SECRET SETTLEMENTS: ETHICS AND PUBLIC POLICY

ARTICLE

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I. Introduction

This article explores the ethics and public policy issues related to secret settlements of cases, with a focus on practice before the federal court in Puerto Rico. This practice of confidential settlements is prevalent in this jurisdiction, particularly in cases involving civil rights violations on the part of government officials[1] and discrimination in both public and private employment.[2] Similar practices in other jurisdictions have raised alarm bells when the cases statutory involve environmental violations, public safety risks or workplace discrimination.

In virtually every case of this nature, defendants demand secrecy from plaintiffs and their attorneys as a condition for settling claims. Such confidentiality requirements range from secrecy about settlement amounts to bans against use of information

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[1] These cases are typically brought pursuant to 42 U.S.C § (1983).

[2] The Commonwealth of Puerto Rico, which in most cases assumes representation of the individual defendants, pursuant to Actions Against the Commonwealth of Puerto Rico Act No. 9, 32 Laws P.R. Ann. § 3085 (1975), consistently requires some form of confidentiality as a condition of settlement.

attained in litigation, to attempts to limit the attorneys from representing clients in similar cases against the same defendant in the future.

This Article questions the professional ethics of attorneys who make such demands and discusses the public policy implications involved in the practice. It proposes a court rule prohibiting secret agreements when public funds are involved and providing for a vigorous balancing test in all other cases, allowing secrecy only when a defendant demonstrates a compelling interest sufficient to trump the public's interest in access to the information.

Demands of this nature place plaintiffs' attorneys in the difficult position of having to choose between their clients' interest in resolution of their cases and the attorney's own interest in and responsibility to protect the public, as well as his/her protected interest in engaging in the profession. The confidentiality provisions seriously undercut the attorney's obligation to advance confidence in the judiciary and the system of justice. They interfere with freedom of speech. The practice places both plaintiffs' attorneys and their clients in a situation where they end up withholding valuable information which would advance the public good.

As attorneys we have obligations to society as well as to our clients. Defense counsel are forcing members of the plaintiffs' bar to choose between a client's interest in settlement and that larger responsibility to society. Secrecy demands affect the freedom of plaintiffs' attorneys to represent future clients effectively and the freedom of clients to make informed choices about the attorneys they will employ to litigate their cases. The demand for confidentiality may also well violated the basic rule that everyone is entitled to access relevant evidence in the search for truth.[3] Through such provisions, the settlement process may appear more akin to blackmail than to legitimate resolution of claims. The very demands for such settlement language place an undue burden on the practice of law and hinder public's right to know. By making such demands, the defense bar is engaging in questionable ethical conduct, in contravention to the American Bar Association Model Rules of Professional Conduct [hereinafter *Model Rules*], applicable to practice before the federal court in Puerto Rico.[4]

Through their rule-making authority, the courts can severely limit this practice in furtherance of the public good. The plaintiffs' bar, collectively, must also play a role. It is one thing to face the issue in the context of a singular case, in which the duty owed to one particular client is paramount, and where defense counsel is insisting that confidentiality is a deal-breaker. It is quite another for the plaintiffs' bar to say a collective "no" to the practice. In point of fact, this will likely demonstrate that

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[3] As early as 1928, the American Bar Association adopted Canon 39, providing that an attorney should not "be deterred from seeking to ascertain the truth" from witnesses, even if such witnesses are "reputed to be biased in favor of an adverse party." In 1934, the ABA Ethics Committee made it clear that no lawyer can claim "ownership" over a witness who is not a party, since the overriding interest furthered by Canon 39 is the search for justice. *See* ABA Committee on Prof. Ethics, Op. No. 117 (1934).

[4] *See* U.S. Dist. Ct. Rules D.P.R., L.Cv.R. 83(E) (2009). Although this article focuses in on the federal court in Puerto Rico, where appropriate, mention will also be made of the Canons of Professional Ethics governing the practice in Puerto Rico. 4 Laws P.R. Ann. Ap. IX (1970).

confidentiality was not, in fact, a "deal-breaker" since most defendants at this stage fear more from a public trial than from a publicly accessed settlement. If the plaintiffs' bar also acts in a concerted manner to resist these demands strenuously, change can be achieved.

