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Sealing and Unsealing Wrongful Death and Minor Settlement Documents

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SEALING AND UNSEALING WRONGFUL DEATH AND MINOR SETTLEMENT DOCUMENTS

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Public access to wrongful death and minor settlements brings into conflict two traditional policies. First, settlements are historically regarded as confidential. Second, documents filed with the court are generally open to public inspection. In this Article, Mr. Forman analyzes the legal implications of access to traditionally private documents which are required by statute to be filed with the court.

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INTRODUCTION

Our federal and state constitutions delegate power to the judiciary to regulate and resolve disputes.[1] Those same constitutions seek to protect our democratic society by authorizing the legislative and executive branches of our government to check and balance the potential abuse of judicial power.[2]

The legislative and executive branches are not the only entities that check and balance the judiciary power. The public and the media check and balance the judiciary's power by observing courtroom proceedings, reviewing judicial records, and expressing opinion through comment and election. This process enables the media and the public to measure the quality of the judiciary's performance and determine whether the judiciary is promoting the interests of democracy.

The media's and the public's checking and balancing role of the judiciary does not rest solely with the judiciary's handling of well publicized criminal matters. The media and the public have a strong concern for how the judiciary handles civil matters as well. In order to address this concern, the public and the media seek access to the courtrooms to view how the courts resolve legal issues either in civil motion practice, the trial setting, or at the appellate level. They also desire access to the documents filed with the court, including the settlements filed with the courts to make sure that: (1) civil suit victims receive their appropriate compensation and retribution, and (2) the judicial system has deterred the defendants and others from committing again the same type of act that generated the previously settled civil suits.

In most cases the media and public would not have access to settlement in formation because the settlements have not been filed with the court. In fact, a settlement is not usually filed with the court[3] unless there are some articulated reasons which

1. U.S. CONST. art. III; MINN. CONST. art. VI.

2. U.S. CONST. art. I & II; MINN. CONST. art. IV & V.

3. Historically, terms of settlements of civil disputes have been held non-public. *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981), *aff'd sub. nom.*, FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) ("Secrecy of settlement terms under such conditions is a well-established American litigation practice."); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 204 (Minn. 1986) ("Historically, the majority of settlements entered into between parties have been private.").

require the trial court to become aware of a settlement and its terms.

Prior to revealing a settlement to the court, the settling parties occasionally stipulate that the court enter an order that the settlement information, which may otherwise become part of the public record, be held confidential. When the parties seek such a confidentiality order, the trial court must decide to what extent it can preclude the public and the media from obtaining the settlement information. Similarly, when the media or the public seek access to settlement information after the trial court has sealed the settlements pursuant to a confidentiality order the trial court must decide whether it can continue to preclude the media or the public access to the sealed settlement information.

This Article analyzes substantive and procedural issues raised when: (1) settling parties request a trial court to enter an order of confidentiality and seal wrongful death[4] and minor[5] settlements; and (2) a trial court is to decide to what extent it can preclude the media and the public from gaining access to the same court sealed settlements.

I. Settlements Requiring Court Involvement

In Minnesota, when representatives[6] of parties settle wrongful death and minor injury disputes on behalf of the parties, those settlements require court involvement. The role of the trial court in minor settlements differs from its role in wrongful death settlements. In minor settlements, the trial court approves the settlement figure,[7] while in wrongful death matters, the trial court approves only the amount that is distributed to each of the next of kin.[8]

In minor settlements the minor is normally represented by

4. Minn. Stat. § 573.02 (1986); Code R. Dist. Ct. 2.

5. Minn. Stat. § 540.08 (1986) ("[n]o settlement or compromise of the action is valid unless it is approved by a judge of the court in which the action is pending.").

6. Minn. Stat. §§ 573.02, 540.08.

7. *Id.* § 540.08; *see also Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200 n.1 ("[B]ecause one of the suits involved a minor child, Judge Schumacher was required to approve the settlement figure stipulated to by the parties.").

8. Minn. Stat. § 573.02 (1986); Code R. Dist. Ct. 2; *see also Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200 n.1. ("[T]he trial court had no jurisdiction in those cases brought under section 573.02 and Rule 2 to approve, or disapprove, of the settlement amounts agreed to by the parties. The court could only approve the *distribution* of those funds among the various heirs.") (emphasis in original); Bond v. Roos,

his guardian or parent.[9] Under Minnesota law, all settled suits involving a minor child require a trial court to approve the parties' stipulated settlement figure.[10] It is the court's role to make certain that the settlement is fair and reasonable for the minor, and structured in such a way that it will give the minor the greatest benefit in the most protective fashion.[11]

Wrongful death actions are normally brought by a representative of the next of kin (trustee).[12] Under Minnesota law, the trial court is required to approve the distribution of settlement funds among the various next of kin in a wrongful death action.[13] The trial court does not have the jurisdiction, however, to approve or disapprove the settlement amounts to which the parties agreed.[14]

In both of these settlement situations, the appropriate petitions and supporting documents are submitted to the court for review. The court normally hears testimony from the representatives of the settling parties as to why the settlement figure or the distribution is reasonable. The testimony is transcribed and a record is established. If the trial court approves, it issues an order approving the settlement figure or distribution amount.

The parties may request that the court order all settlement information to be held confidential. The wrongful death and minor settlement statutes and rules do not state if the court may seal settlement information and hold it confidential. Determination of this issue is within the trial court's discretion[15]

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358 N.W.2d 654 (Minn. 1984); Rath v. Hamilton Standard Div. of United Technologies Corp., 292 N.W.2d 282 (Minn. 1980).

9. MINN. STAT. § 540.08.

10. *Id.*

11. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205 ("court approval of settlements involving minors is to *protect minors*") (emphasis in original). Minnesota Statutes section 540.08 provides that:

> upon petition of the parent, the court may order that the property [settlement consideration] received be invested in securities issued by the United States, which shall be deposited pursuant to the order of the court, or that the property be invested in a savings account, savings certificate, or certificate of deposit, in a bank, savings and loan association, or trust company, or an annuity or other form of structured settlement, subject to the order of the court.

Id.

12. *See supra* note 4.

13. *See supra* note 8.

14. *Id.*

15. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984) (Washington "Rule

and involves the application of both constitutional[16] and common law principles.[17]

II. To Seal the Settlement Documents

A. *Trial Court Power to Seal Settlement Documents*

The trial court has the inherent power to seal documents.[18]

26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."); Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978) (trial court's discretion is "to be exercised in light of the relevant facts and circumstances of the particular case"); Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986) ("the issue before us is whether the district court abused its discretion in holding that the judicial policy of promoting the settlement of litigation justifies the denial of public access to records and proceedings to enforce such settlements"); United States v. Webbe, 791 F.2d 103, 106 (8th Cir. 1986) (quoting Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431 n.18 (5th Cir. 1981) ("When the concern is the efficient administration of justice and the provision to defendants of fair trials, the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge."); Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 ("The court must make its own legal determination in each case . . . . The right of access is therefore best left to the sound discretion of the trial court . . . .").

16. *See, e.g.*, *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203-05 (the sealing of confidential settlement papers potentially raises first amendment and right of privacy constitutional issues).

17. *See, e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 343-44 (right of access may be grounded in the common law of first amendment); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205 (absent a constitutional issue the courts normally apply a common law standard of access to sealed documents).

18. *Warner Communications, Inc.*, 435 U.S. at 598 ("[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes"); United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985) ("[A] court, in its discretion, may seal documents 'if the public's right of access is outweighed by competing interests.' ") (quoting *In re* Knight Publishing Co., 743 F.2d 231, 235 (4th Cir. 1984)); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 474 (6th Cir. 1983) ("trial courts have always been afforded the power to seal their records when the interest of privacy outweigh the public's right to know"); State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 909 (Fla. 1977) ("a trial court has the inherent power to control the conduct of the proceedings before it"); State *ex rel.* Bingaman v. Brennan, 98 N.M. 109, 112, 645 P.2d 982, 984 (1982) ("[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes") (quoting *Warner Communications, Inc.*, 435 U.S. at 598); *see also In re* Estate of Hearst, 67 Cal. App. 3d 777, 783, 136 Cal. Rptr. 821, 824 (1977) (the judge's inherent power extends to control over access to court records to protect litigants' rights); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

Section 47 of the Minnesota Civil Trialbook provides in pertinent part, "[b]riefs, depositions and other documents or an exhibit such as a trade secret, formula or model shall be treated as confidential if all parties stipulate to that effect or if good cause is shown for such treatment." Minn. Civ. Trialbook § 47 (West 1984). Thus,

It has the discretion to decide if it will exercise that power to seal settlement documents and order them confidential.[19] In exercising its discretionary power, the trial court must apply the specific facts and interests in question to either a constitutional or a common law test.

B. Constitutional Law/Common Law Test Debate

1. National Law

This country's courts have not unanimously adopted either the constitutional law or the common law test. In fact, the courts disagree if the media's and the public's right to access to judicial records is protected by the constitution or the common law. The determination by the courts of whether the right to access is protected by constitutional law or common law dictates which test the trial court applies to seal judicial records.

When confronted with a request by the parties to seal and hold settlement documents confidential, a trial court balances the interests of the parties against the interests of the public and the media.[20] The key question for the trial court is how strict a test it should apply to determine if the documents should be sealed.

