

Sincerely,

Ben Kelley
Executive Director
Public Health Advocacy Institute

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September 27,2002

Larry W. Propes
Clerk of the Court
U.S. District Court
1845 Assembly Street
Columbia. South Carolina 29201

Dear Mr. Propes:

Enclosed please find a Comment in Favor of the Adoption of the Proposed Amendment to Local Rule 5.03. Please file it with the Comment Docket.

Thank you,

Seymour Moskowitz
Professor of Law

Comment in Favor of the Adoption of the Proposed Amendment to Local Rule 5.03

Seymour Moskowitz*

I. Introduction

The work of American courts, both federal and state, is built on a foundation of public access to judicial proceedings, including documents in court records. This premise is well-illustrated in the context of criminal trials. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814 (1980), Chief Justice Berger's scholarly opinion, tracing both English common law and American experience, found an "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past" to support this presumption of openness. 448 U.S. at 573, 1000, S. Ct. at 2825. The Chief Justice concluded "[p]eople in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing". 448 U.S. at 572, 100 S. Ct. at 2825. In addition to First Amendment considerations, the Supreme Court has recognized a federal common law right to inspect and copy public records and documents. Nixon v. Warner Communications, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312 (1978). "Federal Appellate Courts have uniformly concluded that this common law right extends to both criminal and civil cases." San Jose Mercury News, Inc. v. U.S. District Court, Northern District, 187 F.3d 109, 1102 (9th Circuit 1999)

The District Court's proposed amendment to Local Rule 5.03 implements this historic openness and will facilitate the timely and appropriate administration of cases on its docket. The court's legal right to enact this rule is clear based on Rule 83 of the Fed. R. C. P. Moreover, precedent and policy strongly support the proposed change of the existing local rule.

*Professor of Law, Valparaiso University School of Law, Valparaiso, IN 46383. Member of the Bar of Indiana, New York, Massachusetts, Connecticut, Seventh Federal Circuit, U.S. Supreme court.

The sealing of settlement agreements has been the root of much mischief. In 1935, a large asbestos manufacturers settled the first asbestos cases under seal. No one was allowed to know what the result of this case. Similarly, over the recent past, numerous cases involving a variety of other products and services were settled and sealed. These settlements concealed the harmful effects of the drug Zomax, the Dalkon Shield, Bridgestone/Firestone tires, to name just a few. The procedures sanctioned and enforced by courts has led to unnecessary harm to the public and the need for courts to handle numerous additional cases.

A. Numerous Court Decisions **Support** the Proposed Amendment

The Eleventh Circuit has made clear that the public has access to the work of the courts in civil cases and documents filed in those cases. In Wilson v. American Motors Corporation, 759 F.2d 1568, 1569-71 (11th Cir. 1985), the court found that the records of a civil case must be open, even when the parties agreed that those records should be sealed. The court cited opinions from other circuits that based the presumption of openness on the importance of preserving the public's right to monitor the functioning of the public's courts. *Id.* at 1570. "Thus it is the rights of the public, an absent third party, which are preserved by prohibiting closure of public records, unless unusual circumstances. The court reaffirmed that the party's competing interests, the court's inquiry must be on the "rights of the public in maintaining open records and the check...on the integrity of the system"... insured by that public access." *Id.* at 1571 (citation omitted) This was reaffirmed in Brown v. Advantage Eng'g, Inc. 960 F.2d 1013, 1014 (11th Cir. 1992): "[o]nce a matter is brought before a court for resolution, it is no longer solely the party's cases, but also the public's case." *Id.* at 1016. Accord, Newman v. Gratic, 696 F.2d 796, 803 (11th Cir. 1983)

Numerous other federal and state courts have affirmed this basic principal of our democratic government. "Access to civil proceedings and records promotes 'public respect for the judicial process"' [citation omitted], and helps to assure that judges perform their duties in an honest and informed manner. Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3rd Cir. 1991) The Seventh Circuit has noted that the right of access to the courts is "fundamental to a democratic state" and "critical to our type of government in which the citizenry is final judge of the proper conduct of public business." United States v. Peters, 754 F.2d 753, *763* (7th Cir. 1985) (citations omitted) ***See also*** Cendant Corp. v. Forbes, 260 F.3d 183, 192 (3rd Cir. 2001), Bonzell v. Pfizer, Lnc., 2002 WL 1902526 (Minn. App. 2002), Mitsubishi v. Circuit Court Milwaukee County, 605 N.W. 2d 868 (Wisc. 2000).

B. The Proposed Amendment Furthers Important Policy Goals

The District Court should adopt the proposed amendment in order to further the timely and appropriate resolution of cases. First, the rule is clear and unambiguous, thus informing all persons of the status of filed settlement agreements and lessening the role of the court in future disputes. Settlements are, by definition, voluntary contractual arrangements between parties. These parties have a variety of means to resolve their dispute, most especially in light of the option of dismissal pursuant to Rule 41 Fed R. C. P. If the parties choose to file settlements with the court after the adoption of the proposed local rule, they will be fully apprised that such agreements are open to all. Concerns about proprietary interests such as trade secrets, or embarrassing or confidential information, can be fully protected by the parties themselves via their freely bargained contract. But private parties should not, through their agreement, be able to contract away the public's right to be informed of the work of courts.

Second, the new rule will not necessarily hinder the settlement of cases. No study that I am aware of shows that sealing agreements **is** a necessary precondition to such voluntary bargains. Moreover, the involvement of the court in facilitating settlements, e.g., Fed. R.C.P. 16; Fed. R.C.P. 26(f); Fed. R. App. P. 33, strongly supports the conclusion that settlements filed in court are "public" records because courts are intimately involved in facilitating these bargains.

Third, by filing their settlement in court, the parties are choosing to employ the power of the federal court as an enforcement mechanism. Unless there is an independent basis for federal subject matter jurisdiction, litigants would normally have no federal court oversight of their agreement. In Kokkonen v. Guardian Life Insurance Company of America, the Supreme Court noted that if a court embodies a settlement contract in its dismissal order or (what has the same effect, retains jurisdiction over the settlement contract) "a breach of the agreement would be a violation of the order and ancillary jurisdiction to enforce the agreement would therefore exist." 511 U.S. 375, 381-82 (1994). "Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." *Id.* Recruiting the court as an enforcement agent thus provides " a powerful means of maintaining and enforcing secrecy." City of Hartford v. Chase, 942 F.2d. 130, 137 (2nd Cir. 1991); (Pratt, J., concurring). If the district court is to play this role, it – not the parties – has the right to decide if the settlement is open to the public.

C. The Proposed Local Rule Is Similar To Numerous Other Court Rules Which Make Settlement Agreements Accessible To The Public

The District Court's proposed rule **is** hardly unique. Many **states** have similar rules of procedure; some go even further than Proposed Rule 5.03(C). Texas Civ. P. R. 76(a)(1)(A) and (B), for example, creates a presumption of openness of court records, defined as all "file

documents" but also "settlements agreements not filed of record" and "discovery, not filed of record" if either concerns "matters with probable adverse affect upon general public health or safety, or the administration of government." Pursuant to Texas Civ. P.R.* 76(a)(2)(B) – (C) hearings on any motion to seal "court records" are public, require public notice and allow non-parties to intervene. Florida Statute § 69.081(4) & (8)(a) outlaws court "orders, judgments, agreements or contracts which have the purpose of effect of concealing a public hazard or concealing information which may be useful to the public in protecting themselves from injury resulting from the public hazard." Statutes in Washington (Rev. Stat. 42.24.6 11(4)(b), Arkansas, North Carolina, Oregon and local court rules in California, Delaware and other states are in accordance with the proposed amendment to the South Carolina District rule.

Respectfully submitted,

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MUNICH, GERMANY

September 25,2002

Larry W. Propes
Clerk of Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

This letter is in response to your invitation for public comment on the proposed amendment to Local Rule 5.03. Previously, I wrote a letter to Judge Joseph Anderson stating my position on the sealing of the records to protect confidentiality of settlements (copy of which is herewith enclosed without attachments). As I did in my letter to Judge Anderson, I am responding as a member of the South Carolina Bar, as the former President of the South Carolina Defense Trial Attorneys, as former President of the DRI, the Defense Research and Trial Lawyers Association (the national defense trial attorney's association), and as the former President of the Lawyers for Civil Justice, a national coalition of defense attorney organizations and corporate counsel, whose primary purpose is the improvement of the civil justice system.

In these capacities, I have had considerable national exposure to and experience with the issues relating to the proposed amendment to Local Rule 5.03 as it now exists. I am still of the view, as stated in the enclosed letter, that further amendments to Local Rule 5.03 are not necessary and not appropriate. However, I have become aware of what may well be a recommendation by the District Court Advisory Committee to the judges as to what it feels is a more appropriate amendment to Rule 5.03. If such occurs, I am in agreement that, if there has to be a change, the recommendation of the Advisory Committee is the better one, subject to two caveats:

1) Any reference to the "public interest" in Rule 5.03 be understood to preserve the judge's discretion to evenhandedly balance any public interest in disclosure against the interests of private litigants in privacy and confidentiality; and

2) Any provision permitting non-parties to intervene in proceedings to seal or unseal court records should be permissive, not mandatory, and should require a showing of good cause to intervene.

The Advisory Committee's proposal, as **I** understand it, would answer the concerns expressed about the current rule without abolishing the discretion of the trial judge, which is an essential element. Also, it will not strip the rights of those whose confidential statements are most often filed, namely those of minors and incompetents.

Very truly yours,

Edward W. Mullins, Jr.

EWMJ**R**:bfr

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MUNICH. GERMANY

July 25, 2002

The Honorable Joseph F. Anderson, Jr
Chief Judge
United States District Court
1845 Assembly Street
Columbia, SC 29201

RE: Court-Ordered Secrecy Agreements

Dear Judge Anderson:

This letter is in response to your request for input on a proposed local rule change that I understand will be discussed at the Court's meeting on July 26, 2002. I am responding as a past president of the South Carolina Defense Trial Attorney's Association, 'the Defense Research Institute (DRI), the national organization of lawyers involved in the defense of civil litigation, and the Lawyers for Civil Justice (LU), a coalition of defense and corporate counsel working to improve the civil justice system.

I have had the opportunity to deal with the issues relating to protecting privacy and confidentiality in litigation on many occasions. It is my view that judges need wide discretion to protect personal privacy and confidential proprietary information and that to inhibit the exercise of that discretion with a hard and fast rule, that leans one way or the other, would not be in the public interest.

Because LCJ, in particular, has been active since the early 1990's in recommending improvements to civil practice and procedure at both the federal and state levels and because it has worked closely with the Judicial Conference on this and other federal practice matters, I thought it would be helpful to the Court to relate some of our experience and to supply some of the information sources that have been generated in the course of this continuing controversy.

Protecting Privacy and Confidentiality in Litigation Protects the Public Interest

Plaintiffs, defendants, and witnesses often are compelled to expose very personal, sensitive information in court. Therefore, disclosure of such information should not be required unless there is a balanced consideration of the interests of privacy and property versus disclosure in a particular case on a full record. To do otherwise, for example by an inflexible rule or presumption, would deprive litigants of the privacy and property rights guaranteed to them by the United States and South Carolina Constitutions.

Enclosed is a re-print of a comprehensive article by Professor Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 428 (1991). Also attached is a copy of a recent, brief article by the Professor, Arthur R. Miller, *Traveling Courthouse Circuses*, ABA Journal (Feb. 1999) confirming his view (and mine) that to impose any further restrictions on a judge's discretion to protect privacy and property rights or to "favor" or "disfavor" either privacy or openness in the exercise of that discretion by local rule is not warranted by recent evidence or experience. The news reports

regarding the Firestone litigation and certain alleged medical malpractice cases appear to be recent manifestations of the same phenomenon, what Professor Arthur Miller has called the "passion for publicity" that did not result from the sealing of settlements.

Information About Public Hazards is Available to the Public Under Existing Law

Perhaps most significant is the fact that after studying both sealing order and protective order practice since 1992, the Judicial Conference, its Rules Committees, and the Federal Judicial Center concluded that there was no need for change. Some of the background of their study and the reasons for their conclusions are contained in the attached letter of March 23, 1998 from Judge Paul V. Niemeyer, then Chair, Civil Rules Advisory Committee of the Judicial Conference, to the Chair of the U.S. House Judiciary Committee. As Judge Niemeyer stated: "A number of experts on the subject have concluded that information sufficient to protect the public health and safety has always been available from other sources. The advisory committee has studied this matter carefully and concluded that no change to the present protective order practice is warranted."

In fact, the Judicial Conference Rules Advisory Committee also considered (at its April 28-29, 1994 meeting) the propriety of adopting a rule dealing with orders limiting public access to judicial records or proceedings (including sealed settlements) and decided against proceeding to study such a rule. Since that time, they have seen no need to revisit the issue.

Courts have broad discretion to balance the competing goals of promoting openness and protecting legitimate interests in privacy and confidentiality when information is sealed upon settlement, as well as when the production of confidential information is compelled in the course of litigation. Recent research on this issue concludes that the current system is working effectively and needs no change. Regulatory agencies already have the power to obtain information from companies about matters affecting "public health and safety." They do not need courts to serve as freedom of information clearinghouses. In fact, federal statutes already require regulated industries to provide a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. The courts should not be asked to duplicate the role of regulatory agencies.

No Compelling Need to Consider Adopting a Local Rule that Would Have Nationwide Implications in such a Sensitive, Controversial Area.

The recent amendment of Local Rule 5.03 would seem to answer any need to revisit the subject, particularly in view of the Judicial Conference's "Local Rules Project" and its actions on confidentiality orders. As Professor Miller noted in his Traveling Courthouse Circuses article:

> "High-profile lawsuits sell ... [but] judges would not permit litigants to conceal information about an unknown threat to public health and safety simply to clear a law-suit from their dockets. And my own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial

> Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * *
>
> Ironically, the center's study found that protective orders most often were used to protect the privacy of plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctiy decided to make no changes to current rules of procedure." Id

As Professor Miller concluded: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process." Id.

I appreciate very much your allowing my input on this matter and please do not hesitate to contact me if you need any further information.

Very truly yours,

Ed

Edward W. Mullins, Jr.

EWMJR:bfr

Enclosures:
Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 420 (1991);

Arthur R. Miller, *Traveling Courthouse Circuses,* ABA Journal (Feb. 1999);

Letter of March 23, 1998 from Judge Paul V. Niemeyer, Chair, Civil Rules Advisory Committee of the Judicial Conference, to the Chair of the U.S. House Judiciary Committee

UNIVERSITY OF MINNESOTA

Jane E. Kirtley
Silha Professor of Media Ethics and Law
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September 24, 2002

Larry W. Propes
Clerk of Court
U.S. District Court
1845 Assembly Street
Columbia, SC 29201

RE: Comments on Proposed Amendment to Local Rule 5.03

Dear Mr. Propes:

Enclosed please find Comments on the Proposed Amendment to Local Rule 5.03 regarding the sealing of settlement agreements.

We appreciate the opportunity to participate in this process, and would be pleased to provide further information if requested to do so.

Sincerely,

Jane E. Kirtley, Director, Silha Center for the Study **of** Media Ethics and Law
Silha Professor of Media Ethics and Law

Enclosure

2002 SEP 27 A 10: 22

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Comments of the **Silha** Center for the Study of Media **Ethics** and Law on **the Proposed Amendment to Local Rule 5.03**

The Silha Center for the Study of Media Ethics and Law submits the following comments on the proposed amendment to Local Rule 5.03.

The Silha Center is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote the understanding of, legal and ethical issues affecting the mass media. The Center also sponsors an annual lecture series, hosts forums, produces a newsletter and other publications, and provides public information about media law and ethics issues. More information about the Silha Center can be found on its web site: www.silha.umn.edu.

The proposed amendment to Local Rule 5.03 would be an appropriate change. We believe the amendment will help to preserve and cultivate public trust in the judicial process, and will promote effective monitoring of governmental activities by citizens. Moreover, the amended rule ensures that the judiciary is not made complicit in concealing important information from the public. The proposed amendment offers a practical solution to the ethical problems raised by secret settlements, one supported by Constitutional and common law, as well as public policy. We hope that the District Court will approve the proposed amendment.

Common Law and Constitutional Issues

It is well established that a presumptive common law right of access to court documents exists. *Nixon v. Warner Communications,* 435 **U.S.** 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") **As** Chief Justice Burger stressed in his opinion in *Richmond Newspapers v. Virginia,* 448 U.S. *555,* 572 (1980), "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

The Fourth Circuit has long favored a policy of strict limitations on the sealing of court documents. *See, e.g., In re Knight Publ'g Co.,* 743 F.2d 231 (4th Cir. 1989). For example, in *Ashcraft v. Conoco*, 218 F. **3d** 288 (4th Cir. 2000), the court found that the trial court had failed to follow the required procedures for sealing the settlement agreement as delineated in *Knight.* "In *Knight,* we explained that, while a district court 'has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests,' the 'presumption' in such cases favors public access. *Knight,* 743 F. 2d at 235; see *Stone,* 855 F. 2d at 182. ('The public's right of access to judicial records and documents may be abrogated only in unusual circumstances')." *Ashcraft* at 302. The court ruled that a settlement agreement could be sealed only if the trial judge satisfied the following requirements: "(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, *(2)* consider less drastic alternatives to sealing the documents, and **(3)** provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Ashcraft* at 302.

The rationale for recognizing the right of access to civil court documents and proceedings, including settlements, was explained in *Brown v. Advantage Engineering, Inc.*, 960 F. 2d 1013 (11th Cir.1992), "Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the **public's case.... It is** immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement." *Brown* at 1016. Thus, when parties use the courts to negotiate settlements, the public has a presumptive right of access to that settlement. Even though the parties may have agreed to keep the terms of the settlement confidential, the public's presumptive right of access almost always defeats the parties' interests in secrecy. Recently, the Seventh Circuit decided two cases involving secret settlements and held in each that private settlements lose any claim of secrecy once the court becomes involved. *See Jessup v. Luther,* 277 F. 3d 926 (7th Cir. 2002); *Herrnreiter v. Chicago Housing Authority,* 281 F.3d **634** (7th Cir. 2002).

The presumption of public access to judicial documents is one that courts are generally extremely reluctant to ignore. ***See*** *Procter & Gamble v. Banker's Trust,* 78 F. 3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing **a** prior restraint. It is not even grounds for keeping the information under seal.")

Moreover, as the Third Circuit observed in *Bank of America* **v.** *Hotel Rittenhouse,* 800 F. 2d 339, **345** (3d Cir. 1986), public access to settlement documents **"serves as** a check on the integrity of the judicial process" (citing *Smith II,* 787 F.2d at 114; *Wilson* **v.** *American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985).

Similarly, the Sixth Circuit recognized, in *Brown & Williamson v. FTC,* 710 F. 2d 1165, 1179 (6th Cir. 1983), that secrecy may conceal corruption. *Brown & Williamson* embodies perhaps the most powerful argument for prohibiting secret settlements because it involved significant public health and safety **issues.** Although the disputed documents in *Brown & Williamson* had been placed under seal pursuant to a confidentiality agreement with the FTC, rather than in a secret settlement, the court's analysis of the strong public interest involved is instructive. "The public has a strong interest in obtaining the information contained in the court record. The subject of this litigation potentially involves the health of citizens who have a strong interest in knowing the accurate 'tar' and nicotine content of various brands of cigarettes." *Brown & Williamson* at 1180

The court held that Brown & Williamson's claimed interest in secrecy did not outweigh the public interest in disclosure, and hinted that the tobacco company's motives for secrecy were suspect. "[The] desire [of Brown & Williamson to shield prejudicial information contained in the judicial records from the public and competitors] **. . .** cannot be accommodated by courts without seriously undermining the tradition of an open justice system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know." *Brown & Williamson* at 1180.

Settlements often concern matters that affect the public's health and safety, and the need for public access to this information is compelling. The proposed amendment to Local Rule 5.03 will clarify that the public's traditional presumptive right of access prohibits secret settlements.

Public Policy Considerations

The increasing emphasis on the right of access to settlements has led many state courts and legislatures to amend rules and pass legislation designed to encourage "sunshine in litigation."

In 1990, the Texas Supreme Court adopted Texas Rule of Civil Procedure 76a, which presumes that all civil court records are open to public inspection. ***See*** TEX. R. CIV. P. 76a (2), (4) (2002). The presumption may be overcome only by a specific, serious and substantial interest that clearly outweighs the presumption. Settlements may be sealed only if no less restrictive means are available to protect the interest asserted. Significantly, the rule provides for public access to settlement agreements, including unfiled settlements and unfiled discovery documents, in cases that involve public safety issues, reflecting the legislative intent to ensure that the goals of the rule is not subverted through a private settlement. ***See*** Lloyd Doggett and Michael Macchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest.* 69 *Tex*. L. Rev. 643 (1991)

In addition, Florida, North Carolina, and Oregon have passed legislation designed to limit secret settlements. Florida's law, passed in 1990 and titled the "Sunshine in Litigation Act," prohibits courts from entering orders which have the purpose or effect of concealing a public hazard or information about a hazard. FLA. STAT. ANN. 69.081 (3) (2002). The Act also prohibits court enforcement of private secret settlements. FLA. STAT. ANN. 69.081 (4) (2002).

North Carolina and Oregon have adopted statutes that prohibit secret settlements in cases in which the government is a party. North Carolina's rule states that such settlements are public records. The presumption of openness may be overcome only by

written findings of an "overriding interest," and there must be no less restrictive means of protecting that interest. N.C. GEN. STAT. 132-1.3 (2002). Oregon's statute prohibits secret settlements where a state official is the defendant unless the court provides written findings, after *in camera* review, that the individual privacy interests of the state official outweighs the public's interest in reviewing the settlement. ORE. REV. **STAT.** $30.402 (2001).

Legislation was introduced in Rhode Island in April 2002 that would prohibit secret settlements in cases involving personal injury, wrongful death, and monetary or property damages caused by defective products, environmental hazards and financial frauds. In these cases, any secret settlement entered into privately by parties "shall be void and unenforceable as Against public policy." 2001 Rill Tracking RI S.B. 2707, 10-21-3. The parties may move for the court to enter a protective order in such cases, but a court may enter such an order only upon a written finding of good cause. 2001 Bill Tracking RI S.B. 2707, 10-21-4(F), (G). The bill has been transferred to thc Rhodc Island senate judiciary committee for further review.

Statutes and rules such as these reinforce a strong presumption of openness. But they nevertheless remain flawed because apply only to settlements in certain types of cases. In addition, they force individual judges to resist pressure by parties favoring secret settlements. The parties argue that secrecy is essential to achieving resolution of a case short of litigation – a solution that may be extremely attractive to a judge dealing with an overcrowded docket Moreover, in an understandable desire to compensate plaintiffs, a judge may be reluctant to undermine an agreement struck between parties in the name of promoting abstract notions of openness and accountability. **A** rule such as the

proposed amendment to Local Rule 5.03, which completely eliminates secret settlements, will be far more effective in guaranteeing the public's right to know.

