

COMMENTARY

Gagging On the Public Interest

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I. INTRODUCTION

Suppose that a chain of motels was turning away black customers, falsely claiming that there were no vacancies. A public interest law firm (PILO) finds a suitable plaintiff, and sues under the civil rights laws barring discrimination in public accommodations.¹ The motel chain offers a substantial sum of money in settlement; however, the settlement is conditioned upon total confidentiality. Neither the terms of the settlement, nor even the fact of the settlement, can be disclosed by either the PILO or its client. Since the terms of the settlement are otherwise in the best interests of the individual client, the PILO lawyer feels that she has no choice but to advise her client to accept them.

The PILO managing board agrees that the lawyer has done the right thing but is not pleased with the gag order.² It had hoped to expose the motel chain's misconduct, and its consequences, to the public.³ Moreover, public-

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1. 42 U.S.C.S. § 2000a (Law. Co-op. 1989).

2. For the remainder of this article, the term "gag order" will refer to any provision on confidentiality. As to settlements, such provisions often merely prohibit the parties from revealing the terms of the settlement. However, they can, as in the case described, prohibit the parties from revealing the fact of the settlement as well. Gag orders are even more prevalent in the discovery process. See *infra* notes 25 and 27.

3. The Seventh Circuit has commented:

[I]n our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.

Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

Litigation by PILOs has been recognized as a form of expression protected by the First Amendment. *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979); see also *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment. . . . It is thus a form of political expression."); *In re Primus*, 436 U.S. 412, 431-32 (1978) (free expression includes not only description of facts, but also persuading to action). See generally Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

ity about the lawsuit would have been good for the PILO.⁴ Had it known at the outset that the case would be settled with a gag order, the PILO might have declined to take the case, and used its finite resources to achieve a more public result.

The board wants to prevent a recurrence, but it feels that it would only be fair if future clients understood at the outset that such gag orders would not be tolerated. Accordingly, the PILO adds a new clause to its standard retainer agreement. The new clause provides that, in exchange for free legal services, the client agrees not to accept a settlement offer conditioned upon a gag order without the PILO's consent.⁵

Surely, PILOs should be able to protect their interests when confronted with gag order settlement offers. Will the retainer agreement clause work? This commentary will discuss whether or not such a clause is valid under the *ABA Model Rules of Professional Conduct*. It will also discuss whether there are, or ought to be, other ways for PILOs to achieve this result.

II. THE *MODEL RULES*

A. CLIENT AUTONOMY

The problem is one of client autonomy. The client, not the lawyer, determines the desired ends of a legal task. The lawyer may only select the legal means to those ends.⁶ Between means and ends, the settlement decision is in the category of ends; therefore, only the client can decide whether or not to

4. All lawyers love to publicize their successes. PILOs have a unique interest in publicizing even their failures. It is important that potential members and contributors be made aware of their litigation activity, whatever the result. Also, publicity on even unsuccessful litigation puts potential defendants on notice that their activities will, at least, be challenged in court.

5. The story about the motel is fictional. However, the part about the gag order settlement and the PILO's amended retainer clause is real. The author is a member of the board of the PILO, which wishes to remain anonymous. Although the members of the board were told about the gag order, they were not told about the facts of the settlement.

In fact, the PILO added language to its retainer agreement covering both the gag order problem and the problem of settlements conditioned upon the waiver of statutory fees. As to the fee waiver problem, there was a precatory request that the client think carefully before accepting such a settlement. Although these two problems are clearly related, I feel that the fee waiver problem has been covered more than adequately elsewhere. See Hungar, *The Ethics of Fee Waivers: Negotiation of Statutory Attorney's Fees in Civil Rights Cases*, 5 YALE L. & POL'Y REV. 157 (1986); Comment, *Settlement Offers Conditioned Upon Waiver of Attorney's Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793 (1983). See generally Symposium: *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984). Some have argued that the retainer agreement can provide as follows: the legal services will be free, unless the client accepts a settlement conditioned upon a fee waiver. In that case, the PILO will charge a fee, and take it from the settlement proceeds. I agree with Hungar that such a retainer clause would invalidly restrict the client's right to settle. See Hungar, *supra*, at 173-175.

