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 Bill 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 the Rhode 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't Know 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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