A majority of courts apply a common law analysis. These courts balance the interest of the parties against a presumption of access in favor of the public and the media.[21] A minority of

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a Minnesota court may seal files where the parties either stipulate to confidentiality, or show good cause for confidentiality. *See* Orliac v. Berthe, 765 F.2d 30, 31 (2d Cir. 1985) (request to "so order" stipulation denied without prejudice "to a further application for a more limited order backed up by an appropriate demonstration of its necessity and scope"); Sharjah Inv. Co. v. P.C. Telemart, Inc., 107 F.R.D. 81, 82 (S.D.N.Y. 1985) ("it would be improper to grant a protective order without first determining there is good cause").

19. *See supra* note 15.

20. *Knoxville News-Sentinel Co.*, 723 F.2d at 475; *In re* Application of Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981); United States v. Hubbard, 650 F.2d 293, 302 (D.C. Cir. 1980); *In re* Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 101 F.R.D. 34, 38 (C.D. Cal. 1984); *In re* Agent Orange Prod. Liab. Litig., 99 F.R.D. 645, 649-50 (E.D.N.Y. 1983); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

21. *See* Short v. Western Elec. Co., 566 F. Supp. 932, 933 (D.N.J. 1982); *State ex rel. Miami Herald Publishing Co.*, 340 So. 2d at 908. Some courts hold that there is a strong presumption of access. *See, e.g.*, United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982). Countervailing interests are needed to rebut the presumption. *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 98 F.R.D. 539, 545 (E.D.N.Y. 1983). "Thus a court, in its discretion may seal documents 'if the public's right of access is

jurisdictions, however, have raised the right of access to a first amendment constitutional right, holding that the trial court can only seal the documents if a compelling, narrowly tailored interest exists.[22]

a. Two-Part Test

Courts generally apply a two-part analysis to determine whether a constitutional or a common law test should be applied to determine access to court files.[23] First, the court examines the "proceeding or document to determine whether it has historically and philosophically been presumed open to the public."[24] Second, "If a historical and philosophical analysis leads to a 'presumption of openness' . . . , the court then examines the constitutional right asserted to determine whether it

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outweighed by competing interests.' " *Hickey*, 767 F.2d at 708 (quoting *In re* Knight Publishing Co., 743 F.2d at 235).

22. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (access to hearing and transcript, regarding impact of securities laws on corporations, to record damaging information about legal operations at annual meetings); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (first amendment right to report of special litigation filed with the court); *In re* Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1983) (access to civil contempt proceedings and transcripts); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (first amendment right to access to court record in an injunction proceeding); *In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (access to pretrial discovery in civil rights case); *In re* DeLorean Motor Co., 31 Bankr. 53 (E.D. Mich. 1983) (access to deposition and transcripts); Note, *Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts*—Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), 58 TEMPLE L.Q. 159, 159 n.3 (1985). *But see Seattle Times Co.*, 467 U.S. at 36 (heightened first amendment scrutiny is not applicable for protective order to restrict disclosure of pretrial discovery material); Note, *Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access*, 16 IND. L. REV. 861, 882-83 (1983). There the commentator stated:

> The party petitioning foreclosure has the burden of proving by clear and convincing evidence that closure is necessary to protect a countervailing interest . . . unless the Supreme Court clearly acknowledges a constitutional source for the public's right of access to judicial records, a procedure outlining standards for reviewing closure orders should assume a common law source for the right . . . . [This test] avoids the stringent standards enunciated by courts finding a constitutional source for the public's right of access.

Id. (citations omitted).

23. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-81 (1980) (access to criminal trial); Gannett Co. v. DePasquale, 443 U.S. 368, 378-93 (1979) (access to criminal pretrial hearing); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1173 (3d Cir. 1986) (access to environmental agency documents); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203-04 (access to settlement documents and transcripts).

24. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204.

'affords protection' to the proceeding or document in question."[25]

b. *First Amendment Right of Access*[26]

i. *Criminal Law*

In applying the two-part analysis, the United States Supreme Court has held that a first amendment constitutional right of access to criminal trials exists.[27] Where such a first amendment right exists, the Supreme Court has stated the court may deny media or public access only if it "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[28]

ii. *Civil Law*

While recognizing a first amendment right of access in criminal matters, the United States Supreme Court has not recognized a first amendment right of access in civil cases. However, it has reserved the issue for later scrutiny.[29]

Many lower courts have rejected a constitutional right of access to civil court files and records.[30] A minority have found

25. *Id.* (citations omitted) (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 575-81). If there is a first amendment right involved, the burden is on the settling parties to show a compelling interest to overcome such a constitutional right. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 680 (1972).

26. In order for a court to apply a constitutional test, the court must find a constitutional right involved. The applicable constitutional rights for the media and the public to obtain access to court documents are the first amendment rights. The first amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

First amendment issues exist when state action is involved. The acts of courts and judicial officers acting within their judicial capacities are considered state action. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 15 (1948) ("judicial action is regarded as action of the State"); United States v. Carpentier, 526 F. Supp. 292, 295 (E.D.N.Y. 1981), *aff'd*, 689 F.2d 21 (2d Cir. 1982) ("judiciary is an arm of the government"). When a court is asked to seal files, there is no state action. State action first occurs when the judge issues the order sealing the files.

27. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. 555 (1980) (plurality opinion).

28. *Globe Newspaper Co.*, 457 U.S. at 606-07; *see also* Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986).

29. *Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17.

30. *In re* Reporters Comm'n for Freedom of the Press, 773 F.2d 1325, 1336 (D.C. Cir. 1985); *see Edwards*, 672 F.2d at 1294 ("the right here in question is of non-consti-

that such a right does exist.[31] Those courts apply a compelling interest test similar to that applied by the United States Supreme Court in the access to criminal action cases. That test requires a party seeking to prevent access to demonstrate that a compelling governmental interest exists to overcome a presumption in favor of access.[32]

c. *The Common Law Right of Access*

While some jurisdictions apply a constitutional test, all courts agree that a common law right to inspect and copy civil court records exists.[33] "The right to inspect and copy records is considered 'fundamental to a democratic state' "[34] and is "based upon the principal that 'what transpires in the courtroom is public property.' "[35]

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tutional origin"); *Belo Broadcasting Corp.*, 654 F.2d at 426 ("The broadcasters assert both a constitutional and a common law right of access to the tapes. We deal first with the claimed right of constitutional derivation: there is no such first amendment right."); State *ex rel.* Tallahassee Democrat, Inc. v. Cooksey, 371 So. 2d 207, 210 (Fla. Dist. Ct. App. 1979) ("There is a basic and fundamental difference between closing an open court proceeding . . . and closing all or a portion of a court file."); Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 871 (Fla. Dist. Ct. App. 1979) ("[W]e find no basis for argument that First Amendment rights entitle petitioners to require the opening of court records properly sealed by the trial judge."); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204; *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

31. *See Wilson*, 759 F.2d at 1570-71; *Publicker Indus., Inc.*, 733 F.2d at 1070; *Continental Ill. Sec. Litig.*, 732 F.2d at 1308; *Iowa Freedom of Information Council*, 724 F.2d at 661; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179; *San Juan Star Co.*, 662 F.2d at 115; *DeLorean Motor Co.*, 31 Bankr. at 55.

32. *See, e.g., Press-Enterprise Co.*, 106 S. Ct. at 2741 (the presumption of access to criminal preliminary hearing overcome by overriding interest); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203 (compelling governmental interest required to overcome presumption of access).

33. *Warner Communications, Inc.*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents."); *Publicker Indus., Inc.*, 733 F.2d at 1066; Newman v. Graddick, 696 F.2d 796, 802-03 (11th Cir. 1983); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 895 (E.D. Pa. 1981); *see Estate of Hearst*, 67 Cal. App. 3d at 782, 136 Cal. Rptr. at 823-24; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202 ("It is undisputed that a common law right to inspect and copy civil court records exists."); State *ex rel.* Bilder v. Township of Delavan, 112 Wis. 2d 539, 550, 334 N.W.2d 252, 260 (1983); *see also* Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or on Camera*, 16 GA. L. REV. 659, 666-72 (1982) (right to judicial records has been recognized in the United States).

34. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202 (quoting United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976)).

35. *Id.* at 202 (quoting Craig v. Harney, 321 U.S. 367, 374 (1947)). The purpose

The right to inspect and copy records has caused the courts to recognize a presumption in favor of access to judicial

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of the right of inspection is to generate "an informed and enlightened public opinion." *Id.* at 202 (quoting *Mitchell*, 551 F.2d at 1258).

Courts that do not apply a constitutional test implicitly determine that first amendment protections exist only when a court prohibits access to the court room or publication of legally obtained information. *See* Brief For Executors of Estate of Wicks, Yakymi and Filk & Plaintiffs' Liability Committee at 13, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986).

Where the media or the public had the opportunity to appear at a hearing where settlement distribution or approval occurs and fails to do so, a court order sealing the settlement files and precluding access subsequent to that hearing should not constitute a first amendment violation. *See In re* Application of KSTP Television, 504 F. Supp. 360, 362-63 (D. Minn. 1980). A prior restraint or gag order will not result because the media is permitted to publish anything that was said in the open courtroom. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (prior restraint case); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (prior restraint case); Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977) (prior restraint); Minneapolis Star & Tribune Co. v. Schmidt, 360 N.W.2d 443, 435 (Minn. Ct. App. 1985) (prior restraint case); Minneapolis Star & Tribune Co. v. Lee, 353 N.W.2d 213, 214-15 (Minn. Ct. App. 1984); Minneapolis Star & Tribune Co. v. Kammeyer, 341 N.W.2d 550 (Minn. Ct. App. 1983) (prior restraint case); *see also Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 n.4:

> We also hold that the Court of Appeals improperly applied a prior restraint analysis in this case. The court reasoned that since the settlement hearings had taken place in open court, the details of settlements had been made public and could not therefore be constitutionally restrained. A prior restraint analysis, however, is improper in this case. Although the hearings were held in "open court," no one but the litigants attended. No details were released to the public or the media. Also, there was not evidence that any of the information in the trial court files was in the Star & Tribune's possession prior to Judge Schumacher's orders sealing the files. Traditionally, a prior restraint analysis has been applied only where information is actually disseminated to the press or public and the government then attempts to halt its dissemination. Because this case does not fall within the traditional prior restraint analysis, the Court of Appeals erred in adopting a first amendment standard based upon this analysis.