6. See MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 1.2(a) and Comment (1983) (amended 1987); see also Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981) (concerning whether attorneys know what is in the best interests of their client).

settle.⁷ Even if the settlement will have an effect on the lawyer's fee, the lawyer cannot veto the client's unilateral decision.⁸

This principle of client autonomy is codified in Rule 1.2(a) of the *Model Rules*, which provides in part:

A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.⁹

7. *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892, 894 (10th Cir. 1975); *Wahl v. Strous*, 344 Pa. 402, 405-06, 25 A.2d 820, 822 (1942); *Dannenberg v. Dannenberg*, 151 Kan. 600, 603-04, 100 P.2d 667, 669 (1940) (attorney-consent provisions are void as against public policy, except in divorce cases); *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.*, 530 F. Supp. 910, 913 (E.D. Pa 1981); *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 419 A.2d 417 (1980) (client's consent to settlement is revocable by client); *Cummings v. Patterson*, 442 S.W.2d 640 (Tenn. 1968) (provision that client must secure approval of counsel before settling was invalid); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (Preliminary Draft No. 6, 1990).

8. *See Giles v. Russell*, 222 Kan. 629, 635, 567 P.2d 845, 850 (1977) (neither valid contingent fee contract nor attorney's lien can interfere with client's right to settle); *cf. Nichols v. Orr*, 63 Colo. 333, 337, 166 P. 561, 562 (1917) (client may settle in good faith regardless of the preferences of the attorney).

But see LA. REV. STAT. § 37:218 (West 1988) (attorney and client may stipulate in a written contingent fee contract that neither will settle without the other's written consent). The statute provides:

By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. *In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim.* Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. *After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void, and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made.*

Id. (emphasis added). *See Southern Shipbuilding Corp. v. Richardson*, 363 So. 2d 1329, 1333 (La. Ct. App. 1978) *aff'd*, 372 So. 2d 1188 (La. 1979) (statute creates option allowing attorney and client to agree not to settle without one another's consent); *In re Vlaho*, 140 So. 2d 226, 230-31 (La. Ct. App. 1962) (statute allows attorney and client to enter into written contract which includes a consent provision, except that such limitation on client's right to settle is enforceable only to the extent it is limited by such contractual provisions); *but see Scott v. Kemper Insurance Co.*, 377 So. 2d 66, 69-70 (La. 1979) (court refuses to hold a settlement to be null and void, noting that La. Rev. Stat. § 37:218 must be read so as not to conflict with the *Model Code of Professional Responsibility*).

9. MODEL RULES Rule 1.2(a). One exception to the rule that the client has unlimited discretion over settlements is found in Rule 5.6: "A lawyer shall not participate in offering or making: . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." MODEL RULES Rule 5.6. *See* Comment, *supra* note 5, at 809 (implications of the *Model Code's* recognition that exclusive authority to settle resides in the client).

Class action lawsuits can also be special cases. *See County of Suffolk v. Long Island Lighting*

B. RETAINER AGREEMENTS

It is possible for the lawyer to limit the objectives—the ends of the legal task—at the outset of representation. Such agreements are permissible under Rule 1.2(c), which provides an exception to Rule 1.2(a): “A lawyer may limit the objectives of the representation if the client consents after consultation.”¹⁰ That is precisely what the PILO attempted by inserting a clause in the retainer agreement.

