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CIVIL PROCEDURE

COURT STRICTLY CONSTRUES RULE 43(K) TO SETTLEMENT AGREEMENTS

In *Ashfort Corp. v. Palmetto Construction Group, Inc.*[1] the South Carolina Supreme Court held that Rule 43(k) of the South Carolina Rules of Civil Procedure applies to settlement agreements. Rule 43(k) requires all agreements between counsel regarding pending litigation either to be reduced to a consent order or written stipulation and entered into the record or to be declared upon the record in open court.[2]

The controversy in *Ashfort* arose over settlement of construction litigation after Hurricane Hugo. The attorneys in the case advised the circuit court that they had settled the case. As a result, the court dismissed the case, noting on the judgment form only that "court advised case settled."[3] When a dispute subsequently arose over the terms of the settlement, respondent, Ashfort Corporation (Ashfort), moved to reinstate the case to the active trial roster, and appellants, Palmetto Construction Group, Inc. (Palmetto), moved to compel settlement. The circuit court, however, refused to compel settlement, finding that there had not been a "meeting of the minds" with regard to the settlement.[4] In affirming the circuit court's refusal to compel settlement, the South Carolina Supreme Court held that the alleged settlement agreement was unenforceable because the parties had not complied with Rule 43(k).[5]

The supreme court based its decision primarily on the rationale behind Rule 43(k). "Like former Circuit Court Rule 14 on which it is based, Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation."[6] The court also noted that its

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1. ___ S.C. ___, 458 S.E.2d 533 (1995) (per curiam).

2. S.C. R. CIV. P. 43(k), entitled "Agreements of Counsels," reads as follows: "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record."

3. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

4. *Id.* at ___, 458 S.E.2d at 534.

5. *Id.* at ___, 458 S.E.2d at 535.

6. *Id.* at ___, 458 S.E.2d at 534 (citing *Ex parte* Pearson, 79 S.C. 302, 60 S.E. 706 (1908)). Rule 43(k) replaced Circuit Court Practice Rule 14, which was labeled "Consent must be in writing." Circuit Court Rule 14 used slightly broader language than the present mandate.

> No agreement or consent between the parties, or their attorneys, in respect to the proceedings in a cause shall be binding, unless the same shall have been reduced to the form of an order by consent and entered; or unless the evidence shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel; or unless made in open Court and noted by the presiding Judge or the Stenographer on his minutes by the direction of the presiding Judge.

holding was consistent with prior case law applying former Circuit Court Rule 14[7] and is consistent with the majority of jurisdictions construing similar rules.[8]

The court, *sua sponte*, raised the Rule 43(k) issue and, oddly enough, did not ask the parties to submit briefs on the matter. Simply, the clerk of court wrote a short letter to appellants' attorney asking if appellants had complied with Rule 43 (k). Appellants' attorney responded by letter to the clerk, and the court, much to counsel's surprise, based its opinion on this rather informal reply. The court rejected appellants' argument that application of Rule 43(k) to settlement agreements implicitly contravenes solid South Carolina precedent such as *Arnold v. Yarborough*,[9] which allows parties to establish settlement agreements by other means, such as through an exchange of letters between counsel.[10] The court also rejected appellants' contention that Rule 43's title, "Evidence; Conduct of Trial," limits the rule to evidentiary and trial matters.[11] Despite Palmetto's argument that the agreement was between its insurer and Ashfort and not "between counsel" as specified in the rule, the court held that Rule 43(k) applied because the rule was intended to prevent the type of dispute being presented.[12]

The court further rejected appellants' argument that applying Rule 43(k) to settlement agreements would create uncertainty.[13] Contrary to appellant's assertion, the court stated that the rule would increase the certainty of settlement agreements by avoiding unnecessary disputes.[14]

S.C. CIR. CT. PRAC. R. 14, *repealed by* S. C. R. CIV. P. 43(k).

7. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 534 (citing Small v. Small, 286 S.C. 87, 332 S.E.2d 769 (1985) and Bell v. White, 279 S.C. 153, 303 S.E.2d 242 (1983)).

8. *Id.* at ___, 458 S.E.2d at 534-35 (citing cases supporting the unenforceability of settlement agreements that do not conform to the formalities of the controlling rules).

9. 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984).

10. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

11. *Id.* at ___, 458 S.E.2d at 535.

12. *Id.* at ___, 458 S.E.2d at 535.

13. *Id.* at ___, 458 S.E.2d at 535.