Practial and Ethical Considerations

A variety of pragmatic and ethical arguments can be made against secret settlements:

- Rules against secret settlements are economically efficient, preventing the waste of duplicative discovery in subsequent litigation. As Judge H. Lee Sarokin wrote in *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. **573,** 577 (1985): "To require that each and every plaintiff go through the identical, long and expensive process would be ludicrous.... There can be no justification for defendants' position other than to discourage other claimants and deprive them of evidence already known and produced to others similarly situated." The amended Local Rule 5.03 will eliminate the problem, keeping all settlement documents, as well as the terms of the settlement itself, open to the public.
- Secret settlements deprive the public of a valuable resource. Judge Jack Weinstein argues that parties who bring a lawsuit and use the resources of the court system act unethically in settling secretly because such secrecy deprives the public of an understanding the judicial process. "When a comprehensive opinion is destroyed, suppressed, or withdrawn as part of a settlement, so, too, are the answers to complex questions such as 'the interpretation and validity of the statute, the interpretation of contract clauses regarding insurance coverage of pollution clean-up costs, and the effects of hazardous substances upon individuals and the environment."' Jack B. Weinstein, *Secrecy and the Civil Justice System Secrecy*

in Civil Trials: Some Tentative Views, 9 J.L. & Pol'y **53, 62** (2000). **A** rule that covers only issues that affect public health and safety provides insufficient protection of the public's right to know.

- The proposed amendment to Local Rule 5.03 will help alleviate the ethical dilemma confronting plaintiffs' attorneys. Secret settlements require plaintiffs' attorneys to choose between the ethical duty to comply with their clients' wish to accept a secret settlement, and the ethical obligation to inform the public about public hazards. Richard Zitrin argues that the **ABA** Model Rules of Professional Conduct should be changed because secret settlements are unethical and dangerous to the public, listing examples of "stories" of dangerous products that were hushed by secret settlements, including the prescription drug Zomax, Dalkon Shield, and General Motors pick-up trucks with side-mounted gas tanks. *See* Richard Zitrin, *Legal Ethics: The Case Against Secret Settlements (or, What You Don 'tKnow Can Hurt You),* **2** J. Inst. Stud. Leg. Eth. 115 (1999).
- However, the ABA has been unwilling to adopt such a change to the Model Rules of Professional Conduct because the Commission on the Evaluation of the Rules of Professional Conduct believes that a change in the law governing secret settlements is best left to the courts and the legislatures. Nancy Moore, a Boston University Law Professor and Chief Reporter for the **ABA** Commission on the Evaluation of the Rules of Professional Conduct, concedes the merits of Zitrin's condemnation of secret settlements, but argues that a change in the ethical rules is not the correct remedy. "If [secret settlements] are bad for society – and I agree that they are – then no one should be entitled to make them.. **..** It is regrettable that

most courts and legislatures do not have the political will to enact such legal restrictions." Nancy J. Moore, *What Needs Fixing: Lawyer Ethics Code Drafting in the Twenty-First Century,* 30 Hofstra L. Rev 923,941 (2002). Accordingly, it would appear that any change in the law governing secret settlements must come from the courts or the legislature.

- Professor Susan P. Koniak argues that secret settlements are contracts that should be governed by the long-standing rule that contracts against public policy are void. *See* Susan P. Koniak. *What Needs Fixing: Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal,* **or** *Something in Between?,* 30 Hofstra L. Rev. 783 (2002).

Conclusion

For all the foregoing reasons, we encourage the District Court for the District of South Carolina to adopt the proposed amendment to Local Rule 5.03. We would be pleased to provide further comment.

Respectfully submitted,

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September 24,2002

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T. David Rheney
F. Drake Rogers
David G. Traylor, Jr.

PAST PRESIDENT
Michael R T Wilkes

EX OFFICIO
William S. Davies

EXECUTIVE DIRECTOR
Aimee L. Hiers

September 26, 2002

The Hon. Larry W. Propes
Clerk of Court, United States
District Court
1845 Assembly Street
Columbia, SC 29201

Re: Comment to Proposed Amendment to Local Rule 5.03

Dear Mr. Propes:

I am writing on behalf of the South Carolina Defense Trial Attorneys' Association **to comment on the proposed Amendment to Local Rule 5.03 dealing with the procedure** for sealing court records. We appreciate the opportunity being given to the South Carolina Defense Trial Attorneys' Association to comment on the court's consideration of amendments to our local rules related to the issue of court-ordered secrecy agreements.

I am also attaching a copy of our letter to Judge Joe Anderson dated July 23, ***2002.*** As is set forth more fully herein, the South Carolina Defense Trial Attorneys' Association would submit that the proposed amendment is unnecessary and its promulgation could lead to many unintended consequences. Accordingly, we would propose that the status auo should be maintained with regard to the local rules relating to confidentiality of settlement agreements leaving this matter within the sound discretion of the trial Judge.

Confidentiality plays an important role in civil litigation. From a defense standpoint, confidential statements are of paramount importance in an effort to protect trade secrets, financial information, and other proprietary information from reaching the general public. As such, "parties who settle a legal dispute rather than passing it to resolution by the Court often do so, in part anyway, because they do not want the terms of the resolution to be made public." Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002). Defendants, particularly, are reluctant to disclose the terms of a settlement lest those **terms encourage others to sue. Id. Therefore, by eliminating the continued use of** confidential settlement agreements, the proposed amendment to Local Rule 5.03 will not address the perceived problems arising from the use of confidential settlement agreements, but instead, may ultimately foster litigation by virtue of potential Plaintiffs being encouraged by reports of "big money settlements." Accordingly, eliminating confidential settlements will not make more useful information available to the public, but will rather promote more unnecessary litigation.

PAST PRESIDENTS- B. Allston Moore, Jr. * H. Grady Kirven (1925-1994) * Harold W. Jacobs * G. Dana Sinkler * Edward W. Mullins, Jr. * G. Dewey Oxner, Jr. 'James W. Alford
C. Dexter Powers (1921-1989) * Jackson L. Barwick * Mark W. Buyck, Jr. * R. Bruce Shaw * F. Barron Grier, III * Robert H. Hood * Robert R. Carpenter * Ernest J. Nauful, Jr.
Saunders M. Bridges * Wade H. Logan, III * T. Eugene Allen, III * Theron G. Cochran * Carl B. Epps, III * Frank H. Gibbes, III * Mark H. Wall * Glenn Bowers 'William M. Grant, Jr.
W. Hugh McAngus * William A. Coates * Michael B. T. Wilkes * Kay G. Crowe * Thomas J. Wills, IV 'William S. Davies, Jr. * John S. Wilkerson, III * W. Francis Marion, Jr. * H. Michael Bowers

Furthermore, the SCDTAA would state that the proposed amendment would impede the process of protecting the parties' private and/or proprietary information and would therefore run the risk of an unwarranted invasion of personal privacy and a deprivation of property rights protected by the Constitution. Upholding the continued use and enforceability of confidential settlements would serve both the public and private interests at issue in this regard, that being the public interest in promoting the settlement of civil disputes without court intervention ***so* as** to preserve judicial resources **and the** private interests of litigants in a civil suit who have a compelling interest in keeping the terms of the resolution of their dispute private. We would undoubtedly agree that openness is an important way of maintaining confidence in public institutions. The openness of judicial proceedings, however, exists primarily to ensure the appropriate functioning of our Courts, not to disclose private and confidential information that the litigants **have** agreed to protect. Arthur R. Millcr, Confidcntialitv, Protcctivc Ordcrs, and Public Access-to the Courts, 105 Harv. L. Rev. 427, 484-487 (1991) (Terms of Settlement have no relationship to a potential public hazard or matters of public health, and unless official conduct is at issue, matters of proper governance are not involved).

Additionally, the SCDTAA would propose that the considered amendment to Local Kule 5.03 is unnecessary in that it applies only to settlement agreements which are filed with the Court, while most agreements are not. In fact, the Court would continue to retain discretion under Local Rule 1.02 to seal such agreements for good cause in appropriate cases. That is, it is our understanding that the proposed amendment to the Local Rule 5.03 will have no effect whatsoever on settlement agreements entered by the parties where the parties themselves agree to confidentiality without involvement by the Court. Furthermore, Local Rule 1.02 provides that for good cause, any of the local rules can be overridden by the Court in any particular case. Therefore, even under the new proposed rule, settlement agreements can be sealed when a demonstrable need for secrecy exists. Hence, even under the proposed amendment, the Court would retain discretion to seal such agreements for good cause, despite the prohibition set forth in proposed amendment. Accordingly, the SCDTAA would comment that the amendment to 'Local Rule 5.03 is unnecessary and in fact, its promulgation could lead to many unintended consequences.

Among these unintended consequences, the SCDTAA would submit that the proposed amendment to Local Rule 5.03 may ultimately result in a chilling effect on settlements of civil disputes. Specifically, the elimination of Confidential settlement agreements will serve as a disincentive for settlement in a majority of civil disputes. Settlements, by their very terms, are mutual resolutions of disputed claims. That is, a settlement is not an admission on the part of the Defendant that its product or behavior was in any way defective, negligent or wrong. By eliminating the use of confidential settlements, the fact of a settlement, and the terms thereof, usually including a recitation of the perceived defect or detrimental behavior, will be made public and emasculate any protection from assumed liability which generally exists with voluntary settlement agreements. Accordingly, by doing away with the protection generally afforded by the confidential nature of settlements, **a** chilling effect on voluntary settlements will undoubtedly result.

Additionally, the SCDTAA would comment that the proposed amendment to Local Rule 5.03 may also affect the enforceability of privately negotiated confidential settlement agreements which do not fall under the terms of the proposed amendment. Currently, the proposed amendment has no effect whatsoever on settlement agreements entered by the parties where the parties themselves agree to confidentiality without involvement by the Court. However, the amendment may inadvertently result in the inability of the Courts to enforce privately negotiated confidential settlements. That is, the ability to enforce the confidentiality provisions of any privately negotiated settlement agreement may ultimately require the parties' submission of the issue to the Court. The presence of the proposed amendment to Local Rule 5.03 regarding confidential settlements, and providing for an outright ban on their use will undoubtedly serve to curb the willingness to enforce the provisions of the agreement. Accordingly, the proposed amended rule may ultimately result in a total and complete ban of confidential settlements, even those privately negotiated at arms length by the parties without Court intervention.

It is our understanding that the South Carolina District Court Advisory Committee intends to submit a proposal for an alternative amendment to Rule 5.03. As outlined hereinabove, the South Carolina Defense Trial Attorneys' Association is opposed to any changes in Rule 5.03. However, it is our opinion after having an opportunity to review the same that the Committee's proposal may be a more acceptable alternative than the current proposed total ban on court-ordered secrecy agreements. It is our understanding that the Committee's proposal will allow court-ordered secrecy agreements after the court has addressed the issue of public interest and allowed for possible non-party intervention into the process. This proposal is a more acceptable alternative and in actuality, codifies existing law. We would suggest that a "good cause" provision might be added to the non-party intervention aspect of the proposed rule. This proposed amendment seems to answer any concerns that some of the Judges might have about court-ordered secrecy agreements without taking away their discretion to protect the rights of those parties who may be entitled to and need confidentiality.

In conclusion, the SCDTAA would submit that both the public and private interests would be best served by upholding the continued viability of confidential settlement agreements by leaving this matter within the sound discretion of the Court without amendment to Local Rule 5.03

With kindest regards, I am,

Sincerely,

H. Mills Gallivan
President

HMG/jt

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July 23, 2002

TRANSMITTED VIA FACSIMILE (803) 253-3246 AND U.S. MAIL

The Honorable Joseph F. Anderson, Jr.
Chief Judge
United States District Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Court-Ordered Secrecy Agreements

Dear Judge Anderson:

Thank you for giving the South Carolina Defense Trial Attorneys' Association the opportunity to comment on the Court's consideration of amendments to our local rules related to the issue of court-ordered secrecy agreements.

Based on your letter of July 5, 2002, and our subsequent telephone conversation, I understand that the Court will be considering a proposed local rule change to either prohibit altogether or at least strongly discourage, court-ordered secrecy agreements in cases that involve public safety concerns. We understand it will focus primarily on confidentiality provisions regarding the settlement of civil suits.

The South Carolina Defense Trial Attorneys' Association would state that there is a well recognized public interest involved when discussing the confidentiality of settlement terms - that being the public interest in promoting the settlement of civil disputes without court intervention so as to conserve judicial resources. Moreover, the litigants in civil suits have a compelling interest in keeping the terms of the resolution of their disputes private. Accordingly, both the public and private interests would be served by upholding and continuing the viability of confidential settlement agreements, especially in situations involving arms' length settlement agreements reached by parties to a civil dispute.

PAST PRESIDENTS - B. Allston Moore, Jr. * H. Grady Kirven (1925-1994) * Harold W. Jambs * G. Dana Sinkler * Edward W. Mullins, Jr. * G. Dewey Oxner, Jr. * James W. Alford
C. Dexter Powers (1921-1989) * Jackson L. Barwick * Mark W. Buyck, Jr. * K. Bruce Shaw * F. Barron Grier, III * Robert H. Hood * Robert R. Carpenter * Ernest J. Nauful, Jr.
Saunders M. Bridges * Wade H. Logan, III * T. Eugene Allen, III * Theron G. Cochran * Carl B. Epps, III * Frank H. Gibbes, III * Mark H. Wall * Glenn Bowers * William M. Grant, Jr.
W. Hugh McAngus * William A. Coates * Michael B. T. Wilkes * Kay G. Crowe * Thomas J. Wills, IV * William S. Davies, Jr. * John S. Wilkerson, III * W. Francis Marion, Jr * H. Michael Bowers

The South Carolina Defense Trial Attorneys' Association is mindful, as stated in the ABA Article forwarded with your request, "that critics of secret settlements say they become a barrier to removing the underlying causes of defective products and detrimental activities that give rise to lawsuits", and that given recent developments in such controversies as the Bridgestone/Firestone defective tire cases, efforts to limit their use has begun. However, we feel that these perceived problems do not arise out of the continued viability of confidential settlement agreements, and that an outright ban on their use, or a limitation of their current use, will not address or correct the problems of which the plaintiffs bar complains in the ABA article.

The primary purpose of the South Carolina Defense Trial Attorneys' Association is to promote justice, professionalism and integrity in the civil justice system. In keeping with this overall purpose, we agree with the recent statements of Chief Justice Jean H. Toal of the South Carolina Supreme Court that openness is an important way of maintaining confidence in public institutions. However, we would submit that tension will always exist between the general principle that the public has a right to know about matters involving the judicial process and the need to maintain and protect the privacy of litigants in a civil suit. The openness of judicial proceedings exists primarily to ensure the appropriate functioning of our courts, not to disclose private and confidential information the litigants have agreed to protect. Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427,484-487 (1991) (Terms of settlement "have no relationship to a potential public hazard or matters of public health, and unless official conduct is at issue, matters of proper governance are not involved." Id. at 484-485).

From a defense standpoint, confidential settlement agreements, are of paramount importance in an effort to protect trade secrets, financial information, and other proprietary information from reaching the general public. Moreover, by continuing the viability of confidential agreements, including settlement agreements, Plaintiffs will be prevented from litigating a case in the court of public opinion, and may also be prevented from divulging significant details about a particular settlement, such as the mount. As the Court is aware, "parties who settle a legal dispute rather than pressing it to resolution by the Court often do so, in part anyway, because they do not want the terms of the resolution to be made public." Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002). Defendants, particularly, are reluctant to disclose the terms of a settlement lest those terms encourage others to sue. Id. Therefore, by eliminating the continued use of confidential settlement agreements, the Court may very well not be addressing the perceived problems arising from the use of confidential settlement agreements, but instead be fostering litigation by virtue of potential Plaintiffs being encouraged by reports of "big money settlements."

As stated earlier, critics of confidential settlement agreements point to these agreements as being barriers to the removal of the underlying causesofdefective

products and detrimental activity which give rise to lawsuits. Many lawyers, law teachers, and judges have studied these issues over the years and have concluded that court seals do not conceal unknown threats to public health and safety. See, e.g., A. R. Miller, Traveling Courthouse Circuses, A.B.A.J. (Feb. 1999). Moreover, the South Carolina Defense Trial Attorneys' Association, however, contends that the elimination of confidential settlement agreements will not be the panacea to that perceived continuing problem. As stated in the ABA Article, it is important to remember that the client/defendant is the master of the decision as to whether to remove the underlying causes of defective products and detrimental behavior, regardless of the use of a confidential settlement agreement. That is, with or without confidential settlement agreements, potential defendants will ultimately decide whether to remedy the problems with their products or behavior.

Additionally, the South Carolina Defense Trial Attorneys' Association also feels that an elimination of confidential settlement agreements will serve as a disincentive for settlement in a majority of civil disputes. As the Court is aware, all settlements by their very terms are mutual resolutions of disputed claims. That is, a settlement is not an admission on the part of a defendant that its product or behavior was in any way defective, negligent, or wrong. By eliminating the use of confidential settlements, the fact of a settlement, and the terms thereof, usually including a recitation of the perceived defect or detrimental behavior, will be made public and emasculate any protection from assumed liability which generally exists with voluntary settlements. That is, the terms would bc made public, thereby clouding the defendant with perceived liability. Moreover, the assumption is made by the plaintiffs bar that confidential settlements Will somehow allow defendants to resist efforts to rectify their defective product or detrimental conduct. We would contend that the logic underlying such a conclusion is suspect. The mere fact that a settlement agreement, and the terms thereof, remain confidential, will in no way allow a defendant to protect the facts of the underlying suit from disclosure. The fact that the defendant has been involved in previous litigation, as well as the facts of that litigation, would be subject to discovery under existing Federal Rules. Thus, the same information the plaintiffs bar complains is now not available with confidential settlement agreements, is actually readily available under the current rules of discovery. In fact, the only thing that will not be available under confidential settlement agreements will be the monetary compensation associated with the settlement and any other facts sealed by the Court.

Aside from the public policy concerns weighing against a rule that would eliminate or discourage confidential settlements, the South Carolina Defense Trial Attorneys' Association would also point out the possible strain on judicial resources which may be required to administer a rule of this nature. Initially, it is our understanding that the rule would address only those cases which would impact public safety, and therefore, the initial concern would be exactly how the determination would

be made as to what types of cases would rise to the level of "public safety". It is not beyond the realm of possibility that an argument could be made that all cases would somehow hinge upon "public safety" concerns. Moreover, as pointed out, currently only two states have enacted rules forbidding confidential settlements and in both states courts are required to go on record as to why an agreement should be afforded confidentiality. Accordingly, under the considered amendment, it appears that the Court would be faced with increased hearings on privately negotiated confidential settlements in which it would otherwise not be involved in order to make threshold determinations as to whether the case involved a matter of public safety, and if so, whether an overriding concern was involved so as to allow confidentiality. Accordingly, extensive judicial resources may be exhausted in the implementation of the proposed amendment. If the settlement does not qualify for confidentiality, then it is certainly possible that the settlement will fall apart and the case will then have to be tried.

In conclusion, the South Carolina Defense Trial Attorney's Association would submit that both the public and private interests would be best served by upholding the continued viability of confidential settlement agreements, especially in situations involving arms' length settlements reached by parties to a civil dispute. As we understand it, the current rules allow the District Court Judges the discretion to approve confidential settlement agreements and requests for sealing orders. We would request that the Court maintain the *status quo* with regard to the local rules and leave this matter within the sound discretion of the trial Judge.

Thank you for this opportunity to comment on this issue. If you need anything further or if we can be of any further assistance, please let me know.

With kindest regards, I am,

Sincerely,

H. Mills Gallivan
President
Direct Dial: ***(864) 271-5341***
mgallivan@gwblawfirm.com

HMG/jt

cc: Professor John P. Freeman
cc: Kathryn Williams, Esq.
cc: Richard S. Rosen, Esq.
cc: Rebecca Lafitte, Esq.
cc: James B. Pressly, Jr., Esq.

02 SEP 16 AM 11:45
DISTRICT OF SOUTH CAROLINA
COLUMBIA, S.C.

September 12,2002

Mr. Larry W. Propes
Clerk of Court
U.S. District Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

Proposed Amendment to Local Rule 5.03

The Alliance of American Insurers is a national trade association representing the interests of more than 325 property-casualty insurance companies throughout the country. More than 30 Alliance members do business in South Carolina and in 2000, accounted for nearly eight percent of all property-casualty insurance written in the state.

The Alliance submits these comments in response to the Court's proposed amendment to Local Rule 5.03 that would prohibit the sealing of settlement agreements filed with the court. For the reasons outlined below, the Alliance strongly **opposes** this proposal.

- Every case should be evaluated independently on its own merits – a blanket "one-size-fits-all" approach is not conducive to the fair and equitable administration of justice.

- The discretion currently available to trial judges to seal settlements or not should be retained. Judges are in the best position to know, after having reviewed the evidence, whether a protective order is necessary. If a judge is convinced that disclosure is in the public interest, a protective order can be denied.

- In today's litigious environment where anyone can, and often is sued €orjust about anything, a settlement often represents a business decision to dispose of a case in the most economical manner possible. Thus, while a defendant's decision to settle a case should not be interpreted as an admission of guilt by a defendant, this is precisely the impression left with the public at large when they hear that a defendant settled a particular case for a certain sum of money. **As** a result, in the vast majority of cases, the potential for damage to a defendant's reputation and image is greatly outweighed by the public's need to know about a settlement.

- Making settlement amounts widely known drives up the cost of future settlements, ultimately translating into higher costs for goods and services. The practice could also spark additional litigation, specifically class action litigation, where abuse is already rampant.

3025 Highland Parkway, Suite 800 • Downers Grove, Illinois 60515
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- Defendants will more likely submit to trial rather than settle claims if settlement agreements could no longer be subject to a protective order. This in turn would further burden already overcrowded court dockets.

We appreciate the opportunity to submit comments on the proposed amendment. Please do not **hesitate** to **contact** me should you **have** any **questions or** desire any further information.

Sincerely,

Joyce E. Kraeger
Attorney – Regulation, Tax, Law & Claims

JEK:clb
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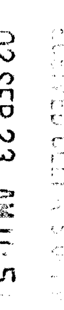
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.



September 19,2002

Larry W. Propes
Clerk of the Court
U.S. District Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Comment on August 1,2002 Proposed Local Rule 5.03 Amendment

Dear Mr. Propes:

Trial Lawyers for Public Justice ("TLPJ") respectfully submits the following comment on the proposed amendment to Local Rule 5.03, dated August 1,2002, which would prohibit the sealing of settlement agreements filed with the court. We wholeheartedly endorse the proposed amendment, which we welcome as an important step forward in the fight against unnecessary court secrecy.