II. Confidentiality in Settlements in the Context of Litigation

In the litigation context, it is not unusual for attorneys to confront ethical requirements which pull in different directions. From the standpoint of plaintiffs' counsel, the settlement context frequently highlights such tensions. In fee-shifting cases, for example, our own interests may be in favor of going to trial, with the prospect of significant lodestar fees available thereafter, and this may conflict with the interest of our client in a prompt resolution. The reverse situation may also occur in other cases in which we prefer not to go to trial, but it is in the client's interest to do so. It is, of course, incumbent upon us to set aside our personal interest in this context.

When a defendant demands confidentiality or the imposition of practice restrictions as a condition of settlement, the tension increases dramatically. This is particularly so in cases involving matters of public concern, such as police accountability, discrimination, environmental justice, and workplace safety.

For a host of reasons, not the least of which are predictability and finality, our clients may be quite eager to settle, and it may be in their best interests to do so. The secrecy which is often demanded, however, will affect their future lives in ways they may not suspect. It also will have a significant impact on our own interests, as we weigh giving up the right to disclose information to which we have had access and as to which disclosure would be in the public interest. Our general responsibility to the public and to the overall administration of justice may conflict with the particular interest of our client.

The confidentiality demands our law office has faced over decades of civil rights practice in Puerto Rico have involved a range of conditions. By far the most common is a demand for confidentiality as to settlement terms. Requirements of this nature also typically include some form of liquidated damages to be paid by the plaintiff if the terms of the agreement are disclosed to anyone beyond spouses, attorneys or financial advisors.

At times, however, defendants have also insisted on silence on the part of the plaintiffs as to the facts underlying the complaint. Some defendants have demanded that plaintiffs' attorneys also agree to maintain silence. On occasion, defendants have attempted to extract an agreement from us to refrain from making statements as to publicly available information about the case or the fact that it has settled. Others have insisted that plaintiffs' attorneys refrain from using any material produced in discovery, even when those documents were not previously subject to a protective order.[5] Yet another extreme requirement which some have attempted to impose is that we agree not to represent future claimants with similar causes of action.

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[5] Rule 26(c) of the Federal Rules of Civil Procedure provides for a party or a person from whom discovery is sought to seek a protective order based on "good cause, in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

In our experience, the defense bar bristles when we question such demands. Many times we have heard the simple retort that we should agree because "everybody else accepts" such onerous requirements. The defense bar sees our resistance as obstinacy which they assert is neither in our clients' interest nor in the interests of their clients.

The unfortunate reality is that attorneys representing plaintiffs too often accept such demands made by government counsel or private defense attorneys, without considering the implications of such decisions. Foremost in the minds of many in the plaintiffs' bar is the client's interest in moving on with his or her life. A cynic might say that these attorneys also are interested in quickly obtaining their fees.

Courts too are inclined to accept such confidentiality provisions, blindly and without any proper balancing of interests. Eager to free up their crowded dockets, courts simply do not pay much attention to issues relating to confidentiality or the sealing of documents submitted to the court, especially when the parties have so stipulated.[6]

This sort of blind acceptance is inappropriate. It was recently called into question by the Third Circuit in *Pansy v. Borough of Stroudsburg*:

> Simply because courts have the power to grant confidentiality does not mean that such orders may be granted arbitrarily. Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.[7]

III. The Public's Right to Know

Every state in the United States and many municipalities have some version of "sunshine laws" or statutes guaranteeing access to public records.[8] Such laws are implicated when there are settlements involving public funds, since there probably are other documents in government files which would relate thereto, which, presumably, should be obtainable through such sunshine laws.[9]

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[6] *See* Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Policy 53, 58 (2000) ("Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders Settlement agreements are often filed under seal as a matter of course.").

[7] *Pansy v. City of Stroudsberg,* 23 F.3d 772, 785-86 (3rd. Cir. 1984).

[8] *See* Craig D. Futterman, Jason E. Huber & Pier Peterson, *Settlements You Can't Sign: Ethical Implications of Chicago's Machinery of Denial*, 9 Police Misconduct and Civil Rights Law Report 1, 13 n. 32 (2009) (listing state statutes).

[9] On the federal level, as of this writing, the Truth in Settlements Act is still wending its way through Congress. Entitled "A bill to require adequate information regarding the tax treatment of payments under settlement agreements entered into by Federal agencies and for other purposes," the measure is

In Puerto Rico, although there is no sunshine law, the constitutionally guaranteed right of access to documents in the public record has been established since 1982.[10] The strong presumption in favor of access to such information unquestionably applies as to government documents related to settlements with the use of public funds.

