HB

171

ATRA American Tort Reform Association

1212 New York Avenue, N.W. • Suite 515 • Washington, D.C. 20005 • (202) 682-1163

April 4, 1992

Honorable Gene Kubina
Chairman
House State Affairs Committee
Alaska House of Representatives
State Capitol
P.O. Box V
Juneau, AK 99811

Dear Chairman Kubina:

The American Tort Reform Association opposes HB 171, which would eradicate the right to privacy and increase cost and delay in the legal system. Twenty-eight states have rejected this trial lawyer legislation. This bill would increase the number of lawsuits filed, strip our judicial branch of its discretion in deciding issues of law, and invade the privacy of both plaintiffs and defendants.

The use of protective orders is already limited by Alaska Riles of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2). There is nothing in the Alaska Code that allows concealment of public hazards. Additionally, many state and federal laws exist primarily to inform the public of public hazards, be they product, environmental or financial. Many Federal acts and agencies also regulate products, substances and professional groups; the FDA, CPSC and OSHA to name a few. The functions of these important consumer safety agencies can never be replaced by the minuscule amount of public safety information that comes through the court system. Courts exist to resolve disputes, not act as regulatory or administrative agencies.

HB 171 would be a triple threat to control of the litigation explosion in this country. It would at once allow a party to a lawsuit to act as the judge in determining the application of the Alaska Civil Code sections referred to above, it would discourage settlement of lawsuits by removing the incentive of confidentiality, and it would create additional litigation by worsening the existing practice of selling information produced in cases, which produces new lawsuits. HB 171 will not guarantee a dissemination of worthwhile safety information to the public, but it will guarantee higher litigation costs for everyone by increasing the duration and complexity of lawsuits.

Finally, HB 171 is against public policy because it would immediately penalize anyone named in or contributing information to a lawsuit by taking away the right to privacy without any proof of guilt and regardless of the outcome. For the individual this could mean that

a non-party testifying in a lawsuit could be subject to public scrutiny. For a company, trade secrets and other important corporate information could published at any time. Again, both plaintiffs and defendants (and their counsel) would be hurt by this. The public has nothing to gain from HB 171, but everything to lose in terms of its right of privacy.

For these reasons the American Tort Reform Association (ATRA) urges that HB 171 be held in your committee. You should know that ATRA is a broad based coalition made up of 375 member organizations; including non-profits, professional societies, trade associations, large corporations, and small businesses. A copy of our membership list is attached for your consideration.

Sincerely,

Martin F. Connor
President

American Tort Reform Association

January 21, 1992

AEtna
Academy of Model Aeronautics
Acme Exterminating Corporation
Adams and Reece
Alabama Civil Justice
Reform Committee
Alabama Hospital Association
Albemarle Women's Clinic
Alexander & Alexander Services, Inc.
Alliance of American Insurers
American Academy of Orthopaedic
Surgeons
American Academy of Otolaryngology
American Academy of Pediatrics
American Association for Counseling
and Development
American Association of
Neurological Surgeons
American Association of Blood Banks
American Association of Engineering
Societies
American Association of Nurserymen
American Bus Association
American Camping Association, Inc.
American Centennial Insurance
Company
American College of Obstetricians
and Gynecologists
American College of Osteopathic
Surgeons
American College of Physicians
American College of Radiology
American College of Surgeons
American Consulting Engineers
Council
American Council of Independent
Laboratories
American Feed Industry Association
American Hardware Manufacturers
Association
American Home Lighting Institute
American Home Products Corporation
American Hospital Association
American Institute of Architects
American Institute of Certified
Planners
American Institute of Certified
Public Accountants
American Insurance Association
American Legislative
Exchange Council
American Machine Tool
Distributor's Association

American Tort Reform Association

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American Medical Association
American Nurses Association
American Optometric Association
American Orthotic and
Prosthetic Association
American Osteopathic Association
American Physical Society
American Red Cross
American Shooting Sports Coalition
American Society for Healthcare
Risk Management
American Society for Surgery
of the Hand
American Society of
Colon and Rectal Surgeons
American Society of
Mechanical Engineers
American Urological Association
American Waterworks Association
Artex Insurance Agency, Inc.
Associated Specialty
Contractors, Inc.
Associated Wire Rope Fabricators
Association for Advancement
of Anesthesia
Association for California
Tort Reform
Association of Commerce and
Industry of New Mexico
Association of Soil & Foundation
Engineers
Augusta Properties
Automobile Importers of
America, Inc.
BSK & Associates
Bayard, Handelman & Murdoch
Beer Institute
Bethlehem Steel Corporation
Blood Center for SE Louisiana
Blood Center of SE Wisconsin, Inc.
Boeing Company
Boy Scouts of America
Builders Hardware Manufacturers
Association
Business & Institutional Furniture
Manufacturers Association
CH2M Hill
CHAIS
COPIC Trust
Casting Industry Supply Association
Centel Corporation
Center for the Study of
Drug Development

American Tort Reform Association

Central Blood Bank, Pittsburgh PA
Century Surety Company
Chemical Manufacturers Association
Citizens Coalition for Tort Reform (Alaska)
Citizens Initiative for Equity in the Legal System (OR)
Citizens on Uniform Reasonable Torts (WY)
City of New York Law Department
Civil Justice Coalition (MN)
Clorox Company
Coalition for Availability and Affordability of Insurance (NV)
Coalition of Americans to Protect Sports
Congress of Neurological Surgeons
Conning & Company
Continental Insurance
Cooper Industries
Council of Community Blood Centers
Council of State Chambers of Commerce
Court Security Systems, Inc.
Covington & Burling
Creative Settlements, Inc.
Credi-Care
Crosby Group, Inc.
Crum & Forster Insurance Company
Cuyahoga Chemical Company
Damon Raike & Company, Inc.
Dana Corporation
DeLeuw, Cather & Company
Deere & Company
Design Professionals Insurance Company
Doctors' Company
Dow Chemical Company
Eagle Crusher Company
Eaton Corporation
Echelon Skating Center, Inc.
Edward B. O'Reilly & Associates Inc.
Elevator World
Eli Lilly and Company
Elite Mushroom Company
Emerson Electric Company
Enserch Corporation
Environmental Compliance Services
Environmental Resources Management
Equipment Manufacturers Institute
Erdman, Anthony, Associates

Exchange Mutual Insurance Company
Exxon Company, U.S.A.
FOJP Service Corporation
Federation of Advocates
for Insurance Reforms (NJ)
Fluor Corporation
Foth & Van Dyke & Associates
G & W Electric Company
GEICO
Gannett Fleming
Garvon, Inc.
Gas Appliance Manufacturers
Association
Gehris, Heroy & Associates
General Aviation Manufacturers
Association
General Electric Company
Golden Rule Insurance Company
Golder Associates
Gordon Cologne & Associates
Great American Insurance Companies
Great Plains Ventures, Inc.
Greater North Dakota Association
Gypsum Association
H.A. Just Waterproofing
Hallen Construction Company
Hanover Insurance Companies
Hartford Insurance Group
Haskell Chemical Company, Inc.
Hawaii Insurance Council
Hawaii Product Liability
Task Force
Health Care Insurance Company
Hensley-Schmidt, Inc.
Housemaster of America
Humana, Inc.
Idaho Liability
Reform Coalition
Illinois Product Liability Project
Independant Gas Company
Indiana Forum for Fair
Liability Laws
Institute of Electrical and
Electronics Engineers
International Association of
Shopping Centers
International Insurance
Services, Ltd.
International Staple, Nail
and Tool Association
Iowa Alliance for Liability Reform
James L. Cromwell, M.D., Inc.
Jervis B. Webb Company

Johnson & Higgins
Johnson & Johnson
Juvenile Products Manufacturers Association
Kansas Civil Law Forum
King, Hall & Associates, Inc.
Kroll, Tract
Lackawanna County Medical Society
Lawyers for Civil Justice
Lembo Research and Development Company, Inc.
Lev Zetlin Association
Liability Task Force (LA)
Libel Defense Resource Center
Liberty Mutual Insurance Company
Lindy's Air Conditioning & Heating, Inc.
Litton Industries, Inc.
Louisiana Dental Association
Louisiana Hospital Association
Lovell Safety Management Company, Inc.
M. Cortese Trucking Company, Inc.
Mader Construction Corporation
Maine Liability Crisis Alliance
Marine Index Bureau, Inc.
Marsh & McLennan Worldwide
McDermott, Will & Emery
Merck & Company, Inc.
Merrill Lynch, Pierce, Fenner & Smith, Inc.
Michigan Community Blood Center
Midland National Life Insurance Company
Minnesota Mining & Manufacturing Company
Mississippi Valley Regional Blood Center
Missouri Society of Anesthesiologists
Missourians for Civil Justice Reform
Mobil Corporation
Monsanto Company
Montana Liability Coalition
Montana Sulphur & Chemical Company
Murray Insurance Associates
Mutual Assurance Company
National Association of Casualty and Surety Agents
National Association of Exposition Managers
National Association of Independent Insurers

American Tort Reform Association

National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents
National Association of Secondary School Principals
National Association of Water Companies
National Association of Wholesaler Distributors
National Capital Reciprocal Insurance Company
National Electrical Contractors Association
National Electrical Contractors Association Maryland Chapter
National Electrical Manufacturers Association
National Forest Recreation Association
National Industrial Sand Association
National Institute of Municipal Law Officers
National Paint and Coating Association
National Pest Control Association
National Professional Management Corporation, Inc.
National Propane Gas Association
National Roofing Contractors Association
National School Boards Association
National Seminars and Education Institute
National Small Business United
National Society of Professional Engineers
National Solid Waste Management Association
National Structured Settlement Trade Association
National Tooling and Machining Association
Nationwide Insurance Companies
Nevada State Medical Association
New Hampshire Coalition for Affordable & Available Insurance
New Hampshire Medical Society
New York Blood Center

Non-Prescrption Drug
Manufaturers Association
North Dakota Task Force
on Liability Insurance
Ohio Alliance for Civil Justice
Oil Capital Electric, Inc.
Oklahoma Municipal League
Oklahomans Against Lawsuit Abuse
Olympia Trails Bus Company, Inc.
Otis Elevator Company
Outdoor Power Equipment Institute
PIE Mutual Insurance Company
Pennsylvania Civil Justice
Coalition
Pennsylvania Manufacturers
Association
Pennsylvania Medical Society
Pennsylvania Task Force on
Product Liability
Pension Company
Pfizer, Inc.
Pharmaceutical Manufacturers
Association
Philadelphia County
Medical Society
Pinole Medical Group
Powder Actuated Tools
Manufacturers Institute, Inc.
Prime-Line Marketing
Product Liability Task Force
of Mississippi, Inc.
Product Liability Task Force (MI)
Professional Lawn & Pest
Applicators
Project Civil Reform, Inc. (FL)
R.S. Eagan & Company
Reiter Construction Company, Inc.
Reliance Reinsurance Corporation
Research Solvents and
Chemicals, Inc.
Rhode Island Chamber of Commerce
Federation
Ringler Associates, Inc.
Rio Grande Valley Chamber
of Commerce
Riverside Canoe Trips, Inc.
Rockwell International
Rogers Mechanical Company
Roller Skating Rink Operators
Association
SYNTEX
San Bernardino County
Transportation Flood Control

Sandmeyer Steel Company
Scandia Family Fun Centers
Seagull Operating Company, Ltd.
Seamcraft, Inc.
Senco Products, Inc.
Sierra Chemical Company
Slug-A-Bug
Small Business Legislative Council
Soberay Machine & Equipment
Society of the Plastics Industry
Soltek of San Diego
South Carolina Civil
Justice Coalition
South Carolina Retail Fireworks
Association
Southeastern Pennsylvania
Transportation Authority
Specialty Advertising Association
International
Sporting Arms & Ammunition
Manufacturers Association
State Farm Insurance Companies
Stateside Associates, Inc.
Stiles & Taylor, P.A.
Stone & Webster Engineering Corp.
Suburban Cardiovascular Specialists
TAMS Consultants
TRW Inc.
Taussig Corporation
Taxpayers for Fair Responsiblity
(CA)
Ten Thousand Waves, Inc.
Tennessee Association for
Civil Justice Reform
Tennessee Dental Association
Texas Civil Justice League
Texas Council of Engineering
Laboratories
Tort Reform Alliance
of Illinois (TRAIL)
Tort Reform Association of
Kentucky (TRAK)
Tort Reform Task Force (DE)
Transamerica Insurance Company
Transco Insurance Services
Travelers Companies
Triten Corporation
U.S. AIG
U.S. Business & Industrial Council
Union Carbide Corporation
United Ski Industries Association
Vermont Tort Reform Coalition
Vulcan Materials Company

STATEMENT

Mary A. Nordale
Robertson, Monagle & Eastaugh
240 Main Street, Suite 800
Juneau, Alaska 99801

My name is Mary A. Nordale and I appear today in behalf of the American Insurance Association in opposition to House Bill 171.

House Bill 171 seeks to change radically the course of trials and trial preparation and would require judges to render decisions on ultimate facts before the normal course of pretrial discovery is completed, let alone the trial itself. By prohibiting a judge from entering protective orders during the course of pretrial discovery without first examining the evidence produced and making the determination that there either is or is not evidence of a hazard and that hazard is or is not a public hazard, the probability of a fair trial is significantly diminished. In fashioning orders throughout the pretrial order, the court could not escape being influenced by his determination as to the existence of a public hazard.

Discovery is the process by which opposing parties learn the facts to be relied on for trial and the process is essential under our system of civil justice. Impairing or impeding the free flow of information will impair justice and the rights of litigants.

The costs of litigation would be increased significantly because the requirement of examination can be invoked by an "interested person." The Alaska Supreme Court has construed terms such as "interested person" very broadly so the expectation is that almost any busybody can force parties to litigation and courts to expend vast amounts of time and money in litigating, first of all, whether the "interested person" is an "interested person" and then whether or not evidence of a public hazard exists. The term "public hazard" is so broad that it could constitute anything, tangible or intangible, that might cause injury.

In the last decade or so the Alaska Supreme Court and the federal court system have sought to diminish the fiscal impact of discovery, shifting more and more of the burden of determining the probity and value of evidence to the parties. House Bill 171 would reverse that trend, forcing the courts once again to become involved in the discovery process, diverting the resources of the courts from trials and other matters of importance to the people seeking their aid. We could be forced into the situation of several states of not being able to bring civil cases to trial for five to 10 years even though we would have added 5 to 10 judges to handle the workload.

Because this type of legislation is foremost on the American Trial Lawyers Association's agenda, several states have had the opportunity to study the issues raised. Florida has enacted such legislation and is now trying to cope with the burden it has placed on the fiscal resources of that court system. Idaho and Montana have rejected the legislation because of cost.

Most of the information sought to be disclosed through legislation such as House Bill 171 is available to the public. There are data bases easily accessible through libraries, industry publications, electronic data bases, magazines and the like. Research in such sources can be time-consuming and attorneys do not like to spend time for which they are not paid. Generating clients and target defendants becomes much easier if legislation such as House Bill 171 is enacted.

Not only will the costs to the court system escalate and the demand for additional judges grow, but the costs to everyone will grow, through increased attorney fees, increased insurance premiums and, generally, the increased cost of doing business. All of these costs are, in some way, passed on to the consumer. With all of this increase in cost, no showing has been made that the consumer will benefit.

My experience as a trial lawyer compels me to advise clients that they may lose more than they gain if, as plaintiffs, they litigate claims of less than $25,000 using attorneys. If you look at the dockets of the courts, you will see that there are hundreds of cases being pursued that involve claims of less than $25,000, many through attorneys. Litigation simply isn't cheap, but sometimes it is necessary. Now, regardless of the subject matter of the litigation a stranger to the issues can inject himself and raise the cost beyond what ordinary litigants can afford. What a bill such as House Bill 171 will do is force people with good causes of action and good defenses to sacrifice their rights to seek resolution through the court system simply because by litigating, they can become victims of intermeddlers and of economic warfare.

There are other, fairer solutions, if a problem exists, and I would urge this committee to seek information as to what perceived problems exist for which this legislation is proposed as a solution and address those problems without closing the doors of the courtrooms of Alaska to individual litigants.

FAX 274-8201

MEMO

TO: HOUSE STATE AFFAIRS COMMITTEE
CHAIRMAN - GENE KUBINA

FROM: KATHRYN KOLKHORST
RUDDY, BRADLEY & KOLKHORST
Member, Defense Bar
Representing - Lawyers For Civil Justice
Motor Vehicle Manufacturers Assn.

DATE: April 2, 1991

RE: OPPOSITION TO HOUSE BILL 171

1. **This bill would interfere with the state court system and tie the hands of the judges.** This bill would interfere with the existing state judicial process and end the discretion of the courts as to whether or not and to what extent to issue protective orders on any litigation before them. Matters of discovery[1] and the approval of settlement agreements[2] are matters which should be left to the court which is familiar with the individual case and not dictated in a blanket manner by the legislature.

Furthermore, this bill purports to change no fewer than six of the existing Alaska Rules of Civil Procedure.[3]

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[1] Discovery is a pretrial process that requires parties to litigation to exchange information to help prepare for trial. Highly confidential information and documents - including trade secrets - are often exchanged, including information that may not be admissible at trial. At the request of one, or often both, of the parties, court may issue protective orders ensuring the confidentiality of this information by prohibiting its disclosure outside of the litigation.

[2] Settlement agreements are contracts between private parties often also approved by the court settling legal disputes outside of the trial process. These agreements often contain provisions which require that the parties not reveal the terms, conditions or amounts of the settlements. Often an agreement requiring confidentiality provides strong incentives for defendants to settle cases on terms favorable to the claimants.

[3] Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d) and 37(a)(2).

2. **This bill would cause extra work for the court system and ultimately require more state judges.** It is to be expected that the fiscal note of this bill would require the costs of appointing and paying more state judges, as an important incentive for settling cases would be eliminated by this bill. If confidentiality in discovery cannot be protected, litigants will fight every document request that an opposing party makes for information that may be sensitive or confidential. Confidentiality promotes cooperation in discovery and private settlement of legal disputes outside the courtroom and without it there will be more cases that take longer time and require new judges.

This bill would essentially make the court system the clearing house for information generated in litigation between two parties. The proper agencies for discovering and addressing public health hazards are the agencies of the executive branch: the Department of Environmental Conservation, Department of Labor, and the like.

3. **There are many proper purposes for confidentiality and privacy.** Confidentiality plays a legitimate role in litigation as plaintiffs, defendants and witnesses will often expose very personal, sensitive information in courts. Public disclosure of this information would be an unwarranted invasion of the right to privacy. Furthermore, corporations and businesses must frequently reveal information of great commercial value, including trade secrets, in order to resolve lawsuits. This is information in which the organization has a valuable property right and enforced disclosure of this information to competitors could be an unconstitutional taking of private property.

Under existing discovery rules a court must be satisfied that there is "a good cause" to issue the protective order[4] to prevent the potential abuse of the information. With a protective order in place during discovery, the court can require the litigants to disclose information among themselves without fear of public disclosure and without constant judicial supervision.

The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by our Constitution. Both are lost when private information becomes public or a trade secret is revealed to a competitor.

4. **This legislation would promote spurious lawsuits.** Although the advocates of this legislation in other states argue that protective orders are used to conceal information about dangerous consumer products or harmful corporate practices, it appears, unfortunately, that the real reason behind this

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[4] Alaska Rule of Civil Procedure 26(c).

legislation is to allow plaintiff's lawyers to share or sell information gained from reading court files of other litigation, perpetuating the litigation explosion and generating additional contingency fees. When members of the plaintiff's bar package and sell information obtained from one lawsuit for use in another lawsuit, "copycat" lawsuits and other spurious lawsuits are generated, producing contingency fees for the plaintiff's bar but no public benefit.

In summary, protective orders and the confidentiality they ensure are a crucial device in our litigation system. The rules governing discovery and settlement operate as a system of checks and balances designed to ensure that both parties in litigation are treated fairly. Because the Rules of Civil Procedure give parties access to the opponent's most sensitive and confidential information, courts must have the authority to balance this intrusion with a guarantee of confidentiality. This legislation would interfere with that balance.

Torts

By Michael Schneider

In February, 1991, the House Judiciary Committee, led by Representative Dave Donley, (D-Anchorage) introduced HB 171: "An Act Restricting Court Orders and Certain Private Agreements Relating to the Concealment of Public Hazards and Information on Public Hazards; and Amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

The notion is not novel. At least eight states will be considering similar legislation during the 1991 legislative session. Florida, North Carolina, and Virginia have passed secrecy/protective-order legislation in the last two years. California (San Diego Superior Court), New York, and Texas have amended their rules of court or their rules of civil procedure to prohibit secrecy/protective orders. A model "Sunshine in Litigation" act has been circulating around the country for the last couple of years and is being considered, at least as an alternative, by our legislature and the states mentioned above.

It's pretty obvious to attorneys why legislation of this type is being considered. The worse the defendant's conduct, the more widespread, the more it tends to affect (or potentially affect) a large class of people, the more it tends to be a "public hazard," and the greater the damages likely to flow from the hazard, the more likely it is that any offer of peace will be coupled with a demand for confidentiality.

The confidentiality provision typically addresses not only the fact of settlement, but the terms of the settlement and all the materials obtained in the course of the case. Orders are often issued in furtherance of these agreements (upon a stipulation of the parties) sealing the court record and/or requiring the return or disposal of documents obtained or disclosed during the case. While we are all forced to enter these agreements to promote our clients' interests, the public interest in being able to define and recognize dangerous products or dangerous practices and the interest of future litigants in being able to prove their case without "mining the game nugget" time after time after time suffers drastically as a result of this conspiracy of silence.

HB 171 is short and to the point. It imposes upon the court a duty to "examine the materials in camera" that are subject of a motion for an order prohibiting disclosure. If the materials or information have previously been disclosed, or concern "a public hazard," then the court is commanded not to enter the requested order. An "interested person" has standing to challenge a secrecy or protective order. An "interested person" is to be construed as that term is used in AS 44.62.300, and does not include a party to the litigation or to the agreement out of which the request for secrecy flows. While this definition is fairly broad, it could be a lot broader and does not clearly include classes such as the news media. Under HB 171, private agreements on materials concerning public hazards are void and may not be enforced. A public hazard is defined to be "an instrumentality that has caused injury to a person or property, and includes a device, instrument, person, procedure, or product, and a condition of a device, instrument, person, procedure, or product."

In my opinion HB 171 should be passed. Nevertheless, this bill could be a lot better than it is. The model "Sunshine in Litigation" Act of 1991 does a better job of addressing the legitimate concerns that are the subject of HB 171. Some examples follow:

a. Unlike the model act, HB 171 doesn't extend to settlement terms or the amount of a settlement.

2. The model act contains a legal presumption of openness. The burden is placed upon those demanding secrecy and confidentiality to prove the merit of their position. HB 171 does not do this.

3. The model act clearly specifies the types of information that may qualify for secret treatment. For instance, the model act recognizes that there is no interest in openness (secrecy is thus authorized) as to "private facts concerning a natural person or trade secrets or other confidential research, development, or commercially secret data."

4. "Interested person" is more broadly and less ambiguously defined than in the version of HB 171 that I reviewed.

5. The model act provides for automatic access to discovery generated in other litigation by parties with similar or identical claims.

6. The model act contains a public-notice provision. If litigants or any other "interested person" are going to fight over secrecy, the public is given notice of the battle and an opportunity to attend.

7. The model act provides for attorney's fees to public-interest litigants where a request for secrecy is successfully opposed.

8. Under the provisions of the model act, it is extremely difficult to hide relevant information about public hazards from governmental or regulatory agencies.

The legislature has already received vigorous opposition to HB 171 from such public-spirited folks as the American Insurance Association, the Motor Vehicle Manufacturers Association, the Pharmaceutical Manufacturers Association, and Lawyers for Civil Justice (and who do you suppose this outfit represents . . . ?).

If any of you really believe that promoting secrecy in litigation is good public policy for the state of Alaska, I would really appreciate it if you would take a moment to commit your thoughts to writing and send them to me. On the other hand, if you believe, as I do, that HB 171 (and better yet, the model act) is an idea whose time has come, I'd encourage you to get your views to the legislature immediately. As you know, this can be done with a telephone call to your local legislative information office and a request that your brief message be communicated to all members of the legislature.

Alaska State Legislature

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

Representative Eugene Kubina

During Session:
State Capitol
P.O. Box V
Juneau, Alaska 99811
(907) 465-4859

During Interim:
P.O. Box 2463
Valdez, Alaska 99686
(907) 835-2111

April 3, 1992

Christine Johnson, Esquire
Court Rules Attorney
303 K Street
Anchorage, AK 99501

Dear Ms. Johnson,

Today the House State Affairs Committee considered HB 171: "An Act restricting court orders and certain private agreements relating to the concealment of public hazards and information on public hazards; and amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

HB 171 was passed out of this committee and is now in the House Judiciary Committee. We respectfully request that you consider the bill to decide whether the issue would be better addressed by court rule changes or new rules rather than by legislation. In addition, we request that you give the House Judiciary Committee your position promptly so that they may hold a hearing on HB 171 before the end of this legislative session.

I am enclosing a copy of the bill and all of the supporting documentation the committee has received. If you have any questions, please feel free to contact me. Thank you very much for your assistance in this matter.

Sincerely,

Gene Kubina

Representative Gene Kubina, Chairman
House State Affairs Committee

MALONEY & HAGGART
ATTORNEYS AT LAW
P. DENNIS MALONEY, P.C.
RICHARD G. HAGGART
405 WEST 36TH AVE., SUITE 200
ANCHORAGE, ALASKA 99503
TELEPHONE
(907) 561-4603
TELEFAX
(907) 562-7888

January 27, 1992

Representative Dave Donley
Room 122, Capitol
P.O. Box V
Juneau, AK 99811

Re: HB 171

Dear Representative Donley:

This letter is to express my support for House Bill 171 introduced last session by the Alaska House Judiciary Committee.

I believe that a bill which prohibits sealing court records to conceal public hazards should be a high priority. The public has a right to know of the dangers of any defective products which could result in injury. Likewise, professionals should not be able to continue practicing without having to account to the public for providing substandard services.

In the past several years, I have been involved in two cases where the sealing of court records deprived the public of its right to know. In one instance, documents proving that State Farm Insurance Company takes advantage of its own insureds by routinely denying payments under medical pay provisions were returned and suppressed by stipulation because of the protection practice problem. In the second case, documents which proved that the Chrysler Volare was manufactured with defective headrests resulting in my client receiving a broken neck in a low speed collision, were also ordered returned and the amount of the settlement was suppressed.

Please give this matter your consideration and support.

Very truly yours,

MALONEY & HAGGART

P. Dennis Maloney

PDM/drm

MSH

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 L Street, Suite 104 • Anchorage
(907) 258-4040

FEB 6 1992

February 3, 1992

The Honorable Gene Kubina
Chair, State Affairs Committee
Alaska State House of Representatives
Alaska State Capital
Juneau, Alaska 99801

Re: HB 171 -- The Sunshine in Litigation Act

Dear Gene:

We recently received the enclosed letter from Lloyd Doggett, a Justice of the Texas Supreme Court. I thought you might be interested in reading it. Justice Doggett indicates that the Sunshine in Litigation Rule adopted in Texas has not had the effect of increasing litigation, as its critics predicted. He strongly supports our efforts to enact HB 171, and has offered whatever assistance he might provide towards that end.

Please let me know when you plan to schedule hearings on this bill. I will plan to attend them in Juneau at that time.

Very truly yours,

Russell L. Winner, Chair

cc: The Honorable Dave Donley, w/ encl.

E:\ACTIONTR\KUBINA2.LTR

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

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EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

January 28, 1992

Debra C. Gravo
Executive Director
Alaska Action Trust
P. O. Box 102323
Anchorage, Alaska 99510

Dear Ms. Gravo:

Thank you for providing current information on Alaska's efforts. If it would be helpful in any way, I would be willing to personally discuss at length our experience and, if it should prove necessary, various alternatives to the Texas Rule that might appear to be compromises but would achieve most of the objective of the Rule.

With approximately a year and a half of experience under both the Texas Rule and the Florida statute discouraging court secrecy, there have not yet been any published appellate opinions. Our Supreme Court has received only one direct request from a media organization for documents in a pending appeal. This was denied with an order noting that the trial court had previously adopted a protective order covering the same documents and was empowered to modify its order under Rule 76a if any modification was justified. The court has at least one other case pending which involves the appropriate method for appellate review of a trial court determination on disclosability. Another appellate review issue has been considered in an unpublished opinion of an intermediate court of appeals.

Texas is the only state in the nation which has a readily accessible data base for evaluating the type and number of secrecy

requests that are being made. This results from the requirement in Rule 76a that all public notices announcing a request for closure be filed with the Clerk of the Supreme Court. From September 1, 1990 to January 23, 1992, notices were filed in 106 cases involving wide-ranging subject matter and types of documents. While the largest single category appears to be requests by defendants in products liability cases, a number have come from plaintiffs in personal injury and non-personal injury claims.

The insistence of the opponents of openness that our courts would be strangled by battles over secrecy have proven false. No doubt this is true in part because those who lack a legitimate basis for secrecy are less likely to demand it when the extensive requirements of Rule 76a must be satisfied. There have been few reported interventions by third parties seeking to oppose secrecy.

Undoubtedly our rule is not perfect and further experience may indicate the need for some improvement. However, I believe that Rule 76a is accomplishing its purpose with no significant adverse side effects on either our judiciary or our business community.

Unfortunately in our State and across the country the culture of secrecy had become so commonplace that it enveloped litigation even when any actual benefits were minimal. "Why take a chance on openness when secrecy is so readily available" became the standard mindset. Countering this growing trend, we recognized that public court records are rich with democracy's indispensable raw material: information.

Several concerns were present in our adoption of Rule 76a. First, greater access to civil judicial records promotes public health and safety. Secrets that are buried in court records preclude public recognition of dangers, accident prevention, and a reduction of injury exposure. In this sense, court secrecy can, literally, kill and maim. Attorney Generals in both Texas and New York have also emphasized the danger to the public when secrecy orders deny law enforcement agencies information necessary to their effective operation.

Second, access to judicial records encourages greater integrity from attorneys and their clients. If documents are made public in one case, a party is less likely to deny their existence in later

litigation. In this regard, the courts are not burdened; rather they are unburdened of the task of hearing repetitive battles over the same discovery disputes.

Third, access ensures greater integrity from the bench. An old adage tells us that "doctors bury their mistakes, but judges publish theirs." Inspection of public records provides a check upon the judiciary and the "good-ol'-boy system" that sometimes develops between judges and favored lawyers.

I commend you and your colleagues for tackling this tough issue and stand ready to provide any assistance that may be appropriate.

Sincerely,

Lloyd Doggett

LD:vs

Monsanto

FRANCIS J. STOKES
Director, Policy Planning

Monsanto Company
800 N. Lindbergh Boulevard
St. Louis, Missouri 63167
Phone: (314) 694-1000

April 2, 1992

The Honorable Gene Kubina
Chairman
House State Affairs Committee

Dear Chairman Kubina:

Monsanto opposes Alaska House Bill 171 that prohibits courts from ordering non-disclosure of information concerning public hazards.

Removing this protection would harm both plaintiffs and defendants who have information that should be kept confidential. Businesses stand to lose valuable trade secrets. The public's interest in good corporate conduct is better served by government regulatory agencies and criminal prosecution -- not by the indiscriminate release of confidential information gathered in lawsuits.

Sincerely,

Francis J. Stokes

cc: Members of the House State Affairs Committee

LAW OFFICES
Richmond & Quinn
A PROFESSIONAL CORPORATION
360 K STREET, SUITE 200
ANCHORAGE, ALASKA 99501

CYNTHIA K. ALLEN
MICHAEL I. KONDZAL
HOWARD J. MEYER III
DANIEL T. QUINN
JAMES E. RAMSEY
ROBERT L. RICHMOND
LESTER K. SYREN
RICHARD E. WELSH
MARC G. WILHELM

TELEPHONE
AREA CODE 907
276-5727

FACSIMILE
(907) 276-2953

April 8, 1992

VIA TELECOPIER

Representative Dave Donley
House Rules Committee
Alaska State Capitol
Juneau, Alaska 99801-1182

Dear Representative Donley:

We are writing to urge you as a member of the House Rules Committee to oppose House Bill 171.

Mr. Richmond and I, as are the other attorneys of our firm, are members of the Defense Council of Alaska and Mr. Richmond is President of that organization. We have reviewed the proposed House Bill 171 and feel that it would have a major detrimental effect on the procedures of the court system during civil litigation. Whatever reform House Bill 171 is attempting to achieve, this is not the proper way to achieve it. Among other faults, the Bill in essence, will require the court to make premature factual determinations early in the litigation without having the benefit of the complete background, giving uncertainty to the whole judicial process. The Bill could force the courts to give advisory opinions.