Unfortunately, this exception does not apply to the settlement decision. The Comment to Rule 1.2, under the caption “Services Limited in Objective or Means,” provides in part:

An agreement concerning the scope of the representation must accord with the Rules of Professional Conduct and other law. Thus, *the client may not be asked* to agree to representation so limited in scope as to violate Rule 1.1, or *to surrender* the right to terminate the lawyer’s services or *the right to settle litigation that the lawyer might wish to continue*.¹¹

Lawyers cannot, therefore, choose to avoid the ethical obligations of the Rules merely by making prior agreements with clients. Under the current *Model Rules*, the client calls the shots on settlement offers, and no clause in the retainer agreement can take this power away from her.¹²

Co., 907 F.2d 1295 (2d Cir. 1990) (approval of settlement despite objections by majority of the members of the plaintiff class).

10. MODEL RULES Rule 1.2(c).

11. MODEL RULES Rule 1.2 comment (emphasis added).

12. In the summer of 1989, I wrote to 25 PILOs, representing all points on the political spectrum. I asked if they had experienced the problem of gag order settlements, and if they had language in their retainer agreements which addressed the problem. Four respondents indicated that they had never experienced the problem, and that there was no language in their retainer agreements to deal with it. Letter from Sierra Club Legal Defense Fund, Inc. to Joel Newman (September 21, 1989); Letter from National Emergency Civil Liberties Committee to Joel Newman (August 2, 1989); Letter from Lawyers’ Committee for Civil Rights Under Law to Joel Newman (August 9, 1989); Letter from National Gay Rights Advocates to Joel Newman (undated). Two PILOs wrote that they had experienced the problem, and accepted the gag order settlement. Both felt that there was no other ethical choice under the current rules. Letter from The Southern Poverty Law Center to Joel Newman (July 25, 1989); Letter from Pacific Legal Foundation to Joel Newman (August 8, 1989).

In my telephone conversations with public interest lawyers, the argument was made that a retainer agreement could recite that the objective of the legal representation was, for example, “The elimination of racist practices in the state of X.” The unstated premise of such a retainer agreement clause would be that the objective of the representation was *not* merely to obtain monetary damages. Therefore, any monetary settlement would be unacceptable. It is my view that such a clause would be so close to an outright restriction on the client’s right to settle that it would be invalid under Rule 1.2.

An additional problem arises under Rule 1.8(d), which provides: “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.” MODEL RULES Rule 1.8(d) (1983).

Does the clause in the retainer agreement give the PILO media rights within the meaning of Rule

C. CONFLICTS AND WITHDRAWAL

Do the Rules mean that if the client accepts the settlement the lawyer must go along, no matter what? Perhaps not. What if the defendant offered a handsome sum of money in settlement, provided that he had the right to punch you, plaintiff's lawyer, in the nose?¹³ If your client accepted such a settlement, would you have to submit yourself to a punch in the nose?

The *Model Rules* do not reach quite so far. Rule 1.16(b)(3) provides in part:

(b) . . . a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: . . .

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.¹⁴

Rule 1.7(b), which would also apply, states, in pertinent part:

A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.¹⁵

Even lawyers are interested in their own bodies, especially their noses. Any settlement offer which puts the lawyer's nose in jeopardy would adversely affect the representation. It is inconceivable that any lawyer could reasonably believe otherwise. The proviso of Rule 1.7(b)(1) could therefore not be met in such a situation, and the lawyer would have to withdraw.¹⁶

Lawyers, therefore, are not totally without options when they disagree

1.8(d)? It is doubtful that the drafters had this situation in mind, but there is nothing in the wording of the Rule, nor in the Comments, which proves conclusively that this situation falls outside of the Rule.

13. See Green, *As Long as Iron Mike Isn't a Friend Of the Family, It's a Tolerable Deal*, Wall St. J., Oct. 17, 1989, at B1 col. 1 (proposed settlement forgoes monetary damages for the right to punch opposing counsel).