Id. (citations omitted).

Once the media or the public has the opportunity to appear, the first amendment "clear and present danger test," *see Estate of Hearst*, 67 Cal. App. 3d at 783, 136 Cal. Rptr. at 824, is no longer applicable, and the sole issue becomes whether the trial court acted reasonably in sealing the files under a common law analysis. Such decisions recognize that the rights of the media are no greater than the rights of the public when it comes to access to documents. *See* Tallahassee Democrat, Inc. v. Willis, 370 So. 2d at 872 ("We are aware of no authority that would give the press rights of access to sealed depositions superior to those enjoyed by the members of the public generally."). In *Warner Communications, Inc.* the United States Supreme Court stated:

> Once beyond the confines of the courthouse, a news gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But, the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.

records.[36] Although this has been characterized by some courts as a strong presumption,[37] it is not absolute and can be overcome.[38] Some courts require a party seeking to restrict access to judicial records to assert either "strong countervailing reasons" or "most compelling reasons" before access can be restricted.[39]

Since the right of access is not absolute,[40] the "court, in its discretion may seal documents 'if the public's right of access is outweighed by competing interests.' "[41] The court has supervisory powers over its records and files, and access may be denied where the files might become a "vehicle for improper purposes."[42] Courts routinely weigh the rights and interests of parties to litigation with those of the public and media when issues of common law access to civil documents arise.[43] The presumption in favor of access to judicial records is balanced against the right of privacy for the settling parties.[44] Where the interests asserted in favor of denying access are strong enough to rebut the presumption, access is denied.[45]

Warner Communications, Inc., 435 U.S. at 609 (quoting Estes v. Texas, 381 U.S. 532, 589 (1965)).

Any lack of notice given to the media or the public will not render an order sealing the files invalid. *State ex rel. Miami Herald Publishing Co.*, 340 So. 2d at 910. This is true even if the media or the public is unable to receive the notice. *Id.* Accordingly, any argument by the media or the public that they did not receive notice about an open hearing regarding settlement approval or distribution does not invalidate a court's good faith order of sealing the files pursuant to the settlement stipulation of the parties.

36. *See Knoxville News-Sentinel Co.*, 723 F.2d at 474; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

37. *See Edwards*, 672 F.2d at 1294; Mitchell, 551 F.2d at 1258-61.

38. *See, e.g., Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

39. *Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 825 (strong countervailing reasons needed to rebut presumption); *Agent Orange Prod. Liab. Litig.*, 98 F.R.D. at 545 ("rebutted by showing that there are strong countervailing interests sufficient to outweigh public interest in access"); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202 ("A party seeking to restrict access under the common law must assert a sufficiently strong interest in support of denying access in order to overcome the presumption. Although no one standard is universally accepted, courts have required parties seeking to restrict access to assert either 'strong countervailing reasons' . . . or 'most compelling reasons,' . . . before access can be restricted.").

40. *Nixon*, 435 U.S. at 598; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

41. *Hickey*, 767 F.2d at 708 (quoting *In re Knight Publishing Co.*, 743 F.2d at 235).

42. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

43. *Short*, 566 F. Supp. at 933; *State ex rel. Miami Herald Publishing Co.*, 340 So. 2d at 908.

44. *Knoxville News-Sentinel Co.*, 723 F.2d at 474.

45. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203.

d. *The Interests Involved*

Whether a trial court applies a constitutional or common law test, it must assess the strength of the interests of the parties, the court, the media, and the public before it can seal the settlement information.

i. *Interests of the Parties*

Confidentiality is the foremost interest of the parties seeking to seal settlement information. Historically, American courts have supported the parties' rights to confidential settlements.[46] Confidentiality protects the privacy rights of the settling parties.[47] The right of privacy is a fundamental right,[48] which requires the party contravening that fundamental right to bear the burden of showing a compelling state interest.[49]

Where cases involve public notoriety prior to the time of settlement, settling plaintiffs may become exposed to thefts, exploitation, trespass, and personal injury after their settlements have been revealed to the public.[50] Sealing the settlements can

46. *Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 472; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204; *see also Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 344.

47. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510-13 (1984) (privacy right may override even first amendment right); *Knoxville News-Sentinel Co.*, 723 F.2d at 474 (trial court has the power to seal records if privacy right outweighs public right to know); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 ("The historical and philosophical privacy of settlement documents, along with the relevant facts and circumstances in this case, demonstrate that the privacy interest asserted by the litigants were strong enough to justify restricting access."). The right of privacy is a fundamental right. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973). Both the United States Supreme Court and the Minnesota Supreme Court recognize a constitutional right of privacy. *See, e.g., id.* at 152-55; *In re* Conservatorship of Torres, 357 N.W.2d 332, 339 (Minn. 1984).

48. *See Roe*, 410 U.S. at 152-53; Griswold v. Connecticut, 381 U.S. 479, 489 (1965).

49. *Griswold*, 381 U.S. at 489. The Minnesota courts have recognized the United States Constitutional right of privacy. *See Conservatorship of Torres*, 357 N.W.2d at 339; *In re* Agerter, 353 N.W.2d 908, 913 (Minn. 1984); Price v. Sheppard, 307 Minn. 250, 256-57, 239 N.W.2d 905, 910 (1976). Minnesota courts have also recognized the need to protect fundamental rights under the Minnesota Constitution. *See, e.g.*, Thiede v. Town of Scandia Valley, 217 Minn. 218, 224-25, 14 N.W.2d 400, 405 (1944).

50. *Estate of Hearst*, 67 Cal. App. 3d at 781, 784, 136 Cal. Rptr. at 822-23, 825 (concern of bombings, threats to lives of family members and events relating to kidnapping of Patricia Hearst); News-Press Publishing Co. v. State, 345 So. 2d 865, 867 (Fla. Dist. Ct. App. 1977) ("a showing that the opening of the depositions might endanger a person's life could well justify the order entered below," denying access); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 ("The litigants brought forth evidence of physical intrusion into their lives that had already occurred."); *see also Seattle*

help prevent this type of intrusion upon the individuals' lives and property.

ii. Interests of the Court

Confidentiality promotes the administration of justice in multi-litigated, multiple party, complex litigation.[51] If judicially approved settlements in multi-litigated, multiple party cases are not maintained as confidential and the settlements are disclosed, invariably, other parties will be less likely to settle their cases. Each non-settling party who is made aware of the terms of other settlements will potentially demand a settlement strongly influenced by earlier settlements. The resolution of cases may then be dramatically delayed.[52] The administration of justice will suffer as the court system is subject to a backlog of cases, extensive litigation, and excessive costs.[53] Similarly, the court's own duty to facilitate resolution of disputes through negotiated settlements may also be interfered with if confidentiality is not permitted.[54]

iii. Interests of the Media and the Public

The media and the public desire access to court records to assess whether the judiciary has exercised its power to promote justice and prevent the incidents which produced the settled suit from reoccurring. Additionally, the public has an interest in making sure that files are not sealed where a member of the public needs access to the file in order to prosecute or defend a claim.

e. Articulate Reasons

Once the trial court determines which standard to apply, it analyzes the facts and interests involved in light of that stan-

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Times Co., 467 U.S. at 32-34 (financial documents protected from disclosure due to privacy concerns).

51. *Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 472.

52. Minneapolis Star & Tribune Co. v. Schumacher, 383 N.W.2d 323, 326 (Minn. Ct. App. 1986), *rev'd*, 392 N.W.2d 197 (Minn. 1986) ("The trial court was 'not unmindful' of the threat by Galaxy Airlines that disclosure of the settlements would 'impede further settlements' and foster 'protracted litigation.' ").

53. *See Newman*, 696 F.2d at 803 (if administration of justice interfered with right of access must be curtailed).

54. *Palmieri*, 779 F.2d at 864 (district court has duty to facilitate "resolution of disputes through negotiated settlements"); *Wilson*, 759 F.2d at 1571 n.4 (trial court has duty to encourage settlement).

dard. The trial court must then articulate reasons based upon facts known to the court and make specific findings as procedural requirements to restrict the right of access.[55] By articulating specific reasons, a firm base is provided from which an appellate court can find that a trial court did not abuse its discretion.

f. National Case Law Regarding Access to Settlement Documents

There are few cases addressing the sealing of settlement documents and access to the sealed settlements. Those cases apply a common law analysis to determine whether the trial court properly sealed the settlements. The following exemplify trial courts' analysis in jurisdictions outside of Minnesota.

i. In Re Franklin National Bank Securities Litigation

In *In re Franklin National Bank Securities Litigation*,[56] the district court refused to set aside a protective order that preserved the confidentiality of a settlement of complex multi-district litigation arising out of the insolvency of one of the nation's largest banks.[57] The protracted litigation involved numerous documents and deposition transcripts.[58] Pre-trial legal fees amounted to more than ten million dollars.[59] The court reasoned that if there had not been a settlement, there would have been at least six months of litigation imposing extensive costs upon all parties and the court.[60] Accordingly, the court stated:

> At the time its sealing order was entered, the court considered the historical importance of the FNB failure and the public interest in disclosure against the private and public interests that would be furthered by a resolution of the matter without further litigation. The latter was more compel-

55. *Edwards*, 672 F.2d at 1294; *see* United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (where the district court articulates reasons for its decision "a firm base for an appellate judgment that discretion was soundly exercised" exists); *Minneaplis Star & Tribune Co.*, 392 N.W.2d at 208 n.6 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)) ("the court must make 'findings specific enough that a reviewing court can determine whether the closure order was properly entered' ").

