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EXPANDING THE PUBLIC'S RIGHT TO KNOW

Access to Settlement Records under the First Amendment

by John J. Watkins

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The Joan Shorenstein Barone Center

PRESS • POLITICS

• PUBLIC POLICY •

Harvard University
John F. Kennedy School of Government

INTRODUCTION

The American lawyer looking for the first time at reported cases from the Federal Republic of Germany is immediately struck by the absence of names. Whereas in the United States, the United Kingdom, and most other common law countries cases have names like *Raffles v. Wichelhaus*, with both Raffles and Wichelhaus being the real people involved in the dispute, in Germany the names are missing. The German Raffleses and Wichelhauses were still the real parties in the litigation, but by the time the decision is reported in the law books the names are deleted, being replaced by numbers and general descriptions.

This phenomenon has an easy explanation, but like most easy explanations it might be too easy. Ask a German lawyer why reported decisions contain no names, and she will say that civil litigants have privacy rights, and that it would be an unconscionable invasion of privacy to enshrine in lawbooks for all time the names and deeds of private persons merely because they have been parties to a dispute that found itself in court.

All of this could also be said about the American system as well, however, yet the argument for anonymizing the parties (except under well-defined exception—e.g., *Roe v. Wade*) has never been taken seriously here. Part of this of course has to do with history, tradition, and precedent. That something has never been done before is quite often (and maybe too often) in law a pretty good argument for not doing it now. But it may also be the case that the willingness to identify the parties depends on different views about the nature of civil litigation. Under one view of civil litigation, the state provides a service for those citizens who have disputes with each other. Just as the state provides fertilizer information to farmers, public transportation to commuters, and police and fire protection to all, so too does it under this model provide a peaceful dispute resolution service for citizens as an alternative to dueling and other forms of self-help. And under this model we can understand why a concern about citizen privacy would predominate, for the citizen by resorting to civil litigation is only availing herself of a service the state provides like all others.

Under a different model, however, civil litigation is the vehicle for making and changing public policy. In many respects this is not new, and is characteristic of common law systems. Much of contemporary public policy about products liability, workplace safety, enforceable and unenforceable contracts, wills and trusts, and the relationship between employer and employee, to take just a few examples, emanated out of judge-made law prompted by private litigation. And now, of course, with so much public policy about race, gender, administrative process, and public communication emerging from privately-inspired constitutional litigation, the view that civil litigation is but a service provided by the state seems odd. Civil litigation, often as much as if not more than legislation and administrative regulation, is how policy is made in this country.

If this is the model of civil litigation, then thinking of it as a private event is discordant, explaining why we think the litigants, like other participants in public events, have lost some of their claim to anonymity. But more pervasively, it is not only the names of the litigants, but also a wide variety of aspects of civil litigation, including the pleadings and settlement negotiations, that now take on the character of events contributing to the formation of public policy.

If this is so, then there is little to distinguish the interests in access to legislative records and deliberations from those in access to pleadings and settlement records in civil litigation. It is this public interest in what looks at first to be private but is in many ways public that inspires the perspective of Professor John Watkins of the University of Arkansas School of Law. Recognizing the enormous policymaking importance of settlements in private litigation (and much of environmental, school desegregation, and employment discrimination litigation provides the archetypes), Watkins explores issues that concern not only questions of press and public access, but also issues of the role of civil litigation in the formation of public policy. And by focusing on the settlement aspects of the proceeding, he is able to train his sights on that part of the process whose importance is likely most shielded from public scrutiny.

Professor Watkins is a nationally-known specialist in the law of the mass media who spent the Spring of 1990 as a Fellow of the Joan Shorenstein Barone Center on the Press, Politics & Public Policy. The Center is proud to publish here the fruits of that fellowship period.

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EXPANDING THE PUBLIC'S RIGHT TO KNOW:
Access to Settlement Records under the First Amendment

By arguing in lawsuits for a First Amendment right to observe trials and inspect judicial records, the press has pushed the courts to fashion a body of law governing access to what Alexander Hamilton called the "least dangerous" branch of government. To date, however, the Supreme Court has recognized only a constitutional right to attend criminal trials and pretrial criminal proceedings. This paper explores a question that is increasingly confronting the lower courts: whether the First Amendment right of access extends to settlement agreements and related documents in civil cases.

These records are not inconsequential. Modern civil litigation involves myriad issues of public importance: corporate and government misconduct, sex and race discrimination, school desegregation, dangerous products, environmental harm, prison reform, voting rights. Although information of interest to the public might surface if a particular case goes to trial, the vast majority of lawsuits today—approximately 90 percent, according to some estimates—are settled and thus resolved without a trial on the merits. In connection with such settlements, judges frequently enter orders sealing court records reflecting the terms of the settlement agreement and other documents pertaining to the lawsuit.

Some of these records might be available through legal avenues other than the First Amendment: the common law right of access, statutes or court rules providing that judicial records are to be available for public inspection, or more general "freedom of information" acts. Potential problems exist with respect to each of these routes, however. Although the general principle of openness is well established at common law, numerous exceptions have emerged that permit judges to deny access to judicial records. Moreover, courts have often interpreted statutes dealing specifically with these records as merely having codified the common law and the various exceptions. Only a handful of courts have adopted rules governing access to documents in their possession, and some freedom of information statutes—including the federal act—do not apply to the judiciary.[1]

It is not surprising, therefore, that news organizations have asserted a First Amendment right of access to judicial records in general and settlement documents in particular. The legal battles are being fought in the lower courts, most of which have recognized a constitutional right to inspect some types of judicial records. Whether this right extends to all such records, including settlement documents, remains unclear.

I. The Nature of the Problem

Even routine civil cases today typically generate a large number of documents, including the pleadings of the litigants, motions requesting certain court action in the course of the lawsuit, orders made by the trial judge in response to those motions, and so-called "discovery" materials that emerge as the litigants prepare for trial. Most of these records are ordinarily filed with the court clerk; however, discovery materials—such as deposition transcripts, responses to interrogatories, and copies of the litigants' own records—are often simply exchanged by the parties in preparation for trial and are not placed in the court file. Deposition transcripts and other discovery records can total thousands of pages.

A relatively recent development in civil litigation, discovery is grounded in the notion that the litigants should be able to obtain the fullest possible knowledge of the issues and facts before trial. For the most part, discovery takes place without judicial oversight, and litigants have wide latitude to acquire information for trial preparation purposes. Because almost anything relevant to the subject matter of the lawsuit is discoverable, irrespective of whether it is likely to be admissible at trial under the rules of evidence, litigants can pry sensitive information not only from their opponents but also from persons not parties to the suit.