14. MODEL RULES Rule 1.16(b). Note that, in light of the disjunctive "or if" at the end of Rule 1.16(b), if the lawyer considers the punchout settlement to be repugnant or imprudent under Rule 1.16(b)(3), then it does not matter that the lawyer's withdrawal, and refusal to be punched out, would have a "material adverse effect on the client. . . ." *Id.*

15. MODEL RULES Rule 1.7.

16. The Comment to Rule 1.7 provides in part, under the caption "Loyalty to a Client": "If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation." MODEL RULES Rule 1.7 comment.

There is an argument that a PILO is inherently in conflict within the meaning of Rule 1.7(b) whenever it litigates a test case. The interests of the PILO are in creating a favorable precedent. Often, the interests of the individual client are quite different. See *NAACP v. Button*, 371 U.S. 415, 448-49 (1962) (Harlan, J., dissenting) (stressing that staff attorneys for the NAACP must abide by the organizations's policies); *In re Primus*, 436 U.S. 412, 445-446 (1978) (Rehnquist, J., dissenting) (reasonableness of a State's fear that a lawyer's desire to influence the substantial liberties in ques-

with their clients over settlements. They can withdraw. But what does withdrawal accomplish? It accomplishes a great deal in the punchout settlement case, where, without the lawyer's participation, the settlement falls apart. It may have some small effect upon an indigent client of a PILO, for, if the PILO withdraws, then the opportunity for free legal services disappears.¹⁷ Generally, however, even in the case of indigent PILO clients, if the lawyer withdraws, the client will simply accept the settlement on her own. Withdrawal may salvage the lawyer's dignity, but it will not defeat the gag order settlement.

D. CONFIDENTIALITY

The very nature of the gag order settlement gives the lawyer another option to consider. Even if the client agrees to the settlement, the gag order will be defeated if the lawyer simply divulges the secret. Disclosure by the lawyer, however, would breach the lawyer's duty of confidentiality, since both the nature of the lawsuit and its settlement are "information relating to representation of a client".¹⁸ Both are therefore client confidences, not to be revealed without the client's consent.¹⁹ Moreover, the lawyer's duty to respect these confidences continues not only during the representation, but also after withdrawal.²⁰ Therefore, if the client wants the secret kept, the lawyer cannot reveal it without violating the *Model Rules*.

III. BEYOND THE RULES: CURRENT STATUTORY AND CASE LAW REMEDIES

Even though the *Model Rules* are not helpful to PILOs, other statutes and case law doctrines are. When a state government is the defendant, state stat-

tion may replace duty to advance client's interest); Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 497-502 (1976).

It is my belief that such inherent conflicts do not prevent PILOs from representing their clients adequately in test cases; however, the potential conflict should be discussed with the client. See also Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1461-1469 (1981) (arguing that the fiduciary duties of public interest lawyers toward their individual clients ought to be relaxed in test case litigation, provided that attorney and client set forth their objectives contractually).

17. The problem is much more serious for an indigent PILO client if the *client* wants to litigate and the *PILO* wants to settle. In that event, if the PILO withdraws, and the client cannot afford another lawyer, then she has no choice but to accept the settlement. Even in this case, however, I do not believe that the PILO should be prohibited from withdrawing. Note that the lawyer's obligations to the client after withdrawal are limited to those steps "reasonably practical to protect a client's interests." MODEL RULES Rule 1.16(d).

18. MODEL RULES Rule 1.6 (confidentiality of information).

19. *Id.* The Comment provides, in the fifth paragraph: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.* comment.

20. MODEL RULES Rule 1.6 comment (under the caption "Former Client").

utes restrict gag orders. As to non-government defendants, although there are few statutes, case law doctrines sometimes allow the unsealing of what has been sealed.

