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The New Role of Secret Settlements in the South Carolina Justice System

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THE NEW ROLE OF SECRET SETTLEMENTS IN THE SOUTH CAROLINA JUSTICE SYSTEM

JEAN HOEFER TOAL* AND BRATTON RILEY**

I. INTRODUCTION	761
II. COMMON LAW BACKGROUND	762
III. PREVENTABLE HARM	764
IV. ANTI-BAN CAMP	766
V. PRO-BAN CAMP	767
VI. RULE 41.1	768
VII. CONCLUSION	772

I. INTRODUCTION

The Supreme Court of South Carolina's decision to enact Rule 41.1 of the South Carolina Rules of Civil Procedure was influenced by the leadership of some of the finest South Carolinians, our common law history of providing open access to our public institutions, and tragic stories of lives being lost under circumstances in which public access to secret settlement provisions would have made a difference. While our rule does not impose an outright ban on secret settlements, it enables our trial judges to balance the litigants' privacy interests against the public interest in the nature and disposition of the lawsuit. The justices of the Supreme Court of South Carolina believe that this rule provides an effective, consistent means for trial judges to thoughtfully address privacy issues in the myriad types of cases that they hear.

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II. COMMON LAW BACKGROUND

The founders of this nation embraced the public's inherent right of access to the work-product of its government, and more specifically, to the courtroom and court-approved documents, for they embedded this public right in the First Amendment of our Constitution.¹ James Madison wrote:

A popular Government, without popular formation, or the means of acquiring it, is but a Prologue to a Farce or a 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 which knowledge gives.²

Support for the public nature of South Carolina government documents appeared in the common law as early as 1848, when the state supreme court noted:

The public records in the Secretary of State's office do not belong to the Secretary; *they are the property of the State*. He is the mere keeper under her authority. Whatever she wills about them, he is bound to obey. If the Legislature should have the folly to declare, by law, that every citizen should have access to them at all times, and be permitted to take copies, the Secretary has no other alternative than to submit.³

Nearly a century later, the Supreme Court of South Carolina recognized the public's privilege to view court records "which have been made the subject of judicial proceedings in any court of record or not of record . . . whether such proceedings . . . be preliminary or interlocutory or even *ex parte*."⁴ More recently, the South Carolina General Assembly codified the public's right of access to government documents, enacting an open records provision as a part of the Freedom of Information Act (FOIA) in 1972.⁵

Meanwhile, the United States Supreme Court began to address the First Amendment and common law protection of the public right of access to judicial records. In *Cox Broadcasting Corp. v. Cohn*,⁶ the Court held that the First Amendment barred a state's attempt to prohibit the press from publishing a rape

1. U.S. CONST. amend. I; see Harold L. Cross, THE PEOPLE'S RIGHT TO KNOW 179 (1953) (noting that the right of access to judicial proceedings and records predated the Constitution).

2. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

3. Pinckney v. Henegan, 33 S.C.L. (2 Strob.) 250, 252 (S.C. 1848) (emphasis added).

4. Lybrand v. The State Co., 179 S.C. 208, 214, 184 S.E. 580, 583 (1936).

5. The Act defines a "public record" as all records "supported in whole or in part by public funds." S.C. CODE ANN. § 30-4-20(c) (Law. Co-op. 1991 & West Supp. 2002).

6. 420 U.S. 469, 495 (1975).

victim's name because the name could be found "in the public domain on official court records."⁷

Three years later, in *Nixon v. Warner Communications, Inc.*,⁸ the Court considered whether television networks could duplicate and broadcast tape recordings played during the criminal trial of several of President Nixon's former advisors. The Court held that the public has the common law right to "inspect and copy public records and documents, including judicial records and documents," which is mitigated by the court's authority to deny access to documents that could become a "vehicle for improper purposes."⁹

The *Nixon* Court distinguished the *Cox* decision, finding that the First Amendment right of access to court records permitted the media to attend the proceedings, hear the tapes played during the proceedings, and have a copy of the trial transcript, but that the right did not attach to "physical access" to the tapes.¹⁰

