Study K-410 November 23, 1998

Memorandum 98-81

Confidentiality of Settlement Negotiations: Confidential Settlements

At its September meeting, the Commission began considering the many comments on its revised tentative recommendation on *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations* (March 1998) (hereafter *"Tentative Recommendation"*). Among those comments was a long letter from the Consumer Attorneys of California (CAOC) suggesting that we should address the use of confidential settlements. (Memorandum 98-62, pp. 25-28 & Exhibit pp. 25-34.) This memorandum discusses that suggestion in detail. A separate memorandum (Memorandum 98-80) covers other aspects of the Commission's proposal. (For convenience, CAOC's letter is attached to this memorandum as Exhibit pp. 1-10.)

BACKGROUND

In drafting its proposal, the Commission sought to avoid the issue of confidential settlements, because of its potential for controversy. The Commission's proposed provision on the admissibility of settlement negotiations (Evid. Code § 1132) would apply to settlement agreements as well as the negotiations leading up to those agreements. But the proposed provision on the discoverability and confidentiality of settlement negotiations (Evid. Code § 1133) expressly excludes settlement agreements from its scope:

> (c) This section does not apply to evidence of a settlement agreement. Nothing in this chapter affects existing law on confidentiality or discovery of a settlement agreement.
>
> **Comment.** ….
>
> Subdivision (c) makes clear that although Section 1133 restricts discovery of settlement negotiations, the provision does not apply to discovery of a settlement agreement and thus does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. ….

The preliminary part explains:

> Settlement agreements, as opposed to settlement offers and associated negotiations, present special considerations. For example, suppose a manufacturing plant allegedly emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement agreement, it may be important to resolve whether other persons, particularly other victims or potential victims, are entitled to disclosure of the agreement. Such issues are controversial and this proposal does not address them. The new standard for confidentiality and discovery of settlement negotiations would not apply to disclosure of settlement agreements.

(*Tentative Recommendation,* p. 11 (footnotes omitted).)

Instead of skirting the issue of confidential settlements, CAOC "strongly urges the Commission to address this issue head-on now and to modify the Proposal to include a provision for discoverability and public record of settlement agreements." (Exhibit p. 8.) Because the use of confidential settlements is an important public issue and CAOC is a major player in legislative debate on that issue, CAOC's request for Commission involvement requires careful consideration. This memorandum explores the relevant policy interests, provides background on existing law and previous legislation in the area, then explains CAOC's proposal and explores how to proceed.

SCOPE OF DISCUSSION

Before proceeding further, some clarification is necessary. The use of confidential settlements is one of a cluster of concerns sometimes known as "Sunshine in Litigation" or simply "sunshine" issues. These issues focus on the extent to which aspects of the litigation process are conducted in private, without disclosure to the public or other interested persons. Other such issues include the use of protective orders in discovery, the sealing of discovery materials and court records, the sharing of discovery materials among litigants, and the silencing of witnesses through contractual agreements.

Even focusing on settlements, there are a number of different issues. Some settlements require the parties to keep the settlement terms confidential. Other settlements include further restrictions, such as clauses prohibiting the parties

from discussing the subject matter or underlying facts of their dispute, provisions requiring the return or nondisclosure of discovery materials, and terms restricting testimony by experts or other witnesses. Still other settlements are filed in court, but under seal.

Case law and commentary on sunshine issues tend to blur these distinctions and use imprecise terminology, referring, for example, to "secret settlements" or "secrecy clauses" without explaining what is meant. Often, cases from one context are cited in connection with another context, because the policy concerns overlap (although there may also be significant differences).

Consistent with the nature of the Commission's ongoing study and the thrust of CAOC's comments, the discussion that follows focuses on the sunshine issues relating to settlement, particularly (but not exclusively) settlements in which the parties agree to keep the settlement terms confidential. We use the term "confidential settlement" to refer to that type of settlement, except as otherwise noted. Where the discussion goes beyond the settlement context, we try to point that out.

POLICY ANALYSIS

Much has been said both for and against confidential settlements. There are important policy reasons for requiring disclosure of settlements, especially in some contexts, but also significant competing interests.

Policy Interests Favoring Disclosure of Settlements

Confidential settlements may keep important information relating to public health and safety "hidden from the public." Lockyer, *Sunshine in the Courts: The Need to Limit Secrecy Agreements That Hide Information on Hazards,* Product Safety & Liability Rptr., Nov. 27, 1992, at 44. "Because the judicial process is frequently the avenue by which the public and regulatory agencies learn of significant health and safety hazards, blocking this avenue may prove detrimental to the public well-being." *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 39 Cal. App. 4th 1194, 1208, 46 Cal. Rptr. 2d 151 (1995). "Among the products whose defects are alleged to have been hidden by protective orders or sealed settlements are Dow Corning's silicone gel breast implants; pickup trucks made by Ford and General Motors; Upjohn's sleeping pill Halcion; Pfizer's Bjork-Shiley heart valves; and McNeil Pharmaceutical's painkiller, Zomax." Luban, *Settlements and the Erosion of the Public Realm,* 83 Geo. L.J. 2619, 2650 (1995). "The

now obvious harms of asbestos were known as early as the later 1920's, but litigation regarding that hazard was … settled with secrecy agreements routinely enforced by the courts." Lockyer, *supra,* at 43. "Much of the injuries related to asbestos could have been avoided if the early cases had not hidden the dangers from the public." *Id.*

The problem arises because participants have little incentive to safeguard the public interest in reaching a settlement. Defendants have an obvious pecuniary interest in preventing dissemination of information about harmful products or practices. Likewise, "injured plaintiffs often are not in the position to protect the public's right to know because as victims of injuries, they are seeking compensation and are often willing to execute secrecy agreements as a condition of settlement." 140 Cong. Rec. S5315-01 (May 5, 1994) (remarks of Sen. Kohl). A San Diego superior court judge has estimated that "99 percent of the plaintiffs, if faced with a choice of becoming a Ralph Nader for the auto industry or being compensated for their injuries, would probably opt to accept the money." *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy*, 78 Judicature 304, 308 (May-June 1995) (remarks of Judge Kevin Midlam). Many settlements are consummated in private, without being presented to a court. Where a settlement is filed in court (e.g., in conjunction with a request to seal the court file), the court may welcome the reduction in its caseload and view the settlement uncritically. Lockyer, *supra,* at 44; *see also* Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 477 (1991). Courts "approve secrecy agreements in settlements because all too often they regard litigation as nothing more than a private dispute mechanism." 140 Cong. Rec. S5315-01 (May 5, 1994) (remarks of Sen. Kohl).

"We must remember, however, that in many product liability cases, there is a third party with interests that need to be protected: the public." *Id.* "The public's right to know should — with rare exceptions — inform our litigation system as much as the interests of private parties." *Id.* "Information that will help avoid numerous injuries and much hardship should not be sacrificed at the alter of a single lawsuit's resolution." *Id.*

Additionally, "[p]ublic confidence in the judicial system is undermined when courts routinely enforce secrecy agreements without consideration of the public welfare." Lockyer, *supra,* at 43. As one scholar commented,

> [n]ot only does [openness] serve to check the exercise of judicial authority and to provide an understanding of how the legal system

> operates, but more importantly it fosters an appearance of fairness and promotes confidence in the system. When cases presented for resolution in the public forum are surrounded with secrecy, there is a natural tendency to question whether justice is being equitably administered. The public and private interests in settling cases without litigation should not be allowed to compromise the importance of a generally open judicial system.