Interest of TLPJ

TLPJ is a national public interest law firm dedicated to using trial lawyers' skills and approaches to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, and protection of the poor and the powerless.

TLPJ is also dedicated to ensuring the proper working of the civil justice system and open access to our courts. For over a decade, we have had a special project – "Project ACCESS" – that opposes unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of Project ACCESS, TLPJ has intervened in a wide variety of cases to fight for the public's right to know and has advised attorneys across the country on how to fight unnecessary secrecy in cases implicating public health, safety, and welfare.

Comment on Proposed Amendment to Rule 5.03

TLPJ supports the proposed amendment because it would ensure that the public has access to important information about the judiciary. Sealed settlements effectively censor such information, undermining the principles that lie at the core of our democracy. As James Madison wrote, "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own governors, must arm themselves with the power knowledge gives."[1]

[1] *Board of Ed. v. Pico*, 457 U.S. 853,867 (1982) (quoting James Madison, 9 Writings of James Madison 103 (G. Hunted. 1910)).

Reply to:
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Based on this historically rooted system of open government, courts have recognized that the public has a presumptive right to inspect and copy court **records.**[2] The proposed amendment comports with this right of access by allowing the public to view settlement documents filed in court, which are, by definition, judicial **records.**[3] **As** the Arkansas Supreme Court has held, once settling parties "seek the imprimatur of a court, . . . it becomes the public's **business.**"[4]

The proposed amendment would also confer a specific, vital benefit on the public by revealing information about hazardous products or dangerous patterns and practices that lie at the heart of litigation, thereby avoiding risks that would otherwise remain **unknown.**[5] **A** notorious example of the harm **caused** by **such hidden** dangers **is** the gruesome pattern of **injuries** and deaths on Bridgestone/Firestone tires, which confidential settlements kept hidden for almost a decade. **As** a result, millions of unsuspecting consumers continued to trust their lives to potentially deadly **tires.**[6]

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[2] *Nixon v. Warner Communications, Inc.*, 435 US. 589,597 (1978).

[3] ***Jessup v. Luther,* 277 F.3d 926, 929-30** (7th Cir *2002)* ("The **public has** an **interest in knowing what tenns** of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *In Re Polemar Constr. Ltd. Partnership,* 2001 WL 1450749, at * 2 (6th **Cir.** Nov. 6,2001) ("There is a strong public policy in favor of public access to judicial proceedings, most particularly as relates to a court's order or decree, embodying a settlement."); *SEC* **v.** *Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (noting that settlement filed in district court is judicial record to which presumption of public's common-law right of access applies); *EEOC v. Erection Co.,* 900 F.2d 168, 169-70 (9th Cir. 1990) (discussing presumption of access factors in reviewing propriety of sealing consent decree); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800* **F.2d 339, 345 (3d** Cu. **1986) ("Having undertaken to utilize the** judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke . . . confidentiality . . . . Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such **records."); *see also Brown v Advantage Eng'g, Inc* ,960 F 2d 1013, 1015-16** (1 1**th Cir 1992) (holding that** presumptive right of access applies to court records sealed pursuant to settlement).

Courts have held that the public right of access trumps the general argument that secrecy encourages settlement. *Brown,* 960 F.2d at 1016 ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement."); *Bank of Am. Nat'l Trust, 800* F.2d at 345 ("We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders."); *Arkansas Best Corp.* **v.** *General Elec. Capital* **Corp.**, 878 S.W.2d 708,712 (Ark. 1994) ("[M]ere encouragement of settlement is not a sufficient basis to overcome the public's right of access."); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) ("Neither the interests of parties in settling cases, nor the interests of **the federal courts in cleaning their dockets, can be said to outweigh** the important values manifested by freedom of information laws."); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.,* 1995 WL 262257, at *2 (E.D. La. May 4, 1995) (holding that Ford failed to specifically demonstrate how disclosure of the settlement agreements would hinder its ability to settle future personal injury lawsuits).

[4] *Arkansas Best Corp.,* 878 S.W.2d at 712.

[5] *See Ending Legal Secrecy,* N.Y. TIMES, September 5,2002, at A22; Martha Neil, *Confidential Settlements Scrutinized: Recent Events Bolster Proponents of Limiting Secret Case Resolutions,* 88 A.B.A. J. 20 (July 2002); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest,* 69 TEX. L. REV. 643,648-49 (1991).

[6] *See Cal. Bill* ***A.B.*** *881: Hearings before Judiciary Comm. of the California State Assembly* (Jan. 23,2002) (statement of Jane Kelly, Director, Public Citizen California office) (at www.citizen.org/congress/civjus/).

More recently, courts have facilitated secret settlements in sexual abuse cases brought against officials of the Catholic church, which hid important information relevant to children's safety. The Connecticut Superior Court, for example, recently admonished the lower courts of that state for participating in the "cover-up" of twenty-three sexual abuse cases against a local diocese by sealing files and delaying trials, "thus encouraging the plaintiffs to enter into settlement agreements containing confidentiality and non-disclosure provisions . . . ." *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 2002 WL 1837910, at *6 (Conn. Super. Ct. June 12,2002). Now, more than ever, courts cannot allow themselves to become unwitting accomplices to such hidden dangers.[7]

Conclusion

In Justice Brandeis' oft-quoted words, "Sunshine is . . . the best of disinfectants."' Access to settlements filed with the court would make the bench and bar accountable, help demystify the courl system, and promote the free flow of information that is so cherished in ow country. For the reasons set forth above, TLPJ respectfully urges the Committee to adopt the proposed amendment to the Local Rule 5.03. Please direct any questions regarding these comments to TLPJ Staff Attorney Rebecca E. Epstein, who can be reached at (202) 797-8600 (telephone), (202) 232-7203 (fax), or at repstein@tlpj.org.

Respectfully submitted,

Rebecca E. Epstein
Staff Attorney

[7] *Accord Equal Employment Opportunity Commission v. National Children's Ctr., Inc.*, 98 F.3d 1406 (D.C. Cir. 1996) ("[B]ecause the Center provides services to children and the alleged misconduct by the Center's staff in this case was of a sexual nature, the public interest in disclosure [of the settlement] **is** compelling."); *Gleba v. Daimler Chrysler Corp.*, 2001 Mass. Super. LEXIS 364 (Mass. Super. Ct. **Aug.** 6,2001) (refusing to approve sealing as condition of settlement because "such an . . . order would serve as a secrecy mechanism that conceals information of harmful products or practices from the public.") .

[8] Louis D. Brandeis, Other People's Money 67 (1933).

Center for Negotiation and Conflict Resolution
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September 6,2002

The Hon. Joseph F. Anderson, Jr.
U.S. District Court
Post Office Box 447
Columbia, **SC** 29202-0447

Dear Justice Anderson:

I noted, in yesterday's New York Times, the action taken by the federal district court to ban secret settlements **and** thought, as will be obvious that you might wish to see one view (if no doubt, many) that supports what you and your **colleague have done.**

Best wishes,

Linda Stamato (sd)

Linda Stamato
Deputy Director

Cc: Sanford M. Jaffe, Director

LS:sd

NY Times A1

Judges Seek to Ban Secret Settlements In South Carolina

By ADAM LIPTAK

South Carolina's 10 active federal trial judges have unanimously voted to ban secret legal settlements, saying such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors and sexually abusive priests.

"Here is a rare opportunity for our court to do the right thing," Chief Judge Joseph F. Anderson Jr. of United States District Court wrote to his colleagues, "and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies."

If the court formally adopts the rule, after a public comment period that ends Sept. 30, it will be the strictest ban on secrecy in settlements in the federal courts. Mary Squiers, who tracks individual federal courts' rules for the United States Judicial Conference, said only Michigan had a similar rule, which unseals secret settlements after two years. The conference is the administrative body for federal courts.

Judge Anderson said the new rule might save lives.

Some of the early Firestone tire cases were settled with court-or-

Continued on Page A13

PICK UP THIS SUNDAY'S NEW YORK TIMES AND look for the Summer Sundays ad in the Long Island section for your chance to win $200 toward dinner for two at Panama Hatties in Huntington. — ADVT.

In South Carolina, Judges Seek to Ban Secret Settlements

Continued From Page A1

United States District Court

South Carolina's federal trial judges have voted to ban secret legal settlements. Chief Judge Joseph F. Anderson Jr. (front row, second from right) calls the vote an "opportunity for our court to do the right thing."

dered secrecy agreements that kept the Firestone tire problem from coming to light until many years later," he wrote. "Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems."

Lawyers say the proposal, which was widely discussed at the American Bar Association's conference in Washington last month, is likely to be influential in other federal courts and in state courts, which often follow federal practice in procedural matters. In South Carolina, the state's chief justice has expressed great interest in the proposal.

The Catholic Church scandals are one reason for a renewed interest in the topic of secrecy in the courts, legal experts say.

"All reactions are going to be affected by the bureaucratic cover-your-cassock responses of the church hierarchy," said Edward H. Cooper, a law professor at the University of Michigan.

But some legal experts and industry groups say the blanket rule is unwise.

"The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing," said Arthur Miller, a law professor at Harvard and an expert in civil procedure. He said the ban on secret settlements would discourage people from filing suits and settling them, and threaten personal privacy and trade secrets.

Joyce E. Kraeger, a staff lawyer at the Alliance of American Insurers, said the current system, in which judges have discretion to approve sealed settlements or not, worked fine. "There shouldn't be a one-size-fits-all approach," Ms. Kraeger said.

Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, praised the South Carolina proposal. Mr. Newman said he regretted having participated in secret settlements in some early abuse cases. "It was a terrible mistake," he said, "and I think people were harmed by it."

Mr. Newman said a rule banning secret settlements, combined with the Internet, would create a powerful tool for lawyers seeking information on patterns of wrongful conduct.

The impact of such a ban could be lilted, however, if adopted only by federal courts. Most personal injury and product liability cases, and almost all claims of sexual abuse by clergy, are litigated in state courts.

Several states have laws and rules that limit secret settlements, typically in cases involving public safety. Florida, for instance, forbids court orders that have the effect of "concealing a public hazard."

Experts say many of those limits are difficult to enforce, particularly when every party to a case is urging the judge to approve a settlement. Indeed, Judge Anderson's colleagues rejected his proposal. which was limited to matters of public health and safety, in favor of a blanket ban.

The federal proposal in South Carolina has caught the attention of Jean Toal, the Chief justice of the South Carolina Supreme Court. Chief Justice Toal said that she would await the formal adoption of the rule before making her own proposal, but that the issue was important and timely.

An idea some call unwise but others say could save lives.

"I'm very intrigued about this," she said, noting that some of her interest arose from "recent claims involving pedophilia and sealed cases." Judge Anderson and Chief Justice Toal noted that a Columbia, S.C., newspaper, The State, had spurred their interest in the issue by publishing a series of articles on secret settlements by doctors repeatedly accused of medical malpractice.

Even under the South Carolina proposal, the settlement amount and the requirement that parties keep quiet could be placed in a private contract not filed with the court. If the contract were violated, a new lawsuit would be required to seek redress. A court-approved settlement, on the other hand, can be enforced by returning to the original judge for a contempt order.

"If they don't want the might and majesty of the court system to enforce their settlement, that's one thing," Chief Justice Toal said. "Sealing the economic terms of the settlement is only one part of it. We're often talking about sealing the entire public record of the case."

Opponents of the proposal argue that secrecy encourages settlements, which they say are desirable given limited court resources.

Judge Anderson told his colleagues that their court, at least, had available capacity. He wrote that the court had disposed of 3,856 civil cases in the previous 12 months, which included only 35 cases tried to a verdict.

"If the rule change I propose were enacted and it did result in two or three more jury trials per judge per year (which is far from certain)," Judge Anderson wrote, "I think we could handle the increased workload with little problem."

Robert A. Clifford, a Chicago lawyer who typically represents plaintiffs, scoffed at the notion that defendants would not settle without secrecy provisions, saying the alternative to a public settlement was a far more public trial.

"The undeniable fact is that the reason they want secrecy is so victim No. 2 does not find out what victim No. 1 got," Mr. Clifford said.

Ms. Kraeger, of the insurers alliance, did not dispute that. "Making that information widely known could have the effect of driving up litigation costs," she said.

Professor Miller emphasized that plaintiffs might not want to have their new wealth made public.

"There is a right not to enable every neighbor and business associate to know what you got," he said. "Would you want to receive calls from telemarketers who discover that you just got $1 million?"

In a forthcoming article in The Hofstra Law Review prompted by settlements in sexual abuse cases involving clergy, Stephen Gillers, a law professor at New York University, argues that confidentiality provisions that forbid victims to talk about their experiences amount to obstruction of justice and violate ethical rules governing lawyers.

Professor Gillers, though, would exclude settlement amounts, trade secrets and private information from any requirement that settlements be made public.

Judge Anderson was most concerned with the selling of secrecy as a commodity, he said in an interview, He recalled being told by a plaintiff's lawyer that the lawyer had obtained additional money for his client in exchange for the promise of secrecy.

"That's what really lit my fuse," the judge said. "It meant that secrecy was something bought and sold right under a judge's nose."

Alternatives

DIGEST

COMMENTARY
Sanford M. Jaffe and **Linda Stamato,** of the Rutgers' Center for Negotiation and Conflict Resolution in New Brunswick, N.J., urge courts and legislatures to act to bar most sealed settlement agreements. ..... **Page 171**

PRACTICE NOTES
In the second of two articles updating CPR Award winners on apologies in ADR. Gainesville. Fla.. law professor **Jonathan R. Cohen** suggests that rejecting apology out-of-hand makes for a poor defense strategy, and explains why. .... **Page 171**

MODEL RULES
The new revisions to CPR's nonadministered U.S. and international arbitration rules are explained by Simpson Thacher & Bartlett partner, **Robert H. Smit,** of New York. and CPR vice president **Kathleen M. Scanlon** .... **Page 172**

NEGOTIATION
An excerpt from the new Harvard University press book "Beyond Winning," by Harvard Law School Prof. **Robert H. Mnookin,** University of Colorado Law Prof. **Scott R. Peppet** of Boulder, Colo., and **Andrew S. Tulumello** of the Washington office of Gibson, Dunn & Crutcher. .... **Page 173**

ADR BRIEFS
President Clinton, ADR and Colombian politics, and more in ADR Briefs. .... **Page 176**

CPR NEWS
CPR names a new president, and more in CPR News. .... **Page 178**

DEPARTMENTS
ADR Briefs .... **Page 176**
Cartoon by Chase .... **Page 177**
CPR News .... **Page 178**
Index Info .... **Page 174 & 182**
Online Info ... **Page 175, 182 81186**

CPR INSTITUTE FOR DISPUTE RESOLUTION WWW.CPRADR.ORG VOL. 18, NO. 9 OCTOBER 2000

Settlement Secrecy Wrongly Hurts The Public's Right to Know

BY SANFORD M. JAFFE AND LINDA STAMATO

in the wake of accidents and deaths attributed to defects in certain tires, particularly those installed on Ford Motor Co.'s popular SUV model, the Explorer, Bridgestone/Firestone Inc. has recalled 6.5 million tires. Public outrage has not subsided despite the recall.

Why? Largely because of the significant delay in informing the public of the threat to its safety in the first place. According to press reports, cases involving Firestone tires occurred over an 8-year period. Some cases were settled with payments to plaintiffs along with signed agreements—by all involved—committing to secrecy not only the terms of the settlements but providing confidential protection for all documents, testimony and expert reports relating to them. Evidently, the public, including the National Highway Traffic Safety Administration, was among the last to know.

Confidentiality becomes controversial under these circumstances, raising, among other things, an important administration of justice issue: How should courts and legislatures treat settlements of cases alleging defects in products that may cause serious harm? After parties reach agreement. courts often are asked to dismiss the action and protect the documents. Judges approve such requests routinely.

(continued on page 175)

Encouragi pology Improves Lawyering and Dispute Resolution

BY JONATHAN R. COHEN

When the history of U.S. legal practice in the 21st century is written, what will be the pivotal subjects? The incorporation of U.S. law into international law? The o nership of patent rights to genetic materials? Unabated inequalities in legal representation between rich and poor? The tax treatment of electronic commerce?

Though at this point such prediction is only guesswork, a contender already is emerging: apology. More specifically, (i) whether lawyers talked with c ents about apology, and (ii) whether our legal system sought to encourage, rather than discourage, apologies after injuries.

There are many reasons to suspect that apology could play a much larger role in preventing and resolving legal disputes than it currently does. Suppose that a doctor makes a mistake that results n harm to a patient. Should the doctor apologize to the patient for his or her error, or should he or she remain silent?

Despite the ethical urge to apologize, based upon advice from their lawyers, hospital risk management boards, and insurance companies, many doctors say nothing–if you apologize, your apology will just be used against you as an admission of fault.

(continued on page 180)

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eweetbrook@rpwb.com

August **30,2002**

Honorable Larry W. Propes
Clerk of Court
United States District Court
1845 Assembly Street
Columbia, SC **29201**

Dear Honorable Clerk:

I write to voice my strong support for Chief Judge Joe Anderson's initiative to ban secret settlements in the district.

Having been a plaintiff's lawyer for **25** years, I have had first-hand experience with the **added costs and suffering that such secrecy agreements, and the related requirement to rcturn all** discovery documents, can cause. Perhaps the best example where I was recently involved was representing numerous states against the tobacco industry for Medicaid cost recovery. In the **course** of **those proceedings, we camc to learn that tlie tobacco industry had survived decades of** litigation unscathed by forcing each smoker to relitigate every issue from scratch.

The industry quickly learned that it could prevent a plaintiff from sharing information by refusing to produce any documents without secrecy agreements requiring their return upon completion of the litigation. Indeed, the industry gloated over its success, recognizing that most of the cases it won were not decisions on the merits, but were achieved by exhausting the plaintiffs' resources. In effect, the tobacco company defeated the judicial system, not simply the opposing party. Industry lawyers secretly patted themselves on the back for using the industry's superior resources to wear down opposing counsel:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

(See attached internal tobacco lawyer memo).

The argument has been made that if a defendant does not have a secrecy agreement option, it will not settle a case. If secrecy agreements are abolished, the ultimate decision to settle will return to its proper focus – the justified fear (sometimes on both sides) of a jury verdict. That is the way it should be. Legitimate uncertainty produces fair settlements.

I hope the Court will finalize the rule, recognizing that in lawsuit settlements, as in many other areas of life, sunshine is the best disinfectant.

Respectfully,

Edward J. **Westbrook**
ewestbrook@,rpwb.com

EJW/kag
cc: Honorable Joseph F. Anderson, Jr.

ATTORNEY WORK PRODUCT
CONFIDENTIAL/PRIVILEGED

MEMORANDUM

TO: S&H ATTORNEYS

FROM: MIKE JORDAN

DATE: APRIL 29, 1988

SUBJ: JOHN ROBINSON'S CALIFORNIA CASES

Although it is not confirmed in writing at this point, during the week of April 25 John Robinson agreed to dismiss his cases against the tobacco industry. Presently I am unsure as to the mechanics of the dismissal, but I suspect that we will receive orders of dismissal in cases filed by John solely, whether served or unserved. I do not know whether this agreement extends to cases filed jointly by John Robinson and George Kilbourne: Brown and Sutton.

Thus Fleming I and II, Monthei, Quandt, Shrum, Whitner, Chidester, Daffron, Dever and Gillespie should be officially ending soon.

This agreement seems to be the result of two factors. First, the California Supreme Court recently ruled that Proposition 51, the proposition that affected joint and several liability, was not retroactive. This meant that asbestos plaintiffs' lawyers could satisfy their entire judgment from any solvent asbestos company, thus eliminating the need to have tobacco as a party to bear a pro rata share. Secondly, the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

JMJ:jp

cc: Control Central

COMMON CAUSE OF SOUTH CAROLINA

RECEIVED CLERK'S OFFICE
02 AUG 29 AM 11:09
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA, S.C.

Mr. Larry W. Propes
Clerk of Court
United States District Court
1845 Assembly Street
PO Box 447
Columbia, SC 29201

September 1, 2002

RE: Proposed Amendment to Local Rule 5.03

Dear Mr. Propes:

Common Cause/South Carolina hereby submits its comment in support of proposed Rule 5.03. This comment was approved by the Executive Committee of our Board of Directors.

Our organization is a public interest group with over eight hundred members in South Carolina which was established over twenty years ago. We advocate open, responsive, and accountable government at the local, state, and national levels. We believe that the public should receive as much information about the workings of government as is practical.

We endorse the proposed rule because it is in accord with our interest in opening up to public scrutiny the work of our federal courts. We believe that our courts should not promote or facilitate secrecy of legal matters brought before the judiciary.

It is especially important that legal matters relating to public safety and the expenditure of public funds be made known to the public. We support the proposal to not seal settlements in cases involving product liability, professional malpractice, and public monies, as well as in all other cases.

We do not support any exceptions which would allow the sealing of settlements as such exceptions would be difficult to fashion and implement.

Common Cause/South Carolina wishes to thank Judge Joseph F. Anderson, Jr. for the leadership that he has provided on this important issue and the beneficial effect that this proposal has already had not only on other federal judges, but also on the South Carolina Supreme Court.

Sincerely,

John V. Crangle
Executive Director

P.O. BOX 7021 • COLUMBIA, S.C. 29202 • (803) 799-0706 (OFFICE) •

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www.bjglaw.com

02 AUG -5 AM 11:59
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA, S.C.

August 1, 2002

The Honorable Larry W. Propes
Clerk of U.S. District Court
1845 Assembly Street
Columbia, South Carolina 29201-2431

Re: Proposed Amendment to Rule 5.03

Dear Mr. Propes:

I have read various documents concerning the unanimous vote of South Carolina's ten Federal Judges to place an outright and absolute ban on sealed court sanctioned settlements. While I certainly have the highest respect for these judges, I question the necessity and reasonableness for such an absolute ban.

For many years I have practiced in the litigation areas of professional liability and products liability. On several occasions it has become appropriate and desirable for both parties to enter into a settlement which is sealed by the consent of the parties and the court. My experience is that in the course of negotiation toward settlement, many factors come into play on the side of both the plaintiff and the defendant which make such an agreement desirable. There are numerous reasons why either side might want to avoid publicity of an agreement reached between them. Most of the time these reasons are not a reflection of any ulterior motive to deprive those who need to know of information which would be beneficial to the public. It occurs to me that when parties have a disagreement they should be allowed to reach any accord suitable to both sides as long as it is not unlawful, immoral, or against public policy. Certainly there are reasons in certain cases which would be acceptable to a court for sealing settlements which do not violate any of the above three criteria.

As you are well-aware, given the changing nature of complex litigation in the 21st century, having rules which are "absolute" may make difficult the achievement of justice and accord between the parties in certain cases, I am one attorney involved in these types of cases who is perfectly willing to trust the judgment and discretion of a judge in these matters. It is my firm belief that while some guidelines regarding the sealing of a settlement are probably appropriate and necessary, an absolute ban on such settlements might, in some cases, infringe on the rights and desires of the litigants and perform no useful judicial purpose.