The Fourth Circuit Court of Appeals applied a balancing analysis to the question of whether a newspaper could gain access to the transcript and motions from a closed-court proceeding.¹¹ The court held that before a trial judge decides to seal documents presented in a closed-court proceeding, the public must be given both notice and an opportunity to object to counsel's request to seal the documents. In addition, the court held that the trial judge should examine alternatives to sealing the documents.¹²

In 1990, the Supreme Court of South Carolina considered the issue of sealing court records and set forth the factors that a trial judge in South Carolina should consider in determining whether to grant a motion to seal court documents.¹³ In *Davis v. Jennings*, we held that the nonexclusive list of factors should include: "[T]he ensuring of a fair trial; the need for witness cooperation; the reliance of the parties upon confidentiality; the public or professional significance of the lawsuit; and the harm to parties from disclosure."¹⁴ Thus, as of 1991, the United States Supreme Court, the Fourth Circuit Court of Appeals, and Supreme Court of South Carolina had developed a common law analysis for

7. *Id.*

8. 435 U.S. 589 (1978).

9. *Id.* at 597-98.

10. *Id.* at 609.

11. *In re The Knight Publ. Co.*, 743 F.2d 231 (4th Cir. 1984).

12. *Id.* at 235. Later, the Fourth Circuit established a test for determining whether the trial judge may grant a motion to seal court documents in a criminal trial. Under this test, the judge must find:

(1) a substantial probability that irreparable damage to defendant's fair trial right will result from failure to seal the record;

(2) a substantial probability that alternatives to sealing will not adequately protect his right to a fair trial; and

(3) a substantial probability that sealing the record will be effective in protecting against the perceived harm.

In re The State-Record Co., 917 F.2d 124, 128-29 (4th Cir. 1990).

13. *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991).

14. *Id.* at 506, 405 S.E.2d at 604 (citing *Mokhiber v. Davis*, 537 A.2d 1100, 1116-17 (D.C. 1988)).

trial courts to employ when considering whether court records could be sealed. These common law developments helped lay the foundation for Rule 41.1.

The state supreme court believed the *Davis* decision would provide the necessary framework to enable trial judges to refuse to seal court documents. Intervening events made it clear that further action was necessary.

III. PREVENTABLE HARM

A constant in the effort to prohibit sealing of court-sanctioned settlement agreements in South Carolina has been the leadership of Joseph F. Anderson, Chief Judge of the United States District Court for the District of South Carolina. Early in his career, Judge Anderson became troubled by the harms that secrecy agreements concealed from the public. In 1994, he presided over a case that settled the moment an intense discovery dispute produced a “smoking gun” document, which revealed that the defendant was exposing the public to a risk of harm.¹⁵ The settlement agreement included a provision whereby the plaintiff agreed never to disseminate the incriminating document.¹⁶

At that time, the district court formed the Civil Justice Reform Act Advisory Group to examine whether the District of South Carolina should impose an outright ban on court-enforced secrecy agreements. The commission narrowly voted to recommend the outright ban. The issue went before the Federal District Judges, who overwhelmingly voted to reject the ban.¹⁷

But several tragic events occurred after the federal judges’ 1994 vote that transformed the federal court’s—and ultimately the state supreme court’s—perspective on the issue. In October 2000, both *USA Today* and *60 Minutes II* exposed Bridgestone/Firestone’s efforts to shield from public view the fact that its defective tires had caused many severe injuries and deaths by entering into court-enforced secrecy agreements.¹⁸ Shockingly, the stories revealed that if secrecy had not been a settlement option, many lives would have been saved.¹⁹

John Monk, a journalist for *The State* newspaper in Columbia, South Carolina, brought the troubling consequences of secrecy agreements to light for South Carolinians in a series of articles he wrote in the spring and summer of 2002. Specifically, the articles focused on medical malpractice suits in South Carolina that terminated with court-enforced secret settlement agreements, shielding the doctors’ identities and their negligent conduct.²⁰ These articles

15. Letter from Joseph F. Anderson Jr., Chief Judge, United States District Court for the District of South Carolina, to the Federal District Court Judges of the District of South Carolina (June 24, 2002) (on file with authors).