Bechamps, *Sealed Out-Of-Court Settlement: When Does the Public Have the Right to Know*, 66 Notre Dame L. Rev. 117, 156 (1990). So much litigation results in settlement that monitoring the judicial system may require some degree of public access to settlements. "[S]ince more than 90% of all civil cases settle in this country, private settlements and blanket confidentiality orders in the discovery process preclude much public knowledge." (Exhibit p. 2.)

Restricting the use of confidential settlements may also foster clean competition and alert businesses to safety problems early, when liability and injury to reputation can be minimized through prompt corrective action. For instance, a manufacturer considering whether to use a new chemical in its products may opt against it upon learning of settlements between another manufacturer and persons allegedly injured by the chemical. Similarly, manufacturers who strive for safe products and production processes may benefit when competitors who are less careful must disclose multiple settlements concerning injuries allegedly attributable to their products or processes. Openness regarding settlements would also permit differentiation between businesses that act promptly to settle cases and correct safety problems, and those that do not.

Policy Interests Weighing Against Disclosure of Settlements

"One of the substantive rights that only confidentiality can protect is the right to privacy …." Miller, *supra*, at 464. "Privacy can be a matter of concern to the plaintiff, the defendant, and nonparties in a wide array of lawsuits." *Id.* For instance, "the plaintiff in a personal injury action is often asked to expose his or her private life to intense scrutiny." *Id.* Requiring disclosure of settlement agreements may intrude on significant privacy interests, as where it reveals that a person is HIV positive. This is of particular concern "given today's unparalleled capacity to record, retrieve, and transfer data, as well as the range of discussions made about people on the basis [of] files, records, dossiers, and data banks." *Id.* at 466.

A second concern is that disclosure of settlements would "provide a disincentive to innovation because the property value of that innovation could not be protected …." Keene, *Warning: Eliminating Protection of Sensitive Information Can be Hazardous to Everyone's Health*, Product Safety & Liability Rptr., Nov. 27, 1992, at 42. "Businesses may be as creative with their intellectual property and proprietary data as with their tangible assets, especially given 'the great extent to which the economy now depends on the production and sale of information.'" Miller, *supra*, at 469, *quoting* Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 Cath. U. L. Rev. 365, 398 (1989). "Their willingness to produce information in litigation often depends heavily on the court's ability to keep the information confidential." Miller, *supra*, at 469. By "discouraging those who design, develop, and introduce new products and modalities into the marketplace," automatic access to trade secrets could be "counterproductive to the protection of health, safety and the environment." Keene, *supra*, at 42. "The failure to introduce feasible and needed technological advances can kill or maim as readily as defective products." *Id.*

Opponents of disclosure also maintain that "settlements would be discouraged" if they could not be consummated quietly. *Id.*; *see also* Miller, *supra*, at 486; *Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Associates*, 800 F.2d 339, 350 (3d Cir. 1986) (Garth, J., dissenting) ("[M]any settlements would not be reached if the secrecy of their terms could not be safeguarded."). Others say, however, that "[b]ecause settlements are so favorable to plaintiffs, defendants, indigents and the court system as a whole, they will continue to be concluded even in the absence of secrecy." Ispahani, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 Geo. J. of Legal Ethics 111, 131 (1992); *see also* Ramsey, et al., *Keeping Secrets With Confidentiality Agreements*, 34 Trial 38, 40 (Aug. 1998) ("In the past seven years since our law office stopped accepting [confidential settlement] agreements, not one case has failed to settle or has settled for less as a result of this policy."). Assuming that there is a decreased settlement rate, the impact could be reduced by limiting disclosure to certain contexts (e.g., cases involving environmental hazards or unsafe products) and by continuing to allow confidential settlements under specified circumstances (e.g., where necessary to protect privacy or trade secrets). Clearly, the case for disclosure is stronger in some contexts than in others. *See generally*, Miller, *supra*, at 477. Many cases do not involve public hazards; existing requirements to report

hazards to regulatory agencies may lessen the need for disclosure in other contexts (although noncompliance with reporting requirements may be a problem).

Finally, disclosure of the amount of a settlement may create problems for both the plaintiff and the defendant. "[C]onfidentiality protects [the plaintiff] from being preyed upon by hucksters and long-lost relatives or friends." *Id.* at 485; *see also Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal. App. 3d 893, 909, 205 Cal. Rptr. 92 (1984) (Crosby, J., dissenting) (Jail inmate who settled with county "doesn't want anybody to know he has money because he might have a lot of problems when they know he has money."). "From the defendant's perspective, confidentiality ensures that the settlement amount will not be used to encourage the commencement of other lawsuits that never would have been brought or as unfair leverage to extract a similar payment in subsequent suits that may be meritless." Miller, *supra*, at 485. As the court pointed out in response to such arguments in *Register*, however, disclosure of settlements may "put prospective claimants on notice that only meritorious claims will ultimately be settled …." 158 Cal. App. 3d at 909. In any event, these issues could be avoided by continuing to permit confidentiality as to the amount of a settlement, as in a recently enacted law governing reacquisitions of lemon cars (1998 Cal. Stat. ch. 1063).

EXISTING CALIFORNIA LAW ON SETTLEMENTS WITH CONFIDENTIALITY REQUIREMENTS

Existing California law appears to draw a sharp distinction between (1) confidential settlements that have been presented to a court and become part of the court file (e.g., in connection with a request to seal the court file and the settlement agreement) and (2) confidential settlements that have been consummated in private.

Confidential Settlements With Judicial Involvement

Where a confidential settlement is reviewed by a court, the settlement becomes a judicial record, triggering a qualified right of public access based on common law, the First Amendment, and the free speech clause of the California Constitution. The leading case on this point is *Wilson v. Science Applications Int'l Corp.*, 52 Cal. App. 4th 1025, 60 Cal. Rptr. 2d 883 (1997), in which the parties entered into a settlement agreement on condition that the court file and the

settlement agreement be sealed. The trial court sealed the record as requested, but a media organization later moved for an order unsealing the file. *Id.* at 1028-29. The trial court denied the motion. *Id.* at 1029.

On appeal, the court pointed out that the settlement agreement was part of the court's file, so the court was "not presented with the considerations which would obtain if [the media organization] were seeking access to a confidential settlement between private parties which was not a part of a court's records." *Id.* at 1029 n.1. Having established that the confidential settlement was a judicial record, the court of appeal invoked numerous precedents from various contexts establishing a qualified right of public access to judicial records. *Id.* at 1030-31. Relying on those precedents and on case law concerning reconsideration of previous orders, the court of appeal reversed and remanded, directing the trial court to review the sealed documents *in camera* to "determine whether, consistent with the legitimate interests of the parties to the original proceeding and the legitimate interests of the moving party, those records may be released fully, partially, with conditions designed to protect confidential information, or not released at all." *Id.* at 1034.