In light of the obvious potential for abuse, judges are authorized to enter protective orders that preclude discovery altogether, restrict its scope, or prevent the litigants from disseminating information that they acquire through the process to anyone not connected with the lawsuit. In the federal courts, for example, a protective order may be issued for "good cause" to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[2] Among other things, a judge may prohibit discovery al-

together, limit its scope to particular matters, or order that records and the transcripts of depositions be sealed.

In many cases, the parties hotly contest the entry of protective orders; for example, a plaintiff may oppose a defense motion that certain records—such as those containing trade secrets or other confidential business information—not be handed over at all. In such cases, the judge must decide whether there is good cause to issue a protective order. Frequently, however, the parties simply consent to the entry of "umbrella" protective orders to facilitate discovery and avoid the expense and delay involved in bringing disputed matters before the judge for resolution.

Often used in complex cases, umbrella orders typically provide that any party who receives documents designated as confidential by his opponent may disclose that information only to counsel and other specified individuals, such as experts, involved in trial preparation. A party who disagrees with a confidentiality designation by his opponent may raise that issue before the court within a specified time. In addition, the orders usually require that any confidential documents subsequently filed with the court for any reason be placed "under seal."[3] As is the case with court orders in general, a litigant who violates the terms of such a protective order can be held in contempt.

Defense lawyers frequently push for these agreements to limit the disclosure of commercially sensitive or potentially embarrassing information, while plaintiffs' attorneys often go along to ensure that they will receive material necessary for trial preparation without costly and protracted battles over discovery. Trial judges routinely enter the requested orders, in large part to expedite the case and to avoid devoting judicial resources to discovery disputes that often have little to do with the merits of the lawsuit. In effect, the court delegates to the litigants significant discretion to decide what documents will be kept secret.

Of course, some of this information might eventually become public at trial. As discussed more fully below, most courts have held that the First Amendment requires civil trials to be open to the public absent the most compelling reasons. However, the vast majority of civil cases are settled by the litigants prior to trial. The settlement agreements often contain confidentiality provisions similar to those found in umbrella protective orders and prohibit the litigants from disclosing documents relating to the settlement or otherwise revealing its terms.

Standing alone, a settlement agreement is nothing more than a contract between the litigants that terminates a lawsuit. No court action is usually required; in the federal system, for example, the parties may terminate a lawsuit simply by filing a "stipulation of dismissal"[4] that reveals nothing about the underlying settlement. In some cases, however, litigants voluntarily seek court approval of the settlement so that they may more easily enforce it in the event of a dispute. In some cases, court approval of a settlement agreement is not merely voluntary, but required. Under the Federal Rules of Civil Procedure, for example, class actions and shareholder derivative suits may not be settled without approval of the trial judge.[5] Most states have similar rules, and some also require court approval of settlements in wrongful death cases and in lawsuits involving minor plaintiffs.

Whether judicial approval is voluntary or mandatory, the result is usually an order dismissing the suit or a consent decree entering judgment for one of the litigants. Either way, the operative documents typically set out the terms of the settlement, direct the parties to adhere to it, and state that the court will retain jurisdiction over any dispute that might subsequently arise. But many orders and decrees also include confidentiality provisions that prohibit the litigants from revealing the settlement's terms, seal court records related to the settlement (and sometimes other court records as well, such as pleadings, motions, and discovery materials on file), and continue in effect the requirements of umbrella protective orders covering discovery information.

Absent intervention by the press or other interested persons, no one is likely to argue against such confidentiality. As is the case with protective orders, the participants in a lawsuit—the plaintiff, the defendant, their lawyers, and the judge—have some incentive to accept confidentiality provisions in settlement agreements. In suits involving allegedly dangerous products, for example, plaintiffs and their lawyers may be able to secure larger settlements from defendants who would rather pay than face a trial and the attendant adverse publicity. Moreover, trial judges faced with crowded dockets often view settlement as an efficient way to deal with a growing backlog of cases. Courts frequently state that settlements are desirable as a matter of public policy, since they conserve increasingly scarce judicial resources and spare the litigants the expense of a trial.[6]

As the foregoing suggests, the parties to a lawsuit can use a combination of protective orders

and settlement agreements to keep potentially important information from becoming public. According to a 1988 *Washington Post* article,[7] General Motors successfully employed this tactic in a series of cases brought by persons who were injured when the fuel tanks of their cars ruptured on impact. As reporters Elsa Walsh and Benjamin Weiser wrote:

> In case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settlements, has obtained agreements that bar opposing lawyers from discussing what they learned about GM. And in two cases, it has asked judges to punish lawyers who allegedly violated confidentiality orders.

Consequently, General Motors was able to keep "controversial documents about auto safety from becoming public" and "avoid a public debate about whether the company placed financial considerations ahead of safety concerns in designing the fuel tanks used in most GM cars until the early 1980s." This strategy is not at all unusual; for example, Johnson & Johnson employed it in lawsuits that followed its decision to withdraw Zomax, a prescription painkiller, from the market after reports of hundreds of adverse reactions to the drug. As Walsh and Weiser observed, "[e]very day someone gets into a car, takes a drug, sees a doctor, or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order."

The problem is not limited to court orders that preclude public access to discovery information and the terms of the settlement, for some judges have sealed entire case files in the process of implementing settlement agreements. For example, Walsh and Weiser reported that a trial judge in the District of Columbia entered such an order in a case alleging sexual misconduct by a psychiatrist with one of his patients. The judge told the journalists that he had sealed all of the court records at the request of the psychiatrist, who feared that he might lose his license if the suit became public. A 1987 study of court records in Dallas County, Texas, suggests that orders of this type might be rather commonplace. According to the *Dallas Morning News*, confidentiality orders were entered in 282 cases between 1920 and 1987, two-thirds of them since 1980. In 139 cases—nearly half the total—the orders sealed all of the documents that had been filed with the court.[8]

As the case involving the psychiatrist illustrates, confidentiality orders may prevent licensing authorities from learning of alleged misconduct. These orders can also interfere with the work of other government agencies. In 1988, for example, a trial judge in New York sealed court records at the request of the parties after a settlement was reached in a case alleging that toxic chemicals had contaminated ground water and caused cancer in children who lived in the area. As a result of the confidentiality order, state and county officials were denied access to court documents with potential public health implications. The trial judge subsequently amended the order to allow health authorities access to "anything under seal that may be helpful and beneficial for the protection of the public health."[9]

Orders sealing court records cause other difficulties as well. One consequence of these orders can be to discourage similar lawsuits, since potential plaintiffs must "reinvent the wheel," often at considerable costs, in preparing their own cases. Indeed, defense lawyers routinely seek confidentiality orders to help discourage additional lawsuits. On the other side of the coin, plaintiffs' lawyers may use the threat of adverse publicity to coerce large settlements from defendants in return for confidentiality. Moreover, confidentiality orders may be entered for reasons that have little to do with sound judicial administration. As a Texas court official told the *Dallas Morning News*, some records are sealed on the basis of "political considerations" or "favoritism with certain law firms."[10]

II. Emergence of the Constitutional Right of Access

Any First Amendment right of access to court records must be viewed in the context of the common law. American courts have long held that the public has a common law right to inspect and copy judicial records in both civil and criminal cases, though the right is far from absolute and may be overcome by competing policy considerations.