14. *Id.* at ___, 458 S.E.2d at 535. As noted by the supreme court, the very purpose of such a rule is:

> [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

Id. at ___, 458 S.E.2d at 535 (alteration in original) (quoting 83 C.J.S. *Stipulations* § 4 (1953)). For other cases discussing the purpose of the rule requiring stipulations to be in writing, see *Interior Credit Bureau, Inc., v. Bussing*, 559 P.2d 104, 106 (Alaska 1977) ("to avoid expending court resources to resolve arguments as to the existence and terms of an oral settlement agreement"); *Roscoe Moss Co. v. Roggero*, 54 Cal. Rptr. 911, 914 (Cal. Ct. App. 1966) ("to insure [sic] that a stipulation . . . be properly understood and evidenced"); *Rosen v. Grand*, 175

Finally, the court rejected appellants' contention that they had substantially complied with Rule 43(k). Appellants offered two pieces of documentation to show compliance with Rule 43(k). First, Palmetto presented a letter and proposed release transmitted from Ashfort.[15] The respondent's letter specifically called for dismissal of the cause of action with prejudice.[16] The court did not specifically address the letter and release, presumably because neither was entered into the record. The court stated generally that the appellants' assertion of substantial compliance was "without merit."[17] Second, appellants argued that the circuit court's "Order of Dismissal" satisfied the mandates of Rule 43(k). The court specifically rejected this contention, finding that the lower court's perfunctory order, which merely noted "court advised case settled," did not constitute compliance with Rule 43(k) because the order did not contain the terms of the alleged settlement agreement.[18]

The holding in *Ashfort* supports the idea that although settlement is favored,[19] the court will not take it upon itself to fashion a settlement agreement by deciding factual issues relating to an alleged oral settlement agreement.[20] There is no judicial economy or efficiency gained if the court has to virtually try the case to give effect to an alleged settlement agreement.[21]

N.Y.S.2d 441, 445 (N.Y. App. Div. 1958) ("to relieve the courts from the constant determination of controverted issues of fact with reference to such proceedings."); *Kaui v. County of Kauai*, 386 P.2d 880, 884 (Haw. 1963) (per curiam) ("for the protection of the court against the burden of determining controverted questions of fact with respect to oral agreements between counsel"); *Sone v. Braunig*, 469 S.W.2d 605, 611 (Tex. App. 1971) ("to remove from the 'fallibility of human recollection' agreements made by 'counsel in the course of judicial proceeding[s] which affect the interests of their clients'" (quoting McClain v. Hickey, 418 S.W.2d 588, 590 (Tex. App. 1967))).

15. *See* Letter from Julius H. Hines of Buist, Moore, Smythe, & McGee, P.A., Counsel for Appellants, to the Honorable Clyde N. Davis, Jr., Clerk of the South Carolina Supreme Court (April 14, 1995) (on file with the South Carolina Supreme Court).

16. *Id.* at 2.

17. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

18. *Id.* at ___, 458 S.E.2d at 535 (citing *Ex parte* Pearson, 79 S.C. 302, 309, 60 S.E. 706, 708 (1908)) and Lyons Enters., Inc. v. Custer, 814 P.2d 780, 782 (Ariz. Ct. App. 1991)).

19. *E.g.*, Darden v. Witham, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance.").

20. *See* Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992) ("But even as the court may enforce settlement, it has the inherent power to refuse to enforce settlements.").

21. *See* Resnick v. Valente, 637 P.2d 1205, 1206 (Nev. 1981) (per curiam) (providing that the rule gives the court an "efficient method for determining genuine settlements and enforcing them" and thus, "does not thwart the policy in favor of settling disputes" but rather, "enhances the reliability of actual settlements" and avoids "trial by affidavit").

The ideals of judicial efficiency and economy are inherent in the South Carolina Rules of Civil Procedure. Rule 1 enunciates how the rules are to be interpreted and applied: "They shall

As the supreme court stated in *Ashfort*, applying Rule 43(k) to settlement agreements is likely to increase certainty surrounding such agreements.[22] The rule achieves greater certainty in several ways. First, Rule 43(k) provides counsel and parties with a bright line test for when the court will enforce settlement agreements.[23] Second, the rule helps avert possible statute of frauds problems by requiring that all agreements not executed or admitted be in writing.[24] Third, the rule avoids unnecessary disputes over whether a condition precedent to the agreement was to reduce the final agreement to writing.[25] Fourth, the rule allows parties to see the agreement laid out in writing and to fully consider its terms before assenting. Thus the process ensures that the parties have reached a "meeting of the minds" and are committed to a final, deliberate agreement.[26]

After *Ashfort*, parties and counsel must clearly comply with the requirements of Rule 43(k) in order to effect a binding, enforceable settlement agreement.[27] Less clear, however, is whether counsel must comply with the

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be construed to secure the just, speedy, and inexpensive determination of every action." S.C. R. CIV. P. 1.

22. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

23. Courts favor encouraging parties to reach a settlement and do not want to make parties afraid to enter into negotiations. Chandler v. Geraty, 10 S.C. 304 (1878). In *Chandler* the court stated:

> These propositions [of settlement amounts] were made simply with a view to avoid litigation, and it is against the policy of the law to discourage parties from attempts to settle their differences by holding them up to any propositions they may make in the course of negotiations for that purpose after such negotiations have failed.

Id. at 308. Without the rule, the court must expend valuable time and energy to determine whether parties embroiled in litigation previously reached an enforceable settlement agreement. *See* Wood v. Virginia Hauling Co., 528 F.2d 423, 425-26 (4th Cir. 1975) ("A settlement agreement by definition should end litigation. Court clerks and . . . judges cannot monitor the disintegration of a cause of action by bits and pieces. . . . There is no such thing as half settlement or even 95 percent settlement."); Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983) (providing that the court has no power to impose, as a "final arbiter," a settlement agreement in which there was no meeting of the minds).

24. *See, e.g.*, Herndon v. Herndon, 183 S.E.2d 386, 389 (Ga. 1971).

25. *See* Columbia Management Corp. v. Resort Properties, Inc., of Beaufort, 279 S.C. 370, 372-73, 307 S.E.2d 228, 229 (1983) "[W]hen the parties contemplate execution of a written agreement as a condition precedent to being bound, no valid contract arises until the agreement is executed." (citing Bugg v. Bugg, 272 S.C. 122, 249 S.E.2d 505 (1978); Holliday v. Pegram, 89 S.C. 73, 71 S.E. 367 (1911))); *overruled on other grounds by* Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990); Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984).

26. The holding in *Ashfort* is consistent with fundamental settlement principles: "'[S]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise . . . .'" O'Connor v. GCC Beverages, Inc., 391 S.E.2d 379, 381 (W. Va. 1990) (quoting 15A C.J.S. *Compromise & Settlement* § 7(1) (1967)).

27. However, Rule 43(k), like former Circuit Court Practice Rule 14, does not apply if the

literal language of Rule 43(k) or with the less rigorous requirements set out in former Circuit Court Practice Rule 14 and prior case law interpreting Rule 14.

A party can comply with Rule 43(k) in three ways. The rule requires that a settlement agreement be reduced to (1) a written stipulation or to (2) a consent order, either of which must be signed and entered into the court record; alternately, (3) the settlement agreement may be announced in open court and noted upon the record.[28]

Former Rule 14, however, allowed three slightly easier ways to satisfy the rule. One could comply with the former rule through (1) a consent order entered into the record, as above, or (2) *through a writing, signed by the party to be charged*, or (3) through announcement in open court, noted by or at the direction of the judge.[29]

Thus, under former Rule 14, a party can satisfy the writing requirement, for example, by an exchange of letters between the parties or counsel, yet such an exchange would be insufficient under a literal interpretation of Rule 43(k)'s "stipulation" requirement. If strict compliance with Rule 43(k) is required, then *Ashfort* dramatically changes state practice concerning the form of settlement agreements because a party could not use letters between counsel to prove a valid, written settlement agreement.

In *Ashfort* the appellants raised this issue by arguing that application of Rule 43(k) to settlement agreements would overrule established South Carolina precedent on the form of settlement agreements, such as the letters exchanged in *Arnold v. Yarborough*.[30] The *Ashfort* court side-stepped this fundamental question, responding that the issue in *Arnold* was the power of the attorney to enter into the settlement agreement on behalf of the client, not the form of the settlement agreement itself.[31]

The literal language of Rule 43(k) is that an agreement should be "reduced" to a written stipulation, intimating reduction of the agreement to one final document.[32] The supreme court, however, did not directly address this issue. Thus, it appears a series of letters between counsel could constitute a written stipulation if signed by counsel and entered into the record as required.

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parties admit or execute the agreement. *Ashfort*, ___ S.C. at ___ n.1, 458 S.E.2d at 534 n.1 ("[I]t is generally held [that] such rules have no application when the agreement is admitted, or where it has been carried into effect." (citing *Ex parte* Pearson, 79 S.C. 302, 309, 60 S.E. 706, 708 (1908))).

28. S.C. R. CIV. P. 43(k).

29. *See* S.C. CIR. CT. PRAC. R. 14, *repealed by* S.C. R. CIV. P. 43(k).

30. 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984).

31. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

32. If this interpretation proves true, South Carolina now requires more formality than many other majority-rule states. *See infra* notes 52-56 and accompanying text, discussing Texas's and Louisiana's interpretation of the "writing" requirement.

