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THE ETHICS OF USING JUDGES TO CONCEAL WRONGDOING

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I. INTRODUCTION

Almost ninety years ago, Justice Louis Brandeis spoke to the logic underlying disclosure-oriented reform efforts when he famously observed, "[s]unlight is . . . the

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best of disinfectants."[1] More recently, another respected jurist made a similar observation about the virtue of having open access to accurate, honest information: "The optimal amount of fraud is zero."[2] The concept that the citizenry is entitled to free and open access to information is so well-woven into our social fabric that the Sixth Circuit Court of Appeals recently remarked that "[d]emocracies die behind closed doors."[3]

Today we view the opportunity to access information, analyze it, and speak about it as a constitutional right.[4] Constitutionally guaranteed access to important information is also afforded at the state level in South Carolina. For example, an

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1. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914).

2. Ackerman v. Schwartz, 947 F.2d 841, 847 (7th Cir. 1991) (Easterbrook, J.).

3. Detroit Free Press v. Ashcroft, 303 F.3d 601, 681 (6th Cir. 2002). Judge Damon Keith in *Detroit Free Press* continued as he stated the following: "The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately . . . . When government begins closing doors, it selectively controls information rightfully belonging to the people." *Id.* For a report on the case, see Rena Steinzor, *"Democracies Die Behind Closed Doors": The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL'Y 641, 666–67 (2003). For a gripping example of manipulation of the judiciary by litigants for antisocial purposes, see *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796, at *1 (W.D. Mich. Feb. 19, 1970). In *Thayer*, "defendant [Liggett and Myers] succeeded in obtaining, on mandamus from the Circuit Court of Appeals, a sweeping protective order . . . . [barring] plaintiff's counsel from revealing any information" about the case to anyone but plaintiff's five experts. *Id.* at *10-*11. The reason given for the order included that the material plaintiff would discover "contained trade secrets and confidential information." *Id.* at *11. The case was tried over five weeks. *Id.* at *1. In an opinion highly critical of defense counsel's litigation tactics, Judge Fox stated "the court was somewhat puzzled by the failure of either the discovered material in the court's file or the evidence presented to reveal anything approaching a trade secret. The court could not reconcile this with defendant's assertion of irreparable harm when seeking its protective order." *Id.* at *13–*14. Judge Fox went on to note the following:

> [T]he court was witness to a spectacle wherein defendant, rich in resources, maintained complete freedom of association and consultation, including courtroom conferences with other attorneys experienced in the trial of similar cases, while plaintiff's counsel, already disadvantaged by the limited resources available to the[m], were prohibited from doing likewise by a blanket protective order obtained by defendant early in the case on grounds which later proved largely illusory.

Id. at *16.

A review of Judge Fox's order discloses that the court was more than "somewhat puzzled" about Liggett's trade secret claim; he was incensed over defense counsel's lack of candor with the court. Judge Fox's opinion makes clear that Liggett's bogus trade secret claim was merely a tactic used to isolate and weaken the plaintiff while allowing the various tobacco companies to collaborate and continue the cover-up that came unraveled during the 1990s.

4. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

express provision in South Carolina's constitution demands that "[a]ll courts shall be public."[5] Statutory law has also embraced openness as both a means to public protection and as an end in itself. The idea that open disclosure confers public benefits has been long ingrained in various bodies of law, including securities laws,[6] consumer product labeling laws,[7] the United States Freedom of Information Act (FOIA) statutes,[8] and legislation providing access to information for the handicapped.[9]

Given a long and strong societal bias in favor of public disclosure about important issues, including legal issues, the modest moves by South Carolina's federal[10] and state judiciary[11] favoring less secrecy in lawsuit settlements ought to have gone unnoticed for being predictable and unexceptionable. Instead, the South Carolina jurists' efforts to bring sunshine to the settlement process have garnered

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5. S.C. CONST. art. I, § 9. For a discussion of South Carolina's tradition of open judicial proceedings, see *Ex Parte Weston*, 19 Media L. Rep. 1737 (BNA) (S.C. Fam. Ct. 1991).

6. *See, e.g.*, Larry D. Soderquist, *Approaching Securities Laws*, *in* NUTS AND BOLTS OF SECURITIES LAW, at 9, 11–12 (PLI 1998) (observing that the federal securities laws passed during the depression embraced Justice Brandeis' disclosure philosophy). The seminal federal securities statute is the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (2000). President Franklin Delano Roosevelt emphasized the Act's disclosure oriented philosophy in his message to Congress in May 1933: "This proposal adds to the ancient rule of caveat emptor, the further doctrine 'let the seller also beware.' It puts the burden of telling the whole truth on the seller." H.R. REP. NO. 85, 73-5480, at 2 (1933).

7. *See, e.g.*, Federal Hazardous Substances Labeling Act, Pub. L. No. 86-613, 74 Stat. 372 (1960) (codified as amended at 15 U.S.C. §§ 1261-1276 (2000)) (allowing dissemination of information concerning hazardous substances where a danger to health is present).

8. The federal Freedom of Information Act is found at 5 U.S.C. § 552 (2000). It has been called "a model for governmental transparency throughout the world." Henry H. Perritt, Jr., *Electronic Freedom of Information*, 50 ADMIN. L. REV. 391 (1998). For a collection of authorities dealing with secrecy in legal proceedings, see ROSCOE POUND INST., MATERIALS ON SECRECY PRACTICES IN THE COURTS 101-303 (2001), *at* http://www.atlanet.org/secrecy/data/mat_sec.pdf.

9. *See* Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (codified at 47 U.S.C. § 303(u) (2000) (expanding access to information resources by mandating inclusion of closed-captioning technology in television sets sold in the United States).

10. D.S.C. LOCAL R. 5.03(C) (barring the sealing of settlement agreement filed with the court).

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

significant national attention[12] and a fair amount of opposition.[13] Despite our nation's bias in favor of accurate, honest disclosure about important public matters, South Carolina finds itself today amongst a distinct minority of states featuring a statutory or court-rule created restraint on secrecy agreements in the settlement context.[14]

This Article examines the importance of openness in court-related matters from a somewhat unconventional perspective. This Article's thesis is that, in many cases, lawyers and judges need look no further than their professional ethical obligations in order to decide that they cannot participate in furthering secrecy agreements relating to legal disputes.

II. THE ETHICS OF WRONGDOERS PAYING FOR DISCLOSURE PROTECTION

A. Payments for Witness' Silence Are Not Favored in the Law

Wrongdoing, in the sense of committing tortious acts or statutory violations, consists of engaging in activity contrary to public policy. Society's aversion to bad acts is so strong that the law gladly punishes those who merely help active

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12. *See, e.g.*, Cheryl Barnes, *The Future of Confidential Settlements*, HOLLAND & KNIGHT NEWS AND ANALYSIS (on file with author) ("The Federal District Court in South Carolina recently passed the most far-reaching of all sunshine provisions."); Greg Moran, *Access Denied*, SAN DIEGO UNION-TRIB., Apr. 27, 2003, at A1 (quoting one lawyer who referred to the South Carolina push for openness as "encouraging"); Debbi Mack, *Circuit Roundup*, CORP. LEGAL TIMES, Feb. 2003, at 64 ("South Carolina federal courts have instituted the first-ever local rule banning sealed settlements."); *60 Minutes II: "Hush Money;" Movement by South Carolina Judges to Change Secret, Court-Approved Lawsuit Settlements* (CBS television broadcast, Jan. 15, 2003) (transcript available at LEXIS, News Library, Curnws File) [hereinafter *60 Minutes II*] ("Now, in an unprecedented reform, judges in South Carolina are cracking down on what some call hush money.").

13. *See, e.g.*, Editorial, *Curtail Courtroom Secrecy*, LAKELAND FLORIDA LEDGER, Sept. 23, 2002, at A10, *available at* LEXIS, News Library, Curnws File ("Some critics argue that the effect of such a rule will be to drive up litigation costs, discourage settlements, violate privacy and infringe on trade secrets."); Eric Frazier, *Judges Veto Sealed Deals: U.S. Bench in S.C. Won't Okay Them*, NAT'L L.J., Aug. 12, 2002, at A1 ("Defense lawyers say their clients routinely settle cases not because of wrongdoing, but to make claims "go away" and save on legal bills. They say banning secret settlements will clog courts because the incentive for a defendant to settle is greatly reduced if they fear plaintiffs won't keep the terms confidential.").