In *Nixon v. Warner Communications, Inc.*,[11] a case involving the White House tapes played to the jury in the Watergate trial, the Supreme Court listed personal privacy, reputation, and confidential business information as countervailing interests that may justify withholding judicial records from public view. The lower courts have identified other such interests, including the right to a fair trial, national security, the need to obtain the cooperation of witnesses, and the

inequity of exposing parties or witnesses who acted in reliance on continuing confidentiality.[12]

The *Nixon* decision plainly contemplates a balancing process by which a court will weigh the right of access against competing interests that might be present. However, the lower courts have disagreed as to how the balance is to be struck. Some courts have held that there is a "strong presumption" in favor of access that can be overcome only by the most compelling of circumstances,[13] while others have treated the need for access as simply one factor to be considered.[14] In any event, the trial judge's ruling is afforded considerable deference on appeal and is unlikely to be overturned.[15]

It is also unclear whether the common law right of access attaches to all judicial records under all circumstances. Though some courts have indicated that it does,[16] others have taken a more narrow view. For example, in *In re Reporters Committee for Freedom of the Press*,[17] the U.S. Court of Appeals for the District of Columbia Circuit surveyed the common law decisions and concluded that there is no right of access to judicial records in civil cases prior to the entry of judgment.

The broadcasters who sought to copy the tapes in the *Nixon* case also asserted a right of access under the press clause of the First Amendment, but the Supreme Court flatly rejected this argument. Pointing out that the public never had physical access to the tapes, the Court held that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." This ruling, which followed from earlier cases in which the Court had refused to recognize a "special" right of press access to correctional facilities,[18] did not address the broader question of whether, and under what circumstances, the public has a constitutional right of access.

In 1980, however, the Court for the first time recognized a First Amendment right of access, holding in *Richmond Newspapers, Inc. v. Virginia*[19] that the public and the press may not, as a general rule, be barred from criminal trials. The Court made plain, however, that overriding interests—such as the need to protect the defendant's right to a fair trial—may in some cases compel closing the courtroom.

Although the vote in *Richmond Newspapers* was 7-1, there was no "opinion of the Court" in which at least five Justices joined. However, the two principal opinions, written by Chief Justice Warren Burger and Justice William Brennan, adopted much the same rationale.[20] First, both noted that criminal trials in this country and in England have long been open to the public. Second, both recognized that the right to attend criminal trials stems from the First Amendment's protection of political speech. As Justice Brennan explained, the First Amendment plays a "structural role . . . in securing and fostering our republican system of self-government" and thus protects "that process of communication necessary for a democracy to survive." Implicit in this notion is "the assumption that valuable public debate—as well as other civic behavior—must be informed."

Acknowledging the "theoretically endless" scope of the right of access, Justice Brennan counselled "sensitivity to practical necessities" and identified "two helpful principles" to limit the right's scope. The first of these looks to history. Support for a right of access, he said, has "special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information." Since criminal trials have long been open to the public, Justice Brennan concluded that the case for a right of access in this setting is quite strong.

The second principle focuses on "whether access to a particular government process is important in terms of that very process." Applying this principle to criminal trials, Justice Brennan reasoned that public access is important because it restrains judicial abuses of political power, aids in accurate fact-finding, helps ensure fairness, and maintains public confidence in the administration of justice. Similarly, Chief Justice Burger noted that holding criminal trials in public guards against decisions based on "secret bias or partiality," has a cathartic effect on the community by satisfying the natural desire to see justice done, and educates the public about how the courts operate.

The Court subsequently expanded the First Amendment right of access to include jury selection and pretrial hearings in criminal cases.[21] In the process, the Court adopted Justice Brennan's two-part test for determining the applicability of the First Amendment right of access in a given situation. As refined, that test requires consideration of "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question."[22]

If the answer to both questions is "yes," the public and press have a qualified First Amendment right of access that can be denied or restricted only to the extent necessary to protect a compelling governmental interest, such as the

right of a defendant to a fair trial, the welfare of a minor who has been the victim of a sexual offense, or the privacy of prospective jurors.[23] Although the right of access, like all others emanating from the First Amendment, is not absolute, this "compelling governmental interest" test is not easily satisfied. Indeed, the unmistakable message from the Supreme Court is that closed courtrooms in criminal cases are to be extremely rare.

Because the First Amendment standard is more rigorous than its counterpart under the common law,[24] the question of whether the constitutional right applies can be critical. Moreover, a trial court's decision to deny access in a First Amendment case is more strictly scrutinized on appeal than a similar ruling based on the common law. While the latter situation is governed by the rather lenient "abuse of discretion" standard of appellate review, decisions involving First Amendment rights are not accorded such deference on appeal.[25]

Certain procedural safeguards also apply when the First Amendment right of access is implicated. The trial court must give the public adequate notice that closure of a proceeding has been sought and must provide interested persons an opportunity to be heard prior to making a decision. If the court decides that closure is necessary, it must specifically state its reasons "on the record" and explain why alternatives to closure would not suffice to protect the countervailing interest.[26] Some courts have imposed similar requirements as a matter of common law or promulgated rules incorporating them,[27] but the practice has not been uniform.

III. Access in Civil Cases

Although Supreme Court rulings to date have involved only criminal proceedings, the lower courts have generally held that the public and press have a First Amendment right of access to civil trials and to judicial records in such cases. Perhaps the leading case on civil trials is *Publicker Industries v. Cohen*,[28] decided in 1984 by the U.S. Court of Appeals for the Third Circuit. After a lengthy examination of English and American legal history, the court concluded that civil trials, like criminal proceedings, have long been open to the public. Moreover, the court observed that "[p]ublic access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of government affairs." Such openness, the court said, increases the quality of judicial administration, enhances and protects the quality of the fact-finding process, helps ensure fairness, and fosters public trust in the judicial system.