Several legal theories support the right of access to judicial records that the court relied on in *Wilson*. "Both the federal (First Amendment to the United States Constitution) and the state (Article I, section 2(a), California Constitution) constitutions provide broad access rights to judicial hearings and records." *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992). "A lengthy list of authorities confirms this right in general, and in particular as it pertains to the press, both in criminal and civil cases." *Id.* California's free speech provision "is more definitive and inclusive than the First Amendment to the United States Constitution." *In re Candiotti*, 34 Cal. App. 4th 718, 724, 40 Cal. Rptr. 2d 299 (1995); *see also Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1144, 51 Cal. Rptr. 2d 91 (1996). There is also a common law right of access to judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The Public Records Act (Gov't Code § 6250 *et seq*.) does not provide a right of access to judicial records, however, because such records are exempt from the Act. *Copley Press*, 6 Cal. App. 4th at 111.

In *Estate of Hearst*, 67 Cal. App. 3d 777, 782, 136 Cal. Rptr. 821 (1977), the court explained the practical basis for the right of access to judicial records. "To prevent secrecy in public affairs public policy makes public records and documents available for public inspection by newsmen and members of the

general public alike." *Id.* at 782; *see also Champion v. Superior Court*, 201 Cal. App. 3d 777, 786, 247 Cal. Rptr. 624 (1988). "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *Estate of Hearst*, at 784. "For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." *Id.* Indeed, it is "a vital function of the press to subject the judicial process to 'extensive public scrutiny and criticism.'" *Id.*, *quoting Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). It is also a "first principle" that the people have the right to know what is done in their courts. *Wilson*, 52 Cal. App. 4th at 1030; *Estate of Hearst*, 67 Cal. App. 3d at 784.

Still, the public right of access to judicial records does not guarantee access to all court materials. *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, ___, 74 Cal. Rptr. 2d 69, 72 (1998); *Estate of Hearst*, 67 Cal. App. 3d at 783. Some materials, such as drafts and outlines of opinions, do not reflect the official work of the court and thus are not "judicial records" subject to access. *Copley Press v. Superior Court*, 6 Cal. App. 4th 106, 112-15, 7 Cal. Rptr. 2d 841 (1992). More fundamentally, even where judicial records are at stake, courts "balanc[e] the interests of secrecy of court documents against the public's right to know." *Id.* at 112.

The nuances of precisely which balancing test applies under which legal theory (First Amendment, California Constitution, or common law) are not entirely clear. It is well-established, however, that "[t]he law favors maximum public access to judicial proceedings and court records." *Pantos v. City and County of San Francisco*, 151 Cal. App. 3d 258, 262-63, 198 Cal. Rptr. 489 (1984); *see In re Marriage of Lechowick*, __ Cal. App. 4th __, __, 77 Cal. Rptr. 2d 395, 400 (1998) (same); *Champion*, 201 Cal. App. 3d at 788 (same); *see also Wilson*, 52 Cal. App. 4th at 1031 (assuring public access to judicial records is "paramount" concern). "Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons." *Pantos v. City and County of San Francisco*, 151 Cal. App. 3d 258, 262-63, 198 Cal. Rptr. 489 (1984); *see also In re Marriage of Lechowick*, __ Cal. App. 4th __, __, 77 Cal. Rptr. 2d 395, 400 (1998); *Champion*, 201 Cal. App. 3d at 788. "The burden rests on the party seeking to deny public access to court records to establish compelling reasons why and to what extent the records should be made private." *Copley Press*, 74 Cal. Rptr. 2d at 73. "Policy reasons to restrict access are 'anything which tends to undermine that sense of security for

individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good.'" *Id.* at 72-73.

Consistent with these principles, the courts have established stiff requirements for sealing court documents, *Copley Press*, 74 Cal. Rptr. 2d at 73, such as "information of a highly confidential nature which is the subject of confidential settlement agreements," *Champion*, 201 Cal. App. 3d at 786. These requirements are not insurmountable. *See id.* at 790 (granting application to seal file, without explaining specific circumstances justifying that result). They are, however, difficult to meet. For example, in *Copley Press*, the press sought access to sealed court records to learn the amount of a settlement between a school district's insurer and a child who was sexually assaulted with a broomstick at school. 74 Cal. Rptr. 2d at 70. The school district opposed the request, arguing that if details of the settlement became public it would expose the victim to ridicule and exacerbate his suffering. *Id.* at 74. The court of appeal was not persuaded:

> [W]e find no authority that the amount of money a person receives in judgment or court-approved settlement as the result of tortious conduct is confidential. The fact of a damage award, whatever size, is not in itself a private fact deserving protection and secrecy in public education is not in the public interest. The settlement amount is not a trade secret, within a privilege, or likely to place anyone in "clear and present danger of attack."

Id. The court therefore concluded that "no compelling reason exists to conceal the agreed-upon amount from the public when weighed against the public's right to know what transpires in both public schools and state courts." *Id.*

Copley involved some special factors weighing in favor of disclosure: The settlement concerned claims against a public entity, and the underlying incident had already received some publicity. *Id.* at 70-71. Nonetheless, the case demonstrates that the public interest in disclosure of a sealed settlement, or other settlement constituting a judicial record, is very strong and is difficult to overcome.

(In some contexts, the common law and constitutional right of access to judicial records is not the only basis for disclosure of a confidential settlement that has been presented to a court. Where a party moves to confirm the good faith of a confidential settlement, for instance, the nonsettling defendant is

entitled to see the agreement. *Mediplex of California v. Superior Court*, 34 Cal. App. 4th 748, 40 Cal. Rptr. 2d 397 (1995); *Alcal Roofing Co. v. Superior Court*, 8 Cal. App. 4th 1121, 1127, 10 Cal. Rptr. 2d 844 (1992); *J. Allen Radford Co. v. Superior Court*, 216 Cal. App. 3d 1418, 1424, 265 Cal. Rptr. 535 (1989). Some counties also have local rules regulating the sealing of court documents. *See, e.g.*, San Francisco County Uniform Trial Court Rule 10.5.)

Confidential Settlements Consummated in Private

Where a confidential settlement is consummated in private, without being presented to or reviewed by a court, the doctrine of public access to judicial records does not appear to apply. The United States Supreme Court has not ruled on this point, but it has determined that a protective order restricting dissemination of discovery materials does not offend the First Amendment, at least if the protective order is entered on a showing of good cause, is "limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). The Court reasoned that "[d]iscovery rarely takes place in public," thus discovery proceedings "are not public components of a civil trial" and the First Amendment does not require access. *Id.* at 33 & n.19; *see also In re Candiotti*, 34 Cal. App. 4th at 722-24; *Coalition Against Police Abuse v. Superior Court*, 170 Cal. App. 3d 888, 216 Cal. Rptr. 614 (1985).