14. James E. Rooks Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 18, 24 n.6 (finding twenty-one states, including South Carolina, limit secrecy for legal settlements either legislatively or through court rules); James E. Rooks Jr., *Settlements and Secrecy: Is the Sunshine Chilly?* 55 S.C. L. REV. 859, 862 (2004).

wrongdoing, such as those who aid and abet[15] or cause[16] criminal acts, or conspire[17] with the violator. These indirect wrongdoers are held accountable for the primary actor's misconduct even though the indirect participants did not actually commit the primary criminal violation. Thus, under the *Pinkerton* Doctrine,[18] a conspirator is made liable for any reasonably foreseeable crime that falls within the scope of the conspiracy, even if the conspirator did not personally commit it.[19]

B. Even Unpaid Witnesses Are Forbidden to Suppress Evidence

The common law is so leery of possible criminal activity that it created an offense to punish even seemingly innocent bystanders who, knowing of the commission of a felony, took no action to report it and withheld vital data from investigators.[20] The witness's silence, when coupled with a concealment of evidence from the authorities, yields the common law crime of misprision (or misprison) of felony. This ancient wrong became indictable in South Carolina by virtue of South Carolina's statutory embrace of the English common law crimes.[21]

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15. *See, e.g.*, 18 U.S.C. § 2(a) (2000) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

16. *See id.* ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."). People who "cause" criminal acts to be performed are subject to prosecution as people who lack the capacity to commit a given crime, but nonetheless, cause an intermediary to commit criminal acts where the intermediary, though innocent of the substantive offense, has the capacity to commit the offense. In *United States v. Ruffin*, 613 F.2d 408 (2d Cir. 1979), the defendant was convicted for causing the willful misapplication of federal funds by a federal officer, even though the defendant was not a federal officer and the trial court acquitted the officer who committed the act. *Id.* at 412–15, 417.

17. *See, e.g.*, 18 U.S.C. § 371 (setting forth the federal criminal conspiracy statute).

18. Pinkerton v. United States, 328 U.S. 640 (1946).

19. *See id.* at 647. Similarly, liability for an abuse of process tort generally extends "to all who knowingly participate, aid, or abet in the abuse." Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). Similarly, "[t]hose who advise or consent to the [abusive] acts, or subsequently ratify them, are liable as joint tortfeasors." *Id.* Aider and abettor liability in civil cases is also accepted in other jurisdictions. *See, e.g.*, Blow v. Shaughnessy, 364 S.E.2d 444 (N.C. Ct. App. 1988) (recognizing an aiding and abetting cause of action in a breach of fiduciary duty case).

20. At common law, the mere failure to report a crime, without more, was not criminal. The statutory framework of misprision, however, required silence and some attempt to mislead investigative authorities. *See* Merek Evan Lipson, Comment, *Compounding Crimes: Time for Enforcement?*, 27 HASTINGS L.J. 175, 182, (1975). As stated in *People v. Lefkovitz*, "It may be the duty of a citizen to accuse every offender, and proclaim every offense which comes to his knowledge; but, the law which would punish him in every case, for not performing this duty, is too harsh for man." 293 N.W. 642, 643 (Mich. 1940) (quoting Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575–76 (1822)).

21. S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976) ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.").

In *State v. Carson*,[22] the Supreme Court of South Carolina upheld the conviction of a murder witness for misprision of felony.[23] The defendant, guilty of misprision, originally denied being present at the murder scene but later recanted.[24] Subsequently, in *State v. Smith*,[25] the South Carolina Supreme Court clarified the extent to which nonreporting per se is a criminal wrong. The court defined misprison as:

> [A] criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact.[26]

In *Smith* the court created a Fifth Amendment-grounded exception to the duty to report misconduct where the reporters disclosure could lead to her criminal prosecution.[27]

The federal misprision of felony statute punishes a nonreporting witness purely for failing to report a federal felony:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[28]

Note that the federal statute's verbiage, unlike South Carolina decisional law, requires no deception practiced on investigative authorities by the defendant. All that is needed, according to the statutory language, is knowledge of a federal felony

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22. 274 S.C. 316, 262 S.E.2d 918 (1980).

23. The court accepted the following statement as describing the crime's elements: "It is described as a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact." *Id.* at 318, 262 S.E.2d at 920 (quoting 15 C.J.S. *Compounding Offenses* § 2(2)). In *Carson*, the defendant "was neither a principal nor an accessory before or after the fact, but merely a witness who concealed valuable information from the investigating officers." *Id.* at 320, 262 S.E.2d at 920.

24. *Id.* at 317, 262 S.E.2d at 919.

25. 357 S.C. 182, 592 S.E.2d 302 (2004).

26. *Id.* at 186, 592 S.E.2d at 304.

27. *Id.*

28. 18 U.S.C. § 4 (2000).

coupled with a failure to report it to a federal official. Case law interpreting the federal statute has read into the crime of concealment the need for proof of action on the defendant's part.[29]

If it can be wrongful to know about the commission of criminal acts and conceal the information (or simply not report it), then what about the culpability of those who turn up evidence of a crime and not only fail to report the criminality, but trade on the information, thus, obtaining compensation for concealing its existence? On one level, at least, we have a simple business transaction. The party who agrees not to disclose information is "selling" his or her silence; the seller's nondisclosure is bargained-for consideration. As in the misprision or concealment case, the legitimacy of the silent-seller's conduct is tenuous. Contracts involving the purchase and sale of silence are not favored; they are enforced only when something prized by society, such as trade secrets, is protected.[30] When contracts of silence injure societal interests, the contract's enforceability is doubtful[31] and its existence may be criminal.

C. Compounding Contracts are Illegal

Major legal and ethical issues arise when the misconduct being covered up by the silence sale is criminal. Contracting to cover-up criminal wrongdoing can itself be criminal since one recognized form of illegal contract is a "compounding" agreement. "Compounding," like misprision, is a common law crime,[32] and it is not clear how a lawyer or litigant can square strong confidentiality clauses in settlement agreements involving egregious misconduct by defendants with the crime of "compounding." *Black's Law Dictionary* defines "compounding crime" as follows:

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29. *See, e.g., United States v. Daddano*, 432 F.2d 1119, 1124 (stating an "indictment alleging concealment [of a felony] and failure to make known" the felony is sufficient to constitute misprison).

30. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 360 (1998).

31. *Id.* at 360-61. Professor Garfield observes the following:

> When there is a great public interest in allowing the enforcement of a contract of silence, as with a contract to protect a trade secret or a valuable idea, then a compelling state interest exists for enforcing the contract, and its enforcement should not offend the Constitution. But conversely, when a countervailing public interest in the suppressed speech outweighs the public interest in allowing the enforcement of a contract of silence, as with a contract to suppress information about criminal or tortious conduct, then no compelling state interest to justify enforcing the contract may exist, and its enforcement may be unconstitutional.

Id.

32. Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572–73 (1924). The crime's original name was "theftbote," referring to a bargain struck between a thief and his victim by which the stolen property would be returned in exchange for an agreement not to prosecute. A.L.I., MODEL PENAL CODE § 242.5 cmt. 1 (1980) [hereinafter MODEL PENAL CODE].

> Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offense at common law, and under the typical compounding statute: (1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration.
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> The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute.
>
> The offense of taking a reward for forbearing to prosecute a felony; as where a party robbed takes his goods again, or other amends, upon an agreement not to prosecute.[33]

Compounding "require[s] payment for silence."[34] The conduct is forbidden in South Carolina, which makes compounding agreements illegal. The pertinent South Carolina statute reads as follows:

> 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.[35]

Notice that compounding is illegal in South Carolina whether or not the offense that is the subject of the compounding agreement is a felony.[36] This approach is

33. BLACK'S LAW DICTIONARY 286 (6th ed. 1990).
34. MODEL PENAL CODE, *supra* note 32, § 242.5 cmt. 1.
35. S.C. CODE ANN. § 16-9-370 (Law. Co-op. 1976).
36. *See id.*

consistent with the Model Penal Code's compounding provision,[37] which likewise criminalizes compounding "any offense."[38] Therefore, victims of criminal acts who obtain restitution for their injuries in return for an agreement not to report the payor's wrongful conduct are at risk in South Carolina. Unlike South Carolina's statutory formulation, the Model Penal Code's compounding provision gives victims an "affirmative defense" to prosecution when the pecuniary benefit they receive as part of the bargain does not exceed what would reasonably be due to them as restitution or indemnification.[39] The Model Penal Code's position is contrary to the common law, which provides no protection to victims who offer to drop criminal charges if the alleged offender makes restitution.[40] True to its common law roots, no safe harbor from prosecution is found in South Carolina's compounding prohibition.[41] Note further that the South Carolina statute applies to "any person" enriched by a contract calling for concealment of criminal misconduct,[42] meaning the statute reaches plaintiffs' lawyers enriched through fees drawn from settlement proceeds flowing in part from compounding arrangements once the lawyers expressly or impliedly commit to join in the concealment agreement.