This extension of the First Amendment right of access makes eminent sense. As Chief Justice Burger observed in *Richmond Newspapers*, "historically both civil and criminal trials have been presumptively open." And, as the lower federal courts have noted, openness in civil cases provides the same sort of "significant positive role" in the functioning of the judicial system as it does in criminal cases.[29] Civil litigation frequently involves issues of crucial importance to the public, and in many cases the government is a participant, either as plaintiff or defendant. Moreover, the impact of such suits, many of which are brought by public interest groups for the express purpose of spurring societal change, often extends beyond the litigants. "While individual cases turn upon the controversies between parties. . .," Justice Brennan pointed out in *Richmond Newspapers*, "court rulings impose official and practical consequences upon members of society at large."

The same justifications support recognition of a First Amendment right of access to judicial records, which are often important to a full understanding of the issues involved and the manner in which the judicial system is functioning. Many courts have held that there is a constitutional right of access to judicial records in civil cases. For example, in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*,[30] the U.S. Court of Appeals for the Sixth Circuit reversed a trial judge's order sealing various documents that the Federal Trade Commission had filed in a lawsuit brought by a tobacco company. Some records reflected the "tar" and nicotine content of several brands of cigarettes as determined by FTC tests, while others contained information that the tobacco companies had submitted to the agency. Concluding that there is a First Amendment right of access to judicial records, the court of appeals noted that these documents "often provide important, sometimes the only, bases or explanations for a court's decision."

There is not universal agreement on the scope of the First Amendment right of access to records, however. Some courts, for example, have held only that the right attaches to documents that form the basis for judicial action.[31] The District of Columbia Circuit has taken an even more restrictive view of the constitutional right of access, holding in the *Reporters Committee* case that the trial judge acted properly in denying, until after trial, access to records filed by the parties in connection with unsuccessful motions for

summary judgment in a libel suit brought by the president of Mobil Oil Corporation against the *Washington Post*. Even though the documents had been considered by the trial judge in ruling on the motions, the court of appeals rejected the notion that the press and public were entitled to contemporaneous access to the documents and held that there is no First Amendment right of access prior to the entry of judgment in the case.

It is settled, however, that access to discovery materials can generally be denied, upon a showing of "good cause," without offending the First Amendment. In *Seattle Times Co. v. Rhinehart*,[32] the Supreme Court held, without dissent, that a litigant has no First Amendment right to reveal information acquired during discovery or to use it for purposes other than trial preparation. Because a litigant is able to obtain this information only by virtue of the procedural rules that govern litigation, the Court said, "continued court control over the discovered information does not raise the same spectre of government censorship that such control might suggest in other situations."

As a result of *Seattle Times*, journalists and other persons not involved in a particular lawsuit may have a difficult time overturning on First Amendment grounds an umbrella protective order that bars the litigants from disclosing discovery information. If the parties to a lawsuit have no First Amendment right to disseminate discovery materials to the public, it follows that the press and public have no independent First Amendment right of access to that information. The lower courts have so held, ruling that the only inquiry is whether the requisite "good cause" exists for a protective order that prohibits the litigants from disseminating information acquired during discovery.[33]

While the term "good cause" is difficult to define, the standard is not as rigorous as that employed under either the common law or the First Amendment. According to one court, the term signifies "a sound basis or legitimate need to take judicial action" and requires "a balancing of interests."[34] A trial judge has broad discretion in applying this standard.[35] Indeed, the fact that thousands of documents are involved in a complex case may be good cause for an umbrella protective order, since document-by-document review would be a strain on judicial resources. In that situation, records that the parties themselves deemed confidential pursuant to the protective order may be protected from disclosure without a court ruling that the requisite "good cause" exists with respect to each document.[36]

As mentioned previously, protective orders often provide that any discovery documents subject thereto must be filed "under seal" with the court in the event that such filing is subsequently ordered by the trial judge or is required by a court rule. The fact that the documents have been so filed, however, does not alter their status as discovery materials. "[P]retrial depositions and interrogatories are not public components of a civil trial," the Supreme Court observed in *Seattle Times*, adding that these materials "were not open to the public at common law" and have not been considered "a traditionally public source of information."[37] Consequently, the press and public have no right of access under the First Amendment or the common law, and the records may be sealed upon a showing of good cause.[38]

Somewhat different considerations come into play, however, if the discovery materials are filed with the court in connection with a motion seeking judicial action of some type. Under these circumstances, some courts have held that there is a First Amendment right of access to the documents, which are no longer the "raw fruits" of the discovery process but rather part of the record on which a judicial decision is based. There is some disagreement, however, as to whether this principle applies to all motions, or only to those that are dispositive of some aspect of the case, such as motions for summary judgment.[39]

The better approach is that recognition of a First Amendment right of access should not turn on whether a particular motion disposes of a case or goes to its merits. A major policy consideration underlying access is the need for public scrutiny of the administration of justice, and that value is served whether the motion in question is potentially dispositive of the case or represents only a small step in the course of the litigation. In either situation, one party is asking the court for a ruling, and access to the documents presented to the court permits the public to evaluate that decision.[40]

IV. Settlement Agreements

As noted previously, settlement agreements become judicial records only when they are filed with the court. In many cases, the parties simply stipulate dismissal of the lawsuit, thus bringing it to a close, and never file a settlement agreement. The result is a private contract between the parties, not a judicial record that is presumptively open to the public. But there are at least three situations when such agreements are filed: (1) the agreement must be approved by the court,

pursuant to a statute or court rule; (2) some judicial involvement in the settlement process is required by law, though the court need not approve the terms negotiated by the litigants; and (3) the litigants voluntarily seek an order of dismissal or consent decree incorporating the settlement agreement because they desire easy recourse to the court in the event of a dispute.

In all three situations, the courts have recognized a common law right of access to the settlement records.[41] In most cases, the balancing process has resulted in disclosure of the documents, and the courts have thus managed to sidestep the First Amendment question. In *Minneapolis Star & Tribune Co. v. Schumacher*,[42] however, the Minnesota Supreme Court applied the common law in a crabbed fashion to keep settlement records under seal and then expressly rejected a constitutional right of access.[43] Accordingly, *Schumacher* will serve as the framework for this discussion.

That decision grew out of settlements in five wrongful death suits based on an airline crash. The records in each suit were sealed at the request of the litigants, who were required by statute to submit the settlement agreements to the court. Shortly after the trial judge entered orders sealing the documents, a newspaper filed a motion to intervene for the purposes of challenging the orders. The judge granted the motion but refused to open the records, concluding that any right of access was outweighed by the privacy interests of the litigants, the effect that disclosure would have on future settlements, and the fact that settlement of the suits would benefit the court and county by reducing the costs of litigation. The Minnesota Supreme Court affirmed.