Just as discovery is not a public component of a civil trial under *Seattle Times*, where parties have entered into a confidential settlement but have not filed it with a court, the settlement is not a public component of a civil trial under California precedents. "The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality." *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*, 51 Cal. App. 4th 233, 241, 58 Cal. Rptr. 2d 791 (1996); *see also Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal. App. 3d 1058, 1082, 267 Cal. Rptr. 457 (1990) ("The agreement to keep the settlement private … was not illegal. Our experience with litigation in the Silicon Valley is that such agreements are routine here.") "We find a private settlement agreement is entitled to at least as much privacy protection as a bank account or tax information …." *Hinshaw*, 51 Cal. App. 4th at 241. Thus, where a litigant seeks discovery of a confidential, out-of-court settlement involving persons who are

not parties to the suit in which discovery is sought, the constitutional privacy rights of those persons are triggered and the standard for discovery is stiff:

> [G]iven the private nature of a confidential settlement of a lawsuit, the burden rests on the proponents of discovery of this information … to justify compelling production of this material. They must do more than show the possibility it may lead to relevant information. Instead they must show a compelling and opposing interest.

Id. at 239. A less demanding standard applies where no third party privacy interests are involved, but the presumption is against, not in favor, of providing access to a settlement that is not in a court file. *See id.* at 794; *Norton v. Superior Court*, 24 Cal. App. 4th 1750, 30 Cal. Rptr. 2d 217 (1994); *but see Home Ins. Co. v. Superior Court*, 46 Cal. App. 4th 1286, 54 Cal. Rptr. 2d 292 (1996) (Requiring disclosure of confidential settlement where non-settling carrier sought to prove that the insured had fully recovered indemnity and costs and should proceed no further against other carriers).

In other words, disputants can avoid public scrutiny of the resolution of their dispute by entering into an unfiled, confidential settlement. There are some limitations:

> • Local rules in some courts discourage the use of confidential settlements. *See* Alameda County Coordinated Local Rule 5.8; Los Angeles County Superior Court Rule 7.19; San Diego County Superior Court Rule 11.6.
>
> • The Public Records Act (Gov't Code § 6250 *et seq.*) governs access to settlements involving public agencies subject to the Act. "[T]he public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny … clearly outweigh[s] any public interest served by conducting settlement of tort claims in secret…." *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal. App. 3d 893, 909, 205 Cal. Rptr. 92 (1984).
>
> • An agreement to suppress evidence is illegal and unenforceable. *See Smith v. Superior Court*, 41 Cal. App. 4th 1014, 1025, 49 Cal. Rptr. 2d 20 (1996) (agreement prohibiting witness from testifying violates fundamental public policy against suppression of evidence); *Williamson v. Superior Court*, 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978) (agreement to withdraw expert as witness and suppress expert's report is void).

> • An offer, demand, or agreement restricting an attorney from prosecuting similar claims on behalf of other clients is prohibited. Rule of Professional Conduct 1-500.
>
> • Confidential settlements are not permitted in instances of attorney misconduct (*see* Bus. & Prof. Code § 6090.5(a)) or medical malpractice exceeding $30,000 (*see* Bus. & Prof. Code § 802).
>
> • A new law (operative January 1, 1999) prohibits confidentiality as to the nonfinancial terms of reacquisitions of lemon cars. 1998 Cal. Stat. ch. 1063.

For the most part, however, the use of confidential settlements is unregulated.

LAW IN OTHER JURISDICTIONS

Several states have enacted "Sunshine in Litigation" rules, most notably Texas and Florida. Florida's statute directly prohibits confidential settlements that conceal "public hazards":

> Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

Fla. Stat. Ann. § 69.081(3) (West 1998). "Public hazard" is defined as "any device, instrument, person, procedure, product, or condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury." Fla. Stat. Ann. § 69.081(2). Trade secrets "which are not pertinent to public hazards" are protected pursuant to statute. Fla. Stat. Ann. § 69.081(5) (West 1998).

Texas has taken a different approach. "Court records" are statutorily "presumed to be open to the general public." Tex. R. Civ. Proc. 76a(1) (West 1998). Included in the definition of "court records" are "settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." Tex. R. Civ. Proc. 76a(2)(b) (West 1998). These and other "court records"

> may be sealed only upon a showing of all of the following:
>
> (a) specific, serious and substantial interest which clearly outweighs:
>
> (1) th[e] presumption of openness;
>
> (2) any probable adverse effect that sealing will have upon the general public health or safety;
>
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

Tex. R. Civ. Proc. 76a(1) (West 1998).

If the Commission decides to study the area of confidential settlements, the staff will do further research on these and other sunshine statutes. Both the Florida statute and the Texas rule were enacted in 1990, so substantial material on the effect of these provisions should be available by now.

Law from other jurisdictions is also instructive as to the First Amendment and common law right of access. As in California, courts considering these doctrines in other jurisdictions have (with some exceptions) distinguished between confidential settlements that have and have not been presented to a court. "Once documents are filed with the court, they lost their private nature and become part of the court file and 'public component[s]' of the judicial proceeding … to which the right of access attaches." *Johnson v. Turner Constr. Co.*, 232 Ill. App. 3d 1068, 598 N.E.2d 406, 410 (1992) (right of access attached to settlement agreement presented in court, but "d[id] not extend to the settlement document in the personal injury case because it was never submitted to the court …."); *see also Securities & Exchange Comm'n v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) ("Once a settlement is filed in district court, it becomes a judicial record."). "Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements." *Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 345 (3d Cir. 1986). "As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate." *Id.* at 344. When, however, a settlement agreement has not been filed with, placed under seal, interpreted, or enforced by a court, it is not a judicial record for purposes of the right of access doctrines. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994); *see also Enprotech Corp. v. Renda*, 983 F.2d 17 (3d Cir. 1993).

A few courts have deviated from this approach, finding that "no first amendment right of access exists in … settlement documents and transcripts sealed by the court." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 204 (Minn. 1986); *see also Grove Fresh Distrib., Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1441 (N.D. Ill. 1995) ("[C]onfidential agreements filed during the course of a lawsuit in reliance on an existing seal — such as confidential settlement agreements — are … worthy subjects for a protective order, because like discovery material, they too cannot really be considered 'public components of a civil trial.'"). Somewhat similarly, a commentator urging greater access recently questioned the wisdom of distinguishing between "sealed settlements with the blessing of the court" and "secret settlements without the blessing of the court." Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 335-36 (1998).

Importantly, there is universal agreement that where a right of access to judicial records exists, it is not absolute. Cases from other jurisdictions provide insights on weighing the policy interests where disclosure of a confidential settlement agreement is sought, both where the right of access applies and where it does not. *See, e.g., Pratt & Whitney Canada, Inc. v. United States*, 14 Cl. Ct. 268, 275 (1988) (Trade secrets and privacy interests can outweigh the public's right of access to judicial records); *Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993) (Parties' desire not to disclose their bad behavior "is certainly not a compelling reason to grant a confidentiality order."). At this point, it is not necessary to go into the details of these decisions.

PREVIOUS LEGISLATION

Previous California legislation on confidential settlements includes:

SB 711 (Lockyer)

In 1992, the Legislature passed but Governor Wilson vetoed SB 711 (Lockyer), which would have restricted the use of confidential settlement agreements in financial fraud cases and in actions alleging personal injury or wrongful death due to a defective product or environmental hazard. The key portion of the bill provided:

> Notwithstanding any other provision of law, as a matter of public policy, in actions based on financial fraud, or based upon personal injury or wrongful death alleging damages caused by a

> defective product or an environmental hazard, no part of any confidentiality agreement, settlement agreement, or protective order to keep from public disclosure information that is evidence of financial fraud, a defective product, or an environmental hazard shall be entered or enforceable upon the settlement or conclusion of any litigation or dispute concerning the financial fraud, defective product, or environmental hazard, unless a final protective order regarding that information is entered by the court after a noticed motion.