As you may know, the Alaska Supreme Court has established a Civil Rules Committee to allow reasoned consideration of proposed changes of this sort. Additionally, the Court System employs a civil rules attorney whose function is to consider and recommend such proposals. In our view, adoption of House Bill 171 would render civil litigation even more unwieldy and expensive. At the very least, the Civil Rules Committee and the court rules attorney should have the opportunity to evaluate this Bill before the legislature adopts such a wide-ranging proposal. We are troubled by what seems to be an effort to bypass these existing evaluation mechanisms established by the judiciary and the court system, the entities most affected by the Bill.

The ramifications of House Bill 171 would be far-reaching and extremely detrimental to the civil litigation process in Alaska. Therefore, we would ask your support in voting against the passage of this Bill.

Yours very truly,

Daniel T. Quinn

DTQ/shg

32\099-999\L

WALTER J. HICKEL, GOVERNOR

REPLY TO: NEW ANCHORAGE PHONE (907) 269-5100

☐ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 25, 1991

The Honorable Gene Kubina
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 171

Dear Representative Kubina:

You have requested the Department of Law to provide the House State Affairs Committee with comments on the legal effects of House Bill 171. We have reviewed the bill and are concerned that, as now drafted, it may create considerable legal difficulties for the state.

House Bill 171 attempts to limit courts' abilities to enter confidentiality orders as to "public hazards." It defines a "public hazard" broadly to mean "an instrumentality that has caused injury to a person or property, and includes a device, instrument, person, procedure, or product, and a condition of a device, instrument, person procedure, or product."

The primary difficulty with the bill is with the first provision where it states broadly that "[a] court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard." This language, in conjunction with the definition of "public hazard," can have very broad ramifications. For example, in the environmental litigation area, it might have a chilling effect on the provision of information concerning the existence or effects of pollution by a confidential informant.

In the Exxon Valdez litigation, there is currently at issue a request to keep confidential the identities of respondents to a survey done of individuals affected by the oil spill. Although the state is not directly involved in this dispute, we support this request for confidentiality at the request of several of our client agencies. The survey at issue involves very personal information such as the use of alcohol and the presence of domestic friction in households. The agencies are concerned that if these

identities are made public, there will be a great reluctance on the part of the villagers to fully participate in state resource surveys in the future. Under the proposed bill, a court would be without authority to enter an order protecting that confidentiality.

With respect to the state's specific interest in environmental cases such as the Exxon Valdez litigation, we are concerned as to the potential impact of the bill on expert work-product. While part (b) of the proposed bill restricts itself to discoverable material, part (a) does not and could be misconstrued to require a court to order the production of attorney work product, such as expert reports. If so, it could put the state at a serious disadvantage in civil environmental prosecutions where the state bears the main brunt of the investigative work. In a worst case, it may inhibit the state or a private entity from fully investigating the effects of an oil spill or other environmental problem. The relationship of the proposed statute to Civil Rule 26(b) protections should be made more explicit.

Other problems may arise where this proposed statute conflicts with statutory or traditional notions of privacy. For example, it is unclear how the prohibition against entering an order which has the effect of concealing "information concerning a public hazard" would interact with a statutory requirement of confidentiality as to personnel records, child in need of aid proceedings, archaeological information, or exploration well data. In the Exxon Valdez litigation, the parties have filed discovery requests with the state which require disclosure of the location of archaeological sites affected by the oil spill. It is our intention to ask the court for a protective order based on federal law which restricts the public dissemination of that information. On their face both (a) and (b) of the proposed bill would prohibit the court from entering the requested order. Although such a result seems unlikely, the potential conflict could be easily avoided by the inclusion of language similar to that found in AS 09.26.120 which provides an exception to public records disclosure provisions for "records required to be kept confidential by a federal law or regulation or by state law."

In other instances there may be information, such as trade secrets relating to the composition of a chemical compound, which technically concerns a "public hazard" but whose possible deleterious effect is so outweighed by the potential commercial damage done by disclosure that no reasonable person would view disclosure as prudent. In some instances, the publication of information which concerns a "public hazard" may interfere with an ongoing law enforcement investigation or disclose confidential techniques and procedures for law enforcement investigations or

prosecutions which a court, in its discretion, would choose to protect. The bill as drafted does not allow a court to make these judgments.

In general, there are likely to be many instances where information that falls within the literal ambit of this statute should be kept confidential but, under the proposed language, a court's discretion to do so would be restricted. This committee should give careful consideration as to the full extent of the legal impacts occasioned by this broad restriction on the exercise of discretion by the court.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Craig J. Tillery
Craig J. Tillery
Assistant Attorney General

CJT: md

cc: The Honorable Dave Donley
The Honorable Rick Halford

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

SPONSOR STATEMENT - HB 171

SECRECY AGREEMENTS IN LAWSUITS

This bill would prohibit courts from ordering non-disclosure of information concerning "public hazards" and would render unenforceable private non-disclosure agreements executed to settle civil litigation.

"Public hazard" is very broadly defined to mean an instrumentality that has caused injury to a person or property, and includes a device, instrument, person, procedure, or product, and a condition of a device, instrument, person, procedure or product.

Product manufacturers in product liability suits, oil companies in oil spill damage suits, and professionals such as lawyers and doctors in malpractice suits, have usually insisted that court records and other information related to litigation be kept secret as part of settlement agreements.

It is in the public's best interest that information about such hazards which have caused widespread harm be available to the people.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date:
Title: An Act restricting court orders and certain private agreements... public hazards
Sponsor: Judiciary Committee
Requestor: State Affairs

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	40.6	40.6	40.6	40.6	40.6	40.6
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	40.6	40.6	40.6	40.6	40.6	40.6
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	40.6	40.6	40.6	40.6	40.6	40.6
FEDERAL FUNDS						
OTHER						
TOTAL	40.6	40.6	40.6	40.6	40.6	40.6

POSITIONS:

FULL-TIME						
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 04/04/91

Approved by: Arthur H. Snowden, II, Administrative Director by
Agency: Alaska Court System
Date: 04/04/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

Sec. 09.25.240(b) grants a broad right to any interested person to bring an action for injunctive relief against a party to a private settlement or discovery agreement in cases involving a public hazard. Exercise of this right will increase the workload of the court system by generating new cases. In addition to the burden that additional filings have on the clerk's office, requests for injunctive relief require in-court time far more frequently than do other types of civil cases.

It has been strongly suggested that this legislation will also have the effect of increasing the number of cases that go to trial by discouraging settlement. We cannot determine if this view is correct. Should this result, the court system will need to request additional funding.

Fiscal Analysis

Personal Services

	Salary	Benefits	Total
Pro Tem Superior Court Judge, PPT - 6 months, Anchorage (25% of active judge salary)	11,500	9,620	21,120
In-Court Clerk, PPT - 6 months, 12	13,296	6,204	19,500
Estimated Total Cost			40,620

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 171

Revision Date: _____ Department Affected: Environmental Conservation

Title: An Act restricting court orders and certain private agreements

BRU: Environmental Quality

Component: Environmental Quality

Sponsor: Judiciary

Requestor: _____

COMPONENT SERIAL NO. 1 0 _ 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: NONE

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: James F. Hayden Phone: 789-9729

Division: Environmental Quality Date: 4/2/91

Approved by Commissioner: Lisa Rudder

Agency: Environmental Conservation Date: 4-18-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

(7)

HOUSE COMMITTEE REPORT

Date Referred: April 3, 1992 FURTHER REFERRAL: Finance

Date of Committee Action: 4.15.92

The JUDICIARY Committee considered: HB 171

HOUSE BILL NO. 171 PROHIBIT SEALING OF CERTAIN COURT RECORDS

"An Act restricting court orders and certain private agreements relating to the concealment of public hazards and information on public hazards; and amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

RECOMMENDATIONS:
be replaced with CS HB 171 (JUD)
[✓] the same title
[ ] a new title

[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)
[✓] fiscal note(s) CTS. (4-3-92)
[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Dave Donley	X				
John Ellis	X	Terry Martin		✓	
Mark Hanley	✓	Mark Hanley	X		
		Kevin Pat Parnell		✓	

Dave Donley
CHAIRMAN'S SIGNATURE

F USE COMMITTEE REPOR

(7)

Date Referred: February 27, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/3/92

The STATE AFFAIRS Committee considered: HB 171

HOUSE BILL NO. 171 PROHIBIT SEALING OF CERTAIN COURT RECORDS

"An Act restricting court orders and certain private agreements relating to the concealment of public hazards and information on public hazards; and amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[Y] no recommendations

[ ] individual recommendations

[X] additional referral to the FINANCE Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[X] fiscal impact Court System

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
T Kelly	✓	Eugene A Kubina		X	
		J David Mackie CHOQUETTE		X	
		Jerry Lee Baker BAKER		✓	

Eugene A Kubina
CHAIRMAN'S SIGNATURE

KEEPING SECRETS

Justice on Trial

Report of the
Conference
on
Courtroom
Secrecy

**Society of
Professional Journalists**

and

**Association of
Trial Lawyers of America**

KEEPING SECRETS
Justice on Trial

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Appendices

EXECUTIVE SUMMARY

During the last decade, court secrecy has assumed an increasingly controversial role in the operation of the civil justice system in the United States. Confidentiality agreements, protective orders, and even sealed court files today are part and parcel of many lawsuits initiated by injured consumers. These include major product liability, medical malpractice, and toxic tort cases, which often involve serious issues of public health and safety.

Such court-approved secrecy agreements and protective orders can keep the facts about hazardous products and practices from the public. They can shield secrets that can be deadly.

The consequences of court secrecy increasingly have been held up to public scrutiny by the press and legal organizations, among them the sponsors of "KEEPING SECRETS: Justice on Trial" -- the Society of Professional Journalists and the Association of Trial Lawyers of America. Held on April 25, 1990, this conference was a groundbreaking effort to establish a dialogue among groups and individuals concerned with the legal, ethical, and practical issues that surround secrecy in our nation's courts.

Participants included journalists, the judiciary, representatives of consumer advocacy and public interest organizations, members of the plaintiff's and defense bars, Constitutional scholars, and academicians. Participants focused on the following central issues:

- *Balancing the public's right to know and the civil litigant's right to privacy*
- *Ethical responsibilities of lawyers*
- *Economic consequences of secrecy*
- *Protection of trade secrets*
- *Role of the judiciary*
- *Models for the future*

Right to Know vs. Right to Privacy

Most Conference speakers argued that public policy interests should override privacy rights in most cases. Public policy interests were defined to include the right of the public to be informed about health, safety, and environmental hazards; the societal value of the free

exchange of scientific information; and the First Amendment right of the press to report on private cases brought in public courts.

Defense lawyers dissented from this view. They argued that property and privacy rights protected by the Constitution take precedence over any claimed right of disclosure, particularly of information obtained through discovery in litigation between private parties.

Consumer and public-interest representatives strongly advocated full disclosure. They cited an historical foundation for public access to *all* court proceedings, including discovery.

Legal Ethics

Secrecy agreements often pose a troubling ethical dilemma for lawyers, particularly plaintiff's attorneys. Under the Code of Professional Responsibility, the primary legal duty of attorneys is to their clients. Yet this duty may conflict with the lawyer's moral obligation to prevent further injury to the public at large. The existing system places relentless economic pressure on clients to acquiesce in secrecy agreements in return for an adequate settlement at a time of great need. For conscientious attorneys, who represent their clients' interests and also recognize a commitment to the larger public good, the system too often offers unsatisfactory choices. Most victims do not have the luxury of rejecting a settlement offer that is contingent on the acceptance of silence. Members of the defense bar, too, are often faced with unsatisfactory choices. Serving the best interest of their clients can mean keeping from the public information vital to its safety and health. This reality -- the clients' immediate and long-term needs -- must be served by the lawyers who represent them.

Cost of Secrecy

Defenders of secrecy orders and agreements contend that they make litigation more efficient by facilitating timely discovery and by promoting settlements. Opponents of secrecy assert that secrecy makes litigation more costly and time-consuming by forcing litigants in similar cases to undergo the same, often laborious, contentious, and costly process of discovering information. Injured victims and those who represent them describe pressure by defense lawyers for confidentiality in return for such information as a form of economic blackmail in litigation.

Trade Secrets

There was general agreement that legitimate trade secrets are appropriate subjects for protective orders, but that umbrella orders that hide such essential information as crash-test data, product hazards, and adverse drug reactions are unacceptable. Such orders can suppress facts that members of the public should have in order to protect themselves from future harm.

Judges' Role

Judges routinely approve secrecy agreements that appear to have been entered into voluntarily by litigants. Crowded dockets and understaffed court systems increase pressures on the judiciary to move litigation along expeditiously. Judges, who are eager to resolve cases, seldom question whether such agreements do in fact serve the best interests of the public. In the interests of efficiency, they naturally welcome settlements arranged by the parties in the case. Where the facts of a case are not reviewed by the court when settlement is proposed, its public policy implications cannot even be considered.

Investigative reports by the press have shown that judges frequently are unaware of the extent to which secrecy agreements hide facts about dangerous products and procedures or about incompetent physicians. Once a secrecy agreement is reached, it is unlikely to be questioned. While defense attorneys argue that agreements between parties must be sacrosanct, consumer advocates assert both a need and a right to challenge such agreements as third parties representing the public. They also claim a right to intervene in hearings involving the sealing of records.

Solving the Problem

The public policy issues raised by court secrecy are national in scope. Ways of resolving the problems of secrecy orders are being explored in state courts and judicial tribunals, state legislatures and in the Congress.

The Supreme Court of Texas, in April 1990, adopted new amendments to the Texas Rules of Civil Procedure that provide explicit standards for sealing court records and settlement agreements. These rules are based on the presumption of openness of court records. Records may be sealed only upon a showing of a specific, serious, and substantial interest that clearly outweighs any likely adverse effect on public health

In Texas the presumption is that court records are open. It is up to the person who desires to seal those records and foreclose public consideration of them to shoulder the burden of proof at every instance.

Justice Lloyd Doggett,
Texas Supreme Court

and safety. The public must be notified of a hearing to seal documents, and the rules allow third parties to intervene and argue that documents not be hidden from the public. Discovery proceedings are encompassed by the rule, with the exception of actions brought to protect trade secrets and intellectual property rights.

Florida has enacted a law (Sunshine in Litigation, effective July 1, 1990) forbidding courts from entering orders that conceal either a public hazard or information about a public hazard. The law defines public hazard to include defective products, dangerous procedures, or even individuals. Any agreement concealing a public hazard is unenforceable, and the legislation allows any "substantially affected person," including representatives of the news media, to contest contracts or court orders conceal hazards.

In New York, an administrative board has been examining new rules that would make it more difficult to seal state court records in cases where the public's right to know outweighs a defendant's right to privacy. "Closing the record has become the routine, and it's high time that we consider whether there should be a presumption of openness," said Justice Sol Wachtler, who presides over the Court of Appeals, New York's highest court, which approves rules changes.

Recent Congressional hearings have brought the problem of court secrecy to the attention of legislators, the judiciary, and the public. In May 1990, the Subcommittee on Courts and Administrative Practices of the U.S. Senate Judiciary Committee, chaired by Senator Herb Kohl (D-WI), conducted hearings that examined court secrecy in the context of victims' rights and public policy interests. Witnesses included five participants in "KEEPING SECRETS: Justice on Trial."

SCOPE OF THE PROBLEM

Without a secrecy order or agreement, information that emerges during the course of civil litigation would normally be available to the press and thus to the public. Secrecy orders range from requiring the return or destruction of discovery materials to forbidding attorneys from disseminating information about a case, even to regulatory and enforcement agencies at the federal or state level.

Secrecy orders sometimes mask from the public the very fact that litigation took place, the alleged cause of injury, and even the names of the parties involved.

Forms of Secrecy

There are three major forms of secrecy:

Protective Orders
These are usually issued at the behest of defendants. They can legally prohibit parties who receive information from the defendant in a lawsuit from distributing it to others -- including the press, the public, or attorneys representing other plaintiffs.

Confidentiality Agreements
Defendants often request -- and plaintiffs frequently agree -- that specific aspects of a lawsuit remain confidential. These may include the alleged cause of injury, an alleged defect in a product, the names of the defendants in a medical malpractice suit, the amount of money paid in any settlement, or even the fact that a suit was filed.

Sealed Court Files
Parties to litigation often resolve suits in private. In such cases the court file is sometimes sealed. When that happens, no one -- whether citizens with an interest in the case, regulatory officials, other lawyers, or the press -- has access to it. Sometimes even the names of the parties are expunged, leaving nothing but a record of a case called "Sealed v. Sealed."

We're not talking about irrelevant facts left in the files of the litigants. We're talking about documents and decisions involving unsafe products, dangerous drugs, toxic wastes, all with potentially devastating effects on people unaware of that danger.

Paul McMasters, Society of Professional Journalists

Process of Secrecy

The quest for secrecy is typically initiated by defendants. Plaintiffs can demand, through the discovery process, all relevant information the defendant has about the causes and circumstances of injuries, including the defendant's knowledge of similar incidents in the past. Defense attorneys, who may object to the request on a variety of grounds, can request a protective order limiting the information they must produce or how the plaintiff may use it.

To expedite discovery, the parties in the case may agree to share information only between themselves. Judges tend to approve most

agreements reached by both parties. Yet the public's right to know about significant health and safety matters may be compromised in the process.

There is no proprietary interest in information concerning a product that is likely to injure someone in the future.

Dianne Jay Weaver,
Plaintiff's Attorney

A confidentiality agreement or protective order may bar plaintiff's attorneys from sharing information about the cause of injury, or other aspects of the case, with attorneys handling similar cases.

Secrecy can be enforced by rigorous sanctions. Someone who violates a secrecy order can be held in contempt of court and may be fined or jailed. Attorneys who violate a court order run the risk of disbarment.

First Amendment and Freedom of Information Concerns

Journalists investigating health and safety hazards have found that confidentiality agreements can bar attorneys from discussing even major cases with the press. Secrecy orders can also prevent medical, scientific, and other experts from revealing critical findings made in connection with litigation.

Secrecy orders can obstruct the resolution of Freedom of Information Act disputes. The mandatory nature of the orders, the sometimes perfunctory participation of the judiciary in granting them, and the threat of contempt for violating them, all raise questions about the freedoms of speech and of the press guaranteed by the First Amendment.

Extent of Secrecy

Since the mid-1970s, secrecy orders have become increasingly pervasive according to evidence gathered by journalists and other Conference participants. A study of secrecy in litigation published in 1988 (*Confidentiality Orders,* by Francis Hare, James Gilbert, and William ReMine), documents a notable increase in secrecy-related written court decisions after 1975.

A judge gave a protective order to General Motors for their crash tests. We couldn't understand why crash tests were ever included in the umbrella of trade secrets. You want to say that cases involving children, trade-secret documents like a Coke formula, or national security issues would be protected. But we found that these very arguments were in fact used to cover up and hide crash-test documents.

Elsa Walsh, *Washington Post*

Two major series of articles in the *Washington Post* and the *Dallas Morning News* revealed that even court officials were frequently unaware of how extensive the practice was in their jurisdictions. Investigative reporter Steven McGonigle, who wrote the *News* series, found that nearly 300 court files had been sealed in Dallas County since 1920. The overwhelming majority represented litigation occurring after 1980. Similarly, the *Washington Post* reporters found about 200 sealed files in courts in Washington, D.C., and its suburbs.

Plaintiff's attorneys report that demands for protective orders and settlement offers contingent on confidentiality have become routine in

product liability cases. A recent monograph published by the Defense Research Institute advises defense lawyers to seek protective orders in complex product liability litigation, even when they "can make no special claim of confidentiality."

Additional Issues for Consideration

Court-approved secrecy raises a complex series of intertwined issues ranging from such high Constitutional questions as whether there is a First Amendment right of access to legal proceedings, to the highly pragmatic need for an efficient judicial process. Beyond issues debated at the conference, those below were identified as also meriting more extensive consideration.

Access to information versus dissemination
Should information that emerges during a lawsuit be made available to parties other than litigants? To what extent can the judicial process be seen as a conduit for the dissemination of factual material about corporate products to the public at large?

Private litigation in public courts
When parties use a public institution to resolve private disputes, do they retain their rights of privacy? To what degree? Do the courts serve primarily a public function? When does privacy take precedence over public knowledge, and when does the public interest overrule certain privacy considerations?

Role of the press
What is the status of the press as observers and reporters of court proceedings? Are there limitations on the right of access by the media to public records? Does the press have a role in seeking to overturn secrecy agreements?

How should the civil justice system serve the public interest?
Do secrecy orders reflect a long-standing perception that civil litigation is properly used only to resolve private matters? Is that perception now changing? Are plaintiff's lawyers seen as private attorneys general who take on some of the functions of government regulators as monitors of pubiic health and safety? Do we need new rules to ensure that court proceedings remain open and to ensure that important public interests are not ignored?

There are rights of individual litigants. A lot of cases don't involve more than a single issue for two people, even if it's a hospital. Nothing there is going to transect the public good by preventing an occurrence to others. For the most part the system is working.

Harold Jacobson,
Defense Attorney

INTRODUCTORY REMARKS

Why Trial Lawyers Urge Openness

Russ Herman, President, Association of Trial Lawyers of America

Because courts are public institutions, because secrets buried in court records have the potential to kill and maim, and because openness in society prevents injury, we are delighted to co-sponsor this conference. It brings a much-needed dialogue.

As trial lawyers, we're not as interested in what the law is, as in what it should be.

Secrecy is a frightening aspect of life in America. It can keep vital health and safety information from the press, the regulatory agencies, and the public.

As we become more open through sunshine laws and with the narrowing of executive privilege, the judiciary, which is supposed to hold the scales of justice, has become a haven for secrecy.

Most of it is a collective fault. The judiciary in this country is underpaid. It's understaffed. We don't have enough judges. We don't have enough courthouses. So expediency sometimes takes over for substance.

But sometimes secrecy buries critical facts -- about Pfizer heart valves, even though more than 50,000 of our citizens currently depend upon those valves for their lives -- about killing and disfiguring defects and hazards in autos, 3-wheelers, prescription drugs, cigarette lighters, IUDs, toxic poisons, and health care. When the facts are shut up, the public good is damaged.

The Trial Lawyers of America have been campaigning vigorously against secrecy. Our object is to prevent injury before it happens, and thereby prevent lawsuits.

In May of 1989 we passed a resolution urging our members to reject secrecy. Last month we appeared as *amicus curiae* in the U.S. District Court in Houston, urging that a stamp of confidentiality be removed from Pfizer heart valve litigation documents.

We are pleased that last week the Texas Supreme Court set in motion a rule making it much more difficult for Texas judges to shield court records from public view.

Trial lawyers are advocates. We're proud of what we are and what we do. We're committed to making America a safer place to live and

I settled out of court because I had to. They [American Motors] paid for my silence. But for the people who got injured after me, I feel I owed them something and I didn't speak up. There has to be a change in the way these cases are settled. To settle to keep someone silent is terrible.

Ed Keller, Accident Victim

we're grateful for your participation, regardless of whether you agree with our point of view.

Erosion of Our Right to Know

Paul K. McMasters, National Freedom of Information Chairman, Society of Professional Journalists

I am reminded of a story told by Rick Doyle, a good friend and editor from Walla Walla, Washington, when he received a First Amendment Award for fighting restrictions on access to public records. He mentioned what used to be a common high-school biology lab experiment with innocent frogs. It involved bringing a container of water to a boil, then dropping in an unsuspecting frog. Obviously the frog would immediately jump out of the cauldron.

However, if you sat that same frog in a perfectly comfortable container of water, and then slowly raised the temperature, the hapless frog would just sit there until his goose was cooked.

To us in the news business, secrecy is inimical to freedom. The trend toward secrecy – the sealing of names and documents, the movement to bar access to criminal charges, the classifying of data, the seemingly indiscriminate use of secrecy by judges and prosecutors and lawyers – that is quite simply a trend away from freedom. At a time when this nation stands as a symbol of freedom to people the world over, it is ironic that our own freedoms are being quietly eroded.

I think we in the press need to look in the mirror before we yell too loudly at you in the law business. Our business is printing secrets, not keeping them.

Michael Gartner, President, NBC News, and Keynote Speaker

That's why this conference seemed like a good idea. Periodically, people like us -- judges, journalists, lawyers, public advocates -- need to stop and take stock. To see if we're in hot water yet.

As a journalist, I think the temperature is rising. This past year, the United States wielded the secrecy stamp 6.7 million times. This represents millions of documents kept from public view. That would be okay if they all were true secrets protecting national security. But we know from experience that that's not the case.

Some were, no doubt, actions by government employees caught up in this administration's obsession with secrecy. Some were attempts to hide official mistakes. Some were just nice little pieces of information that a smart office-holder could leak later for his or her own benefit.

This past year, U.S. citizens and others filed 394,916 requests for access to federal records under the Freedom of Information Act. Almost none of these elicited responses within the ten days prescribed by the law. A huge number were delayed or denied for reasons not allowed under the law.

This past year the Supreme Court ruled that criminal rap sheets available and open to the public at the local level were not open to the public if gathered in one place -- FBI files.

At a time when people all over the world are struggling and sacrificing to be more like us, we seem bound and determined to be less like what they think we are.

Government officials seem to be saying the individual U.S. citizen can't be trusted with the facts, that mere people must be protected from the truth. In far too many of these cases, we're not talking about irrelevant facts better left in the files of the litigants. We're talking about documents and decisions involving unsafe products, dangerous drugs, toxic wastes, all with potentially devastating effects on people unaware of that danger.

Obviously a practice that has gained such widespread currency must have some utility. We have speakers who will point that out. Just as obviously, it has its downside. I hope that we'll leave here today with a better sense of the risks and the benefits and a better idea of how to minimize one and maximize the other.

JUSTICE FOR WHOM:

THE CASE FOR AND AGAINST SECRECY

Members of the Panel:

George Trubow, Center for Informatics Law (Moderator)
Dr. Devra Davis, Scholar in Residence, National Academy of Sciences
Steve McGonigle, *Dallas Morning News*
James W. Morris III, Morris and Morris, Richmond, Virginia
Eugene I. Pavalon, Pavalon & Gifford, Chicago, Illinois

The panel considered secrecy from the viewpoints of science, the press, and the defense and plaintiff's bar.

Dr. Davis, a toxicologist, cited the danger secrecy poses to the free exchange of information in a democratic society; the investigative reporter, Steve McGonigle, spoke of his experience in uncovering the pervasiveness of secrecy orders involving even major cases and described what his newspaper had done to fight secrecy; defense attorney James Morris argued that the existing system, where private litigants try private matters, works efficiently; while Eugene Pavalon, a plaintiff's lawyer, decried the pressure on injured victims to enter into secrecy agreements and urged uniform enforcement of existing rules clearly placing the burden of proof on the party seeking the order.

Points raised during the discussion included whether openness puts American corporations at a competitive disadvantage vis-a-vis their foreign counterparts; the circumstances in which private litigation takes on a public significance; and whether the court system is properly used to disseminate information about corporate products. The panelists agreed that trade secrets should be protected, but, with the defense attorney dissenting, argued that because the courts are essentially public forums, information generated in litigation should normally be available to the public.

How Secrecy Appears to a Scientist and a Victim

DEVRA DAVIS: I speak both as a scientist who has studied some of the phenomena that have been kept secret and as a person who nearly died from an adverse drug reaction in 1983. The drug I had taken for my broken foot, Zomax, had been billed as the best thing since morphine, but without narcotics. Within twenty minutes of taking it, I nearly died.

Zomax can produce a powerful immunological reaction in people with no previous history of allergic response to anything, who are perfectly healthy and have no idea that they're at risk. Later, the drug's

producer, McNeil Pharmaceutical, offered money to those who suffered from such reactions if they promised to keep secret what had happened. Fatal reactions to Zomax had occurred long before my own reaction but were sealed from the public record in return for settlement of lawsuits.

McNeil succeeded in maintaining court-ordered secrecy about such matters and suppressing the publication of information in medical journals. Throughout years of litigation, McNeil effectively shielded its officials from ever having to testify or be deposed. They alleged that information they had was protected.

We will never know how many people died from Zomax. Only those of us who survived can confirm what we took.

Something is basically wrong with a system that allows secrecy to keep people from making informed decisions and even to die because they are unaware of the hazards to which they are exposing themselves.

The history of lawsuits over Zomax, asbestos, post-menopausal estrogens and cancer, Dalkon Shields, seat belts, heart valves, and DES provides evidence that court-ordered secrecy helps neither science nor the public.

— Dr. Devra Davis, National Academy of Sciences

Within the company, a year before my reaction, battles raged about how to deal with reports of problems. Some medical personnel resigned. The company destroyed internal files on reported allergic reactions and launched a major campaign to invade the market.

They finally stopped production of the drug after Congressional pressure made it clear they would be forced to do so. In order to settle the cases that ensued, the courts repeatedly sealed medical and scientific records.

As late as 1986 people were unnecessarily killed by Zomax. They didn't know it was no longer being marketed.

The use of legally approved secrecy to shield corporate mistakes is not unique to Zomax. The history of lawsuits over Zomax is mirrored by the history of suits over asbestos, post-menopausal estrogens and cancer, Dalkon Shields, seat belts, heart valves, DES and others. They all provide evidence that court-ordered secrecy helps neither science nor the public.

The range of scientific and technical matters affected by court-ordered secrecy is nearly limitless.

At its heart, science is an inherently democratic institution, fueled by shared, freely exchanged information. Democracy, as Jefferson wrote, rests on the informed consent of the governed. The absence of vital information about matters of health and safety imperils the ability of anyone to give informed consent. The practice of secrecy in the courts

can result in the failure to tell the public about proven hazards, and sometimes people die. Secrecy endangers lives, perverts science, and ultimately undermines democracy itself.

What One Newspaper Did About Secrecy

STEVE McGONIGLE: About ten years ago my paper started investigating a lead smelter in Dallas that was polluting the atmosphere and the soil to the extent that it resulted in brain damage to children in the area. After a series of stories over a period of years, a lawsuit was filed on behalf of approximately 300 people by families in a housing project directly across the street from the smelter.

Two years later we learned there had been a settlement. I was sent to look at it. I found that not only could I not look at the settlement, I couldn't look at the lawsuit. As far as the court system was concerned, there was no lawsuit.

The phenomenon of the entire court file being sealed -- everything from the pleadings to discovery to the settlement itself -- was surprising.

I asked the judge about it. He told me that this was the way it was and he wasn't going to change his mind and tough luck, which is music to the ears of a reporter.

There had been a settlement in the range of $20 million, the largest settlement of its kind in a toxic pollution case in Dallas County, if not the state.

I was assigned to look into the practice of sealing records on a wholesale level, to determine if this was an isolated incident.

The more I talked to people, the more surprised I was at how little they knew about what was going on in the court system. The practice of sealing was virtually unknown system-wide. Even the clerk of the District Court did not know the number of records he had under seal, did not know that in fact many of them had no sealing order.

Through the assistance of a judge in Dallas who became incensed when I told him what was going on, I was able to get limited access to the court records, to inventory them, to determine why types of cases were under seal, and to get the names of people involved.

We found a practice, more prevalent than people would like to believe, of physicians in malpractice actions sealing lawsuits they deemed professionally embarrassing or that could result in a loss of license.

My newspaper decided to confront judges with the lack of guidelines for sealing records, to confront the District Clerk with the lack of safeguards for sealing records that should not be sealed.

We filed suit in early 1988 and received a partial summary judgment which was satisfactory to neither side. Both sides appealed.

As the case wound through the appellate system, media groups, in conjunction with members of the Texas Trial Lawyers Association caught onto the issue. A bill was introduced in the legislature mandating the Supreme Court of Texas to amend the rules of civil procedure in Texas for sealing court records.

This resulted in a remarkable document that will take effect in September, which sets out specific guidelines for what cannot be sealed and the procedures under which things must be sealed.

Perhaps the most dramatic, and one of the more controversial, aspects of these rules is a provision for the openness of discovery proceedings in cases involving public health and safety. Depositions, memoranda -- virtually anything that is obtained during the discovery process, if it involves a case which could impact public health and safety -- is now open to everyone.

The Case for Privacy

JAMES MORRIS: Courage is not the sole province of those who speak for unlimited dissemination of private information, but is useful to those who speak in this setting of the right to privacy for individuals and corporations as well, and who recognize that there is a significant tension between the public's right to know and the right to privacy, between the uses of the courts for private litigation or for public reasons.