16. *Id.*

17. *Id.*

18. Thomas A. Fogarty, *Can Court’s Cloak of Secrecy be Deadly?*, USA TODAY, Oct. 16, 2000, at B1; *60 Minutes II: Hush Money?* (CBS television broadcast, Oct. 10, 2000).

19. Fogarty, *supra* note 18; *Hush Money?*, *supra* note 18.

20. John Monk, *Medical Mistakes Kept Secret*, THE STATE, June 18, 2002, at A1.

suggested that state trial courts might have been granting motions to seal court documents without adhering to the factors set forth in *Davis*,²¹ particularly the factor that considers “the public or professional significance of the lawsuit.”²² In response, Chief Justice Toal gave a presentation at the August 2002 South Carolina Judicial Conference, emphasizing the precedential value of the *Davis* factors. At the time, it was believed the presentation would empower state trial judges to deny many of these motions to seal court-enforced settlements.

Meanwhile, in June 2002, Judge Joseph Anderson, also moved by the Bridgestone/Firestone stories, Monk’s pieces in *The State*, and an article in *Voir Dire*²³ by Richard Zitrin and Carol M. Langford, again proposed a partial ban on secret settlements to his colleagues on the District Court.²⁴ This time, Judge Anderson did not submit an outright ban for a vote; rather, he suggested that the federal court should ban secret settlement agreements that involved “matters implicating public safety.”²⁵ This time, his colleagues on the federal bench responded by voting not just to ban secrecy agreements that affected public health and safety but to ban secret settlement agreements outright in South Carolina.

During the summer of 2002, the state supreme court worked closely with Judge Anderson to provide assistance in helping the federal bench with their decision concerning the secret settlement ban. Based on the lead of the federal judges, we wanted to examine the possibility of curtailing the proliferation of secret settlements in the state court system. In South Carolina, we have established a tradition of adopting procedural rules parallel to those in the federal courts. In the 1980s, our state courts adopted the Federal Rules of Civil Procedure,²⁶ and in the 1990s, we adopted the Federal Rules of Evidence.²⁷ Thus, since the federal bench was willing to close the courtroom to attorneys’ attempts to seal settlement agreements, we proposed to do the same.

In August 2002, the Supreme Court of South Carolina submitted Proposed Rule 38 of the South Carolina Rules of Civil Procedure²⁸

21. 304 S.C. 502, 405 S.E.2d 601 (1991).

22. *Id.* at 506, 405 S.E.2d at 604.

23. Richard Zitrin and Carol M. Langford, *It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements*, VOIR DIRE, Spring 2000, at 12 (arguing that attorneys should be ethically prohibited from creating a secret settlement agreement that implicates public health or safety).

24. Letter from Joseph F. Anderson, Chief Judge, United States District Court for the District of South Carolina, to the Federal District Court Judges of the District of South Carolina (June 24, 2002) (on file with authors).

25. *Id.*

26. The South Carolina Rules of Civil Procedure (SCRCP), which mirror the federal rules with some exceptions, became effective July 1, 1985.

27. The South Carolina Rules of Evidence (SCRE), which mirror the federal rules with some exceptions, became effective September 3, 1995.

28. Proposed Rule 38, entitled “Sealing Documents and Settlement Agreements,” provided as follows:

(a) Purpose. Because South Carolina has a long history of maintaining open court proceedings and records, this Rule is intended to establish guidelines for governing the filing under seal of settlements and other documents. The Court

to the general public, established a period to receive public comment on the Proposed Rule, and set a date for a public hearing on the issue in January 2003. The Proposed Rule included an outright ban on court-sanctioned secret settlement agreements.²⁹ This proposal generated significant response during the public comment period.