The *Schumacher* case falls into the first and second categories set out above. Because one of the wrongful death suits involved a minor, a statute required the trial judge to approve the settlement figure negotiated by the litigants. In the other four suits, however, the judge's statutory role was to approve the distribution of settlement funds among the various heirs, not to pass on the amounts agreed upon by the parties. Although the Minnesota Supreme Court pointed out that the judge's involvement was much more limited in these four suits than in the first, it did not consider this distinction significant; rather, the court simply held that there is a common law right of access to settlement documents "made part of a civil court file by statute."

Nonetheless, the court agreed with the trial judge that competing interests justified sealing the records, emphasizing that the litigants had been the focus of considerable media attention and that further intrusion into their privacy was likely to occur if the settlements were made public. The court also cited the "historic privacy of settlement agreements" and the public policy "favor[ing] the settlement of disputed claims without litigation" as factors that helped overcome the common law presumption in favor of access.

As should be obvious from the preceding paragraph, the Minnesota Supreme Court does not consider the common law standard to be particularly rigorous. Of greater concern, however, is the court's reliance on the fact that settlement agreements have traditionally been private matters and the notion that settlements should be encouraged as a matter of public policy. If these factors are employed in the balancing process, the scales would be tipped in favor of nondisclosure in virtually every case.

Moreover, the court dismissed as irrelevant the statutes mandating judicial approval of the settlements. According to the court, the provision requiring approval of settlement terms in cases involving minors was designed "to protect minors, not to expose these settlements to the public." Similarly, the purpose of the statute providing for court involvement in the distribution of settlement funds among heirs in wrongful death cases is "to facilitate the effective and proper distribution" of those funds, not "to bring wrongful death settlements within the public eye." Armed with this interpretation of the statutes, the court was able to neutralize—or perhaps even eliminate—the common law presumption in favor of access and thus balance away the public's right to inspect the records.

Other courts have been considerably more generous in their application of the common law. For example, in *Shenandoah Publishing House, Inc. v. Fanning*[44] the Virginia Supreme Court tersely rejected the argument that access to the settlement records in this medical malpractice case would "have a chilling effect on future litigants and will counteract the public interest in encouraging settlements." And, in marked contrast to the Minnesota Supreme Court in *Schumacher*, the Virginia court viewed a state statute that required judicial approval of the settlement as supporting recognition of a right of access to the documents:

> Here, the judicial records in issue were accumulated in a wrongful death action. In Virginia, settlements of wrongful death claims must be ap-

> proved by the courts. The public has a societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them.[45]

This is not to say, however, that the need for access diminishes when litigants voluntarily seek court approval of a settlement rather than submit their agreement to the trial judge because they are compelled by law to do so. As the U.S. Court of Appeals for the Third Circuit pointed out in *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*,[46] "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." Having undertaken to utilize the judicial process in this fashion, the court explained, the litigants "are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements." The court also acknowledged the "strong public interest" in encouraging settlement but concluded that it "does not rise to the level. . . that may outweigh the public's common law right of access."

Because the courts in *Shenandoah Publishing* and *Bank of America* granted access to the settlement documents under the common law, they did not reach the constitutional question. The Minnesota Supreme Court, however, held in *Schumacher* that there is no First Amendment right of access to such records, at least when the settlement agreement is filed pursuant to a statute. At the heart of the court's analysis, based on *Richmond Newspapers* and its progeny, was the fact that settlement agreements have historically been private, entered into "outside of the courtroom and without the participation of the court." Although the settlement agreements in question were "required by statute to be brought before the court," that did not "destroy the historical fact that settlements have been private agreements not subject to public scrutiny."

The court did not in so many words apply the second prong of the Supreme Court's First Amendment test, but its conclusion that access would be inconsistent with the public policy of encouraging settlement seems to be another way of saying that public scrutiny would not play a "significant positive role" in the functioning of the judicial system. "One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public," the Minnesota court noted. "[Public access] would tend to discourage settlements rather than encourage them."

These arguments are not persuasive. Surely the fact that settlement agreements have traditionally been reached in private without judicial involvement does not lead to the conclusion that settlement agreements filed with the court have typically been shielded from public scrutiny. The proper inquiry would be whether settlements of the latter type have historically been open to the public. Because the practice of requiring the filing of settlement agreements for court approval is relatively recent, however, there is not a long-standing tradition of openness. This example underscores a major difficulty with the "history" prong of the Supreme Court's two-part test: if the proceeding or record in question does not have much of a track record, one has a difficult time concluding that it has traditionally been open to the public.[47]

Nonetheless, a court is quite plainly exercising its judicial authority when it approves a settlement agreement,[48] and court records reflecting action by a judge have long been open to the public at common law. Indeed, as noted above, even discovery materials attached to motions for summary judgment are generally considered subject to the First Amendment right of access. Although settlement agreements may not have historically been filed with the court for approval, these documents are plainly analogous to other court records that have traditionally been available for public inspection. When a particular record or proceeding is of rather recent vintage, the courts should look to its functional equivalent in applying the "history" test. The *Schumacher* court failed to do so, deciding instead to base its historical analysis on purely private settlement agreements that never even became court records.

In addition, the court's reliance on the public policy of encouraging settlements is misplaced. To be sure, it is difficult to argue that settlements should be actively discouraged; after all, the nation is in the midst of a litigation explosion that has swamped the courts.[49] However, the very fact that judges—elected and appointed officials paid with tax dollars—are involved in the settlement process calls for some form of public oversight. Court approval of a settlement agreement is a judicial act, and the underlying documents provide some basis for evaluating it. As the Third Circuit quite correctly observed in *Bank of America*, access to settlement records increases public confidence in the courts and "serves as a check on the integrity of the judicial process." The need for public scrutiny is made more compelling by the increasingly active role that judges are playing in pushing litigants toward settlement.[50]

Moreover, disclosure of court-approved settlement agreements and related documents contributes to the public's understanding of the judicial system, a factor that the Supreme Court stressed in the line of cases commencing with *Richmond Newspapers*. At a time when settlements are a way of life in civil litigation, such an understanding is more important than ever. If the public and press enjoy a First Amendment right to attend a trial, it follows that they have a correlative right of access to documents that reflects disposition of a case without trial. As pointed out previously, the courts have employed such reasoning in recognizing a First Amendment right of access to summary judgment records, and it applies with equal force to court-approved settlements and the underlying documents.[51]

Given the important issues that frequently emerge in civil litigation, one cannot overlook the societal interest in making available information from court files about dangerous products, toxic chemical spills, government wrongdoing, and other matters of public concern. Although the Supreme Court has not relied on this consideration in its access decisions, some lower courts have taken into account the public's interest in obtaining information from judicial records and proceedings.[52] Put another way, access not only contributes to the proper functioning of the courts, but also enables the public to learn of matters of potential significance.