56. 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1983).

57. *Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 472; *see also Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 345.

58. *Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 469.

59. *Id.*

60. *Id.* at 472.

ling. *Secrecy of settlement terms under such conditions is a well established American litigation practice.*

The balance then struck has not now changed. The intervenors have placed no substantial new weight on the scale. Lapse of time also works against intervenors' position. The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.

This case generated considerable public interest and received extensive coverage in the media. Settlement of the class action aspect of the case was widely publicized and was concluded only after a public hearing on that settlement. In addition, the imminent settlement of the action between FDIC and Ernst & Ernst, albeit not the terms, was reported in the press and there was public knowledge that the settlement agreement would be sealed. The court at that time would have entertained the views of a public interest group such as intervenors on the advisability of its protective order.[61]

ii. Palmieri v. State of New York

In *Palmieri v. State of New York*,[62] the Second Circuit Court of Appeals held that the New York State Attorney General was not entitled to sealed settlement negotiations for use in a grand jury investigation. In balancing the need of the grand jury to gather evidence and the district court's duty to "facilitate . . . resolution of disputes through negotiated settlement,"[63] the court found that the evidence was insufficient to determine if the state attorney general met his burden to rebut the presumption that the sealing was not improvident, or show that compelling or extraordinary circumstances existed to unseal the settlement negotiations.[64] The case was remanded for this purpose.

61. *Id.* (emphasis added).
62. 779 F.2d 861 (2d Cir. 1985).
63. *Id.* at 864.
64. *Id.* at 866. It is important to note that the Second Circuit placed the burden on the state to show that its interests outweighed those of the settling parties before it would unseal the files.

iii. Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates

In *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*,[65] the Third Circuit Court of Appeals, in a split decision, held that the trial court abused its discretion in denying a motion to unseal motion and settlement agreement documents.[66] This dispute arose out of the construction of the Hotel Rittenhouse in Philadelphia.[67] The bank filed a lawsuit against the partners and developers of the construction project because the partners and the individuals failed to make payment on a loan.[68] Subsequent to that lawsuit, the concrete contractor commenced a lawsuit in federal court against the bank for $800,000.00 on the basis of alleged assurances by the bank of direct payment for the work performed for the partners and the developers.[69] The bank and the partners' action settled prior to trial.[70] At the parties' request, the settlement agreement was filed under seal in the district court.[71] Prior to that time, all proceedings had been open to the public.[72] The settlement agreement was filed because the parties felt that they would probably disagree on the terms and would want the court to grant recourse to them.[73]

The district court subsequently entered a series of orders in the bank-partner litigation pursuant to motions asking it to enforce the settlement agreement.[74] The court awarded judgment for the bank against the developers and partners for over $38,000,000.00 and ordered the Hotel Rittenhouse to be sold.[75] The court filed an order setting the terms of the payment for the sale, and the docket sheet showed that order was filed under seal and not to be opened until further order.[76]

Ultimately, the concrete contractor filed a formal motion in

65. 800 F.2d 339 (3d Cir. 1986).
66. *Id.* at 346.
67. *Id.* at 340.
68. *Id.*
69. *Id.* at 340-41.
70. *Id.* at 341.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

district court to unseal the settlement documents.[77] In a one paragraph order, the trial court stated that it weighed the public interest in access to judicial records, the concrete contractor's interest in access to the settlement, and the public and private interest of settling disputes. The district court concluded the latter interest was paramount.[78] The concrete contractor appealed the decision not to unseal the documents.[79]

The Third Circuit determined that the interest of the concrete contractor outweighed the interest of the settling parties to seal their settlement agreement.[80] The court of appeals noted that the settling parties could have settled their case and filed stipulations of dismissal with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure.[81] By using Rule 41, the settlement documents would not have become part of the court record, effectively denying the concrete contractor access.[82] The court stated, however, that once the settling parties undertook to "utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once the settlement is filed in the District Court, it becomes a judicial record, and subject to the access accorded such records."[83]

The court reasoned that the trial court's determination that the general interest in encouraging settlement did not outweigh the concrete contractor's interest in having access to those documents.[84] The court of appeal's decision was partially predicated on the fact that the trial court failed to particularize reasons showing the need for continuing secrecy.[85]

The court also distinguished *In re Franklin National Bank Securities Litigation*.[86] The Third Circuit stated that *Franklin National Bank Securities Litigation* was distinguishable because in the *Bank of America National Trust & Savings Association* case there

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 344-46.
81. *Id.* at 344.
82. *Id.*
83. *Id.* at 345.
84. *Id.* at 346.
85. *Id.*
86. 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).

was only a single dispute between a small group of parties, unlike the multitude of parties involved in *Franklin National Bank Securities Litigation*.[87]

The majority of the court of appeals also rejected the dissent's discussion concerning the historical significance of secrecy of settlements.[88] The majority also rejected the dissent's argument that the sealing of the file fosters judicial economy and encourages additional settlements.[89]

2. *Analysis of Wrongful Death and Minor Settlements*

a. Minneapolis Star & Tribune Co. v. Schumacher

To date, the only court to address access to minor and wrongful death settlements is the Minnesota Supreme Court. In *Minneapolis Star & Tribune Co. v. Schumacher*,[90] the Minnesota Supreme Court held that the trial court properly applied a common law standard and properly sealed the wrongful death and minor settlement documents of five of the Reno, Nevada - Galaxy Airline crash cases.[91] The settling parties stipulated to keeping the settlements confidential.[92] Since the cases involved wrongful death and minor settlements, the parties were required to submit the settlement papers to the court.[93] At the time of submission, the parties requested a trial court order sealing the documents.[94] The trial court agreed to seal the documents and held that the privacy rights of the individuals involved outweighed any public right to the dissemination of the information.[95]

The trial court articulated nine reasons why the parties' interests overcame the common law presumption of access. The trial court's reasons were:

(1) that the press had access to all information involved in

87. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 346.

88. *Id.* at 344-45. Circuit Judge Garth's dissent discusses in depth the significance of secrecy to settlements. *Id.* at 346-53 (Garth, J., dissenting).

89. *Id.* at 345.

90. Minneapolis Star & Tribune Co. v. Schumacher, 383 N.W.2d 323 (Minn. Ct. App. 1986), *rev'd*, 392 N.W.2d 197 (Minn. 1986).

91. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206.

92. *Id.* at 200.

93. The cases involved wrongful death and minor settlements. The trial court was required to approve the distribution of the wrongful death files and the stipulated figure in the minor settlement. *Id.* at 200 n.1.

94. *Id.* at 200.

95. *Id.* at 201.

> the cases, the files were open for inspection up until the settlements, and the settlements were held in open court; (2) the request for sealing of the files came after consent by all of the parties and discussion by all of the parties; (3) the value to the public of the additional information was outweighed by the interest of the individual to "grieve privately and avoid harassment"; (4) the private rights of the individual could not be impugned; (5) the families involved had a right to protect themselves from harassing elements, to get on with their lives and to "mourn in peace"; (6) "disclosure of settlement agreements could produce theft, exploitation and improper use, trespass and injury to the plaintiffs"; (7) a disclosure of the settlement would impede settlement and foster more litigation; (8) the court's docket and cost of litigation to the parties as well as cost to the county itself would be benefited by the settlement of the other cases as opposed to lengthy trial; and (9) the plaintiffs, although they might have been able to receive greater recovery if the cases had gone to trial, chose to settle their cases in order to avoid any additional publicity.[96]

After sealing the files and settlements, the media, which had not attended the hearings to approve the settlements, moved to intervene and obtain access to the file and the settlement documents.[97] The trial court granted the intervention but denied access.[98]

The media sought a writ of prohibition from the court of appeals.[99] In a two-to-one decision, the court of appeals granted a writ of prohibition directed to the trial court, prohibiting the sealing of the records.[100] The court of appeals determined that the trial court should have applied a "compelling governmental interest" test instead of the common law balancing test[101] and that the interests of the settling parties were not sufficiently compelling to overcome the presumption of access accorded the media.[102]

In reversing the court of appeals, the Minnesota Supreme

96. Brief For Executors of Estates of Wicks, Yakymi and Filk & Plaintiffs' Liability Committee at 3-4, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1987).

97. *Minneaplis Star & Tribune Co.*, 392 N.W.2d at 201.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Court held that a common law balancing test was appropriate because of the historical right of settlements to remain confidential.[103] The court reasoned that while wrongful death and minor settlements are required by statute to be brought before the court, the fact that settlements historically "have been private agreements not subject to public scrutiny" is not altered.[104]

The court also held that rules of evidence support the historic right of privacy of settlement.[105] The fact that settlements, offers of settlement, and statements made during settlement negotiations are not admitted into evidence at trial is additional support for secrecy of settlements.[106]

In continuing its analysis of why the common law was applicable, the court expressed its favor of resolution of matters by settlement as opposed to litigation.[107] The court stressed that failure to adhere to the settling parties' wishes for private handling of the settlement is inconsistent with the parties' desire to settle, thereby avoiding public inspection, and the policy of the court to encourage settlement of multi-party, multi-litigated cases.[108]

The court distinguished access to civil settlement issues from criminal matters.[109] In criminal matters, the United States Supreme Court has said that a constitutional right to access exists.[110] The Minnesota Supreme Court stated, "the historical evidence demonstrates conclusively that . . . criminal trials both here [in America] and in England [have] long been presumptively open."[111] Additionally, the court felt the inter-

103. *Id.* at 204-05. ("Historically, the majority of settlements entered into between parties have been private").