D. Compounding Reflects an Unethical Bargain

Compounding agreements are not benign. They can be viewed as a form of witness tampering.[43] Under the Model Penal Code, witness tampering is a felony

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37. The Model Penal Code states the following:

> A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.

Id. MODEL PENAL CODE, *supra* note 32, § 242.5.

38. *Id.* & cmt. 2.

39. *Id.* & § 242.5 cmt. 3. Some state statutes follow the Model Penal Code's policy in favor of allowing victims restitution without risk of criminal punishment. *See, e.g.*, S.D. CODIFIED LAWS § 22-11-11 (Michie 1998) (allowing affirmative defense of restitution); UTAH CODE ANN. § 76-8-308 (2003) (same); WASH. REV. CODE ANN. § 9A.76.100 (West 2000) (permitting restitution as a defense).

40. MODEL PENAL CODE, *supra* note 32, § 242.5 cmt. 3.

41. *See* S.C. CODE ANN. § 16-9-370 (Law. Co-op. 1976).

42. *See id.*

43. The compounding prohibition "seeks to deter [victims of crime] from a kind of passive obstruction of justice by penalizing agreement to refrain from prosecution in consideration of payment. Purportedly, therefore, the purpose of the law of compounding is to encourage reporting of crime by punishing agreements to forestalling prosecution." MODEL PENAL CODE, *supra* note 32, § 242.5 cmt. 3; *see also* Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation*

that occurs when, *inter alia*, a personal, pecuniary benefit is offered to a witness in an effort to induce the witness to withhold "any testimony [or] information" concerning a pending or impending proceeding or investigation.[44] If buying the silence of a mere witness can translate into criminal misconduct, then it stands to reason that purchasing the silence of a witness-victim is fraught with risk.

Viewed more broadly, compounding agreements may be seen as a contractual mechanism designed by the drafter to limit others' access to the machinery of justice. The effect of a secrecy agreement is to cut off access to witnesses, evidence, and to stifle potential informants. Various formulations of this sort of agreement have been decried as contrary to public policy and unethical. Specifically, two agreements used to impede access to legal services are directly banned as unethical in the Rules of Professional Conduct; namely, noncompetition clauses in lawyers' employment agreements[45] and prohibitions against adversaries placing limits on lawyers' ability to take cases in the future.[46] Ethics authorities likewise have decried settlement agreement provisions barring the plaintiff's lawyer

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Are Illegal and Unethical, 31 HOFSTRA L. REV. 1, 12-13 (2002) (discussing the legal effect of noncooperation promises contained in settlement agreements). After analyzing relevant obstruction of justice cases, Professor Gillers concluded:

> The lesson of these cases is that a party who requests or makes a contractually binding noncooperation promise as part of a settlement agreement, and a lawyer who assists that party, should recognize that the conduct may be held illegal under one of the obstruction statutes. While this risk may seem modest if a person merely asks another to refuse voluntary cooperation, it is high if the request is made as part of a settlement agreement. A settlement agreement presumes that the plaintiff is getting something of value in exchange for giving up claims or rights. A noncooperation agreement gives up the right voluntarily to provide the government and private parties with information about civil or criminal misconduct. Giving someone a financial reward to induce noncooperation is unlawful. It is therefore but the smallest of steps, and logically no distance at all, to conclude that making or asking for a contractually binding noncooperation pledge as part of the consideration in a settlement agreement, or assisting a client in doing so, is also a crime. And if this conduct is unlawful, then it would also be unethical for the lawyer to assist it.

Id. (footnotes omitted).

44. MODEL PENAL CODE, *supra* note 32, § 241.6(1)(b); § 241.6(1)(b) (1980); *see also* 18 U.S.C. § 1512(b) (2000) (making it a federal crime to tamper with a witness).

45. MODEL RULES OF PROF'L CONDUCT R. 5.6(a) (2002) [hereinafter MODEL RULES].

46. *Id.* at R. 5.6(b) (stating "a lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy"). The Rule's two chief justifications are also applicable to secrecy agreements: it avoids distortions that otherwise might crop up when clients end up with rewards that are less related to the merits of their case than to the desire of the defendant to "buy off" plaintiff's counsel, and concern over the client's lawyer being placed in a conflict of interest between the interests of the present client and the interests of potential future clients. *See id.* cmt.

from future use of information gained in the employment,[47] "subpoenaing certain records or fact witnesses," or using certain experts,[48] making referrals to certain other lawyers,[49] or agreeing not to reuse "interpretations of the law" learned in the employment.[50] There is no logical way to distinguish the effect of secrecy agreements calculated to conceal material facts from the foregoing forms of unethical bargains.

Any reasonable lawyer ought to be concerned about participating in, or assisting a client to enter into contracts contaminated by criminal or ethical wrongdoing. Lawyers are sworn to uphold the law.[51] Lawyers are not given free passes to engage in antisocial conduct just because they are hired by a client.[52] Although settlement agreements are clients' contracts and are favored in the eyes of the law,[53] this holds true only up to a point. Settlement contracts are not immune from public policy scrutiny,[54] as South Carolina's federal and state judiciary have

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47. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).

48. Colo. Bar Ethics Comm., Formal Op. No. 92 (1993).

49. D.C. Bar, Legal Ethics Comm., Op. No. 35 (1977).

50. Ill. State Bar Ass'n, Advisory Opinion 00-01 (2000). A summation of the Illinois ethics committee observation is as follows:

> A conflict of interest would be created between Lawyer's representation of one client and other similar clients if Lawyer were to sign a confidentiality agreement required by an accounting firm that would prohibit Lawyer from divulging a package of ideas developed by the accounting firm that would reduce the client's tax obligations. For purposes of the Illinois Rules of Professional Conduct, a lawyer cannot agree to keep confidential interpretations of the law.

The crux of the problem identified by the Illinois opinion is that the confidentiality agreement would place the lawyer for "Client A" in a conflict when representing other clients from whom he would be obligated to withhold potentially advantageous tax strategy information. *Id.* Exactly the same problem is presented by the secrecy agreements discussed in this Article.

51. A Bar applicant in South Carolina pledges, "I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor . . . ." S.C. APP. CT. R. 402(k). Engaging, counseling, or assisting in criminal acts obviously is conduct that does not pass as "consistent with trust and honor."

52. *See, e.g.*, Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 355–60 (1998) (discussing accessorial liability under the criminal law for defense lawyers). Collecting money for repeatedly selling substandard and dangerous goods, such as the infamous Firestone-Ford Explorer tire failures, is misconduct that will almost certainly be indictable under the mail and wire fraud statutes. *See* 18 U.S.C. §§ 1341, 1343 (2000). It is no defense to compounding that the defendant has never been indicted or claims not to have committed a crime. Indeed, one of the evils targeted by the defense is the fact that it is calculated to deflect attention from the wrongdoer, thereby allowing criminality to continue.

53. *See, e.g.*, Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 30 (2003) ("Public policy clearly favors the private negotiation and settlement of litigated disputes.").

54. It has been suggested that lawyers are mere technicians, whereas "'the client is the master of the decision,' as long as there isn't a statute or professional conduct rule that says otherwise." Martha Neil, *Confidential Settlements Scrutinized: Recent Events Bolster Proponents of Limited Secret Case*

demonstrated in ruling implicitly that the public interest in favor of resolving lawsuits by settlement is, standing alone, an inadequate justification to support secrecy orders.[55] Nowhere is the societal interest against secrecy selling in the settlement context greater than where the wrongdoer's conduct is criminal.