In short, the public policy of encouraging settlements is not a sufficient justification for rejection of a First Amendment right of access. One might argue, however, that there is a distinction between settlement agreements that must be approved in whole or in part by the trial judge and those that the litigants voluntarily file for court approval. In the first situation, access might well discourage settlements that are driven in part by the desire to avoid adverse publicity. Knowing that settlement documents would probably become public, some litigants might well choose to press the matter to trial. In the second situation, however, access would not have as much of an impact, since the parties could simply stipulate dismissal and enter into a private settlement agreement that would not be filed with the court.

Even if court approval is mandated, the need for scrutiny of the judicial process outweighs any perceived advantages of sealed settlements. If one assumes that the number of trials will increase because parties are less willing to settle, then that is the price society must pay for open government. Moreover, a surge in trial activity is hardly a certainty, for there are numerous other factors—such as the desire to minimize lawyers' fees and litigation expenses—that play a role in settlement decisions. These considerations may be far more important to some litigants than keeping a dispute out of the public eye.

In any event, the fact that court approval is required in a given case actually strengthens the argument in favor of access, since assessment of judicial performance in this context is particularly important. If, as the Minnesota Supreme Court noted in *Schumacher*, judicial involvement in the settlement process is necessary to protect the interests of minor plaintiffs or ensure the efficient distribution of settlement funds among heirs, access to the underlying records will ensure that the court has done its job. As the Virginia Supreme Court observed in *Shenandoah Publishing*, the public most certainly has a strong interest in ascertaining whether "the courts are administering properly the powers conferred upon them."

The foregoing analysis supports recognition of a First Amendment right of access to settlement agreements and related documents on file with the court. Faced with the constitutional presumption of access, trial judges would be much less likely to keep settlement documents confidential or to seal virtually all judicial records in a case that has been settled. Only one class of documents—discovery materials—would remain beyond the scope of such a First Amendment right of access. In light of the *Seattle Times* decision, a court-approved settlement that retains the secrecy provisions of protective orders entered during discovery must be evaluated under the "good cause" standard rather than the more rigorous First Amendment test.[53] Nonetheless, public access to the settlement records would reveal the fact that the discovery materials had been sealed, and in some cases those documents might ultimately be opened for public inspection.[54]

V. Conclusion

It is arguable, of course, that the common law right of access is sufficient to protect the public interest; for example, the courts in *Shenandoah Publishing* and *Bank of America* employed the common law balancing test in holding that the settlement records at issue were open to public inspection. The Minnesota Supreme Court's decision in *Schumacher*, however, reveals the inadequacies inherent in the common law, at least as it is applied in some jurisdictions. Although the court recognized a common law right of access to settlement agreements, its opinion suggests that these records can be routinely sealed. Privacy in-

terests of the type deemed sufficient in that case to outweigh the presumption of openness are present in almost any lawsuit that attracts press coverage and in many others that go unnoticed by the news media.[55]

Moreover, the highest court in each jurisdiction is free to write its own version of the common law right of access, and judicial views concerning the value of openness may vary wildly.[56] Even when courts adopt common law principles that parallel those developed under the First Amendment, legislatures may displace the common law with more restrictive statutes governing access.[57] Despite heightened sensitivity on the part of some legislatures to "the public's right to know" and the emergence of various bills that would broaden access to court records, there is certainly no guarantee that these measures will pass—and always the possibility that less enlightened legislation will. Similarly, any access regulations promulgated by the courts may not open judicial records to the same extent as the First Amendment.

One cannot downplay the significance of what may be the beginning of a trend toward remedial statutes and court regulations that make settlement documents and other judicial records more accessible.[58] These developments are indeed welcome and should be encouraged, but the constitutional presumption of openness provides far greater assurances of access and, therefore, far more benefit to the public. To the extent disclosure of certain records may discourage some litigants from reaching a settlement and thus lead to more trials, that negative effect is more than outweighed by the public interest in acquiring information. And in a litigious society in which the courts play an enormous role in the shaping of public policy, the need for that information is greater than ever.

Endnotes

1. If a governmental entity is a litigant, one might be able to obtain the desired settlement documents from that body pursuant to a freedom of information act. For example, a North Carolina statute defines the term "public records" to include "all settlement documents in any suit, administrative proceeding or arbitration instituted against any [public] agency. . . in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility." N.C. Gen. Stat. § 132-12.2. Several courts have held that a public agency's promise of confidentiality in settling a lawsuit does not preclude disclosure of records pertaining to the settlement under an FOI statute. *E.g.*, Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989); Daily Gazette Co. v. Withrow, 350 S.E.2d 738 (W. Va. 1986); Register Division of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 92 (Ct. App. 1984).

2. Rule 26(c), Federal Rules of Civil Procedure.

3. *See generally* Hare, Gilbert & ReMine, *Confidentiality Orders* (John Wiley & Sons 1988).

4. Rule 41(a)(1), Federal Rules of Civil Procedure.

5. Rules 23 and 23.1, Federal Rules of Civil Procedure.

6. *E.g.*, Autera v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969) (settlement of civil cases "is in high judicial favor," since litigants "avoid the expense and delay incidental to litigation" and the court "is spared the burdens of a trial").

7. Walsh & Weiser, "Public Courts, Private Justice," *Washington Post National Weekly Edition* (November 28, 1988), p. 6.

8. McGonigle, "Secret Lawsuits Shelter Wealthy, Influential," *Dallas Morning News* (November 22, 1987), p. 1A.

9. Weiser, "Release of Sealed Records Ordered in Xerox Toxic-Chemical Case," *Washington Post* (August 17, 1989), p. A24. *See also* Weiser, "Forging a 'Covenant of Silence': Secret Settlement Shrouds Health Impact of Xerox Plant Leak," *Washington Post* (March 13, 1989), p. A1.

10. McGonigle, *supra* note 8.

11. 435 U.S. 589 (1978).

12. *See, e.g.*, In re Knoxville News-Sentinel Co., 723 F.2d 470 (1983); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988). *See generally* Recent Development, "Public Access to Civil Court Records: A Common Law Approach," 39 *Vanderbilt Law Review* 1465 (1986).