The bill authorized entry of a final protective order ("FPO") only for good cause shown and only if the information subject to the order qualified for nondisclosure on one of four grounds:

> (1) The subject matter is privileged pursuant to Section 1040 of the Evidence Code [i.e., privilege for official information].
>
> (2) Disclosure would violate an interest protected by the right to privacy guaranteed in the California Constitution.
>
> (3) Disclosure would reveal trade secrets information which cannot be excised or redacted reasonably.
>
> (4) Disclosure would reveal confidential personal or business information which is not a trade secret and that information does not indicate a public risk, hazard, or danger which would defraud the public, cause serious environmental danger, or pose a serious threat to the health and safety of one or more persons.

Where trade secrets were involved, certain additional requirements had to be met.

The bill also affected protective orders entered in the course of discovery: Any protective order entered before judgment would automatically expire within 30 days of entry of final judgment. Thereafter, information protected by such an order would remain protected only if the court entered an appropriate FPO.

SB 711 did not, however, restrict the use of confidentiality as to the financial terms of settlements.

> Nothing in this section shall be deemed to prohibit the entry or enforcement of that part of a confidentiality agreement, settlement agreement, or stipulated agreement between the parties which requires nondisclosure of the amount of any money paid in settlement of a claim.

Despite the efforts to accommodate competing concerns in SB 711, the "battle over the bill was hotly contested and closely watched, according to all accounts."

Lawyers, Executives, Interest Groups Watched Closely as Legislature Debated, Governor Vetoed Controversial Bill, Product Safety & Liability Rptr., Nov. 27, 1992, at 12. The bill was co-sponsored by the California Trial Lawyers Association (now CAOC) and the Center for Law in the Public Interest. Supporters included the Los Angeles District Attorney's Office, the Judicial Council, and various consumer and environmental groups. Opponents included many defense and business groups. The vote on the bill was 21-16 in the Senate and 43-31 in the Assembly.

Subsequent Legislation

To the staff's knowledge, there have not been any major bills on confidential settlements since SB 711. Just last session, however, the Legislature passed and Governor Wilson signed AB 2410 (Shelley), which prohibits and renders unenforceable confidentiality clauses in agreements between consumers and manufacturers for reacquisition of lemon cars. As in SB 711, the bill does not restrict confidentiality as to the financial terms of a reacquisition. The vote was 21-12 in the Senate and 43-32 in the Assembly.

CAOC'S PROPOSAL

CAOC urges the Commission to revise its proposal on settlement negotiations to require that settlement agreements be accessible to the public, unless a party shows good cause for confidentiality:

> [T]here should be a strong presumption in favor of the public filing of settlement agreements which contain the terms an settlement of resolving a dispute in a civil [case] filed in the State of California. A written settlement agreement, or a settlement agreement recited into the record, should be accessible to the public unless good cause is established by one or both parties demonstrating why, based upon the facts and circumstances of the particular case, the settlement agreement itself should not be public.

(Exhibit p. 8.) CAOC suggests that the standard of San Francisco County Uniform Trial Court Rule 10.5. be used in determining whether there is good cause for nondisclosure — "i.e., that 'disclosures would violate a personal, financial or other interest protected by law, *and* that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information.'" (*Id.* at 9 (emphasis added).)

CAOC further states that "in cases involving multiple defendants in which settlements are reached by the plaintiff with less than all defendants, those settlement agreements could remain confidential until the case was actually resolved, either by settlement or by trial." (*Id.*) "Such a temporary confidentiality provision would protect the interests of the parties to the settlement and provide no incentive either to the settling parties or to the non-settling parties until the case was finally resolved in the trial court." (*Id.*)

In contrast to SB 711, CAOC's current proposal would apply to all types of cases, not just actions for financial fraud or bodily harm due to a defective product or environmental hazard. As presently framed, the proposal also differs from SB 711 in that it does not permit parties to keep the monetary terms of settlements confidential. Another important difference is that CAOC's proposal would not affect protective orders entered in the course of discovery.

RESPONDING TO CAOC'S PROPOSAL

Responding to CAOC's proposal could be a simple matter of suggesting that CAOC bring its own bill on confidential settlements. However, it appears that CAOC views the Commission's proposal on settlement negotiations as an appropriate vehicle for addressing confidential settlements. It seems likely that CAOC will not support and may very well oppose the Commission's proposal unless it includes restrictions on confidential settlements. As the Commission knows from past experience, CAOC opposition will make the proposal difficult to enact.

Consequently, it may not be a sufficient response simply to encourage CAOC to bring its own bill. It is appropriate to explore and evaluate other possibilities.

Authority to Study

A threshold matter is whether the Commission is authorized to study confidential settlements. The Commission's study of the admissibility, discoverability, and confidentiality of settlement negotiations is based on its broad authority to study "[w]hether the Evidence Code should be revised." 1998 Cal. Stat. res. ch. 91. That authority clearly encompasses issues relating to the admissibility of evidence. The Commission's authority to study the discoverability of evidence of settlement negotiations is also clear: The Evidence Code includes provisions on discoverability of certain types of evidence (e.g., Evid. Code §§ 1119-1120, 1122-1124, 1043, 1045, 1560 *et seq.*), and the

Commission's calendar of topics for study includes "[w]hether the law relating to discovery in civil cases should be revised." 1998 Cal. Stat. res. ch. 91. Finally, the Evidence Code defines certain communications as "confidential." See, e.g., Evid. Code §§ 952, 980, 992, 1012, 1035.4, 1037.2, 1119, 1070. Presumably, authority to determine what is "confidential" also encompasses authority to determine what cannot be kept "confidential," as, for instance, a settlement agreement. Thus, the Commission appears to have authority to study confidential settlements. The Commission's calendar of topics for study does not, however, include a specific grant of authority to study confidential settlements.

Options as to Involvement and Linkage to Ongoing Study

Possible approaches to CAOC's proposal include:

> (1) *No study of confidential settlements*. Finalizing a recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations, without taking a position on confidential settlements (other than preserving existing law). Introducing a bill based on that recommendation.
>
> (2) *Separate study*. Finalizing a recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations, without taking a position on confidential settlements (other than preserving existing law). Introducing a bill based on that recommendation. Commencing a study of confidential settlements. Issuing a separate recommendation on confidential settlements, which could be the subject of a separate bill or could be combined with the first bill (if that bill is still pending).
>
> (3) *Combined study*. Broadening the current study to include confidential settlements. Circulating a tentative proposal on confidential settlements before issuing a final recommendation. Introducing legislation implementing the Commission's recommendation in early 2000.

A definite downside to studying confidential settlements is that the area is more controversial than most topics the Commission studies. Achieving consensus may be very difficult, if not impossible. Whether successful or unsuccessful, the study would require much staff and Commission time. Some members of the Legislature may view the Commission's involvement as an inappropriate intrusion into a highly politicized and controversial area.