In cases involve governmental misconduct, the issues may be addressed on two fronts: public access laws and guarantees, providing the public with information about how its tax dollars are spent, and access to court records. When the defendant is a private party, however, the issue would be addressed solely as to the latter.

In cases involving both public and private defendants, information about earlier settlements may be pertinent to the theories of liability in subsequent cases. Prior knowledge of an officer's documented misconduct may lead to supervisory liability in a case involving a later incident of police violence.[11] Earlier cases of sexual harassment involving the same offender may point to the inadequacy of an employer's anti-harassment policies and thereby defeat a likely affirmative defense.[12] Earlier acts of harassment may also be "extremely probative" on issues of discriminatory intent and knowledge.[13] Evidence of previous air pollution violations can go a long way to show that a company opened a plant with the knowledge that its existing technology was insufficient to meet air quality requirements.[14]

While the parties are free to agree to a private settlement which need not be submitted for court review or approval,[15] the litigants frequently opt for court approval of the agreement, rather than an entirely private settlement. This is usually the only way to assure federal court jurisdiction over enforcement proceedings.

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primarily aimed at revealing details of publicly announced settlements regarding corporations accused of wrongdoing. As recently stated, "[t]his legislation would require detailed and publicly accessible disclosures of these settlement agreements and the tax write-offs that accompany them." Corporate Crime Reporter, *Legislation Would Shed Light on the Cost of Government Settlement Agreements to American Taxpayers* (available at *www.corporatecrimereporter.com/news/200/legislation-would-shed-light-on-thecosts)* (accessed on April 11, 2016).

When the bill was first introduced in 2014, Senator Warren explained that deals with corporate offenders were given great play in the media, with information about the bottom-line settlement, without informing the public about the tax breaks built into the deal, severely lowering the benefit to the public. Elizabeth Warren, Blog, *My new bill to stop the back-room deals* (available at http://elizabethwarren.com/blog/settlementsact) (accessed on April 13, 2016). The bill was passed by the U.S. Senate on September 21, 2015, but the House has not yet acted on the measure.

[10] *Soto v. Secretario,* 112 D.P.R. 477 (1982).

[11] *Gutiérrez Rodríguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989).

[12] *See Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).

[13] *Hurley v. Atl. City Police Department,* 174 F.3d 95, 111 (3rd Cir. 1999).

[14] *Orjias v. Stevenson,* 31 F.3d 995, 999-1002 (10th Cir. 1994).

[15] Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure allows for dismissal of an action without a court ordered if all parties so stipulate, presumably allowing a settlement to remain confidential as a private agreement. Fed. R. Civ. P. 41 (a)(1)(ii). This is not the case, however, with respect to class actions, which must be approved by the court. *See* Fed. R. Civ. P. 23 (e)(2). The rules applicable to practice before the federal court in Puerto Rico also require court approval for settlements involving minors. *See* Fed. R. Civ. P. 41(b).

In 1994, the Supreme Court held that federal courts lacked ancillary jurisdiction to consider alleged breaches of an agreement to settle a case which the plaintiff then dismissed.[16] Since the voluntary dismissal did not entail a court order, the breach of the agreement was not a "violation" and therefore did not implicate the "court's power to protect its proceedings and vindicate its authority."[17] If the agreement lacks the judicial *imprimatur*, it becomes merely a private contract, with enforcement limited to enforcement in local courts, through the filing of an independent action. In cases before the United States District Court in Puerto Rico, if federal jurisdiction is not retained, parties may be required to adjudicate their post-settlement enforcement disputes in a court at a considerable distance from the federal courthouse in San Juan, in Spanish, with the necessity to translate key documents. Given the parties' interest in maintaining enforcement in the federal court, settlement agreements are routinely submitted to the court for approval in this jurisdiction.