13. *E.g.*, Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987); In re Application of NBC, 635 F.2d 945 (2d Cir. 1980); Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

14. *E.g.*, United States v. Webbe, 791 F.2d 103 (8th Cir. 1986); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). *See also* Stone v. University of Maryland Medical System Corp., 855 F.2d 178 (4th Cir. 1988); Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988).

15. As the appellate courts are fond of saying, a trial judge will be reversed only for "abuse of discretion." *E.g.*, Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987).

16. *E.g.*, Stone v. University of Maryland Medical Systems Corp., 855 F.2d 178 (4th Cir. 1988); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34 (C.D. Cal. 1984); Mokhiber v. Davis, 537 F.2d 1100 (D.C. App. 1988).

17. 773 F.2d 1325 (D.C. Cir. 1985).

18. Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974). *See also* Houchins v. KQED, Inc., 438 U.S. 1 (1978).

19. 448 U.S. 555 (1980).

20. For detailed treatment of the opinions, see Lewis, "A Public Right to Know About Public Institutions: The First Amendment as Sword," 1980 *Supreme Court Review* 1; BeVier, "Like Mackerel in the Moonlight: Some Reflections on *Richmond Newspapers*," 10 *Hofstra Law Review* 311 (1982).

21. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (jury selection); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (preliminary hearing).

22. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

23. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

24. *See* Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988).

25. *See* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984).

26. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

27. *E.g.*, Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987); In re Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983); In re Kowalski, 16 Media L. Rptr. 2019 (Minn. App. 1989); Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

28. 733 F.2d 1059 (3d Cir. 1984). *See also* Westmoreland v. CBS, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983). *But see* In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985). For commentary on the issue of access to civil proceedings, see Note, *"Publicker Industries v. Cohen*: Public Access to Civil Proceedings and A Corporation's Right to Privacy," 80 *Northwestern Law Review* 1319 (1986); Comment, "The First Amendment Right of Access to Civil Trials after *Globe Newspaper v. Superior Court*," 51 *University of Chicago Law Review* 286 (1984).

29. *E.g.*, Publicker Industries v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Concurring in *Richmond Newspapers*, Justice Stewart flatly stated that the "First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." That view is not necessarily shared by all of the present members of the Court, however. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (O'Connor, J., concurring) (suggesting that right of access is limited to criminal trials); In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (Scalia, J.) (expressing doubt that societal interests served by access to criminal trials are equally important in civil litigation).

30. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

31. *E.g.*, Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987); In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984).

32. 467 U.S. 20 (1984).

33. *E.g.*, Courier-Journal & Louisville Times Co. v. Marshall, 828 F.2d 361 (6th Cir. 1987); In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986); Stenger v. Lehigh Valley Hospital Center, 554 A.2d 954 (Pa. Super. 1989). In fact, "strangers" to the lawsuit may not have legal standing to attack umbrella orders that are agreed upon by the litigants. *See, e.g.*, Oklahoma Hospital Association v. Oklahoma Publishing Co., 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985); Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988); Booth Newspapers, Inc. v. Midland Circuit Judge, 377 N.W.2d 868 (Mich. App. 1985), *cert. denied*, 479 U.S. 1031 (1987). Standing exists, however, when a protective order has been imposed over a litigant's objection. *See, e.g.*, Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

34. In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987).

35. For example, courts have found good cause where protective orders were entered to: (1) help ensure a fair trial, Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986); Houston Chronicle Publishing Co. v. Hardy, 678 S.W.2d 495 (Tex. App. 1984), *cert. denied*, 470 U.S. 1052 (1985); (2) protect the privacy rights of individuals and their freedom of association, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Courier-Journal & Louisville Times Co. v. Marshall, 828 F.2d 361 (6th Cir. 1987); Stenger v. Lehigh Valley Hospital Center, 554 A.2d 954 (Pa. Super. 1989); (3) guard against the release of information that might adversely affect the voting process by which shareholders approved a reorganization plan for a company in bankruptcy, In re Texaco, Inc., 84 B.R. 14 (S.D.N.Y. 1988); and (4) prevent disclosure of trade secrets and other sensitive commercial information, Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989).

36. *See, e.g.*, McCarthy v. Barnett Bank, 876 F.2d 89 (11th Cir. 1989); In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987); Oklahoma Hospital Association v. Oklahoma Publishing Co., 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985); In re Consumers Power Company Securities Litigation, 109 F.R.D. 45 (E.D. Mich. 1985); In re Korean Air Lines Disaster, 597 F. Supp. 621 (D.D.C. 1984). *But see* In re "Agent Orange" Product Liability Litigation, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987) (upholding trial judge's decision to lift an umbrella protective order after the case had been settled and to require a showing, on an individualized basis, of good cause for continued protection of particular documents).

37. *See also* In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987); United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866 (E.D. Pa. 1981); Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988); Stenger v. Lehigh Valley Hospital Center, 554 A.2d 954 (Pa. Super. 1989); Herald Association, Inc. v. Judicial Conduct Board, 544 A.2d 596 (Vt. 1988).

38. Several federal courts have held that, absent a protective order entered for good cause, the public and press have a right of access under the Federal Rules of Civil Procedure to discovery records filed with the court. *E.g.*, Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); In re "Agent Orange" Product Liability Litigation, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). *See also* Avirgan v. Hull, 118 F.R.D. 252 (D.D.C. 1987) (in light of "the presumption inherent in Rule 26(c) that the discovery should be open," press and public may attend a deposition unless court for good cause enters protective order barring attendance).

39. *Compare* Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) (First Amendment right of access attaches to discovery materials filed by a litigant in support of a motion for summary judgment) *with* Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (no First Amendment right of access to documents considered by a court in ruling on a discovery motion, and "the same good cause standard is to be applied that must be met for protective orders in general"). *See also* In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (discovery documents filed with an unsuccessful summary judgment motion may be withheld from the public until final disposition of the case without offending the First Amendment).

40. *See* Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988) (modern discovery practice has "greatly affected the way in which our courts do justice," and a litigant who submits a discovery motion to the court "enters the public arena of courtroom proceedings and exposes [himself], as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny").