IV. ANTI-BAN CAMP

The South Carolina Defense Trial Attorneys' Association argued that a ban on sealed settlements would encourage potential plaintiffs to bring lawsuits after hearing about high-dollar settlements around the state.³⁰ Further, the Association asserted that the ban would unnecessarily intrude into a party's proprietary

recognizes, that as technology advances, court records will be more readily available and this Rule seeks to balance the right of public access to court records with the need for parties to protect private information from public view. Further, the Court recognizes that, especially in the case of settlement agreements, the parties may, by contract, agree to settle any matter confidentially, and have the matter voluntarily dismissed under Rule 41(a)(1), SCRCp, without court involvement.

(b) Filing Documents under seal. Should Rule 26(b)(5), SCRCp, be inapplicable, and absent another governing rule, statute, or order, any party seeking to file documents under seal shall file and serve a "Motion to Seal." The motion shall identify, with specificity, the documents or portions of documents for which sealing is considered necessary, shall contain a non-confidential description of the documents, and shall be accompanied by a separately sealed attachment labeled "Confidential Information to be submitted to Court in Connection with the Motion to Seal." The attachment shall contain the documents for the court to review *in camera* and shall not be filed. The motion shall state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

- (1) the need to ensure a fair trial;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality;
- (4) the public or professional significance of the lawsuit;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- (7) why the public interest is best served by sealing the documents.

The burden is on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents.

Unless otherwise ordered by the court, the clerk of court shall treat the motion to seal in a manner similar to all other motions filed with the court.

(c) Sealing Settlements. No settlement agreement filed with the court shall be sealed pursuant to this Rule.

(d) Orders Sealing Documents. All orders sealing documents shall set forth with specificity the reasons that require sealing the documents.

29. S.C. R. CIV. P. Proposed R. 38(c).

30. Letter from the South Carolina Defense Trial Attorneys' Association to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (January 6, 2003) (on file with the Clerk of Court).

information and right of privacy.³¹ Finally, the defense bar contended that even if the state supreme court imposed the ban, the South Carolina court system would become the de facto enforcer of private settlement agreements.³² If not, then a complete ban on private, confidential settlement agreements could also ensue, foreclosing a major tool used in disposing of lawsuits. Many interested members of the South Carolina Bar and representatives of various national interest groups wrote to our court during the public comment period, supporting the arguments above. Notably, domestic relations lawyers wrote to emphasize the intimate personal and financial details that appear in the South Carolina Family Court system which should remain protected.³³

V. PRO-BAN CAMP

The members of the Bar who wrote in favor of the ban raised appealing arguments as to why our court should ban court-sanctioned secret settlements. University of South Carolina School of Law Professor John P. Freeman argued that secrecy agreements have been used to “shield serious wrongdoing from public view.”³⁴ In a letter to Judge Anderson, Professor Freeman also underscored that an ethical or even criminal violation could result from a lawyer agreeing to create a secret settlement agreement if it were deemed to be a

31. *Id.* The Association’s letter relies on Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991) (arguing that the Rules of Civil Procedure were enacted to protect the rights of the litigants and that the defendant’s right of privacy is one of those protected rights that would be eroded if secret settlements were not court-enforced). *See also* Letter from David E. Dukes to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (January 8, 2003) (arguing that the proposed rule would undermine a defendant’s interest in protecting proprietary information, which would temper the party’s interest in settling with the plaintiff) (on file with the Clerk of Court); Letter from Robert V. Dewey, Jr. to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (January 7, 2003) (arguing that judges should retain the discretion to balance the privacy interest of defendants against the public interest in the potentially protected settlement agreement) (on file with the Clerk of Court).

32. South Carolina’s circuit courts already have become the enforcer of private settlement agreements. In this instance, the courts do not enforce the agreement using their power of contempt; rather, the aggrieved party brings a breach of contract action, and the courts may award damages in the aggrieved party’s favor.

