

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. Hunt ed. 1910)).

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

² *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

³ *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002) (“The public has an interest in knowing what terms 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 Cir. 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 (11th 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/).

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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.

Conclusion

In Justice Brandeis' oft-quoted words, "Sunshine is . . . the best of disinfectants."⁷ Access to settlements filed with the court would make the bench and bar accountable, help demystify the court system, and promote the free flow of information that is so cherished in our country. For the reasons set forth above, TLPJ respectfully urges the Committee to adopt the proposed amendment to 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,

/s/

Rebecca E. Epstein
Staff Attorney

⁷ Louis D. Brandeis, *Other People's Money* 67 (1933).