Doubtless many civil lawsuit settlement agreements relate to no criminal wrongdoing; however, some do. Criminal violations are ubiquitous. A tremendous volume of the civil wrongs capable of injuring the population can be prosecuted as crimes. Putting aside state statutory crimes and common law crimes, the number of federal crimes alone is said to exceed 3000.[56] Nearly any serious instance of civil wrongdoing (such as environmental law violations, injuries caused by drunk drivers, sales of dangerously defective products, battery committed by child molesters,

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Resolutions, A.B.A. J., July 2002, at 20, 22 (quoting Professor Stephen Gillers). And it is true that the decision whether to enter into a settlement agreement rests with the client, not the lawyer. MODEL RULES, *supra* note 45, at R. 1.2(a). However, clients are not always entitled to get what they want when it comes to settling lawsuits. Missing is the qualification that clients properly may only enter into valid, enforceable contracts, *i.e.*, ones that are neither illegal nor offend public policy. An agreement that, in the presiding judge's considered opinion, seriously threatens to jeopardize public safety ought to qualify as one offensive to public policy.

55. *See supra* notes 10–11 and accompanying text. In their reluctance to honor private secrecy deals in filed cases, South Carolina's federal and state judges do not stand alone. In Florida, the "Sunshine State," one finds a robust public records act called the Sunshine Law. FLA. STAT. ANN.§ 286.011 (West 2003). The state also features a "Sunshine in Litigation Act" applicable to secret settlements. Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West Supp. 2002). The Sunshine in Litigation Act declares, among other things, that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing" either a "public hazard" or a government settlement "is void, contrary to public policy, and may not be enforced." *Id.* § 69.081(4) & (8)(a) (West Supp. 2004). See Ray Shaw, *Sunshine in Litigation*, FLA. B.J., Jan. 2000, at 63, for a discussion of Florida's Sunshine in Litigation Act. Like Florida, Texas has adopted fairly strong antisecrecy provisions. *See* Tex. R. Civ. P. 76(a) (setting forth the standard to seal court records). Virginia has adopted a statute that allows plaintiffs' attorneys to share information relating to personal injury actions or wrongful death actions with other attorneys "involved in a similar or related matter, [but only] with the permission of the court, after notice and opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material" consents to being bound by the protective order. VA. CODE ANN. § 8.01-420.01 (Michie 2000). Other states also have provisions limiting secrecy. *See* N.C. GEN. STAT. ANN. § 132-1.3(b)(2) (2003) (limiting secret settlements, but only as to to settlements involving the government, not private companies); OR. REV. STAT. § 30.402 (2001) (same). *See also* CAL. CT. R. 243.2 (establishing procedures for parties to follow to request sealing records); N.Y. CT. R. 216.1(a) (allowing records to be sealed only upon a showing of "good cause"); GA. SUPER. CT. R. 21 (limiting access to documents filed with the court). For an example of a federal court rejecting the primacy of honoring settlements at the risk of embracing noxious settlement agreements, see, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786–88 (3d Cir. 1994) (disavowing any automatic right to confidentiality and requiring "a particularized showing of the need for confidentiality in reaching a settlement").

56. Dennis E. Curtis, Comment, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019, 1022 (1995); *see also* Timothy Lynch, *Ignorance of the Law: Sometimes a Valid Defense*, LEGAL TIMES, Apr. 4, 1994, at 22 (stating that there are 3,000 federal statutes on the books).

conversions of funds and breaches of trust, investment fraud, and sales of adulterated food or drugs) can be punished in some way under the criminal law.

E. Himmel *Points the Way: No Compounding Agreements*

The famous ethics case of *In re Himmel*[57] forcefully drives home the risk which compounding poses for lawyers. Himmel was an Illinois lawyer who represented a woman injured in a motorcycle accident. Himmel was the woman's second lawyer. He was hired to help her recover funds from her former attorney, Casey. Her aim was to collect from Casey $23,233.34, which was her share of a $35,000 settlement Casey had negotiated on her behalf. After receiving the settlement check, Casey eventually "converted" and "misappropriated" the proceeds.[58]

Himmel conducted an investigation, which included contacts with the insurance company that paid the money, its counsel, and Casey.[59] At the time (and at present), Illinois' ethics code featured a provision requiring lawyers to report fellow lawyers guilty of misconduct.[60] Having determined Casey had robbed his client, Himmel nonetheless shirked his reporting obligation.

Evidently, the client specifically directed Himmel to take no further action against Casey other than to obtain the return of her money.[61] In fact, Himmel believed his client's reporting of Casey to the Illinois' disciplinary authorities obviated the need for any filing on his part.[62] With proof in hand of Casey's thievery, Himmel negotiated a settlement by which Casey agreed to pay the client $75,000, and in return, the client "agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey."[63] Under the negotiated deal, Himmel stood to earn at least $17,000.[64] True to form, however, Casey failed to perform,[65] leaving Himmel with no choice but to sue. Ultimately, Himmel obtained a $100,000 judgment against Casey.[66] Had Casey "satisfied the judgment," Himmel would have received in excess of $25,000 as his fee.[67] Himmel's efforts subsequently culminated into a $10,400 payment to the client, while Himmel did

57. 533 N.E.2d 790 (Ill. 1988).
58. *Id.* at 791.
59. *Id.* at 791–92.
60. *Id.* at 793; *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (1980) [hereinafter MODEL CODE] (requiring lawyers to report misconduct of other lawyers).
61. *Himmel*, 533 N.E.2d at 792.
62. *Id.*
63. *Id.* at 791.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Himmel*, 533 N.E.2d at 791.

not receive any fee.[68] Casey was disbarred for other misconduct.[69] In the course of disbarring Casey, the Illinois investigators learned of Himmel's litigation and about the attempted confidential settlement agreement.[70]

Himmel was charged with violating Illinois' mandatory reporting requirement applicable to lawyer misconduct. The hearing board found that he violated the provision and recommended a private reprimand.[71] The reviewing board recommended dismissing the complaint.[72] The Illinois Supreme Court weighed the evidence, which included proof that (1) Himmel never had a grievance against him in eleven years of practice; (2) he never obtained a fee for his work on behalf of Casey's victim; (3) he had been instructed by his client not to report Casey; (4) he thought his client reported Casey;[73] and (5) he believed his information about Casey was privileged and hence not subject to the mandatory reporting requirement.[74] The Illinois Supreme Court rejected the reviewing board's dismissal recommendation and suspended Himmel for one year.[75]

The court announced that it was "particularly disturbed" by proof that Himmel chose to try to settle with Casey and give him confidentiality rather than make the mandatory report.[76] The court held that by following this course,

> both [Himmel] and his client ran afoul of the [Illinois] Criminal Code's prohibition against compounding a crime, which states in section 32-1:
> "(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.
> (b) Sentence. Compounding a Crime is a petty offense."[77]

The court pointed out that "[b]oth respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion."[78]

The Illinois Supreme Court's reliance in *Himmel* on the Illinois compounding

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68. *Id.* at 792.
69. *Id.* at 791.
70. *Id.* at 791–92.
71. *Id.* at 792.
72. *Id.*
73. *Himmel*, 533 N.E.2d at 792.
74. *Id.* at 793.
75. *Id.* at 796.
76. *Id.*
77. *Id.* (quoting ILL. COMP. STAT. ANN. § 32-1(a) (West 1998).
78. *Id.*

statute was a wake-up call for lawyers around the country.[79] One can safely assume that when *Himmel* came down, few lawyers were aware of what the crime of compounding was, much less whether the crime of compounding was on the books in the state in which they practiced. Fewer lawyers still appreciated the implications of the compounding offense for the many lawyers located in states with mandatory obligations to report lawyer wrongdoing. Thanks to *Himmel*, lawyers in Illinois and elsewhere are aware of the risks that compounding agreements and concealing lawyer wrongdoing can pose to their right to practice law.[80] In fact, Illinois is currently one of the leading jurisdictions when it comes to lawyers reporting other lawyers for ethical impropriety.[81]

Because South Carolina, like Illinois, is a state with a compounding statute, several consequences are immediately evident. One consequence is that if a settlement agreement, like the one in *Himmel*, gives rise to the compounding offense, then the confidentiality agreement is unenforceable, since illegal contracts are void. In *Jackson v. Bi-Lo Stores, Inc.*,[82] the South Carolina Court of Appeals emphatically endorsed the illegality defense, stating the following:

> It is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort.
>
> The illegality doctrine has also been recognized by the United States Supreme Court which, in *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), held illegality is a defense to a contract action:
>
> > The authorities from the earliest time to the present unanimously hold that no court will lend

79. *E.g.*, Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO. J. LEGAL ETHICS 175, 198 n.232 (1999) (remarking that, in light of lawyer Himmel's disastrous brush with Illinois' compounding statute, "[p]ractitioners are . . . well advised to check state law before agreeing to forego another attorney's criminal prosecution as part of any settlement or dispute resolution").