33. Letter from Melissa F. Brown to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (January 8, 2003) (suggesting that the supreme court adopt a separate rule on secret settlement agreements as they apply to intimate domestic matters) (on file with the Clerk of Court). *See also* Letter from C. Dixon Lee, III to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (January 8, 2003) (recognizing that, pursuant to Rule 20 of the SOUTH CAROLINA FAMILY COURT RULES, litigants in family court must file a financial declaration, which includes name, address, place of employment, social security number, income, assets, and liabilities, and arguing that if the litigant’s personal declaration became public, the litigant could be highly vulnerable to identity fraud) (on file with the Clerk of Court).

34. Letter from John P. Freeman to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (December 10, 2002) (on file with the author) (citing *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796 (W.D. Mich. Feb. 19, 1970), as an example of defendants attempting to seal court records under the auspices of protecting phantom trade secrets).

compounding agreement.³⁵ Professor Freeman cited an Illinois disciplinary case in which a lawyer was suspended from the practice of law for a year for entering into a confidential settlement agreement that forbade his client from filing a civil or criminal action against another lawyer who had stolen the client's funds.³⁶

The South Carolina Trial Lawyers' Association supported Proposed Rule 3.8 primarily because it would unshackle the plaintiff's lawyer from being forced to sign a confidential settlement agreement to honor his obligation to obtain a fair settlement on behalf of his client while cognizant that the document conceals a potential public harm.³⁷ Further, the Association argued that the ban would not reduce the defendant's incentive to settle because parties will continue to elect to settle a case in order to avoid the "uncertainty of trial."³⁸

VI. RULE 41.1

The Supreme Court of South Carolina held a public hearing on January 12, 2003, and many advocates presented their arguments for and against the ban. The court took the issue under advisement. After a full evaluation of the arguments from both sides, the court adopted Rule 41.1, which does not provide for an outright ban on secret settlements but sets forth the procedural and equitable framework within which a secret settlement could be sanctioned in the South Carolina court system.³⁹

35. Letter from John P. Freeman to the Honorable Joseph F. Anderson Jr., Chief Judge, United States District Court for the District of South Carolina (July 11, 2002) (on file with the author) (noting that a compounding agreement, which is defined as the receipt of consideration in return for an agreement not to prosecute, BLACK'S LAW DICTIONARY 280 (7th ed. 1999), is illegal in South Carolina, S.C. CODE ANN. § 16-9-370 (West 2003) provides:

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.

36. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). This issue of disclosure of a compounding agreement also brings up the related issue of whether the Supreme Court of South Carolina will adopt Rule 1.6 of the ABA's MODEL RULES OF PROFESSIONAL CONDUCT, which permits the lawyer to breach the attorney-client privilege where disclosure can prevent the client from committing a crime or fraud. If the court chooses to adopt the Rule, lawyers will have to think twice about creating a private secret settlement that contains a provision requiring his client to keep confidential a criminal act or fraudulent activity.

37. Letter from the South Carolina Trial Lawyer's Association to Honorable Joseph F. Anderson Jr. Chief Judge, United States District Court for the District of South Carolina (July 25, 2002) (on file with the author).

38. *Id.*

39. S.C. R. Civ. P. 41.1, Sealing Documents and Settlement Agreements, provides:

(a) Purpose. Because South Carolina has a long history of maintaining open court proceedings and records, this Rule is intended to establish guidelines for

governing the filing under seal of settlements and other documents. Article I, § 9, of the South Carolina Constitution provides that all courts of this state shall be public and this Rule is intended to ensure that that Constitutional provision is fulfilled. However, the Court recognizes that as technology advances, court records will be more readily available and this Rule seeks to balance the right of public access to court records with the need for parties to protect truly private or proprietary information from public view and to insure that rules of court are fairly applied. This Rule does not apply to private settlement agreements and shall not be interpreted as approving confidentiality provisions in private settlement agreements where the parties agree to have the matter voluntarily dismissed under Rule 41(a)(1), SCRCP, without court involvement. The enforceability of those provisions is governed by general legal principles, not by this Rule.