In addition, the supreme court's broad construction of Rule 43(k) in *Ashfort* may indicate a willingness to maintain consistency with the looser writing requirement of former Rule 14. In *Ashfort* the supreme court rejected two limiting arguments raised by the appellants. First, the appellants argued that Rule 43 did not apply to settlement agreements because the rule's title "Evidence; Conduct of Trial" limited application of the rule to evidentiary and trial matters.[33] Consistent with its prior approach to construing the South Carolina Rules of Civil Procedure,[34] the supreme court held that because the text of Rule 43(k) is unambiguous, Rule 43(k) could not be limited by its title.[35]

Similarly, the *Ashfort* court broadly interpreted Rule 43(k) in rejecting appellants' second argument that the rule was not applicable because it regulates agreements between counsel.[36] The appellants contended that the agreement in question was not between counsel but merely confirmed by counsel as a formality.[37] The supreme court responded by stating that such a narrow reading of the rule would frustrate the rule's purpose of preventing disputes over the existence and terms of "*all agreements* regarding pending litigation."[38] Thus, the supreme court apparently interpreted the scope of Rule 43(k) as consistent with the language of former Rule 14, which applies to all agreements and consents "between the parties, or their attorneys."[39]

Former Circuit Court Practice Rule 14 is an old and venerable rule, and courts have historically enforced strict compliance with it. "Under this rule [14] the court will not hold a party or his counsel bound to do or abstain from doing anything in pursuance of an agreement not shown to have been made in accordance with the rule."[40] The court has stated that the rule is for the protection of the court and of the parties. Thus, parties must adhere faithfully to its requirements, or the courts will simply not enforce the agreement.[41]

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33. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

34. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993).

35. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535; *see Garner*, 312 S.C. at 486, 435 S.E.2d at 849 ("For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, *but they cannot undo or limit what the text makes plain.*" (emphasis added)).

36. S.C. R. Civ. P. 43(k).

37. *Ashfort*, ___ S.C. at ___, 458 S.E.2d at 535.

38. *Id.* at ___, 458 S.E.2d at 535 (emphasis added).

C. Cir. Ct. Prac. R. 14, *repealed by* S.C. R. Civ. P. 43(k).

40. *Ex parte* Pearson, 79 S.C. 302, 309, 60 S.E. 706, 708 (1908).

41. *See* Bell v. White, 279 S.C. 153, 154-55, 303 S.E.2d 242, 243-44 (1983) (refusing to reinstate action for specific performance of an option agreement based on alleged oral agreement between counsel); Brewton v. Inter-Carolinas Motor Bus Co., 167 S.C. 151, 151-52, 166 S.E. 85, 85 (1932) (per curiam) ("'[T]he proper and safer practice, for the protection of all parties, and for the court as well, is to have such consent, if obtained, evidenced by writing.'" (quoting Wade v. Gore, 154 S.C. 262, 264, 151 S.E. 470, 471 (1930))); *see also* Moore v. Jim Moore

Soon after its decision in *Ashfort*, the supreme court applied its holding to find another alleged settlement agreement unenforceable. In *Widewater Square Associates v. Opening Break of America, Inc.*[42] the supreme court utilized Rule 43(k) to decide a dispute over the meaning and effect of a form order. The issue in *Widewater* was whether an administrative judge effectively dismissed an allegedly settled cause of action by checking the block marked "Settled" on Form 4, South Carolina Rules of Civil Procedure, Form Order. The judge wrote "Noted at Roster Sounding" under the settlement block but did not check the block entitled "Action Dismissed."[43] The petitioners argued that Form 4 reflected a final, enforceable order of settlement. The respondents in *Widewater* denied entering into a settlement and characterized the petitioner's contention as "simply an attempt to gain relief where none was given, to assert that a judicial determination occurred when it did not."[44]

The supreme court held that whether Form 4 had been intended to be used as an administrative form or to order final judgment in the action was ultimately irrelevant. The court refused to enforce the alleged "settlement" order under the circumstances because the alleged settlement agreement, although arguably "announced in open court," did not set forth the terms of the agreement as required by Rule 43(k) and as explained in *Ashfort*.[45]

The holding in *Ashfort* and its almost immediate application in *Widewater* suggest that the supreme court will require strict compliance with Rule 43(k), consistent with the spirit of the case law applying former Circuit Court Practice Rule 14. The supreme court's decision is highly significant because Rule 43(k) applies to all settlement agreements, unless admitted or executed. Thus, Rule 43(k) is now an additional, crucial hoop through which counsel must jump to ensure a binding settlement agreement. Practitioners must do

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Cadillac, Inc., 287 S.C. 240, 241, 335 S.E.2d 798, 798 (1985) (per curiam) (finding "[n]o excusable neglect is shown when an alleged extension is not obtained in writing as required by Circuit Court Rule 14 and no excuse is offered for failure to comply with the rule"); Metts v. Carmack, 276 S.C. 280, 278 S.E.2d 333 (1981) (per curiam) (finding alleged extension was not binding absent compliance with Rule 14); Gillespie v. Rowe, 275 S.C. 98, 99-100, 267 S.E.2d 535, 536 (1980) (per curiam) (finding no excusable neglect).