80. *See* Laura Gatland, *The Himmel Effect: 'Snitch Rule' Remains Controversial but Effective, Especially in Illinois* A.B.A. J., Apr. 1997, at 24, 24 (noting from 1992 to 1995, in Illinois, lawyer reporting constituted 8.9% of total complaints received and 18.2% of the complaints resulted in formal disciplinary charges). The *Himmel* lesson evidently has stuck in Arizona as well, as demonstrated by the fact that lawyers filed nearly one-fifth "of the complaints referred for investigation by disciplinary officials in 1995." *Id.* It is probably no coincidence that Arizona, like Illinois, features a case where a lawyer was punished purely for failing to report misconduct by another lawyer. *Id.* at 25.

81. *See id.* at 24.

82. 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993).

> its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, *nor will they enforce any alleged rights directly springing from such contract.*

Id. at 654, 19 S.Ct. at 845 (emphasis added). South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act. In *Roundtree,* the court concluded that "[his] whole transaction is without the pale of the law, and [he] cannot invoke the aid of the courts in enforcement of any claim depending on it." *Id.* 77 S.E. at 932. *See also, Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760, 762 (1993) ("an illegal contract has always been unenforceable . . . South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution.").[83]

Jackson and similar cases give lawyers a good reason not to assist a client in entering into a compounding agreement. A party to a compounding agreement is a party to a crime, and all lawyers have better uses of their time than to participate in or aid and abet client criminality.[84] Aiders and abettors or accomplices are, after all, guilty of criminal acts as principals.[85] Lawyers have no business sponsoring or knowingly assisting criminal acts, whether by their clients or anyone else. Nor does any precept of "zealous representation" require that clients be given settlement deals they wish to consummate, no matter how illegal. Clients have no right to lawyers' assistance should they choose to violate the law. Moreover, nothing of enduring value can be gained by a client desirous of having the other side enter into a compounding agreement since the confidentiality provision is unenforceable.[86] An even better reason to refrain from becoming involved with compounding

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83. *Id.* at 276–77, 437 S.E.2d at 170.

84. In South Carolina an aider and abettor or accomplice is criminally culpable as a principal if substantial assistance is given to another known to be committing a crime. *See* State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) ("In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct.").

85. In the eyes of the law where an aider and abettor participated in a criminal act by another, "[t]he act of one is the act of all." *Id.*

86. *See, e.g.,* Boyd v. Adams, 513 F.2d 83, 87 n.5 (7th Cir. 1975) ("The universal rule . . . is that '[c]ompounding a crime being itself criminal, an agreement not to prosecute is void, not only because it is against the policy of the law, but also because the agreement is itself a crime . . . .'" (quoting Williamsen v. Jernberg, 240 N.E.2d 758, 760 (Ill. Ct. App. 1968) (quoting 17 C.J.S. *Contracts* § 228))).

agreements is that the illegal provision may taint the entire contract, enabling the other side to set it aside altogether. Indeed, "[m]ost reported decisions dealing with compounding . . . are civil disputes in which the victim is attempting to enforce a note or other obligation given by the alleged offender."[87]

F. Compounding Raises Ethical Red Flags

Compounding agreements contravene public policy[88] and are criminal. It is no defense to a compounding charge that the alleged wrongdoer claims innocence. The essence of the offense is obstructing justice; it matters not that the alleged wrongdoer has neither been charged nor is innocent in fact.[89] Compounding deals or any other contract that contravenes public policy poses problems for the lawyer who negotiates, executes, or joins in it. Such action sets the table for multiple ethical violations on the lawyer's part. Various provisions of the Rules of Professional Conduct reach lawyer participation in compounding agreements:

> Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[90]
>
> Rule 1.16(a)(1): "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law . . . ."[91]

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87. MODEL PENAL CODE, *supra* note 32, § 242.5, cmt. 3. For different concrete examples of problems that compounding can induce into contractual relations, see *Johnson v. Pittman*, 139 S.E. 440 (N.C. 1927), where the court identified various scenarios from North Carolina and other jurisdictions where courts voided as contrary to public policy executory agreements calculated to interfere with criminal arrests or prosecutions. *Id.* at 441–42. Assessing North Carolina precedent, the court observed the following: "In all the cases in North Carolina it appears that, in each instance when the executory contract was made, there was an unlawful agreement, and this unlawful agreement, express or reasonably implied from all the circumstances, constituted the corrupting and invalidating vice of the transaction." *Id.* at 442.

88. WILLIAM SHEPARD MCANINCH & W. GASTON FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 370 (3d ed. 1996) ("Agreements to . . . stifle public prosecutions are contrary to public policy.") (citing Liberty Mut. Ins. Co., v. Gilreath, 191 S.C. 244, 9 S.E.2d 126 (1939)).

89. *See* 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1421 (1962) (observing that compounding agreements include "promises not to prosecute," "promises to conceal evidence," and promises to halt a prosecution already started; such bargains "are illegal whether the party in whose behalf they are made is innocent or guilty").

90. MODEL RULES, *supra* note 45, at R. 1.2(d).

91. *Id.* at R. 1.16(a)(1).

Rule 8.4(d): "It is unprofessional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice . . ."[92]

Various authorities have discussed the dynamics of how secrecy demands are presented and may be answered.[93] As to compounding agreements involving South Carolina lawyers, the message can be put in differing verbiage so long as the punch line is always the same: "No." The South Carolina attorney who just says "No," and thereby avoids a compounding charge, runs scant risk of losing a settlement once the nonconfidentiality message is conveyed to the other side.[94] A recent analysis of the "chilled-settlement argument" found a notable lack of support for the often-advanced view that parties' rejection of secrecy restrictions causes cases not to settle.[95]

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92. *Id.* at R. 8.4(d). Compounding agreements, besides being criminal in South Carolina, are manifestly prejudicial to the administration of justice. After all, "the purpose of the law of compounding is to encourage reporting of crime by punishing agreements to forestall prosecution." MODEL PENAL CODE, *supra* note 32, § 242.5, cmt. 3. The Code classifies compounding agreements as a form of "passive obstruction of justice." *Id.* Furthermore, it has been stated:

> "[A]ny bargain, express or implied, having for its purpose or consideration the concealment or compounding of a crime is unlawful." Were the rule otherwise, "[a] party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed."

Sandra S. Baron, Hilary Lane & David A. Schulz, *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1032 (1996) (quoting 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1718 (3d. ed 1972) (citation omitted)).

93. *See, e.g.*, Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55, 56 (noting that the defense's demand for confidentiality is often first disclosed to settling plaintiffs after the settlement agreement has been drafted). Komoroske suggests that this eleventh hour strategy puts plaintiffs at a disadvantage:

> Faced with either taking the offer and signing the confidentiality agreement or going back to litigation or the bargaining table, most clients opt for the former. Because it is the lawyer's duty to protect the client, the lawyer often accedes to the defendant's demand, and the public is none the wiser.

Id. This Article suggests that it is exceedingly unwise for either the client or the lawyer to agree to the defense's demand, whether put forward at the eleventh hour or earlier, provided the defendant's wrongdoing could be punishable as a crime and a compounding statute is in effect.

94. Rooks, *Let the Sun Shine In*, *supra* note 14, at 23.

95. *Id.* at 23–24. Rooks noted that legal ethics expert Richard Zitrin has observed the following: "In three judicial seminars I have been privileged to speak at on this subject, I did not find a single judge who believed cases would not settle" were a secrecy demand to be rejected. *Id.* at 23. In his article, Rooks invited "any attorney or judge who knows of such a case to write to me." *Id.* A check with Rooks on September 18, 2003, revealed that nobody to date has notified him of an instance where rejection of a confidentiality requirement caused a case not to settle. Telephone interview with James E. Rooks, Senior Policy Research Counsel, Center for Constitutional Litigation (Sept. 18, 2003).