(b) Filing Documents under seal. Should Rule 26(b)(5), SCRCP, be inapplicable, and absent another governing rule, statute, or order, any party seeking to file documents under seal shall file and serve a "Motion to Seal." The motion shall identify, with specificity, the documents or portions of documents for which sealing is considered necessary, shall contain a non-confidential description of the documents, and shall be accompanied by a separately sealed attachment labeled "Confidential Information to be submitted to Court in Connection with the Motion to Seal." The attachment shall contain the documents for the court to review *in camera*. The motion shall state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

1. the need to ensure a fair trial;
2. the need for witness cooperation;
3. the reliance of the parties upon expectations of confidentiality;
4. the public or professional significance of the lawsuit;
5. the perceived harm to the parties from disclosure;
6. why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
7. why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

The burden is on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents. In family court matters, the judge shall also consider whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter.

Unless otherwise ordered by the court, the clerk of court shall treat the motion to seal in a manner similar to all other motions filed with the court. The motion shall be entered in the Clerk's File Book and on the Motion Calendar and a hearing on the motion shall be held.

(c) Sealing Settlements. A proposed settlement agreement submitted for the court's approval shall not be conditioned upon its being filed under seal. Under no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution.

Simultaneously with the filing of a motion seeking court approval of a settlement, or after a settlement has been approved, any party to the litigation may file a motion seeking to have all or part of the settlement filed under seal.

If the agreement is approved, and a motion to seal has been filed, the procedure set forth in (b) above shall be followed with the exception that the factors for sealing a settlement set forth below shall be addressed.

In adopting the Rule, the court firmly agreed with Justice Brandeis, who proclaimed that “[s]unlight is said to be the best of disinfectants.”⁴⁰

We could not impose a complete ban on secret settlements in the South Carolina court system for various reasons. First, advocates who opposed the complete ban set forth in Proposed Rule 38 accurately noted that not all confidential information contained in a settlement needs to be revealed to the public. Therefore, the Rule established four factors that the trial court should contemplate in determining whether the settlement agreement should be sealed.⁴¹ We extracted factors (1) and (2) from the guidelines in the *Davis* decision.⁴² Factor (3) was shaped by *In re Knight Publishing Co.*,⁴³ where the Fourth Circuit found that the trial judge must consider alternatives to sealing court records.⁴⁴ Finally, we included factor (4) because we believed that the trial judge should not be limited by public health and safety concerns as the exclusive justification for refusing to grant a motion to seal a settlement.

Second, based on due process considerations, we believed that we needed to provide a procedure giving both parties and the public an opportunity to be heard before a judge grants or denies a motion to seal a settlement agreement.⁴⁵ Therefore, section (c) of Rule 41.1 requires the party seeking the sealed settlement to follow the procedural direction of section (b), which directs the party to file a “Motion to Seal” identifying the documents to be sealed. The trial

In determining whether to approve the filing of the settlement documents, in whole or in part, under seal, the court shall consider:

1. the public or professional significance of the lawsuit;
2. the perceived harm to the parties from disclosure;
3. why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and,
4. why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

In family court matters, the judge shall also consider whether the settlement: 1) contains material which may expose private financial matters which could adversely affect the parties; and/or 2) relates to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter.

(d) Orders Sealing Documents. All orders sealing documents or all or parts of settlements shall set forth with specificity the reasons that require they be sealed.

Note:

Rule 41.1 was enacted to set forth with clarity the fact that the courts of this State are presumed to be open and to set forth with particularity when documents and settlement agreements, submitted to a court for approval, may be sealed.

40. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 63 (Richard M. Abrams, ed. 1967) (1914).

41. S.C. R. CIV. P. 41.1(c); S.C. APP. CT. R. 41.1(c).

42. *Davis v. Jennings*, 304 S.C. 502, 506, 405 S.E.2d 601, 604 (S.C. 1991).