104. *Id.* at 205. Under the Minnesota Wrongful Death Statute, the court does not participate in the settlement negotiations nor does it approve the settlement terms. MINN. STAT. § 573.02 (1986); CODE R. DIST. CT. 2; *see also Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200 n.1, 205. The court's sole role is to effect a proper distribution of the funds, and it is not the intent of the Wrongful Death Statute to bring the settlements into public view. *Id.* The intent of the Minor Settlement Statute is to require the court to approve the settlement, and not to bring the settlement before the public. *Id.*; MINN. STAT. § 540.08.

105. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204.

106. *Id.*; FED. R. EVID. 408; MINN. R. EVID. 408.

107. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

108. *Id.*

109. *Id.* at 204.

110. *Richmond Newspapers*, 448 U.S. at 569.

111. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204 (quoting Richmond News-

est of the public and the press to be fully aware of the processing of the individuals through our criminal justice system is of the utmost importance to our society.[112]

Similarly, the court posited that the interest in public supervision of settlements for wrongful death and minor injury actions in Minnesota does not rise to the same level as the right of supervision of criminal trials.[113] The court relied on the purpose behind court-approved wrongful death settlements.[114] This purpose is to allow the court to order distribution of the recovery in accordance with the proportionate pecuniary loss of the parties entitled to recovery.[115] Neither the minor settlement statute, Minnesota Statutes section 573.02, subdivision 1, nor Rule 2 of the Code of Rules for the District Court, require court approval because of some need for public oversight of settlement process.[116]

In balancing the right of the settling parties and the media, the court ruled in favor of the settling parties. The record in-

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papers v. Virginia, 448 U.S. 555, 569 (1980)). Courts consistently recognize that criminal files shall be open for public scrutiny. *See, e.g., In re* Application of Nat'l Broadcasting Co., 653 F.2d 609 (D.C. Cir. 1981) (abscam video-tape); *In re* Application of Nat'l Broadcasting Co., 635 F.2d 945 (2d Cir. 1980) (abscam videotapes). However, the application of such criminal principles to civil proceedings is unwarranted. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204.

112. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204. The public's interest in the supervision of settlement in civil cases does not rise to the level of import that the supervision of criminal prosecution does. *Carpentier*, 526 F. Supp. at 294 ("The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are . . . events of legitimate concern to the public and . . . fall within the responsibility of the press to report the operations of government."). In Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983), the Eleventh Circuit held that the press has a right to be present at a civil hearing for the release of an incarcerated prisoner because "[i]f it is beneficial to have public scrutiny of criminal proceedings that may result in conviction and punishment, then it is also helpful to allow public access to civil proceedings that modify the earlier trials by freeing prisoners before their sentences are completed or parole has been granted." *Id.* However, that court also stated that it was not deciding whether the right of access to all civil trials was equivalent to the right of access of criminal trials. *Id.*

113. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204-05.

114. *Id.* at 205.

115. *Id.*

116. *Id.* For an explanation of Rule 2 of the Code of Rules for the District Courts, see address by Hon. Albin Pearson, Minnesota State Bar Ass'n convention (June 20, 1952) *reprinted in* 51 MINN. STAT. ANN. 432 (West 1980). Settlements, even in wrongful death cases, are "of the distinctively non-public nature" and application of the strict scrutiny constitutional test for access of sealed documents is not appropriate. *See* Note, *supra* note 22, at 185 n.186 (discussing the non-public nature of pre-trial document). When private parties replace the State as the plaintiff, the public's interest in supervision of court action is reduced.

cluded substantial evidence that if a court were to reveal the settlement information, the settling plaintiffs would be exposed to thefts, exploitation, trespass, and personal injury.[117] In fact, three families who lost relatives in the crash had their homes burglarized and received harassing phone calls.[118] The right of the individuals to have their lives and property protected was the court's foremost consideration.[119] The supreme court stated that the potential harm to the settling parties was more than mere speculation.[120] The supreme court stated further that the trial court did not abuse its discretion when it relied upon the possibility of future intrusions and harassments in the plaintiffs' lives in a case that involved significant public interest.[121]

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117. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

118. *See* Brief of Executors of Estates of Wicks, Yakymi and Filk & Plaintiffs' Liability Committee at 23, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1987).

119. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206.

120. *Id.*

121. *Minneapolis Star & Tribune Co.* is not unlike *Estate of Hearst*. In *Estate of Hearst* the court denied the media the right to access sealed probate documents. The court stated:

> The gravamen of Trustees' petition asking the probate court to seal the files and will in Estate of Hearst was that members of the Hearst family, including minors and family members who have changed their surname by marriage, would be in grave danger of their lives and property if their identities were discovered through use of the probate files in Estate of Hearst, files which contain periodic accountings and pertinent material dealing with the testamentary trust from the time of Hearst's death to the present. As evidence of such imminent danger Trustees filed newspaper clippings reporting numerous bombings, threats to the lives of family members, and events related to the notorious kidnapping of Patricia Hearst. Most of these events occurred in early 1976 and suggested that the Hearst family had become target for various lawless radical organizations. Although the whereabouts and identities of prominent members of the Hearst family and their properties were admittedly public knowledge, Trustees asserted that use of the material in the probate files would expose many hitherto unnoticed persons as members of the family and reveal the locations of their homes and properties, this because periodic accountings filed on behalf of the trust identified the beneficiaries and their home addresses. Further, the accountings would pinpoint property holdings of the Hearst trust which, to date, have not been publicly identified. Trustees asked the court to exercise its inherent jurisdiction to control its records by sealing the files in the Hearst Estate until such time as threats to members of the family had dissipated and danger to their lives and property had ended.

Estate of Hearst, 67 Cal. App. 3d at 781, 136 Cal. Rptr. at 822-23. The court went on to note:

> If indeed it were established that beneficiaries of the Hearst trusts would be placed in serious danger of loss of life or property as a consequence of general public access to the Hearst probate files, then the court would have the power to protect the benficiaries' interests by temporarily denying public

The trial court, as well as the supreme court, implicitly rejected the media's assertion that the public's interest in learning whether the court had justly treated the survivors and evaluated the safety of the airline industry outweighed any private litigant's privacy interest.[122] While there is no question that the public has the right to be certain that justice is done in the court system,[123] the supreme court reasoned that the interest in assuring justice was outweighed by the privacy right of the individual settling party, the need to foster settlement, the administration of justice, and the rights of innocent non-settling third parties.[124] Similarly, although the public did have an interest in making certain that the airlines operated their planes safely, the Federal Aviation Administration was charged with protecting the public's interest in the safe operation of the airways.[125] In addition, the information concerning the settlements had no bearing on whether the airlines were to be operated safely in the future.[126]

b. Precedential Effect of the Minneapolis Star & Tribune Co. Analysis and Decision

The Minnesota Supreme Court expressly limited its decision to the sealing of "settlement documents or transcripts made

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access to those files, in that protection of beneficiaries is one of the justifications for court jurisdiction over a testamentary trust.

Id. at 784, 136 Cal. Rptr. at 825; *see also* News-Press Publishing Co. v. State, 345 So. 2d 865 (Fla. Dist. Ct. App. 1977) (showing that opening of depositions might endanger person's life could well justify order entered below).

The *Estate of Hearst* court reasoned that the trustees were entitled to a temporary sealing of a document. *Estate of Hearst*, 67 Cal. App. 3d at 785, 136 Cal. Rptr. at 825-26. The court stated, however, that the trustees will be required to show that the Hearst family continued under a clear and present danger of attack and the trial court may not deny access to the files if there is no indication of serious danger to lives or property to the trust beneficiaries. *Id.* at 785, 136 Cal. Rptr. at 825.

122. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206.

123. *See Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178. "Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court." *Id.*; *see also In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984).

124. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205; *see also Application of Nat'l Broadcasting Co.*, 653 F.2d at 620 (injury to innocent third parties may be considered in denying access).

125. *See* Brief For Executors of Estates of Wicks, Yakymi and Filk & Plaintiffs' Liability Committee at 25, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1987).

126. *Id.*

part of a civil court file by statute."[127] The court stated that it did not intend its decision to apply to other civil trial records or documents.[128] This limitation by the court raises a question as to the precedential effect of *Minneapolis Star & Tribune Co.*

A discussion of the precedential effect of the *Minneapolis Star & Tribune Co.* analysis and decision follows and is broken into two parts. The first part addresses the precedential effect of the test articulated by the Minnesota Supreme Court to determine whether a first amendment right of access or a common law right of access exists to seal and unseal settlement documents in general. The second section considers the precedential effect of the *Minneapolis Star & Tribune Co.* decision on the factual merits on other cases where settlements are to be sealed or unsealed.

i. Precedential Effect of the First Amendment/Common Law Test Analysis on Settlements Presented to the Court.