III. SECRECY AND JUDGES' ETHICAL OBLIGATIONS

A. Selling Secrecy Right Under the Judge's Nose

A *New York Times* reporter has provided some insight into the origin of the debate over court approved secret settlements in South Carolina. According to the reporter's account, Chief Judge Joseph F. Anderson's interest in the topic stemmed from post settlement contact with a happy plaintiff's lawyer:

> Judge Anderson was most concerned with the selling of secrecy as a commodity, he said in an interview. He recalled being told by a plaintiff's lawyer that the lawyer had obtained additional money for his client in exchange for the promise of secrecy. "That's what really lit my fuse," the judge said. "It meant that secrecy was something bought and sold right under a judge's nose."[96]

Judge Anderson aptly characterized the nature of the bargain that this Article concerns; namely, the buying and selling of secrecy.[97] A disturbing corollary to the

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96. Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1.

97. *Id.* A new case gives plaintiffs' lawyers further reason to think twice about selling secrecy in connection with settling lawsuits. It suggests that selling secrecy may be dangerous to a client's financial health.

The case is *Amos v. Commissioner*, T.C. Memo. 2003-329 (2003), *available at* http://www.ustaxcourt.gov/InOpHistoric/Amos.TCM.WPD.pdf. Amos is a taxpayer who had the misfortune of being kicked in the groin by Dennis Rodman while serving as a television cameraman at a Minnesota Timberwolves game. Litigation ensued, with Amos bringing a personal injury claim against Rodman. The case was settled for $200,000, under terms calling for strict confidentiality:

> [A]s part of the consideration for this Agreement and Release, the terms of this Agreement and Release shall forever be kept confidential and not released to any news media personnel or representatives thereof or to any other person, entity, company, government agency, publication or judicial authority for any reason whatsoever except to the extent necessary to report the sum paid to appropriate taxing authorities or in response to any subpoena issued by a state or federal governmental agency or court of competent jurisdiction * * * Any court reviewing a subpoena concerning this Agreement and Release should be aware that part of the consideration for the Agreement and Release is the agreement of Amos and his attorneys not to testify regarding the existence of the Agreement and Release or any of its terms.

Though the lawsuit was a personal injury action, with actual damages recovered in such actions being normally tax-free, the IRS took the position that Amos really has not been hurt, making the entire $200,000 received by Amos a taxable payment for his sale of secrecy. The Tax Court disagreed, but only in part. It held that $80,000 of the settlement proceeds reflected a payment for the settlement's confidentiality component, making Amos liable for taxes on that amount.

secrecy-selling reality is that the dollar value of the secrecy sold rises in relation to the amount of harm that the payor would suffer if the public knew the truth. In turn, this means that the greater the societal harm that the payor has inflicted (and, perhaps is and will be inflicting), the bigger the price tag for the secrecy sale. The bigger and more dangerous the problem the defendant has created, the more money the defendant is likely willing to pay to suppress facts concerning the problem.

B. When Does the Judge "Know" the Bargain is Illegal?

Never will a criminal compounding agreement be advertised in express terms to a judge asked to accept, seal, or enforce the bargain. Lawyers do not present themselves in court as sponsors or aiders and abettors of criminality, at least not intentionally. So how may a judge be expected to tell the difference between the benign civil compromise and the malignant compounding contract? The following is a suggested test. Litigants, their lawyers, and judges owe a duty to act in good faith toward all concerned and to our legal system generally. A reasonable explanation of what good faith requires has been set forth by the Tenth Circuit Court of Appeals in *Richards v. Platte Valley Bank* as follows:[98]

> Good faith is determined under a subjective standard without considering the party's negligence. The term "bad faith" requires showing some indicia of dishonest conduct. The mere failure to make inquiry, even though there are suspicious circumstances, does not constitute bad faith, unless the facts and circumstances are so cogent and obvious that to remain passive would amount to deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.[99]

Facts that are "cogent and obvious" about a proposed judicial transaction, such as a settlement that suggests grave wrongdoing on the proponents' part, bespeak bad faith and call for judicial inquiry. Judges faced with evidence of serious misconduct are not free to avert their eyes.[100] Facts sufficient to provide a judge with a strong

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Amos thus furnishes yet another reason for plaintiffs' lawyers not to let their clients enter into secrecy sales. The more prominently featured that a secrecy sale is in the settlement agreement, the greater the risk that the defendant's payment for the secrecy component may yield an IRS assessment. A personal injury client blind-sided by such an IRS attack is apt to be very unhappy with his or her lawyer if the lawyer failed to explain in advance the tax risk being shouldered by the client for selling secrecy along with the injury claim.

98. 866 F.2d 1576 (10th Cir. 1989).

99. *Id.* at 1582–83 (citations omitted).

100. *See infra* notes 105–08 and accompanying text.

suspicion of compounding or other illegal dealing are to be investigated.[101] Judges called on to process or preside over a suspicious transaction are not free to "shut [their] eyes for fear of what [they] would learn," for conscious avoidance of the truth can be the legal equivalent of knowledge.[102] If compounding is involved, the secrecy-selling occurring under the judge's nose involves the commission of a criminal act. If this situation arises, averting one's eyes is not an acceptable option for a judge sworn to uphold the law.[103]

The simple truth is that the bigger the defendant's problem, the more likely it is that the defendant has been or is violating a criminal law. The selling of secrecy is not just ill advised but, in jurisdictions featuring compounding statutes, criminal. It is thus by no means far-fetched to imagine that lawyers obtaining money for selling secrecy "right under a judge's nose"[104] are not just gaming the system, but are engaged in criminal activity.

C. Faced With Compounding, Ethical Standards Require the Judge to Resist

Criminal activity is a bad thing for starters, and its virtue is not improved when it occurs, complete with lawyer-sponsorship, in the course of a filed lawsuit. Judges aware that cases pending before them are about to be settled with a compounding agreement face several distasteful options. One option is to become a "complicit partner"[105] in the wrongdoing by looking the other way and scratching a pending case off the trial roster. Another option is to intervene, demand that secrecy not be sold, and risk antagonizing the parties and their lawyers. In this case, the judge's expression of concern about the possibility that the case involves compounding is

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101. *See infra* notes 105–08 and accompanying text.

102. United States v. Nazon, 940 F.2d 255, 258-59 (7th Cir. 1991). *Nazon* provides a sample instruction equating conscious avoidance with knowledge:

> When the word "knowingly" is used in these instructions, it means that a defendant realized what he was doing and was aware of the nature of his or her conduct, and did not act through ignorance, mistake, or accident. Knowledge may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case. *You may infer knowledge from a combination of suspicion and indifference to the truth.* If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, *yet shut his eyes for fear of what he would learn, you may conclude that he acted "knowingly,"* as I have used the word.

Id. (alteration in original). Every federal circuit court has approved some form of a "conscious avoidance" instruction. *See, e.g.*, United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) (observing that "[e]very court of appeals has approved one or another version of an ostrich instruction" which "informs the jury that actual knowledge and deliberate avoidance of knowledge are the same thing").

103. *See infra* notes 105–08 and accompanying text.

104. Liptak, *supra* note 96.

105. John S. Austin, *Federal Judges Resist Confidential Settlements*, Litigation News Online, Jan. 2003 (on file with author).

apt to be particularly disturbing to the defendant, since mention of compounding carries with it a suggestion that the judge views the defendant's behavior as criminal. A third option is for the judge to simply seek to reason with the parties, urging settlement while seeking to have the offending secrecy provision deleted.

Putting aside the recent adoption of federal and state rules barring or limiting court approved secrecy agreements, it is never proper for a judge knowingly to authorize an illegal compounding agreement to be entered under seal. This action is improper because Canon 2 of the Code of Judicial Conduct demands that judges avoid both "impropriety and the appearance of impropriety."[106] The same logic that bars judges from holding membership "in any organization that practices invidious discrimination"[107] likewise militates against judges authorizing illegal settlement transactions. Such behavior is not an option for a public official obliged to "comply with the law" and "*act at all times* in a manner that *promotes* public confidence in the integrity . . . of the judiciary."[108] Judges "should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards."[109] The comment to Canon 2 admonishes, "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges."[110] The same substantive directions are given to federal judges in Canon 2 of the Code of Conduct for United States Judges promulgated by the Judicial Conference.[111]

D. Public Policy Favoring Settlement is Not Absolute

The strong public policy favoring resolution of litigated disputes by settlement[112] is not unqualified. A settlement transaction is a contract, and not every contract is enforceable. Illegal deals and agreements contrary to public policy are not eligible for judicial enforcement.[113] A case in point is *In re Kasschau*,[114] a

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106. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1999) [hereinafter MODEL CODE OF JUDICIAL CONDUCT].