A. WHEN THE GOVERNMENT IS THE DEFENDANT

When a PILO is the plaintiff, usually the government is the defendant. It is particularly obnoxious for a party to ask that a settlement be hidden from public view when that party is the keeper of the public trust. One recently-enacted statute provides specifically that settlements with the state government as defendant may not be kept secret.²¹ Moreover, case law in many states makes clear that such settlements are public records under the state Public Records and Freedom of Information Acts. In those states, therefore, such settlements can be disclosed.²²

B. AS TO ALL DEFENDANTS

In April of 1990, pursuant to a state statute,²³ the Supreme Court of Texas promulgated rules which make it much more difficult to seal court records.²⁴ In related developments, Virginia enacted a statute which provides that information obtained through discovery in personal injury or wrongful death actions may be shared with other lawyers bringing similar actions, even if the information is subject to a protective order. The sharing may only be accomplished after a court hearing.²⁵ Florida has enacted the Sunshine in Litigation Act, which prevents courts from entering orders or judgments which would have the effect of concealing a "public hazard," and which declares any agreement which would have such an effect to be con-

21. N.C. GEN. STAT. § 132-1.3 (1989).

22. See, e.g., *News & Observer Publishing Co. v. Hospital System, Inc.*, 55 N.C. App. 1, 12-13, 284 S.E.2d 542, 549 (1981), *review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982), *cert. denied, appeal dismissed*, 459 U.S. 803 (1982) (terms of settlements made by county health system in actions for wrongful termination of agreements were considered "public records"); *Dutton v. Guste*, 395 So. 2d 683, 685 (La. 1981) (documents of settlements between various architects and engineers and the state were "public records"); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. Dist. Ct. App. 1987), *review denied*, 520 So. 2d 586 (Fla. 1988) (disclosure of litigation documents); *Register Division of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal. App. 3rd 893, 908-09, 205 Cal. Rptr. 92, 102 (Ct. App. 1984) (county required to disclose to newspaper documents regarding secret settlement between county jail inmate and county); *Norwood v. F.A.A.*, 580 F. Supp. 994, 999 (W.D. Tenn. 1983) (settlements with terminated air traffic controllers subject to disclosure); *Daily Gazette v. Withrow*, 350 S.E.2d 738 (W.Va. 1986) (settlements of federal civil rights actions within disclosure requirements of Freedom of Information Act).

Four state statutes provide that litigation papers (including the attorney work product) involving public agencies become part of the public record once the litigation, including all final appeals, is complete. CAL. [GOV'T] CODE § 6254(b) (Deering 1982); CONN. GEN. STAT. ANN. § 1-18a(e)(2) (West 1958); N.D. CENT. CODE § 44-04-19.1 (1989); ORE. REV. STAT. § 192.501 (1989).

23. TEX. [GOV'T] CODE ANN. § 22.010 (Vernon 1989).

24. TEX. R. CIV. P. ANN. r. 76(a) (Vernon 1990) (effective September 1, 1990).

25. VA. CODE ANN. § 8.01-420.01 (1989).

trary to public policy and unenforceable.²⁶ Similar legislation has been proposed elsewhere.²⁷

There has been significant press coverage of the problem of gag orders.²⁸ The problem is particularly pressing in the products liability area, in which a gag order might mean that other potential victims will not be warned. The problem in public interest litigation is analogous. Gag orders in such cases might leave other potential victims unaware of their constitutional rights. In light of this press coverage, similar legislation will likely be forthcoming in other states.²⁹ This legislation may also apply to settlements as well as discovery documents.³⁰

In addition, a growing body of case law holds that information which was sealed pursuant to a gag order settlement may be unsealed.³¹ Of course, the

26. FLA. STAT. § 69.081 (1990) (effective July 1, 1990).

27. H.R. 129, 101st Cong., 1st Sess. (1989). This legislation specifically prohibits settlements in product liability cases conditioned upon an agreement by the claimant and her attorney to return or destroy documents related to the action. A related bill was introduced in Maryland in 1989 and referred to Committee. House Bill No. 977, Maryland House of Delegates (1989). However, Delegate Rosenberg, who introduced the bill, has decided that existing case law is more effective than his proposed statute. Therefore, he decided against introducing similar legislation in 1990. Letter from Delegate Samuel I. Rosenberg to Martha Thomas, Wake Forest Law Librarian (Nov. 25, 1989).