The Minnesota Supreme Court limited *Minneapolis Star & Tribune Co.* to settlement documents and transcripts required to be made part of a civil court record by statute. This limitation appears in the portion of the opinion discussing whether the court should apply a first amendment or a common law test for access to the sealed documents.[129] This indicates that the court's analysis to determine which test applies is limited to those narrow situations where settlement information is required by statute to become part of a civil court record. Thus, the supreme court gives little guidance as to which test applies to settlements which are brought before the court by court rule, or settlements that are voluntarily presented to the court.

Although the Minnesota Supreme Court has not indicated which test applies in settlements not requiring court approval by statute, a strong argument exists in favor of applying the same test to these situations. The test that the Minnesota Supeme Court applied is one articulated by the United States Supreme Court and other jurisdictions deciding if a first amendment right of access applies to trials and documents.[130]

127. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203.
128. *Id.*
129. *Id.*
130. *See supra* note 23.

Thus, it seems that the test should be applicable to access to any settlement document that is presented to the court.

The issue that remains is to what extent will settlement documents that are submitted to the court ever be subject to the first amendment constitutional right of access standard. Since the Minnesota Supreme Court stated, settlements are historically and presumptively private[131] the first leg of the two-part test to determine whether a constitutional test should be applied will most likely never be met where private parties settle their actions.

The media's right to access is no greater than the public's right to access. Thus, barring a gag order, a prior restraint, or the prevention of publication of information that has already been disseminated to the media and the public in the court room, neither the media nor the public have the constitutional right or the need to be protected by a strict scrutiny, compelling governmental interest test. Thus, the media's and the public's rights are probably not of constitutional dimension and not an exception to the presumption of confidentiality.

Where a plaintiff settles with the United States or state governments, however, an exception may exist to the presumption of confidentiality. For example, the Freedom of Information Act[132] permits the public and the media the right of access to government documents. Presumably, settlement documents would be accessible under this act. Although this diminishes the presumption of confidentiality, there is no guaranty that the right of access or preclusion of sealing the document is a constitutional right. The right may be merely statutory or one of common law.

ii. The Precedential Effect of the Minneapolis Star & Tribune Co. Decision on the Factual Merits

The reasoning and the analysis of the Minnesota Supreme Court to determine if a constitutional or common law right applies probably has greater precedential value than what the court indicates in its opinion. Given the unique factual situation in that case, the court's limitation is appropriate. Four examples below distinguish the *Minneapolis Star & Tribune Co.* decision on its facts from other potential decisions.

131. *See supra* note 112.
132. 5 U.S.C. § 522 (1984).

1. *The Prosecution or Defense of a New or Additional Matter*

In *Minneapolis Star & Tribune Co.*, the party seeking access to the documents was the media. The media was not seeking the information for the purpose of prosecuting or defending a case in which it was involved. However, a party that does seek access to sealed documents to prosecute or defend his or her case, may well be granted access despite the interests of the settling parties.[133]

An example of such a case is *Wilson v. American Motors Corp.*[134] In that case, the parties seeking access to the documents needed the information for collateral estoppel purposes to defend her case.[135] The Eleventh Circuit Court of Appeals ruled that it could not deny the party access to the documents because it felt the interest of the party seeking the documents outweighed those interests of the settling parties.[136]

2. *The Class Action Situation*

A second distinguishing factual situation arises in class action settlements. In Minnesota, the rules of civil procedure require all class action settlements and compromises to be approved by the trial court.[137] The trial court is to approve whether the settlement is reasonable, fair, and adequate.[138] Any proposed dismissal or compromise of a class action requires that notice be sent to all class members.[139]

Although all class members are not class representatives, those members are parties to the action and should be entitled

133. *See Wilson*, 759 F.2d at 1571-72.
134. *Id.*
135. *Id.* at 1569.
136. *Id.* at 1571-72.
137. MINN. R. CIV. P. 23.05.
138. *See* Wilson v. St. Joseph Hosp., 366 N.W.2d 403, 406 (Minn. Ct. App. 1985).
139. MINN. R. CIV. P. 23.05. "Notice of compromise or settlement of class actions is also necessary to insure that class members do not continue to rely erroneously upon the assumption that an action is proceeding on their behalf." 1 HERR & HADOCK, MINNESOTA PRACTICE, § 23.18 at 463 (West 1985). Failure of non-represented members of the class to receive notice of settlement and compromise will probably also mean that the non-representative has failed to receive notice or any indication that the parties intend to seal the documents. Under normal circumstances where parties do not receive notice for sealing the documents they are entitled to no greater rights of those documents than the ones that do receive those documents. *See supra* note 35. However, where non-represented class members fail to receive notice of the sealing and the settlement the court's approval of the settlement may be restricted because the rule requiring notice will not have been met.

to access to the documents, whether they are sealed or not. An order sealing the documents or a hearing for approval of the settlement will probably not withstand a request by a non-representative class member to either prevent the sealing or seek access to the sealed documents. This issue is probably somewhat innocuous, however, because it is highly doubtful that representatives of the class will deny other class members the right of access to their settlement papers.

3. Settlements With the Government

A third factual situation which is distinguishable involves settlements with the government. The distinguishing feature is the presumption of openness. Settlements with the United States Government and the state government are subject to a greater presumption of openness than settlements between private parties. There are two reasons for this greater presumption of openness. First, the actions of the executive branch, as opposed to private parties, are much more subject to outside scrutiny. The media and the public carefully scrutinize the actions of the executive branch. In order to scrutinize the government's actions, they may need access to government documents.

Second, state legislatures and Congress have enacted statutes, such as the Freedom of Information Act,[140] which permit the public and the media access to executive branch materials. Inherent in those statutes is a presumption against confidentiality of government material. With this presumption, the parties desiring to prevent the sealing, or those who seek access, have a stronger basis to obtain access or prevent the sealing which may outweigh the countervailing interests of the settling parties. At a minimum, the presumption of openness in favor of the media and the public probably is greater than if the government was not involved and will require stronger countervailing interests on behalf of the settling parties, like the privacy interest in *Minneapolis Star & Tribune Co.*, before the court seal the information or deny access.[141]

140. 5 U.S.C. § 522.

141. Recently some of the wrongful death claims due to the space shuttle explosion were settled between the representatives of the deceased and the United States Government. *See* Nat'l Law J., Jan. 12, 1987 at pages 3-4, 14. Those settlements were made out of court. *Id.* The media had sought access to review the details of the settlement pursuant to the Freedom of Information Act. *Id.* at 14. To date, the

4. *The Voluntary Presentment of a Settlement to the Court by Individual Private Parties*

A comparison of *Minneapolis Star & Tribune Co.* with *Bank of America National Trust & Savings Association* also highlights some of the reasons why the precedential value of *Minneapolis Star & Tribune Co.* is limited. The wrongful death and minor settlement statutes in the *Minneapolis Star & Tribune Co.* case required the parties to submit their settlements[142] to the court while the parties in the *Bank of America National Trust & Savings Association* voluntarily submitted their settlements to the court.[143] The parties in *Minneapolis Star & Tribune Co.* were required to appear before the Hennepin County District Court to have the wrongful death settlement distributions[144] approved and the minor settlement approved.[145] In *Bank of America National Trust & Savings Association*, the settling parties did not have to file their settlement papers with the court.[146] They could have filed a stipulation of dismissal with their settlement papers which included confidentiality clauses that would have precluded the concrete contractor's attempt to seek access to the documents on the theory that they were public judicial records.[147]

Finally, the trial court in the *Minneapolis Star & Tribune Co.* case articulated specific reasons to keep the settlement agreements secret.[148] The trial court in the *Bank of America National*

United States Government has declined to disclose that information. *Id.* at 3. Recently, the settlement of litigation relating to the death of shuttle crew member Ronald E. McNair was ordered sealed by United States District Court Judge Carl O. Bue Jr. Nat'l Law J., May 25, 1987 at page 13. (discussing McNair v. Morton Thiokol, Inc., No. A-86-3822 (S.D. Tex. May 7, 1987))

142. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200 n.1.

143. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 344-46.

144. MINN. STAT. § 573.02; CODE R. DIST. CT. 2.

145. MINN. STAT. § 540.08 (1986).

146. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 344.

147. *Id.*

148. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205. Judge Schumacher cited three reasons for his decision:

> (1) The fact that "disclosure of [the] settlement agreements could produce thefts, exploitation and improper use, trespass and injury to the [heirs]"; (2) the fact that disclosure "[would] impede further settlements [in other cases] and thereby foster more and protracted litigation"; and (3) the fact that the court and the county "would benefit by the settlement of those cases rather than lenghty trials."

Id.; *see also* Brief of Executors of Estates of Wicks, Yakymi and Filk & Plaintiffs Liability Committee at 3-4, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1987).

Trust & Savings Association case failed to do so.[149] Similarly, included in the trial court's specific reasons for sealing the documents in the *Minneapolis Star & Tribune Co.*, was the need to prevent exploitation, theft, and harassment (the privacy interests).[150] Those privacy interests did not exist in *Bank of America National Trust & Savings Association.*

c. *Closing the Court Room During the Settlement Distribution or Approval Hearing*

Where a trial court decides to close the court room and preclude the public and the media from access during the settlement hearings, the trial court may raise first amendment issues not addressed in the access to documents cases. Denying the public and the media the right to be at the hearing is not the same as denying the public and the media the right to publicize information that was once made public at the hearing which they could have attended.[151]

First amendment rights may be violated where the public or the media is denied access to the court room in civil proceedings.[152] The United States Supreme Court has found this to be the case in criminal matters.[153]

If the court room is closed prior to the settlement hearing, the court may deprive the media and public of first amendment constitutional rights. In order for the trial court to properly close the doors and to preclude access, if constitutional rights exist, the settling parties must show a compelling, narrowly-tailored interest that would overcome any presumption of openness.[154] This standard is a strict scrutiny standard and is more difficult to meet than a mere balancing test.