I would hope that the Judges of the South Carolina Federal **Court** would revisit their position with regard to the "absolute" ban and work toward documented guidelines to assist **a** judge in the exercise of his discretion.

I appreciate the opportunity to comment on this matter. Should you have any questions or desire any other comment, please feel free to contact me.

With best regards, I remain

Verytruly yours,

BETHEA, JORDAN & GRIFFIN, P.A.

Hutson S. Davis, Jr.

HSBJr:dac
c: Richard **S.** Rosen, Esquire
S.C. Defense Trial Lawyers Association

{73555.1}

WILLIAM A KESTER

108 Windward Court
Pendleton, SC 29670

August 3, 2002

U.S. Clerk of Court
1845 Assembly St.
Columbia, SC 29201

REF: Proposal To Ban Secret Court Decisions

Dear Clerk of Court:

Please record my strong support of the proposal to ban secrecy of federal court decisions. There is no justice when it is hidden from our citizens. Hopefully this ban will also be extended to state decisions.

Sincerely,

William A. Kester

2600 River Road, Des Plaines, IL 600153236

GREGORY LACOST
COUNSEL

September 30,2002

Via Fax: 803/765-5469 &
Regular Mail

Larry W. Propes
Clerk of Court
US District Court
1845 Assembly Street
Columbia, SC 29202

Dear Mr. Propes:

This letter is submitted in response to the Court's invitation for public comment concerning the proposed amendment to Local Rule 5.03 D.S.C. I am writing on behalf of the National Association of Independent insurers (NAII), the nation's largest full-service property and casualty trade association, representing more than 715 members. Our organization opposes the proposed amendment for the reasons set forth in this letter.

Any discussion of confidentiality in the context of settlement agreements requires consideration of various competing interests. While public access to court proceedings must be assured, there are well-recognized situations where the public's right to know is outweighed by a litigant's legitimate right to privacy. See, e.g., Fed. R.Civ. P.26(c) [1] In most cases, at least one party's participation in the litigation process is involuntary, and there are no effective safeguards to ensure that a lawsuit is meritorious before a party is forced to participate in discovery. We all know that most cases are settled, many times for reasons unrelated to the merits of the claim asserted by the plaintiff, Among the many reasons parties may choose settlement is the desire to avoid the public display of a trial. In those and many other cases, assurance of confidentiality is a very important component of any settlement, and it may be critical to a party's desire to settle for reasons wholly unrelated to avoiding future suits by other plaintiffs. The proposed amendment under consideration deprives litigants of that assurance of confidentiality.

The implication in recent media reports on this issue is that the current practice somehow endangers public safety by "hiding" important information. That implication is unfounded. Any such a conclusion is contrary to studies by the Rules Committee of the United States Judicial Conference, practical experience, and conclusions of scholarly articles on the subject. The right of public access to court proceedings is to ensure the appropriate functioning of the court system. not to require public dissemination of private information the parties have agreed to protect.

[1] The importance of preserving the integrity of protective orders is addressed in the attached copy of my letter dated July 23,2002 to Judge Joe Anderson.

Phone: (847) 297-7800 FAX: (847) 297-5064
Web site: http://www.naii.org

In most cases, the only information contained in a settlement agreement is the fact that the parties have agreed to resolve their differences in consideration for the payment of money, While most agreements also state that settlement is not to be construed as an admission of fault (and is not, as a matter of law), it is well recognized that this is the very implication that arises from public reporting of the settlement of a case. What interest is served by the court's refusal to enforce an agreement of confidentiality between litigants'!

We are aware of statements that have been made by the Chief Judge to the effect that this proposed rule would have no effect on settlement agreements between parties where the court is not asked to get involved. Admittedly, this would account for the vast majority of settlement agreements because very few settlements require court sanction. The concern, however, is that if court expressly refused to sanction confidential settlement agreements, litigants would have no forum in which to enforce valid contractual confidentiality obligations when breached by a party to a settlement contract. Such a rule would effectively emasculate any right of privacy that litigants have heretofore enjoyed. It would also deter many settlements, which is contrary to the interests of the.parties, the courts, and the public.

Based upon the foregoing, our organization would strongly urge the Court to decline to adopt the proposed rule amendment. We believe the current local rule 5.03 allows the proper exercise of balanced discretion by the court and permits the protection of the interests of all litigants while at the same time ensuring that litigation is conducted in an open forum.

Thank you for allowing me to comment on this important matter. Please feel free to contact me with any questions you may have. Additionally, I look forward to any comments you may have on this matter,

Very truly,

Gregory LaCost

GLC/oms

National Association of Independent Insurers

2600 River Road, Des Plaines, IL 60018-3286

GREGORY LACOST
COUNSEL

September 30, 2002

Via Fax: 803/765-5469 &
Regular Mail

Larry W. Propes
Clerk of court
US District Court
1845 Assembly Street
Columbia, SC 29202

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[1] The importance of preserving the integrity of protective orders is addressed in the attached copy of my letter dated July 23, 2002 to Judge Joe Anderson.

Phone: (847) 187-7800 FAX: (847) 2975064
Web site: http://www. naii.org

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Based upon the foregoing, our organization would strongly urge the Court to decline to adopt the proposed rule amendment. We believe the current local rule 5.03 allows the proper exercise of balanced discretion by the court and permits the protection of the interests of all litigants while at the same time ensuring that litigation is conducted in an open forum.

Thank you for allowing me to comment on this important matter. Please feel free to contact me with any questions you may have. Additionally, I look forward to any comments you may have on this matter.

Very truly,

Gregory LaCost

GLC/oms

2600 River Road. Des Plaines, IL 60018-3286

ROBERT L. ZEMAN
SENIOR VICE PRESIDENT
STATE GOVERNMENT AFFAIRS

July 23, 2002

The Honorable Joseph F. Anderson, Jr.
United States District Court for the District of South Carolina
1845 Assembly Street
Columbia, SC 29202-0447

RE: Proposed Amendment to Local Rule *5.03*

Dear Judge Anderson:

I am writing on behalf of the National Association of Independent Insurers (NAII), the nation's largest full-service property and casualty trade association, representing more than 700 members. We understand that the Court is considering an amendment to Local Rule 5.03 **D.S.C.** that may limit the discretion of the District Judge in sealing court records and settlements, at least in cases involving public safety. We would appreciate the Court's consideration of this letter betting forth our organization's opposition to the proposal.

Although the Court has only indicated an intent to reexamine rules relating to confidential settlements and sealed court records, our organization is concerned over the implications any restrictions may have for protective orders issued during the course of discovery. Through discovery procedures, a litigant can compel production of materials of a highly sensitive and confidential nature such as trade *secrets* and other proprietary materials. Rule 26(c) sets forth a procedure whereby the Court can issue "any order which justice requires" upon a showing of "good cause" to provide proper protection of the material from public dissemination, etc Simply because material subject to a protective order is filed with the Court in conjunction with a dispositive motion or other proceeding does not make it any less confidential, and the Court should maintain discretion to extend the protection of these materials by sealing a portion of the Court's records. To restrict that discretionary power would only serve to diminish the substantial safeguards provided by Rule 26(c).

A proposal to similarly limit the discretionary power of District Courts to issue protective orders in matters affecting "the protection of public health or safety" was considered and rejected by the Advisory Committee on Civil Rules of the Judicial Conference of the United States. (See letter of March *23,* 1998 from the Honorable Paul V. Niemeycr, Committee Chairman to Representative Henry J. Hyde, Chairman, Committee on the Judiciary of the United States House of Representatives.) This committee conducted a "serious study of protective order practices . . . in response to pending legislation." According to the report of the committee, These studies all

suggested that there is no need to make it more difficult to issue discovery protective orders. The studies generally showed:

- That there is no evidence that protective orders in fact create any significant problem in concealing information about public hazards or in impeding efficient sharing of discovery information;

- That much information can be gathered from parties and nonparties during discovery that no one would have a right to learn outside the needs of a particular lawsuit;

- That discovery would become more burdensome and costly if the parties can not reasonably rely on protective orders; and

- That administration of a rule creating broader rights of public access would impose great burdens on the court system."

We would urge this Court to adopt the reasoning of Judge Niemeyer and his committee members in declining to further restrict the important safeguards provided by protective orders.

The United States Supreme Court has concluded that trial courts *must* have the discretion to enter protective orders, "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1j, it is ***necessary*** for the trial court to have the authority to issue protective orders conferred by Rule 26(c)." *Seattle Times Co. v. Rhinehart*, **467 U.S 20, 34** (1984) (emphasis **added).** "It is clear from experience that pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Id.* at **34.**

Such protective orders do not implicate any First Amendment interests of the public. **As** the Supreme Court recognized in *Seattle **Times,*** there exists no unfettered right of public access to discovery materials. Discovery materials and proceedings

> are not public components of a civil trial. Such proceedings were not open to the public at common **law,** and, in general, they are conducted in private as a matter of modern practice. Much of the infomation that surfaces during pretrial discovery may be unrelated, or only tangentially related, *to the* **underlying** cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of infomation.

467 **U.S** at 33 (citations omitted).

Moreover, it is commonly recognized that protective orders are warranted to limit use of discovery materials to the litigation in which they were produced: "The courts are empowered to issue protective orders on a good cause showing that a party intends to use the discovery for a purpose unrelated to settlement or trial preparation of the case in which the discovery is taken or requested." 6 James Wm. Moore, *Moore's Federal Practice* § 26.101[1][b], at 26-241 (3d ed. 2002). To the extent that courts have endorsed sharing of discovery as a matter of efficiency, they have recognized that the proper approach is to enter the protective order, and then allow actual litigants in other cases who need the information for another action to appear and seek a modification of the protective order that allows them access under a similar protective order while still preserving the confidentiality of the information.

It could also be argued that the proposed limitations may run afoul of Rule 83 of the Federal Rules of Civil Procedure. Rule 83 provides that local rules adopted by district courts must be consistent with the Federal Rules of Civil Procedure and Acts of Congress. "The idea [of Rule 83] was *not* to enable local courts to diverge in significant ways from the national scheme embodied in the Civil Rules." 12 Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3151 (2d ed. 1997). The United States Supreme Court has held that where the subject is "weighty" and "complex," and of "great importance to litigants," it is not suitable for resolution by local rule. *Miner v. Atlass*, 363 U.S. 641, 641 (1960). The proper method for determining whether a local rule is inconsistent with a Federal Rule of Civil Procedure is to inquire, first, whether the two rules are textually inconsistent and, second, whether the local rule subverts the overall purpose of the Federal Rule. *See Whitehouse v. U.S. Dist. Ct.*, 53 F.3d 1349, 1355, 1363 (1st Cir 1995). The fact that Congress, in consultation with the Judicial Conference recently considered and rejected similar limitations militates against adopting a restrictive rule in this district,

In summary, the Districts Courts must have discretion to enter protective orders under Federal Rule 26(c) in order to balance the confidentiality interests of the producing party against the interests of the opposing party in obtaining discovery in order to conduct the instant litigation Any rule that would limit the discretion of the District Court to carry the force and effect of protective orders beyond the termination of the particular litigation would unnecessarily water down the impact of protective orders and diminish their balancing effect. Accordingly, we respectfully request the Court not to further amend the local rules in a manner that would take away this important protection for litigants,

Very truly yours,

Robert L. Zeman

RLZ\oms
H:\Legal\LnCost\SC\Ltr 07-23-02 Anderson

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DATE: September 30, 2002

TO:

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Larry E. Propes Clerk of the Court U.S. District Court	(803)765-5469	

FROM: Michael K. Brown DIRECT DIAL: (213) 457-8018

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September 30, 2002

VIA FACSIMILE (803) 765-5469

Larry E. Propes
Clerk of the Court
U.S. District Court
1845 Assembly Street
Columbia, South Carolina

Dear Mr. Propes:

I am writing to comment on proposed changes to Local Rule 5.03 regarding the filing ot documents under seal.[1] Although substantive law regarding when federal courts is well-settled [see, *e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)], we believe Local Rule 5.03 is an appropriate method for laying out the procedural ground rules for how and when issues relating to the court record sealing are to be raised and decided.

Because of the limited procedural purpose of local rules of court, we feel it important to note that the Federal Judicial Conforonco has studied how confidentiality in litigation works in practice, including whether

---

[1] By way of background, our firm Is a California firm of approximately 210 lawyers throughout the state and we have, for many years, represented companies in disputes which required the disclosure of confidential and proprietary informadon, including trade secrets, which needed the issuance of a Protective Order. We also have been involved in many cases where the terms of the settlement needed to remain confidential. I have been personally involved for several years in analyzing proposed legislation concerning protective orders and confidential settlements in several states and I have testified on several occasions before the California Legislature concerning these topics.

confidential settlement agreements (filed with the court) are misused, and concluded that no substantive change in the law was required. See, Report of Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, March 23, 1998 (Justice Paul V. Niemeyer, U.S. Court of Appeals).

To that end, we trust that the Court intends Local Rule 5.03 to be a the procedural mechanism by which litigants may move for the sealing of court records, one that also ensures adequate briefing on the issues that existing substantive law allow federal judges to weigh as they exercise their discretion to seal records.

Nevertheless, there are two issues concerning with the proposed changes to Local Rule 5.03 which we feel are problematic and should be revisited. The first is new subparagraph (B), which would allow non-parties to intervene in an action to object to a motion to seal documents filed with the court.

Subparagraph (B) appears to run afoul of controlling federal law in several respects. First, by mandating a role for non-parties in actively opposing sealing issues (and being bound by the court's ruling), subparagraph (B) impermissibly conflicts with Federal Rule of Civil Procedure 24, which requires non-parties to seek leave to intervene.

Moreover, because subparagraph (B) purports to mandate a role for non-parties on sealing issues, it also appears to violate the Constitution, which requires that parties seeking to intervene have Article III standing. See Diamond *v. Charles,* 476 U.S. 54, 68-69 (1986)(noting that standing may be required for party sought to be added through permissive joinder); Sokagan Chippewa Community *v. Babbitt,* 214 F.3d 941, 946 (7th Cir. 2000)(noting split in circuits over whether parties intervening as of right must have Article III standing).

Because of these fundamental problems, we respectfully request that Subparagraph (B) not be adopted. If, in a given case, a non-party wishes to weigh in on the sealing of a court record, existing amicus *curiae* procedures allow that party to seek leave to file a brief, without conferring them a

participatory role not permitted them by the Federal Rules or the Constitution.

The second problem with the proposed changes to Local Rule 5.03 is in subparagraph (A). We have no doubt that the briefing considerations listed in that subparagraph are not intended to alter substantive law on the propriety of sealing court records or limit the discretion judges possess in deciding whether to seal court records. We are concerned, however, that the list in subparagraph (A) may overemphasize the factors weighing against the sealing of court records, while glossing over factors – such as privacy concerns – that justify the sealing of such records. Thus, subparagraph (A) appears to create a risk that judges will decide sealing issues under the wrong substantive legal standard. We accordingly request that this subparagraph be further revised to more strongly acknowledge the propriety of sealing court records when an appropriate showing has been made.

I would be pleased to discuss these issues further with you or the other members of the Court.

Very truly yours,

Michael K. Brown

MKB:gsa

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FACSIMILE TRANSMISSION SHEET

TO: Larry Propes 803-765-5469

NUMBER OF PAGES INCLUDING COVER SHEET: 5

FROM: Henry B. Smythe, Jr., Esquire (Direct Dial 843-720-4607)

SENDER: Kathy S. Hall

DATE: September 30, 2002 File No. 9407.0000

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ADDITIONAL COMMENTS:

Buist · Moore · Smythe · McGee · P.A.

September 30,2002

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BY FACSIMILE AND FIRST CLASS MAIL
Larry W. Propes
Clerk of Court
1845 Assembly Street
Columbia, SC 29201

Dear Mr. Propes:

This letter is in response to your invitation for public comment on the proposed amendment to Local Rule 5.03. I wrote a previous letter dated July 24, 2002 (copy of which is enclosed) to Judge Joseph Anderson stating my position on the sealing of the records to protect confidentiality of settlements. in this letter, I am responding as a lawyer who practices primarily in the product liability area representing manufacturers and as a member of Product Liability Advisory Council, an organization which prepares and submits briefs amicus curiae to federal and state courts in cases involving significant product liability issues. I have also represented Firestone in the federal and state courts of South Carolina for about twenty-five years.

I have had considerable experience with the issues relating to the proposed amendment to Local Rule *5.03* as it now exists. I remain convinced that further amendments to Local Rule 5.03 are not necessary or appropriate. However, I have become aware of what may well be a recommendation by the District Court advisory Committee to the judges regarding what may be a more appropriate amendment to Rule 5.03. If there is to be a change, I am in agreement that the recommendation of the Advisory Committee is preferrable, subject to two caveats:

1. Any reference to the "public interest" in Rule 5.03 be understood to preserve the judge's discretion to balance evenhandedly any public interest in disclosure against the interests of private litigants in privacy and confidentiality; and

2. Any provision permitting non-parties to intervene in proceedings to seal or unseal court records should be permissive, not mandatory, and should require a showing of good cause to intervene.

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As I understand it, the Advisory Committee's proposal would answer the concerns expressed about the current rule without abolishing the discretion of the trial judge.

Yours very truly,

Henry B. Smythe, Jr.

HBSjr./ksh

BUIST, MOORE, SMYTHE & McGEE, P. A.

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July 24, 2002

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BY FACSIMILE
The Honorable Joseph F. Anderson, Jr.
U. S. District Judge
U. S. Dismct Court for District of SC
P. O. Box 447
Columbia, SC 29202-0447

RE: Court-Ordered Secrecy Agreements

Dear Judge Anderson:

The letter is in response to your request for input on a proposed local rule change to be discussed at a meeting with the other judges on July 26,2002. I am writing to express my views as a lawyer who practices primarily in the product liability area representing manufacturers and as a member of Product Liability Advisory Council. an organization which prepares and submits briefs amicus curiae to federal and state courts in cases involving significant product liability issues. I have also represented Firestone in the federal and state courts of South Carolina for about twenty-five years.

After considering the matters addressed in your letter of June 24,2002 to the South Carolina U. S. District Court Judges, I urge that a further amendment of Local Rule 5.03 prohibiting all court-ordered secrecy agreements or, alternatively, suggesting that secrecy agreements are "strongly disfavored" not be adopted. I strongly support the present system which allows the individual judge the discrstion to balance competing factors in each individual case with regard to whether to allow a confidential secrecy agreement.

Our system is likely to do a better job addressing these issues if the judge and the parties are allowed on a case-by-case basis to fashion appropriate agreements taking into account the facts and

nesds of the parties and the public. As your letter to the judges indicates, the judiciary is sensitized to the need for appropriate scrutiny to ensure that the public safety is considered as part of the equation in matters relating to secrecy agreements. The strict requirements of Local Rule 5.03 ensure that a file would be sealed only after careful consideration and with justification acceptable to the court.

In my experience, confidentiality of settlements is often an important factor for the plaintiff as well as the defendant in negotiating the settlement of a case. Privacy issues should continue to be considered as the court balances the various interests. The judge should retain the present discretion to control whether private information is to he disclosed to the public. The absence of confidentiality would impede settlement of some cases.

Product manufacturers are required to report information relating to the public safety to regulatory agencies, such as NHTSA, before products are placed on the market, as well as after. For example, existing law gives NHTSA broad authority to seek information about claims and litigation. While the courts should consider public safety in connection with proposed secrecy agreements, they should not take on the role of regulatory agencies.

Because Firestone is mentioned in your letter of June 24, 2002. I would like to address Firestone's settlement policy in South Carolina as it is known to me: Firestone seeh protective orders for trade secret and proprietary information where appropriate. If the court agrees, this information generally remains protected after a settlement. Although I do not have the ability to review all of the old files, I believe Firestone has not sought to seal a file handled by this office since at least 1985. The standard settlement agreement contains a confidentiality clause protecting only information regarding "the terms of the settlement and the amount of money paid."

In summary, there are rules and standards in place which allow an appropriate balancing of the interests of privacy aid the public interest. Removing the discretion of the judge to inquire into these matters and fashion an appropriate order for the particular case would be an unwarranted step.

Thank you for the opportunity to submit these comments.

Yours very truly,

HBSjr./ksh

Henry B. Sinythc, Jr.

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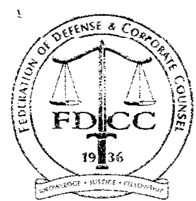

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September 26,2002

Via Overnight Delivew

The Honorable Joseph F. Anderson, Jr.
Chief Judge
United States District Court
1845 Assembly Street
Columbia, SC 29201

RE: Court-Ordered Secrecy Agreements

Dear Judge Anderson:

This letter is in response to your request for input on a proposed local rule change regarding the sealing of confidential settlement agreements filed with the court. I am responding as the President of the Federation of Defense and Corporate Counsel.

The Federation is a professional organization consisting of lawyers actively engaged in the private practice of law who devote a substantial amount of their professional time in the defense of civil litigation, as well as corporate counsel and other executives engaged in risk management and the defense of claims. Election is by peer review and membership of lawyers in private practice is limited to 1000. Current membership is slightly over 1300 and includes members from each of the United States plus Australia, Canada, Europe, Puerto Rico and other areas.

Many Federation members have had the opportunity to deal with the issues relating to protecting privacy and confidentiality in litigation. Our organization is firmly committed to the belief that judges need wide discretion to protect personal privacy and confidential proprietary information and that to inhibit the exercise of that discretion would not be in the public interest.

Settlement agreements filed in court often contain personal, sensitive information. Disclosure of such infomation should not be required unless there is a balanced consideration of the interests of privacy and property versus disclosure in a particular case on a full record. To do otherwise, for example by an inflexible rule or presumption, would deprive litigants of the privacy and property rights guaranteed to them by the United States Constitution.

It is significant that after studying both sealing order and protective order practice since 1992, the Judicial Conference, its Rules Committees, and the Federal Judicial Center concluded that there was no need for change. Judge Paul V. Niemeyer, then Chair, Civil Rules Advisory Committee of the Judicial Conference, to the Chair of the U.S. House Judiciary Committee stated: "A number of experts on the subject have concluded that information sufficient to protect the public health and safety has always been available from other sources. The advisory committee has studied this matter carefully and concluded that no change to the present protective order practice is warranted." Courts have broad discretion to balance the competing goals of promoting openness and protecting legitimate interests in privacy and confidentiality when information is sealed upon settlement, as well as when the production of confidential information is compelled in the course of litigation. Regulatory agencies already have the power to obtain information from companies about matters affecting "public health and safety." Federal statutes already require regulated industries to provide a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. Sealing of settlement agreements does no harm to the public interest.