28. See, e.g., Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, *Newsday*, April 24, 1988, at 3; Walsh & Weiser, *Court Secrecy Masks Safety Issues*, *Wash. Post*, Oct. 23, 1988, at A1, col. 3; Walsh & Weiser, *Hundreds of Cases Shrouded in Secret*, *Wash. Post*, Oct. 24, 1988, at A1, col. 1; Weiser, *Forging a "Covenant of Silence"*, *Wash. Post*, March 13, 1989, at A1 col. 1; Walsh, *Va. Firms Seek Veto of Disclosure Bill*, *Wash. Post*, March 26, 1989, at C6, col. 1 (articles dealing with settlements and the related problem of confidentiality orders in the discovery process). The Association of Trial Lawyers of America adopted a resolution against secrecy orders at its Board of Governors meeting on May 6, 1989. Trial Lawyers for Public Justice, a PILO based in Washington D.C., established "Project ACCESS" to fight court secrecy nationwide in October of 1989. An ABA group has also taken a position against gag orders. ABA Report of the Action Commission to Improve the Tort Liability System, Recommendations 10-12 (1987). See generally F. HARE, CONFIDENTIALITY ORDERS; THOMAS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: CONFIDENTIALITY AND SECRECY ORDERS IN CIVIL CASES (1989); Annotation, *Public Access to Records and Proceedings in Civil Actions in Federal District Courts*, 96 A.L.R. FED. 769 (1990).

29. See note 28, *supra*, for some efforts that may lead to legislative activity in this area.

30. Some of the existing legislation in this area already applies to discovery documents. See note 25, *supra* and accompanying text.

31. See, e.g., *United States v. Kentucky Utilities Co.*, 13 Fed. R. Serv. 3d (Callaghan) 545, 554-55 (E.D. Ky. 1989) (documents sealed as part of a settlement order, with U.S. as one of the parties, made available to a newspaper); *Bank of Am. Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339, 346 (3d Cir. 1986) (district court abused its discretion in denying a contractor's motion to unseal a settlement agreement); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (district court abused its discretion in ordering total closure of public record of a separate settled action involving same party); *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 317-18, 196 Cal. Rptr. 871, 877 (Cal. App. 4 Dist. 1983) (trial court's refusal to modify order sealing court record in sexual molestation case remanded with instructions to balance interests of private litigants and public policy). *But see* *Federal Deposit Insurance Corporation v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982) (confidentiality of settlement terms affirmed).

In a related matter, the Supreme Court has held that the public has a right of access to records

case law doctrine is not all that helpful to a PILO, as it is very expensive and time consuming to reverse a gag order through court action.

IV. POSSIBILITIES FOR REFORM

The current movement in the courts and legislatures to prohibit gag orders when the government is the defendant, and to restrict both gag order settlements and the various gag orders on discovery materials for all defendants, should continue. When the defendant is not an agency of the government, however, these statutory and case law restrictions are still cumbersome tools. What is needed is a specific provision in the *Model Rules* that the retainer agreement described in the Introduction to this article will be valid.

The appropriate place in the *Model Rules* would be Rule 1.2(c). A new sentence could be added which provides:

A public interest law organization may, by prior written agreement with the client, retain the sole right to accept or reject settlement offers conditioned upon confidentiality. Such a right may only be exercised after consultation with the client.³²

and proceedings of courts in criminal trials. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (right of public to attend criminal trials); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) (public and press may attend trial and report what they have observed; however, common-law right to inspect judicial records did not compel release of Watergate tapes).

Two circuits have held that a right of access to civil trials exists. See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3d Cir. 1984) (newspaper publishers' right of access to civil trial); *In re Continental Ill. Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (newspapers entitled to corporate committee report). But see *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 529 F. Supp. 866, 913 (E.D. Pa. 1981) (no right to public inspection of public records); *Newman v. Graddick*, 696 F.2d 796, 802-03 (11th Cir. 1983) (same).