As a matter of policy, one could view CAOC's proposal as inconsistent with the Commission's proposal to protect the confidentiality of settlement negotiations. Increasing the confidentiality of settlement negotiations is likely to foster settlements by permitting frank discussion of the parties' positions and concerns. Restricting the use of confidential settlements might have the opposite effect, deterring settlement in some instances.

One can, however, take a different view. The objective of the Commission's proposal is not just to promote settlement, but to promote settlements that are in the public interest. Increasing the confidentiality of settlement negotiations may permit litigants to openly explore a variety of options and enhance the likelihood of early, mutually satisfactory and thus durable settlements, conserving the resources of courts and litigants, as well as sparing litigants from the stress and uncertainty of prolonged litigation. See *Tentative Recommendation*, at 3, 5-8 & nn. 10-12, 27. Likewise, the goal in regulating confidential settlements would be to promote settlements that are in the public interest — ones that do not conceal significant safety hazards from the public. Protecting the confidentiality of the process of reaching a settlement is not necessarily inconsistent with requiring openness as to the end result.

Options as to General Direction if the Commission Studies Confidential Settlements

If the Commission decides to study confidential settlements, there are many options as to how to proceed. CAOC's proposal and SB 711 would provide starting points for discussion, but laws from other jurisdictions may also serve as models. There would be numerous points to consider, such as:

- What types of cases should be covered by the reform?

- How should the reform be structured? Should settlements be filed in court under specified circumstances? Should certain types of confidentiality clauses be flatly prohibited, as in the new law on reacquisitions of lemon cars? Should litigants desiring confidentiality be required to seek a FPO, as in SB 711?

- What circumstances would justify nondisclosure of settlement terms?

- Should the reform apply to all settlement terms, or only to certain terms (e.g., nonfinancial terms)?

The challenge would not only be to develop a proposal that fairly balances the competing interests and garners broad support, but also to ensure that the proposal is constitutional. Requiring judicial involvement, such as having parties file their settlements in court or making certain settlement terms contingent on to court approval, almost certainly would trigger the federal and state constitutional rights of access to judicial records. Statutory language inconsistent with those constitutional rights (such as provisions protecting confidentiality to a greater extent than is constitutionally permissible) would be invalid, and may jeopardize the remainder of the proposal as well.

RECOMMENDATION

Studying confidential settlements would be a major undertaking in what has been described as "dangerous territory." It seems unlikely, however, that the Commission will be able to avoid this issue altogether if it decides to proceed with its proposal on settlement negotiations. The Commission could either introduce its bill on settlement negotiations and let come what may as to confidential settlements, or it could study confidential settlements in its usual manner and attempt to develop a sensible proposal.

In deciding between these options, **the staff recommends undertaking a study of confidential settlements only if the Legislature appears to support this**. We urge the Commission to **pay close attention to the advice of its legislative members**, and perhaps to seek specific legislative authorization before getting into the area. We are also attempting to obtain input from the business community and other interested parties on the advisability of such a study.

If the Commission does study confidential settlements, we would separate the study from the study of settlement negotiations, but coordinate the two studies. There is relatively little overlap between the topics, and a study of confidential settlements could easily lead to consideration of other sunshine issues, such as the standards for granting protective orders. As a matter of clarity, it seems best to consider the topics separately, at least for most purposes. The Commission may also want to hire a consultant to provide assistance if it decides to study confidential settlements.

The Commission faces a difficult choice. The use of confidential settlements is an important public issue, and CAOC is seeking the Commission's involvement.

Tackling the issue would be very challenging, perhaps ultimately unsuccessful. Assuming other interested parties are in agreement that such a study is desirable, however, the Commission may be best-positioned to work out a balanced approach, fair to the competing interests, that protects the public where needed.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

JAMES C. STURDEVANT*

LINDA M. FONG
JACK P. HUG
MARK T. JOHNSON
STEVEN S. KAUFHOLD

THE STURDEVANT LAW FIRM
A PROFESSIONAL CORPORATION
475 SANSOME STREET, SUITE 1750
SAN FRANCISCO, CALIFORNIA 94111-3141

TELEPHONE
(415) 477-2410

FACSIMILE
(415) 477-2420

E-MAIL
slf2@hooked.net

August 7, 1998

VIA FACSIMILE (650) 494-1827 & REGULAR MAIL

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: **California Law Revision Commission Proposal on "Admissibility, Discoverability and Confidentiality of Settlement Negotiations"**

Dear Members of the Commission:

The Board of Governors of the Consumer Attorneys of California ("CAOC") has reviewed and considered the California Law Revision Commission Proposal on "Admissibility, Discoverability and Confidentiality of Settlement Negotiations" ("Proposal"). While CAOC is in general agreement with the Proposal, it opposes any conclusion that the settlement agreement itself should remain confidential except in situations in which a good cause requirement is satisfied. There is universal agreement that settlement negotiations, and discussions during mediation, should be held confidential for all time. There is also substantial agreement that blanket "sealing" of confidentiality orders violates established public policy as well as case law and court rules in California.

I. INTRODUCTION

A. Background

Confidentiality orders are frequently sought by corporate defendants in employment discrimination cases as well as those involving product liability, toxic torts, civil rights and environmental damage. Although requests for sealing orders and stipulations for confidential settlement agreements reached in individual or multi-party cases have become routine, this appears to be a fairly recent phenomenon.[1] Many authors have recently noted that unnecessary protective

[1] See McHam, Texas Policy Research Forum, Secrecy in the Public Domain: A Report on Discovery, Protective Orders and Sealed Records (March 9, 1990) (studies show that most of

orders and secret settlements increasingly hinder the workings of the public civil justice system and threaten vital public interests.[2] Recent articles have noted a very disturbing trend toward resolving cases of legitimate public interest in secret. Investigative reports in the Washington Post, The Dallas Morning News, N.Y. Newsday, and Legal Times, among others, have documented that unnecessary secrecy exists at every stage of the process.[3]

Some cases are being filed under seal. Many more involve blanket protective orders which virtually conceal the entirety of the discovery process. In many of these cases, when damaging facts are discovered, cases are settled in secret. Although the public and the press generally have access to trials, since more than 90% of all civil cases settle in this country, private settlements and blanket confidentiality orders in the discovery process preclude much public knowledge. See Schultheis and Bryant, "Unnecessary Secrecy in Civil Litigation: Combating the Threat to Effective Self-Governance," 3 Maryland Journal of Contemporary Legal Issues," 49 (1991). All of these actions which private parties take in public cases filed in the civil justice system can have the effect of substantially impacting the public interest and the public's genuine interest in knowing the terms by which civil

---

the records now under seal in Texas are those pertaining to cases filed in since 1980).

[2] See Doggett and Mucchetti, Public Access to Public Courts: Discouraging Secrecy in the Public Interest, 69 Tex. L. Rev. 643 (1991); Bechamps, Sealed Out of Court Settlements: When Does the Public Have a Right to Know?, 66 Notre Dame L. Rev. 117 (1990); Fitzgerald, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J. Law & Pol. 381 (1990).