I suggest that settlements occurred in most of the cases talked about here because people agreed to protective orders for their own private purposes, to settle the case. Settlement is one of the most encouraged aspects of civil litigation. It's sacred to us.

If we can't settle cases the system would collapse. I think perhaps we're flogging the wrong horse. You're seeking a way to get information that you consider valuable, and that may well be valuable.

We've got a system that works. It's where private litigants try private matters and seek resolution for their own ends and purposes.

You want to convert that into a system whereby all the information

that you think is necessary to you, for whatever particular axe you grind, is available to you because it happens to show up in a court file.

There are issues here. First is access as opposed to dissemination. What is important to the court system, and in the settling of private disputes between private people, is access, not dissemination. That's not the function of the court system.

We have to go to a public court and file our case. But discovery materials are entirely different. We have in this country a unique system of discovery. If you ever get into lawsuits, you'll find out how horrendous it can be to you personally.

The Supreme Court of the United States has said clearly in the *Seattle Times* case that there is no public right to know. There is no constitutional right to discovery papers.

Corporate America is at a serious competitive disadvantage. If you want similar records from a Japanese manufacturer, the Hague Convention ties you in knots. Plaintiff's lawyers know that as well as I do. If you want to go to Canada to take a deposition, you'd better not say you're "discovering" anything. You better have a specific question to answer, and promise to use it in court. Otherwise they won't let you in the country to take the deposition.

American manufacturers' files are wide open to discovery. No other manufacturing group, no other defendants in the world, have to suffer that.

If you're suggesting a rule that would not allow people involved in a case to keep the amount of the settlement private, you're treading upon their right of privacy. And the Supreme Court does recognize that there is a right of privacy, but no right of access to discovery documents, in a private lawsuit.

If you sued for $24 million and got six, you didn't take the $6 million because you were bribed to be quiet. You took it because there were three chances out of four you would lose that case. And they paid because there was one chance out of four that they would lose. But publication of a $6 million settlement doesn't send that true message to the public and future jurors.

Individual litigants have a right to privacy and to control the time and expense of their own lawsuits. They should not be forced to an arduous process of going through 10,000 documents and deciding which is private and which isn't, at their expense, simply because someone else might want the information. They want to have their litigation go

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We've got a system that works. It's where private litigants try private matters and seek resolution for their own purposes. If we can't settle cases the system would collapse. If you want to get corporate documents, go to the Congress, beef up your FDA. There is no First Amendment right to the discovery materials of private litigants, no matter how strongly you feel there should be.

James Morris, Defense Attorney

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quickly and without undue expense, so they agree to privacy. And it's their lawsuit and not the second person's or the third person's.

I have heard it said that we do this because it makes it more economical. I have yet to hear a plaintiff's lawyer say "I will charge less for the second case, if you'll give me those documents, and I'll use them the second time." I've never heard anyone say that, if you give me those documents and depositions, we will agree to use those only, and save all the cost of discovery in the second case. No, they go through it all again the second time.

Implement the Laws We Have

EUGENE PAVALON: I'm a plaintiff's lawyer. I've been practicing for over 30 years and I have, of necessity, engaged in secrecy orders. I feel uncomfortable about it. Sometimes I feel dirty when I do it and I must confess that the organized trial bar -- the plaintiff's bar as well as the defense bar and the trial bench -- share the guilt as to the pervasiveness of secrecy orders.

As plaintiff's lawyers, our first obligation is the representation of our client. The case is always our client's case, not the lawyer's. Naturally the client will accept a financially favorable settlement with the condition that it be protected by a secrecy order.

There have been exceptions when the client has dug in his heels and said, "I feel I have an obligation to others out there who might suffer the same injuries. I'm willing to struggle on with this litigation, knowing that in the long run we'll win and there will be a greater good served."

I'm a plaintiff's lawyer. I've been practicing for over 30 years and I have, of necessity, engaged in secrecy orders. I feel uncomfortable about it. Sometimes I feel dirty when I do it. The organized trial bar shares the guilt as to the pervasiveness of secrecy orders.

Eugene Pavalon, Plaintiff's Attorney

But that individual is rare. When a client tells you, "I need the money. I have a wife, a child, and a wheelchair. I can't work. Settle the case," the case must be settled, even though secrecy is required.

The economic pressure to expedite litigation is such that most of these orders are agreed to and approved by the court. Can you imagine an owner's manual of a vehicle being privileged? That has become almost standard operating procedure. If you don't agree to broad secrecy orders in the product area, there will be briefs, time spent, "in camera" inspections of the documents, and the like. You may lose a year of valuable time, particularly for your client.

There are three primary areas in which secrecy is sought. First is the broad range of product liability, including drugs and toxic substances. Another involves the professional negligence lawsuit. The third, which is not given enough attention, is when an individual litigant sues a

corporation because of an unfair business practice, or circumstances involving consumer fraud. In order to prevent a class action, the corporation will seek a secrecy order.

These three areas could, I believe, all be handled in the same fashion.

First, the argument that American business is at an unfair disadvantage because we are laboring under a civil justice system that provides the right to know, is nonsense. Foreign corporations doing business in the United States are subject to the same process as any American corporation.

If the courts would implement the substantive law that has long been in existence, there wouldn't be any problem. There is a basic question as to whether a corporate defendant is really entitled to this type of broad blanket protection. The corporation must show there is a trade secret involved and that the corporation will suffer competitive harm if the documents become a matter of public domain.

I believe the only way to deal with secrecy orders appropriately is to look at what the Texas court has done. Our state supreme courts must implement rules. Legislatures must legislate. The body of law in this area is sound. The framework for setting the benchmarks for these protective orders is set forth in the case law. The Texas Supreme Court has provided that the party seeking a protective order for documents must show a specific, serious, and substantial interest which clearly outweighs the presumption of openness. That certainly is a good start.

How Can We Balance the Public Interest and the Right to Privacy?

DEVRA DAVIS: No one can be opposed to secrecy under all circumstances. It would be helpful if we differentiated four different types of cases in which secrecy might apply in different ways. Criminal cases are generally in one world. Tort and product liability cases are often in another. Personal matters -- gender preference or divorce settlements -- are generally in another realm. And finally trade secrecy: I don't think anyone here wants to see American competitiveness suffer or trade secrecy sacrificed.

STEVE McGONIGLE: When one crosses a threshold of the courthouse steps, privacy's been compromised. Maybe, as Jim Morris said, if it were one of us, and it were nasty litigation accusing us of everything from stealing one another's underwear to violating a contractual dispute, we'd feel differently.

From a public policy standpoint, it is no longer private litigation when it enters the courthouse door.

JAMES MORRIS: We have a system designed entirely for the resolution of private disputes among private people, without the intrusion of all the people who have their own agenda, whether it's a good agenda or a bad agenda, to cause disruption and additional expense to people who happen to be involved in litigation.

If you want to get corporate documents, go to the Congress. Beef up your FDA. It seems to me, based on what Dr. Davis said, to be the culprit in the Zomax case. If companies are fraudulently withholding information, there are systems in place for dismantling them.

I'm talking about a system under which most of the disputes in this country are resolved, and you convert that into some kind of grand information-dissemination scheme, an information access scheme.

There is no First Amendment right to the discovery materials of private litigants, no matter how strongly you feel there should be. And until you change the law, we must live with it. There is in place a system that works.

DEVRA DAVIS: We need to look at the tort system as the system of last resort. The tort system now has all our attention because of the failures of the regulatory system to provide adequate protection. If we had a more active regulatory sense, we would have had air bags in cars a lot sooner. All torts are not equal. I think we can come to some agreement as to which ones would clearly merit more public disclosure.

EUGENE I. PAVALON: Whose case is it? It isn't a matter of private parties going into a private forum and litigating a private matter. Historically, our courts are public forums.

PUBLIC COURTS, PRIVATE JUSTICE

Members of the Panel

Bruce Sanford, Baker & Hostetler, Washington, D.C.
General Counsel, Society of Professional Journalists (Moderator)
Hon. Jim R. Carrigan, U.S. District Court, Colorado
Joan Claybrook, President, Public Citizen
Alfred W. Cortese, Kirkland & Ellis, Washington, D.C.
Dianne Jay Weaver, Weaver, Weaver & Petrie, Fort Lauderdale, Florida

The panel focused on the tension in civil litigation between public policy interests and privacy rights. Participants spoke of their own experience with conflicts such as the ethical dilemmas of lawyers caught between their professional responsibility to an injured client on the one hand and their perceived moral obligations to future victims on the other. Judges, too, face a conflict when they encounter secrecy agreements which help to settle cases efficiently, but may ill-serve the larger public interest.

According to defense lawyer Alfred Cortese, the proper balance between private property rights and public disclosure is maintained by the system as it now operates, and he contended that the courts should not be used to disseminate information about products.

Joan Claybrook, a consumer advocate, claimed that virtually no court secrecy is justifiable and that the judiciary and the plaintiff's bar share with defendants some of the responsibility for the prevalence of secrecy agreements.

Judge Carrigan described the judicial pressures that encourage court-approved secrecy agreements, but noted that the courts belong to the people, not to the bench or the bar, and that judges as well as lawyers have an obligation to protect the public interest in court openness.

How Secrecy Hurts Consumers

JOAN CLAYBROOK: Much of the secrecy we see in courtrooms today has emerged because of the success of the trial bar, particularly in the 1970s, in exposing life-threatening defects, coverup of damaging information, and malpractice. We are seeing secrecy in settlements including requirements for return of critical documents, systematic internal destruction of documents by a corporation, and blanket orders for destroying such things as design manuals.

There has been a systematic strategic effort to secure secrecy in the courtroom by the defense bar. This has had an adverse effect particularly in product liability cases, medical malpractice cases, fraud cases, consumer fraud cases, on consumers generally, on plaintiffs and the regulatory system.

Consumers are adversely affected because they fail to get notice about dangerous products. When this information is not in the public domain, consumers aren't warned. They have no capacity to protect themselves. They buy or use products that they otherwise would not have. They go to medical practitioners whom they would have avoided.

The result is not academic. The result is paraplegia, quadriplegia, brain damage, burn injuries, and many other kinds of horrible and needless disabilities.

Finally, the regulatory agencies. When the regulatory agencies haven't done their job, litigation is the last resort. It is my contention that regulatory agencies are always going to be behind. The necessary bureaucratic process is always going to mean that product liability law plays a role in protecting the public as an ongoing deterrent. It's important to have individual citizens able to enforce the law themselves. And government agencies are certainly harmed when information developed in litigation is kept secret.

The issue of private property versus public property is settled when the product is offered in the first instance. When you offer a product in the market place you give up your right to withhold information about the quality, the content, the safety of that product.

Joan Claybrook, President,
Public Citizen

The question is, where do we go from here? I suggest that there is an ethical responsibility that the trial bar must grapple with. For too long the plaintiff's bar has acquiesced in the issuance of protective orders and secrecy settlements for a good reason -- to assure expeditious treatment of the case and maximum benefit for their clients.

But there are strategies that would help to serve both the client and the public interest. They shouldn't be considered separately. The most obvious is educating trial lawyers on how to oppose unnecessary and overly broad orders.

There are other actions that should be taken: alerting consumer groups to the opportunity to intervene, requesting disclosure on behalf of the public, notifying pertinent government agencies or petitioning them about particular matters so they know to request documents even if they don't have access to them, educating the judiciary about the effects of secrecy on the public interest, and generally raising a public fuss on this issue.

The injured victims' lawyers have, I believe, a specific obligation to bring this critical information about life-threatening dangers to public attention.

Ethical Dilemma of Lawyers

DIANNE WEAVER: There is an ethical conflict we trial lawyers find ourselves in with protective orders. I would like to respond to the challenge made by Jim Morris. I can, I should, and I will continue to lower my fees when there is full and complete disclosure and sharing of information. Then, when the second, the fourth, or the thousandth victim is injured by the same defect, it is not necessary to reinvent the wheel.

I would like to challenge American companies to eliminate my fee by making full disclosure to the public of hazards and changing the product so that future injuries are prevented.

There is no proprietary interest in information concerning a product that is likely to injure someone in the future.

Two vignettes that encompass what we're talking about touched me so deeply I decided I had to seek procedural changes that would help the public. One involves a protective order obtained in Florida by a large pharmaceutical company, which prohibited me and my firm from disclosing the hazardous side effects of a very popular anti-inflammatory drug and even precluded me from giving that information to the FDA. I settled the case because one of my clients was in need of immediate economic compensation. I am still sickened because I am certain there are people -- family members of people in this room -- who are taking that drug without the knowledge of what can happen.

The second goes to the ability of the administrative agencies to do their job. Any firearm manufactured outside the United States must pass certain simple safety requirements, but American manufacturers of firearms are exempt from the 1968 Gun Control Act, which mandates safety requirements only for foreign guns. In one case we were able to obtain information which would show clearly that the gun involved did not meet the minimal standards for safety. We had a judge who would not make this information subject to a protective order. Whereupon the manufacturer offered my seriously injured client a substantial sum of money for sealing these documents, over and above what would be proper compensation. It was his decision. It is my guilt that we entered into it.

In the Florida House of Representatives, the Public Hazard Disclosure Act just passed out of committee. It will relieve me and others from the situations I described. It says, in essence, there is no proprietary interest in hiding a public hazard.

Destroying Confidence in the Courts

ALFRED CORTESE: What is the problem? Judges have been balancing the confidentiality interests of the owners of private property against the need for public disclosure for years. In my experience those considerations have been weighted very heavily in favor of disclosure.

The implication that protecting confidential information is unethical or irresponsible is totally inconsistent with our law. Our law, as it should, has traditionally punished the person who betrays the secret or reveals the confidence, not the owner of the secret.

Why is information produced in litigation valuable?

It's a property right. The owner has exclusive rights in the property. And the Constitution protects personal property from government abuse. The rules of civil procedure compel parties to produce proprietary information in discovery. The United States has the most liberal discovery of any nation in the world. Documents produced in the process of pretrial preparation, so-called discovery documents, are fundamentally different from documents placed in the public records. They are often irrelevant, taken out of context, and inadmissible at trial. Further, granting a public right of access to discovery materials would threaten Constitutional rights: the constitutionally protected rights of privacy and the efficient functioning of the judicial system.

The Supreme Court has never found a First Amendment right of access to information used in a civil trial. The Court said, in *Seattle Times*, that a litigant has no First Amendment right of access to information made available only for purposes of trying his suit. The D.C. Circuit has said that a protective order may be the least intrusive means of achieving the goals of protecting the fairness of the judicial process and preserving the discovery system.

The trial court has to decide what is and what is not in the public interest.

Confidentiality, or secrecy if you will, generally promotes another fundamental value in our society -- the right to privacy. Confidential information that a defendant produces in litigation, solely to resolve a legal dispute thrust upo.. him without his consent, clearly involves that defendant's right to privacy.

Those who seek information from the courts for reasons other than keeping a watch on the court process, such as lawyers who are interested in using discovered information in other law suits, are in fact bastardizing an important right.

The implication that protecting confidential information is unethical is inconsistent with our law. Our law, as it should, punishes the person who betrays the secret, not the owner of the secret. Those who seek information from the courts for reasons other than keeping a watch on the court process -- such as lawyers who are interested in using discovered information in other lawsuits -- are in fact bastardizing an important right.

Alfred Cortese,
Defense Attorney

Some here today advocate imposing a clearing-house function on the courts. But the courts were not intended for that purpose. There obviously is information that should be disclosed, and that question is resolved every day by the trial judge. It is part of the litigation process, and is necessary to maintain that balance of interest between one party's right of privacy and property rights on the one hand, and the right of the public to know on the other. Those distinctions have to be maintained. We cannot get carried away in some emotional appeal.

I think that any other view would turn the courts into conduits of information for those members of the public who are either unable or unwilling to seek the information from more legitimate sources.

Public Responsibility of the Court System

HON. JIM R. CARRIGAN: I suggest that the public/private issue is not fully presented because we've got to remember that courts belong not to the lawyers, the judges, or the clerks. Courts belong to the people. Lawyers are officers of the court.

Lawyers' obligations and responsibilities are not just to their own client in a specific case, although that is paramount, but rather to the court and the public as well.

There are many cases where the protective order is perfectly justified. But if we're talking about a dangerous product, in the typical setting I see, the order is leverage for a truce in the paper war that litigation has become.

It's the old carrot and stick routine. The carrot is the promise to produce, in a reasonably prompt fashion, an orderly discovery of the facts that the other party is entitled to anyway, without the added delay and expense of tactics such as multiple motions, evasions, and excuses.

In this kind of setting, I don't see how the plaintiff's entering in such an order can really be treated as voluntary.

I've signed lots of secrecy orders. Typically we are faced with mountains of paper every day. We're doing these orders up on the bench during the jury trial. And if you come to an order that says "stipulated order," and all the attorneys in the case signed off on it, who are we to stop and review this and ask for a hearing and raise a dispute over something that's been agreed to.

The problem is we have become a little lackadaisical, and we rely too much on the attorneys to not stipulate things that are unfair. But we

Courts belong to the people. Lawyers' obligations and responsibilities are not just to their own client in a specific case, but rather to the court and the public as well.

Hon. Jim R. Carrigan, U.S. District Court, Colorado

don't often enough consider that fact that it's not an even playing field out there.

The defendants have established networks for sharing information. Can plaintiffs share information? The defendants, through in-house counsel and through the local counsel they select to represent them in all their Jeep cases or Dalkon Shield cases in that city, are all coordinated.

They get the information from all the cases throughout the country into one place.

Back in 1980, in a Ford gas-tank-defect case, I was faced with reversing the magistrate who had signed a secrecy order. I asked from the bench if Ford's counsel would agree to be in the same position that the plaintiff's counsel was in. Would they agree they would not accept in this case any of the information that had been gathered in other cases by Ford? And they would not send back to Ford any information obtained in this case to be shared with Ford's other defendants and defense counsel around the country.

Of course no such agreement was forthcoming.

I decided that it would be foolish in terms of judicial administration to make everybody who's got the identical case involving the identical defect start over in a different court and do the same tedious, repetitive discovery.

Rule 26(c) does provide for certain standards. It does place on the person seeking the order the burden of persuading the trial judge that there are real grounds for keeping the information confidential.

But that good cause often has not been tested where the parties have agreed. The judge has an obligation to make sure that the public interest in keeping the public courts open is outweighed by the interest of the defendant in keeping the information confidential. When I talk about the public, I talk about the Fourth Estate as the representative of the public.

We've got a lot to learn. But we've made progress, and I hope we'll continue to make progress.

Secrecy vs. Safety

JOAN CLAYBROOK: It seems to me that the courts have lost control of this issue.

First of all, the judge should put the burden where the courts have said it is. Defendants should be required to behave properly and not use secrecy as a tactic to waste the time of the court, to waste the time of the plaintiff, and to cause an extraordinary cost.

The issue of private property versus public property is settled when the product or the service is offered in the market place in the first instance. When you offer a product in the market place, you give up your right to withhold information about the quality, the content, the safety of that product.

ALFRED CORTESE: The purpose of the First Amendment right of access is really to permit the public to observe the court process. It's not to aid the plaintiffs in litigating their lawsuits. You may not like it, but that's what the law is. It is absolutely wrong to say that the manufacturer gives up every right he has, every property right he has in every piece of paper, merely because he puts his product on the market. That is nonsense.

JOAN CLAYBROOK: Trade secrets are an exception to the rule.

ALFRED CORTESE: But who makes that decision, Joan? The judge has to make that decision.

JOAN CLAYBROOK: I agree, and that's why...

ALFRED CORTESE: And that's why we need the process to be reasonable and fair.

JOAN CLAYBROOK: I respectfully suggest that disallowing the ability of the consumer to notify the FDA about the hazard in a pharmaceutical product is not reaching a reasonable compromise. Disallowing the public knowledge about the hazards of the products they are ingesting and giving to their children is not a reasonable compromise.

We believe individuals in this country have the right to complete access to information which affects their lives. And we believe they will make responsible decisions when they have that information.

HON. JIM R. CARRIGAN: The American Bar Association has made recommendations in this area. One is that where information obtained under secrecy agreements indicates hazards to other persons, or reveals evidence relative to claims based on such hazards, courts should permit disclosures, after hearing, to other plaintiffs or government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information.

It says no protective order should contain any provision that requires an attorney for a plaintiff to destroy information or records furnished pursuant to such order, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded.

An attorney for plaintiffs should only be required to return copies of documents obtained from the defendant on condition the defendant agrees not to destroy them, so they will be available under appropriate circumstances to government agencies or to other litigants in future cases.

JOAN CLAYBROOK: Al, I have failed to hear either from you or Jim any reason why you believe, as a matter of public policy, it is not in the best interest of the public to be informed concerning hazards to which the public might be unknowingly subjecting themselves.

ALFRED CORTESE: That is not our position. We are in favor of the public having knowledge of these hazards. The problem is that you want to do it in a way that eliminates the defendants' rights.

How Should Protective Orders Be Limited?

LINDA LIPSEN, Consumers Union: What is the best way to limit protective orders? Do you do it through legislation, through the courts?

DIANNE WEAVER: This is a question I've gone round and round about, because I'm a firm believer in the separation of the branches. But I finally resolved it in favor of the fact that public welfare has to override any proprietary interest.

We have to address it through the legislative process, where we have addressed other public-hazard issues.

HON. JIM R. CARRIGAN: If I as a judge were to order that Congress enter certain kinds of orders at the end of its hearings, that might be a slight invasion of the whole concept of division of powers. I would much prefer that any changes be made through the Judicial Conference of the United States, or simply through case law.

I think case law is very solid, except in the Supreme Court. It may take them a while to get around to this. In the inferior courts, the general rule favors openness.

Before you get a confidentiality order in the first place, the defendant

has a rather heavy burden of proof if it's not agreed to by the plaintiffs. If the plaintiff has agreed and the defendant has agreed, most judges are not going to spend a lot of time reviewing it.

Once the confidentiality order has been entered and you later ask that it be lifted, the judge wonders why the plaintiff agreed to this order and suggested that the court sign it. As a practical matter the burden is on the plaintiff to get it reopened.

TESTING THE SYSTEM:

BALANCING PUBLIC INTEREST AND PRIVACY RIGHTS

Members of the Panel

Alice Neff Lucan, Davis, Graham & Stubbs, Washington, D.C. (Moderator)
Arthur Bryant, Trial Lawyers for Public Justice
Mary Cheh, Professor, George Washington University National Law Center
Harold Jacobson, Lord, Bissell & Brook, Chicago, Illinois
Elsa Walsh, *Washington Post*

The panel considered the extent to which the civil justice system has been, and should be, an open forum. According to a public interest trial attorney, Arthur Bryant, the public historically had access to all court proceedings. Mary Cheh, a law professor, argued that our current perception of the role of civil litigation is in a state of transition. Because plaintiffs are now assuming the role of private attorneys general, she suggested, the rules developed in the past are no longer adequate to meet the new demands for openness that such litigation implies.

In the view of defense attorney Harold Jacobson, much civil litigation, such as medical malpractice lawsuits, involves only individuals and is therefore of no interest to the general public. Investigative reporter Elsa Walsh, however, cited instances where, under the guise of privacy, important facts about medical negligence and hazardous products were kept from the public. Both the reporter and the public interest litigator agreed that the presumption of openness should be paramount, and that the public's need to know about litigation overrides almost all considerations of individual privacy.

Conflict Between Openness and Reporters' Privilege

ALICE LUCAN: I represent reporters. One of the most frequent calls for help is to quash subpoenas. Reporters just don't want to testify in any type of legal proceeding.

We know there are good reasons for protective orders and sealed files. Ironically, when they are subpoenaed, reporters want this same kind of secrecy. They not only want to protect their confidential sources, they want to protect their editorial processes. They don't want anyone to be able to demand testimony about unpublished and non-confidential information.

Every inch of the privilege that reporters have obtained has been fought for against litigators who claim to have the right to any citizen's testimony and are not terribly concerned about the consequences. The fervor of litigators to get reporters to the witness stand is fed by the fact that reporters are cheaper and easier to find than anybody else, and they are (sometimes) accepted by a jury as "trained observers."

What has emerged from that struggle is a lesson for us today.

In federal and state courts, indeed in many state codes, a qualified privilege to protect a reporter from testimony exists. It tests every demand for a reporter's testimony against roughly the same standards:

> Is the information needed on an issue central to the case?
>
> Is the information material and relevant to this issue?
>
> Are there alternative sources to get the information?

Some courts or statutes add the question: How much will the giving of this testimony impede the news-gathering process in the future?

These tests exist because of the value this society puts on freely given, freely flowing information and because the courts have come to believe that forcing reporters to testify does affect the flow of information.

Openness tugs from both sides. One side wants the testimony to occur immediately. The reporter wants people to continue to talk to him or her, wants to avoid the appearance of bias, wants to continue to cover the news rather than sit in the witness chair.

So, my conclusion is that the reporter's privilege, while demanding secrecy in the short run, is actually founded on a commitment to open information in the long run. The question before this panel is whether the process of protective orders can be designed to promote the benefits of openness as well.

Prevalence of Sealed Records

ELSA WALSH: When Ben Weiser and I started looking at the issue of court secrecy, we thought it existed only in settlements in which people couldn't discuss the case or reveal the amount of settlement. We found it was much broader, deeper, and very widespread, that instead of being the exception, it was quite common.

We found that judges routinely sealed cases because parties wanted it, without any probing questions, without any examination of the facts.

Judges routinely granted umbrella protective orders in almost every kind of civil litigation where a protective order was sought.

When we asked judges why they did it, the response we got from one judge -- Peter Wolf in D.C. Superior Court -- was common. Judge Wolf had sealed an entire case in which a doctor had acknowledged having a sexual relationship with a patient to whom he was prescribing heavy psychotropic medication. He said he sealed it because the doctor was worried he would lose his license. When we asked if he reported it to a disciplinary committee, he said it wasn't his place, that judges were not white knights riding in on chargers.

Judges routinely granted umbrella protective orders in almost every kind of civil litigation where a protective order was sought.

Elsa Walsh, *Washington Post*

His response was one we found all over the country.

A judge had given a protective order to General Motors for their crash tests. We couldn't understand why crash tests were ever included in the umbrella of trade secrets.

You want to say that cases involving children, particular trade-secret documents like a Coke formula, or national security issues would, under normal circumstances, be somewhat protected. But we found that these very arguments were in fact used to cover up and hide crash-test documents.

The Archdiocese of Washington got a case sealed in which a priest had had sexual relationships with a young child. You could argue that it was for the protection of the child to seal that case. My argument is that there are other ways to protect information. Take out the child's name. Who was it protecting? The child or the Archdiocese?

The Case for Maximizing Openness

ARTHUR BRYANT: We're dealing with what I call four different types of PR, and none of them is public relation..

The first is propriety information. I don't think anyone would argue that there aren't legitimate trademarks that are deserving of secrecy. No lawyer is asking to make public the trademarked secret of the formula for Coca-Cola. Plaintiff's lawyers in personal injury cases, product liability cases, environmental law cases are not attempting to make trade secrets public or sell them to others.

The second PR is privacy -- personal information about private aspects of someone's life. A corporation has no right of privacy. The right to be left alone does not apply to General Motors, it applies to you and me. In these cases, plaintiff's trial lawyers are not seeking to make private personal information public.

The third PR is property rights. It is the new argument defendants are trying to advance. "All the documents that show how many people we're injuring, that show how we might design [the product] better, are our property and we shouldn't produce them." Simply put, the defendants have no property rights in this information.

Plaintiff's lawyers in personal injury cases, product liability cases, environmental law cases are not attempting to make trade secrets public or sell them to others.

Arthur Bryant, Trial Lawyers for Public Justice

The fourth PR -- what this dispute is really about -- is profits. The reason for unnecessary secrecy is straightforward -- simple profit maximization by the corporations. It works for a variety of reasons. Less money is paid out because lots of people simply don't know why they've been injured. People who do know they've been injured can't win because the information costs are too high. "Your case is worth $50,000. I'll make you spend $25,000 to get the documents. Settle for a song."

Those who can get topnotch lawyers, who have extreme injuries that justify finding the key documents, can get a bonus. The companies are willing to pay these bonuses because they've done the calculation and realize they're maximizing profits far more by paying off those few than they would be by opening up the information and letting everybody sue.

Because there's no publicity, there are no stockholder suits. Stock prices are higher. Government regulation is stymied. The press is stymied. And finally, democracy is stymied.

I believe there is a public interest in even the most minor one-on-one dispute that the facts be public. The question of whether our court system works, and whether the system ought to be changed, and who it benefits and how, can only be told if the public knows what's going on, not just in the huge cases but in the little cases.

Changing Perceptions of the Public Interest in the Civil Justice System

MARY CHEH: We're in the throes of completely changing our perception of the nature of a civil lawsuit. We have to decide where we go from here.

Until quite recently, the perception of a civil lawsuit was that it was private in nature. It was a dispute between parties who used public resources to solve the matter. But the common view was that these were private matters.

That perception is reflected in the way judges have reacted to the request for protective orders. Judges have reflexively, perhaps thoughtlessly, granted these orders. I think the Federal Rules of Procedure were crafted when the model -- the perception of a civil

lawsuit as private -- was operative. It anticipated wide-ranging, exhaustive discovery. If you have worries about privacy or proprietary information, we can protect you. But we want to facilitate the lawsuit. We want to get it underway. We want the truth to come out. We want settlements to proceed.

Our perception of that has changed for a variety of reasons. Persons are buffeted by commercial products and by conditions created by large corporations; the government is unwilling or unable to look at harms being caused. It seems as though, by default, plaintiffs are becoming private attorneys general.

Even if we conclude that this change to private attorneys general is a good idea, you have to admit that the rules are not now currently capable of handling the changing dimension of a lawsuit in those circumstances.

We might want to fine-tune this, talk about in what kind of circumstances openness should be applicable, how we will review documents where there is a claim. Are we talking about discovery? Are we simply talking about settlements? To whom should the information go?

You could have a system saying that all corporations or business -- whenever there's any claim involving serious injury and death with respect to the product and there may be future victims -- that that information has to be disclosed publicly in some fashion.

As we change our perception of the lawsuit, the rules as they are currently crafted may not be able to handle what we have in mind.

Enforcing the Right to Openness

ARTHUR BRYANT: I believe that historically the court system was always open. A common-law right of access predates the Constitution because civil trials were open to the public.

The federal rules originally provided that all discovery was filed in court and open to the public. That was changed solely for administrative convenience.

The major change is that plaintiff's lawyers, the press, and the public are beginning to enforce their rights. In the recent past, the plaintiff's lawyer wanted the documents. The defense lawyer wanted the secrecy. The judge didn't want to hear about it. Everybody cut the deal and walked away.

For the first time, plaintiff's lawyers and the press are taking seriously their duties to oppose secrecy. Plaintiff's lawyers are saying, "Wait a minute, I can't continue to do this." The press is saying, "We can't continue to allow this." This is not revamping the conception of the system, but taking seriously their roles as private attorneys general and enforcing the conception that was there from the beginning.

The real question is: Can the system stay true to the principles it was founded upon from the very start?

Protecting the Privacy of Litigants

HAROLD JACOBSON: You have to define what are court records. There's certainly ample case law that discovery matters are not part of the court record. Some discovery matters may be filed with the court, some may not. Discovery includes things which will never gain an evidentiary status. The tendency is to let everything get discovered. It should be that way. But within that realm you must have some safeguards. There are still rights of individual litigants.

I'd go back to the right of privacy. A lot of cases don't involve more than a single issue for two people, even if it's a hospital. There's nothing that's going to transect the public good in the sense of preventing an occurrence to others.

Everybody would rather see a liberal discovery process with some protection built in to prevent abuse than see discovery limited in another way.

ELSA WALSH: Let me give you an example where privacy was argued in an individual case involving a heart surgeon at the Washington Hospital Center. An internal review found that he had been responsible for three or four deaths. None of the families had been notified.

The doctor went to court to stop the review process from reaching its final stage, which would be to terminate him, arguing that his reputation and privacy would be damaged. The judge agreed to seal the whole court file. The hospital went along because if the information had gotten out they would have been liable to lawsuits from some of those families.

The doctor went to work in a hospital in Montgomery County, Maryland. The hospital, because of the sealed suit, was never informed of the record which had found this doctor negligent.

One would wonder what sort of reputation or privacy rights were being protected. Did the judge not have a greater responsibility to protect the public?

HAROLD JACOBSON: Let me tell you how Illinois works. We have a Medical Studies Act that allows the committees on a hospital to look into the credentialing of physicians, to curtail or revoke their privileges, suspend them, whatever. They do that with confidentiality.