When the agreement is part of a court record and has been approved by the court, the anti-secrecy argument is particularly strong. The confidentiality of such agreements is particularly suspect in light of the common law right of access to court proceedings, which has been firmly established for decades.[18]

The only question in the context of court-approved settlements becomes the extent of the right of public access. Should the public have a right to review settlements which the parties have chosen to shroud in secrecy, or should the wishes of the litigants be respected in this regard? It is submitted that on balance, in most cases, any preferences for secrecy which the litigants might have should cede to the public interest in disclosure.[19]

Turning to discovery materials, the law is somewhat murkier, and the anti-secrecy forces face a more uphill battle. The common law right to "inspect and copy . . . judicial records and documents,"[20] has not generally been thought to extend to discovery materials obtained in the course of litigation.[21] Remarkably, however, there has been

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[16] *Kokkonen v. Guardian Life Insurance Co. Of America,* 511 U.S. 375 (1994).

[17] *Id.* at 380.

[18] *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978).

[19] *Pansy*, 23 F.3d 772 (reversing an order of confidentiality of settlement with the Police Department and requiring the lower court to apply the the proper balancing inquiry.)

[20] *Id.* at 597.

[21] *See* Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts,* 105 Harvard L. Rev. 427, 441 (1991) (discovery process should not be "piggybacked" on to the right of public access). Of particular interest in Puerto Rico is a First Circuit decision arising from the civil rights case presented by the families of two young men killed by the police at Cerro Maravilla in 1978. *In re San Juan Star Co.,* 662 F.2d 108 (1st Cir. 1981) The Court, in *In re San Juan Star Co.*, addressed several orders issued by the district court prohibiting access to discovery materials. *Id.* The First Circuit held that discovery has only limited First Amendment protection. *Id.* The court affirmed an order prohibiting parties and their counsel from disclosing deposition testimony to the press and the public. *Id.* However, it reversed a bar on attorneys sharing information with their clients as well as an order quashing subpoenas issued by the Puerto Rico Senate seeking information which, although in the possession of the government, had been restricted pursuant to a prior protective order. *Id.*

very little analysis as to whether post-settlement restrictions on the release of discovery materials are allowable.

It could certainly be argued that once discovery has been submitted to a court in a public filing, such as summary judgment papers, it has become a public court record subject to the right of access discussed above. This is, particularly in those cases relied upon by the court in its resolution, sometimes disposing of the entire action, heightening the public interest in obtaining access to the underlying documents.[22]

The Supreme Court has not spoken on these issues, having examined the confidentiality of discovery materials exclusively in the context of protective orders during litigation, applying a constitutional balancing test for the issuance of such protective orders.[23] The Court has not considered post-settlement restrictions on materials not covered by such protective orders can be allowed.

The Circuit Courts of Appeals have offered some direction regarding these issues. The Fifth Circuit has stated that "[a] party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal."[24] The Third Circuit, applying Rule 26(c) good cause criteria,[25] has vacated a district court's restriction on a newspaper's access to discovery materials which were submitted to a protective order regime after plaintiff's counsel gave the paper discovery documents.[26]

The blanket demand for silence regarding discovery materials appears to have no specific basis in law or procedure, except when a protective order has been issued. The fact that at attorney obtained such materials during litigation does not mean that he or she must limit their use to litigation purposes, unless the objecting party can establish a significant reason why this should be so, sufficient to trump any public interest in access to these documents.

IV. Attorney Responsibilities to Promote Access to Justice

When attorneys are prevented from using information which they obtain in one case for future litigation purposes, plaintiffs are prohibited from speaking about their life experiences, or settlements remain hidden from public view, the justice system falters. Both attorneys and their clients should be free to speak their minds and describe their experiences. Such freedom advances not only their own interests, but also those of other victims of illegal behavior, as well as the public interest.

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[22] *See Baxter International, Inc. v. Abbott Laboratories,* 297 F.3d 544, 548 (7th Cir. 2002) (Taking note of presumption of public disclosure regarding materials that formed the basis of the dispute between the parties and the court's resolution thereof.).

[23] *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984).

[24] *Harris v. Amoco Production Co.,* 768 F.2d 669, 683-684 (5th Cir. 1985).

[25] Fed. R. Civ. P. 26(c), providing for protective orders related to discovery materials. *See generally Seattle Times,* 467 U.S. 20 and *Pansy,* 23 F.3d at 785-786 (discussing applicable factors).

[26] *Shingara v, Skiles,* 420 F.3d 301 (3rd Cir. 2005). The underlying case was a claim by an employee of the Pennsylvania State Police department that he was retaliated against for speaking out about defective radar speed detection devices. In vacating the protective order, the Court of Appeals observed that the lower court had "downplayed the fact that this case involves public officials and issues important to the public." *Id.* at 306.