Furthermore, the Judicial Conference Rules Advisory Committee also considered (at its April 28-29, 1994 meeting) the propriety of adopting a rule dealing with orders limiting public access to judicial records or proceedings (including sealed settlements) and decided against proceeding to study such a rule. Since that time, they have seen no need to revisit the issue.

The recent amendment of Local Rule 5.03 would seem to answer any need to revisit the subject, particularly in view of the Judicial Conference's "Local Rules Project" and its actions on confidentiality orders. As Professor Miller noted in his Traveling Courthouse Circuses article:

> "High-profile lawsuits sell ... [but] judges would not permit litigants to conceal information about an unknown threat to public health and safety simply to clear a law-suit from their dockets. And my own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial

Professor Miller concluded: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process."

Thank you for the opportunity to address the concerns of the Federation with you regarding the proposed amendment to Local Rule 5.03.

Very truly yours,

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September 27, 2002

The Honorable Joseph F. Anderson, Jr.
District Court Judge
United States District Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Court-Ordered Secrecy Agreements

Dear Judge Anderson:

I note your proposed rule and that the comment period expires at the end of the month. For the record, I continue to adhere to the views stated in my letter to you of July 11, a copy of which is enclosed.

Thanks for giving me a an opportunity to be heard.

With kindest regards,

Sincerely yours,

John Freeman

John P. Freeman
Professor of Law

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July 11,2002

The Honorable Joseph F. Anderson, Jr.
District Court Judge
United States District Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Court-Ordered Secrecy Agreements

Dem Judgc Andcrson:

Thanks for inviting me to comment on the issue of court-ordered secrecy agreements which is currently under review by our district court Judges.

Your letter of June 24 to the various district court judges does a good job of laying out the different positions on the issue. You, your fellow judges, and the other persons you invited to comment all have more experience dealing with confidentiality agreements and orders than I do. In this field, you folks are the experts more than me. On the other hand, it will come as no surprise to you that I have some views on the subject, which I am glad to have a chance to share.

As you point out, a confidentiality agreement that hides from public view very material information inherently is suspect. Though I am all in favor of seeing cases settle, I also believe that lawyers' ability to sweep dirt under the rug and keep it there is limited. So is lawyers' and litigants' ability to enlist the judiciary as accomplices in taking anti-social action.

I appreciate that one strong argument in favor of confidentiality agreements and orders sealing documents is that such action makes settlements easier in some cases. There is a dimension that needs scrutiny, however. That dimension relates to the propriety of the underlying settlement-confidentiality agreement from which the order sealing records springs.

I am concerned about the ethical propriety of l wyers agreeing to contracts that are illeg l or which contravene public policy. A reason for being skeptical about orders sealing documents where the public interest is involved is that the court's action may be a part of a transaction that is illegal or otherwise offends public policy. Let me develop this concept.

One form of illegal contract is a compounding agreement. It is not clear how a lawyer or litigant can square strong confidentiality clauses in settlement agreements involving egregious misconduct by defendants with the crime of "compounding." ***Black's Law*** *Dictionary* **259** (5th ed. 1979) defines "compounding crime" as follows:

> Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offense at common law, and under the typical compounding statute; (1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration.
>
> The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute.
>
> The offense of taking a reward for forbearing to prosecute a felony; as where a party robbed takes his goods again, or other amends, upon an agreement not to prosecute.

Compounding crime is forbidden in South Carolina. **A** compounding agreement is illegal. S.C. Code **Ann.** § 16-9-370 (1980) reads:

> Any person who, knowing of the commission of an offense, takes any money or reward, upon an agreement or undertaking expressed or implied, to compound or conceal such offense or not to prosecute or give evidence shall:
>
> > (a) If such offense is a felony be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or imprisoned not more than one year, or both;

> (b) If such offense is a misdemeanor be deemed guilty of a misdemeanor and upon conviction be fined not more than one hundred dollars or imprisoned not more than three months or both.'

It is true that many requests presented to a court to seal evidence are not part of a compounding agreement reached by the litigants. On the other hand, undeniably many of the wrongs people sue over in civil cases involve some form of conduct that would support a criminal prosecution. These include investment fraud, breach of trust, embezzlement, mail fraud and wire fraud. The risk compounding poses for lawyers was forcefully driven home by the famous ethics case of ***In re Himmel,*** 125 Ill.2d 531, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988). Himmel represented a woman injured in a motorcycle wreck who sought to recover from her former attorney, Casey, $23,233.34, which was her share of a $35,000 settlement Casey had negotiated on her behalf.

Himmel conducted an investigation which included contacts with the insurance company that paid the money, its counsel, and Casey. After studying the situation, Himmel concluded that Casey had stolen the client's funds. The client specifically directed Himmel to take no further action against Casey other than to get her money. Himmel then negotiated a settlement by which Casey agreed to pay the client $75,000 and in return the client agreed not to file a criminal, civil, or disciplinary complaint against Casey. Had Casey paid the money, Himmel would have received one-third of the settlement as his fee. Casey failed to perform, leaving Himmel with no choice but to sue him.

Himmel subsequently obtained a $100,000 judgment against Casey, which eventually translated into a $10,400 payment to the client, and zero dollars for Himmel. Himmel did not report Casey's misconduct to the Illinois Grievance Board. At the time, Illinois had in effect the Code of Professional Responsibility, DR 1-103(a) of which called for mandatory reporting by lawyers of their unprivileged knowledge of another lawyer's unethical behavior.

Casey was disbarred for other misconduct. In the course of disbarring Casey, the Illinois investigators learned of Himmel's litigation, and about the attempted confidential settlement agreement. Himmel was charged with violating DR 1-103(a). The hearing board found that he violated the provision and recommended a private reprimand. The Reviewing Board recommended dismissal. The Illinois Supreme Court weighed the evidence, which included proof that (1) Himmel had never had a grievance against him in over 10 years of practice; (2) he never took a fee for his work on behalf of Casey's victim; (3) he had been instructed by his client

---

[1] It is noteworthy that the Model Penal Code's compounding provision gives victims an "affirmative defense" to prosecution so long as the pecuniary benefit they receive as part of the bargain does not exceed what was due them as restitution or indemnification. ***Id.*** $242.5. No such affirmative defense is present in South Carolina's formulation.

not to report Casey; (4) he thought his client had reported Casey; (5) he believed that his information about Casey was privileged and hence not subject to the mandatory reporting DR 1-103(a)'s mandatory reporting requirement. The Illinois Supreme Court suspended Casey for a year.

The court announced that it was "particularly disturbed," by proof that Himmel chose to try to settle with Casey and give him confidentiality rather than make the mandatory report. The court held that by doing this,

> both respondent and his client ran afoul of the [Illinois] Criminal Code's prohibition against compounding **a** crime, which states in section 32-1: **"(a) A** person compounds a Crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of the offender. (b) Sentence. Compounding a Crime as a petty offense."

The court pointed out that "both respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion."

Himmel's reliance on the Illinois compounding statute was a wake-up call for lawyers. One can safely assume that when *Himmel* came down, few lawyers were aware whether the crime of compounding was on the books in the state in which they practiced, and fewer still or appreciated the consequences of the statute if it were. Because South Carolina is a state with a compounding statute, several consequences are immediately evident.

One is that if **a** settlement agreement (like the **one** in *Himmel*) **gives** rise to the compounding offense, then the confidentiality agreement is unenforceable. In *Jacbon v. Bi-Lo Stores, Inc.*, 437 S.E.2d 168, 170 (S.C. App. 1993), the Court of Appeals emphatically endorsed the illegality defense, saying:

> It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 **C.J.S.** Torts § 12 (1954). This rule applies at both law and in equity **and** whether the cause of action is in contract or in tort. 1A C.J.S. Actions § 29 (1985). *See also Graham v. Graham,* 276 S.C. 341,278 S.E.2d 345 (1981); *Nelson v. Bryant,* 265 *S.C.* 558,220 S.E.2d 647 (1975); *Roundtree v. Ingle,* 94 S.C. 231, 77 S.E. 931 (1913); ***Restatement (Second) of Torts*** § 774 (1977).
>
> The illegality doctrine has also been recognized by the United States Supreme Court which, in *McMullen v. Hoffman,* 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), held illegality is a defense to a contract action:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.
>
> *Id.* at 654, **19** S.Ct. at 845 (emphasis added). South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act. In *Roundtree,* the court concluded that "[his] whole transaction is without the pale of the law, and [he] cannot invoke the aid of the courts in enforcement of any claim depending on it." *Id.* 77 S.E. at 932. *See also, Berkebile v. Outen*, 311 S.C.50, 53, 426 S.E.2d 760, 762 (1993) ("an illegal contract has always been unenforceable . . . South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution."),

Jackson and cases like it give a lawyer a good reason not to cause a client to enter into a compounding agreement. Lawyers have no business sponsoring criminal acts and, in any event, nothing is gained by a party to a compounding agreement since the confidentiality provision is unenforceable. An even better reason to refrain from getting involved with compounding agreements is that the illegal provision may taint the entire contract, enabling the other side to set it aside altogether. Indeed, "[m]ost reported decisions dealing with compounding . . . are civil disputes in which the victim is attempting to enforce a note or other obligation given by the alleged offender." **ALI,** Model Penal Code & Commentaries, § 242.5, cmt. 3, at 252 (1980) (Model Penal Code). Another problem with a compounding agreement or any contract that contravenes public policy is that the lawyer who negotiates it is setting the table for multiple ethical violations on his or her part:

Rule 1.2(d): A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .

Rule 1.16(a)(1): [A] lawyer shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law . . . .

Rule 8.4(e) It is unprofessional conduct for a lawyer to: (e) [e]ngage in conduct that is prejudicial to the administration of justice. (Note: "[T]he purpose of the law of compounding is to encourage reporting of crime by punishing

agreements to forestall prosecution." Model Penal Code § 242.5, cmt. 3, at 251 (1980).).

I recognize that a court order sealing documents is not a compounding agreement, but where the court's action is spawned by such an agreement, the order's parentage is dubious.

Your proposal to bar court-ordered secrecy agreements in cases involving matters of public safety is a good one. It rests on the idea that agreements contrary to public policy are disfavored in South Carolina. *E.g., Reeves v. Surgeant,* 200 S.C. 494, 498-99, 21 S.E.2d 184, 186 (1942) (noting that contracts in restraint of trade "are against public policy and void."); *Grunt v. Butt, 138* S.Ct. 298, 17 S.E.2d 689,693 (1941), ("It seems to be well established in this State that contracts having for their object anything that is obnoxious to the principles of the common law, or contrary to statutory enactments or constitutional provisions, or repugnant to justice and morality, are void; and that the courts of this State will not **lend** aid to the enforcement of contracts that are in violation of law or opposed to sound public policy.").

The alternative position mentioned in your letter would be to take the position that secrecy agreements are "strongly disfavored" in the district. This is better than nothing, but it troubles me. We live in an age when personal safety, public safety and "homeland security" are matters of everyday concern. The "strongly disfavored" option translates "sometimes favored." There is a serious risk, even a likelihood, that the exceptions will devour the rule. **A** bright line test is better. I question why and when a judge should ever grant private litigants the right to hide information "implicating public safety." At a minimum, litigants sponsoring an agreement calling for judicial action in such a case should be required to explain, in detail, how their (and the court's) proposed course of action squares with public policy. Sponsoring parties should back up the representations with affidavits or testimony under oath.

Finally, let me briefly add two points. First, I do not believe that secrecy provisions are make-or-break settlement components. Cases that can settle will settle without them. I say this because I know from experience what happens when defendants come sniffing around, requesting what are, in essence, compounding agreements. When told to go fly a kite they always come back with the money and settle anyhow. **As** Richard Zitrin and Carol Langford point out in the article included in your materials, there is no evidence that settlements are less common or less ample in states having sunshine-in-litigation laws barring secret settlements.

My second point is that I take issue with the view that lawyers are duty-bound to give their client whatever settlement the client would like or, as stated by Steven Gillers in an *ABA Journal* article included with your letter, "the client is the master of the decision." Gillers' statement is a half-truth. Missing is the qualification that clients properly may only enter into valid, enforceable contracts, *i.e.,* not ones that offend statutory law or public policy. To my knowledge lawyers have no ethical obligation to help their clients enter into illegal agreements or ones that

contravene public policy. **An** agreement that, in the presiding judge's considered opinion, threatens to jeopardize public safety ought to qualify as one offensive to public policy. Just as parties have no legal right to enter into such contracts, courts have no business taking steps to facilitate them. Let me add that, in my opinion, agreements calling for concealment of evidence relating to serial frauds are no less suspect.

Thanks for giving me an opportunity to make these comments.

With kindest regards,

Sincerely yours,

John P. Freeman
Professor of Law

cc: H. Mills Gallivan, Esquire
Kathryn Williams, Esquire
Richard S. Rosen, Esquire
Rebecca Lafitte, Esquire
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September 24, 2002

Larry W. Propes, Clerk,
US District Court
1845 Assembly Street
Columbia, SC 29201-2431

Dear Larry:

Pursuant to your request on the new proposed Rule change on secrecy, please find enclosed several of the news media reports and evaluations of the suggested change. As is reflected, the innovative and courageous act by the South Carolina Judiciary is supported widely throughout the United States. Many of us are confident that the citizens of our country would benefit tremendously by the openness that is embodied in the Rule. The Rule certainly reflects our country's endeavor to protect its citizens through its public forums.

Most respectfully,

Terry E. Richardson, Jr.

TERjr:jgd
Enclosures

The New York Times

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In South Carolina, Judges Seek to Ban Secret Settlements

By ADAM LIPTAK

South Carolina's 10 active federal trial judges have unanimously voted to ban secret legal settlements, saying such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors and sexually abusive priests.

"Here is a rare opportunity for our court to do the right thing;' Chief Judge Joseph F. Anderson Jr. of United States District Court wrote to his colleagues, "and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies."

If the court formally adopts the rule, after a public comment period that ends Sept. 30, it will be the strictest ban on secrecy in settlements in the federal courts. Mary Squiers, who tracks individual federal courts' rules for the United States Judicial Conference, said only Michigan had a similar rule, which unseals secret settlements after two years. The conference is the administrative body for federal courts.

Judge Anderson said the new rule might save lives.

"Some of the early Firestone tire cases were settled with court-or-

Continued on *Page A12*

In South Carolina, Judges Seek to Ban Secret Settlements

Continued From Page A1

dered secrecy agreement8 that kept the Firestone tire problem from coming to light until many years later," he wrote. "Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems."

Lawyers say the proposal, which was widely discussed at the American Bar Association's conference in Washington last month, is likely to be influential in other federal courts and in state courts, which often follow federal practice in procedural matters. In South Carolina, the state's chief justice has expressed great interest in the proposal.

The Catholic Church scandals are one reason for a renewed interest in the topic of secrecy in the courts, legal experts say.

"All reactions are going to be affected by the bureaucratic cover-your-cassock responses of the church hierarchy," said Edward H. Cooper. a law professor at the University of Michigan.

But some legal experts and industry groups say the blanket rule is unwise.

"The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing," said Arthur Miller, a law professor at Harvard and an expert in civil procedure. He said the ban on secret settlements would discourage people from filing suits and settling them, and threaten personal privacy and trade secrets.

Joyce E. Kraeger, a staff lawyer at the Alliance of American Insurers, said the current system, in which judges have discretion to approve sealed settlements or not, worked fine. "There shouldn't be a one-size-fits-all approach," Ms. Kraeger said.

Jeffrey A. Newman. a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, praised the South Carolina proposal. Mr. Newman said he regretted having participated in secret settlements in some early abuse cases. "It was a terrible mistake;' he said, "and I think people were harmed by it."

Mr. Newman said a rule banning secret settlements, combined with the Internet, would create a powerful tool for lawyers seeking information on patterns of wrongful conduct.

The impact of such a ban could be limited. however, if adopted only by federal courts. Most personal injury and product liability cases, and almost all claims of sexual abuse by clergy, are litigated in state courts.

Several states have laws and rules that limit secret settlements, typically in cases involving public safety. Florida. for instance, forbids court orders that have the effect of "concealing a public hazard."

Experts say many of those limits are difficult to enforce, particularly when every party to a case is urging the judge to approve a settlement. Indeed, Judge Anderson's colleagues rejected his proposal, which was limited to matters of public health and safety, in favor of a blanket ban.

The federal proposal in South Carolina has caught the attention of Jean Toal, the chief justice of the South Carolina Supreme Court. Chief Justice Toal said that she would await the formal adoption of the rule before making her own proposal, but that the issue was important and timely.

> *An idea some call unwise but others say could save lives.*

"I'm very intrigued about this." she said, noting that some of her interest arose from "recent claims involving pedophilia and sealed cases." Judge Anderson and Chief Justice Toal noted that a Columbia, S.C., newspaper, The State, had spurred their interest in the issue by publishing a series of articles on secret settlements by doctors repeatedly accused of medical malpractice.

Even under the South Carolina proposal, the settlement amount and the requirement that parties keep quiet could be placed in a private contract not filed with the court. If the contract were violated, a new lawsuit would be required to seek redress. A court-approved settlement, on the other hand, can be enforced by returning to the original judge for a contempt order.

"If they don't want the might and majesty of the court system to enforce their settlement, that's one thing," Chief Justice Toal said. "Sealing the economic terms of the settlement is only one part of it We're often talking about sealing the entire public record of the case."

Opponents of the proposal argue that secrecy encourages settlements, which they say are desirable given limited court resources.

Judge Anderson told his colleagues that their court, at least, had available capacity. He wrote that the court had disposed of 3,856 civil cases in the previous 12 months, which included only 35 cases tried to a verdict.

"If the rule change I propose were enacted 'and it did result in two or three more jury trials per judge per year (which is far from certain)," Judge Anderson wrote, "I think we could handle the increased workload with little problem."

Robert A. Clifford, a Chicago lawyer who typically represents plaintiffs, scoffed at the notion that defendants would not settle without secrecy provisions, saying the alternative to a public settlement was a far more public trial.

"The undeniable fact is that the reason they want secrecy is so victim No. 2 does not find out what victim No. 1 got;' Mr. Clifford said

Ms. Kraeger, of the insurers alliance, did not dispute that. "Making that information widely known could have the effect of driving up litigation costs," she said.

Professor Miller emphasized that plaintiffs might not want to have their new wealth made public.

"There is a right not to enable every neighbor and business associate to know what you got," he said. "Would you want to receive calls from telemarketen who discover that you just got $1 million?"

In a forthcoming article in The Hofstra Law Review prompted by settlements in sexual abuse cases involving clergy, Stephen Gillers, a law professor at New York University, argues that confidentiality provisions that forbid victims to talk about their experiences amount to obstruction of justice and violate ethical rules governing lawyers.

Professor Gillers, though, would exclude settlement amounts, trade secrets and private information from any requirement that settlements be made public.

Judge Anderson was most concerned with the selling of secrecy as a commodity, he said in an interview. He recalled being told by a plaintiff's lawyer that the lawyer had obtained additional money for his client in exchange for the promise of secrecy.

"That's what really lit my fuse," the judge said. "It meant that secrecy was something bought and sold right under a judge's nose."

United States District Court

South Carolina's federal trial judges have voted to ban secret legal settlements. Chief Judge Joseph F. Anderson Jr. (front row, fourth from left) calls the vote "a rare opportunity for our court to do the right thing."

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Ending Legal Secrecy

One of the most troubling, and least scrutinized, aspects of the child sexual abuse scandal now roiling the Roman Catholic Church is the enabling role played by the court system. In case after case, judges have signed off on secret settlements of child-molestation suits, freeing the offending priests to molest again. In one Boston case, brought on behalf of a boy who was raped by a priest, the judge sealed all the records and the priest moved to New Hampshire, where he later pleaded guilty to abusing two more children.

South Carolina's 10 active federal judges recently struck an important blow against this kind of secrecy when they voted unanimously to ban secret settlements in all kinds of cases. If South Carolina's federal courts formally adopt the rule after a public comment period ends later this month, it will be the nation's strictest ban on secret settlements. Michigan, the only state with such a rule, requires that secret settlements be revealed after two years.

It is not hard to see why secret settlements are popular; they often advance the interests of everyone in the courtroom. Defendants, usually a corporation or a large institution, can dispense with an embarrassing lawsuit without exposing its wrongdoing to public scrutiny. Plaintiffs, by agreeing to remove an obstacle to settlement, can generally get a resolution, and damages, more quickly. For judges, secret settlements make it easier to resolve cases, reducing often overcrowded dockets.

The main loser in secret settlements is the public. Consumers are deprived of information they need to protect themselves from unsafe products. Workers are kept in the dark about unsafe working conditions. And, as we now know, parishioners have been prevented from learning that their priest had been successfully sued for abuse. In 1933, the Johns Manville company settled a lawsuit by 11 employees who had been made sick by asbestos. If that settlement had not been kept secret for 45 years, thousands of other workers might not have contracted respiratory diseases.

The move by the South Carolina judges is still just a start. It would prohibit judges from sealing court files, but it does not prevent the parties themselves from contracting to keep a settlement secret — which could be in their narrow self-interest, but is clearly not in the broader public interest. Some experts, including Stephen Gillers of New York University Law School, have put forward the provocative notion that private secrecy agreements constitute illegal obstruction of justice. And they have urged that state legal ethics rules be rewritten, or in some cases simply applied in their current form, to prohibit lawyers from participating in such settlements.

One Boston judge who sealed court records in a priest molestation case told The Boston Globe earlier this year that she might not have done so "if I had been aware of how widespread this issue was." It was, of course, rulings like hers across the country that helped hide just how big a problem sex abuse was in the church. The American public is entitled to know when lawsuits are settled. Judges around the country should follow South Carolina's lead and ban court-approved secret settlements. Obstruction of justice laws and legal ethics rules should be used to prohibit the rest.

Chicago Tribune

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EDITORIALS

Attacking legal secrecy

In Boston, the Roman Catholic archdiocese secretly settled case after case of priests accused of child molestation and judges sealed many of the files. That freed some priests to move elsewhere and molest again.

Until the Firestone tire scandal erupted in the summer of 2000, most Americans had never heard about certain tires' potentially lethal problems with tread separation mainly because the company had quietly settled most claims--and judges often sealed key documents. Some 271 deaths and more than 800 accidents were linked to those tires, federal authorities said.

The Johns-Manville company was sued in 1933 by 11 employees who argued that asbestos made them sick. The ensuing settlement was kept secret for decades. By then, thousands more workers had been exposed.

For decades, courts across the country have routinely sealed legal files, and ignored the potential public health perils that come from dangerous products, incompetent doctors, and others who have benefited from secret settlements.

Now South Carolina's federal district court has voted to ban secret settlements filed with the court, sending a clear message to the nation's legal community. "Here is a rare opportunity for our court to do the right thing, and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept in secret by public bodies." Chief Judge Joseph F. Andersnn Jr of the United States District Court in South Carolina wrote to his colleagues before they voted in July.