We also have a medical disciplinary board with mandatory reporting requirements by statute. It covers the hospitals, it covers insurance companies. It covers not only hospitals having to report they've done something with somebody's privileges, it makes it mandatory for hospitals and insurance carriers to report every settlement, every judgment.

ELSA WALSH: In most cases we reviewed involving medical malpractice suits, as part of the settlement the hospitals demanded the doctor's name be removed from the lawsuit and the settlement, so it was only the hospital who was on record, not the doctor.

ARTHUR BRYANT: The Illinois medical practice procedure doesn't solve the key problem, which is the public doesn't know a thing. They've got a private system referring complaints to a private system.

When Secrecy Is Unethical

JACK OLENDER, Plaintiff's Lawyer, Washington, D.C.: How does the panel feel about a change in the disciplinary rules governing lawyers that would make it unethical for a lawyer on any side of the case to be a party to a secrecy or confidentiality agreement without first showing to the court that this would not impair public policy and the public health and safety? Do you think this would be the easiest way to remove the tremendous economic pressure on the victim of torts to accept confidentiality agreements in exchange for a settlement?

HAROLD JACOBSON: For the most part there's a system I think is working. When you get into some of the gray areas, there is a serious question as to whether public interest is really involved or whether we're dealing with the individual.

JACK OLENDER: Do you agree it's unethical in instances where faulty medical devices are used, or where your defendant doctor has flunked the board four times and has lost six malpractice suits, to demand secrecy in return for money?

HAROLD JACOBSON: There is no secrecy there. Those things are available. If you want to find out whether a doctor has flunked the board, all you have to do is write the board. They'll tell you when he took the test, when he flunked, whether he can take it again, or flunked it five times so he can't take it anymore.

I'm not sure I would place it on an ethical basis. I think you owe a duty to your client. You owe a duty to the court. One of the duties to the court would be not to mislead the court. If you really believe the public interest is involved, you should not ask for it.

Rather than putting it on an ethical basis, there's no sense in misleading your client. In the situation you're describing, you could never enforce an agreement like that. Why would you want to delude a client into thinking that is an enforceable agreement?

ARTHUR BRYANT: What ought the rules to be?

I would give the public notice, as Texas does. I would put into law, as Texas did, the presumption that court records are open to the public, including discovery; that the burden is extremely heavy on those seeking privacy and they have to meet it with a particularized showing of harm. Even if they prove that secrecy is needed, every lawyer representing victims with similar cases and every government agency with any interest in the area should have an absolute right of access to the information, as long as they don't make it public.

ALICE LUCAN: On a good showing?

ARTHUR BRYANT: On no showing. And finally, that under no circumstances should anybody ever be required to destroy documents, to return the documents back to the wrongdoer, unless there is at least an agreement that the defendant will maintain those documents in perpetuity.

CLOSING PLENARY: MAKING NEW RULES

The closing plenary session looked at how courts might establish consistent rules for sealing records and agreements. On April 1, 1990, the Supreme Court of Texas adopted new rules in the Texas Rules of Civil Procedure that provide specific standards for the process, including a definition of what constitutes a court record. The Texas rules are based on a presumption of openness. Records may be sealed only on a showing of a specific, serious, and substantial interest which clearly outweighs this presumption.

Justice Lloyd Doggett, who was instrumental in the formulation and acceptance of the Texas rules, told the Conference what they were and how they had been adopted.

Justice Lloyd Doggett, Texas Supreme Court

"Publicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."

These are the words not of a modern commentator but of then-attorney Louis Brandeis, talking about the dangers of the Big Trusts in a book called *Other People's Money: How the Bankers Use It* (1914), and in advocating the spirit of openness that I think provides the underpinning for our new rule 76(a).

When a private dispute is taken before a city council, a regulatory agency, or enters the halls of Congress or state legislatures, it loses its purely private character.

The same can be said of the public's interest in decisions made in the third branch of government. Though the dispute may be principally private, decisions reported in the press have far-reaching public policy consequences.

Often what began as solely a private dispute begins to have an impact on the entire community. I'm here to answer two questions: What did we do in Texas with regard to our rule? How did we do it?

First is the importance of the presumption of openness. We began with a clear and unequivocal statement that in Texas the presumption is that court records are open. It is up to the person who desires to seal those records and foreclose public consideration of them to shoulder the burden of proof at every instance, in the original proceeding or any attempt later to modify or vacate a sealing order.

That burden is not an amorphous concept like good cause. Rather it is to first overcome with a specific, serious, and substantial interest, to present that to the judge, and have the judge do a balancing between that and the presumption of openness contained in the rule. And, I think for the first time in this equation, to include a finding that the specific and serious interest outweighs any probable adverse effect upon the public health and safety.

In that regard the Texas Supreme Court came down squarely on the other side of the position taken by at least one federal appellate court that the public interest doesn't factor into the equation. We say it's central to the consideration of whether documents should be sealed.

When a private dispute is taken before a city council, a regulatory agency, or enters the halls of Congress or state legislatures, it loses its purely private character. The same can be said of the public's interest in decisions made in the third branch of government.

Justice Lloyd Doggett,
Texas Supreme Court

Unlike some of the speakers who have addressed this subject today, our rule is not absolute. It does not say that the public health and safety in every single circumstance will always surmount the private interest.

There may be circumstances where the public interest is so minimal and is affected in such a slight way, and the private interest is so great, that one outweighs the other. But it calls on the judge to exercise a weighing process according to specific standards.

It further calls on the judge to be sure that the sealing order entered is not some blanket order covering everything -- from the well-justified protection of the design drawing to the advertisement in Germany -- but to be very specific with regard to what is covered and to use the least restrictive means of sealing.

The second subject dealt with was what is a court record. A court record is more than just what has a file-stamp on it from the local district clerk. A court record is defined in this rule to include those agreements, never filed in the courthouse, that are designed to obstruct and defeat the purposes of the rule.

It does not require the filing of every settlement agreement. But it encompasses any settlement agreement that contains provisions designed to prevent disclosure of documents concerning either the operation of government or the destruction of documents concerning public health and safety.

Finally the most controversial provision -- discovery. That's where the battle is won and lost in many cases. It is essential that it be incorporated within this rule when it affects matters adverse to the public health and safety or matters of corruption in government.

We make specific exceptions for actions brought to protect trade secrets or intellectual property rights. But at the heart of the rule is the inclusion of this definition.

It's been suggested that there is a heavy burden already provided by federal rule 26(c) and its progeny in state courts. But the truth of the matter is that the burden is more illusory than real, because any of you who have been involved in these battles know that often the first thing the judge says is: "Go outside and work it out. I've got real lawsuits to litigate here and I don't need to be bothered going through 10,000 documents."

I think many judges have shirked their responsibility in not being willing to look at these problems and recognize that this is more than just two litigants.

The provisions we put in regarding notice and hearing recognize that you can have all the guarantees in the world, but if you don't have a way to enforce those guarantees procedurally you have wasted your time. So we provide for the first time some very specific notice requirements. A notice of a hearing to seal documents has to be posted wherever notices for open meetings are posted in a given Texas courthouse.

That same notice has to be sent to the clerk of the Supreme Court in Austin, where there is a very good capital press corps and a number of public interest groups. For the first time, we'll have a way to know a year from now, at a conference like this, how much sealing or how many attempts at sealing have been made in our state, and what cases, because the notice must include a specific description of the type of document sought to be sealed and the type of case involved.

Finally, there is a guarantee in these procedures for a person not a party to the lawsuit to pay a $15 intervention fee and intervene -- be it a member of the news media, a public interest group or an attorney with a similar case -- and urge that documents not be hidden from the public.

There are other provisions. I think that for the first time appeals of these orders will have some meaning, rather than an appellate court trying to decide whether a judge abused his or her discretion in finding or not finding good cause for sealing documents.

We now have the specific standards that a judge has to consider and make specific findings on.

Judges can continue to enter protective orders. But when a protective order covers "court records," as determined in Rule 76(a), these must be in compliance with its provisions, its presumption of openness.

The second question is: how do you get a rule like this adopted. The answer, in two words, is *five votes*. That was hard to come by, and we didn't have any votes to spare.

I think the struggle has to be defined in terms of openness versus secrecy, in terms of public involvement versus public exclusion. If the struggle is defined, as is so often the case in one state after another, as one group of greedy lawyers versus another group of greedy lawyers, guess who will lose.

I think the slogan has to be not unlike our Texas rural legal foundation: what we're concerned about is justice, not "JUST US."

think the struggle has to be fined in terms of openness versus recy, in terms of public volvement versus public clusion. If the struggle is defined, is so often the case in one state er another, as one group of edy lawyers versus another group greedy lawyers, guess who will e.

Justice Lloyd Doggett,
Texas Supreme Court

In Texas the term 'trial lawyer' is itself pejorative. It's a pejorative in the newspaper Steve McGonigle works for. It's used on their editorial pages as a pejorative. Yet it was that newspaper that played the most significant role in getting this rule adopted, that conducted the important initial study.

Ironically, the first draft of this rule was prepared by a member of the Texas Association of Defense Counsel who worked for the *Dallas Morning News*. He did a fine job, though I think we managed to make a few improvements.

The focus of the rule is not strictly on tort litigation or products; it recognizes that much more is involved here than personal injury cases, important as these are.

A second consideration in adopting the rule is that openness begets openness. If it's all done privately and secretly and there's no public input, you're unlikely to get a very workable rule.

We were fortunate to have a public hearing where journalists and their organization and public interest groups like Consumers Union and Public Citizen and Common Cause participated and helped. I think that made all the difference in the world.

In short, though, no matter how you try to accommodate the differences, you will have a tremendous struggle. It will be very close and it will be very controversial.

But I hope it will be worthwhile and that you can find five votes, as we did in Texas.

When it comes to government operation, I've always found a lot of meaning in what Mark Twain said a long time ago about bourbon. I think it can be applied to government openness: too much is never enough."

ALICE LUCAN: There is a very strong tradition of case law on this question. There is authority dating back to 1267 on the issue that civil proceedings were open, and that openness had a beneficial effect on the veracity of a witness's testimony.

The habit of keeping things closed and of encouraging settlements by making protective orders has occurred beside and perhaps in spite of that tradition.

The problem with the tradition and this enormous body of case law is that it has not yet been drawn into a format that everybody agrees on. I think that the state of law in this area is ripening. This conference is a signal. If I were providing strategy, I would look for an omnibus case that addressed as many of the issues as possible and try to litigate that to the Supreme Court.

But this is not a friendly court involving things that the Court perceives as private and traditionally closed, as grand juries are.

Perhaps what we need is to get the law in all of the Circuits, or legislation or rules. It needs to be done in an orderly fashion so that everybody follows the same rules and understands exactly what they are.

GEORGE TRUBOW: There is no fabric of consistency or uniformity. It is a danger when judges across the county apply different standards, different tests, to decide something as important as the availability of information beyond the courtroom.

The Texas court has done what nobody else has: developed a consistent approach throughout the jurisdiction.

I think that's the most important step to be taken. There has to be uniformity in the approach. Without it, we have real dangers because judges are making independent judgments on their own whims, with no consistent standards. Texas should be lauded for providing leadership for the rest of the country.

The Fight for Openness

Michael C. Maher, President-Elect, Association of Trial Lawyers of America, Plenary Chair

The word 'battle' has been tossed about. Let me cite the words of Sun Tu, a Chinese general who lived 2500 years ago.

He said, "The art of war is of vital importance to the state, a matter of life or death, a road either to safety or to ruin. Under no circumstances can it be neglected. Hence it is only the enlightened ruler and the wise general who use the highest intelligence of the army for the purposes of spying and thereby achieving the greatest results."

Sun Tu also says that "the general who is skilled in defense hides in the most secret recesses of the earth."

If you look at what happens in litigation on a regular basis, it exemplifies the defensive posture.

But when you talk about a matter of public policy, something that involves human health, or providing protection against further injury, you step beyond private matters.

'hen you talk about a matter of ıblic policy, something that :volves human health, or ·oviding protection against further jury, you step beyond private :atters.

Michael C. Maher, Plaintiff's Attorney

The first thing most parents teach their children is that when you do something wrong, admit it. Don't lie about it. The faster you tell somebody, the better it is in the end.

If we can educate corporate America to believe in that premise, we will have gone a long way toward resolving the problem of secrecy and thus prevent future injury.

ATLA has become committed to this campaign. Last fall, President Russ Herman opened a conference on toy safety by saying: Put us out of business. Dianne Weaver echoed that today: Make it so we don't have any fees in the second, fourth, or thousandth case.

This is what we invite. We are going to continue to fight this battle. We think it is of great importance to the American people and also to the rest of the world in these times, when countries around the globe are looking to us for leadership not only in free enterprise, but in democratic principles.

LUNCHEON ADDRESS

Hon. Kenneth W. Starr, Solicitor General of the United States

The Crossroads of Privacy Interests and the Right to Publish: The First Amendment and the Work of the Supreme Court

Recent Supreme Court decisions have kept many of us on the edge of our First Amendment seats.

Last term, the *Florida Star* case presented rather starkly once again the difficult question of truthful, factual information being published in arenas that touch on the most sensitive human dignity interests, interests that weigh upon the consciences and hearts of judges very heavily.

That case held that a newspaper could not be held liable for publishing the name of a rape victim under a Florida statute that proscribed the publication or the identification of the victim of a sexual-abuse offense. The press had lawfully obtained the information, which had inadvertently been provided to the reporter from the *Florida Star* by the sheriff's office of the county in question.

It was a violation of internal procedures for the sheriff's office to make the mistake, but the reporter, having secured the information, then reported it. It was not purloined. It was made available, in effect, by the public information room of the sheriff's office.

So when the press lawfully obtains information of public interest, as it did in the *Cox Broadcasting* case some years ago involving the victim of a rape-murder, and then in the *Florida Star* case last term, it seems highly problematic in light of our First Amendment traditions to punish the publication of information that the government did not have to release, but did release, even if inadvertently.

But the Court went to very considerable pains in the *Florida Star* case to emphasize how undeveloped this area of the law is. Indeed, the crossroads of privacy interests and publication rights had become terribly busy of late, yet remained rather unregulated.

This, in contrast to the *Times v. Sullivan* arena, was an arena of murky, very facts-specific, case-by-case determination.

The Court was essentially saying that in this difficult area there were few if any basic bright lines. In the *Florida Star* situation, the Court

overturned the contrary judgments of Florida courts in favor of the victim, BJF.

The Court engaged in a highly fact-specific, detailed explanation of exactly what happened in that case. One came to know the inner workings of the sheriff's office, the activities of the reporter in question, and how that story ultimately went to press.

Justice Thurgood Marshall, speaking for the Court, emphasized the contextual nature of each case. Throughout the opinion the Court treaded ever so lightly, stressing at each turn the sensitivity of this enterprise.

That case strongly suggests to me that the mood of the Court as a whole is very strongly pro privacy. Quite apart from the agonized tone of Justice Marshall's opinion, the nature of Justice Scalia's concurring opinion and the impassioned dissent by Justice White suggest as much.

We can also see this pro-privacy bent in the Reporters' Committee FOIA case, a case in which I was more than mildly interested because I had served on the panel of the court of appeals that adjudicated it. I joined the initial panel opinion that permitted CBS to obtain access under FOIA to FBI rap sheets on four individuals of a family in Pennsylvania.

Then, on re-hearing, I dissented from my colleagues' determination that we had been right in the first instance. The case went up to the Supreme Court, which then spoke with remarkable unanimity. The Court held that the rap sheet would not be made available to CBS under FOIA.

But the Court did not embrace the balancing test that I had tentatively -- and in a primitive fashion -- offered in my dissenting opinion at the court of appeals level. Rather, the Court said in this instance, unlike what it was destined to do in the *Florida Star* case, in effect as follows:

"We're not going to go on a case-by-case, highly contextual, highly fact-specific basis. We want a bright line. We are going to hold that a third party's -- Bob Shakne of CBS -- request for law enforcement records or information about a private citizen, not a public official, not a public figure, can reasonably, presumptively be expected to invade that individual's privacy."

And when the request seeks no official information about a government agency or the operations of the government itself, but information that the government is storing, then the invasion of privacy is -- in the Court's view -- unwarranted.

At the same time that we see this pro-privacy bent in the Court's jurisprudence, it would be wrong to assume that in this sensitive arena the Court is monolithically on a pro-privacy bent. The decision just a month ago in the Florida grand jury case makes that countervailing point rather nicely.

A reporter for a local newspaper in Florida, the *Charlotte Herald News*, wrote a series of articles about possible corruption in the sheriff's department and the state attorney's office. The reporter was then called, and in fact did testify, before a grand jury.

Once the grand jury's investigation came to an end, the reporter was interested in making public the information that he had shared with the grand jury. The Court, faced with a Florida statute that forbade precisely that, said that there really is no legitimate governmental interest, in the face of powerful First Amendment pro-disclosure values, to suppress the statements of witnesses who had once appeared before the grand jury in a now-completed investigation.

At the same time, the Court was unanimous not only in vindicating this First Amendment interest on the part of the press, but of paying homage to, in the Court's own words, "the tradition of secrecy surrounding grand jury proceedings." The Court did not go out of its way in this respect, but it also did not avoid saying very kind words about the tradition of secrecy.

In fact, the secrecy of the grand jury proceedings was viewed by all nine Justices as important to safeguarding a number of powerful interests that weighed heavily on the scales, including the interests of persons who have been accused of wrongdoing, but who are exonerated by the grand jury.

What all this portends, I believe, is that the Supreme Court is increasingly concerned about private citizens being caught up in the web of the information-rich, super-glasnost society and losing the ancient right -- so valued in Western civilization -- to be left alone.

In fact it was in the *Florida Star* case that the Court declined to accept the invitation to hold broadly that truthful publications may never be punished consistently with the First Amendment. The Court observed in rather elegant terms, in Justice Marshall's felicitous turn of phrase, that "the future may bring forth scenarios which prudence counsels not be resolved anticipatorily."

The Court cited, in so eschewing this broad, bright-line rule, the distinctly non-privacy case of *Near v. Minnesota* and the hypothetical in that ancient case of prohibiting the publication of the movement of

What all this portends, I believe, is that the Supreme Court is increasingly concerned about private citizens being caught up in the web of the information-rich, super-glasnost society and losing the ancient right – so valued in Western civilization – to be left alone.

Hon. Kenneth W. Starr,
U.S. Solicitor General

troops in time of war. In a nutshell, the Court is unanimously sensitive to privacy interests even when weighed in the First Amendment-balance context.

That should come as no surprise. The powerful conflicting interests at stake in the publication-rights versus privacy-interests arena leave little room for sweeping absolutes. At least in the confines of a courtroom and a conference room, where judges come together to discuss and to deliberate, broad generalities that may move individuals toward one point on the spectrum or another have a way of yielding to the complexity and the anguish of individual cases.

The Supreme Court's anguish in *Florida Star* about BJF and the horror that had befallen her can be seen in the very manner in which the Court saw fit to entitle the case -- *The Florida Star v. B.J.F.* Acting almost like the nation's schoolmaster, the Court pointedly noted, almost proudly, that it was using B.J.F.'s initials, rather than her name. It was a teaching gesture by the schoolmaster.

This is a Court where, after all, people like Roe, Doe, and, once upon a time, Poe, are frequent litigants.

It is noteworthy that such a landmark in the privacy field remains that much-discussed and, in many quarters (perhaps these), much-maligned article by Warren and Brandeis a hundred years ago on privacy, the ancient right in Western tradition to be left alone.

That article is far from being the definitive word on the subject and on legal doctrine. But it does, a hundred years after its publication, remain a touchstone for the Court's analysis. It was invoked by Justice Stevens for the unified Court in the *Reporters' Committee* case, and it found its way, through quoting from that unsettling case, *Time Inc. v. Hill*, into Justice White's dissent in the *Florida Star* case.

It may well be that serious re-thinking is and will continue to be underway in this challenging arena of First Amendment ferment. We remain committed to the *Times v. Sullivan* spirit of robust and uninhibited debate in an open society, and thus we are deeply suspicious -- both as a people and as a legal system -- of legal actions that sound in the nature of actions of seditious libel.

We remain deeply suspicious of anything that smacks of the Alien and Sedition laws. But at the same time, we remain, as a people and thus in our law, deeply concerned about basic human-dignity interests that undergird the entire edifice of our Constitution.

WITNESS TESTIMONY

James Miller
44 years old
Printer
Carlsbad, California

Mr. Miller's twin sons were severely injured in a 1988 head-on collision while wearing rear seat lap belts in a Ford Escort. One died, the other is paraplegic.

The Millers were asked to keep the amount of their settlement with Ford confidential. They agreed to do so if Ford would alert its customers to the need for using rear seat shoulder harnesses, and provide the harnesses through dealers at a reasonable cost. Ford refused, so the $6 million settlement was not kept secret.

Our new 1986 Ford Escort was equipped with front-seat lap belt/shoulder harness combination restraints, and rear seat lap belts when we purchased it. On November 13, 1988, we were struck head-on by a driver who had crossed the center-line of a road in our home town of Carlsbad, California. The front end of our car was virtually demolished. My wife and I suffered broken bones and bruises, but were saved from more serious injuries by our shoulder harnesses, even though we were in the front of the car, where most of the damage occurred. However, our 11-year-old twin sons, James and Richard, secured only by rear lap belts, both sustained broken spines, and James had a cervical injury. James died, and Richard was left a paraplegic.

We sued Ford for not providing shoulder harnesses for the rear seats. Ford offered to settle our case if we would agree to keep the amount of compensation a secret.

We told Ford that we would agree to such a request only if Ford would send a letter to every existing pre-1990 Ford Escort and Mercury Lynx owner, advising them of what Ford had known for 20 years: that properly installed 3-point shoulder harnesses clearly protect passengers better than lap belts alone. Our attorney obtained an internal Ford document which said that. We also asked Ford to make kits available to dealers to install shoulder belts, for a reasonable cost, in the anchor points which are already required by law in all post-1972 automobiles. We asked for that because we found that Ford dealers did not have the parts needed to install shoulder belts for rear seats. They cost an extra $12 per belt when installed at the factory. (European Escorts are required by law to have shoulder harnesses installed before sale.)

Ford refused to agree to those conditions. We felt then, and still do, that for us to agree to keep quiet would place us in complicity with Ford's own 20-year silence on this subject. Only by opening this subject to public discussion would we be making a contribution to

safety, so that other families will not lose their children, or see them severely injured and permanently disabled, as we have.

Therefore, we refused to accept any secrecy and the case settled without it.

We are speaking out about this now because the public has to know two things:

1. The public should know that rear seat lap belts do not provide necessary protection in certain circumstances. Our family's present condition shows how devastating the injuries can be.

2. The public should know that, although Ford never admitted that its seat belt design was defective, it eventually treated our case as if a defect had been proved in court. Ford paid an amount of money that will support our handicapped son for the rest of his life.

The public would not know these things unless we spoke out.

)nly by opening this subject to ublic discussion would we be aking a contribution to safety, so iat other families will not lose ieir children, or see them severely ijured and permanently disabled, s we have.

James Miller, Father of Accident Victims

Mr. Keller was left paraplegic after an incident in September 1981, in which his Jeep CJ-5 vehicle rolled over when he swerved to avoid hitting a car in front of him.

Mr. Keller's case was settled by the vehicle manufacturer, with the amount not to be disclosed. Mr. Keller believes that this confidentiality camouflages just how serious injuries resulting from the Jeep CJ-5 rollover problem were, even from American Motors' perspective.

Ed Keller
43 years old
Disabled former electrician
Hughesville, Maryland

On September 11, 1981, I was driving my CJ-5 Jeep in a line of traffic, travelling at about 30 mph. A car directly ahead of me stopped short, and I swerved to avoid it. The maneuver I made is routine in traffic situations, and everybody does it from time to time. I also assumed that a Jeep could handle an easy maneuver like that. It wasn't until 1985 that I learned that American Motors had known, since at least July 1979, that its CJ-type vehicles would roll over more easily than regular cars.

My car did roll over, and I was thrown out of it. There was only about $1200 in damage to my car, but I suffered a spinal cord injury, and now need braces and crutches to walk. Only through long, painful rehabilitation was I able to avoid permanent confinement to a wheelchair. Before I was injured I worked as an electrician. Now I am completely unable to earn a living doing the only kind of work I am trained to do.

I sued American Motors in 1982. After about two years of investigation and discovery, American Motors offered to settle my case two weeks before trial, if I would agree to keep the amount of compensation secret.

Since 1988, I have been a volunteer at the National Rehabilitation Hospital. I volunteer one day a week in the occupational therapy department. I help the therapists with spinal cord injury victims like myself, encouraging patients not to give up hope and to try to get out of their wheelchairs.

To me, my case means I beat the giant that hurt me. Being involved in the case was extremely hard on my family and me. I really want to show, in public, what American Motors did wrong. For me not to talk about compensation means no one will know just how serious my case was, even from American Motors' perspective. I have a family to support, and that's why I agreed. There was also a lot of pressure from American Motors to agree to secrecy. I've done my best to put the incident behind me and move ahead with my life, but the secrecy part of it still grates on me.

For me not to talk about compensation means no one will know just how serious my case was, even from American Motors' perspective. I have a family to support, and that's why I agreed.

Ed Keller, Accident Victim

Fred Barbee
54 years old
Retired appliance repair company owner
Minong, Wisconsin

Mr. Barbee's wife died on April 26, 1988, after her Bjork/Shiley artificial heart valve broke. The valve was originally implanted in May of 1982.

Pfizer has routinely sought protective orders in its heart valve cases, and has gone to court to try to maintain confidentiality of thousands of documents related to its heart valves.

Fred Barbee testified before the Dingell subcommittee. He and his wife were never advised by any doctors about the heart valve problem. They never read about it in the press. All of the company's settlements were kept confidential, so the media couldn't learn about litigation while it was underway. Nearly ten years after the first Shiley fracture, the Barbees were totally in the dark.

My name is Frederick Barbee, and I believe that secrecy, of the kind you're talking about in this conference today, killed my wife.

My wife, Carol, had a Bjork/Shiley artificial heart valve implanted in May 1982. About six years later, she collapsed after doing some yard work. She said she was having trouble breathing and that she thought she was having a heart attack, or that something might be wrong with her replacement valve. Until that time, we had never heard that Bjork/Shiley artificial heart valves would break.

I took Carol to the closest hospital where, despite emergency room care, she went into cardiac arrest. She was then rushed by ambulance to a hospital in Duluth, an hour away. She had open heart surgery in Duluth to replace the valve. By the end of that surgery, she had suffered so much oxygen deprivation that she slipped into clinical death. After all of the heroic efforts to save her life, she died about 48 hours after the first symptoms appeared.

I later discovered several things about her type of heart valve. I learned that dozens of other valves had fractured over a period of years before Carol's broke, including a number of them before hers was even implanted. I learned that Shiley, the company that made them, had not provided any information about the problem to patients who had the valves. I learned that the symptoms of a broken valve are like those for a heart attack, and that most of the people whose valves fractured died as a result. I learned that many of their families had filed lawsuits against Shiley, Inc., the manufacturer, and its parent company, Pfizer, Inc. I learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I

learned that Shiley had negotiated settlements in those cases that required the victims to keep their settlements confidential.

I read newspapers and watch television. If I had ever heard anything about this problem in the news I would have taken my wife back to the doctor to see what should be done about it. Even if she didn't have the defective valve replaced, and even if we couldn't prevent the strut fracture, having some advance information about the problem would have allowed us to plan for an emergency, and possibly save her life.

If I had known what to expect, I would have made arrangements for Carol to be taken to Duluth, not to our local hospital, because I now know that only immediate open-heart surgery would have saved her life -- and our local hospital didn't have the capability to perform open heart surgery. If I had heard *anything* about valve fractures before April 24, 1988, we would have had time to reach Duluth, and Carol might be alive today.

But Shiley wanted this problem kept secret, and they got their way. I have learned that Shiley knew of problems with the valve as early as 1978, yet attorneys, victims' families, and the public are still struggling to get this information.

I have learned that Shiley knew of problems with the valve as early as 1978, yet attorneys, victims' families, and the public are still struggling to get this information.

Fred Barbee, Husband of
Heart Valve Victim

Devra Lee Davis, Ph.D.
Toxicologist
Scholar in Residence,
National Academy
of Sciences,
Washington, D.C.

Dr. Davis suffered a near-fatal anaphylactic reaction to a prescription drug (Zomax) in 1983, two months before the drug was withdrawn from the market by its manufacturer, McNeil Pharmaceutical.

Dr. Davis believes that, as a result of secrecy provisions attached to settlements of lawsuits against McNeil, research on the effects of the chemical constituents of Zomax has been inhibited.

On January 4, 1983, I almost died. The drug I had taken early that morning for my broken foot, Zomax, had been billed as the best thing since morphine without narcotics. Within 20 minutes, it had nearly killed me.

I am a specialist in toxicology. When my heart began racing after taking Zomax, I pulled out my bedside copy of the *Physicians' Desk Reference* to learn what type of reaction I might be having. I was relieved to find no warning about a sometimes fatal allergic response called anaphylaxis. But my pulse soon soared to 140, and I began to experience that profound sensation of impending doom and deep dread characteristic of true anaphylaxis, along with breathing difficulties and gigantic hives all over my body.

I blacked out and tumbled down a flight of stairs. "Mommy! Mommy! Are you dead?" my six-year-old cried.

After I was treated at the hospital emergency room, I learned that a number of patients had experienced violent, allergic reactions to Zomax and that some had died. Later I met physicians who had survived other traumas with the same drug, as much as *three years earlier.* One drove his car off a super highway and was treated for a heart attack. Another suffered a punctured lung when his heart was restarted.

The Washington Post, on October 25, 1988, disclosed the background of the litigation and regulatory processes surrounding Zomax. This article by Weiser and Walsh detailed how the company that manufactures Zomax, McNeil Pharmaceutical, deliberately downplayed the severity of adverse reactions from the drug, in its reports to the Food and Drug Administration, in its aggressive marketing campaign, and in its letters to doctors.

Some of the victims of anaphylactic reactions to Zomax -- and some families of those who died -- sued McNeil. Two were physicians who

spoke to me about their devastating reactions and told me that, as a condition of settling their cases, they were required never to disclose the details of their lawsuits or talk about what had happened again. They also agreed not to publish any reports of their reactions in medical journals, which are a key source of information for doctors to learn about such reactions. One of these reactions occurred three years before mine. If these warnings had been published, Zomax might well have been withdrawn from the market before my brush with death.

In order to settle cases, courts repeatedly sealed medical and scientific records, effectively shutting off access to vital technical information and preventing scientists from initiating research projects and from publishing results. In fact, Zomax is an unusual compound for research. It causes cancer in animals at doses about the same as those that could be taken by humans. It also produced severe renal disease, psychiatric disturbances and suicide in people with no previous history of such illness. Most interestingly, Zomax spawned powerful immunological reactions in people with no previous history of allergic response.

McNeil succeeded in having court-ordered secrecy maintained about such matters and suppressing the publication of information in medical journals, stifling the free flow of information so vital to scientific research.

In order to settle cases, courts repeatedly sealed medical and scientific records, effectively shutting off access to vital technical information and preventing scientists from initiating research projects and from publishing results.

Dr. Devra Davis, Scientist and Victim

Two former employees of McNeil, one a physician heavily involved in developing the product, recently filed suit against McNeil, claiming they were fired in retaliation for arguing for stronger warnings and earlier withdrawal of Zomax from the market. Throughout its years of litigation, McNeil shielded these officials from testifying or being deposed in lawsuits, alleging that information they had was protected under court-ordered secrecy of prior settlement agreements. After most of the allergic reaction deaths and other cases had been settled, they were terminated.

In their public pleadings, these former employees have disclosed crucial scientific information about the potential of this drug to kill or produce life-threatening reactions. They have attached large portions of the company's records on the Zomax problem to their complaint in court, to make it a part of the public record and protect it from the effect of later secrecy orders.

My interest in Zomax, and in the secrecy problem related to it, goes far beyond the personal level. There is much more work to be done on this fascinating compound. Zomax differs by one molecule from Tolectin-DS, which is now one of the most widely-prescribed pain

medications in the U.S. We need to know the extent to which severe allergic reactions are also occurring with this drug.

The use of legally ordered secrecy to shield corporate mistakes is not unique to Zomax, but cuts across all product liability cases. When there is an allegation that a drug is causing injury, the manufacturer is not always forthcoming to researchers with what it knows about the problem. Moreover, attorneys are sometimes prohibited from disclosing company documents (including test records) which they receive during discovery. As a result, judicially sanctioned secrecy can compromise medical research.