[3] See e.g. Walsh and Weiser, "Public Courts, Private Justice," Washington Post (October 23-26, 1998), at A1; Weiser, "Secrecy in Toxic Spill Case Assailed: Review of Xerox Settlement May Spur Legislation for Disclosure," Washington Post (March 22, 1989), at A16 (article notes that Senator Moynahan and New York state health officials were critical of a secret settlement between Xerox and two families over a toxic spill at a manufacturing plant in Webster, New York, in which trichloroethylene had leaked into the ground water); Meier, "Deadly Secrets: System Thwarts Sharing Data on Unsafe Products," N.Y. Newsday (April 24, 1998), at 3 (article describes how corporate defendants take measures to prevent information about a public safety problem from emerging out of product liability litigation); McConigle, "Secret Lawsuits Shelter Wealthy, Influential," Dallas Morning News (November 22, 1987), at A1 (first of two parts); Corboy, "Masked and Muzzled. Litigants Tell No Evil: Is this Blind Justice?" Legal Times (Jan. 8, 1990), at 27; Rushford, "Pfizer's Telltale Heart Valve," Legal Times (Feb. 26, 1990), at 1, and (March 5, 1990), at 6 (two articles dealing with secrecy about the danger of Pfizer's Shiley Heart valve).

cases are settled in this country.

B. Class Action Settlements

The one exception to private settlement agreements is the manner of resolution of class actions. In virtually every case of which CAOC is aware, the terms of the settlements in class actions are made public. Because they affect large numbers of people subject to the conduct or practice, the terms of the class action settlement agreement are widely disseminated through publication which reaches both class and non-class members as well, as well as individual notice to class members. Beyond the need in class actions to provide the terms of the settlement to those absent class members who were unaware of the litigation, there is a commonality between settlements in class actions and in individual actions. For example, class action settlements do not necessarily involve and resolve all disputes between all persons subject to the conduct or practice because the class definition is often limited to exclude many claims. Further, the terms of the class action settlement are public even though it is often the case that several or hundreds of class members "opt out" of the settlement after notice to preserve their own right to sue. If the purpose behind a secret settlement agreement is to prevent other potential plaintiffs from bringing claims, that concern would apply equally in the dissemination of notice of settlement terms in class cases to those absent class members who opt out and then bring their own actions.

For these reasons, there is no real difference between the settlements in class cases and in most individual cases. Most of the claims involve a pattern of conduct to which many individuals and consumers are subject in similar ways. What distinguishes the two dispute resolution vehicles is that in the individual case resolved by a secret settlement agreement, all potential claimants outside the lawsuit who are not affected directly by the resolution, are prevented from knowing about it, and do not receive any compensation for any harm that befell them.

C. California Precedents Involving Secrecy.

In California, there has been both decisional law and local court rules pertaining to confidentiality agreements and to the sealing of records. For example, in Champion v. Superior Court (Boccardo) (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, the Court of Appeal considered at some length the increasing practice in California of sealing documents furnished by the parties during the litigation. The court began its discussion by noting:

> [a] recent acceleration in requests to seal documents of this court and an increasing trend by litigants to assume that when the parties stipulate below or convince the trial court of the need for confidentiality, no showing of need must be made in [the appellate] court.
>
> 201 Cal.App.3d at 785.

The appellate court noted that the petition for a writ of mandate "was filed openly in this court." Id. Thereafter, the petitioner lodged with the Court of Appeal a set of 19 exhibits. A cover letter advised the Court of Appeal that although the petitioner did not view the exhibits as sensitive, the trial court has issued an order sealing the file and that other parties might consider the records sensitive. Id. at 785-86. As the court noted, none of the parties explained why the documents were sensitive, "but real parties said they contained 'information of a highly confidential nature which is the subject of confidential settlement agreements.'" Id. at 786. The real parties' opposition was filed together with a request that it be sealed followed by requests from amici, appendices to the amicus brief, rebuttal briefs, rebuttal declarations, replies and further supplemental declarations. "Finally, both petitioner and real parties apparently in a quandary similar to ours, filed applications for orders sealing all briefs, petitions, applications and all other pleadings filed in this case." Id.

In Estate of Hearst (1977) 67 Cal.App.3d 777, 136 Cal.Rptr. 821, the court "squarely faced the issue of whether a trial court could seal its files from public scrutiny." Champion at 786. In Estate of Hearst, the trustees of the estate of William Randolph Hearst filed a request which was granted to seal the probate file. On review, the court concluded that:

> to prevent secrecy in public affairs public policy makes public records and documents available for public inspection by newsmen and members of the general public alike.... Statutory exceptions exist ... as do judicially created exceptions, generally temporary in nature.... Clearly a court has inherent power to control its own records to protects rights of litigants before it but "where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." . . .
>
> [C]ountervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property,

> where it injured the public or the public good.... 67 Cal.App.3d at 782-783 (citations omitted).

In Hearst, the Trustees had sought to seal the probate file to reduce the danger to family members from discovery of their identities, addresses and property holdings. The Trustees' request was filed a short time following the notorious kidnapping of Patricia Hearst. The trustees feared that other members of the family might be in danger. The Hearst court concluded that if the danger were established, "the court would have the power to protect the beneficiaries' interests by temporarily denying public access to those files." Id, at 784. But the court emphasized that "[c]lose and difficult factual questions may be involved in balancing the right of public access to public records against rights of the Hearst beneficiaries to be secure from possible terrorist attacks," and that the trial court possessed "limited power, exercisable under exceptional circumstances and on a showing of good cause, to restrict public access to portions of court records on a temporary basis." Id. at 785.

Finally, the court in Hearst noted that when "relief sought extends to sealing permanent court records and denial of access to court orders, rather than temporary limitation of access to evidentiary transcripts, the trial court must be careful to limit its denial of access by narrow and well-defined orders." Id.

Taking these factors into account, the court in Champion established the following standard with respect to a request to seal documents:

> Applying these principles in the appellate court setting, we conclude that a party seeking to lodge or file a document under seal bears a heavy burden of showing the appellate court that the interests of the party and confidentiality outweighs the public policy in favor of open court records. The law favors maximum public access to judicial proceeding and court records . . . Judicial records are historically and presumptively open to the public and there is an important right of access which should be closed except for compelling countervailing reasons." Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258, 262-263, 190 Cal.Rptr. 489.
>
> Champion, 201 Cal.App.3d, at 788.

In addition, prior legislative efforts in California have considered the virtual elimination of secret settlements. SB 711 was passed by the California Legislature

in 1992. It prohibited the sealing or secrecy of settlement agreements involving claims of financial fraud, personal injury or wrongful death resulting in damages, and cases of environmental harm or damage. It provided that no part of a settlement agreement could be sealed unless there was an order entered following a hearing on a noticed motion in which good cause were demonstrated. The bill was passed by the Legislature in 1992 but vetoed the same year by Governor Wilson.

Soon after Champion was decided, the San Francisco Superior Court issued a local rule which established a strong presumption against sealing orders and record confidentiality. Most recently, in re-enacting the entire set of local court rules in 1998, the San Francisco Superior Court included Rule 10.5, entitled "Confidentiality and Protective Orders," with respect to this issue. Effective July 1, 1998, it provides essentially as follows:

1. That orders directing parties or others to comply with agreements to maintain the confidentiality of documents relating to a proceeding "are disfavored." (Rule 10.5A.2);

2. The showing requires either that the subject matter of the document is privileged under a provision of the Evidence Code or that the "disclosures would violate a personal, financial or other interest protected by law, and that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information." (Rule 10.5A and B);

3. Protective orders can be issued which are "designed to facilitate the expeditious production of documents during discovery, provided that the order permits counsel to designate as confidential under the terms of such order only those documents as to which counsel entertains a good faith belief that such document is entitled to confidentiality pursuant to [the above standard]." (Rule 10.5B) (emphasis added); and

4. That any sealing order shall carefully circumscribe "the sealing of only those documents, pages or ... those portions of documents or pages, which contain the information requiring confidentiality."