Bans on information about earlier cases may prevent future litigants from identifying and contracting the services of attorneys who, through experience and prior litigation, may be able to represent them more efficiently. Attorneys may be effectively prevented from taking on new clients, stymied in their ability to apply the full breadth of their own knowledge and experience to such representation.

Such restrictions also may prevent potential litigants from having access to crucial witnesses with important information to provide. Litigants may be forced to engage in costly, unnecessary litigation efforts, such as depositions, when they could have easily accessed the information directly.[27]

Secret settlements and silence requirements also make it even harder for those who are not privileged with information hidden in corporate offices and government files to get past pretrial dispositive motions. Despite having viable claims, future plaintiffs may face early dismissal on the pleadings, lacking sufficient information to demonstrate "plausibility" pursuant to the *Twombly* and *Iqbal* pleading standard.[28] Precise knowledge of the underlying facts in previous cases may well be the key to assuring that a future victim of misconduct even gets his or her foot in the door of the courthouse.

V. Ethical Implications

The most extreme demand our office has faced in settlement negotiations in federal court cases in Puerto Rico is that we refrain from future representations of clients against the same defendant. This unquestionably is a violation of applicable ethical standards under applicable rules.

Rule 5.6 of the American Bar Association Model Rules of Professional Conduct, a version of which has been adopted by all fifty states[29] and is applicable to federal court practice in Puerto Rico,[30] provides that an attorney "shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." Demands which impede the right to practice law clearly contravene this ethical dictate. The Rule seeks to assure that clients have access to the best possible representation. It also was enacted to guarantee

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[27] *See* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyer Ethics*, 87 Or. L. Rev. 481, 494 (2008), in which the following is stated:

> As a result, valid claims may never be brought or will be rendered harder to prove. Even when they do not succeed in suppressing evidence entirely noncooperation settlements impose the substantial costs of taking a deposition, or obtaining a judicial ruling, on parties who otherwise would have been able to obtain relevant information informally, and at minimal expense, from a willing witness. *Id.* at 496.

[28] *Iqbal v. Ashcroft,*556 U.S. 662 (2009); *Bell Atlantic v. Twombly, 550* U.S. 544 (2007). Although the Supreme Court has stated that the pleading standard is not a requirement for specific detail, the "plausibility" calculus certainly has provoked the need for considerable pre-filing factual research. Secrecy provisions in settlements of earlier cases impact upon access to such knowledge.

[29] *See* Model R. Prof. Conduct 5.6 (ABA 2008).

[30] *See* U.S. Dist. Ct. Rules D.P.R., L.Cv.R. 83(E) (2006).

attorney autonomy and to assure that he or she is free to engage in future professional activities.[31]

Settlements which limit the future work of attorneys contravene this rule. They also provoke potential conflicts between the lawyers' current obligation to represent one client and the loyalty they may extend to future clients.[32] Other secrecy demands in the settlement context may also run afoul of Rule 5.6. A ban on the use of information obtained through a previous case affects an attorneys' future practice and impairs his/her ability to represent clients zealously.[33] If attorneys acquire information in one case which will benefit a future client, we should not have our hands tied by a settlement agreement prohibiting use of that information.[34]

While other demands in the settlement context may be outside the purview of Rule 5.6, they are no less troubling. In a 2006 opinion, the District of Columbia Bar Legal Ethics Committee addressed the ethical implications of an agreement prohibiting an attorney from disclosing the fact of settlement as well as the identity of defendants, deciding to put a halt to such practices.[35] "Where clauses such as these to be regularly incorporated in settlements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers."[36]

A defense attorney who demands that a plaintiff in one case refrain from talking about his or her experience to other potential litigants may also violate Rule 3.4(f) of the Model Rules, which prohibits an attorney from requesting a person "other than a client to refrain from voluntarily giving relevant information to another party," except in certain specified situations.[37] The testimony of witnesses is in furtherance of the

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[31] *See* Model R. Prof. Conduct 5.6 (ABA 2008).

[32] *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 93-371 (1993); N.C. Bar Leg. Formal Ethics Op. 9 (2004). Agreement not to represent future clients with similar claims "denies members of the public access to the very lawyer who may be best suited, by experience and background, to represent them." *See generally* Craig D. Futterman, supra n. 8 at 15-16.