That's exactly right, Judge Anderson. Northwestern University law professor Steven Lubet was more blunt. He called secret settlements "an abomination ... really a means of depriving the public of knowledge" that it should have.

The South Carolina ban would be limited to that district, but proponents hope it may galvanize federal and state efforts to pass new anti-secrecy laws. Those laws need to be carefully crafted to demolish unwarranted secrecy but allow judges enough room to maneuver.

Everyone acknowledges that some cases merit secrecy; for example, when a company's legitimate trade secrets are at stake Even in South Carolina, the federal judges would retain the discretion to seal cases. The laws also would need to deal with the reality that many secrecy agreements are struck outside the court, between, say, a patient and a doctor who is being sued for malpractice. In many of those cases, the settlement is kept secret by an agreement between the two, and the court is only tangentially involved.

In Illinois, court files must remain open unless lawyers demonstrate a compelling reason to seal them. In practice, however, most judges rarely challenge secret settlement agreements, many of which are settled on the condition that the details not be disclosed.

Some lawyers argue that anti-secrecy measures would discourage settlements and clog the courts with more trials; they say future plaintiffs would take advantage of knowing how much the last claim was settled for. That's hard to dispute. More openness means more knowledge for plaintiffs' lawyers to exploit. Still, that's a byproduct of openness, not a reason to thwart it.

Several states have passed legislation clamping down to some extent on court secrecy. In Illinois, an anti-secrecy bill has failed twice since 1999, opposed by some manufacturers' groups and insurance companies. That legislation would have barred any settlements, inside or outside court, that concealed a public hazard. Rep. James Brosnahan (D-Evergreen Park) says he will introduce the bill again next year. If it doesn't go too far, the bill may have merit.

In the meantime, the Illinois Supreme Court could also help send a message encouraging openness by issuing a rule to provide clear direction to state trial judges--no secrecy, with a few rare exceptions. The rule would help judges carve out what exceptions they could make, and force judges to ask some tough questions before sealing filed court documents, including settlements. The first question should be: If I seal this file, could others he harmed7

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Today's debate: Courtroom secrets

Don't keep public in dark

Our view:

S.C. ban on sealed suits is welcome. Judges are too quick to close cases.

This summer, as sexual-abuse accusations engulfed the Roman Catholic Church, the Bridgeport, Conn., diocese got help covering up its role in the scandal from an unlikely source: the state's appeals court. It refused to make records public in 23 cases filed since 1993 against priests accused of abusing children.

Outrageous as it seems, this conspiracy of secrecy isn't unusual. Courts regularly suppress information on threats to public safety, ranging from incompetent doctors to hazardous products to serial harassers.

Secrecy thrives because it benefits the parties involved in lawsuits. Defendants want records sealed to hide their bad behavior. Plaintiffs often go along in return for bigger settlements. Judges approve the deals to remove the cases from their calendars. The only loser is the public, which learns nothing about risks that could be avoided.

Judges can reject secret settlements, but few have done so. Until recently. In a rare move, federal judges in South Carolina have approved a ban on sealed settlements that could take effect Nov. 1. Their action points to an important way that courts can ensure they function as the open forums they were meant to be. Already, South Carolina's state judges and some Florida federal judges are considering similar measures.

The potential dangers of secrecy argue strongly for ending the practice:

▶ **Hazardous products.** In 1998, two years before Bridgestone/Firestone recalled 6.5 million tires then linked to 88 US deaths, documents about the faulty tires were suppressed in a lawsuit at Firestone's request. The case involved a West V i a University football player who was killed after the tread peeled away on a Firestone ATX tire, and the Ford Explorer he was driving rolled over. Firestone officials say the documents involved trade secrets.

▶ **Personal wrongdoing.** Several South Carolina doctors settled malpractice suits, one repeatedly, under deals that hide the facts and exact amounts from prospective patients, according to *The State*, a Columbia, S.C., newspaper. In New Jersey, a local government agency hid a $75,000 settlement of a public employee's racial and sexual-harassment claim until *The Press of Atlantic City* won a fight to make the details public.

▶ **Fraudulent claims.** A federal court in Eugene, Ore., has suppressed records in a lawsuit that accuses State Farm, the nation's largest auto insurer, of using fraudulent medical reports to slash insurance payments to the victims of car accidents. Public advocacy groups have won the release of some records, but others remain sealed.

Consumer groups and lawyers representing plaintiffs have been waging battles in a dozen states to outlaw court secrecy. But their efforts have been beaten back by business interests. Opponents are now fighting to reverse South Carolina's ban on sealed records, arguing it might endanger corporate trade secrets and individuals' privacy.

Those concerns are misplaced. Under the proposed changes, judges would retain the authority to make exceptions when privacy rights outweigh the public interest.

Consumer advocates have long argued that the public is harmed when courts are too willing to allow secret settlements. Judges have the power to insist on full disclosure. Now they need to wield it.

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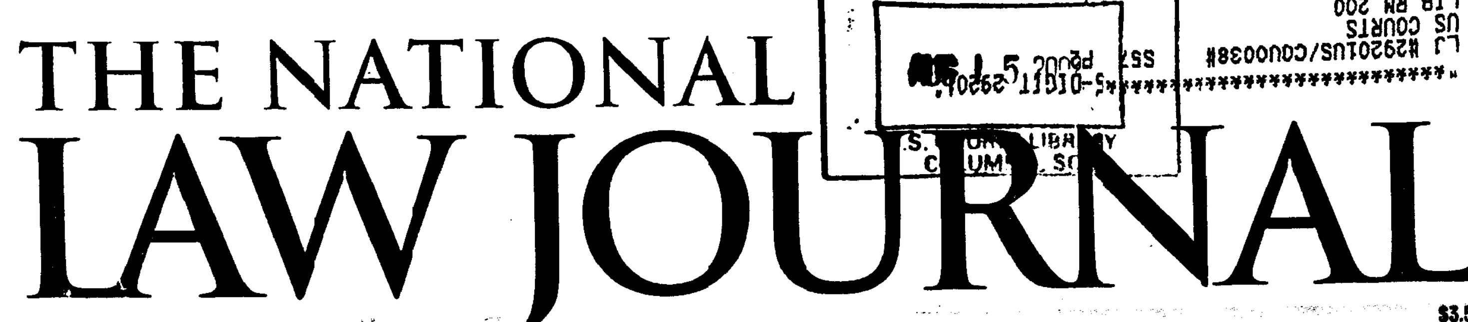
INSIDE



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veto sealed deals

U.S. bench in S.C. won't OK them.

By Eric Frazier
SPECIAL TO THE NATIONAL LAW JOURNAL

EIGHT YEARS AGO, U.S. District Judge Joe Anderson proposed a dramatic change in the local rules of South Carolina's federal courts.

His goal: an end to court orders for lawyers wanting to seal settlement agreements.

His fellow judges didn't think much of the idea and voted it down.

But this year, he kept hearing charges that secret settlements in pedophile priest cases have allowed child molesters to escape prosecution and abuse more children. And he recalled similar accusations in the Ford-Firestone tire controversy, where critics say hundreds of lives might have been saved if dangers revealed in early law suits hadn't been concealed by secret settlements.

Maybe, Anderson thought, it was time to try again, and he was right. The state's federal judges have unanimously approved a proposed amendment to their court's local rules. one which simply states that "no settlement agreement filed with the court shall be sealed pursuant to the terms of this rule."

"I don't think judges should be in the bus'ness of rubber-stamping the buying and selling of secrecy," says Anderson, South Carolina's chief district court judge.

The vote has attracted attention across the country, with plaintiffs lawyers and consumer advocates hailing it as a

SEE 'SEALED' PAGE A10

S.C. judges' new step could start something

'SEALED' FROM PAGE A1

sign of momentum nationally to limit secret settlements, especially when such agreements and discovery documents might hold clues to public health or safety hazards.

"It has stirred quite a buzz," says Robert Clifford, a Chicago lawyer who chairs the American Bar Association's litigation section. "Maybe South Carolina has started a trend."

'A lot of merit'

South Carolinas state courts could follow. Jean Toal, chief justice of the South Carolina Supreme Court, says she has talked to Anderson and plans to discuss the issue at a conference for South Carolina's state judges later this month.

"I think it's a very intriguing idea that has a lot of merit," Toal says. "Public health and safety issues might be dramatically affected."

The federal judges' plan hasn't yet been inserted into their local rules. The judges are accepting public comment until the end of September, and will decide after that whether their proposal should be modified.

But the unanimous vote—and the circumstances surrounding it—suggest strong support from the bench. Anderson actually suggested banning court-ordered secrecy only in cases where the settlement amount suggested a legitimate complaint and where an ongoing public health or safety hazard might be concealed.

His fellow judges, however, opted for the broader ban. South Carolina appears to be just the second federal jurisdiction to adopt local rules limiting secret settlements, says Mary Squiers, director of the Local Rules Project for the U.S. Judicial Conference.

Michigan's eastern district is the other jurisdiction. There, a local rule allows sealed settlement agreements to remain secret for two years from the date of sealing. After that, the documents must be unsealed and placed in the court file.

Such limits on secret settlements are equally rare in the nation's state courts. with only a couple of states enforcing aggressive bans aimed at protecting public health or safety.

Florida, for instance, has a "sunshine in litigation" law that prohibits courts from entering any order or judgment that might conceal a public hazard. Trade secrets "not pertinent to public hazards" are exceptions to the rule.

In Texas, the rules of civil procedure say settlement agreements can be sealed only upon a showing of specific and serious cause. Those reasons must outweigh the presumption of openness and any probable adverse effect the secrecy might have on public health or safety.

The Center for Justice and Democracy, a consumer-oriented think tank opposed to secret settlements. says legislatures in at least seven states considered adding such anti-secrecy laws last year as the Ford/Firestone tire controversy drew national headlines.

Those measures died, however, under pressure from pro-business lobbyists, says Emily Gottlieb, the center's deputy director. But she and others say the activity in South Carolina suggests a new groundswell might be building. The recent accounting scandals at companies such as Enron and WorldCom, they suggest, have heightened the public's demand for more information about corporate activities.

"I think this is probably going to foreshadow a trend," says Richard Rosen, South Carolina Bar president. "There's a lot of pressure on courts to open up files and not agree to secret settlements."

Some judges have long expressed reluctance to sign orders lending their courts' imprimatur to such settlements. They believe if parties agree to settle a case, a judge's order isn't necessary. A

notice of voluntary dismissal can be signed by tho parties, submitted to the judge and placed in the court file.

But for large insurers and corporations dealing with potentially large products liability cases, secrecy—and a judge's order enforcing it—literally can he worth millions.

Defense lawyers say their clients routinely settle cases not because of wrongdoing, but to make claims "go away" and save on legal bills. They say banning secret settlements will clog courts because the incentive for a defendant to settle is greatly reduced if they fear plaintiffs won't keep the terms confidential.

With a judge's order, litigants who violate confidentiality can be held in contempt of court. Without that kind of insurance, defense lawyers contend, their clients could face media leaks, frivolous copycat lawsuits and unwarranted damage to their corporate reputation.

"It can be a very important factor in litigation, depending on the type of litigation you're talking about," says William Coates, a Greenville, S.C., lawyer and board member of Defense Research Institute, a Chicago-based group for defense trial lawyers and corporate counsel. "If it's patent litigation, I suspec: secrecy is of paramount importance to the litigants, as well as third parties."

He says sometimes, it's the plaintiff who desires secrecy, perhaps to keep others from learning about the money he has won.

Discovery is key issue

Defense attorneys say that their biggest concern often isn't keeping the dollar amount of a settlement secret, but rather keeping discovery documents confidential—especially those containing trade secrets or company finances.

"A lot of the information you see corporations trying to protect is proprietary information," says Mills Gallivan, president of the South Carolina Defense Trial Attorneys Association. "I think that's really what this comes down to, ultimately."

ter a private confidentiality agreement that isn't filed with the court? If the plaintiffs

Limits on secret settlements have not clogged dockets.

Coates wondered, would the underlying confidentiality and settlement agreements then go into the public record?

"Those issues have to be expbred," he says. "It's got some ramifications we all need to take a look at."

Some plaintiffs attorneys say its not just about pratecting proprietary documents.

Ken Suggs, a Columbia, S.C., plaintiff's lawyer, says he has encountered some defense lawyers so concerned about secrecy that they not only want discovery documents destroyed, but they also want to block plaintiffs attorneys from saying the case was settled "favorably" or "to my client's satisfaction"

Suggs called the judges' proposal a welcome change. "We've all seen instances where money was used to cover up the continued marketing of a dangerous product," he says "Now, when we uncover a particularly dangerous practice, the courts can't be an accessory to the covering up."

JEAN TOAL: ***The chief justice of the South Carolina Supreme Court will discuss the ban with other state judges at a state conference later this month, and they may follow suit.***

Toal, the South Carolina Supreme Court chief justice, says she has discussed the issue with judges from states that have banned or enacted aggressive limits on secret settlements. She says the judges reported no clogging of dockets.

Clifford, the ABA litigation section chief, says he doesn't see where such bans wauld chill settlements. After all, he says, a nonconfidential out-of-court settlement would likely still look more attractive to most defendants than a public trial. "They'll still settle the cases," he says. "They'll just hope nobody goes looking" in the court files. NLJ

SOUTH CAROLINA'S LARGEST NEWSPAPER • FOUNDED IN 1891

The State

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Editorial

Kudos to judges

A DECISION LAST MONTH BY federal judges in our state to ban secret court settlements was a bold move that should benefit the public in a number of areas. Thanks to all the U.S. district court judges, and especially Chief Judge Joe Anderson, who led the move.

The ban, thought to be the most far-reaching in the nation, stops the practice of parties using the courts to keep important information from the public. Such gag orders kept the public unaware of the Firestone/Ford Explorer problem for years after the companies and some victims were aware of it and helped the Catholic church secretly keep abusive priests in parishes. They even keep secret the actions of elected officials.

The ban won't affect parties to lawsuits from reaching a settlement before trial and agreeing to keep quiet about it. It will simply prevent them from using the power of the federal court to enforce their agreement.

Of course, most lawsuits are handled in state court. We are encouraged that S.C. Chief Justice Jean Toal plans to address that problem with state judges this month. While we'd like for her to follow the federal judges' lead, she could do the public a huge favor by simply requiring that certain types of settlements — including those that affect public safety or involve the government — remain open to public review.

Letters to the Editor

The Greenville News

THURSDAY, AUGUST 1, 2002 • THE GREENVILLE NEWS

greenvilleonline.com 3B

Judges vote to open lawsuit settlements

THE ASSOCIATED PRESS

COLUMBIA — South Carolina's 10 federal judges have agreed to a ban on sealing lawsuit settlements they preside over.

The judges voted unanimously last week for an outright ban on sealed, court-sanctioned settlements. Chief U.S. District Court Judge Joe Anderson had wanted to ban only those cases involving public safety.

The legal community is going to be "a little shocked" by the broad secrecy ban, said Richard Rosen, president of the South Carolina Bar.

While the federal judges' vote will not affect state-court approved settlements, the South Carolina Supreme Court could consider a similar ban.

These rules can be very influential on state practices," said Columbia lawyer Richard Gergel, who specializes in medical malpractice and personal injury cases. "I think they (secret settlements) are going to become very disfavored in both state and federal courts."

Opponents of the secrecy ban say the openness could hamper the quick settlement of potentially long and complicated cases.

Secrecy can protect people who bring suits as well as the reputation of defendants, said Mills Gallivan, a Greenville attorney and president of the state Defense Trial Attorneys Association.

Gallivan said he would like to see federal judges keep the discretion they now have to seal settlements.

This is the kind of thing that will catch national attention," said Robert Clifford, a Chicago attorney who chairs the American Bar Association's litigation section. "I certainly hope that it is a signal of an emerging trend."

No other federal court district has a similar ban, said Mary Squiers, a legal consultant based in Massachusetts who works with a national rule-making committee for federal courts. A rule in Michigan unseals secret settlements after two years.

"It's going to change the dynamic of settlements," Squiers said.

The new rule is set to take effect in the fall after a public comment period that ends Sept. 30. Proponents hope it will increase public awareness of faulty products, such as Firestone tires. and other potential dangers, such as Catholic priests accused of child molestation and medical malpractice.

State Supreme Court Chief Justice Jean Toal has said she was not ready to go as far as Anderson's initial proposal to ban secrecy in cases involving public safety. But, she has said she will air the issue of secret settlements when the state's 100-plus judges meet next month for their annual conference.

The Greenville News
Monday
JULY 15, 2002

Judge: Ban secret settlements

THE ASSOCIATED PRESS

COLUMBIA — A federal judge and the state's Supreme Court chief justice want to see fewer secret settlements of lawsuits that involve public safety.

"Several events have occurred which have caused me to become even more convinced that court-ordered secrecy agreements adversely affect public safety and should be strongly discouraged, if not disallowed entirely," U.S. District Court Chief Judge Joe Anderson said in a June 24 letter to federal judges and lawyers around the state. He wants a ban on secret settlements.

Secret, court-approved settlements have come in high-protile cases including Firestone tires, priests accused of child molestation and medical malpractice.

"Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone hre problems," Anderson wrote.

Federal judges will vote on Anderson's proposed ban when they meet July 26. That requires six of the 10 active federal judges to approve the plan.

Texas and Florida are the only states that ban secret settlements in public safety matters.

State Supreme Court Chief Justice Jean Toal is not going as far as Anderson but says she'll air the issue of secret settlements when the state's 100-plus judges meet next month for their annual conference.

Mills Gallivan, a Greenville attorney and president of the S.C. Defense Trial Attorneys' Association, said secrecy is needed in a variety of situations.

For instance, a wealthy corporation might be worried that an injured could impress the jury enough to win a big award, even though the corporation believes itself innocent. Consequently, it might pay a big settlement but wouldn't want anyone to know because the size of the settlement implies liability.

Ken Suggs, a Columbia plaintiff's attorney and national officer in the Association of Trial Lawyers, said defendants often dangle money before a victim to win a secret settlement.

Toal: Secret deals often break rules

1991 ruling set standard for sealed settlements, chief justice says

By RICK BRUNDRETT
Staff Writer

South Carolina's judges often break court rules for sealing settlements in lawsuits, the top state judge said Thursday.

"I say every court level, including my *own* has been guilty," Supreme Court Chief Justice Jean Toal said during a judicial conference in Columbia. "This is a good time for all of us to get on the same page."

Toal's *speech* was her first public comments *since* telling The State newspaper two weeks ago that she favors banning secret settlements in S.C. courts.

The state's federal judges last month adopted a temporary rule banning all secret settlements in federal lawsuits. Toal said Thursday she won't present her proposal to the state Supreme Court until the federal judges make a decision, expected in November.

She'll rely on feedback to the federal judges and responses to her by state judges, lawyers and the public. A new court rule wouldn't take effect until next spring at the earliest, after lawmakers have reviewed it, she said.

At least nine states, including Georgia and North Carolina, restrict secret settlements.

State judges want clarification, said Circuit Court Judge Gary Clary of Gaffney.

"I think is something that's been a concern of a number of judges for quite some time," he said during a break at Thursday's conference.

Clary, who's been on the bench 10 years, thinks certain settlements don't need to be sealed, but he said that decision should be made case by case.

The temporary federal rule would, for example, allow the public to learn *about* faulty products, such as the defective Firestone tires in the late 1990s. Toal told The State earlier that sensitive information, such as trade secrets, can be kept confidential without sealing the entire record.

In her speech Thursday, she stressed openness.

"There is a *strong* presumption that if something is filed in the public court system, it's public and it remains public."

But she said state judges routinely seal settlements simply because the parties involved agree to keep the case secret.

Toal reviewed a 1991 state Supreme Court *case* that establishes what she said are the "rules of the road" for sealing settlements. That ruling requires judges to make specific findings that "weigh the need for *secrecy* against the right of access."

Circuit Court Judge Alison Renee Lee of Columbia, who was elected to the bench *three years ago, said* afterward she hasn't been asked to seal a settlement and wasn't aware of the 1991 ruling. "I'll be sure to follow those factors," *she* said.

The State

111TH YEAR, NO. 219 • SOUTH CAROLINAS LARGEST NEWSPAPER Wednesday, August 7, 2002 COLUMBIA, S.C. • SWITCHBOARD (803) 771-6161 • CAPITAL FINAL

Toal backs publicizing lawsuit settlements

S.C.'s chief justice will propose rule change to rest of state's high court

By RICK BRUNDRETT
Staff Writer

The top state judge now supports banning secret settlements in South Carolina lawsuits,

"Our position has long been that secret settlements are not favored," said Chief Justice Jean Toal.

Last week, South Carolina's U.S. judges — led by Chief U.S. District Court Judge Joe Anderson — called for an outright ban on sealed settlements in lawsuits filed in federal courts.

Early last month, Toal wasn't ready to go as far as Anderson in his initial proposal to shine the light on settlements.

But, now, Toal said, they're "two hearts beating as one."

She became more convinced about an outright ban last week af-

SEE DEALS PAGE A5

DEALS

FROM PAGE A1

ter talking with other state supreme court justices during a New England conference.

Florida and Delaware judges told her that banning sealed settlements in their *states* hasn't dogged the courts with lawsuits, nor has it had a "chilling effect" on settlements.

At least nine states, including Georgia and North Carolina, have laws or court rules restricting *secret* settlements.

Toal said rule changes far South Carolina's courts would have to be made by the entire five-member Supreme *Court*. She plans to *make* a proposal to her colleagues after a presentation later this month at a state judicial conference. She also will review feedback about the federal rule change and talk with state judges.

A new rule wouldn't take effect until next spring at the *earliest*, Toal said. State lawmakers could kill *any* proposed rule when they reconvene next year, although a three-fifths vote in *each* house is needed to do so.

State Rep. Rick Quinn, R-Richland, said Tuesday he couldn't support an outright ban. "A hard-and-fast rule for *every* case—I wouldn't support it. But if there were some standards, I would support it."

Toal, a former Democratic lawmaker, said the General Assembly has voted "pretty strongly in favor of public disclosure."

Banning secret settlements protects the public by allowing them, for example, to learn more quickly about faulty products, say supporters of the ban. And plaintiffs' lawyers in similar cases would have access to information from defendants, they say.

Toal's more philosophical. "We base our decision on the common law that our courts are open."

Richard Rosen, president of the the state bar association, said insurance, medical and manufacturing groups — and their lawyers — might oppose a blanket ban.

"That could be a very contentious debate," the Charleston lawyer said Tuesday.

Dr. R Duren Johnson Jr., president of the South Carolina Medical Association, wrote to Anderson that patients might want sealed settlements to protect their condition and treatment from "public *exposure*."

Other reasons for secret settlements include protecting the identities of molested children, or preventing those who are not involved in wrongful death cases from going after large awards, Rosen said.

Toal said information such as trade secrets could remain confidential without sealing the entire file.