41. *E.g.*, Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987); Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates, 800 F.2d 339 (3d Cir. 1986); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); Sogeclif U.S.A. Ltd. v. Decludt, 16 Media L. Rptr. 1765 (D.D.C. 1989); Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. App.), *cert. denied*, 342 So.2d 1100 (Fla. 1976); Shenandoah

Publishing House, Inc. v. Fanning, 368 S.E.2d 253 (Va. 1988); Matter of Estates of Zimmer, 442 N.W.2d 578 (Wis. App. 1989); C.L. v. Edson, 409 N.W.2d 417 (Wis. App. 1987). *See also* Equal Employment Opportunity Commission v. The Erection Co., 900 F.2d 168 (9th Cir. 1990); City of Hartford v. Chase, 733 F. Supp. 533 (D. Conn. 1990); Courier-Journal & Louisville Times Co. v. Peers, 747 S.W.2d 125 (Ky. 1988). *See generally* Forman, "Sealing and Unsealing Wrongful Death and Minor Settlement Documents," 13 *William Mitchell Law Review* 505 (1987); Comment, "Common Law or First Amendment Right of Access to Sealed Settlement Agreements," 54 *Journal of Air Law & Commerce* 577 (1988).

42. 392 N.W.2d 197 (Minn. 1986).

43. *See also* Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. App. 1986) (rejecting First Amendment right of access to settlement records), *vacated for lack of jurisdiction*, 730 S.W.2d 648 (Tex. 1987). One federal district court has held, without extended discussion, that there is a constitutional right of access to settlement documents in the possession of government agencies and officials. Society of Professional Journalists v. Briggs, 675 F. Supp. 1308 (D. Utah 1987). A court willing to apply the First Amendment in this situation would presumably reach the same result with respect to settlement records that have been filed with the court. For a discussion of the *Briggs* case, see Note, *"Society of Professional Journalists v. Briggs*: Toward a Deferential Balancing Test for the Right of Access," 1989 *Utah Law Review* 787.

44. 368 S.E.2d 253 (Va. 1988).

45. It is clear, however, that the court was not laying down an absolute rule that settlement agreements in all wrongful death cases must be open to the public because a statute requires their approval by a judge. Rather, the court held only that the interests advanced in this case for sealing the records were particularly weak, while the policy considerations supporting disclosure—including the public's "vital interest" in medical malpractice cases—were particularly strong.

46. 800 F.2d 339 (3d Cir. 1986).

47. For this reason, some courts have disregarded the fact that particular proceedings may not have been traditionally open to the public in holding that there is a right of access under the First Amendment. *E.g.*, In re Search Warrant, 855 F.2d 569 (8th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989) (search warrants and related documents); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (bail hearings); United States v. Criden, 675 F.2d 550 (3d Cir. 1982) (evidentiary suppression hearing); Herald Co. v. Board of Parole, 499 N.Y.S.2d 301 (Sup. Ct. 1985), *modified*, 510 N.Y.S.2d 382 (App. Div. 1986) (parole revocation hearings). Other courts, however, have declined to apply the First Amendment absent a tradition of openness. *E.g.*, Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (summary jury trial, a device of recent origin used to facilitate settlement); Johnson Newspaper Corp. v. Melino, 547 N.Y.S.2d 915 (App. Div. 1989) (professional disciplinary hearing), *aff'd*, 1990 Westlaw 181714 (N.Y. 1990).

As the commentators have pointed out, the "history" prong is inconsistent with the Supreme Court's traditional practice of interpreting the First Amendment in light of current values and conditions. Moreover, there is no logical link between history and self-governance, the core First Amendment value underlying the right of access. Given these concerns, it has been suggested that the courts treat historical tradition as only one factor in assessing access claims. *See generally* BeVier, supra note 20; Note, "What Ever Happened to the 'Right to Know'?: Access to Government-Controlled Information since *Richmond Newspapers*," 73 *Virginia Law Review* 1111 (1987).

48. *See* United States v. Swift & Co., 286 U.S. 106 (1932); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981).

49. On the other hand, the view that settlement should be affirmatively encouraged as a matter of public policy is not without its critics. *See*, e.g., Fiss, "Against Settlement," 93 *Yale Law Journal* 1073 (1984).

50. *See, e.g.*, Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (observing that case was settled with the "encouragement and assistance" of the trial judge); Rule 16(a)(1), Federal Rules of Civil Procedure (authorizing trial judges to call pretrial conference to facilitate settlement). *See generally* Resnik, "Managerial Judges," 96 *Harvard Law Review* 374 (1982).

51. In an analogous situation, the courts have extended the First Amendment right of access to plea agreements in criminal cases. *E.g.*, United States v. Haller, 837 F.2d 84 (2d Cir. 1988); In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986).

52. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983); WPIX, Inc. v. League of Women Voters, 595 F. Supp. 1484 (S.D.N.Y. 1984); Herald Co. v. Board of Parole, 499 N.Y.S.2d 301 (Sup. Ct. 1985), *modified*, 510 N.Y.S.2d 382 (App. Div. 1986). *See also* In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (Wright, J., dissenting in part).

53. *See, e.g.*, Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988).

54. *See, e.g.*, In re "Agent Orange" Product Liability Litigation, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987).

55. Indeed, one must question the court's evaluation of the privacy interests in *Schumacher*, for the lawsuits grew out of a concededly newsworthy event, *i.e.*, a plane crash. It is well settled that a plaintiff in an invasion of privacy suit based on public disclosure of private facts must establish that the published information is not "of legitimate public concern"—that is, that it is not newsworthy. Applying this standard, the courts have held that persons unwillingly dragged into newsworthy events generally cannot recover for invasion of privacy even though their participation was wholly involuntary. *E.g.*, Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla. App. 1982), *cert. denied*, 464 U.S. 893 (1983). If privacy interests in circumstances such as these are not sufficient to impose tort liability, it is difficult to understand how they can outweigh the common law presumption in favor of access to judicial records. In both contexts, the courts are required to balance the societal interest in receiving information about issues or events of public concern and the privacy interests of individuals who, one way or another, are involved in or connected with such matters.

56. Compare, for example, the majority and dissenting opinions in Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. App. 1986), *vacated for lack of jurisdiction*, 730 S.W.2d 648 (Tex. 1987).

57. *See* Mokhiber v. Davis, 537 A.2d 1100 (D.C. App. 1988) (Ferren, J., dissenting in part).

58. *E.g.*, Rule 21.2, Georgia Uniform Rules for Superior Courts (order limiting access to court records "shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest"); Rule 76a, Texas Rules of Civil Procedure (court records may be sealed only upon a showing of "a specific, serious and substantial interest" that "clearly outweighs" the presumption of openness and "any probable adverse effect that sealing will have upon the general public health or safety"). *See also* Va. Code Ann. § 8.01-420.01 (protective orders in personal injury and wrongful death suits may not prohibit an attorney from voluntarily sharing discovery information with lawyers involved in similar cases); H.R. 129, 101st Congress, 1st Session (bill to require that protective orders in product liability actions permit disclosure of information related to product safety to governmental regulatory agencies and attorneys representing other plaintiffs).