A democracy rests on the informed consent of the governed. Science is an inherently democratic institution, fueled by shared, common information. The practice of secrecy in the courts can result in a failure to tell the public about proven hazards -- endangering lives, perverting science, and ultimately undermining democracy itself.

Rule 76(a). Sealing Court Records

Adopted by the Supreme Court of Texas, April, 1990; Effective September 1, 1990

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or

the administration of public office, or the operation of government;

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120(a).

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21(a), upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise

provided herein. A temporary sealing order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does

not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Applicable Portions of Related Rules

Rule 166(b). Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76(a) with respect to all court records subject to that rule.

Rule 120(a). Special Appearance

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such

affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

Sunshine in Litigation Act

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 69.081, Florida Statutes, is created to read:

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

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

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

PANELISTS AND SPEAKERS

Arthur Bryant
Trial Lawyers for Public Justice

Art Buchwald
Syndicated Columnist

Hon. Jim R. Carrigan
U.S. District Court, Colorado

Mary Cheh
Professor, George Washington University
National Law Center

Joan Claybrook
President, Public Citizen

Alfred W. Cortese
Kirkland & Ellis, Washington, D.C.

Dr. Devra Davis
Scholar in Residence,
National Academy of Sciences

Justice Lloyd Doggett
Texas Supreme Court

Michael Gartner
President, NBC News

Russ M. Herman
Herman, Herman, Katz and Cotlar, New Orleans, Louisiana

Harold Jacobson
Lord, Bissell & Brook, Chicago, Illinois

Alice Neff Lucan
Davis, Graham & Stubbs, Washington, D.C.

Michael C. Maher
Maher, Gibson & Guiley, Orlando, Florida

Steve McGonigle
Dallas Morning News

Paul K. McMasters
National Freedom of Information Chair,
Society of Professional Journalists

James W. Morris III
Morris and Morris, Richmond, Virginia

Eugene I. Pavalon
Pavalon & Gifford, Chicago, Illinois

Bruce Sanford
Baker & Hostetler, Washington, D.C.
General Counsel, Society of Professional Journalists

Hon. Kenneth W. Starr
Solicitor General,
United States Department of Justice

George Trubow
Center for Informatics Law

Elsa Walsh
Washington Post

Dianne Jay Weaver
Weaver, Weaver & Petrie, Fort Lauderdale, Florida

ORGANIZATIONS REPRESENTED

Access Magazine
Administrative Office of U.S. Courts
Aetna Life and Casualty
Alliance for Justice
American Bar Association
American Home Products - Law Department
American Insurance Association
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Association of Trial Lawyers of America
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BNA - Daily Report for Executives
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Trial Lawyers for Public Justice
U.S. Department of Justice
U.S. House Judiciary Committee
U.S. Medicine
U.S. Senate Judiciary Committee
U.S. Subcommittee on Courts, Intellectual Property, and the Administration of Justice
U.S. Subcommittee on Technology and the Law
U.S. Subcommittee on the Constitution
U.S. Public Interest Research Group
USA Today
Wagner, Cunningham, Vaughan & McLaughlin

Washington Post
Wake Forest University Law School
Weaver, Weaver & Petrie
Law Offices of Robin Page West
Law Offices of Douglas B. Wessel
Woman's Day
Women in Communications
WTOP Radio
Mark Zarbock, P.C.

KEEPING SECRETS
Justice on Trial

Society of Professional Journalists (SPJ) is an organization of people working in the news media with more than 300 chapters across the country. Through its Freedom of Information (FOI) Committee and its First Amendment Center, SPJ works to increase the free flow of information to the public.

Carolyn Carlson, President, Society of Professional Journalists
Paul K. McMasters, Chair, Freedom of Information Committee (SPJ)

Association of Trial Lawyers of America (ATLA) is an international professional organization of the trial bar. Most of its 65,000 members are plaintiff's attorneys. ATLA is dedicated to the protection of consumers and the prevention of injury. It works to strengthen the civil justice system and promotes fairness for injured consumers.

Russ M. Herman, President, Association of Trial Lawyers of America
Thomas H. Henderson, Jr., Executive Director (ATLA)

Conference Staff

Marcia Feldman, Conference Coordinator
Lisa Macdonald, Conference Co-coordinator
Mary Petersen, Conference Administrator
Lesley Lovell, Conference Assistant
Madelyn Appelbaum, Director of Public Relations (ATLA)
James E. Rooks, Jr. Manager, Editorial Services (ATLA)

Report written by Barbara Wolfson
Text designed by Mary Petersen
Graphics by Levine & Associates

ANTI-SECRECY AGREEMENT ACTIVITY:
A National Perspective

CALIFORNIA: By local rule, last July the San Diego County Superior Court adopted a policy which states that secrecy practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

COLORADO: A bill based on the Florida statute was introduced in January, 1991.

FLORIDA: The Florida Sunshine in Litigation Act took effect on July 1, 1990 and is the model for many other states. The law forbids courts from entering orders which conceal a "public hazard" or information about a public hazard. It also makes any agreement to conceal a public hazard unenforceable, and allows the public and news media to contest orders or contracts which would conceal public hazards.

HAWAII: In 1990 the House passed a bill applying only to health and safety information produced in discovery in wrongful death actions. There are plans to introduce new, broader secrecy legislation in 1991 which would provide for public access to such information.

ILLINOIS: A bill modeled after the Florida statute is being introduced in April 1991. There are plans to request court rule amendments similar to those adopted by the Texas Supreme Court.

NEVADA: The Senate Judiciary Committee, as a whole, is sponsoring anti-secrecy legislation. The local Society of Professional Journalists plans to testify in favor of the bill.

NEW HAMPSHIRE: A measure modeled after Rhode Island's 1990 bill is expected to be introduced this session.

NEW JERSEY: Assembly Bill 4110, essentially identical to the Florida statute, was introduced last October. Assembly Resolution 136, pending action, urges New Jersey attorneys and judges not to enter into or approve secrecy agreements or orders in civil cases involving toy-related injury and death, and urges the New Jersey Supreme Court to adopt rules to implement the resolution.

NEW YORK: New York State's Administrative Board of the Courts circulated a proposed court rule on secrecy for comments by the bench and bar. In February, the Board considered the comments and implemented the rule, which prohibits sealing of court records without a finding of good cause.

NO. CAROLINA:	Legislation took effect on July 1, 1989 prohibiting government agencies, officials, or employees from entering into confidential settlements to resolve suits in connection with official duties or responsibilities.
RHODE ISLAND:	Legislation that would prohibit courts from entering orders against disseminating product liability litigation documents, and prohibit agreements which involve non-return or destruction of documents was vetoed by the Governor last year. Legislation is expected to be reintroduced this year.
TEXAS:	The Texas Rules of Civil Procedure were amended in 1990 to establish standards for sealing court records. The Texas Supreme Court adopted the approach of establishing a "presumption of openness" in all court records and detailed the procedures under which records could be sealed.
VIRGINIA:	Legislation signed by the Governor in July 1989 allows attorneys to share information produced in discovery if they have permission of the court, and if the attorneys who would receive the information agree to be bound by the terms of any protective order.
WASHINGTON:	This session, a bill is being introduced which is expected to utilize a "public hazard" concept similar to the Florida Sunshine in Litigation Act.
WISCONSIN:	A secrecy bill has been introduced this session which is similar to the Florida statute, but will provide procedures similar to those utilized in Texas' amended court rules.

SECRECY HURTS CONSUMERS

Countless injuries and deaths could have been prevented if safety test records and documents, as well as records of settlements and judgments, had been made public and were accessible. There is no justification for allowing marketing considerations to outweigh public safety.

Hundreds of people have been badly burned, and some even killed, when their Bic lighters either failed to extinguish properly or exploded. Bic has denied responsibility but has refused to hand over design information, safety-test results, and records of complaints and accidents, unless access was limited to the current parties in a lawsuit. In many cases, Bic made secrecy a condition of settling lawsuits.

"America's courts are public, not private, institutions. Secrecy agreements undermine the public's right to know. And critical information hidden from the public can lead to human casualties."

- Ralph Nader

Over the last five years, scores of victims of fiery car crashes have filed lawsuits against General Motors, alleging the auto manufacturer knew GM gas tanks were vulnerable to puncture during high-speed crashes. The victims say these fuel leaks were well-documented by the company, which estimated the cost of fixing the tanks -- from $8.59 to $11.59 a car, by its own estimates -- was too high. GM has consistently used secrecy agreement procedures to keep closely held and controversial documents out of the public eye.

"There is no justification for auto manufacturers withholding safety information from the public. This legislation could result in saving lives and preventing injury -- a consideration that should be foremost in manufacturers' design and marketing strategies."

- Jim Miller
Victims Group Opposed to
Unsafe Restraints

SECRECY HURTS PATIENTS

Patients rely on prescription drugs for their recovery; sometimes, the drugs are instead their death sentence. Too often, pharmaceutical manufacturers knowingly continue to market dangerous products because the business cost of a recall or warning would be so great. They settle the vocal cases only if the plaintiff agrees to seal the file -- and with it, all records of the drug's dangerous legacy.

In 1985, McNeil Pharmaceutical recalled its painkiller Zomax from the market. According to an FDA study in the same year, Zomax was already a factor in 14 deaths and 403 life-threatening allergic reactions. Yet, McNeil chose to quietly settle lawsuits out of court to prevent the disclosure of information collected over the course of the lawsuits. As patients were suffering and successfully challenging McNeil in court, the company stepped up its marketing program.

"In order to seal cases, courts repeatedly sealed medical and scientific records, effectively shutting off access to vital technical information and preventing scientists from initiating research projects and publishing results."

- Dr. Devra Davis, Toxicol gist
National Academy of Sciences
Zomax allergic reaction victim

SECRECY HURTS WORKERS

Knowingly exposing workers to unsafe working conditions is a criminal act, but settling with some employees in secret to avoid mass litigation is unconscionable. Secrecy agreements affecting the workplace can keep significant findings of health and safety hazards out of the public domain.

Workers at the Goodyear Tire and Rubber Co. filed suit after many of them developed cancer, claiming Goodyear knew many of the chemicals used in the tire-making process were toxic and even carcinogenic. In 1980, Goodyear sought and was granted a broad protective order covering every document it provided to workers. In 1986, Goodyear confidentially settled 34 of the cancer cases. It was not until 1989 that a federal judge overruled confidentiality restrictions on the health-related documents.

"It would have been so helpful for us to have (the chemical exposure document) so it could be used in a preventive manner."

- Louis Beliczky
Director of Industrial Hygiene
United Rubber Workers

In 1929, 11 employees of the Johns-Manville Corporation filed suit against their employer for asbestos exposure. During the trial experts testified about the dangers of silicosis and asbestosis, as well as the hazards that existed for those workers with pulmonary dust exposure. The Johns-Manville Corp. settled the extensive cases with secrecy agreements, safeguarding all public records about the dangerous diseases. It was not until the late '50s that the real facts about the diseases began to emerge.

"Only by documenting and publicizing hazards in the workplace can we be sure we are working together to make our work environment safe and healthy. Letting workers suffer or die because of a 'judicial loophole' is contrary to everything we have fought these last 20 years."

- Jan Chatten-Brown, Coordinator
WORKSAFE!

SECRECY HURTS SENIOR CITIZENS

Vulnerable seniors are often dependent on their doctors' medical advice and on the drugs that are prescribed. Some companies have chosen to exploit this emotional and financial vulnerability through secret settlement cases in order to discourage additional justifiable lawsuits. This type of secrecy is perhaps one of the most appalling abuses of the civil justice system.

The Pfizer heart valve was taken off the market in 1986 after causing over 150 deaths, but is still implanted in some 50,000 people. Reports of the defective valve have been withheld from the medical community and the public because of protective orders requested by the manufacturer -- orders which even prohibited forwarding information to the Food and Drug Administration. Pfizer has paid millions of dollars to settle many lawsuits in return for secrecy orders.

"I learned that Shiley, the company that makes the heart valve, had not provided any information about the problem to patients who had the valves...I learned that many of the patients had filed lawsuits against Pfizer...I learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I believe secrecy killed my wife."

- Fred Barbee, whose wife died when her Pfizer heart valve malfunctioned. Ten years after the first fatality, the Barbees were never notified of a problem.

Oraflex, an anti-arthritic drug, caused kidney and liver damage in many senior citizens. A senior staff physician for Eli Lilly, the manufacturer, knew of its harmful side effects. He instructed staff to change the findings in a scientific study on Oraflex to "play down" its harmful effects. Press kits were sent to over 6,000 newspapers, magazines, radio and TV stations to promote the "wonder drug." Three months later, 49 Americans, most of them senior citizens, were dead and nearly 1,000 injured. Eli Lilly sought protective orders to hide this prime example of corporate greed.

"Senior citizens are exposed to more drugs and medical devices than any other sector of society. Protective orders and secrecy agreements harm the public by keeping hazards quiet. Companies that do not have public hazards have nothing to fear by this legislation."

- Howard Owens, President
Congress of California Seniors

SECRECY HURTS THE ENVIRONMENT

Secrecy orders can block attempts by scientists and health officials to monitor hazardous chemicals. Worse, information is grudgingly released only to plaintiffs in a lawsuit, and then sealed -- continuing the exposure of the public to environmental hazards.

In a confidential settlement, the Xerox Corporation paid two families in New York nearly $5 million in a case alleging that chemical leaks from a Xerox plant caused neurological damage to seven family members. Neighbors still living on the same street cannot obtain information about the hazards they still face -- even the family whose 12-year-old child just developed a rare form of cancer.

"The policy interests of the public and the environment must always be considered before the financial interests of a private company. We have to know more about these problems in order to stop them from happening again."

- Michael Picker, Director
National Toxics Campaign

In California, following an accident at Fiberite's Orange County plant, over 20 people developed serious complications including repiratory problems, liver disease and birth defects in newborns. Despite the potential gravity of the situation -- it happened next to a child care center -- Fiberite refused to settle the case unless all the information regarding the toxic incident was sealed in the process.

"Locking away vital health and environmental data serves no one, and throws up roadblocks to legitimate scientific inquiry into chemical and other types of contamination. The Sierra Club strongly endorses SB 711."

- Michael Paparian, Director
Sierra Club of California

Summary of Developments on Secrecy Issue

California: The Center for Public Interest Law, Sacramento, and the California Trial Lawyers Association are sponsoring legislation on secrecy in the current legislative session. Additional sponsors include the Sierra Club, DES Action, Ralph Nader, Motor Voters, the National Toxics Campaign, the Congress of California Seniors, and the Michelle Snow Foundation. **San Diego County:** By local rule, the San Diego County Superior Court adopted a policy on confidentiality agreements and protective orders, effective July 1, 1990. The rule states that such practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

Florida: The Sunshine in Litigation Act, which took effect on July 1, 1990, was the first state legislation which identified a class of dangers to public health and safety and sought to limit the extent to which they could be concealed. The law forbids courts from entering orders which conceal a "public hazard" or information about a public hazard. A public hazard can be a "device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product, that has caused and is likely to cause injury." The statute also makes any agreement or contract to conceal a public hazard unenforceable, and allows the public and the news media standing to contest court orders or contracts which would conceal public hazards. Courts are required to allow disclosure of information that is sought to be concealed if the information might be useful to members of the public to protect themselves from injury by a public hazard.

Hawaii: The Hawaii Academy of Plaintiffs' Attorneys has introduced legislation in both houses in the current legislative session. House Bill 2019, based on the Florida Sunshine in Litigation Act, is pending a floor vote. Senate Bill 1838 is similar to the Texas court rule amendments but goes well beyond any existing rules or legislation in several areas. It includes a finding on undesirable effects of secrecy. It presumes openness to the public of all court documents, discovery and settlement agreements, whether or not filed with the court; allows the news media to file standing requests to receive notices of hearings on secrecy questions, and requires maintenance of a public file of secrecy motions for the entire state; and awards attorney fees to any person who substantially prevails in opposing a motion to limit public access.

Illinois: The Illinois Trial Lawyers Association plans to sponsor a bill in the current legislative session, modeled on the Florida statute. It also plans to request court rule amendments similar to those adopted by the Texas Supreme Court.

Iowa: The Iowa Trial Lawyers Association plans to sponsor legislation based on the Texas court rule amendments.

Louisiana: The Louisiana Trial Lawyers Association will be actively supporting a bill (called the Sunshine in the Courtroom Bill) that would amend Article 1426 of the Louisiana Code of Civil Procedure by incorporating the elements of the Florida legislation.

Massachusetts: House Bill 3775, similar to the Florida Sunshine in Litigation Act, has been filed by Rep. Salvatore DiMasi, chair of the House Judiciary Committee. The bill is broader than the Florida legislation in that it would apply to any dispute that has matured to the extent that one potential plaintiff and one potential defendant have notice of the possibility of litigation. It would establish a presumption in favor of disclosure of information regarding a public hazard, and require any party opposed to disclosure to prove beyond a reasonable doubt that the information would not help the public to protect itself from the hazard.

Michigan: The Michigan Trial Lawyers Association has proposed amendments to the Michigan Court Rules which utilize the "public hazard" concept of the Florida Sunshine in Litigation Act but employ it in the court rule context. Amendments to Rules 2.302(c), 2.310(b) and 2.310(C) would add provisions prohibiting the entry of discovery orders that would conceal public hazards. Those rules govern protective orders in general and requests for production of documents, directed to both parties and non-parties.

Nevada: The Nevada Trial Lawyers Association is actively sponsoring a bill similar to the Florida legislation. It will be sponsored by the Senate Judiciary Committee as a whole in the legislative session which started on January 21. Public hearings are expected to be held in Las Vegas.

New Hampshire: The New Hampshire Trial Lawyers Association is actively supporting Senate Bill 91, which is nearly identical to Rhode Island's 1990 bill. Hearings were held in February.

New Jersey: In last year's session, Assembly Bill 4110 was introduced on October 29, 1990. It is essentially identical to the Florida legislation. Assembly Resolution No. 136, introduced May 24, 1990, urges New Jersey attorneys and judges not to enter into or approve secrecy agreements or orders in civil cases involving toy-related injury and death. Assembly Resolution No. 136 also urges the New Jersey Supreme Court to adopt rules to implement the resolution. Both measures are pending.

New York: On February 4, New York State's Administrative Board of the Courts adopted a new rule on sealing of court records in civil actions in the trial courts. The rule takes effect on March 1. The rule prohibits sealing of records without a specific finding of good cause. The rule directs the court to consider the interests of the public as well as the interests of the parties in determining whether good cause has been shown. "Court records" are defined as all documents and records of any kind that are filed with the clerk. Discovery material that is not filed with the clerk is unaffected.

North Carolina: Legislation on confidential settlements of suits against the state government took effect on July 1, 1989. The statute prohibits government agencies, officials, or employees from entering into confidential settlements to resolve suits in connection with their official duties or responsibilities.

Oregon: The Oregon Trial Lawyers Association is supporting two bills in the current legislative session. Senate Bill 579 is similar to the Virginia legislation. It would amend the Oregon Rules of Civil Procedure to provide that protective orders in any civil litigation will not prevent an attorney from sharing information and materials covered by the protective order with an attorney handling a similar or related case. Disclosure may be made only by court order, and only to attorneys who agree to be bound by the protective order, but the court would be required to allow disclosure unless good cause is shown by the protective order's beneficiary. Senate Bill 580 would provide that confidential settlement agreements are not binding unless a court orders that they are, after findings that confidentiality is necessary to protect a party and that it will not harm the public interest. The bill would also provide that a confidential settlement order does not bar sharing of information between attorneys so long as the terms of the settlement are not disclosed.

Rhode Island: House bill 90-H-8522 was introduced in 1990. The bill would have prohibited courts from entering orders against disseminating product liability litigation documents (or information about product safety and design matters) to regulators or other attorneys. It would also have prohibited discovery or settlement agreements which would require return or destruction of documents as well as agreements not to represent other victims of similar product defects in the future. The bill would have prohibited the sale for profit, directly or indirectly, of documents or information provided pursuant to the bill. The bill passed the Senate 41-0 on June 28, 1990 and the House by a vote of 69-3 on July 5. It was vetoed by then Governor DiPrete on July 11 after the legislative sessions had ended. Mr. DiPrete was defeated in the November election. A new bill has been introduced in the session that convened in January.

Texas: In 1990, Texas became the first state to address secrecy concerns through court rules which took effect on September 1, 1990,. The Texas Supreme Court chose to focus on the issue of sealed court records, and adopted amendments to the Texas Rules of Civil Procedure to establish standards and procedures for sealing. The court recognizes a "presumption of openness" of all court records, which could be overcome only after a showing that a specific, serious and substantial interest in sealing records outweighs any adverse effect on public health and safety, and that no less restrictive means than sealing would protect the interest. "Court records" includes all documents filed in a civil action, as well as unfiled discovery material and settlement agreements that are not filed but might have an adverse effect on public health and safety. The court detailed specific procedures (notice, public hearings, etc.) by which records could be sealed under the new rules, and provided that individuals and organizations not a party to the case could participate in hearings.

Virginia: HB 1582, the first legislation of its kind, was introduced in 1989 by ATLA Member Bernard Cohen, a member of the General Assembly. It passed and was signed by the Governor, and took effect on July 1, 1989. It allows attorneys to share information produced in discovery if they have permission of the court (given after a hearing), and if the attorneys who would receive the information agree to be bound by the terms of any protective order.

Washington: The Washington State Trial Lawyers Association is sponsoring bills in both House and Senate during the current legislative session. The bills, HB 1320 and S 5388, are very similar to the Florida Sunshine in Litigation Act.

Wisconsin: The Wisconsin Academy of Trial Lawyers plans to introduce a bill in the current legislative session. It is expected to be similar in operation and effect to the Texas court rule amendments.

March 1, 1991

Facts About Secrecy in Litigation

- **Secrecy in litigation,** the practice of keeping private what would otherwise be public information emerging from litigation, includes the following practices:

  Protective Orders that legally prohibit parties receiving information in a lawsuit from distributing this information to others (e.g. attorneys representing other plaintiffs).

  Confidentiality Agreements that require certain matters, once they are discussed or agreed to, to remain confidential except among the parties directly involved. Such matters might include the cause of injury and the contributing factors, the terms of settlement, and even the fact that a lawsuit was ever filed.

  Sealed Court Files that legally preclude access to any details of a case. The parties' names may even be withheld, leaving only a record titled "Sealed v. Sealed."

- **Secrecy has jumped steadily and significantly** in civil cases since at least the mid-1970's. Plaintiffs' attorneys indicate that demands for protective orders are now a routine occurrence in product liability cases.

- **The process of secrecy** is typically initiated by defendants. Plaintiffs can demand all information that the defendant has about the causes and circumstances of injuries, including the defendant's knowledge of any prior, similar incidents. Defense attorneys may object to the request on a variety of grounds, and may request a protective order limiting the information they have to produce. Through a protective order, they may also seek to prohibit the sharing of information with other attorneys. To expedite discovery, the parties directly involved in the case may agree to share information, but only among themselves. Judges tend to approve most agreements reached by both parties. Yet the public's right to know, especially about vital health and safety matters, can be sacrificed in the process.

- **First Amendment/Freedom of Information concerns** have also arisen in court secrecy practices. Journalists researching stories about health or safety hazards may find that confidentiality agreements bar attorneys from discussing information crucial to public safety with the media. Secrecy orders can also bar medical, scientific and other experts from discussing critical findings. They can also interfere with resolution of Freedom of Information Act disputes. The mandatory nature of the orders, the direct involvement of the judiciary in granting them, and the threat of contempt if they are violated, all raise questions about freedom of the press and free speech.

Examples of Secrecy:

ENVIRONMENTAL SAFETY: Secrecy orders can block attempts by scientists and health officials to monitor hazardous chemicals. In a confidential settlement, Xerox Corp. paid two families in Webster, New York nearly $5 million in 1988 in a case alleging that chemical leaks from a Xerox plant caused cancer and neurological damage to seven family members. Neighbors living on the same street could not obtain any information about the toxic hazards they may face. Until a 1989 court decision which released sealed records to state and local health authorities, medical experts who had analyzed the alleged connection between the children's illnesses were not even allowed to share their findings with the health officials.

MEDICAL MALPRACTICE: Some physicians have effectively avoided disciplinary charges by their peers because sealed court files remove all records of civil suits in which the facts would clearly warrant disciplinary action. In the District of Columbia, for example, records of a 1983 suit alleging that a doctor had sexually assaulted a patient during a gynecological examination were sealed after the doctor settled the case and admitted having a sexual relationship with his patient.

PRODUCT SAFETY:

- PFIZER HEART VALVE: A 1985 report on a defective heart valve withdrawn from further use in 1986, but still implanted in some 50,000 people, has been withheld from the medical community and the public because of protective orders obtained by Pfizer, Inc. Nearly 250 deaths have been caused by the defective valves, according to Pfizer's own statements. Pfizer has paid millions of dollars to settle many lawsuits in return for secrecy orders.

- BREAST IMPLANTS: In 1989, requests to the FDA by a public interest group seeking copies of safety studies of breast-implant material were denied on trade secret grounds. Expert witnesses who testified in lawsuits are under protective orders and cannot reveal what the manufacturer's records show about the hazards of materials in breast implants used by thousands of women. This is an example of how a protective order can be detrimental to public health and safety.

- AUTOMOBILE FUEL SYSTEMS: A series of suits against General Motors alleged that the fuel system used in GM cars built before the early 1980's presented avoidable risks of fuel-fed fires. GM systematically obtained protective orders that successfully kept from public scrutiny internal documents showing that financial considerations outweighed safety concerns in the design and manufacture of its automobiles.

Fred Barbee
Retired appliance repair co. owner
Minong, Wisconsin
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Mr. Barbee's wife died on April 26, 1988, after her Bjork/Shiley artificial heart valve broke. The valve was originally implanted in May of 1982.

Pfizer has routinely sought protective orders in its heart valve cases, and has gone to court to try to maintain confidentiality of thousands of documents related to its heart valves.

Fred Barbee testified before the Dingell subcommittee. He and his wife were never advised by any doctors about the heart valve problem. They never read about it in the press. All of the company's settlements were kept confidential, so the media couldn't learn about litigation while it was underway. Nearly 10 years after the first Shiley fracture, the Barbees were totally in the dark.

STATEMENT OF FREDERICK BARBEE
Minong, Wisconsin

My name is Frederick Barbee, and I believe that secrecy, of the kind you're talking about in this conference today, killed my wife.

My wife, Carol, had a Bjork/Shiley artificial heart valve implanted in May 1982. About six years later, she collapsed after doing some yard work. She said she was having trouble breathing and that she thought she was having a heart attack, or that something might be wrong with her replacement valve. Until that time, we had never heard that Bjork/Shiley artificial heart valves would break.

I took Carol to the closest hospital where, despite emergency room care, she went into cardiac arrest. She was then rushed by ambulance to a hospital in Duluth, an hour away. She had open heart surgery in Duluth to replace the valve. By the end of that surgery, she had suffered so much oxygen deprivation that she slipped into clinical death. After all of the heroic efforts to save her life, she died about 48 hours after the first symptoms appeared.

I later discovered several things about her type of heart valve. I learned that dozens of other valves had fractured over a period of years before Carol's broke, including a number of them before hers was even implanted. I learned that Shiley, the company that made them, had not provided any information about the problem to patients who had the valves. I learned that the symptoms of a broken valve are like those for a heart attack, and that most of the people whose valves fractured died as a result.

I learned that many of their families had filed lawsuits against Shiley, Inc., the manufacturer, and its parent company, Pfizer, Inc. I learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I learned that Shiley had negotiated settlements in those cases that required the victims to keep their settlements confidential.

I read newspapers and watch television. If I had ever heard anything about this problem in the news I would have taken my wife back to the doctor to see what should be done about it. Even if she didn't have the defective valve replaced, and even if we couldn't prevent the strut fracture, having some advance information about the problem would have allowed us to plan for an emergency, and possibly save her life. If I had known what to expect, I would have made arrangements for Carol to be taken to Duluth, not to our local hospital, because I now know that only immediate open-heart surgery would have saved her life -- and our local hospital didn't have the capability to perform open heart surgery. If I had heard <u>anything</u> about valve fractures before April 24, 1988, we would have had time to reach Duluth, and Carol might be alive today.

But Shiley wanted this problem kept secret, and they got their way. I have learned that Shiley knew of problems with the valve as early as 1978, yet attorneys, victims' families, and the public are still struggling to get this information.

Devra Lee Davis, Ph.D.
Toxicologist, presently scholar-in-residence at the
National Academy of Sciences, Washington, D.C.
Professor at Mt. Sinai Medical Center, Dept. of Environmental and
Occupational Medicine, New York City

Dr. Davis suffered a near-fatal anaphylactic reaction to a prescription drug (Zomax) in 1983, two months before the drug was withdrawn from the market by its manufacturer, McNeil Pharmaceutical.

Dr. Davis believes that, as a result of secrecy provisions attached to settlements of lawsuits against McNeil, research on the effects of the chemical constituents of Zomax has been inhibited.

STATEMENT OF DEVRA LEE DAVIS, Ph.D.
Washington, D.C.

On January 4, 1983, I almost died. The drug I had taken early that morning for my broken foot, Zomax, had been billed as the best thing since morphine without narcotics. Within 20 minutes, it had nearly killed me.

I am a specialist in toxicology. When my heart began racing after taking Zomax, I pulled out my bedside copy of the Physicians' Desk Reference to learn what type of reaction I might be having. I was relieved to find no warning about a sometimes fatal allergic response called anaphylaxis. But my pulse soon soared to 140, and I began to experience that profound sensation of impending doom and deep dread characteristic of true anaphylaxis, along with breathing difficulties and gigantic hives all over my body.

I blacked out and tumbled down a flight of stairs. "Mommy! Mommy! Are you dead?" my six-year-old cried.

After I was treated at the hospital emergency room, I learned that a number of patients had experienced violent, allergic reactions to Zomax and that some had died. Later I met physicians who had survived other traumas with the same drug, as much as three years earlier. One drove his car off a super highway and was treated for a heart attack. Another suffered a punctured lung when his heart was restarted.

The Washington Post, on October 25, 1988, disclosed the background of the litigation and regulatory processes surrounding Zomax. This article by Weiser and Walsh detailed how the company that manufactures Zomax, McNeil Pharmaceutical, deliberately downplayed the severity of adverse reactions from the drug, in its reports to the Food and Drug Administration, in its aggressive marketing campaign, and in its letters to doctors.

Some of the victims of anaphylactic reactions to Zomax -- and some families of those who died -- sued McNeil. Two were physicians who spoke to me about their devastating reactions and told me that, as a condition of settling their cases, they were required never to disclose the details of their lawsuits or talk about what had happened again. They also agreed not to publish any reports of their reactions in medical journals, which are a key source of information for doctors to learn about such reactions. One of these reactions occurred three years before mine. If these warnings had been published, Zomax might well have been withdrawn from the market before my brush with death.

In order to settle cases, courts repeatedly sealed medical and scientific records, effectively shutting off access to vital technical information and preventing scientists from initiating research projects and from publishing results. In fact, Zomax is an unusual compound for research. It causes cancer in animals at doses about the same as those that could be taken by humans. It also produced severe renal disease, psychiatric disturbances and suicide in people with no previous history of such illness. Most interestingly, Zomax spawned powerful immunological reactions in people with no previous history of allergic response.

McNeil succeeded in having court-ordered secrecy maintained about such matters and suppressing the publication of information in medical journals, stifling the free flow of information so vital to scientific research.

Two former employees of McNeil, one a physician heavily involved in developing the product, recently filed suit against McNeil, claiming they were fired in retaliation for arguing for stronger warnings and earlier withdrawal of Zomax from the market. Throughout its years of litigation, McNeil shielded these officials from testifying or being deposed in lawsuits, alleging that information they had was protected under court-ordered secrecy of prior settlement agreements. After most of the allergic reaction deaths and other cases had been settled, they were terminated.

In their public pleadings, these former employees have disclosed crucial scientific information about the potential of this drug to kill or produce life-threatening reactions. They have attached large portions of the company's records on the Zomax problem to their complaint in court, to make it a part of the public record and protect it from the effect of later secrecy orders.

My interest in Zomax, and in the secrecy problem related to it, goes far beyond the personal level. There is much more work to be done on this fascinating compound. Zomax differs by one molecule from Tolectin-DS, which is now one of the most widely-prescribed pain medications in the U.S. We need to know the extent to which severe allergic reactions are also occurring with this drug.

The use of legally ordered secrecy to shield corporate mistakes is not unique to Zomax, but cuts across all product liability cases. When there is an allegation that a drug is causing injury, the manufacturer is not always forthcoming to researchers with what it knows about the problem. Moreover, attorneys are sometimes prohibited from disclosing company documents (including test records) which they receive during discovery. As a result, judicially sanctioned secrecy can compromise medical research.