Most lawsuits are settled without a trial, and most settlements are done without a court order, said Robert Clifford, a Chicago lawyer who is chairman of the American Bar Association's litigation section, so new open rules might not have an impact on many settlements.

In South Carolina, very few settlements require court approval, Rosen said.

The State

111TH YEAR, NO. 195 • SOUTH CAROLINA'S LARGEST NEWSPAPER Sunday, July 14, 2002 COLUMBIA, S.C. • SWITCHBOARD (803) 771-6161 • CAPITAL FINAL ++

Secret court deals in S.C. face scrutiny

Federal judge urges ban on deals when public safety at risk; S.C. chief justice to air issue at meeting

By JOHN MONK
Staff Writer

Two of South Carolina's top judges — one federal, one state — say they want to ban or limit secret court settlements, especially in cases where the public's safety is at stake.

In recent letters to prominent lawyers and the state's 12 other federal judges, U.S. Chief Judge Joe Anderson proposed banning secret court settlements where public safety is involved.

"Several events have occurred which have caused me to become even more convinced that court-ordered secrecy agreements adversely affect public safety and should be strongly discouraged, if not disallowed entirely, by our court," wrote Judge Anderson in the June 24 letter to the other federal judges in South Carolina.

Judge Joe Anderson

Chief Justice Jean Toal

Anderson cited his concerns with secret court-approved agreements in cases involving defective Firestone tires, Catholic priests who molest children, and incompetent S.C. doctors — all matters where the public could be harmed by ignorance of dangerous events and people.

"Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems," Anderson wrote.

He wants the federal judges to vote on the matter at their July 26 meeting. Six of the 10 active federal judges must vote "yes" before banning secrecy agreements. (The other three judges are on senior status and don't have a vote.)

The State newspaper obtained Anderson's letters; he confirmed their authenticity but declined to comment.

Anderson's letter comes after a State series, published in June, pointed out hundreds of secret settlements are in S.C. courthouses involving doctors whose negligence has killed or harmed patients. Those settlements are kept from public view.

Although court-approved secrecy agreements are common in much of the nation, there are precedents for Anderson's action.

A 1980 U.S. Supreme Court decision involving public access to trials noted that openness in courts assures fairness and discourages misconduct.

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing," the Supreme Court said.

Texas and Florida are the only states that ban secret settlements in matters where public safety is an issue, according to the American Bar Association.

Around the country, various federal appeals courts in recent years have overturned secret settlements, saying public interests were involved.

'AN EXTREMELY IMPORTANT ISSUE'

State Supreme Court Chief Justice Jean Toal is not going as far as Anderson, who wants to ban secret settlements in all cases involving public safety.

But Toal did say she intends to air the issue of secret settlements at the annual conference of the state's 100-plus judges in August.

"It's an extremely important issue. Openness is an important way of maintaining confidence in public institutions," she said. "I'm delighted that Chief Judge Anderson is also discussing this."

Toal said that since mid-June, when The State reported on secret court settlements involving doctors and hospitals, judges have asked her what the S.C. Supreme Court's policy is on such settlements.

That's why she's airing the matter at the August judiciary conference, she said.

Toal said she'll remind state judges that they must meet a high standard — such as finding that someone could be harmed by disclosing terms of a settlement — before sealing a public record.

Those standards are set out in a 1991 S.C. Supreme Court case, Davis v. Jennings. It requires judges to make specific findings, on the record, as to why a case should be closed.

SEE JUDGES PAGE A12

JUDGES

FROM PAGE A1

In making those findings, a judge should weigh "the need for secrecy against right of access," the decision said. Factors to be considered include the "public or professional significance of the lawsuit, and harm to parties from disclosure," the decision said.

Even if a judge thinks that by approving a secret deal, parties might settle a case more easily, that's not enough by itself to close records, the decision said.

'SOMETHING WRONG'

Judges are key figures in deciding how open courts are.

Their role works this way:

Before or during a *trial,* a defendant might offer a plaintiff money to settle the case. This offer is often made on condition that the plaintiff not reveal the amount

Once the plaintiff agrees to keep terms secret, the judge orders the parties not to talk. This order could be enforced by a fine or requiring the plaintiff to give back money awarded as part of the settlement.

However, the size of a settlement is crucial to understanding how serious allegations are, said S.C. Department of Insurance director Ernst Csiszar.

If a case is settled for $10,000 or $15,000, that probably means the defendant wasn't at fault but wants to avoid the expense of a

> "Several events have occurred which have caused me to become even more convinced that court-ordered secrecy agreements adversely affect public safety and should be strongly discouraged, if not disallowed entirely by our court."
>
> *—From a June 24 letter by U.S. Chief Judge Joe Anderson to other federal judges in South Carolina*

> maintaining confidence in public institutions."
>
> *— S.C. Chief Justice Jean Toal*

tled for $500,000, that sends a signal there must have been something wrong," Csiszar said.

Csiszar said when bad doctors are allowed to conceal settlements, no one benefits.

"We have to get to the point where our professional people and the public truly understand who is creating the mischief," said

LAWYERS DIVIDED

Any effort to curtail secret settlements might prove controversial with lawyers.

Although not all settlements are secret, the practice is ingrained in the state's legal culture, lawyers said.

In cases involving medical errors, there are hundreds of secret settlements in S.C. courthouses, lawyers said.

However, some lawyers want open settlements.

Ken Suggs, a Columbia plaintiff's attorney who is a national officer in the Association of Trial Lawyers, said defendants whose products or practices have killed or injured people often dangle money before a victim to win a secret settlement.

Banning secret settlements will remove that unfair pressure tactic, Suggs said.

"If a court rule says, You can't have secret settlements,' then the weakest person in the chain — the victim — is not put in the position of having to make the decision to keep silent,' Suggs said.

Plaintiffs often agree to take a monetary settlement and keep silent because it's far easier than going through a trial, Suggs said.

The most common exceptions are people who've had a child killed — they want a trial or public settlement to make a point, Suggs said.

Mills Gallivan, a Greenville attorney who is president of the S.C. Defense Trial Attorneys' Association, said his group will study the matter.

However, Gallivan said, court-approved secret settlements can speed a case's resolution.

He said other reasons for keeping settlements private include:

- In some cases, a wealthy corporation might be womed that an injured victim could impress the jury enough to win a big jury award, even though the corporation believes itself innocent. Consequently, a defendant might pay a big settlement but wouldn't want anyone to know because the sue of the settlement implies liability;
- Parties to a lawsuit, including individuals and corporations, ought to have the right to settle their disputes privately. "To me, the court should not have a dog in that fight," Gallivan said;
- Plaintiffs' lawyers would try to take the size of the public settlement and use it as leverage in similar cases. Each case has different facts, he said, adding a settlement in one case shouldn't influence another case.

As for public safety, Gallivan said, "It probably is being addressed in other forums."

Regulatory agencies and legislatures can make public safety changes like requiring product improvements, Gallivan said. Courts should assess liability and set damages — not make public policy, he said.

"Even a plaintiff in some cases wants settlements secret," Gallivan said.

'A COMPLEX SUBJECT'

Richard Rosen, president of the S.C. Bar Association, which has 8,000-plus lawyers in the state, said his association has a task force studying the issue.

"It's a complex subject," said Rosen. His group has lawyers who will have differing views.

To others, the subject is not

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."
>
> *—A 1980 US Supreme Court decision involving public access to trials*

hard. The public should have a right to know about information — gathered in taxpayer-supported courts — that can kill or harm them.

"Sunshine is the best cure," Csiszar said.

Reach Monk at (803) 771-8344 or jmonk@thestate.com

The State

111TH YEAR, NO. 212 • SOUTH CAROLINAS LARGEST NEWSPAPER Wednesday, July 31, 2002 COLUMBIA, S.C. • SWITCHBOARD (803) 771-6161 • CAPITAL FINAL ++

Judges.back secrecy ban

10 federal jurists in S.C. vote o end sealed settlements

By CLIF LeBLANC
Staff Writer

Lawsuits settled by federal judges in South Carolina would not be kept secret if the state's U.S. judges have their way.

The 10 judges voted unanimously last week far an outright ban on sealed, court-sanctioned settlements.

The change might make S.C. federal courts the nation's first to institute such a ban on secret settlements, change the way even state cases are handled and lead a national trend toward openness, S.C. and American Bar Association lawyers said Tuesday.

"This is the kind of thing that will catch national attention," said Robert Clifford, a Chicago attorney who chairs the ABA's litigation section. "I certainly hope that it is a signal of an emerging trend."

The rule would allow the public to learn of faulty products such as the defective Firestone tires in the late 1990s.

The rule would not apply in state courts. But S.C. Chief Justice Jean Toal said she would bring up the subject at next month's conference of state judges. The chief justice has sweeping authority over the state's judicial system.

The federal change would go further than many S.C. lawyers thought it would.

Chief U.S. District Court Judge Joe Anderson wanted to ban secret settlements only in cases involving public safety.

Anderson would not discuss the change and referred a reporter to the document filed Tuesday with the federal clerk of court in Columbia.

The new rule is set to take effect in the fall after a public comment period that en& Sept. 30.

The legal community is going to be "a little shocked" by the broad secrecy ban, said Richard Rosen, president of the State Bar Association.

Lawyers who represent insurance companies and others who

SEE BAN PAGE A9

BAN;

FROM PAGE A1

are sued oppose the change, said Mills Gallivan, president of the S.C. Defense Trial Attorneys Association.

Judges should keep the discretion they now have to seal settlements, said Gallivan, a Greenville attorney. Secrecy can protect people who bring suits as well as the reputation of defendants.

The judges' proposal follows a senes of articles in The State pointing out hundreds of secret settlements in state courthouses that involved negligence by doctors who hurt and killed patients.

Some lawyers say the rule will have more symbolic than practical effect.

Most lawsuits for damages are filed in state, not federal, courts, said Rosen, a Charleston attorney. Medical malpractice, for example, is almost exclusively argued in state courts.

In addition, few suits filed in federal court seek a judge's approval. Most are settled privately between the parties before trial.

Still, federal judges handle many suits that allege defective products, civil rights and employment discrimination, environmental violations and negligence, as in airplane crashes.

A court-ordered settlement binds everyone to secrecy — enforced by the fear of violating a judge's order.

A legal consultant who works with a national rule-making committee for federal courts said she knows of no other district that has such an outright secrecy ban.

But case law and other directives might place the same kind of limits on sealed agreements in other states, said Mary Squiers, who works in Massachusetts.

The most comparable ban Squiers could find was a Michigan rule that unseals secret settlements after two years.

"It's going to change the dynamic of settlements," she said of South Carolina's proposal.

But it could result in fewer settlements and settlements involving far less money, Squiers said. Secrecy often motivates defendants to bargain.

Gallivan said there are valid reasons for sealed settlements:

- Companies might have trade secrets to protect, and individuals prize their privacy;
- Someone subjected to sexual harassment may not want the public to know, Gallivan said;
- In the cases of large settlements, plaintiffs might not want creditors or relatives to know their cash flow has jumped.

Gallivan said federal judges in 1994 rejected a similar ban being considered by Congress as part of the Judicial Reform Act.

He and S.C. Bar president Rosen agree there is a national appetite for fewer secret settlements

The failure of Firestone tires for example, caused abaut 30(deaths, by government estimates

More recent disclosures that courts were used to hide sexual abuse by Catholic priests fuel a' push to open the courts, they said.

"The courts feel like they are under some pressure not to participate," Rosen said. "I feel that this is going to be a cutting-edge rule.'

Columbia lawyer Richard Gergel, who specializes in medical malpractice and personal injury cases, said state courts might follow suit.

"These rules can be very influential on state practices," Gergel said. "I think they (secret settlements) are going to become very disfavored in both state and federal courts."

Toal could not be reached Tuesday because she was in New England attending a conference of chief justices.

But earlier this month she said she was not ready to go as far as Anderson's initial proposal, which would have banned secrecy only in cases involving public safety.

Current practice allows secret settlements but directs state judges to weigh harm to parties.

EDITORIAL
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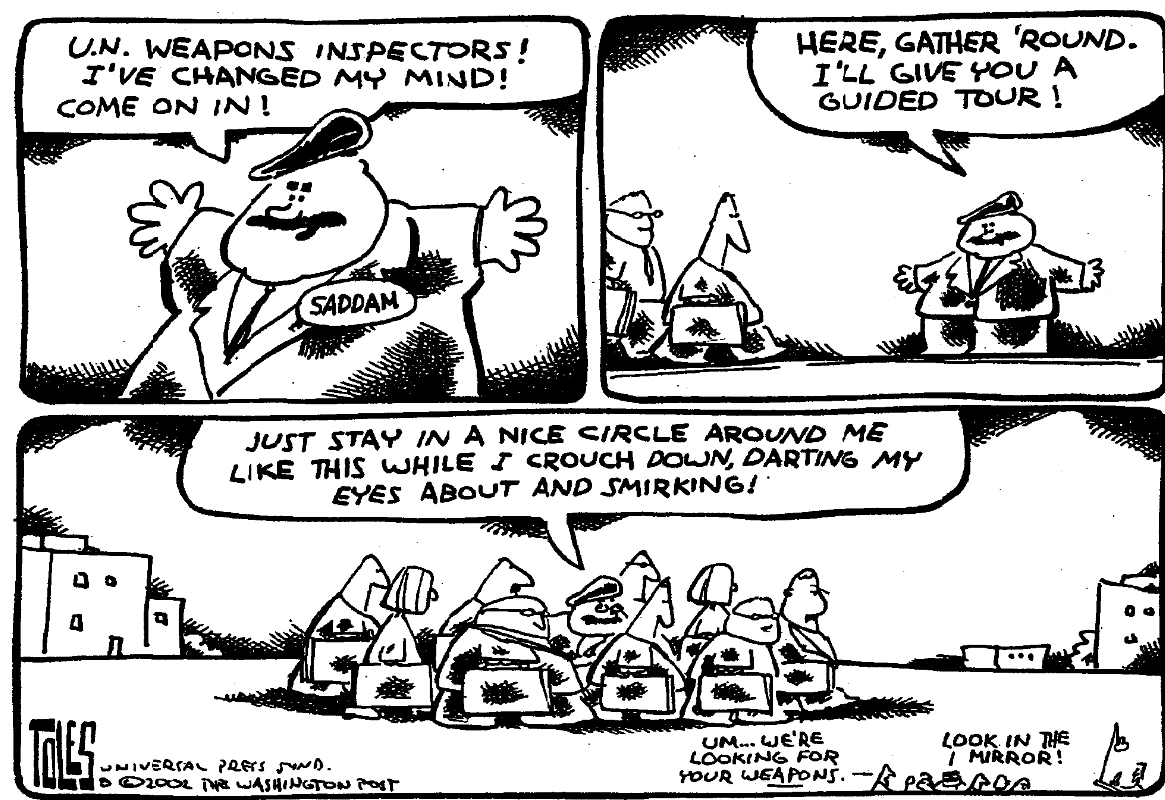
Editonal

Judges should follow Toal's lead

CHIEF JUSTICE JEAN Toal's decision to push for an end to court-ordered secrecy agreements is a big boost for the idea that South Carolinians have a right to know what their government does. We hope her colleagues on the state Supreme Court will go along with her plan to write regulations — which would be in keeping with the court's insufficiently followed rulings on the matter — that will prohibit judges from sealing records of lawsuit settlements, and we hope the Legislature will sign off on them. As Justice Toal explained recently, "We base our decision on the common law that our courts are open."

As federal judges in South Carolina recognized in approving their own rule last month to outlaw secret settlements in U.S. District Court, there's nothing to prevent individuals from deciding on their own to settle a lawsuit and to keep their decision secret. With the new rule, they simply can't count on the courts to enforce that agreement. That is as it should be.



Likewise, there's nothing to stop our justices from carving out a few targeted exceptions, for instance protecting trade secrets and the names of children who have been victims of abuse. Such exceptions would not distract from the larger point — allowing the public to know about potential threats (rather than using our court system to cover up those threats), and to evaluate the performance of our court system.

Even though it will be at least next spring before Justice Toal can get state regulations written and approved by the Legislature, there is nothing to stop judges from refusing to lend a governmental cloak of secrecy to private agreements between now and then. Justice Toal likely will ask judges to do just that when she addresses them at a state conference later this month. They would do the public a great service by voluntarily acceding to her request.

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Editorial

Judges could help public by limiting secret settlements

SOUTH CAROLINA IS not known as a state where the public's business is done in public.

We threaten citizens with imprisonment if they so much as mention that they have complained that elected officials may have acted uneihically or illegally.

Our Commerce Department gives out tax breaks that are nearly impossible to trace, and money the state spends wining and dining industrial recruits is in many cases never made public.

And local governments routinely make it difficult for citizens to get basic public information, from who has been arrested to what the council did at its last meeting.

But in an extraordinary display of leadership and concern for the public good, federal and state judges are considering proposals to eliminate or at least reduce one particularly problematic form of secrecy in South Carolina: secret court settlements.

U.S. District Judge Joe Anderson has asked his fellow federal judges to prohibit secrecy agreements when the parties settle lawsuits that involve questions of public health and safety. The state's 13 district judges will consider that proposal at a meeting Friday.

No matter how the federal judges vote, S.C. Chief Justice Jean Toal plans to discuss the problem of secret settlements with state judges at a meeting next month. She will remind them of standards her court set out a decade ago that prohibit many secret settlements.

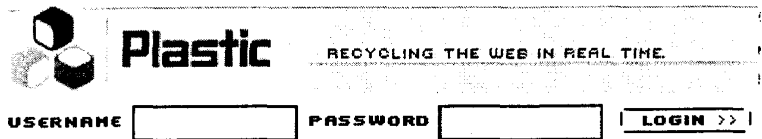
It has become routine for parties settling lawsuits to insist that the settlement, and often any Information unearthed as part of the litigation, be sealed from public view. Defendants want the secrecy so the information can't be used against them elsewhere: plaintiffs usually go along because it means they get their money; and the courts sign off because settlements are less expensive and time-consuming than trials.

But as Judge Anderson noted, such secret settlemenls meant that the Firestone/Ford Explorer threat was hidden for years, with the blessing of our court system, while people continued to die. It meant that allegations against pedophile priests were kept secret while the priests abused their next victims. It means that a handful of incompetent doctors continue to practice while evidence of the threat is sealed away.

It would be a huge step forward for the federal judges to ban secret settlements that involve public safely. But they, and the state judges, would do well to consider another harmful type of secret settlements: those that allow the government to hide its misdeeds.

Last year, for examplb, the state paid a former government employee $300 000 to settle a lawsuit in which he charged that the governor had him fired because he was white and the governor needed to appease supporters upset that a similarly placed black employee had been fired. The hasty settlement included a gag order, so the public could never find out the truth. There is no reason settlements involving allegations against elected officials — or any government official, for that matter — should ever be secret

Ideally, our Legislature would pass laws to prohibit such secrecy. But given lawmakers' track record on other matters of public access to government, we're not particularly hopeful. Perhaps judges, because they are not so easily influenced by those who benefit from it, will be able to take a step our elected officials have been unwilling to take to pull back the veil from South Carolina's culture of secrecy.



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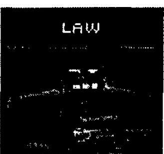
Loose Lips... Save Lives? Judges Abolish Secret Legal Settlements

found on The New York Times (registration required)
written by wka, edited by Nick (Plastic) [read unedited]
posted Mon 2 Sep 9:42am



Some of the early firestone tire cases were settled with court-ordered secrecy agreements that kept the firestone tire problem from coming to light until many years later. Arguably, some lives were lost because judges signed secrecy agreements regarding firestone tire problems.

"South Carolina's federal trial judges have voted to ban secret settlements. Stating that now is a bad time for secrecy in our society. and noting specific scandals (Enron, Catholic priests) where the public good would probably be better served by public settlements, all 10 active federal judges in the state voted in favor of the ban. Critics of such a ban note that secrecy encourages settlements, and that a ban would 'threaten personal privacy and trade secrets.' The South Carolina ban, which would only apply to federal settlements (not sexual abuse, personal injury, or product liability cases, which are state matters), could go into effect as early as September 30th."

[comment on this story | more plastic...]

show best: 1 comment by oldest first change

1. Actions, Consequences

by eric b
at Mon 2 Sep 12:19pm

score of 1

it's about damn time. perhaps these companies might..just ***might*** consider doing better safety tests on their products before shipping them out (at least to south Carolina). the secret settlement is an easy way for large corporations to avoid a whole lot of bad publicity, especially when the

amount of money they settle on is less than a drop in the bucket compared to what they'd lose if the public knew what was going on (eg: firestone). i see no reason why the federal courts should assist these companies, or the priests for that matter, in saving face when they screw up. the only part of the article that i don't commend is the fact that "only Michigan had a similar rule, which unseals secret settlements after two years."

[...reply just to this | comment on the story... | next new]

4. Re; Actions, Consequences

by Violator

at Mon 2 Sep 11:45pm

in reply to comment 1

score of 2.5 compelling

This issue isn't just about safety vis a vis consumer products - it is also about the transparency of the legal system, in my opinion.
By engaging in a secrecy agreement system, the public is first of all denied access to the information on what is going down in their state, town, flyshit hamlet. This gives J. Q. Public an unrealistic impression of the prevalence of crimes, and of the risks associated with certain activities (ie; driving Ford Explorer SUV's). It denies the public the information which members need to make decisions - and by decisions I mean, getting fed up with SUV explosions and writing letters to their representatives to demand stricter legislation.

Consider Chemical Company X, which "accidentally" dumps a thousand tons of waste into a stream, and is sued by a bunch of farmers who now have six eyes and glow at night. The farmers and the company settle out of court, with secrecy AKA "non disclosure" agreements. The farmers and/or the chemical company can then sell up their farms, to unsuspecting people, and leave the mess to spread through the environment to affect all manner of people. This gets the farmers money, and saves the chemical company on legal fees, settlment fees, and cleanup.

However, it costs the community in terms of pollution, non-disclosure, and removes a key aspect of the Law - precedent. Every case which is settled out of court in secret (as opposed to out of court in the open where the malfeasance is publicised, entering it into the public domain for discussion and processing via democracy) is one case where precedent cannot be inherited and passed on to future cases. There is no heritance of legal perspective, of the arguments and judgments of what is right and wrong, no terms of reference by which future cases may be judged.

this is a serious problem, especially in areas where the law is poorly explored - lets say, online piracy and so on. RIAA nukes your computer, trashing a $60,000 at-home contract for your home business, and you sue them, they settle out of court in secret, and they just keep on doing what they do. When someone else comes along and doesn't take a buy-off due, perhaps, to losing something irreplaceable and beyond value like the only digital photos of their deceased foetus, then they lack the terms of reference which could have potentially been gained from the earlier cases, and cannot get the same quality of justice.

In this way, I think Sou Caro has laid down a very sensible precedent.

Disingenuous (adj): wanting in noble candor or frankness; not frank or open; uncandid; unworthily or meanly artful.