Thus, the spirit and imprimatur of San Francisco Superior Court Local Rule 10.5 strongly disfavors the confidentiality of documents related to a public proceeding, imposes a stringent showing of good cause and is limited to facilitate the production of documents in discovery. The spirit of this rule is in complete

harmony with the proposal set forth below.[4]

II. THE CALIFORNIA LAW REVISION COMMISSION PROPOSAL

The current Commission Proposal must be examined and considered in light of these precedents including Hearst, Champion, and the San Francisco Superior Local Rule regarding confidentiality.

As a general proposition, CAOC supports the proposal to make settlement negotiations fully confidential by making them inadmissible to prove liability in a civil action. CAOC also agrees that this proposal, if enforced fairly and in good faith, will increase the likelihood of settlements in civil actions and, hopefully, settlements that will occur early enough in the litigation process to reduce substantially the soaring costs of litigation. CAOC has the following concerns, however, with respect to several aspects of the proposal.

First, with respect to the exception that evidence of settlement negotiations is admissible to prove the validity of a claim where there is partial satisfaction of an undisputed claim or acknowledgment of a pre-existing debt, I do not agree. Consumers often enter into negotiations with a creditor without counsel and without knowledge or appreciation of their legal rights. Any negotiations or acknowledgment about the "validity" of such a debt should not be admissible in any subsequent civil action in which the consumer debtor raises legal challenges with respect to the validity or legality of the debt. For example, there are numerous provisions of the federal Fair Debt Collection Practices Act and its California counterpart, the Robbins-Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788, et seq., which provide protection for consumers involved in such arrangements or contracts. It would disserve those statutory schemes, and the protections for consumers embodied in them, to allow the creditor to make admissible settlement negotiations or the debtor's acknowledgment of the validity or existence of the debt solely for purposes of attempting to resolve it without litigation. Thus, with respect to that exception, we believe it should be deleted.

---

[4]Other county Superior Courts in California have enacted similar rules. For example, by local rule, the Superior Court of San Diego County, California adopted a policy on confidentiality agreements and protective orders effective July 1, 1990. San Diego Sup. Ct. R. 6.9 (1994). The rule states that such practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

Second, CAOC believes that the Proposal presents an excellent opportunity to debate and resolve the issue of the confidentiality or non-admissibility of settlement agreements in civil cases. In fact, the example contained in the proposal at page 11 provides an excellent example of why a settlement agreement, but not negotiations leading up to it, should be admissible, not as evidence of liability but as evidence of the terms by which a dispute has been resolved. The example contained in the Proposal illustrates the point. It supposes that a manufacturing plant emits a hazardous chemical in a nearby residence which sues for resulting injuries. If there is a resulting settlement agreement, negotiations leading up to it are confidential and protected from discovery and admissibility. However, because of the risk to other consumers or potential victims of the emission, the settlement agreement itself should be discoverable and admissible. It should not be admissible to prove liability, but only to prove terms and conditions of the resolution of that dispute.

There are a host of other examples which make the discoverability and admissibility of settlement agreements important. These include, by way of example, issues involving the sale of defective products, tobacco litigation, and consumer fraud. The settlement agreements reached in those cases should not be shielded from public view. CAOC strongly urges the Commission to address this issue head-on now and to modify the Proposal to include a provision for discoverability and public record of settlement agreements.

III. PROPOSED AMENDMENT TO THE PROPOSAL

Based upon the above historical references concerning confidentiality, and the applicable standards applying to the sealing of records and confidentiality in California, there should be a strong presumption in favor of the public filing of settlement agreements which contain the terms and settlement of resolving a dispute in a civil filed in the State of California. A written settlement agreement, or a settlement agreement recited into the record, should be accessible to the public unless good cause is established by one or both parties demonstrating why, based upon the facts and circumstances of the particular case, the settlement agreement itself should not be public. The following is CAOC's recommendation for the good cause requirement.

Many statutes and rules in California set forth a good cause requirement. For example, ex parte applications, motions for leave to amend complaints, and motions for relief from default (Code of Civil Procedure § 473) all impose a good cause requirement on the moving party. Typically, what "good cause" means in

the context of these motions is delineated in the case law concerning and resolving particular cases.[5] With respect to the confidentiality of court records and documents produced in discovery, San Francisco Superior Court Rule 10.5 already provides a standard -- i.e., that "disclosures would violate a personal, financial or other interest protected by law, and that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information." (Emphasis added). Rule 10.5A1 and 2.

This is an appropriate standard for trial judges to weigh the showings provided by one or both parties who seek to maintain the confidentiality. In order that the exemption from public disclosure of settlement agreements does not swallow up the general rule against the confidentiality of such agreements, the standard must be sufficiently strong to empower trial judges throughout California to enforce it. However, the unique or highly unusual facts of a particular case, with or without the idiosyncratic nature of one or both parties, would provide authority for a trial judge to seal a written settlement agreement in a particular case. Under the proposed standard, trial judges would not seal settlement agreements in cases in which there was evidence of a pattern of conduct or a practice by the defendant; or that other potential claimants, not subject to the dispute resolution, were treated in similar ways under the same process by the defendant, i.e. an employment discrimination policy or a plan to accomplish a reduction in force which was allegedly discriminatory and which gave rise to the individual lawsuit.

Finally, in cases involving multiple defendants in which settlements are reached by the plaintiff with less than all defendants, those settlement agreements could remain confidential until the case was actually resolved, either by settlement or by trial. Such a temporary confidentiality provision would protect the interests of the parties to the settlement and provide no incentive either to the settling parties or to the non-settling parties until the case was finally resolved in the trial court.

IV. CONCLUSION

It is important to remember that we continue to be participants in a public civil justice system. Despite encroachment on that system from many angles and by many players, and despite increasing efforts to encourage, indeed to mandate

---

[5] Motions to continue a trial date impose a list of factors or circumstances which do not constitute good cause. See Cal. Rule of Court 375 and section 9 of the Standards of Judicial Administration.

private dispute resolution in virtually all civil cases, the public record of dispute resolutions that emanate from the public civil justice system are matters of important public interest. Once a settlement agreement has been reached and documented, absent a showing of good cause as set forth above, those settlement agreements should become part of the public record, as much as the pleadings and orders are that exist in those cases. Allowing those cases to be resolved on a public record showing only a dismissal of the complaint with prejudice disserves the public interest and often enables the party engaged in the practice which led to the lawsuit to continue that practice against hundreds or thousands of other individuals.

Sincerely yours,

THE CONSUMER ATTORNEYS OF CALIFORNIA

BY: James C. Sturdevant

JCS/jpc

D:\168\1998C\L-CLRC2.168