A democracy rests on the informed consent of the governed. Science is an inherently democratic institution, fueled by shared, common information. The practice of secrecy in the courts can result in a failure to tell the public about proven hazards -- endangering lives, perverting science, and ultimately undermining democracy itself.

James Miller
44 years old
Printer
Carlsbad, California

Mr. Miller's twin sons were severely injured in a 1988 head-on collision while wearing rear seat lap belts in a Ford Escort. One died, the other is paraplegic.

The Millers were asked to keep the amount of their settlement with Ford confidential. They agreed to do so if Ford would alert its customers to the need for using rear seat shoulder harnesses, and provide the harnesses through dealers at a reasonable cost. Ford refused, so the $6 million settlement was not kept secret.

STATEMENT OF JAMES MILLER
Carlsbad, California

Our new 1986 Ford Escort was equipped with front-seat lap-belt/shoulder harness combination restraints, and rear seat lap belts when we purchased it. On November 13, 1988, we were struck head-on by a driver who had crossed the center-line of a road in our home town of Carlsbad, California. The front end of our car was virtually demolished. My wife and I suffered broken bones and bruises, but were saved from more serious injuries by our shoulder harnesses, even though we were in the front of the car, where most of the damage occurred. However, our 11-year-old twin sons, James and Richard, secured only by rear lap belts, both sustained broken spines, and James had a cervical injury. James died, and Richard was left a paraplegic.

We sued Ford for not providing shoulder harnesses for the rear seats. Ford offered to settle our case if we would agree to keep the amount of compensation a secret.

We told Ford that we would agree to such a request only if Ford would send a letter to every existing pre-1990 Ford Escort and Mercury Lynx owner, advising them of what Ford had known for 20 years: that properly installed 3-point shoulder harnesses clearly protect passengers better than lap belts alone. Our attorney obtained an internal Ford document which said that. We also asked Ford to make kits available to dealers to install shoulder belts, for a reasonable cost, in the anchor points which are already required by law in all post-1972 automobiles. We asked for that because we found that Ford dealers did not have the parts needed to install shoulder belts for rear seats. They cost an extra $12 per belt when installed at the factory. (European Escorts are required by law to have shoulder harnesses installed before sale.)

Ford refused to agree to those conditions. We felt then, and still do, that for us to agree to keep quiet would place us in complicity with Ford's own 20-year silence on this subject. Only by opening this subject to public discussion would we be making a contribution to safety, so that other families will not lose their children, or see them severely injured and permanently disabled, as we have.

Therefore, we refused to accept any secrecy and the case settled without it.

We are speaking out about this now because the public has to know two things:

1. The public should know that rear seat lap belts do not provide necessary protection in certain circumstances. Our family's present condition shows how devastating the injuries can be.

2. The public should know that, although Ford never admitted that its seat belt design was defective, it eventually treated our case as if a defect had been proved in court. Ford paid an amount of money that will support our handicapped son for the rest of his life.

The public would not know these things unless we spoke out.

Ed Keller
43 years old
Disabled former electrician
Hughesville, Maryland

Mr. Keller was left paraplegic after an incident in September, 1981, in which his Jeep CJ-5 vehicle rolled over when he swerved to avoid hitting a car in front of him.

Mr. Keller's case was settled by the vehicle manufacturer, with the amount not to be disclosed. Mr. Keller believes that this confidentiality camouflages just how serious injuries resulting from the Jeep CJ-5 rollover problem were, even from American Motors' perspective.

STATEMENT OF ED KELLER
Hughesville, Maryland

On September 11, 1981, I was driving my CJ-5 Jeep in a line of traffic, travelling at about 30 mph. A car directly ahead of me stopped short, and I swerved to avoid it. The maneuver I made is routine in traffic situations, and everybody does it from time to time. I also assumed that a Jeep could handle an easy maneuver like that. It wasn't until 1985 that I learned that American Motors had known, since at least July 1979, that its CJ-type vehicles would roll over more easily than regular cars.

My car did roll over, and I was thrown out of it. There was only about $1200 in damage to my car, but I suffered a spinal cord injury, and now need braces and crutches to walk. Only through long, painful rehabilitation was I able to avoid permanent confinement to a wheelchair. Before I was injured I worked as an electrician. Now I am completely unable to earn a living doing the only kind of work I am trained to do.

I sued American Motors in 1982. After about two years of investigation and discovery, American Motors offered to settle my case two weeks before trial, if I would agree to keep the amount of compensation secret.

Since 1988, I have been a volunteer at the National Rehabilitation Hospital. I volunteer one day a week in the occupational therapy department. I help the therapists with spinal cord injury victims like myself, encouraging patients not to give up hope and to try to get out of their wheelchairs.

To me, my case means I beat the giant that hurt me. Being involved in the case was extremely hard on my family and me. I really want to show, in public, what American Motors did wrong. For me not to talk about compensation means no one will know just how serious my case was, even from American Motors' perspective. I have a family to support, and that's why I agreed. There was also a lot of pressure from American Motors to agree to secrecy. I've done my best to put the incident behind me and move ahead with my life, but the secrecy part of it still grates on me.

As Amended

90 --

DGT6143

90 H-8522

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1990

Passed by House 69-
(7-5-90)

Passed by Senate 41-0
(6-28-90)

Vetoed by Governor Edward D. DiPrete
(7-31-90 - after sessions ended)

Legislature reconvene Jan. 2, 1991

AN ACT

RELATING TO CAUSES OF ACTIONS

90-H 8522

Introduced by: Reps. Teitz, Boyle, Bramley, Gaschen and Friedemann
Date Introduced: February 7, 1990

Referred To: Committee on Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. CHAPTER 9-1 OF THE GENERAL LAWS ENTITLED "CAUSES OF ACTION" IS HEREBY AMENDED BY ADDING THERETO THE FOLLOWING SECTION:

9-1-50. Availability of information in product liability actions. -- (a) No court may enter an order in a product liability action involving a product distributed in commerce that forbids any person from making any document or other information which is obtained in discovery and which is reasonably related to design specifications, performance standards, warranties, warnings and instructions or any other matter related to the safety of any product distributed in commerce available to:

(1) a federal, state or local regulatory agency, law enforcement agency or legislative or judicial body if the agency or body has regulatory, law enforcement, legislative or adjudicative responsibility with respect to the product and if the agency or body states in writing to such person before such document or information is made available that is has procedures in place to prevent the unauthorized disclosure to the public of trade secret information; or

(2) any person who the person reasonably believes:

(A) is an attorney duly licensed to practice law in a state or the District of Columbia; and

(B) is representing a person with a product liability claim which involves a product of the same type, brand or model involved in the product liability action of the person furnishing the document or information, for use in connection with a product liability claim.

If a document or information is made available under paragraph (1) to an agency or body, opposing counsel shall be notified of the fact not later than five (5) days after it is made available.

(b) In a product liability action involving a product distributed in commerce, no person may request as a condition to cooperating with discovery or to the settlement of the action that the claimant or the claimant's attorney agree:

(1) to return or destroy documents related in any way to the action if the claimant or the claimant's attorney has agreed in writing to be bound by an order entered with respect to the document and be bound by the jurisdiction of the court entering the order;

(2) in the case of an attorney, not to represent any other claimant in any action similar to the product liability action or any claimant in any other product liability action against any of the defendants in the product liability action; and

(3) to any terms that would violate the restrictions on court orders in subsection (a) of this subsection.

(c) No court may enter an order requiring any claimant or claimant's attorney to return or destroy any document related in any way to a product liability action involving a product distributed in commerce if such person has agreed in writing to continue to be bound by a valid confidentiality order.

SECTION ~~X~~3 This act shall take effect upon passage.

SECTION 2. No documents or other information provided pursuant to this section shall be sold, directly or indirectly, for profit.

DGT6143

90 H-8522

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

AN ACT

RELATING TO CAUSES OF ACTIONS

***

This act would prohibit gag orders by courts on information relating to defective products discovered in civil litigation to government agencies or attorneys handling product liability cases involving a product of the same type.

The act would take effect upon passage.

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DGT6143

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Missouri

SECOND REGULAR SESSION

HOUSE BILL NO. 1139

85TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE GRAHAM.

Pre-filed December 27, 1989 and 1000 copies ordered printed.

DOUGLAS W. BURNETT, Chief Clerk

2524-1

AN ACT

Relating to the disclosure of discoverable materials.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section 1. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such information or materials with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

Section 2. An agreement between the parties of a lawsuit to keep the terms of any settlement confidential shall not be binding on the parties unless the court so orders. An order to keep the terms of a settlement confidential shall be issued only upon motion of either party and a finding by the court, based on clear and convincing evidence, that confidentiality is needed to protect one or more of the parties to the suit and the

public interest will not be harmed. An order issued pursuant to this section shall not bar an attorney or party to the cause from voluntarily sharing with another any materials and information gathered during discovery or otherwise during the preparation or investigation of the case provided such information or material does not disclose the terms of the settlement agreed to by the parties.

VIRGINIA

1989 RECONVENED SESSION

REENROLLED

VIRGINIA ACTS OF ASSEMBLY - CHAPTER

An Act to amend the Code of Virginia by adding a section numbered 8.01-420.01, relating to protective orders; disclosure of discoverable materials and information.

[H 1581]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-420.01 as follows:

§ 8.01-420.01. Limiting further disclosure of discoverable materials and information; protective order.—A. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

B. The provisions of this section shall apply only to protective orders issued on or after its effective date.

_____

President of the Senate

_____

Speaker of the House of Delegates

Approved:

_____

Governor

FLORIDA 1990

ENROLLED
SB 278

Second Engrossed

A bill to be entitled

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 69.081, Florida Statutes, is created to read:

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.--

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions

themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information

or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

CODING: Words stricken are deletions; words underlined are addition

SENATE BILL NO. 278

THIS ACT originated in the Senate; it was passed by the Senate on May 30, 1990, and has been examined and found to be correctly enrolled.

PRESIDENT OF THE SENATE

SECRETARY OF THE SENATE AND
ENROLLING CLERK

PASSED the House of Representatives on May 28, 1990

SPEAKER OF THE HOUSE OF REPRESENTATIVES

CLERK, HOUSE OF REPRESENTATIVES AND
EX-OFFICIO ENROLLING CLERK

APPROVED this 1st day of June, 1990

GOVERNOR

FILED in Office of the Secretary of State on

JIM SMITH
SECRETARY OF STATE

By

FLORIDA 1990

ENROLLED
SB 278

Second Engrossed

A bill to be entitled

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

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or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions

Final: Enacted

TEXAS RULES OF CIVIL PROCEDURE

Adopted by the Supreme Court of Texas, April, 1990;

Effective September 1, 1990

Rule 76a. Sealing Court Records

1. **Standard for Sealing Court Records.** Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is

otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Notice.** Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the

movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any party who have answered in the case pursuant to Rules 21 and 21a, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. A temporary sealing order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof

of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment)

relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

*****

APPLICABLE PORTIONS OF RELATED RULES

Rule 166b **Forms and Scope of Discovery; Protective Orders; Supplementation of Responses**

5. **Protective Orders.** On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

Rule 120a. Special Appearance

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

*****

For further information contact: Justice Lloyd Doggett
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711
512/463-1344
Adm. Asst: Virginia Smith

ANCHORAGE SCHOOL DISTRICT, Appellant,

v.

ANCHORAGE DAILY NEWS, Appellee.

No. S-3148.

Supreme Court of Alaska.

Sept. 1, 1989.

Newspaper brought action against school district seeking declaratory and injunctive relief granting access to settlement documents to which school district was a party. The Superior Court, Third Judicial District, J. Justin Ripley, J., ordered district to disclose terms of settlement agreement. School district appealed. The Supreme Court, Burke, J., held that settlement provision prohibiting disclosure of terms of settlement was unenforceable as violating public records disclosure statutes.

Affirmed and remanded with instructions.

1. Records ⇐54

Public records disclosure statutes apply to records maintained by municipalities. AS 09.25.110, 09.25.120.

2. Records ⇐64

Question of whether municipality must disclose particular document under public records disclosure statutes is resolved by balancing fundamental public interest in disclosure against municipal interest in confidentiality, and trial court may also consider interest of third party in preventing disclosure. AS 09.25.110, 09.25.120.

3. Records ⇐65

In recognition of fundamental nature of public right to know, municipality seeking to prevent disclosure of records has burden of proving that records should not be disclosed.

4. Records ⇐53

Exceptions to statutory public record disclosure requirements are narrowly construed and doubtful cases are resolved by permitting public inspection. AS 09.25.110, 09.25.120.

5. Records ⇐53

Public agency may not circumvent statutory public record disclosure requirements by agreeing to keep terms of settlement agreement confidential. AS 09.25.110, 09.25.120.

6. Records ⇐53

Settlement provision prohibiting disclosure of terms of settlement involving school district was unenforceable as violating public records disclosure statutes. AS 09.25.110.

7. Courts ⇐493(2)

Superior court had jurisdiction over newspaper's action against school district for injunctive and declaratory relief granting access to settlement documents, even though federal court had entered a protective order; newspaper was not a party to federal litigation, and federal court had not addressed confidentiality issue when superior court entered its judgment.

Kermit E. Barker, Jr., Lane, Powell & Barker, Anchorage, for appellant.

D. John McKay, Middleton, Timme & McKay, Anchorage, for appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON, and MOORE, JJ.

OPINION

BURKE, Justice.

This appeal presents two questions. The first is whether Alaska's public records disclosure statutes, AS 09.25.110–09.25.120, require a municipal school district to produce for public inspection documents settling a school district lawsuit, despite the district's agreement to keep the settlement terms confidential. The second question is whether the plaintiff below may obtain the relief it seeks while there remains outstanding a United States District Court order prohibiting disclosure of the settlement

terms, obtained after entry of the superior court judgment which is the subject of this appeal.

I. FACTS AND PROCEEDINGS BELOW

In 1985, the Anchorage School District sued W.R. Grace & Co. for damages equal to the cost of removing and replacing fireproofing installed in an Anchorage high school. Although the action was filed in superior court, Grace removed the case to the United States District Court for the District of Alaska, based on diversity of citizenship.

In December 1988, a reporter for the Anchorage Daily News learned that the parties had agreed to settle. School district officials, however, refused to provide the reporter with copies of the settlement documents, because the settlement agreement contained a confidentiality provision. The Daily News sued the school district in superior court, seeking declaratory and injunctive relief granting access to the settlement documents.[1] On December 13, 1988, the superior court ordered the district to disclose the terms of the settlement agreement. Following entry of final judgment, the school district filed this appeal. The superior court stayed enforcement of its production order pending the announcement of our decision.

While the appeal was pending, Grace filed a motion in the United States District Court for an order sealing the settlement documents. Grace did not disclose to the federal court the existence of the state court judgment, or the fact that there was an appeal pending in this court. On January 20, 1989, United States District Court Judge H. Russel Holland ordered that the terms of the settlement not be disclosed.[2]

This court and the Daily News first learned of the federal protective order when the school district appended a copy of the order to its reply brief. We permitted the Daily News and the school district, thereafter, to submit supplemental briefs on the effect of the federal court's order.

On February 16, 1989, following oral argument, we issued an order affirming the decision of the superior court. We instructed the court, however, not to enforce its judgment unless and until the United States District Court vacates or modifies its protective order.

II. THE PUBLIC RECORDS DISCLOSURE STATUTES

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

[1–4] Alaska's public records disclosure statutes[3] apply to records maintained by municipalities. *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1318–23 (Alaska 1982). In general, they provide broad public access to municipal

1. Grace accepted the school district's tender of defense of the public records act claim.

2. The school district did not oppose Grace's motion.

3. AS 09.25.110 provides:

> Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.

AS 09.25.120 provides in part:

> Every person has a right to inspect a public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law. Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the legal fees therefor a certified copy of the writing or record, and the copy shall in all cases be evidence of the original.

books, records, papers, files, accounts, writings, and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality.[4] *City of Kenai*, 642 P.2d at 1323. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the record should not be disclosed. *Id.* Exceptions to the statutory disclosure requirements are narrowly construed. *Doe*, 721 P.2d at 622. Doubtful cases are resolved by permitting public inspection. *City of Kenai*, 642 P.2d at 1323.

[5, 6] We recognize the important public policy served by those measures which encourage settlement. *See, e.g., Alaska Airlines v. Sweat*, 568 P.2d 916, 930 (Alaska 1977); *Interior Credit Bureau v. Bussing*, 559 P.2d 104, 106 (Alaska 1977). We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. *The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential.* Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.[5]

III. THE FEDERAL PROTECTIVE ORDER

The school district argues that the federal court's protective order deprives us of jurisdiction over the Daily News' public records act claim. The Daily News contends that we may affirm the decision of the superior court in its entirety, notwithstanding the conflicting federal order. Neither argument is entirely correct.

Federal and state courts often have concurrent jurisdiction and, as a general rule, try not to interfere with each other's proceedings. *Donovan v. Dallas*, 377 U.S. 408, 413, 84 S.Ct. 1579, 1582, 12 L.Ed.2d 409 (1964). Instead,

> [e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.

Kline v. Burke Constr. Co., 260 U.S. 226, 230, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922);

4. The court may also consider the interest of a third party in preventing disclosure. *Compare City of Kenai*, 642 P.2d at 1323–24 (privacy and reputation interests of persons whose employment applications were subject to the disclosure order entitled them to withdraw applications) *with Doe v. Alaska Superior Court*, 721 P.2d 617, 624 (Alaska 1986) (limiting executive privilege doctrine to exclude unsolicited public comments).

5. The school district also argues that the public meetings act, AS 44.62.310–44.62.312, authorizes confidential settlement agreements because it permits a public body to discuss in executive session matters "which would clearly have an adverse effect upon the finances of the government unit," AS 44.62.310(c)(1). The purpose of the open meetings act is to assure that government units transact business openly. The people have not delegated to their representatives the power to decide what the public may or may not know. AS 44.62.312(a)(2), (4). Assuming that the district may discuss a proposed settlement in closed session, the act specifically prohibits taking any action during executive session. AS 44.62.310(b); *see also City of Kenai*, 642 P.2d at 1326 n. 29. The open meetings requirement is intended to further the same purpose as the public records disclosure statutes, not to decimate it.

see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296, 90 S.Ct. 1739, 1798, 26 L.Ed.2d 234 (1970) ("lower federal courts possess no power whatever to sit in direct review of state court decisions").

In certain instances, however, a state court must refrain from exercising its jurisdiction. In *Anchorage Daily News v. Anchorage Times Publishing Co.*, 631 P.2d 500 (Alaska 1981), we held that the superior court erred when it enjoined an arbitration proceeding scheduled by the United States District Court. Although the superior court had jurisdiction, under state law, to determine whether the parties had an arbitration agreement, it erred when it granted injunctive relief which interfered with the defendant's effort to obtain arbitration in a federal forum. *Id.* at 503–05. We viewed as "dispositive of t'.e jurisdictional issue" the following statement by the United States Supreme Court:

> [A state court] is without power under the United States Constitution to interfere with efforts by [a litigant] to obtain arbitration in federal forums on the ground that [the litigant] is not entitled to arbitration or for any other reason whatsoever. [Such litigant] has an absolute right to present its claims to federal forums.

Id. at 504 (quoting *General Atomic Co. v. Felter*, 436 U.S. 493, 497, 98 S.Ct. 1939, 1941, 56 L.Ed.2d 480 (1978)).

[7] In the case at bar, the Daily News sought a declaratory judgment that the settlement documents which ended the litigation in federal court were open to public inspection under state law.[6] The Daily News was not a party to the federal litigation and the federal court had not addressed the confidentiality issue when the superior court entered its judgment. Thus, we hold that the superior court had personal and subject matter jurisdiction. The court did not abuse its discretion in exercising its jurisdiction to determine that the Daily News had the right under state law to inspect the settlement documents. The court's declaratory judgment was, therefore, valid.[7]

Had Grace or the school district informed Judge Holland of the state court's judgment, he could have decided whether the substantive law of Alaska precluded him from ordering the settlement documents sealed.[8] Grace and the school district, however, induced Judge Holland to enter his order while still ignorant of the judgment.[9] We believe, nevertheless, that the principles discussed in *Anchorage Daily News v. Anchorage Times Publishing Co.*, dictate that the superior court not attempt to enforce that part of its judgment requiring production of the settlement documents, unless and until the federal protective order is vacated or modified.

The Daily News has moved to intervene in the federal case, asking Judge Holland to reconsider his decision. Accordingly, the federal court is now aware of the proceeding in state court. No doubt, it will be made aware of our decision as well. We are confident that Judge Holland will evaluate the Daily News' motions in light of all

6. AS 22.10.020(g) provides:

> In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

7. A Civil Rule 54(b) judgment is final for purposes of res judicata. *Vertecs Corp. v. Reichhold Chemicals*, 671 P.2d 1273, 1275–76 (Alaska 1983); Alaska R.Civ.P. 54(b).

8. Federal jurisdiction in the litigation between Grace and the school district was based on diversity of citizenship. Therefore, Alaska law governed the substantive legal issues even though the case was removed to federal court. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80, 58 S.Ct. 817, 822–823, 82 L.Ed. 1188 (1938).

9. *See* DR 7-106(B)(1) (lawyer shall disclose "[l]egal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel").

applicable principles of law.[10]

The superior court's judgment is AFFIRMED, and the case is REMANDED with instructions to the superior court not to enforce its judgment requiring production, unless and until the federal protective order is vacated or modified.

Nancy R. CARTER, Appellant,

v.

David A. NOVOTNY, Appellee.

Nos. S–2645, S–3049.

Supreme Court of Alaska.

Sept. 8, 1989.

Rehearing Granted Oct. 9, 1989.

Minor child's maternal aunt appealed from two orders of the Superior Court, Third Judicial District, Anchorage, David C. Stewart, J. pro tem., which first awarded shared legal custody of child to both aunt and child's father, with physical custody in father, and second, ordered physical custody transferred from father to aunt with joint legal custody retained. The Supreme Court, Compton, J., held that: (1) Superior Court had jurisdiction to make such award, and (2) award was not abuse of discretion.

Second order affirmed.

1. Divorce ⇐312.6(1)

Father failed to file cross appeal from order modifying custody and, thus, father's insufficiency of evidence claim was not properly before Supreme Court.

2. Parent and Child ⇐2(12)

Parent is entitled to custodial preference over nonparent unless there is clear evidence that parent is either unfit or welfare of child requires that child be placed in custody of nonparent.

3. Parent and Child ⇐2(18)

Burden of proving that parent's custody of child would be clearly detrimental to child is on nonparent seeking to modify custody.

4. Parent and Child ⇐2(17)

Superior court had jurisdiction to award shared custody of minor to both parent and nonparent. AS 25.20.060.

5. Parent and Child ⇐2(17)

Superior court did not abuse its discretion in awarding parent and nonparent shared custody of minor child with physical custody in nonparent, even though court had determined that it would be detrimental to child to continue physical placement with father, insofar as such award was in best interest of child. AS 25.20.060, 25.24.150.

Charles Hagans, Hagans, Brown, Gibbs and Moran, Anchorage, for appellant.

William T. Ford, Anchorage, for appellee.

Ame Ivanov, Anchorage, Guardian Ad Litem.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

The principal issue presented in this appeal is whether the superior court erred in awarding shared custody of Heidi Novotny to David A. Novotny, her father, and Nancy R. Carter, her maternal aunt, after having determined that it would be detrimental

10. After we issued the order affirming the decision below, Judge Holland permitted the Daily News to intervene in the federal case and vacated the June 20 protective order. Grace appealed to the United States Court of Appeal, Ninth Circuit, but dismissed the appeal when the circuit court refused to grant a stay pending appeal. The settlement documents were released for public inspection.

Johnson & Johnson

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-

April 10, 1992

Federal Express - Saturday Delivery

Honorable Dave Donley
Chairman, House Judiciary Committee
Alaska House of Representatives
State Capitol, Room 120
Juneau, AK 99801-1182

Dear Mr. Donley:

RE: HB 171 - PROTECTIVE ORDER LEGISLATION - OPPOSE

Johnson & Johnson is opposed to House Bill 171 which would sharply curtail the discretion of judges to issue protective orders in certain civil cases. We urge its defeat in your committee.

Under current Alaska judicial policy and the Alaska Rules of Civil Procedure, a judge is authorized to weigh the public's right-to-know against a civil defendant's right-to-privacy and protection from the release of proprietary or embarrassing information. A judge, when the circumstances merit, may issue a protective order barring the release of settlement, judgment, or pre-trial discovery information. This sound judicial policy provides civil litigants assurance that they may litigate and settle a case but still protect personal, privileged or proprietary information by obtaining a protective order.

Johnson & Johnson, as the world's largest health care company, is also opposed to HB 171 for the following reasons:

1. House Bill 171 will have an adverse impact upon high technology business. HB 171 would alter this judicial policy by disallowing protective orders in lawsuits based on the mere allegation that such an order may conceal information concealing a "public hazard" or that the materials sought to be protected have "previously been disclosed to the public" in any jurisdiction. These restrictions could place any party to litigation at the risk of the disclosure of trade secret or other proprietary information to business competitors. Pre-trial discovery routinely produces proprietary information of great value to competitors, which is presently covered by protective orders by agreement of the parties. Such protection is increasingly important to maintain domestic and international competitiveness.

2. The bill also ignores many state and federal laws that exist primarily to inform the public of "public hazards," be they product, environmental, or financial. Several federal agencies, including the U.S. Food and Drug Administration, the Consumer Product Safety Commission, and OSHA, also regulate product and workplace safety. HB 171 is therefore totally unnecessary to protect the public from so-called "public hazards" that, in the case of pre-trial discovery, have not yet been judicially determined. The effect is to penalize litigants and non-party participants by eroding their right of privacy without any findings of liability or blame.

3. Restricting the use of protective orders by mutual agreement would discourage settlements, protract litigation and increase costs to litigants and the Alaska court system. The denial of protective orders will force more cases to trial by encouraging defendants to litigate rather than settle, thereby dramatically eroding judicial resources. Such a development would harm the business climate.

Thank you for allowing me to convey our thoughts on this bill. If you have any further questions, they may be directed to Johnson & Johnson's ICOM Government Affairs Manager, Mr. David Shestak, (916) 631-8114 or me at (908) 524-3070.

Sincerely,

Donald P. Sharkey
Director, State Relations

/jem

cc: Honorable Max Gruenberg
Vice Chairman, House Judiciary Committee

Mr. D. Shestak
Johnson & Johnson ICOM Development Group

Ms. D. Kapsa
Pharmaceutical Manufacturers Association
Sacramento, CA

Statement

Pharmaceutical Manufacturers Association

STATEMENT OF THE
PHARMACEUTICAL MANUFACTURERS ASSOCIATION

The Pharmaceutical Manufacturers Association (PMA) represents more than 100 companies that are responsible for the new prescription medicines discovered and developed in this country. We appreciate the opportunity to express our opposition to Alaska House Bill 171, which would restrict or eliminate the use of protective orders -- court orders ensuring the confidentiality of sensitive, private information, such as trade secrets or medical records. We believe confidentiality is essential to businesses and corporations engaged in litigation to ensure that valuable, confidential business information is not revealed to competitors or others who could harm the business or gain an unfair advantage if armed with the information.

Under traditional rules, courts have discretion to enter a protective order, ensuring confidentiality, when the litigant requesting the protective order has demonstrated a need for it. Alaska House Bill 171 simply would restrict or eliminate this discretion.

The advocates behind proposals of this type argue that courts are granting protective orders with increasing frequency to conceal information about dangerous consumer products or harmful corporate practices such as environmental pollution. According to these advocates, the public has a right to know this information. In reality, if someone has information about a harmful product or environmental hazard, that information should be reported to the appropriate governmental agency for action. Courts are meant to resolve legal disputes, not to act as public information clearinghouses. The real purpose behind these proposals is to allow plaintiffs' lawyers to share or sell information from litigation for use in other litigation, thus perpetuating the litigation explosion and generating additional contingency fees.

Any attempt to restrict or eliminate protective orders, and the confidentiality they ensure, will have numerous negative consequences:

1100 Fifteenth Street, N.W. Washington, D.C. 20005 (202) 835-3400

Increased Litigation Costs: If confidentiality cannot be protected, litigants will fight every document request that an opposing party makes for information that may be sensitive or confidential. This will cause increased hearings before the court, increased legal costs to both parties, as well as increased public costs for the additional court time.

Increased Court Congestion: Confidentiality promotes cooperation in discovery and private settlement of legal disputes outside of the courtroom. Without confidentiality, these components of litigation will end up back before the judge, requiring increased attention that could have been used to resolve other cases. Consequently, there will be increased court congestion. This is an unjustifiable result in light of the long delays litigants already face and the excessive burdens that confront courts due to over-crowded court dockets.

Loss of Fundamental Litigant Rights: The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the Constitution. Both of these rights are lost when private information becomes public, or a trade secret is revealed to a competitor. Without the authority to issue protective orders to guarantee confidentiality, courts cannot protect these fundamental rights of the litigants.

Unfair Treatment of Corporate Defendants: Generally, only corporate defendants possess trade secrets or other confidential business information that can be put at risk of unwarranted disclosure during litigation. Thus, if the use of confidentiality is restricted in litigation, corporate defendants frequently will have much more at stake and much more to lose than private individuals. Further, defendants have no choice about whether to participate in lawsuits. Unlike plaintiffs, defendants cannot consider whether to risk exposing highly confidential information before entering into the litigation. Consequently, corporate defendants would be unfairly disadvantaged by a change in court rules such as those proposed.

Perpetuation of the Litigation Explosion: Various segments of the plaintiffs' bar often package and sell information obtained from one lawsuit for use in other lawsuits. These aggressive sales and distribution of discovery and settlement materials stir up copy-cat lawsuits and generate adverse publicity against a "target" defendant. Without protective orders, the packaging and sale of litigation will grow phenomenally, perpetuating spurious lawsuits and creating additional burdens on already overcrowded courts. This will mean more money for lawyers and more lawsuits and legal expenses for everyone else.

In summary, PMA believes that protective orders, and the confidentiality they ensure, are a crucial device in several components of the litigation process. The rules governing discovery and settlement operate as a system of checks and balances designed to ensure that both plaintiffs and defendants are treated fairly. When the rules give parties free access to their opponents' most sensitive and confidential information, courts must have the authority to balance this intrusion with a guarantee of confidentiality. Although both plaintiffs and defendants have important rights at stake, defendants often have far more to lose when confidentiality cannot be guaranteed. Thus, restricting or eliminating the discretion of courts to protect confidential information will undermine the delicate system of checks and balances to the detriment of litigants, the courts, and the public. Therefore, we respectfully urge that you vote against House Bill 171.

HB 171: SECRECY OF PUBLIC HAZARDS

by Paul Cossman

House Bill 171 would prevent litigants and courts from keeping information secret concerning hazards to the public. Frequently, a defendant will only release information about public hazards to a plaintiff in a lawsuit if there is an agreement to keep the information secret. This bill would prevent that from occurring.

There are many examples of past cases where defendants have kept public dangers secret. Some examples include cases where people have been burned and killed when Bic lighters failed to extinguish properly or exploded, and cases where people have been burned and killed in GM vehicles with exploding gas tanks that could have been altered at a nominal cost. There have been cases which involve scout masters who sexually abuse their scouts. As lawsuits are brought and settled, these defendants insist on secrecy as a part of the settlement. This allows the scout masters to keep their positions and abuse other children. These hazards should not be hidden from the public.

Often a defendant will settle with a plaintiff and require that the dangers uncovered by the plaintiff be kept secret. When that is a condition of settlement, an impoverished and injured plaintiff is not in a position to require disclosure. House Bill 171 would prevent the defendant from requiring that the plaintiff keep the public danger secret.

The procedures of House Bill 171 are simple. If a defendant files a motion to keep secret materials produced in litigation discovery, the court must deny the motion if the materials have previously been disclosed or if the materials concern a public hazard. A court may not enter any order which has the effect of concealing information about a public hazard.

HB 171 would permit people who are not parties to the litigation to oppose a defendant's request to keep discovery materials secret if they contain information about public hazards. If a court enters an order which conceals public hazards, in violation of HB 171, then a person who was not a party to the litigation can file a motion to vacate the judgment and allow disclosure of the information concerning the public hazard.

In a situation where there is a private agreement between a plaintiff and a defendant to keep a public hazard secret, HB 171 would void that portion of the agreement and allow disclosure of the public hazard. Again, HB 171 would allow people who are not parties to the agreement to bring an action for a court order allowing disclosure of the public hazard.