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149. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 346.

150. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

151. *Id.* at 206 n.4.

152. *See Publicker Indus. Inc.*, 733 F.2d 1059 (access to hearing and transcript addressing impact of securities laws on corporations to record damaging information about legal operations at annual meeting); *Iowa Freedom of Information Council*, 724 F.2d 658 (access to civil contempt proceedings and transcripts).

153. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (access to criminal trial); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (access to criminal trial); *see also* Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (first amendment right to access to civil hearings and actions contesting penal conditions).

154. *Globe Newspaper Co.*, 457 U.S. at 606-07 (where a first amendment right to access does exist, the Supreme Court stated that the test to be applied is whether the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest).

d. *The Gag Order or Prior Restraint*

If the settlement hearings are held in open court and the media or the public is present at the hearing, the trial court cannot preclude the media or the public from disseminating the information they possess unless a compelling interest exists to outweigh any first amendment right of publicizing that information.[155] Once the information is legally disseminated to the public and the public is in possession of it, the only way the public can be denied the right to publicize it is if there are interests which are so compelling that they outweigh any first amendment right to access.[156]

Where the settlements are presented in open court, the attorneys representing the settling parties must make sure that the information that is revealed and transcribed is the information to which the settling parties would permit the media or public to have access. In order to reveal only the permitted information, the attorneys at the hearing should present only the non-confidential evidence at the hearing and not elicit the confidential information that their clients desire kept confidential.

Only the information that is brought out during the public hearing is legally disseminated public information. Once the hearing has concluded and the judge has ordered the records sealed, those documents are then confidential and are not legally disseminated information.

III. To Unseal the Documents

Periodically, the public or the media seek access to sealed judicial records. This portion of the article addresses both the procedural and the substantive issues regarding attempts to gain access to those sealed documents.

A. *Trial Court Procedural Issues*

1. *Minnesota Interim Rules on Access to Public Records*

Once a Minnesota trial court seals settlement documents, the public or the media seeking access to those documents

155. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 n.4. "Traditionally a prior restraint analysis has been applied only where information is actually disseminated to the press or public and the government then attempts to halt its dissemination." *Id.*

156. *Id.*

should attempt to do so pursuant to the Minnesota Interim Rules on Access to Public Records.[157] Under Rule 4, a request to inspect or obtain copies of the public records is made to the custodian (court administrator) of those records.[158] A request to inspect or obtain the copies must be in writing directed to the custodian unless otherwise allowed by the custodian.[159] The request should include: (1) the name, mailing address, and telephone number of the requesting person; and (2) the specific documents which the person wishes to inspect or have copied.[160]

The custodian must respond to the request within five working days of the request.[161] The response must indicate whether the records are public and, if so, when inspection may take place.[162] If the records can be made available for inspection and copied without unreasonable disruption of the court's administration, inspection or copying must take place five days after the receipt of the request.[163] If there will be disruption, then the custodian must notify the requestor of the reason for delay and where and when the inspection will take place.[164] If disruption prohibits the inspection from being performed within five days of the receipt of the request, the inspection must occur within a "reasonable time from the date of the request."[165]

If the custodian cannot determine whether access should be permitted, he must send the documents to the state court administrator for a determination.[166] The requestor must be notified of that fact within five working days after the state court adminstrator receives a referral.[167] If the number of documents requested to be inspected and reproduced is unreasonable, the custodian may require the request to be limited.[168] If

157. It is not, however, necessary to exhaust administrative remedies prior to seeking judicial review. *Id.* at 209 n.7.
158. Minnesota Interim Rules on Access to Public Records 4, subd. 1.
159. *Id.* Rule 4, subd. 3.
160. *Id.*
161. *Id.* Rule 5, subd. 1.
162. *Id.* Rule 5.
163. *Id.* Rule 5, subd. 2.
164. *Id.* Rule 5, subd. 3.
165. *Id.*
166. *Id.* Rule 5, subd. 7.
167. *See id.*
168. *Id.*

the documents are not inspected within the appropriate time period, the custodian will deem the request to review the documents to be withdrawn.[169] If "access to the records is not permitted" under the rules, the response shall indicate the statute, federal law or court, or administrative rule that is the basis for denial of the inspection request.[170]

If the custodian denies the requestor access to the documents or his request is limited, the requestor may appeal in writing to the state court administrator who is required to respond in writing no later than five working days after the administrator receives the appeal.[171] Although a requestor should appeal the denial of access to the state court administrator, he is not required to do so before seeking judicial review.[172]

2. *Intervention*

Since one need not appeal to the state court administrator prior to seeking judicial review, the requesting party may seek access by intervening in the settled case action sealing the documents pursuant to Rule 24.01 of the Minnesota Rules of Civil Procedure.[173] The Minnesota Supreme Court has held that intervention pursuant to Rule 24.01 "provides the best method for allowing a non-party to challenge a trial court's order" sealing a court file[174] and has stated that:

> Rule 24.01 establishes a four-part test that the non-party must meet before being allowed to intervene as of right: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties.[175]

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169. *Id.*

170. *Id.* Rule 5, subd. 6.

171. *Id.* Rule 7.

172. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 209 n.7 ("the ability to appeal a denial of access to the State Court Administrator under Interim Rule 7 is not an administrative remedy that requires exhaustion before seeking judicial review.").

173. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 207-08.

174. *Id.* at 207.

175. *Id.* at 207-08 (citations omitted). In applying these factors, the court stated:

> The timeliness of the application to intervene, as in any case, will be based

If a potential intervenor meets the test under Rule 24.01, the trial court should grant the motion to intervene for the limited purpose of challenging the trial court's order sealing court files. If the trial court denies the intervenor's request to unseal the files, the intervenor may then seek a writ of prohibition from the court of appeals to review the trial court's denial.[176]

3. *Articulate Reasons*

In *Minneapolis Star and Tribune Co.*, the supreme court noted that when ruling on a motion requesting access, the trial court must "articulate for the record the competing interests of the parties and indicate how the court has weighed these interests along with any presumption in favor of access."[177] There must be specific findings "that a reviewing court can determine whether the closure order was properly entered."[178]

B. *Substantive Matters*

The issues addressed in this subsection are very similar to those addressed in section III of this article. The trial court has the discretion to keep the documents sealed or to unseal them.[179] The trial court must make a determination as to whether a constitutional test or a mere common law access should be applied.

The trial court must determine which party bears the burden

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upon the particular circumstances involved and such factors as how far the suit is progressed, the reason for delay in seeking intervention, and any prejudice to the existing parties because of the delay. Also, where access to court files is involved, a legally protected interest under Rule 24.01 can be found in the public's right to access under the Supreme Court Interim Rules on Access to Public Records. If the document or record involved is a "public record" under interim Rule 3, subd. 2, a legally protected interest arises. The party seeking access must then demonstrate that this interest relates to the property or transaction involved in the underlying action. Third, the potential intervenor must show that, as a practical matter, the disposition of the action may impair or impede the party's ability to protect its stated interest. Although this issue is for the trial court to resolve, we emphasize that it should be viewed from a practical standpoint rather than one based on strict legal criteria. Finally, the potential intervenor's interest must not be adequately represented by the existing parties. In cases such as this one, where the existing parties are opposed to access, this factor should not be difficult to meet.

Id. (citations omitted).

176. *Id.* at 208.

177. *Id.* at 208 n.6.

178. *Id.*

179. *See supra* notes 15-17 and accompanying text.

of proof. If a constitutional test is applied and the constitutional right involved is the privacy right of the parties, then the burden should be on the media or public seeking access to show a compelling interest in favor of access which outweighs the privacy interest. If, on the other hand, the constitutional right involved is the first amendment right which runs in favor of the party seeking access, then the burden should be on the settling parties to show that their interests are so compelling that they outweigh the other parties' first amendment rights.[180]

If there is a common law standard to be applied, then the test becomes whether the trial court abused its discretion in sealing the files in the first place.[181] The burden should rest on the intervenor to show that there was an abuse of discretion since intervenors are bringing the motion seeking access. The trial court's duty is only to balance competing interests to determine whether it has abused its discretion when it sealed the documents.[182]

C. *The Appellate Practice*

1. *Writ of Prohibition*

If a trial court denies the public or the media access to the documents, their recourse is through a writ of prohibition.[183] A writ of "prohibition is an extraordinary remedy and should be used only in extraordinary cases."[184] A writ of prohibition is "limited to instances where there is no speedy or adequate

180. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 607-08; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203.

181. *See, e.g., Wilson*, 759 F.2d at 1570; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 ("Under this standard of review, we hold that Judge Schumacher did not abuse his discretion by denying access to the settlement documents.").

182. *See, e.g., Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202-03.

The interest of the media to have access merely to provide the information to the public because there has already been extensive media coverage may not be a sufficient interest to outweigh countervailing settling parties interest. *See, e.g., Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 470. Additionally, the media's interest merely to sensationalize an event is one that the courts should not condone, *see In re* Application of KSTP Television, 504 F. Supp. 360 (D. Minn. 1980), and should not be sufficient to justify access.

The most compelling reason to unseal the documents occurs when an individual seeks access needs to prosecute or defend his own litigation. *Wilson*, 759 F.2d at 1571. The court did permit access to sealed records because the party seeking the information needed them for collateral estoppel purposes. *Id.* at 1571. Without that information justice could have not been accomplished. *Id.*

183. *See Minneapolis Star & Tribune Co.*, 392 N.W.2d at 208-09.