42. ___ S.C. ___, 460 S.E.2d 396 (1995) (per curiam).

43. *Id.* at ___, 460 S.E.2d at 396.

44. Brief of Respondent at 15, *Widewater* (No. 91-CP-40-1171) ("In the instant case, there was no settlement agreement. There has been no compliance with a settlement agreement because there was no settlement.").

45. *Widewater*, ___ S.C. at ___, 460 S.E.2d at 397. *Compare* Lummus Cotton Gin Co. v. Counts, 98 S.C. 136, 146, 82 S.E. 391, 393 (1914) (presuming that under Rule 14 an agreement marked "heard" and referred to a referee was valid), *with* Brown v. Rogers, 71 S.C. 512, 516, 51 S.E. 257, 258 (1905) ("The marking of the case 'heard' by the circuit judge on the calendar in open court was not an agreement in writing . . . nor was it a memorandum of such an agreement noted by the presiding judge, with the consent in open court of the plaintiff's attorney, under rule 14 of the circuit court.").

more than enter into the valid settlement agreement; they must reduce the agreement to one of the forms allowed by Rule 43(k) and enter the agreement into the record. The practicing bar may have valid concerns[46] that this new rule will indeed transform settlement negotiations into the colloquial "three ring circus" depending upon how strictly the rule is construed.

As the supreme court noted, *Ashfort* is consistent with the majority rule. That is, the overwhelming majority of jurisdictions construing similar court rules or statutes have held that the written stipulation rule applies to settlement agreements. Because the language of court rules or statutes differs from state to state, the facets of rule or statutory application correspondingly differ, but the primary rationale behind the decisions is the same. For example, in *Canyon Contracting Co. v. Tohono O'Odham Housing Authority*,[47] the Arizona Court of Appeals held that Arizona Rule of Civil Procedure 80(d), requiring disputed, out- of-court agreements to be in writing, applies to settlement agreements because the language of the rule does not limit the type of agreements to which it applies and because sound policy reasons support applying the rule to settlement agreements.[48] The Arizona court also strictly construed the rule's requirements in light of the policy of avoiding difficult issues of proof.[49]

The courts in both Texas and Louisiana have also applied their written stipulation rules[50] to settlement agreements, as is reflected in ample case law from both jurisdictions. As in South Carolina, Texas and Louisiana courts will not compel enforcement of agreements that do not comply with the rule.[51] The Texas and Louisiana courts strictly construe their rules and seem

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46. *See* Hines letter, *supra* note 15, at 1-2 ("Even where attorneys have confirmed the terms of a settlement in writing, the settlement would be voidable at the will of either party at any time prior to entry or filing of an order or written stipulation. . . . It remains the general understanding of the bar that settlement agreements are binding when made, not when entered upon the record.").

47. 837 P.2d 750 (Ariz. Ct. App. 1992), *cited with approval in Ashfort* ___ S.C. at ___, 458 S.E.2d at 534-35.

48. *Canyon Contracting*, 837 P.2d at 752.

49. *Id.* at 754 (citing Hackin v. Rupp, 452 P.2d 519, 520-21 (Ariz. Ct. App. 1969)); *see* Lyons Enters., Inc. v. Custer, 814 P.2d 780, 782 (Ariz. Ct. App. 1991) ("[I]n order to determine not only that the parties reached an agreement but the terms of the agreement, the trial court would have to resolve the factual dispute between the parties . . . . This is precisely what [the rule] was designed to avoid.").

50. LA. CIV. CODE ANN. art. 3071 (West 1994) reads, in pertinent part: "[A settlement] must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding." Likewise, TEX. R. CIV. P. 11 states that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

51. *E.g.*, Felder v. Georgia Pac. Corp., 405 So. 2d 521, 523 (La. 1981) (citing Bourgeois v. Franklin, 389 So. 2d 358 (La. 1980); Jasmin v. Gafney, Inc., 357 So. 2d 539 (La. 1978));

to focus on the rules' purpose to avoid disputes about the existence and terms of settlement agreements.[52] The Texas and Louisiana courts have also considered what constitutes compliance with the "writing"[53] and "open court"[54] requirements of their respective rules. The consensus seems to be that a valid agreement needs to evidence the unequivocal assent of the parties and the definite terms of the agreement.[55]

As noted in *Ashfort*,[56] Georgia and New York are noteworthy exceptions to the majority.[57] These two minority jurisdictions reason that the local rules

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Kennedy v. Hyde, 682 S.W.2d 525, 528 (Tex. 1984); Estate of Pewthers v. Holland Page Indus., Inc., 443 S.W.2d 392, 397 (Tex. App. 1969).