[33] Colorado Bar Leg. Ethics Comm., Ethics Op. 92 (1993), provides the following:

> [T]he test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitations. Material restrictions obtained with an eye towards thwarting a non-settling claimant from obtaining counsel of choice fail this test. *Id.*

[34] *See* ABA Formal Ethics Op. No. 00-417 (2000), which provides that:

> Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances. An agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b). *Id.*

[35] D.C. Bar Legal Ethics Comm., Ethics Op. 335 (2006).

[36] *Id.*

[37] An exception is made for individuals who are related to or an employee or agent of an employee or when the attorney "reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Model R. Prof. Conduct 3.4(f)(1) and (2) (ABA 1983).

ultimate search for truth, and with some exceptions not applicable here, witnesses do not "belong" to one party or another.[38] The defendants sometimes demand silence on the part of a settling party who may well be a key witness in the case of another future litigant.

Defense counsel routinely do this in Puerto Rico, demanding such agreements from current plaintiffs whom they do not represent and prohibiting them from speaking about their life experiences as a condition for obtaining a resolution of their cases. These demands often come at a time when a client is weary from a lengthy, if not oppressive, litigation process. At the time such settlement offers are made, our clients are often at their most vulnerable, and although full disclosure is made, they may fail to understand fully the impact of their agreements not to cooperate with others who may be facing the same fate or victimized through the same practices. Courts simply rubber-stamp these efforts.

The decision to settle a case is the exclusive domain of the client,[39] and plaintiffs' attorneys are ethically obligated to inform our clients of all settlement offers.[40] In Puerto Rico, as elsewhere, there is also a strong public policy in favor of voluntary settlements of conflicts.[41] An attorney in this jurisdiction has the obligation to promote settlement, not only because it is often in the best interest of his/her client, but also as a more general proposition in support of the efficient and fair functioning of the judicial system.

We also have an obligation as attorneys to promote public confidence in the judicial system.[42] These competing requirements are difficult to reconcile. If, in the course of our work, we obtain information shedding light on an ongoing problem, but are cannot share the same, this has the potential of working hardship on future litigants, making the fair resolution of subsequent cases more difficult and calling into serious question the fairness of the system. While we cannot let our own interests interfere with our advice to our clients, it is nonetheless difficult for us to sit by and accept such prohibitions when we often believe them to be contrary to our commitment not only to future clients but also to the broader quest for social justice.

History is replete with examples of risks to public safety kept secret through such settlements.[43] One need only witness the Catholic Church pedophilia scandal and the

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[38] *Supra* n. 4.

[39] Model R. Prof. Conduct 1.2(a) (ABA 2007).

[40] *See* PR Code of Prof. Conduct, 4 Laws P.R. Ann. Ap. IX § 19 (2013).

[41] *Carpets & Rug Warehouses v. Tropical Reps & Distributors, Inc.,* 175 D.P.R. 615 (2009); *see Marek v. Chesny,* 473 U.S. 1, 12 (1985) (Powell, J., concurring) ("Parties to litigation and the public as a whole have an interest — often an overriding one — in settlement rather than exhaustion of protracted court proceedings.").

[42] *See In re Rivera Vicente,* 172 D.P.R. 349 (2007) (Fiol Matta, J., dissenting) ("each attorney is a mirror in which the image of the profession is reflected," requiring that the attorney "act with the strictest sense of the responsibility imposed by the social function which he/she exercises.") (Translation ours).

[43] *See generally* Richard Zitrin*, The Laudable South Carolina Court Rules Must be Broadened,* 55 S.C. L. Rev. 883, 884 (2004) (observing that before the Firestone case mentioned in note 2, there were other settlements related to the prescription drugs Zomax and Halcion, the Shiley Heart Valve and the Dalkon Shield, all of which were taken off the market long after secret settlements had been reached

secrecy demanded of the earliest victims who settled their cases, to appreciate the conflicts created by demands of this nature.[44] When a police officer remains on the force and is allowed to continue violating the rights of citizens, a corporation continues to pollute the waters or a physician with a horrendous record evidenced by prior malpractice cases continues to operate, we are right to have concerns about this being swept under the rug through confidential settlements.