43. 743 F.2d 231 (4th Cir. 1984).

44. *Id.* at 235.

45. *Id.* (finding that before the court could grant defense counsel's motion to seal court documents, the public was afforded the right to object and be heard).

judge then reviews the actual documents at an *in camera* hearing.⁴⁶ Third, Rule 41.1 forbids a governmental body from being a party to a secret settlement, following the axiom that the finances and the work product of a publicly-funded institution must be available for public review.⁴⁷

Finally, in crafting Rule 41.1, we addressed the importance of protecting the intimate, personal information that parties disclose in family court. We added two more factors that authorize the trial judge to protect the privacy of a minor, especially in custody disputes, as well as protect against disclosure of unnecessary financial information that could negatively impact the parties.⁴⁸

Because the jurisdiction of the state court system covers various intimate areas of the law, the State Rule could not follow the federal bench's courageous decision to adopt a complete ban. But aside from the above concerns that may dissuade the trial judge from keeping a court-enforced settlement public, the Supreme Court of South Carolina believes it has provided a framework that empowers our trial judges to resist granting motions to seal settlement agreements.

While the defense bar argued that severely limiting court-enforced secrecy agreements would reduce defendants' willingness to settle because they would no longer be armed with the bargaining chip of confidentiality, we decided to join the twenty other United States jurisdictions that have limited a party's capacity to keep settlement information confidential.⁴⁹ The court could not find

46. S.C. R. CIV. P. 41.1(b); S.C. APP. CT. R. 41.1(b).

47. Even Arthur R. Miller, the Harvard Law School professor who defends the court's ability to protect litigants' privacy interests, concedes that governmental agencies may not be an appropriate party to a secrecy agreement, but he would still leave the discretion of that determination to the trial judge. Miller, *supra* note 31, at 485-86. Our decision to prohibit a public body's participation in a secret settlement is consistent with the purpose of our Freedom of Information Act, which gives public access to the work product of our state government and its agencies. S.C. CODE ANN. §§ 30-4-10 to -165 (Law. Co-op. 1991 & West Supp. 2002).

48. S.C. R. CIV. P. 41.1(c).

49. See, e.g., ARIZ. REV. STAT. ANN., SUP. CT. R. 123 (West Supp. 2003) (governing public access to judicial records); ARK. CODE ANN. §§ 25-18-401 to -403, 16-55-122 (Michie 2002) (prohibiting the sealing of government documents and voiding agreements that restrict disclosures of environmental hazards); CAL. R. APP. P. 12.5, 56 (governing sealed documents on appellate review and stating procedures for appealing the trial court's ruling on sealing); CAL. CT. R. 243.1-243.4 (governing sealed records at trial); DEL. SUP. CT. R. ANN. 9(bb) (Michie 2003) (governing sealing of court records); DEL. CH. CT. R. 5(g) (governing sealing of court records); FLA. STAT. ANN. § 69.081 (West Supp. 2004) (prohibiting concealment of public hazards); GA. SUPER. CT. R. 21 (setting forth procedure for limiting access to court files); IDAHO CT. R. 32(f) (requiring least restrictive means for sealing documents and written findings by the court); IND. CODE ANN. § 5-14-3-5.5 (Michie 2001) (placing burden on proponent to establish that policy of openness is outweighed by factors favoring sealing); KY. REV. STAT. ANN. §§ 224.10-210, -440 (Michie 2002) (stating policy that records and hearings are open to the public); L.A. COUNTY SUPER. CT. R. 12.20 (disfavoring confidentiality agreements and protective orders); LA. CODE CIV. PROC. ANN. art. 1426 (West Supp. 2002) (governing protective orders); MASS. R. IMPOUNDMENT P. (requiring motion requesting documents and exhibits sealed be supported by affidavit); MICH. STAT. ANN. R. 8.105 (Law. Co-op. 1992) (prohibiting court from entering sealed order unless party files written motion, court makes written finding of good cause, and no less restrictive means are available); NEV. REV. STAT. ANN. § 41.0385 (Michie 2002) (stating claims against government agencies are public records); N.J. CT. R. § 4:10-3 (governing protective orders); N.Y. CT.