See also Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 66 (1983) (PILOs as a group have special first amendment interests, which should restrict any gag orders on their litigation).

32. Since Rules 6.1, 6.2 and 6.4 appear to deal with PILOs without defining them, I am not urging that they be defined here. However, if a definition were needed for the Terminology section, such a definition could read:

Public Interest Law Organization Any organization organized for the practice of law for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy or criminal defense.

This definition is inspired by a former provision of the New York Penal Code concerning an exception to the rule that corporations may not practice law, cited in *Application of Community Action for Legal Services, Inc.*, 26 A.D.2d 354, 356, 274 N.Y.S.2d 779, 783 (App. Div. 1966).

Although it may be beyond the scope of this article, this same language could be extended to allow PILOs to retain decisional rights over other settlement agreements, especially those conditioned upon fee waivers.

V. CONCLUSION

Imagine an ordinary civil case in which the defendant has a legitimate reason for wanting a gag order settlement.³³ For example, take a contractual dispute between an actress and a movie producer. The dispute arises over a difference of opinion about the terms of the contract. The movie producer offers a settlement; however, the producer is concerned that, if word of the settlement were to get out, the movie magazines would misinterpret it and she would get a bad reputation. Accordingly, she conditions her settlement offer upon confidentiality. The actress has the advice of counsel on the adequacy of the settlement. Presumably, she can make her own judgments as to whether a publicized settlement would help or hurt her career.

If the two parties agree to a gag order settlement, should it be enforceable? If any gag order settlements are to be allowed, this one should. Of course, the public has an interest in all litigation. The courts are public bodies. The public has a right to know what they do, and to decide whether they are doing it properly. Furthermore, litigation creates precedent, which will have an effect upon the public in the future.³⁴ Also, in this particular hypothetical, the public fascination associated with the motion picture industry is present. But that is all. It is not unreasonable to argue that the public interests here are outweighed by the legitimate privacy interests of the parties.

Who should decide whether to accept the gag order settlement? Clearly, the actress-client should decide. After all, she is paying; it is her lawsuit. Moreover, the consequences of the gag order *per se* upon her lawyer are minimal.

Now consider a case brought by a PILO. Assume that the defendant proposes a gag order settlement. Should such a gag order be allowed? If so, who should make the decision—the PILO or the client?

There is a much stronger argument that the gag order should not be allowed in the first place. If the defendant is a public entity, its litigation ought to be public knowledge. Even if the defendant is private, however, the public should have a right to know. A PILO's litigation is, by definition, brought in the public interest.³⁵

If the gag order were to be allowed, who should decide to accept or reject it, the PILO or the client? The client will have the same reactions to publicity as in a non-PILO case. Publicity may help or hurt her business interests. Personally, she may crave the limelight, or be painfully shy. However, the

33. If the defendant's need for a gag order were not legitimate, then the gag order should be void as against public policy. *See supra* note 28.

34. *See generally* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (taking disputes all the way through to judgment is important for establishing legal precedents and for communicating to the public at large).

35. *See supra* note 3.

PILO will have an interest in publicity which goes far beyond that of the typical lawyer.³⁶ Often, the desire to make a public statement is a major factor in a PILO's case selection. How often can a private lawyer make that claim? The PILO's interest is strong, while the client's is relatively weak. Provided that there is advance notice in the retainer agreement, this decision should be the PILO's call.

The PILO is, indeed, a special case. Whether we agree with it or not, we all profit when a PILO forces *public* debate on important issues. PILOs should be allowed to restrict gag order settlements by contractual provision, without running afoul of the ethics rules. If the change is made correctly, the harm to client autonomy will be minimal—a small price to pay for a huge gain in public welfare.

36. *See supra* note 4.