52. *See* McClain v. Hickey, 418 S.W.2d 588, 590 (Tex. App. 1967) ("The rule requires a written and signed memorial of the agreement. This necessarily means that the assent to and details of the agreement be shown by the memorial; otherwise the assent to and content of the agreement might be preserved only in the memory of the persons making it.").

53. *See, e.g.*, Cavallini v. State Farm Mut. Auto. Ins. Co., 44 F.3d 256 (5th Cir. 1995) (parties' correspondence satisfied writing agreement and thus created enforceable settlement despite later objections to terms); Parich v. State Farm Mut. Auto. Ins. Co., 919 F.2d 906, 914 (5th Cir. 1990) ("[A] writing will not be considered a compromise if the court must receive parol evidence to reach that conclusion." (citing Senegal v. Delahoussaye, 311 So. 2d 58, 61 (La. Ct. App. 1975))); *Felder*, 405 So. 2d at 524 ("[W]here two instruments, when read together, outline the obligations each party has to the other and evidence each party's acquiescence in the agreement, a written compromise agreement, as contemplated by La. C.C. art. 3071, has been perfected"); Coleman v. Academy of the Sacred Heart, 650 So. 2d 265, 267 (La. Ct. App. 1994) ("A letter by one of the parties setting forth their understanding of the agreement is not an agreement of the parties reduced to writing.").

54. *See, e.g.*, Jones v. American Motorists Ins. Co., 769 S.W.2d 617, 619 (Tex. App. 1989) (holding that an entry of "8-27-87 Dismissed" on the trial court's docket sheet did not reflect an agreement made "in open court" or memorialize the terms of the agreement on the record).

Anderegg v. High Standard, Inc., 825 F.2d 77 (5th Cir. 1987), is an amusing case addressing the open court requirement. In *Anderegg* plaintiff's counsel claimed to have "announced" an oral settlement in open court by shouting out its terms onto the record, over the defendant's protests and disavowals. Incredibly, the district court held that these antics satisfied Texas' Rule 11. The Fifth Circuit reversed, stating:

> It is clear that the Rule contemplates that something *more* is required for the enforcement of such an agreement than that it be a valid contract. . . . An 'agreement' such as the one in this case, one in which the terms are shouted at the bench by counsel for one side and immediately repudiated by the other, might well consist of something *less* than a contract valid under general law—in such a case there may have been no antecedent agreement between counsel at all. . . . We conclude that the "made-in-open-court" exception to Rule 11's requirement of a signed writing for enforcement of agreements between counsel requires the substantial equivalent of a writing and signatures: a statement into the record of the terms of the agreement in the presence of the court, plus the agreement of the parties (or their counsel) to be bound by it affirmatively stated on the record. Clearly, what was done in this case does not suffice.

Anderegg, 825 F.2d at 80-81 (footnotes omitted).

55. *See Felder*, 405 So. 2d at 524.

56. ___ S.C. at ___ n.2, 458 S.E.2d at 534-35 n.2.

57. *See, e.g.*, Boswell v. Gillen, 62 S.E. 187 (Ga. 1908); Langlois v. Langlois, 169

do not apply to compromise and settlement agreements because settlements completely dispose of the litigation and thus are not true procedural agreements affecting pending litigation.[58] In *Ashfort* the South Carolina Supreme Court did not find this reasoning persuasive.[59]

In New York and Georgia the courts have established various additional criterion to preclude doubtful oral settlement agreements. In fact, the courts often apply the minority rule in a way that makes it virtually indistinguishable from the majority rule. Most oral settlement agreements are upheld in Georgia and New York for reasons compatible with the majority rule exemption of admitted or executed settlement agreements.[60] For example, the minority courts will enforce only a "'definite, certain, and unambiguous [oral] settlement agreement, which is not denied.'"[61] As under the majority rule, "'where the very existence of the agreement is disputed, it may only be established by a writing.'"[62] Similarly, "the failure to agree to even one

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N.Y.S.2d 170 (N.Y. App. Div. 1957).

58. *Boswell*, 62 S.E. at 187 ("The rule of court that no consent between attorneys or parties, if denied, will be enforced, if not in writing, has no application to an oral agreement and compromise of a pending suit."); *Langlois*, 169 N.Y.S.2d at 175 ("That rule is applicable only to agreements relating to matters in the action and it does not apply to an agreement completely disposing of the action and of the claim upon which it was based.").