[...reply just to this | comment on the story... | next new]

6. Re: Actions, Consequences

by Thalia

score of 1.5 informative

at Tue 3 Sep 11:30am

in reply to comment 4

Three wrong assumptions here... although the gist is right.

First, in a real estate contract you do have to disclose anything that affects the property, **regardless** of **settlements. There is a** disclosure law for that.

Second, there is no precedent set when a settlement is open either. If you settle, instead of reach a legal resolution, you remove your case from the law. In other words, the second guy suing the company may have your settlement to see, but judges will NOT use it as precedent if it was a settlement.

Third, settlements are optional. It's not like the defendant forces the poor plaintiff to keep **quiet. It looks more like the defendant pays** off the plaintiff to keep quiet. In other words, those farmers are offered $1 million for their farm as settlement... which they take instead of the potential judgement of maybe $300K. Is that unfair? Well, that depends on whether you believe that people's silence should be purchasable. If you have a case which you are pursuing for moral reasons, not for the

money, you can always refuse to settle.

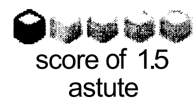
Thalia

[...reply just to this | comment on the story | next new]

2. Oh good...

by Misch

at Mon 2 Sep 1:36pm


score of 1.5
astute

Now we might finally get to see the settlement between Scientology and the IRS ... (Even though it was published, briefly, before being thrown behind the curtain again by lawsuit.) Strange that they're the only "religion" that has tax deductible "religious training" fees.

It's about time.

[...reply just to this | comment on the story... | next new]

7. Re: Oh good...

by Thalia

at Tue 3 Sep 11:33am
in reply to comment 2

score of 1

While I'm no fan of Scientology, your statement that it's the only religion that has tax deductable training fees is simply wrong. If you donate money to any church/synagogue/mosque/religious unit of your choice, you can deduct it from your taxes. This even applies if the organization is providing training for you (for example as a lay minister, or priest, or whatever.) The only question about Scientology was whether it was a real religion or not. And in 99% of the cases, the IRS doesn't question this at all.

I recommend Germany if you really hate Scientology. There, it has been declared an illegal cult, and you may not be a Scientologist if you want to hold public office, be a teacher, or work for government. Of course, Germany also has an official state religion. to which a percent of your taxes go. (But, for freedom, you may choose to give your money to the Catholics or the Lutherans.)

Thalia

[...reply just to this | comment on the story... | next new]

8. Re: Oh good...

by ~~Blue Dot~~
at Thu 5 Sep 4:25am
in reply to comment 7

score of 1

But, for freedom, you may choose to give your money to the Catholics

Nothing smacks of freedom like bloated hierarchy, antiquated authoritarianism, and state sponsored theology.

[...reply just to this | comment on the story... | next **new**]

9. Re: Oh good...

by Misch
at Thu 5 Sep 9:34pm
in reply to comment 7

score of 1

That's for a donation.

We're talking about paying a "fixed donation" and receiving services in return.

Under the terms of the "secret agreement", "Scientology would receive a special religious education tax deduction for its members. Scientologists can deduct tens -- sometimes hundreds -- of thousands of dollars per year for their private religious education. This kind of religious education deduction appears not to be available to Catholics, Protestants, or Jews sending their children to private religious schools. The Tax Notes Journal **published by the prestigious Tax Analysts'** organization, a nonprofit organization which provides information relating to U.S. tax laws, also noticed this most unusual inequity. According to Tax Analysts, The IRS's Revenue Ruling 93-73 may give a tax break to the Church of Scientology which is not shared by other churches."

This came up in a court case this year. A Jewish man who sent his children to a private hebrew school tried to claim 55% of the expenses as religious training (based on the percentage of classes that were such). Didn't fly **with the 9th Circuit Court of Appeals.**

LA Times story.

"In Tuesday's decision, the appellate court criticized the IRS for refusing to disclose the terms of a 1993 settlement with the Church of Scientology. That agreement, among other things, permits Scientologists to get

deductions in conflict with the 1989 Supreme Court decision, according to the 9th Circuit.

In support of their claim, the Sklars presented a 1997 Wall Street Journal article that provided details of the settlement. The 9th Circuit said that since the IRS failed to present any contradictory evidence on the nature of the settlement, the court was obliged to accept the Sklar's representations."

[...reply just to this | comment on the story... | next new]

3. Here's a lawyer who knows which side of his bun...

by MAYORBOB

at Mon 2 Sep 4:20pm

score of 1.5
nuanced

...is getting buttered.

> ***"Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, praised the South Carolina proposal. Mr. Newman said he regretted having participated in secret settlements in some early abuse cases. 'It was a terrible mistake,' he said, 'and I think people were harmed by it.'"***

I'm sure that Mr. Newman would be willing to divulge the details of those settlements to the people who were harmed later on, but, well, you know he signed that secrecy agreement.

"Illegitimi Non Carborundum"

[...reply just to this | comment on the story... | next new]

5. good.

by RobbieF

at Tue 3 Sep 8:49am

score of 0.5
modappeal

Maybe now we might see some PROgress.

[...reply just to this | comment on the story... | next new]

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Legal community weighs ban on secret settlements

By: Warren Wise Of The Post and Courier Staff
Originally Published on: 08/12/02
Page: 1

COLUMBIA - Plaintiffs who suddenly fall into large sums of cash from a product liability settlement in court may no longer be able to shield their windfall from creditors or relatives. Institutions trying to hide embarrassing facts from the public might find it harder to keep things quiet.

But desperate plaintiffs trying to get the money to pay their medical bills might find themselves with less leverage in cases against deep-pocket defendants.

The issue is the secret settlement of civil lawsuits, and the rules of the game in South Carolina just changed. That's because the state's 10 federal judges voted unanimously last month for a proposed rule change to ban sealed, court-sanctioned settlements - a decision that could place South Carolina as a national trendsetter toward not only openness in federal courts but state courts as well.

No other state requires all federal suit settlements to be open. Michigan comes closest, requiring secret settlements to be unsealed after two years.

So far, the policy affects only cases in federal courts here. But with state judges expected to take up the matter at a conference this month, the idea could spread. South Carolina's top jurist, Chief Justice Jean Toal, said last week she was leaning in the direction of a ban on sealed settlements.

The new federal rule doesn't take effect until this fall after a public comment period ends Sept. 30, but the legal community already knows it could affect suits that allege defective products, civil rights and employment discrimination, environmental violations and negligence, as in airliner disasters.

But in what ways will it affect them? One of the positive outcomes could be that the public finds out about dangerous situations sooner. For example, the failure of Firestone tires in the late 1990s was an instance in which sealed settlements helped keep details of the design flaws out of the press. Though those flaws eventually became a national story and led to a massive product recall, critics say lives could have been saved had information from some early lawsuits not been held under seal.

Yet some observers point out that secrecy can serve a purpose. For example, if a company faces a court trial in a liability case, one of its concerns may be the public disclosure of information it would rather keep private, That can be a powerful incentive for the defendant to settle - reducing the caseload of the court and speeding up the time it takes for defendants to receive their checks.

But it also reduces the ability to talk. Some settlements not only keep the records private but include agreements requiring all parties to stay silent on the terms. Plaintiffs who release

information about these settlements can find themselves back in court - this time on the receiving end of a suit.

And then there's the perception issue. Will defendants be less likely to give ground for fear that public disclosure of the terms of a settlement will be an embarrassment? Will defendants take their chances in court rather than settle one case with a public settlement that might encourage others to file similar suits?

That's the significant issue as far as University of South Carolina law professor Howard B. Stravitz is concerned. Stravitz - who specializes in civil procedure, federal courts and cases involving breast implants, asbestos and tobacco - thinks the rule will affect defendants more than plaintiffs. Defendants will become reluctant to settle in the open for fear of spawning new suits, he says.

He frames the issue simply: public interest versus a "chilling effect" on settlements.

A counter-argument to that is that while the public may not know the terms of a settlement, the lawyer who got the settlement does. If the settlement was profitable, the lawyer can always go looking for new clients with the same complaint. For example, the lawyer in a 1994 lead paint lawsuit in Charleston won a secret settlement for his client - and then held a "Lead Fair" in the neighborhood, handing out hot dogs and soft drinks while testing children for lead poisoning.

Plus, not all companies that settle cases believe that they are at fault. With the rising cost of litigation, many corporations have adopted policies of settling even frivolous lawsuits - not because they believe they can't win, but because it's cheaper.

That raises another interesting point: If corporations are less likely to settle secretly with attorneys who bring frivolous suits, will the number of such suits actually decrease? Attorneys who bring suits may be less likely to do so if they know the companies involved are no longer inclined to automatically propose a settlement.

It remains to be seen whether more openness will clog the court system and slow down the judicial process, but almost everyone agrees there are examples, such as court proceedings that deal with child molestation, when it's best to keep settlements closed.

But should everything involving child sexual abuse be kept under seal? The Lowcountry case of pedophile teacher Eddie Fischer led to a series of lawsuits - and several secret settlements. For example, the $105 million in damages awarded in 2000 to plaintiffs who sued Fischer's employer was never paid. Instead, the plaintiffs settled out of court for $22 million - in secret. The amount was revealed through court documents in another case.

Warren Wise covers the Legislature and state government. Contact him at (803) 799-1165 or wwise@postandcourier.com. Insight is a regular feature in which Post and Courier writers take a look at the news behind the news. Is there a topic or an issue you'd like for us to explore? Please send suggestions to Insight, c/o Robert Behre, The Post and Courier, 134 Columbus St., Charleston, S.C. 29403.

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• SUPREME COURT TODAY

VOL. 71, NO. 6 — *NOTABLE NEWS DEVELOPMENTS IN THE LAW* — AUGUST 13, 2002

HIGHLIGHTS

Federal District Court in *South* Carolina Approves Proposal To Prohibit Sealing of Settlement Documents Filed With Court

Lawyers who file settlement documents with the U.S. District Court for the District of South Carolina will no longer be able to obtain a protective order sealing those documents under a proposal approved by the court's judges. The proposal would amend the court's local rules of civil procedure to expressly prohibit the sealing of settlement agreements filed with the court, absent a requirement to seal in the governing rule, statute, or order.

The Chief Judge Joseph F. Anderson Jr., who initiated the change, says the rule amendment would be the first of its kind in federal court. Anderson says that the court should not sanction the privacy of settlement documents that contain information on dangerous products or other threats to health or safety about which the public has an interest in being informed. Page 2085

Civil *Procedure—Protective Orders*

South Carolina Federal District Court Proposes to Cease Sealing Settlements

RALEIGH, N.C.—Judges at the U.S. District Court for the District of South Carolina Aug. 1 proposed an amendment to the court's local rules of civil procedure that would prohibit the sealing of settlement agreements filed with the court.

Chief Judge Joseph F. Anderson Jr., said that, if the amendment to Local Civil Rule 5.03 is formally adopted, "I think we'd be the first federal court" to adopt such a rule. Formal adoption by amendment by the district court's judges is likely following the end of a public comment period, he said.

Amendment to Local Rule. A year ago, the court adopted Rule 5.03, which prescribes sealing of documents filed with the court except when certain strict requirements are met, including public notice.

Rule 5.03 expressly applies "[a]bsent a requirement to seal in the governing rule, statute, or order." Moreover, "[n]othing in [the local rule] limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court."

Subsections (A) and (B) of the local rule set forth the procedures that must be followed by a party seeking to file documents under seal and the public notice that must be provided by the clerk of the court.

The court's proposed amendment to Rule 5.03 would clarify that settlement agreements filed with the court will not be sealed. Specifically, the proposal would add a new subsection (C), providing: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule."

Anderson said he originally proposed a narrower change that only would have included product liability settlements where the product is still being marketed or widely used. However, following consideration by all the district judges, it was decided to expand the scope of the rule to include all settlements filed with the court.

The rule changes only would impact settlements that the district court was asked to approve, according to Anderson. Attorneys still could reach confidential settlements without court involvement. In addition, local rules also would retain a provision allowing settlements to be kept secret if a judge deems it is appropriate and there is no public interest involved in the case, Anderson said.

Anderson told BNA that he proposed the change because certain settlements contain information on dangerous products or other threats to health or safety about which the public has an interest in being informed. "I don't think the court should sanction the buying or selling of secrecy where public safety is at stake," he said.

The court is accepting public comment on the proposal through Sept. 30.

The text of Local Civil Rule 5.03 and the proposed amendment are available at http://www.scd.uscourts.gov on the court's Web site.

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September 30. 2002

Via Facsimile (803) 765-5960
The Honorable Larry W. Propes
Clerk of Court
U.S. District Court
1845 Assembly Street
Columbia, SC 29201

RE: Proposed South Carolina Federal Protective Order Rule Change

Dear Larry:

Thank you for the opportunity to comment on the rule revisions above-referenced. Accordingly, please allow this letter to serve as my categorical objection to any proposed changes to Local Rule 5.03 that purport to do the following, to any degree:

a. dilute or delete judicial discretion;
b. abolish protective orders or severely restrict them in scope and purpose; and,
c. prohibit the sealing of settlement documents on the vagaries of the self-interested few.

Generally, the rule changes as proposed would do violence to the very structure of South Carolina's legal system. The judiciary as a body is the most circumspect of institutions in law, and to call into question, generally or specifically, its wisdom is to degrade society's faith and trust in our legal system.

Specifically, the changes would remove the privacy and confidentiality privileges provided by protective orders to any and all actual and potential defendants, harming one class of litigants to benefit another. The value of a protective order in all but a few, exceptional cases is known by all to be significant, even to its detractors, and the arguments for preserving protective orders are classic. Where an issue to be protected is portrayed by an adverse party to be so vile as to be publicly harmful, that issue has usually already been made public through the media and other means.

Changes to the sealing of settlement agreements have the potential to seriously harm innocent litigants and victims. Particularly in settlement agreements, the good of

the whole would rarely be served by harming those directly affected by the settlement agreement. This is a well-settled premise.

Finally, I have received the Advisory Committee's proposal regarding settlement agreements tempered by judicial discretion, and I find it infinitely preferable to any proposal usurping judicial discretion in any area, but particularly in the area of protective orders and settlement agreements.

I have attempted to abbreviate my comments herein in consideration of the reader hereof. In summary, no good can come of the weakening or abolishing of judicial discretion in any area of our law. To take a current rule and attempt to adjust it for the sake of a few in the name of many is contrary to everything our freedoms stand for.

Sincerely,

Edward K. Pritchard, III

WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 588-0302

September 30, 2002

Larry W. Propes
Clerk of Court
1845 Assembly Street
Columbia, South Carolina 29201

Re: Comments to Proposed Amendment of Local Rule 5.03

Dear Mr. Propes:

The Washington Legal Foundation hereby submits these comments in response to this Court's proposed amendment to Local Rule 5.03 regarding the sealing of settlement agreements filed with the Court. WLF is opposed to this amendment on the grounds that it is against the public interest and sound public policy. The proposed rule unnecessarily and arbitrarily denies the district court with discretion to decide on a case-by-case basis whether a settlement agreement should be allowed to be kept confidential. The proposed amendment may also have adverse precedential effect throughout the federal judiciary and thus, run counter to the efforts of the Judicial Conference and Judicial Council of the U.S. Court of Appeals for the Fourth Circuit to harmonize local rules of practice.

Interests of WLF

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including litigants and attorneys who practice in the federal and state courts in South Carolina. WLF itself engages in litigation on a wide variety of legal issues, including civil justice reform and the proper and efficient functioning of the judiciary. With particular relevance to the current proposal, WLF has filed amici curiae briefs in several courts advocating the protection of trade secrets and other confidential information in the course of litigation and discovery. See. e.g., *Chicago Tribune* Co. *v. Bridgestone/Firestone, Inc.*, 263 F.2d 1304. (11th Cir. 2001) (discovery materials containing trade secrets not subject to public disclosure under common law or constitution).

Comments on Proposed Amendment to Local Rule 5.03

In August 2001, the U.S. District Court for the District of South Carolina adopted a new Local Rule 5.03 which sets forth the procedure that must be complied with before documents filed with the court can be sealed. In general, a Motion to Seal must be filed that states the reasons for sealing the documents. The trial court retains the discretion to grant to deny the motion. Current Rule 5.03 generally comports with the Fourth Circuit's decisions in *In re Knight Publishing* Co., 743 F.2d 231 (4th Cir. 1984) and *Ashcraft v. Conoco, Inc.* 218 F.3d 288 (4th Cir. 2000) regarding the sealing of court documents.

On August 16, 2002, an amendment to this rule was proposed that would add a new subsection to Rule 5.03 as follows:

> (C) No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule.

As is evident by this proposed rule, district court judges would be stripped of their authority and discretion to determine whether settlement agreements filed with the Court will be allowed to remain confidential, even though both parties to the litigation agree that the settlement agreement should be kept confidential. The proposed rule would, in essence, make it an irrebuttable presumption that the interests in disclosure outweigh the significant privacy and other concerns that may warrant keeping the settlement agreement confidential.

While WLF recognizes that most settlement agreements are not filed with the court, and hence, would not be subject to the mandatory disclosure rule as proposed in the current amendment to Rule 5.03. WLF believes that there are compelling public policy reasons that warrant keeping the current practice that give the district courts discretion to determine on a case-by-case basis whether settlement agreements should be made public. In the first place, the proposed rule would likely discourage parties from settling litigation if the parties desire that the terms of the agreement should remain confidential and 1) the settlement agreement is required to be filed with the court, or 2) if the agreement is not required to be filed with the court, but the parties nevertheless prefer that the agreement be filed with the court so that the court can better supervise the execution of its terms.

Because of our overcrowded court dockets, it is in the public interest to have rules and procedures that facilitate, rather than hinder, the settlement of costly litigation. There are sound reasons why the parties wish to keep their settlement agreements confidential. such as the desire to keep financial information, trade secrets or other confidential business information private. The public's "right to know" the terms of settlement agreements between private parties in civil litigation is not based on the common law or constitution, and certainly does not automatically trump the privacy and private property concerns of the parties. In addition, forcing settlement agreements that are filed with the court to be made public may stir up unwarranted litigation if relatively large settlement awards are made in particular cases. In short, the case has not been made by the proponents of this inflexible rule that the status quo regarding the filing the sealing of court records and documents should be altered. As the old adage goes, "if it ain't broke, don't fix it."

In addition to these public policy concerns, WLF believes that the proposed rule is such a departure from current practice of this and of other federal courts regarding the filing of settlement agreements, that it undermines the efforts of the Judicial Conference to harmonize the practice of all the district courts nationwide in general, and the practice in the Fourth Circuit in particular. This Court, therefore, should proceed with caution in this area, lest the proposed rule runs afoul of either the letter or spirit of Fed. R. Civ. Rule 83. Rule 83 allows local courts to promulgate local rules, but only so long as those rules are "consistent with" the federal rules and Acts of Congress. In particular, Kule 26(c)(7) providing for a protective order of certain trade secret and confidential information may be implicated if settlement agreements contain such information. There may very well be other unintended or adverse consequences of this amendment as a precedent for other courts to revise their rules regarding the sealing of court records and settlement agreements.

By forbidding the sealing of any settlement agreement filed with the court, the implication is that the current practice has allowed certain public health and safety matters to be kept from the public. However, practical experience and studies have shown this not to be the case. WLF believes that the current practice of allowing the district courts to use their sound discretion regarding the sealing of filed settlement agreements will satisfy any public interest concerns.

For the foregoing reasons, WLF urges this Court not to adopt the proposed amendment to Local Rule 5.03.

Respectfully submitted,

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September 30, 2002

Larry W. Propes
Clerk of Court
United States District Court
1845 Assembly Street
Columbia, SC 29201

RE: Proposed Amendment to Local Civil Rule 5.03, DSC

Dear Mr. Propes:

In response to the Court's August 16,2002 Notice requesting comments on the proposed amendment to Local Civil Rule 5.03, DSC, I am writing on behalf of American International Companies ("AIC"). I am Manager of Claims Litigation at AIC (i.e., insurer member companies of American International Group), one of the world's leading providers of commercial and general liability insurance. Because our companies and insureds are frequently parties to litigation in the Federal Courts of South Carolina, we felt it would be helpful to the Court to provide an insurers' perspective,

I have had an opportunity to review the proposed amendment to Local Civil Rule 5.03, DSC. In addition, I have considered some of the previous analysis by the Federal Courts of these issues, including the findings of the Judicial Conference, its Rules Committee and the Federal judicial Center that there was no need to change the existing law.

AIC has had the opportunity to deal with the issues relating to protecting privacy and confidentiality in litigation on many occasions. There are certain cases where a court-ordered confidentiality agreement may be important to some or all parties. We further feel that it is important to leave with the trial judges, the discretion to decide if and when a court-ordered confidentiality agreement is appropriate. Litigants in civil suits have a compelling interest in keeping the terms of their resolutions private. Often our insureds require some measure of confidentiality *before* settling a *case.* From the insurer's standpoint, confidential settlement agreements are of paramount importance in an effort to protect trade secrets, financial information and

other proprietary information from reaching the general **public,** and often protect the disclosure that a plaintiff (often a minor) may receive a large sum of money.

As the Court is aware, "parties who settle a legal dispute rather than pressing it to resolution by the Court often do so, in part anyway, because they do not want the terms of the resolution to be made public." Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002). insurance companies and their insureds, particularly, are reluctant to disclose **the terms of a settlement less those terms encourage others to sue. Therefore, by** eliminating the continued use of confidential settlement agreements, the Court may very well not be addressing the perceived problems arising from the use of confidential settlement agreements, but instead be fostering litigation by **virtue** of potential plaintiffs being encouraged by reports of "big money settlements." it may also, in instances where an insured has the power to **reject a settlement, make** the **difference in whether the case is settled or proceeds to trial,**

Moreover, the assumption made by the plaintiff's bar that the confidential settlements will somehow **allow defendants to** resist efforts to rectify their dcfcctivc product or detrimental conduct is suspect. The mere fact that a settlement agreement, and the terms thereof, remain confidential, will in no way allow a defendant to protect the **facts of the underlying suit from disclosure. Further, Confidential** settlement agreements do not control whether or not a potential defendant will ultimately remedy the problems with their products **or** behavior. In the big picture, the ultimate and most efficient gatekeeping device is the discretion of the trial judge and the amendment eliminates that.

In conclusion, AIC would submit that both the public and private interests would best be served by upholding the continued viability of confidential settlement agreements, especially in situations involving arms-length settlements between parties to a civil suit. As we understand it, the current Rules allow the District Court judges the discretion to approve confidential agreements and requests for sealing orders. We **would** request that the Court maintain **the status** quo with regard to the Local Rules and leave this matter within the sound discretion of the trial judge.

Thank you for the opportunity to comment on this issue. If you need anything further or if we can be of any further assistance, please let me know.

J. Donal Tierney
Manager, Claims Litigation
American International **Companies**

JDT:jmm