any hard evidence demonstrating that states which enacted secret settlement limitations experienced a decrease in the number of court-enforced and private settlement agreements.⁵⁰

VII. CONCLUSION

After careful consideration of the arguments on both sides, the Supreme Court of South Carolina enacted Rule 41.1. In the end, we found most persuasive the tenet in South Carolina and in this nation that courts remain open to the public. A closed court system would undermine the purpose of the Freedom of Information Act,⁵¹ which the General Assembly of South Carolina enacted to ensure that activities funded with public money remain public. The state court system should not be the handmaiden of secrecy; rather, it should expose harmful conduct to the public that confidential settlement agreements attempt to conceal.

R. §§ 216.1, 3103 (governing sealing of court records and protective orders); N.C. GEN. STAT. § 132-1.3(b) (2003) (prohibiting sealing of settlement document unless overriding interest overcomes policy of openness, and no other less restrictive means are available); OR. REV. STAT. § 30.402 (2001) (prohibiting sealing of settlement with governmental agency); SAN DIEGO COUNTY SUPER. CT. R. 11.6 (stating policy that confidentiality agreements and protective orders approved only when genuine trade secret or privilege protected); S.F. COUNTY SUPER. CT. R. 10.5 (disfavoring sealing of documents); TEX. R. CIV. P. § 76a(1) (requiring specific, serious and substantial interest clearly outweigh presumption of openness); VA. CODE ANN. § 8.01-420.01 (Michie 2000) (allowing materials covered by a protective order in personal injury and wrongful death actions to be voluntarily shared with attorney in a related action with permission of the court after notice and hearing); WASH. REV. CODE ANN. §§ 4.24.601, 611 (West Supp. 2004) (declaring public right to information regarding public health and safety). ROSCOE POUND INST., MATERIALS ON SECRECY PRACTICES IN THE COURTS (2000); see generally Laurie Kratyk Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (suggesting a balancing approach to litigation confidentiality using the principal objectives of the right of public access to judicial proceedings). This note is an exact copy of note 40 in Joseph F. Anderson Jr., *Hidden From the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 725 n.40 (2004).

50. The court came upon a chart from Florida (on file with author) showing that during the period from the passage of the Florida Sunshine in Litigation Act in 1990, FLA. STAT. § 69.081 (Supp. 2004), until 1999, the overall number of tort actions filed per 1,000 people declined from 2.63 in 1990 to 2.39 in 1999, representing a decline of 9.1%. This evidence counters the argument asserted by South Carolina Defense Trial Lawyer's Association, *supra* note 30, at 2, that a secret settlement ban would cause an increase in tort actions filed. The same chart also shows that tort actions disposed of per 1,000 people also declined from 2.68 in 1990 to 2.28 in 1999, representing a decrease of 15%. While two proponents of secret settlement bans have argued that the rate of decrease in tort action dispositions has tracked the rate of decrease in tort action filings in Florida during the period that the Sunshine in Litigation Act has been in effect, our interpretation of the data indicates that the rate of decrease of tort action dispositions is greater than the rate of decrease of tort action filings. This suggests that fewer litigants are pursuing court enforced settlements in the Florida state court system. See James E. Rooks Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 22; Letter from the Association of Trial Lawyers of America to Larry W. Propes, Clerk of Court, United States District Court for the District of South Carolina (September 24, 2002) (on file with the Clerk of Court). Regardless, the Florida data does not indicate how many private settlement agreements may have been created as a result of the Act. Therefore, we found the data inconclusive.

51. S.C. CODE ANN. §§ 30-4-10 to -165 (Law. Co-op. 1991 & West Supp. 2002).