59. *See Ashfort*, ___ S.C. ___ n.2, 458 S.E.2d at 534-35 n.2. Not all judges in Georgia support the minority rule. In a vigorous dissent in Herndon v. Herndon, 183 S.E.2d 386, 389 (Ga. 1971) (Felton, J., dissenting), a divorce settlement case, Justice Felton stated that, in addition to ignoring a statute of frauds violation, "[t]he most objectionable phase of the court's rulings [in *Herndon*] is that they make another unwarranted exception to the law which prevents the substitution of an oral agreement for a definite, written contract by which the parties agreed to be bound exclusively."

60. *See Ashfort*, ___ S.C. at ___ n.1, 458 S.E.2d at 534 n.1.

61. Southern Med. Corp. v. Liberty Mut. Ins. Co., 454 S.E.2d 180, 182 (Ga. Ct. App. 1995) (quoting Smith v. Haverty Furniture Co., 326 S.E.2d 812, 812 (Ga. Ct. App. 1985)); *see, e.g.*, *In re* Dolgin Eldert Corp., 286 N.E.2d 228 (N.Y. 1972) (holding that the settlement agreement in question must be sufficiently definite and complete in its material terms and respects and be supported by competent evidence).

62. Reichard v. Reichard, 423 S.E.2d 241, 243 (Ga. 1992) (quoting LeCroy v. Massey, 366 S.E.2d 215, 216 (Ga. Ct. App. 1988)); *see, e.g.*, *Langlois*, 169 N.Y.S.2d at 175. *LeCroy* illustrates the usefulness and efficiency of the majority's bright line test. The alleged settlement in *LeCroy* was "hotly contested"—three of the six attorneys involved swore they reached a settlement, and three swore that there was no settlement agreement. *LeCroy*, 366 S.E.2d at 216. *Langlois* is also illustrative. In *Langlois* after plaintiff had advised the defendants and the judge that the case was settled, after the case was stricken from trial calendar, and after plaintiff had admitted existence and terms of settlement, the court held that plaintiff did not have the arbitrary right to repudiate an oral settlement not yet reduced to writing. *Langlois*, 169 N.Y.S.2d at 175.

In Georgia, when a settlement agreement is disputed, and a written agreement, therefore, is required, the writing "'ideally consists of a formal written agreement signed by the parties. However, letters or documents prepared by attorneys which memorialize the terms of the agreement reached will suffice.'" Herring v. Dunning, 446 S.E.2d 199, 202 (Ga. Ct. App. 1994) (quoting Stevens v. McCarty, 401 S.E.2d 605, 607 (Ga. Ct. App. 1991)).

essential term means there is 'no agreement to be enforced.'"[63]

In New York, the courts frequently uphold oral settlement agreements on the basis of prejudice. "Even if a stipulation be verbal, the court will hold it to be effectual, so as not to prejudice, deceive, or defraud the opposite party, if he has relied and acted upon the agreement in good faith."[64] New York's more liberal approach to oral settlement agreements likely stems from its view that the purpose of the stipulation requirement is administrative convenience.[65]

The minority rule appears to enforce basically the same oral settlement agreements that the majority rule would enforce.[66] Doctrinally, however, the rules are fundamentally different. As noted by the Nebraska Supreme Court in *Omaha National Bank v. Mullenax*,[67] strict adherence to the minority rule could produce an anomalous result:[68]

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63. *Reichard*, 423 S.E.2d at 243 (quoting Bridges v. Bridges, 349 S.E.2d 172, 174 (Ga. 1986)); *see, e.g.*, Monaghan v. SZS 33 Assoc., L.P., 875 F. Supp. 1037, 1042 (S.D.N.Y. 1995) ("In view of the fact that an agreement was reached, the absence of significant disagreement as to its terms and contingencies, and the . . . good-faith reliance on the settlement, the oral stipulation will be enforced."), *aff'd*, 73 F.3d 1276 (1996).

64. Lee v. Rudd, 198 N.Y.S. 628, 630 (N.Y. Sup. Ct. 1923).

In essence, the New York view is estoppel; this parallels the majority view that the stipulation rule is inapplicable if the stipulation is executed. *See, e.g.*, *Monaghan*, 875 F. Supp. at 1042 ("A settlement agreed to before a court but not recorded can still be enforced when there is little dispute as to its terms and no dispute as to the parties having reached an agreement."); Gass v. Arons, 227 N.Y.S. 282, 284 (N.Y. City Ct. 1928) (holding a settlement had been announced in open court despite the fact that terms of the agreement were discussed off record, in the judges chambers; alternatively, the court found that plaintiff had shown sufficient prejudice to uphold the verbal agreement because plaintiff had lost an opportunity to finish trial in term of court in which it was begun by relying on settlement). *See generally* 15A C.J.S. *Compromise & Settlement* § 7(2) (1967) ("Sufficiency of Acceptance in General").