The definition of public hazard in HB 171 includes any instrumentality that has caused injury to a person or property, including devices, instruments, persons, procedures, products and conditions of devices, instruments, persons, procedures, or products.

Legislation and court rules similar to HB 171 have already been enacted in Florida, North Carolina, Virginia, New York, Texas and part of California. Similar legislation and court rules are now pending in 14 other states besides Alaska. There is no valid public policy reason to allow public dangers to remain secret. To the contrary, this is an opportunity to promote public safety without adding any new burdens to any already-existing governmental agencies. It is an opportunity to prevent future injuries at no cost to the Alaskan public.

TRUST REPORT *continued from page 1*

In a recent Bar Rag (November-December 1991) letter to the editor, attorney Kenneth Gutsch expressed the opinion that passage of HB 171 would both increase costs of litigation and deter settlement.

We disagree. The public has the right to know of proven public hazards so that future injuries and deaths can be avoided. The prospect of public disclosure of these hazards will induce an elimination of these hazards, and an early settlement of suits brought against them. Litigation should be reduced, and early settlements increased.

As I indicated in my last report, the Alaska Action Trust strongly supports passage of HB 171. What follows is the Trust's position paper on HB 171, written by Paul Cossman, as well as a summary of state developments on the secrecy issue. Academy members are encouraged to contact Representative Kubina directly to let him know of their support of HB 171, and to ask him to pass the bill out of his committee. He can reached at 835-2111 during the interim and at 465-4853 during legislative session. If you wish to comment to us on this issue, please call or write Paul Cossman, Debra Gravo at the Trust office, or me.

SUMMARY OF DEVELOPMENTS ON SECRECY ISSUE

Enacted Legislation:

Florida: The Sunshine in Litigation Act, which took effect on July 1, 1990, was the first state legislation which identified a class of dangers to public health and safety and sought to limit the extent to which they could be concealed. The law forbids courts from entering orders which conceal a "public hazard" or information about a public hazard. A public hazard can be a "device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product that caused and is likely to cause injury." The statute also makes any agreement or contract to conceal a public hazard unenforceable, and allows the public and the news media standing to contest court orders or contracts which would conceal public hazards. Courts are required to allow disclosure of information that is sought to be concealed if the information might be useful to members of the public to protect themselves from injury by a public hazard.

North Carolina: Legislation of confidential settlements of suits against the state government took effect on July 1, 1989. The statute prohibits government agencies, officials, or employees from entering into confidential settlements to resolve suits in connection with their official duties or responsibilities.

Virginia: House Bill 1582, the first legislation of its kind, was introduced in 1989 by ATLA Member Bernard Cohen, a member of the General Assembly. It passed and was signed by the Governor, and took effect on July 1, 1989. It allows attorneys to share information produced in discovery if they have permission of the court (given after a hearing), and if the attorneys who would receive the information agree to be bound by the terms of any protective order.

Adopted Court Rules:

California (San Diego County): By local rule, the San Diego County Superior Court adopted a policy on confidentiality agreements and protective orders, effective July 1, 1990. The rule states that such practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

New York: On February 4, 1991, New York State's Administrative Board of the Courts adopted a new rule (22 NYCRR Part 216) on sealing of court records in civil actions in the trial courts. The rule took effect on March 1. The rule prohibits sealing of records without a specific finding of good cause. The rule directs the court to consider the interests of the public as well as the interests of the parties in determining whether good cause has been shown. "Court records" are defined as all documents and records of any kind that are filed with the clerk. Discovery material that is not filed with the clerk is unaffected.

Texas: In 1990, Texas became the first state to address secrecy concerns through court rules which took effect on September 1, 1990. The Texas Supreme Court chose to focus on the issue of sealed court records, and adopted amendments to the Texas Rules of Civil Procedure to establish standards and procedures for sealing. The court recognized a "presumption of openness" of all court records, which could be overcome only after a showing that a specific, serious and substantial interest in sealing records outweighs any adverse effect on public health and safety, and that no less restrictive means than sealing would protect the interest. "Court records" includes all documents filed in a civil action, as well as unfiled discovery material and settlement agreements that are not filed but might have an adverse effect on public health and safety. The court detailed specific procedures (notice, public hearings, etc.) by which records could be sealed under the new rules, and provided that individuals and organizations not a party to the case could participate in hearings.

Pending Legislation:

Alabama: The Alabama Trial Lawyers Association is supporting Senate Bill 328, which is identical to the Florida legislation. The bill is in the Senate Judiciary Committee.

Alaska: House Bill 171 was introduced on February 27, 1991 and is pending in the House State Affairs Committee. The bill utilizes the "public hazard" concept and several procedural points of the Florida legislation.

California: The Center for Public Interest Law, Sacramento, and the California Trial Lawyers Association are sponsoring Senate Bill 711. The bill would prohibit confidentiality agreements, protective orders and settlement agreements which would conceal a public hazard or threat of environmental damage, and would give any person standing to contest an order, agreement or contract which conceals such information. There are numerous additional sponsors. The bill is pending in the Senate Judiciary Committee.

Hawaii: The Hawaii Academy of Plaintiffs' Attorneys is supporting House Bill 2019. The bill utilizes the "public hazard" concept of the Florida Sunshine in Litigation Act. It also employs a standard to be met by those seeking protective

orders that is similar to that used by the Texas court rule amendments. The bill passed the House on March 12, but has since been deferred until next year.

Illinois: The Illinois Trial Lawyers Association is supporting two identical bills, House Bill 276 and Senate Bill 245. The bills are based on the Texas court rule amendments.

Louisiana: The Louisiana Trial Lawyers Association is actively supporting a bill (called the Sunshine in the Courtroom Bill) that would amend Article 1426 of the Louisiana Code of Civil Procedure by incorporating the elements of the Florida legislation.

Massachusetts: Two bills have been introduced. Senate Bill 778, similar to the Texas court rule amendments, was heard by the legislature's Joint Judiciary Committee on March 11. House Bill 3775 is similar to the Florida Sunshine in Litigation Act, but is broader in certain respects. It would apply to any dispute that has matured to the extent that one potential plaintiff and one potential defendant have notice of the possibility of litigation. It would establish a presumption in favor of disclosure of information regarding a public hazard, and require any party opposed to disclosure to prove beyond a reasonable doubt that the information would not help the public to protect itself from the hazard. The House bill was heard by the Joint Judiciary Committee on March 27. No further action has been taken on either bill as yet.

New Jersey: Assembly Bills 3794 and 4110 were introduced on October 29, 1990. They are essentially identical to the Florida legislation. Assembly Resolution No. 136, introduced May 24, 1990, urges New Jersey attorneys and judges not to enter into or approve secrecy agreements or orders in civil cases involving toy-related injury and death. Assembly Resolution No. 136 also urges the New Jersey Supreme Court to adopt rules to implement the resolution. All measures are still pending.

Oregon: The Oregon Trial Lawyers Association is supporting two bills that are pending in the Senate Judiciary Committee. Senate Bill 579 is similar to the Virginia legislation. It would amend the Oregon Rules of Civil Procedures to provide that protective orders in any civil litigation will not prevent an attorney from sharing information and materials covered by the protective order with an attorney handling a similar or related case. Disclosure may be made only by court order, and only to attorneys who agree to be bound by the protective order, but the court would be required to allow disclosure unless good cause is shown by the protective order's beneficiary. Senate Bill 580 would provide that confidential settlement agreements are not binding unless a court orders that they are, after findings that confidentiality is necessary to protect a party and that it will not harm the public interest. The bill would also provide that a confidential settlement order does not bar sharing of information between attorneys so long as the terms of the settlement are not disclosed.

Pennsylvania: Two bills are pending in the House. House Bill 751 is very similar to the Rhode Island bill, but is not limited to product liability litigation, and additionally bars requests for non-disclosure of the amount of settlements. House Bill 752 is a simplified version of the Florida legislation, but has additional provisions that (1) allow prevailing parties to recover attorney fees, and (2) make it a misdemeanor to conceal a public hazard intentionally, knowingly or recklessly. Senate Bill 656, similar to the Florida legislation, is pending in the Senate Judiciary Committee.

Rhode Island: House Bill 5987, introduced in February, has been passed by the House Judiciary Committee. It would prohibit courts from entering orders against disseminating product liability litigation documents (or information about product safety and design matters) to regulators or other attorneys. It would also prohibit discovery or settlement agreements which would require return or destruction of documents, as well as agreements not to represent other victims of similar product defects in the future. The bill is nearly identical to a secrecy bill that was passed overwhelmingly in 1990 but was vetoed by then Governor DiPrete after the legislative session had ended. Mr. DiPrete was defeated for reelection.

Wisconsin: The Wisconsin Academy of Trial Lawyers is supporting a bill similar in procedures and effects to the Texas court rule amendments.

Proposed Court Rule Amendments:

Michigan: The Michigan Trial Lawyers Associations has proposed amendments to the Michigan Court Rules which utilize the "public hazard" concept of the Florida Sunshine in Litigation Act but employ it in the court rule context. Amendments to Rules 2.302(c), 2.310 (b) and 2.310 (c) would add provisions prohibiting the entry of discovery orders that would conceal public hazards. Those rules govern protective orders in general and requests for production of documents, directed to both parties and non-parties.

New Jersey: A possible court rule amendment to prohibit some forms of secrecy in settlements is under consideration by a subcommittee of the Civil Practice Committee appointed by the New Jersey Supreme Court to review the rules of civil procedure. The next rule changes in New Jersey are scheduled for September 1992.

continued on page 6

from page 5

South Carolina: The South Carolina Trial Lawyers Association has submitted proposed rule changes to the South Carolina Supreme Court that are identical to Texas Rule 76a and a portion of a Texas rule on protective orders for discovery material.

Bills Not Passed, 1991 Legislative Sessions:

Arkansas: Senate Bill 698 died in committee. The bill utilized the "public hazard" concept of the Florida legislation, but would have applied only to settlement agreements and other agreements and contracts to conceal public hazards. The bill also had a section providing that it would not be construed to require disclosure of "private facts, concerning a natural person, that are not pertinent to public hazards."

Colorado: House Bill 91-1060, based on the Florida model, was defeated 6-5 in the House Judiciary Committee in February.

Connecticut: House Bill 7304, based on the Florida legislation, died in the House Judiciary Committee with no vote taken.

Hawaii: Senate Bill 1838, which was similar to the Texas court rule amendments but went well beyond any existing rules or legislation in several areas, died in committee. It included a finding on undesirable effects of secrecy. It would have presumed openness to the public of all court documents, discovery and settlement agreements, whether or not filed with the court; would have allowed the news media to file standing requests to receive notices of hearings on secrecy questions, and would have required maintenance of a public file of secrecy motions for the entire state; and it would have awarded attorney fees to any person who substantially prevailed in opposing a motion to limit public access.

Iowa: House Study Bill 294, based on the Texas court rule amendments, died in the House Judiciary Committee.

Kansas: Senate Bill 104 was defeated in the Senate Judiciary Committee. The bill substantially duplicated the Florida Sunshine in Litigation Act but also utilized procedural elements of the Texas court rule amendments as to notice and hearing requirements. The Kansas City Business Journal published an editorial in support of the bill.

Mississippi: House Bill 87 was defeated in the House Judiciary Committee. The bill incorporated elements of both the Florida Sunshine in Litigation Act (on "public hazards") and the Texas court rule amendments (establishing a presumption of openness and procedure for requests to seal court records.)

Montana: House Bill 473, essentially identical to the Florida Sunshine in Litigation Act, was passed by the House Judiciary Committee, but was defeated in the House.

Nevada: Senate Bill 373, similar to the Florida legislation, was defeated 9-8 by the Judiciary Committee on April 30. The bill would have given representatives of the news media, and the federal, state or local government standing to contest court orders that would conceal a public hazard. It would also have required hearings on contested orders to be "advanced as a matter of immediate public interest and concern."

New Hampshire: Senate Bill 91, identical to the Rhode Island legislation, was approved by the Senate on March 14, but was defeated in the House on May 3.

New Mexico: House Bill 865, similar to the Florida legislation, was heard by the House Judiciary Committee on March 7, but was tabled.

South Dakota: House Bill 1252, identical to the Florida Sunshine in Litigation Act, was reported out of the House Judiciary Committee, but was defeated in the House, 34-32.

Virginia: House Bill 1205 was introduced in January 1991 but was defeated in committee. The bill was similar to the Florida legislation. It was supported by the Virginia Trial Lawyers Association, but was strongly opposed by the Virginia Chamber of Commerce.

Washington: House Bill 1320, which was similar to the Florida Sunshine in Litigation Act, passed the House on March 18, but was not voted out of the Senate Law and Justice Committee before the legislative session ended.

TORT BRIEFS

MICHIGAN

Michigan has been facing a serious medical malpractice threat this year. The Senate Republicans have introduced a 28 bill health care package which would provide more expert witness restrictions, shorten the statute of limitations, adjust contingency fee sliding scales, cap non-economic damages at $225,000 and provide for an alternative fault-based adjudicatory process to the existing civil justice system.

OREGON

A secrecy bill passed the Oregon House by a 55-4 vote on May 31, the Senate with a 25-1 vote on June 15, and was then signed into law by the governor. The bill prohibits confidential settlements by state governmental agencies and employees without full and complete disclosure to the court of the settlement terms, and requires court authorization of any confidential settlements. The bill became effective October 1, 1991.

OHIO

Court Developments: The Ohio Supreme Court recently overturned the state's 1970's enactment of a $200,000 medical malpractice cap on non-economic damages in the case of Morris v. Savoy, No. 89-1807 (Ohio, Aug. 29, 1991) holding the damage limitation violated the Due Process Clause of the Ohio Constitution.

Morris was injured in an automobile accident, and subsequently treated by a neurosurgeon, Savoy. Following surgery performed by the defendant, Morris was left paralyzed from the neck down. During the federal court trial, Savoy admitted negligence, leaving damages as the only issue to be determined. The jury awarded $2.2 million which included an award of $845,000 for pain and suffering. The defendant moved to limit the award for pain and suffering to the $200,000 cap.

The Ohio Supreme Court determined that the cap violated the due process clause finding that no rational basis existed between the $200,000 damage cap and malpractice insurance rates. The Court further cited a 1987 Insurance Service Organization (ISO) claim study, the statistical arm of the insurance industry, which found that savings from various tort "reforms" were "marginal to nonexistent," including a $250,000 cap on non-economic damages.

This decision represents a significant step in that a court of ultimate jurisdiction has ruled in a way suggesting that there is no nexus between tort "reform" and lower insurance rates.

NEW YORK

In a progressive step, the New York legislature eliminated the requirement that medical negligence cases must first be considered by a medical malpractice screening panel prior to a jury trial during this year's session. The legislation became effective October 1, 1991.

FEDERAL LEVEL

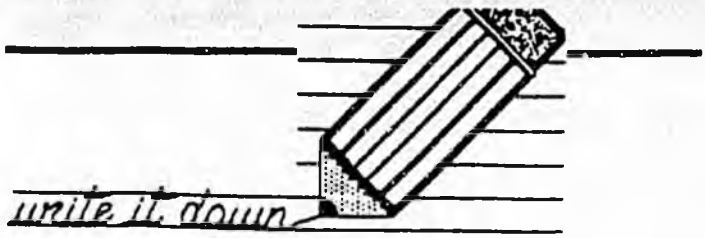
More Bills Introduced in the House. On October 8th and October 17th, 1991, similar bills to provide economic incentives to promote the development of alternative dispute resolution systems for medical malpractice claims were introduced in the House and Senate, respectively. The bills -- H.R. 3516 and S. 1836 -- also contain provisions that would preempt state tort law and enact uniform federal medical liability standards. Neither bill was introduced with any co-sponsorship by Democratic members. In the Senate, S. 1836 is the fourth comprehensive medical malpractice proposal introduced since the start of the First Session; in the House, H.R. 3516 is the third. There has been no significant action on any of these bills and none is presently scheduled.

THE NETWORK CORNER

Are you looking for information for a case? The Network Corner is here for the use of all Academy members, free of charge. It is a regular feature of *The Alaska Trial Lawyer*.

If you are seeking information, submit your inquiry to *The Alaska Trial Lawyer* by mail (P.O. Box 102323, Anchorage, Alaska 99510) or by phone at 258-4040).

- please limit your notice to 50 words or less
- include your name and phone number
- we will list your notice in the next issue



MARK YOUR CALENDAR

CONTINUING LEGAL EDUCATION HIGHLIGHTS

Products Liability/Wrongful Death Seminar
January 11, 1992
Chicago, Illinois
Sponsored by Illinois Trial Lawyers

ATLA Winter Convention
January 12-16, 1992
Boca Raton Resort
Boca Raton, Florida

Medical-Legal Update Seminar
February 12-16, 1991
Vail, Colorado
Sponsored by National College of Advocacy

UPCOMING ALASKAN EVENTS

First day of the second session, 17th Legislature

Roundtable Lunch
January 14, 1992
QuarterDeck, Twelve noon
$15.00 inclusive

Academy Dinner
January 23, 1992
QuarterDeck
6:00 p.m. no host cocktails 6:30 p.m. dinner
$30.00 inclusive
Speaker: Dr. Paul Craig speaking on the topic of brain injuries. Midnight Sun Court Reporting will be demonstrating "real-time" reporting (a process whereby a reporter's steno outline is immediately translated into the English word on a computer screen)

Mastering Jury Trials
A one-day seminar by Russ Herman, ATLA past president
May 29, 1992
Clarion Hotel
Anchorage, Alaska

WE APPLAUD THEIR COMMITMENT

The Alaska Academy of Trial Lawyers and Alaska Action Trust, both non-profit organizations, are financially dependent upon annual membership dues and monthly contributions. The Trust and Academy were facing a $40,000 deficit this fiscal year. Generous contributions from the lawyers listed below have made it possible to maintain both organizations at the levels it has taken years of hard work and money to attain.

The Academy engages in many activities which serve as invaluable resources for plaintiff-oriented attorneys. The monthly newsletter, roundtable luncheons, and dinner meetings are exceptional venues for the exchange of views and information. The Academy is involved in various public service programs which cast a positive light on the legal profession, such as Community Law School and the Toy Safety Program. A professional staff combined with a dedicated membership has made the Academy a force to reckon with in Alaska's legal community.

The Trust, the political arm of the Academy, represents the interests of the general public and trial lawyers in Juneau. The Trust addresses and monitors many issues of importance, including workers' compensation, criminal law, auto insurance, insurance reform, family law, workplace safety, and works to defend the rights of the individual and to protect the civil justice system.

The success of both the Academy and Trust is due entirely to the hard work, perseverance and financial contributions of its members.

Thank you.

Winston Burbank	**Mestas & Schneider**
Grant Callow	**Jim Pentlarge**
Charles Coe	**Laurel Peterson**
George Dickson	**Rice, Volland & Gleason**
Pete Ehrhardt	**Eric Sanders**
Michael Flanigan	**Chris Schleuss**
Rick Friedman	**Clifford Smith**
Lewis Gordon	**Torrisi & Snyder**
Peter Gruenstein	**John Suddock**
Dick Harren	**Vincent Vitale**
Jeff Jefferson	**Bob Wagstaff**
Kelly, Cossman & Associates	**Russ Winner**

Legislation targets concealment in public hazard settlements

Unjust bill blackmails business

By Mary A. Nordale

A fundamental principle on which American courts operate is that each case is unique. Whether the parties in a case are at trial or in appeal, the courts must deal with their claims and circumstances alone.

The system is designed to be fair to both parties. House Bill 171, introduced by the House Judiciary Committee, would change that.

This bill provides that a court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard. It also allows someone who is not a party, a stranger to the case, to contest the order or judgment.

A public hazard is an instrumentality "that has caused injury to a person or property, and includes a device, instrument, person, procedure or product, and a condition of a device, instrument, person, procedure or product."

The courts have adopted discovery rules to assist litigants, before trial, in acquiring as much information about the case they are trying as they need in order to be successful.

These rules work for the advantage of both parties, so no surprises occur in the courtroom. And at trial, the judge has the advantage of knowing as much as possible about the facts and the issues so that he or she can apply the law fairly and correctly. Thus the decision can reflect the general rules of civil behavior our society endorses.

In the course of the discovery process a judge may be required to enter a number of orders either compelling a party to disclose information, or protecting a party from having to disclose information that is clearly not relevant to the issues. Often a court will order disclosure of information that is clearly not admissible in the case, but that may "lead to" admissible evidence.

By asserting that a public hazard is involved, any stranger to the case can contest the order and require either or both parties to turn over to the stranger all of the information covered by the order. A judge would be required to make a determination on what are called "ultimate facts" and means that the judge will have determined as the outcome of the trial before the parties ever get to a courtroom.

All of this means that an environmental litigation organization, an attorney interested in commencing a case, or even newspapers can intervene in a case in which a defendant — targeted by the environmental litigation organizations or the American Trial Lawyers, for example — may be involved to acquire information about the defendant and compel a judge to dictate the outcome of a case before it can be tried.

This bill would destroy the courtroom as a place in which to settle disputes. It would lead to a system of blackmail against target defendants, especially natural resource-based industries.

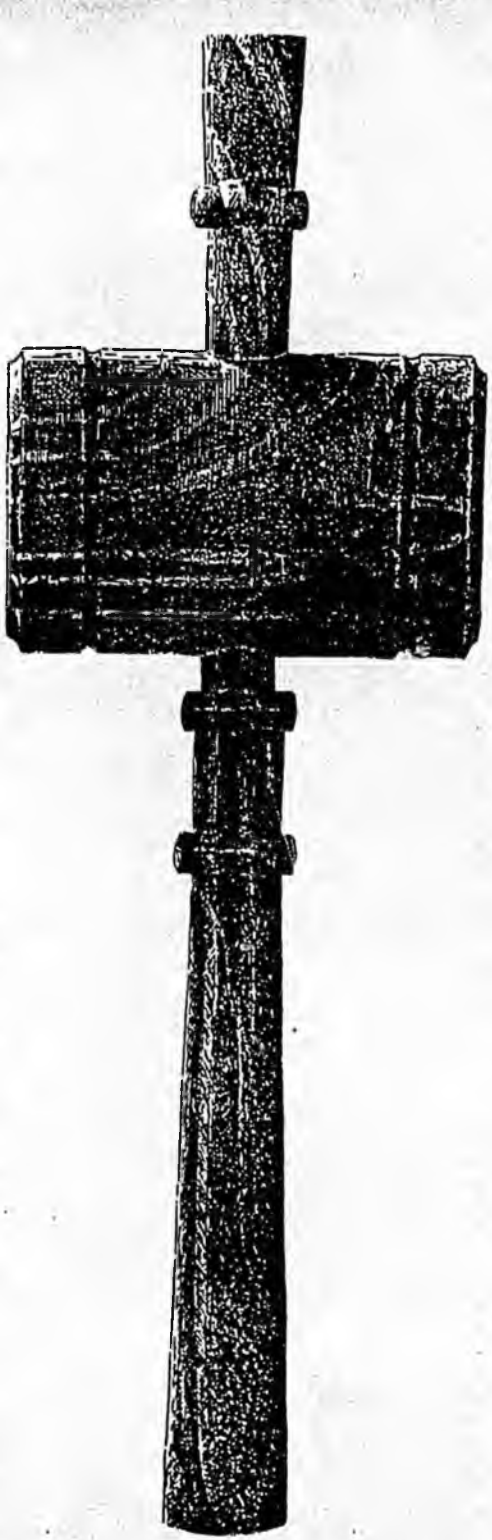
All a plaintiff would have to do is write a letter to his target defendant alleging injury because of a public hazard. The defendant would know that the choice is to settle out of court or defend against the plaintiff and any other person who wanted information about the defendant's business.

Because the costs of trying a case can be enormous, the target defendant may very well determine that peace with the plaintiff — even if the plaintiff does not have a good case and would not win — may be less expensive than a defense.

What business in its right mind would want to establish itself in Alaska knowing that it faces this kind of blackmail? What business in Alaska already established can survive? Chevron has shut down its refinery on the Kenai Peninsula, stating that one cause is the regulatory climate.

We have lost jobs and a significant part of Alaska's economy. Consider what would happen if HB171 passes. Even the local hardware store would have to reconsider the advantages of staying in business.

Mary A. Nordale is a lifelong Alaskan, former assistant U.S. Attorney and assistant district attorney in Fairbanks, and former Commissioner of Revenue, now in private practice in Juneau. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.



Legislation exposes secrets

By Michael J. Schneider

It has been observed that American industry is motivated by little more than money. The "bottom line" is not the only line, but it's the only line that seems to get much attention. While this approach has provided us with industrial superiority, a high standard of living, and considerable hope for the future, it carries with it some tragic and avoidable consequences.

Schneider

If the cost to the particular business or industry of correcting a product defect or a dangerous design is greater than the benefit to that industry or business, then the problem goes unremedied. Corporate wrongdoers continue to reap the monetary benefits of their dangerous products, while people, their families and the public bear the burden. Few perceive this reality as keenly as those of us whose privilege it is to represent the maimed and the injured against the giants of American industry.

One of our greatest frustrations as plaintiffs' attorneys is that we are frequent and unwilling participants in the conspiracy of silence that surrounds litigation over public hazards.

The consuming public and government regulators are kept unaware of dangerous products, safety violations and predatory business practices because of the widespread practice of making settlements and facts, obtained in the course of litigation, secret from all but the parties to the case.

The conflict arises very simply. Our first duty is to our individual client's interests. When a corporate wrongdoer finally buys peace at the courthouse steps (or on appeal after a favorable verdict), silence is customarily demanded by the wrongdoer.

Plaintiff and plaintiff's counsel are compelled to promise that they will not disclose the nature or terms of the settlement reached, nor the facts obtained or disclosed during the course of the lawsuit. A maimed and injured plaintiff rarely declines a fair settlement offer to hold out for the "public's right to know."

Most of us in the same circumstances would make the same decision. Unfortunately, the consequence is that the most hideous and widespread misconduct and public danger remains secret, while the judicial system pays an outrageous price processing claims. This is because each new plaintiff must replow the same ground in order to obtain the facts and circumstances necessary to develop their case.

Many meritorious cases are not prosecuted because of the expense and difficulty involved. Corporate misconduct goes unpunished and consumers are left without the information they need to promote the safety of their families.

Fortunately for all of us, a move is afoot to end this conspiracy of silence. The House Judiciary Committee, under the leadership of Rep. Dave Donley, has introduced House Bill 171. That legislation is in the process of making its way through the House of Representatives and is currently before the House State Affairs Committee.

While this bill may be subject to criticism because it doesn't go far enough, it will alter Alaska's public policy in favor of the consumer and in favor of openness.

This bill needs our support to ensure that corporate wrongdoers will be unable to hide their misconduct behind a check at the courthouse steps.

Support for this legislation can be easily expressed. Your local legislative information office will be happy to send a short public opinion message to your legislators or to the entire legislature for free. Do it today. Opposition from the insurance industry, the automotive industry and the pharmaceutical industry is already being heard in Juneau. Now let them hear from us, the public consumer.

Michael J. Schneider is former chairman of Alaska Action Trust, a committee of trial lawyers opposing reductions in plaintiffs' rights and other changes in the civil justice system. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.

ANCHORAGE TIMES, MAY 5, 1991

Sealed out-of-court settlements leave public in dark

By BARRY SIEGEL
Los Angeles Times

SEATTLE – There is a moment that recurs with disheartening regularity for Barbara Arbuckle.

It comes during her conversations with women who, like her, have survived faulty Pap smears and deadly cervical cancer.

Just as Arbuckle is nodding sympathetically in response to a companion's account of medical travail, just as she is thinking this lady's story is a film of my own life, the other woman invariably leans forward, eyes narrowing, with questions: So where were your Pap smears done? Do you know anything about my lab? How many tests did you have? How did they botch your case?

Arbuckle has talked in general terms on national television programs about problems with Pap smears. She has testified before a U.S. Senate subcommittee. She has campaigned tirelessly for what she calls "the public's right to know." But she is unable to answer these other women's specific questions.

I can't tell you, she responds, looking away. I just can't.

Such is the price Arbuckle paid in agreeing to a sizable out-of-court settlement of her lawsuit against two laboratories that she said misread her Pap smear results. In exchange for avoiding an expensive, drawn-out trial, Arbuckle agreed not to identify the labs publicly, or discuss details of her case, or disclose evidence that she and her lawyer had gathered about the labs' problems with other patients' Pap smears. In fact, she agreed to let most of the court records of her suit be sealed from public view.

"Today I regret that deal," Arbuckle, 27, told a state legislative hearing in Washington state last January. "There are things that you all should know. I can't say some things. And those things could save lots of lives. ... Lives would be saved if people knew."

With those words of public remorse, Arbuckle joined a mounting national backlash against sealed settlements and protective orders, which over the past 15 years have become a commonplace element of the civil-justice system.

A few individual judges have started preventing secret settlements or reversing their own confidentiality orders. A national trial lawyers association has launched an offensive called Project Access, which files legal challenges to confidentiality orders and mails out thick information packages full of key cases and sample briefs.

Citizens regularly drive cars, take drugs, operate equipment and live near toxic polluters that have been the subject of lawsuits covered by a confidentiality order. Does the public have an absolute right to know about these cases? Or should plaintiffs and companies be allowed to settle their private disputes as they see fit? Where to draw the line between private rights and public interest? These are the questions being raised by lawyers and lobbyists in a growing national debate.

> *'There are things that you all should know. I can't say some things. And those things could save lots of lives.'*
>
> **– Barbara Arbuckle,**
> **who settled a case involving faulty Pap smears**

Barbara Arbuckle takes part in this broad exchange, but also sees the matter in more personal and morally vexing terms. The legal system, after all, forced her to choose between her own interests and the public interest.

"My attorney's advice was to let go, move on, because she knew I was wore out," Arbuckle said. "I agreed." I'm not mad at my lawyer. She handled this to the best of her ability. I was a 23-year-old waitress, just scratching by with no one to help her. But the bottom line is, this hurt the public. It hurt lots of other people. So I have a question: Why should my attorney have to advise me about this in the first place?"

A look at Arbuckle's case and the debate in Washington offers more than one answer to this question.

Barbara Arbuckle was 21 when her troubles began – first discomfort and pain, then problems with menstruation. For two years she regularly visited her doctor, who took a series of Pap smears but could find nothing wrong.

Then, watching television late one night in October 1985, Arbuckle happened upon a show in which medical people were sitting around talking about cervical cancer. There was a listing of symptoms. This sounds just like me, Arbuckle thought.

Three weeks later she underwent a radical hysterectomy to remove advanced cervical cancer.

"I had all the goals in life," she recalled. I was going to have a little boy, a little girl. Then the doctor told me nope, you don't get it. This shouldn't have happened – it's not just bad fate. I'd been going to my doctor, telling him my symptoms for two years, taking the tests. So I called my attorney."

Eventually, her lawyer came to believe the fault was with two Seattle labs. The labs, attorney Mary Ann Ottinger claimed in a lawsuit, misread Arbuckle's Pap smears. Such misdiagnoses, it emerged, had been a growing problem across the country, and were not uncommon at the two labs in question. But the scope of the problem had been obscured by secret court settlements.

Soon Arbuckle was speaking out in public regularly, being careful not to dwell on the particulars of her own case, since there had been no judgment in court yet. Reporters called every week. Geraldo Rivera invited her on his talk show. So did Larry King.

"The response from all over since I started to talk was so much," Arbuckle said. "It's amazing – people do read, people watch TV, people learn. We were giving the public the knowledge. The only way I knew about Pap smears was that late night TV show. Without that show I'd be dead. If I can learn about my health watching TV, why not others?"

But while her public appearances multiplied, her legal battle dragged on without resolution. One trial date was postponed, then another, until the case was 2½ years old. Defense lawyers came back again and again to question Arbuckle.

"They asked hundreds of questions," she said. "When was the first time I saw a doctor? How often did I see him? What about my sex life? How often? For how long?"

Then, in early January 1988, the defending companies learned Arbuckle was scheduled to testify within days before a subcommittee of Congress that was investigating Pap smear misdiagnoses. "No way did the defendants want their names and the details spread over USA Today," said Ottinger, Arbuckle's attorney. "They did not want it in Congress and the papers."

So just as Arbuckle was packing for Washington, a generous settlement offer arrived. It had a condition, though: Arbuckle could not talk about the particular details of her case, and the file would be sealed.

Arbuckle bristled. "After 2½ years of legal fighting, I'm told I have to keep my mouth shut. And the whole record is to be sealed. My case doesn't exist. To what purpose?"

See p. 72 re FLORIDA LAW.