107. *Id.* at Canon 2(C).

108. *Id* at Canon 2(A) (emphasis added).

109. *Id.* at Canon 1(A).

110. *Id.* at Canon 2(A) cmt.

111. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2, *at* http://www.utd.uscourts.gov/judges/judges_code.html (last visited Apr. 4, 2004).

112. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 286 (1999) (noting the "long-established public policy" supporting "the private settlement of disputes," a policy "aimed at preserving the autonomy of litigants to resolve their own disputes as they wish and at conserving both public and private resources by avoiding trial").

113. *See, e.g.*, Plumlee v. Paddock, 832 S.W.2d 757, 758 (Tex. Ct. App. 1992) (holding ambulance owner's contract, whereby attorneys would pay owner "for personal injury case referrals," was "illegal and void against public policy").

114. 11 S.W.3d 305 (Tex. Ct. App. 2000).

Texas family court case. In *Kasschau* the parties settled their marital dispute at a mediation, with a term of the settlement calling for the parties' attorneys to destroy tape recordings and transcripts of the wife's conversations with third parties.[115] This provision violated a Texas statute criminalizing the destruction of evidence.[116] Rather than just striking the offending provision, the trial court threw out the entire settlement.[117] The appellate court refused mandamus relief, stating the following:

> [W]e recognize that there are competing public policy interests at stake here. On the one hand, courts are responsible for carrying out this state's policy of encouraging the peaceable resolution of disputes involving the parent-child relationship through voluntary settlement procedures. On the other hand, public policy prohibits courts from enforcing illegal contracts. Here, we are unable to find the trial court violated the public policy encouraging settlements by refusing to enforce a settlement agreement that it found contained an illegal provision.[118]

The appellate court rebuffed the husband's argument that his wife was barred by estoppel from challenging the agreement under which she had accepted payment, noting that "[a] void contract cannot be rendered enforceable by estoppel."[119]

Putting aside instances involving compounding or, as in *Kasschau*, destruction of evidence, the public is likely apt to view judicial furtherance of secrecy selling in settlement contracts as irresponsible when the settlement conceals wrongdoing that poses a serious public risk, even if the defendant's underlying misconduct is not criminal. The United States Supreme Court has recognized that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[120] The First Circuit applied this test in holding that clauses in employees' settlement agreements barring employees from "assist[ing] in any way anyone else who files any claim, complaint, or charge nor institute any lawsuit against"[121] the employer are contrary to public policy and void.[122] Any balancing test needs to account for the fact that any justification for secrecy declines as the menace posed by the defendant's future conduct escalates. Because secrecy agreements are driven by economics, they are

115. *Id.* at 312.
116. *Id.* at 312–13. The evidence to be destroyed was the product of illegal taping.
117. *Id.* at 309–12.
118. *Id.* at 314 (citations omitted).
119. *Id.*
120. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).
121. EEOC v. Astra USA, Inc., 94 F.3d 738, 741 n.2 (1st Cir. 1996).
122. *Id.* at 744–45 (limiting holding to such agreements that bar assistance from the EEOC).

most commonly seen when the defendant's financial risk is greatest—when, in other words, the defendant's misconduct is most egregious.[123]

It has been argued that secrecy sales "undermine public safety . . . because they're used extensively in cases involving either defective products or bad doctors or other areas where the public is at risk for being victimized again by the wrongdoer who's settling the case."[124] For example, according to Chief Judge Joseph F. Anderson, "some of the early Firestone tire cases were settled with court-ordered secrecy agreements that kept the Firestone tire problem from coming to light until many years later. . . . Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems."[125]

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123. There are abundant examples of antisocial secrecy selling. For articles on the Boston Archdiocease's use of secret settlements, see Walter V. Robinson & Stephen Kurkjan, *Records Show a Trial of Secrecy, Deception*, BOSTON GLOBE, Dec. 4, 2002, at A27; Sacha Pfeiffer, *Critical Eye Cast on Sex Abuse Lawyers: Confidentiality, Large Settlements Are Questioned*, BOSTON GLOBE, June 3, 2002, at A1; Walter V. Robinson & Sacha Pfeiffer, *Priest Abuse Cases Sealed by Judges*, BOSTON GLOBE, Feb. 16, 2002, at A1; Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases*, BOSTON GLOBE, Jan. 31, 2002, at A1. Professor Doré has set forth other examples of tort cases involving repeated injury and suspect secrecy sales. Doré observed the following:

> Stipulated protective orders and settlement gag orders in cases involving silicone breast implants, the Shiley heart valve, the antidepression drug Prozac, toxic shock syndrome, and the fungicide Benlate, to name just a few, have spurred attempts to restrict such orders and facilitate public access to the often voluminous discovery and pleadings underlying the confidential settlement of these cases.

Doré, *supra* note 112, at 300–01. Settlements involving the Pfizer's Bjork-Shiley heart valve are noted in Stephen Gillers, *Court-Sanctioned Secrets Can Kill*, L.A. TIMES, May 14, 2003, at 13. For an interesting report on Eli Lilly's handling of Prozac litigation, see Zitrin and Langford, *It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements*, *in* VOIR DIRE, Spring 2000, at 12. For an examination of Lilly's strategy to encourage plaintiffs' lawyers to settle with secrecy deals, see Jeff Swiatek, *Lilly's Legal Tactics Disarmed Legions of Prozac Lawyers*, INDIANAPOLIS STAR, Apr. 23, 2000, at A1 (noting among other things, Lilly supposedly entered into a "deal to essentially buy off the plaintiffs with a huge cash payment, secretly negotiated even as the trial went on."). As for toxic shock syndrome, arguments have been set forth that "[t]he full story of [the offending product] RELY has never been revealed, because Procter & Gamble, through confidential settlements, effectively limited what the public knows about this tragedy." William Trombetta, *The Death of Common Sense: How Law is Suffocating America*, 14 J. PUBLIC. POL. & MARKETING 339, 341 (1995) (book review). For a chilling report on DuPont's Benlate vicious tactics to seal settlement agreements, see Jan Hollingworth, *Suits Shed Light on DuPont's Benlate*, TAMPA TRIB., Feb. 25, 2001, at 1. Helping make the DuPont's Benlate dealings amongst the most corrupt ever was DuPont's behavior in not only directly paying certain Florida plaintiff's lawyers over $6 million in fees, unbeknownst to the fee-taking lawyers' clients, but also in making the payment to the lawyers in exchange for an unethical contractual lock-out agreement, in flagrant violation of "several standards of attorney conduct." *Id.*

124. Neil, *supra* note 54, at 20 (quoting Robert A. Clifford, Chair, ABA Section of Litigation).

125. Liptak, *supra* note 96, at A1 (quoting Chief Judge Joseph F. Anderson, U.S. District Court for the District of South Carolina). According to one grisly report:

> For nearly a decade, lawsuits against Bridgestone/Firestone piled up in

Firestone clearly elected to pay for secrecy because it realized that the cost it would bear if the truth escaped would be many times greater than the bill it paid to the secrecy-sellers and their lawyers. The availability of secrecy sales gave Firestone an economic incentive to profit by exploiting public ignorance of the dangers posed by Firestone's defective tires.

E. Cover-ups of Public Safety Problems Raise an Appearance of Impropriety

One way to change the wrongdoer's decision-making matrix is simply to outlaw secret settlements when serious wrongdoing occurs, which is what a compounding statute accomplishes. When conduct on the part of the wrongdoer settling the case poses a serious societal risk, but does not break the criminal law, judicial condonation of the secrecy sale still poses a problem for the judge under Canon 2.[126] Judges who assist or turn a blind eye to the commission of bad acts by parties or their agents, "where the public is at risk for being victimized again," are engaging in irresponsible and improper conduct. Such behavior is difficult to square with judges' ethical obligation to "avoid impropriety and the appearance of impropriety in all of the judges activities."[127]

It is true that public policy favors settlement of legal disputes. This policy alone, however, is a slender reed on which to support unwavering judicial support for secrecy selling. Balancing is necessary. Secrecy selling rests on a promise, and according to the United States Supreme Court, "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[128] South Carolina's judges' antisecrecy

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> courthouses across the USA, detailing deaths and injuries from car wrecks caused by tire tread separation. Yet, until a few months ago, the life-and-death importance of tire safety was not even a whisper in the national dialogue. Blame the delayed realization—and the highway carnage created in the interim—on pervasive secrecy in America's court system, say safety advocates and plaintiffs' lawyers.
>
> Behind closed doors, Firestone year after year agreed to pay plaintiffs millions of dollars to settle cases and thereby hush up its tire problems. In dozens of cases, the courts made it illegal for anyone to divulge the financial terms of the settlements and possible evidence about safety defects that are allegedly hurting or killing people. Only in the past few weeks has the public learned that 101 U.S. deaths are linked to persistent problems with Firestone tires. Had those documents been available to the public, lives could have been saved, lawyers and safety advocates say.

Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly?: Judicial Orders Protecting Companies Kept Tire Cases Quiet*, USA TODAY, Oct. 16, 2000, at 1B.

126. See *supra* notes 105–08 and accompanying text.

127. MODEL CODE OF JUDICIAL CONDUCT *supra* note 106, at Canon 2.

128. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

action demonstrates there is a heavy counter-balancing weight on the side of curbing confidentiality agreements that threaten public health and safety.

To the extent that balancing between private parties' rights and the public interest is required, close cases should be resolved in favor of public protection and full disclosure. Courtrooms do not exist to house antisocial conspirators; rather, they exist to serve the public interest. Courthouses and the judges who populate them function as a public utility dispensing justice for the good of society, not as private catering operations created to give individual parties whatever they want. As Professor Judith Resnik has explained, "[c]ourts are not 'servants' of the parties; courts have an independence from the parties, not only as the voices of other parties' interests, but as institutions expressive of and accountable to the public."[129] The same theory applies to the judges who populate those public courtrooms. According to the Code of Judicial Conduct's Preamble:

> The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.[130]

Judges who lend support to suppressing factual information about dangers to public health or safety, the disclosure of which would be highly beneficial to the public, are not striving "to enhance and maintain confidence in our legal system."[131] Rather, they undercut confidence in our courts and our system of justice by playing favorites and placing the private, pecuniary interests of the rich, powerful wrongdoer ahead of the interests of potential victims. Courthouses exist to facilitate truth finding, not truth hiding. Just as judges are prone to narrowly construe privilege claims that interfere with truth-seeking,[132] they should also view skeptically secrecy requests to seal or protect from view publicly-useful information about serious health or safety hazards.

Access to information is a public good in this country. The better informed

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129. Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994).

130. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 106, at Preamble.

131. *Id.*

132. *See, e.g.*, Pierce County, Wash. v. Guillen, 537 U.S. 129, 144 (2003) ("We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."); United States v. Nixon, 418 U.S. 683, 709–10 (1974) (discussing the principle that privileges should not be broadly construed because they interfere with "the search for truth"); Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 705 (N.Y. 1989) (discussing the attorney-client privilege and noting that "the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose").

citizens are, the better choices they are likely to make. The better the choices made, the more efficient and productive our markets and economy. "[C]ontracts of silence threaten public access to information and, therefore, warrant careful judicial regulation."[133] Conscientious judicial regulation of secrecy selling in settling major lawsuits calls for more than judges turning a blind eye to the risk that the public interest may suffer if vital information is placed out of reach. Lawyer involvement in corrupt secrecy sales (such as where criminal acts or the grave risk of future harm to the public are hidden) cannot be ignored or condoned by judges called on to bless secrecy pacts.

Existing ethical precepts demand aggressive judicial intervention, not passivity. Judges are enjoined to "strive to enhance . . . confidence in our legal system."[134] Confidence in our legal system is not enhanced when a secrecy agreement "hides from government regulators and the scientific community information that is critical to public health and safety, removes substantial matters of public concern entirely from the justice system's scrutiny, and multiplies the cost to parties and the court system by requiring repeated litigation of the same facts."[135] A judge who abets efforts to hide such factual information from public scrutiny is not fulfilling the public interest mission assigned by the Code of Judicial Conduct.

F. The Duty to Report Misconduct Applies

South Carolina state court judges who are lawyers have a double-barreled obligation to report lawyer misconduct stemming from Rule 8.3 of the Rules of Professional Conduct,[136] which is applicable to them as lawyers, and Canon 3D(2) of the Code of Judicial Conduct,[137] which is applicable to them as judges. Both provisions require judges to take action in the face of lawyer misconduct,[138] including reporting the lawyer to "the appropriate authority"[139] when the judge has "knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[140] For federal judges, the

133. Garfield, *supra* note 30, at 266.

134. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 106, at Preamble.

135. Rooks, *Let the Sun Shine In*, *supra* note 14, at 18.

136. MODEL RULES, *supra* note 45, at R. 8.3.

137. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 106, at Canon 3D(2).

138. MODEL RULES, *supra* note 45, at R. 8.3; MODEL CODE OF JUDICIAL CONDUCT *supra* note 106, at Canon 3D(2). Canon 3D(2) calls for "appropriate action," defined in the provision's comment as action that "may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body." *Id.*

139. In South Carolina the appropriate authority is the Commission on Lawyer Discipline.

140. S.C. APP. CT. R. 501, Canon 3D(2); S.C. APP. CT. R. 407, R. 8.3(a).

need to report or take other "appropriate action" is triggered when "the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a . . . lawyer."[141]

In jurisdictions where compounding is outlawed, a compounding agreement is a criminal transaction. A judge is apt to learn about the compounding either because the parties wish the settlement agreement to be placed under seal, an option not readily available in South Carolina state courts and not at all available in South Carolina Federal District Courts, or, more likely, because breach of a privately arranged secrecy agreement has occurred or is being threatened, and judicial enforcement is sought. If the agreement sought to be enforced is indeed an illegal compounding agreement, then the judge has no business lending assistance to its enforcement since the confidentiality requirement is void. Lawyers who seek to enforce illegal compounding agreements "right under the nose" of a federal or state court judge are engaging in conduct that the judge must not aid. Rather, the misguided lawyers are engaging in antisocial, unethical conduct that should be stopped by the judge and reported to the disciplinary authority.

IV. CONCLUSION

Secrecy selling breeds antisocial joint ventures between wrongdoers, victims, and lawyers, with each profiting in some way from the cover given to the wrongdoer to continue its depredation. Those who profiteer off public ignorance and unholy alliances have no incentive to halt secrecy selling. The impetus for change must come from elsewhere. In South Carolina, change has been ushered in by an enlightened judiciary.

At its center, the debate over secrecy selling in litigated cases is a discussion about how we view courthouses and judges, about what we expect out of them, and about what they may expect of themselves. This concern over secrecy selling caused Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina, to ponder, "What are we really doing to be handmaidens of that kind of secrecy?"[142] Chief Justice Toal framed a fair question, one that ought to disturb every conscientious judge. Our ethics codes speak in lofty terms about integrity and honor and judges' duty to "enhance . . . confidence in our legal system."[143] Judge

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141. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3B(3), *at* http://www.utd.uscourts.gov/judges/judges_code.html (last visited Apr. 4, 2004).

142. *60 Minutes II*, *supra* note 12.

143. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 106, at Preamble. The Code of Professional Responsibility, Ethical Consideration 9-6, featured a provision declaring:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and

Anderson was quite right to raise his voice against secrecy selling, and his fellow district court judges were wise to join his lead. The same goes for Chief Justice Toal and the members of her court.

Judges determined to reduce judicial involvement in secrecy selling to an absolute minimum are behaving in the best tradition of the judiciary and in the best interests of the legal profession. The judiciary cannot seal, enforce or process illegal compounding agreements. They are criminal contracts and are void as a matter of law. Lawyers who sponsor such agreements should be reported by judges to the appropriate disciplinary authorities.

The frequent occurrence and staunch defense of secrecy selling demonstrates that the ability to exploit ignorance can be a highly valuable commodity. However, truth is also a valuable commodity. Our courthouses and judges exist to serve the truth-finding business of society. The actions of South Carolina's federal and state judiciaries to limit antisocial truth-selling by litigants reflect policy decisions that are both correct and entirely consistent with the ethical exhortations that guide lawyers' and judges' behavior.

> to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

MODEL CODE, *supra* note 60, at EC 9-6.