65. As stated in *Monaghan*:

> It has been recognized . . . that the rule requiring stipulations of settlement to be in writing is one of convenience designed to relieve courts from having to resolve disputes as to the terms of such stipulations. Thus where there is no dispute as to terms it is eminently reasonable to refuse to permit use of the rule against a party who has been misled or deceived by the oral stipulation . . . *or who has relied upon it.*

Monaghan, 875 F. Supp. at 1043 (quoting Hansen v. Prudential Lines, Inc., 461 N.Y.S.2d 670, 675 (N.Y. Sup. Ct. 1983)).

66. See Rosen v. Grand, 175 N.Y.S.2d 441, 446 (N.Y. App. Div. 1958) ("Since respondents suffered no prejudice from the repudiation of the alleged settlement, it would not be in the best interests of justice to explore unnecessary and embarrassing issues of fact arising between counsel and the court."); Goldbard v. Empire State Mut. Life Ins. Co., 171 N.Y.S.2d 194, 201-02 (N.Y. App. Div. 1958) (demonstrating the court's refusal to enforce an alleged oral settlement agreement because the "inchoate and staccato negotiations that ensued in this case, culminating in a relayed telephone call," did not warrant the finding of "the finality, the deliberateness, or the occasional formalization" associated with a binding settlement agreement.).

67. 320 N.W.2d 755 (Neb. 1982).

68. Interestingly, the Nebraska Supreme Court overruled itself to join league with the

> It would be strange indeed if an [oral settlement] agreement which would be unenforceable under the statute of frauds and is also unenforceable under a court rule applicable to all parties to a suit were to become enforceable simply because the matter involved in the settlement agreement was pending as a lawsuit in court. Even though the law favors and encourages settlements, the fact that a lawsuit has been filed ought not to validate an otherwise unenforceable contract.[69]

The bright line test of the majority rule avoids this anomalous result and is relatively easy to administer. If the parties have complied with the writing requirement, the agreement is enforceable. On the policy side, the court can more comfortably assume that the settlement agreement embodies a final, deliberate, formal agreement to which all parties have assented after objective assessment of and reflection on the proposed terms.

In *Ashfort*, the South Carolina Supreme Court adopted this bright line test for enforcement of settlement agreements, holding that Rule 43(k) of the South Carolina Rules of Civil Procedure applies to settlement agreements. *Ashfort* dictates that practitioners do more than enter into a traditionally enforceable settlement agreement. Practitioners must also comply with Rule 43(k). Before the court will enforce an alleged settlement agreement, the parties either must (1) reduce the settlement agreement and its terms to a consent order or written stipulation and enter it into the record or (2) announce the agreement and its terms in open court and enter them into the record. A question unanswered in *Ashfort* is whether traditional settlement writings, such as an exchange of letters between counsel, constitute a written stipulation of a settlement if entered into the record. Until that question is definitively resolved, the safest course for practitioners is to strictly and literally comply with the dictates of Rule 43(k).

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majority. In Simmons v. Murray, 204 N.W.2d 800 (Neb. 1973), the Nebraska Supreme Court originally embraced the minority rule. In addition to relying on the reasoning enunciated in the New York and Georgia decisions, *Simmons* held that the Nebraska Supreme Court was not required to take judicial notice of lower courts' rules of practice. *Id.* at 801.

In a strong dissent, Justice Newton noted that "the spectacle of counsel contradicting each other as to the existence of an agreement illustrated the reason why the rule was adopted," *id.* at 804, namely, the protection of the court, and of attorneys as officers of the court, in the efficient, dignified administration of justice. *Id.* at 804 (citing Manowitz v. Gaenslen, 142 S.W. 963 (Tex. App. 1912)). Justice Newton further stated: "*The law favors settlements but not disputes in regard to them* between attorneys. Misunderstandings frequently occur, even between very careful practitioners. If we are to hear and heed such disputes, settlements will be discouraged. Attorneys will be afraid to discuss settlements for fear of being misunderstood or wrongfully quoted." *Id.* (Newton, J., dissenting) (emphasis added).

69. *Mullenax*, 320 N.W.2d at 758. The court held that alleged oral compromises not made in open court are unenforceable when in violation of the court rule requiring written stipulations or agreements or when in contravention of the statute of frauds. *Id.*