184. Thermorama, Inc. v. Shiller, 271 Minn. 79, 83-84, 135 N.W.2d 43, 46 (1965).

remedy available."[185] Where there is no other adequate remedy at law available, a writ of prohibition may lie to prevent an abuse of a lower court's discretion.[186]

Even if the intervenor has a right to appeal the trial court's order pursuant to Rules 103.03 and 105 of the Minnesota Rules of Civil Appellate Procedure, the Minnesota Supreme Court has stated that the writ of prohibition is still the proper remedy[187] and that the right to appeal in access cases is not an adequate remedy.[188] In those cases, time is of the essence[189] and, if there is a possibility of the issue becoming moot or the possiblity of the relevancy of the material which the intervenor seeks will diminish with the passing of time, the use of the writ of prohibition is necessitated.[190] The court also stated that, since questions of access are usually determined by appellate courts rather than trial courts, the writ of prohibition is appropriate.[191] "Because a final decision on such questions is normally rendered only after an appellate proceeding, an expedited review is necessary in order to make the appellate court's decision something more than simply the answer to an issue that is moot or no longer relevant."[192]

The writ of prohibition provides sufficient time to prepare a record which adequately presents the legal issues involved.[193] If need be, the parties should use appendices to present the relevant documents or trial court records.[194] If the sealed documents or records are necessary for review, the court should be made aware of this in order to allow the appellate court adequate time to request the sealed documents from the trial

185. Hancock-Nelson Mercantile Co. v. Weisman, 340 N.W.2d 866, 870 (Minn. Ct. App. 1983). A Writ of Prohibition is appropriate where the following essential elements are shown to exist:

> The court, officer or person against whom it is issued must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) the exercise of such power will result in injury for which there is no other adequate remedy at law.

Id. at 868 (citations omitted).

186. Weidel v. Plummer, 243 Minn. 476, 68 N.W.2d 245 (1955); Liptak v. State *ex rel.* City of New Hope, 340 N.W.2d 366, 368 (Minn. Ct. App. 1983).

187. *See Minneaoplis Star & Tribune Co.*, 392 N.W.2d at 208.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

court.[195] The parties should formulate the issues fully prior to review.[196] Additionally, the legal issues or arguments presented to the trial court should be as extensive as those to the court of appeals on review.[197]

2. *Standard of Review*

In a proceeding for prohibition or mandamus, the appellate court determines if the trial court abused its discretion.[198] The trial court's discretion is "to be exercised in light of the relevant facts and circumstances of the particular case."[199] Where the district court articulates reasons for its decision, the appellate court generally finds "a firm base for an appellate judgment that discretion was soundly exercised."[200] The judgment must be based upon articulable facts known to the court.[201] Once the trial court does articulate its reasons for sealing the files, the appellate courts should accord deference, a higher degree of finality, and "great weight to a district court decision to deny requests for public access . . . ."[202] Since the trial court is in the best position to fairly weigh the competing needs and interests of the parties,[203] the appellate courts should never extend the scope of their review beyond "whether the relevant factors were considered and given appropriate weight" by the trial court.[204]

IV. SUGGESTED LITIGATION STRATEGIES FOR PRACTITIONERS

If parties truly desire to keep settlements secret, they should include confidentiality clauses in their agreements and volunta-

195. *Id.* at 208-09.
196. *Id.* at 209.
197. *Id.*
198. *See, e.g.*, Valley Broadcasting Co. v. United States District Court, 798 F.2d 1289, 1294 (9th Cir. 1986) ("We review a district court's denial of access to its records for abuse of discretion."); *Wilson*, 759 F.2d at 1570; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 ("The proper standard of review for questions of access under the common law standard is abuse of discretion.").
199. *Warner Communications, Inc.*, 435 U.S. at 599; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206.
200. United States v. Criden, 648 F.2d 814, 819; *see also Edwards*, 672 F.2d at 1294.
201. *Edwards*, 672 F.2d at 1294.
202. Note, *supra* note 33, at 684-85.
203. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206.
204. *Criden*, 648 F.2d at 819. This "discourages reversal on the ground that the appellate judges might have decided differently had they been the original decision makers." *Id.*

rily submit dismissals with prejudice without filing their settlements with the courts. Only in rare situations, like wrongful death actions[205] and minor settlements,[206] are settling parties required to present the settlements to the courts and have them made a portion of the judicial records. Thus, the easiest way to keep settlements confidential is to keep them out of court.

Once the settling parties submit their settlements to the court for approval or distribution, they must be prepared for the possibility that the media or the public may seek access to those documents if they are sealed.[207] As part of their settlement stipulation, the parties may require an order from the trial court sealing the settlement documents.

In order to seal those documents, the parties must make sure that they do not deprive the media or the public of any constitutional right.[208] Additionally, the settling parties must have sound reasons for sealing the documents and holding them confidential which outweigh a presumption in favor of access by the media or public.[209] Those reasons must be clearly articulated to the court. A proposed order to the court sealing the files should articulate the reasons why the files were sealed so that there is no question in the minds of an appellate court that the trial court did articulate reasons to seal the files.

A trial court has the discretion to seal or unseal settlement information.[210] In determining whether or not to seal or unseal settlement information, a trial court will apply either a constitutional or common law access test.[211] If a constitutional test is applied, the standard of review is one of strict scrutiny

205. MINN. STAT. § 573.02 (1986).

206. MINN. STAT. § 540.08 (1986).

207. *See, e.g., Bank of Am. National Trust & Sav. Ass'n*, 800 F.2d at 340-41; Palmieri v. State of New York, 779 F.2d 861, 862 (2d Cir. 1985); *Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 470; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200-01; Jaden Electric Div. of the Farfield Co. & Corbit's, Inc. v. Wyoming Valley West School Dist., 342 Pa. Super. 587, 493 A.2d 746 (1985).

208. See *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203 for discussion of first amendment right deprivation.

209. *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 346 (trial court must make a "particularized showing of the need for continued secrecy" as opposed to a general interest in encouraging settlement for the court to seal those settlement documents); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203.

210. *See supra* notes 15-17 and accompanying text.

211. *See Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203-04 (discussing the application of a constitutional or common law access test).

and normally requires proof of compelling, narrowly tailored interest to overcome the presumption of access.[212] If there is merely a common law right of access test to be applied, then the court must balance the interests of the settling parties with the interests of the parties seeking access.[213]

In order to seek access of sealed documents, the public or the media will encounter a series of procedural hurdles. First, the media and public should do everything possible to be present at the settlement hearings. If the media or the public is present, all of the information presented in open court may be legally disseminated subject to a compelling, narrowly tailored interest against disclosure.

If the media or public is not in attendance at the hearing, they may seek access under the Minnesota Interim Rules for Access to Public Records.[214] If that proves unsuccessful, then the parties seeking access should move to intervene in the action involving the settlements.[215] If the trial court denies the motion to intervene, or grants the motion to intervene but denies access, the parties seeking access may then pursue immediate appellate review by a writ of prohibition.[216] The party seeking access will have to show the appellate court that the trial court abused its discretion in sealing the information or denying access to the information.[217]

Whether an intervenor is successful in unsealing the files will depend upon the intervenor's needs. If the need is to merely publicize an event and the settling parties have sound reasons to keep the settlements confidential, the intervenor will most likely not prevail. If, however, the intervenor needs the information to protect its rights, for example, a litigant who needs the information because it is relevant to the defense of its case, the intervenor will have a far greater chance of prevailing and obtaining access to the settlement documents.

212. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606-07; *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203.

213. *See, e.g., Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202.

214. *See* Interim Rules on Access to Public Records (1985).

215. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 207.

216. *Id.* at 208.

217. *See, e.g., Wilson*, 759 F.2d at 1570 (access to documents case); *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 (standard of review for questions of access under the common law is abuse of discretion); *Liptak*, 340 N.W.2d at 368 (Writ of Prohibition case).

CONCLUSION

Settlements in civil actions are historically confidential and normally are not presented to trial courts. Where a statute or rule requires, settlements are required to be presented to the court. When those settlements are presented to the court, the parties occasionally seek a stipulation and order holding the settlement documents confidential and sealed. The sealing and the unsealing of settlement documents requires all counsel to be cognizant of both constitutional and common law issues.

The primary constitutional issue that is raised is whether the party desiring to preclude the sealing, or seeking access to already sealed documents, has a first amendment right that must be protected. If such a right exists, then the settling parties who desire the sealing, or seek to preclude the right of access, bear the burden of showing a compelling interest which outweighs the media's and public's constitutional rights. If no constitutional right exists, however, then the settling party only bears the burden of showing that its interest outweighs the interest of the media and the public under a common law analysis.

Since settlements are historically private and confidential, the party seeking to prevent sealing, or seeking access to already sealed documents, probably does not have a constitutional right to access to those settlement documents. More than likely, they only have a common law right of access. If the media has obtained the information through public dissemination in the courtroom, then the media and the public have a first amendment right to present that information outside the courtroom.

Depending upon the facts of each case, consitutional as opposed to common law rights may exist when the parties agree to seal the documents, during the settlement hearing, and in attempts by outside parties to gain access to sealed documents. The counsel representing the settling parties should do everything within their capabilities to make sure that the interest remains one of common law. Conversely, the counsel representing parties who are seeking access or preclusion of sealing, should do all that they can to make sure the interests are of a constitutional magnitude. Failure to do so by any counsel involved will make it more difficult for that counsel to obtain the desired result sought by his or her client.