VI. A Call for Action

On November 1, 2002, the ten judges of the United States District Court for the District of South Carolina approved an amendment to Local Rule 5.03, prohibiting the sealing of settlement agreements which are filed with the court.[45] While the South Carolina rule is a good start, few other jurisdictions have followed the lead on this issue.[46]

Each federal district court has rule-making authority.[47] The United States District Court for the District of Puerto Rico has long exercised that authority, approving extensive Local Rules which have the force of law.[48] It is incumbent upon the district court to exercise its authority to address the issue of secret settlements in this jurisdiction.

The district court would not be working on a blank slate. In a 2013 Standing Order related to its Electronic Case Filing System, the federal court in Puerto Rico made significant advances in this direction. In Standing Order No. 9, the judges of the district court took note of the overuse of sealed filings and observed that "filing and viewing restrictions ha[ve] increased in a manner inconsistent with the applicable . . . access policies and took corrective action.

Attorneys in federal court cases in this jurisdiction can no longer seal documents automatically by so designating them in the Electronic Filing System. Rather, they must file a separate public "Motion to Restrict" along with the document they present at a restricted filing and viewing level. The court then grants or denies the public Motion to Restrict, determining whether "the interest to be protected . . . outweighs the presumption of public access."[49] If the request is denied, the document is entered in the record accessible to the pubic.[50]

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in earlier cases); *Miller, supra* n. 21, at 478 (Confidentiality more questionable when it relates to matters important to public health and safety, and when the sharing of information among litigants would promote fairness and efficiency, *id.* at 490).

[44] *See* Stephanie S. Abrutyn, *Courts are Just as Guilty in Church Coverup*, Hartford Courant, (May 26, 2002); Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases; Settlements Kept Scope of issue out of Public Eye*, (Boston Globe 2002).

[45] D.S.C. Local R. 5.03.

[46] *See* E.D. Mich. LR 5.3 (limiting duration of sealing of settlements).

[47] Fed. R. Civ. P. 83(a)(a)(1).

[48] *See Air Line Pilot's Ass'n v. Precision Valley Aviation,* 26 F.3d 220, 224 (1st Cir. 1994).

[49] Standing Order No. 9. *In the Matter of: Amendment to the Restricted Filing and Viewing Levels Module, Misc.* No. 03-149 (January 30, 2013).

[50] *Id.*

Although Standing Order No. 9 appears to be directed at the excessive use of sealed filings in criminal cases, it should be applied rigorously in the context of civil cases as well. Standing Order No. 9 provides that "[s]tipulations between the parties are insufficient to justify restricted access."[51] In practice, however, court approval of stipulated secret settlements is done as a matter of course in this jurisdiction. The author is unaware of any case in which the court has rejected a secrecy provision in a settlement approved by the court.

When public funds are involved, as is the case in settlements involving public officials charged with civil rights violations, there is no justification for the sealing of documents. Standing Order No. 9 should be amended to prohibit such sealing. When the agreement involves private parties, a proper balance must be struck. The court should require the proponent of secrecy to articulate and establish a compelling reason to justify confidentiality and to demonstrate that the asserted interest is sufficient to outweigh the public's right of access to court records.

Secret settlements in public court actions must be the exception, not the rule. Courts, unlike the much-heralded private dispute resolution entities, are paid for by the people, with public funds. These are public forums, in which the presumption of access by the public should not be taken lightly. Courts should eschew a knee-jerk imposition of confidentiality in settlements.

The current practice has no justification beyond many defendants' improper interest in hiding misconduct. The fact that this has always been done this way is no excuse. When defense counsel insists on secrecy as a condition of settlement, or go further by insisting on the attorney's waiver of his/her right to be an effective advocate in future cases, there are serious ethical implications, and the system of justice is adversely affected.

The fault, however, also lies with the plaintiff's bar. If we too willingly accept such provisions, we may do harm not only to other victims, but also to the legal profession and the search for justice. By concerted action, however, all of us can contribute to an environment in which these demands are rarely made, if ever, and in which courts subject them to the heightened scrutiny.

VII. Conclusion

Secrecy agreements such as those discussed in this article are more often than not devices for hiding information related to issues of great public, be it sexual misconduct, police brutality or the public's exposure to dangerous products. If a settlement can be brought about only by throwing a shroud of secrecy over matters of public concern, then perhaps the settlements should be rejected as a misuse of the court system and a perversion of our responsibilities as attorney-advocates. The public exposure of trials, with full public access to critical testimony and discovery materials is the reverse side of this equation. This is indeed a small price to pay for the benefits derived from a truly public court system.

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[51] *Id.*