Dangers Insurance Companies Hide

'The Blood of Thy Neighbor'

Morton Mintz

Imagine a manufacturer who discovers that one of his products has a defect that is causing grave injuries to unsuspecting consumers. If he promptly warns them, halts production, and recalls the product, he will be obeying a moral obligation that is deeply rooted in our religious and ethical heritage. The obligation is expressed this way in Leviticus 19:16: "Neither shalt thou stand idly by the blood of thy neighbor."

Now imagine a house bordering an alley. From a second-floor window, X sees Y lay a nearly invisible wire across the alley and then run away. Moments later, X sees Z—an unsuspecting stranger to whom he has no special tie—walking toward the wire. X's moral obligation to warn Z is also his duty under the laws of a dozen foreign countries. In the United States since 1973, 27 states and the District of Columbia have enacted some version of the so-called "Good Samaritan" statute.

In a final scenario, our manufacturer neither warns of the defect nor recalls the product. Figuratively, he lays a nearly invisible trip wire and flees. Watching him do it from the window, and then sitting in silence as consumers are ambushed, is the manufacturer's products liability insurer. He is above it all. He sounds no warning. Unlike X, however, he claims that his conduct is morally right—even though, unlike X, he is not a "stranger" to Z since the insurer profits from the consumer, and even though, unlike X, he in essence enabled Y to lay the trip wire by underwriting the effort.

His conduct, he points out, is required by the courts. They have ruled that an insurer has no affirmative duty to warn the public or to facilitate a recall of a product it insures. "Indeed, under the laws of, I think, every state," Craig A. Berrington, general counsel of the American Insurance Association, told me, "the insurer has an absolute obligation to provide a defense for that policyholder against claims that arise, and the insurer can be sued when policyholders believe that insurers are not vigorous enough in providing that defense."

Lie-ability Insurance

"My primary concern," Berrington said, is that no standard be established under which

> insurers essentially become police officers or reporting officials—an arm of the government . . . or that insurers do the work of government and be blamed when government fails in its responsibility to make judgments as to what products ought not to be on the market. . . . A legal duty to disclose with regard to a product that the insurance company has covered would be contrary to the insurer's statutory and contractual obligations today and place the insurer in a terrible bind.

Berrington has a point about the role of government, but through him the insurance industry makes an argument for preserving the confidentiality of a commercial relationship no matter the cost in human life. It's an argument that government, which has no higher mis-

Morton Mintz, an award-winning investigative reporter for the Washington Post, *now retired, is the author of* At Any Cost: Corporate Greed, Women, and the Dalkon Shield *(Pantheon 1985).* *This article is reprinted with permission from* The Washington Monthly *(January/February 1991).*

sion than public safety, must not compel insurers to divulge information that would protect us from massive, continuing disease, injury, and death. It's an argument that would surely astound most Americans were they aware of it; but through a quiet accretion of court rulings, and without congressional debate, this privileged position asserted by products liability insurers has evolved into national policy. It's an argument that in essence is an excuse for the insurance industry to stand by the blood of its neighbors.

Meanwhile, the neighbors in the marketplace and the workplace have been shedding lots of blood. Consider the dreadful catastrophes caused by only two products: the Dalkon Shield, the defective intrauterine contraceptive device (IUD), and asbestos, the deadly mineral.

New Year's Eve Irresolution

The Dalkon Shield was sold in the United States from January 1971 to June 1974, when the manufacturer, pressed by a worried Food and Drug Administration (FDA), ended domestic sales (but continued foreign sales until at least April 1975). During those three-and-one-half years, physicians implanted an estimated 2.2 million of the devices in the United States and 800,000 in some 100 other countries. For at least a decade after the sales halt, according to recently available court documents, the liability insurer joined the manufacturer in suppressing knowledge of the IUD's hazardous defects.

The foreseeable and preventable result was that tens if not hundreds of thousands of women suffered life-threatening pelvic infections, which commonly impaired or destroyed their ability to bear children. In addition, hundreds of children were born with injuries inflicted by the Dalkon Shield while it was their companion in the womb, causing blindness, cerebral palsy, and mental retardation. Eighteen deaths have been reported, but the toll is certainly much higher, if only because in Third World countries no one was counting.

The insurer was Aetna Casualty & Surety Company. ACS is wholly owned by Aetna Life & Casualty Company, one of the world's largest providers of insurance and financial services. In its corporate publications, Aetna acclaims itself a "good corporate citizen." Notably, it was an ACS senior claims adjuster who, on New Year's Eve of 1981, writing in the margin of a complaint filed by a Dalkon Shield victim, raised the rarely asked question: *"What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?"* [Italics added.]

That William D. McGehee had asked the question did not become known for more than six years; whatever the answer, it isn't on the record. So I asked Aetna for an answer, and a spokesman assured me I'd get one. Several days later, Aetna backed out, giving an interesting reason: The information I was seeking concerned the industry as a whole, and therefore I should talk to Berrington, the insurance association counsel.

The courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer.

About 21 million U.S. workers have been exposed to asbestos, and several hundred thousand of them are expected to die of asbestos-induced cancer over the next quarter-century. In *Outrageous Misconduct*, Paul Brodeur wrote: "By 1981, many of the nation's insurers had known for decades that asbestos workers were dying early, but had kept silent while their underwriters wrote policies for workmen's compensation and comprehensive general liability as fast as they could put pen to paper."

Proving to a fare-thee-well that they had known the truth from their own "actuarial tables, ratings schedules, physicians' reports, workmen's compensation claims, underwriting guidelines, and safety-and-engineering manuals," Brodeur wrote:

> If at some point along the way, Aetna, Travelers, Commercial Union, Liberty Mutual, INA, Hartford, Home, Lloyd's, or any of the other major insurers of the asbestos industry had gone public with their inside knowledge, they might well have been able to save tens of thousands of lives and untold suffering and pain.

Why did insurers conceal their knowledge and continue to provide coverage? Disclosure, Brodeur explained, would

> have encouraged claims and damage suits, and run counter to basic insurance-company practice, which is to write as much coverage as possible, and as cheaply as possible, in order to reap a rich harvest of premiums that, when invested, will return enough money to pay for future claims and make a profit for the company.

As Ralph Nader put it in a 1987 article in the *Suffolk Law Review*, insurance companies "have become predominantly cash flow financial institutions. . . . More and more attention is being paid to increasing investment income through premium volume."

Such a casino philosophy too often has led to industry indifference to loss prevention and advocacy for health and safety, which, as some insurers often brag, are historical objectives of insurance. Thus, Aetna's top officers piously stated in their 1989 annual report that "the best way to keep premiums down is to work with clients to prevent or minimize losses." Yet, while the Aetna Life and Casualty Company foundation made $6.8 million in grants in 1985, Nader wrote in 1987, "the only safety contribution was $5,000 to an Indianapolis, Indiana, Volunteer Fire Department, according to the annual report of the company and the foundation."

The downside of loss prevention for the industry was described in a 1971 study by Herbert S. Denenberg, the former insurance commissioner of Pennsylvania. Loss prevention, he wrote, "might encourage self-insurance and might otherwise lessen the need for insurance [and] lower premiums, and decrease . . . income and cash flow."

Robert Hunter, president of the National Insurance Consumer Organization (NICO), said in an interview, "It's a shocking thing that what the industry knows from its files could save lives [but] is never tapped." He cited an example: The National Highway Traffic Safety Agency (NHTSA) test-crashes cars equipped with dummies to find out how safe —or unsafe—they are, while insurers refuse to release the data on millions of cars that have crashed with real people in them.

"Even repeated litigation arising from well-known and identical hazardous product models or services has not prompted the insurance industry to insist on elimination of possible dangers," Nader wrote. "The insurance industry's indifference to loss prevention has been a significant contributor to the 'insurance crisis' of the 1980s, which hit consumers and businesses with skyrocketing premiums."

Was the conduct of insurers in the Dalkon Shield and asbestos cases an aberration? "It happens routinely," Denenberg told me. "They don't come forward and say, 'Hey, world, look out for this!'" Fortunately, some firms break the mold. In 1970, for example, Charles K. Cox, president of the Insurance Company of North America (INA), said that INA "will no longer insure the company that knowingly dumps its wastes."

Early in the Reagan administration, NHTSA voided an automobile safety standard that required air bags or other automatic restraints and would have saved thousands of lives annually. In what Nader hailed as a "luminous exception" to the industry norm, the huge State Farm Mutual Automobile Insurance Company fought NHTSA's action up to the Supreme Court and was vindicated in 1983 when the court held the action illegal.

However admirable, such exceptions provide no clue as to how many deaths and injuries insurers could have prevented through the years, or could prevent from now on, by dedicating themselves to loss prevention and by disclosing their knowledge of dangerous defects in products and needless workplace hazards. Brodeur found that insurers could have saved the lives of tens of thousands who fell victim to only one product, asbestos.

So it's a fair question: What did the insurers know and when did they know it about hazardous defects identified after marketing in, say, automobiles? Aircraft? Athletic gear? Building materials? Butane lighters? Drugs and vaccines? Food additives? Playground equipment and toys? Toxic chemicals? No one asks the insurers to reveal everything they know. And they shouldn't, says NICO's Hunter. "But in the case of a product that kills they have a duty to warn."

Robins's Hoods

Aetna became deeply involved in the Dalkon Shield episode 16 years ago in Wichita, Kansas, where the manufacturer, A.H. Robins Company, was the defendant in an early, seemingly routine personal injury trial. To that point Robins had sold more than 4.5 million Dalkon Shields, claiming that in preventing pregnancy the device had a stunningly low failure rate of 1.1 percent per year. All along, however, Robins—but not Aetna—had known that the claim was based on studies that were unreliable at best and fraudulent at worst: The true failure rate of the Dalkon Shield was later determined to be about 5.5 percent.

In February 1975, near the end of the trial, a leading plaintiffs' lawyer, Bradley Post, introduced a smoking-gun internal Robins memo. In the memo, which was written exactly four days before the company bought rights to the Dalkon Shield in June 1970, a Robins medical executive revealed that the developer of the device had admitted to him that he knew the pregnancy rate to be well over 1.1 percent. The memo erased any possible doubt at Aetna that the claim was false, devastated the defense, and led the jury to make the first award of punitive damages to a Dalkon Shield victim.

A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.

The amount of the award was relatively small—$75,000. But the defeat and its implications infuriated Aetna and William A. (Skip) Forrest, Jr., general counsel of Robins. They blamed Roger L. Tuttle, the Robins in-house counsel in charge of Dalkon Shield products liability litigation. Soon afterward, Tuttle testified —and Forrest denied—that Forrest ordered him to arrange the destruction of hundreds of "troublesome" documents (some of which Tuttle secretly saved). In short order, Aetna forced Tuttle's dismissal from Dalkon Shield legal matters. Forrest replaced him with what is now McGuire, Woods, Battle & Boothe, Virginia's second-largest law firm, which would coordinate as many as 150 Dalkon Shield defense law firms around the country.

A development of supreme importance followed in a few weeks. According to hitherto unreported Aetna internal memos, by November 1974 ACS had, or was trying to take, "complete control" of Dalkon Shield litigation from Robins. Through McGuire, Woods, ACS in March 1975 clearly assumed complete control. From that day forward, McGuire, Woods was getting its marching orders from the insurer, not the manufacturer.

In the process, Aetna had to, and did, learn what Robins knew and what plaintiffs' attorneys would soon demonstrate with overwhelming scientific evidence: the longer a Dalkon Shield remained in the body, the greater the risk of pelvic infection or pelvic inflammatory disease (PID). As far back as 1956, articles in scientific literature had warned that nylon rotted upon long-term exposure to body fluids. Robins's IUD was the only one with a retrieval string that was not only made entirely of nylon, but also consisted of hundreds of tiny filaments encased in a sheath. As the nylon rotted, bacteria that penetrated the spaces between the filaments were wicked into the normally germ-free uterus, where they caused PID.

Robins did not test the Dalkon Shield for safety until after it began to sell the device worldwide. Aetna knew this. In October 1975, a meeting was held at Aetna to discuss "problems of defense" in Dalkon Shield lawsuits. One of the problems, claims adjuster Ronald Szeremeta said in a memo, was "lack of testing prior to marketing." In February 1976, an ACS internal memo acknowledged inadequate testing. But later in 1976, Aetna was still reassuring other companies providing coverage to Robins. Yes, an Aetna official told one of them, Aetna was "completely satisfied with Robins's testing and marketing program."

Incriminating Experiments

The first experiments incriminating the Dalkon Shield string were reported in 1974 by IUD expert Howard J. Tatum. Aetna then began to fund numerous string studies through McGuire, Woods, using the lawyer-client relationship to cloak the results. An early, ominous report came in December 1975, when the law firm told senior ACS attorney John A. Edgerly, Sr., that a British study was "showing greater bacteria buildup with DS [Dalkon Shield]." Aetna also paid for a comparative study by New York University's primate laboratory of IUDs in baboons (primates that, after chimpanzees, have a female reproductive system most closely resembling a human's).

Attorney Edgerly feared confirmation of Tatum's experiments. And so in June 1977, he wrote a classic head-in-the-sand directive to Harris W. Wagenseil, then a San Francisco lawyer who has been described as "a principal architect" of the defense of the Dalkon Shield, and who reported to Aetna mostly through McGuire, Woods. First, Edgerly instructed Wagenseil to classify information about the baboon study as a lawyer's confidential "work product" to prevent plaintiffs' counsel from seeing it. Then he

wrote: "There is one caveat, and that is, this test could verify the finding of Tatum—if the conclusion appears to be headed in this direction, the study will be aborted."

For whatever reason, the study continued long enough to go far toward confirming Tatum's experiments. In an analysis of the data in 1981, after the study was completed, Dr. William M. O'Leary, professor and chairman of microbiology at Cornell, concluded that there was "a striking association" between the multifilamented string and bacterial contamination of the womb. After I learned of the study in 1984, NYU refused for six months to reveal who had paid for it. Finally, Forrest admitted in court testimony that Aetna had picked up the entire bill.

Only a complete recall could protect Dalkon Shield wearers, all of whom were unaware that the string deteriorating in their bodies was exposing them to ever-increasing peril. The need for a recall of these IUDs became apparent in late May 1974, when Robins disclosed that four women who had become pregnant while wearing the Dalkon Shield had suffered rare fatal septic infected miscarriages. The toll of serious cases and fatalities increased almost daily.

FDA staff members urged Commissioner Alexander M. Schmidt to recall at least all unimplanted Dalkon Shields. But he settled for a "voluntary" suspension of sales—the weakest course of action besides doing nothing. It was also the course Robins had preferred because, a Robins lawyer advised, it minimized the company's legal liability. An Aetna memo quoted a revealing admission from an official identified as Bill Dumbauld: "Bill's caustic comment was 'those unsafe cars on the road aren't being recalled.'"

To force a recall, Aetna could have refused to renew the annual liability coverage that Robins needed to do business since, as Robins's own insurance broker warned, if ACS didn't insure the Dalkon Shield, no other carrier would. The possibility was considered. But Aetna resisted a true recall, and a reason emerged in a 1980 interoffice communication in which ACS official Douglas D. Carr discussed a meeting the previous day. Robins, he wrote, "was still contemplating a recall of the IUD which would 'precipitate an influx of claims.'"

Aetna renewed its coverage in 1976 and again in 1977. That it coveted the Robins account is suggested by an internal memo warning that "unless we do something to safeguard ourselves, profitability of account will disappear." Although Aetna's profits from 1974 to 1977 haven't been disclosed, its 1973 profit from Robins was relatively trivial —about $30,000, according to an internal memo.

Even supposing that Aetna subsequently jacked up its premiums, it seems strange that profits on this scale could account for the annual renewals after 1974, when Aetna had to know that big trouble lay ahead. But blindly following the "basic insurance-company practice" of seeking the maximum possible premium income in order to make investments had apparently led Aetna into a colossal blunder. "I can't see anything beyond stupidity," said NICO's Hunter, "I just can't."

Aetna finally cut off coverage effective February 28, 1978. The cut-off was a consequence of a megabucks battle with Robins, similar to one in the asbestos litigation, over the question of when the insurer's liability began: upon exposure to the product or upon diagnosis of disease. Negotiations failed to settle the dispute, so Robins sued Aetna.

In March 1977, while the case was pending in circuit court in Richmond,

the companies signed a secret armistice. Aetna, waiving traditional immunities from liability, consented to some cold-blooded provisions. It would pay all compensatory awards, even for "*intended* bodily injuries," and for injuries arising "on account of Robins's failure to disclose relevant information and the *supplying of false and misleading information* [to physicians and women]." [Italics added]. The quid for this quo was that Robins would pay all punitive awards. The lawsuit was settled in 1984, on the eve of trial.

The pact could have embarrassed Aetna and rocked the industry if it leaked into a court proceeding. ACS outside counsel Rufus Coldwell warned in a 1982 memo that a judge could construe it "in an unfavorable manner and place upon ACS some heretofore non-existent duty of disclosure to the public."

In February 1984, the then-chief U.S. district court judge for Minnesota, Miles W. Lord, excoriated E. Claiborne Robins, Jr., and two other top Robins executives for having refused to recall the Dalkon Shield. A multitude of women were still carrying "the deadly depth charge in their wombs, ready to explode at any time," Lord told the utterly unrepentant trio standing before him. "Face up to your misdeeds," he pleaded. "Please, gentlemen, give consideration to tracing down the victims and sparing them the agony that will surely be theirs." Finally in October, Robins asked all women who were wearing the Dalkon Shield to have it removed.

If Lord had seen the newly available court documents, he surely would have extended his wrath and his plea to complicit Aetna executives. Still, he had a few harsh words for Aetna:

> The policy of delay and obfuscation practiced by [Robins's] lawyers in courts throughout this country has made it possible for you and . . . Aetna Casualty and Surety Company to delay the payment of these claims for such a long period that the interest you earn in the interim covers the cost of these cases. You, in essence, pay nothing out of your pockets to settle these cases.

[redacted]

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment.

[redacted]

But in keeping with the court rules—it's a no-no for a jury to be told whether a defendant is insured—the Aetna executives were, and remain to this day, all but invisible. Yet they have been complicit in a decade of delay of the recall, while the Dalkon Shield injured thousands more women than any serial rapist ever has.

Monkey Business

Aetna dodged my questions about the baboon study, the armistice with Robins, and other awkward subjects, citing "legal reasons," "advice of counsel," and the inviolability of insurer confidentiality: "We are prevented by law from publicly discussing or otherwise disclosing any information provided to us in confidence by our clients," a spokesman told me at the time.

"Confidentiality is not only paramount to an insurer's relationships with its clients; it is also our business and legal principle without which it might not be possible for insurance companies to pro-

vide . . . liability insurance in any form."

Unlike the insurance industry, the medical and legal professions do not say "never" to disclosure because they recognize that confidentiality treated as an absolute inevitably collides with higher responsibilities to the welfare or the community at large:

- The American Medical Association's ethical code allows a physician to "reveal the confidences entrusted to him in the course of medical attendance" if "required to do so by law or [if] it becomes necessary in order to protect the welfare of the individual or of the society."
- The American Psychiatric Association's "Guidelines on Confidentiality" warn that "psychiatrists today may be held responsible for protecting parties whom their patients seriously threaten, particularly when these other persons have been specifically identified."
- The American Bar Association's Model Rules of Professional Conduct say that information confided by a client may be revealed "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Considering that a dangerous patient or client is usually only a threat to one person or a few people, and that just one needlessly hazardous product may injure tens of thousands of people, is it rational public policy to treat the insurer-customer relationship as sacrosanct?

And even in financial matters that aren't life-threatening, the government is likely to construe professional confidentiality as waivable. Accountants had no small role in the S&L disaster, a case in point being a major accounting firm's apparent cover-up of the shenanigans of Charles Keating, Jr. So late last year, the House of Representatives passed a bill requiring accountants to alert regulators to serious irregularities. The bill died in conference with the Senate, but Rep. Ron Wyden (D. Or.), who has been sponsoring the proposal for years, sees a good chance of enactment in the new session. A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.

But the way things stand, the courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer. In *Ethics in the Sanctuary*, author Margaret P. Battin recalls the much-publicized West German case of Jurgen Bartsch, a 15-year-old butcher's apprentice who confessed to his priest that he had committed a murder:

> The priest attempted to persuade Bartsch to give himself up to the police. When he was unable to do so, the priest followed Roman Catholic church law requiring absolute confidentiality of the confessional and did not reveal information about the murder or Bartsch's intentions. Bartsch committed three more murders—all of them of 11-year-old boys, all of whom he subjected to sexual torture prior to killing them—before he was caught four years later [in 1966].

At least the priest did what he felt he could to avert further bloodshed. The insurers of asbestos and the Dalkon Shield did not.

More than two years after William McGehee had asked his incisive question about the insurer's duty, he was still groping for a satisfactory answer—while women in large numbers continued to be stricken with pelvic infections. He rephrased his concern in April 1984 in handwritten notes in which he spoke of the "dilemma of insurance company which knows that insured has danger of defective product."

Aetna's headquarters are less than 20 miles from a nuclear plant. If the "defective product" giving rise to the "dilemma" were about to cause a meltdown at the plant, would Aetna bend its iron rule of confidentiality?

The Columbus Dump

Thirteen days after the February 1975 verdict in Wichita, Forrest and other Robins officials met in Hartford with five Aetna executives and an official from Robins's insurance broker to discuss why the case had been lost and how to build better legal defenses against Dalkon Shield lawsuits. Toward the end of two pages of handwritten notes, Joseph E. Fazio, an ACS manager and claims attorney, made a startling reference to Forrest: "Purging files to be sure that for future they will not be as vulnerable." The meeting minutes also refer to a discussion of purging of documents.

In one way or another, thousands of documents sought by plaintiffs' lawyers vanished suspiciously after McGuire, Woods took over the Dalkon Shield litigation under Aetna's direction. An especially odd fate awaited about 20 boxes of documents, some concerning secret tests of the Dalkon Shield's string.

The papers had been in the possession of Harris Wagenseil, the San Francisco attorney retained by McGuire, Woods. He shipped the boxes to Columbus, Indiana, when he moved to a new home there. In what he described in testimony as a "spring cleaning," his wife had the boxes carted off to the city dump.

At the time, the papers relating to the string tests were under a court "nondestruct" order. In a February 1984 report to Judge Lord, two special masters said that plaintiffs' attorneys had established a strong prima facie case that there was "ongoing fraud" and that it had "involved the destruction or withholding of documents."

In June 1984, when Dalkon Shield litigation was reaching floodtide proportions, four ACS officials met to discuss the carrier's options. One sentence in notes of the meeting—handwritten by someone not publicly identified—leaps off the page: "If we propose alternative #1—re: giving greater detail about how to run their [Robins's] operations and they don't accept it and we walk, aren't we conspiring even more."

This teasing hint drew strength in 1985, when the U.S. Department of Justice began to investigate whether Robins had criminally obstructed justice. In four subpoenas, a federal grand jury in Wichita ordered Robins ("Company X" or "Company" in public court papers because of the secrecy of grand jury proceedings) and McGuire, Woods ("Law Firm Y" or "Law Firm") to produce specific records. Company and Law Firm, asserting the attorney-client and lawyer's work-product privileges, refused to produce substantial numbers of the subpoenaed documents.

In deciding whether to sustain the refusal, District Judge Patrick E. Kelly, who was supervising the grand jury, conducted an in camera examination of sealed grand jury testimony and exhibits. Kelly ruled that the privileges could not be invoked "as a result of the crime-fraud exception." The in camera submissions, he said,

> contain a strong prima facie showing that [Company] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing, and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the courts, obstruction of justice, and perjury.

Significantly, Kelly noted that these alleged acts had occurred "during the period of representation by [Law Firm]" —that is, during the period Aetna controlled the law firm's representation of Robins.

An appeal by Company X failed. Upholding Kelly 3 to 0, the U.S. Court of Appeals for the Tenth Circuit said, "From 1975 to 1985, the law firm was responsible for the nationwide coordination of Company's defense." From 1975 to 1985, Aetna had "complete control" of this litigation.

'What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?'

Company X petitioned for Supreme Court review. In a vigorous reply brief in February 1989, the Justice Department listed the possible violations it was investigating: obstruction of justice, mail and wire fraud, false declarations before the grand jury, racketeering, and conspiracy.

The Supreme Court denied the Robins petition in June 1989—an obviously significant victory for the Justice Department. So it was astounding when in January 1990 the department dropped its five-year investigation. Had Company X been found to be not provably guilty of any crimes? Found wholly innocent of criminal activities? Had the "false declarations before the grand jury" suddenly been transformed into true declarations?

Runaround Suit

Flat-out allegations of conspiracy were made against (and denied by) Aetna in private lawsuits. Such allegations against an insurer are not a first. In cases dating back to 1977, for example, 80 former asbestos workers at a Johns-Manville plant in New Jersey accused Metropolitan Life Insurance Company of "negligence, fraudulent concealment, and conspiracy," and a federal judge ruled that the insurer "could be held as a defendant" on those accusations, Brodeur wrote in *Outrageous Misconduct*.

One allegation was that in a 1935 report on asbestos disease, Metropolitan had altered certain passages "to suit the insurance industry"; another was that it had withheld "vital information from asbestos workers." However, after long delays of a trial that might have determined Metropolitan's legal accountability, the parties settled.

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment, thanks to a class-action lawsuit called *Breland*. Robins's bankruptcy filing in 1985 meant Aetna faced a nightmarish possibility: It could become the sole defendant in the hundreds or thousands of lawsuits latent in the approximately 195,000 claims that survived court screening. But Aetna itself could not have devised a more brilliant self-rescue than *Breland*.

It was a mockery of an adversarial lawsuit: Aetna instantly embraced it; the lead plaintiff's lawyer had never tried a civil suit; Aetna produced only the documents it cared to (summarized in a 99-page "index"); and no plaintiff's lawyer took a single deposition. The *Breland* plaintiffs' counsel crafted the class action as an unprecedented—and, for the ongoing asbestos litigation, precedent-setting—"mandatory non-opt-out class."

This extraordinary move meant that hundreds of thousands of Dalkon Shield victims who had never heard of their self-appointed putative benefactors—Glenda Breland, her co-plaintiffs, and their lawyers—would, without their knowledge or consent, forever lose their constitutional right to a jury trial against Aetna, to select their lawyers, and to have their cases heard in the jurisdictions where they live.

U.S. District Judge Robert R. Merhige, Jr., of Richmond, who supervised both the Robins bankruptcy and the *Breland* hearings, certified the class action, airily declaring in his April 1988 opinion that, "there have been no suggestions that Aetna had any relation with the alleged injuring device except as an insurer." He disregarded the allegations of conspiracy and other wrongs imputed to Aetna even in *Breland*, and he was at variance with uncontested facts. Aetna's "complete control" of the Dalkon Shield litigation had been a reality for nearly 13 years, for example. And contrary to Merhige's opinion, Aetna attorney Edgerly's order to abandon the baboon test if it was yielding undesired results was certainly more than a "suggestion."

Based on Merhige's ruling, *Breland* counsel and Aetna reached an amicable settlement, as no one had doubted they

would. The claimants—most of them exceedingly weary of waiting to be compensated for injuries suffered a decade or more earlier—could not easily refuse, though some plaintiff's lawyers claimed "collusion" contaminated the settlement.

Once all the agreement's misleading provisions are weighed, they indicate that for $43 million—little more than nuisance value—Aetna could walk away from the multibillion-dollar arena of Dalkon Shield liability immune from lawsuits for ever after. This from a company that in 1989 listed assets of $87.12 billion and a net income of $676 million. No wonder Aetna was so happy to pay *Breland*'s attorneys—including a former partner of the judge involved—fees of $8.2 million (an average of $407 an hour) plus expenses.

In a brief filed as part of an unsuccessful appeal to overturn the settlement by 500 of the Dalkon Shield victims involuntarily corralled by *Breland*, two plaintiffs' lawyers cut to the heart of the matter: "If one follows Aetna's arguments to their logical conclusion," they wrote, "an insurer such as Aetna cannot be held liable for fraud, obstruction of justice, negligence, or any other tortious activities as long as it is acting as insurer at the time of its tortious activities."

Sunshine on Policyholders

The first line of defense against defective and needlessly unsafe products resides not in those who manage the offices where they are insured, but in those who manage the factories where they are made. This deserves particular emphasis because in recent years *self-insurance* has become commonplace in a wide range of manufacturing industries, including automotive parts, chemicals, general aviation, medical devices, pharmaceuticals, sporting goods, and tobacco.

Since 1979, Reps. John Conyers, Jr., (D. Mich.) and George Miller (D. Cal.) have proposed a bill to strengthen the first line of defense. The bill says that "whoever is an appropriate manager with respect to a product or business practice," and who "discovers . . . a serious danger associated with such product (or a component of the product) or business practice," shall within 30 days "inform each appropriate federal agency in writing . . . and warn affected employees in writing." A manager convicted of a violation "shall be fined not less than $50,000 or imprisoned not less than two years, or both"; a convicted corporation shall be fined not less than $100,000.

The virtues of this approach are several: It would infuse personal accountability where there is now too little, offset pressures on managers to cover up, and be enforced by U.S. attorneys—no new bureaucracy would be needed. In an impressive example of local initiative, California enacted a close copy of Conyers-Miller in late November.

Florida has also blazed a trail toward corporate accountability. Its "Sunshine in Litigation Act," which took effect July 1, says that

> any portion of an agreement or contract with the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

Why not a federal sunshine in litigation act?

In the 1972 law creating the Consumer Product Safety Commission, Congress put on distributors and retailers the same legal burden of disclosure it put on manufacturers: Each and every one who obtains information "which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard" must inform the CPSC immediately. If he doesn't, the agency is empowered to compel him to do that which he had already been morally bound to do.

In 1975, former Sen. Frank E. Moss (D. Utah) and the late Sen. Warren G. Magnuson (D. Wash.) introduced a CPSC bill that would have extended the reporting requirement to products liability insurers (and to independent testing labs). For Congress, the bill was an apparently novel perception that protecting human life, safety, and health is too important to exempt insurers (and labs) from reporting serious hazards to regulators. The measure passed the Senate but died in squabbles with the House of Representatives over unrelated issues—and was never reintroduced.

Still, the public health and safety being so much at stake, we need new federal and state legislation that revives the implicit message of Magnuson and Moss: The "thou" in Leviticus 19:16—"Neither shalt thou stand idly by the blood of thy neighbor"—exempts none of us, including the insurer watching from the window. ☐

Keeping Court Records in the Open

Texas Supreme Court Adopts New Rule

Lloyd Doggett

When a private dispute is taken before a city council or a regulatory agency or enters the halls of Congress or a state legislature, it is no longer purely private. The public finances these institutions and thus has an interest in what is occurring in them.

The same can be said with regard to the public's interest in decisions made in the third branch of government—the judiciary. Although a particular dispute may be essentially private, judicial decisions often have far-reaching public-policy consequences.

In November 1987, the *Dallas Morning News* published a series of articles[1] about sealing civil court records in Dallas County. Its investigation disclosed that since 1980, sealing orders had been entered in over 200 non-child-related cases. In each instance, trial judges had sealed court records without any prior notice to the public to allow its interest to be considered.

Judges had sealed the records without hearings and without any showing that secrecy was proper. Many overly broad orders closed entire files rather than only those parts that could justifiably have been sealed. Orders explaining the reasons for sealing had often also been sealed. Many records had apparently been closed in perpetuity because the orders specified no expiration time. Since the *Dallas Morning News* survey did not analyze protective orders restricting access to unfiled discovery in otherwise unsealed files, it represents only a small segment of secrecy directives.

During 1988, the nationwide implications of such secrecy for the public were explored in incisive series of articles in the *Washington Post*[2] and *Newsday*.[3]

Need for Action

There is no reason to believe that the Dallas County experience was unique or even substantially different from that in other parts of the state. This situation clearly indicated the need for a comprehensive, uniform rule governing the sealing of civil court records.

Last year, legislation sponsored by Representative Orlando Garcia of San Antonio was enacted to mandate the Texas Supreme Court to adopt guidelines for judicial use in determining whether civil records should be sealed.

The court submitted the issue to a subcommittee of its standing rules advisory committee. Public hearings were held before the subcommittee, the advisory committee, and the supreme court itself. Participants included diverse representatives from the bar as well as public interest and citizen groups. After considerable debate, the advisory committee made a recommendation that was then revised substantially by the supreme court.

As finally approved, Texas Rule of Civil Procedure 76a is, therefore, a product of debate and compromise. It was adopted by the narrowest possible margin—a 5-4 vote—after the court was bombarded with communications suggesting that greater openness would produce the most dire economic consequences. The Product Liability Advisory Council, the Texas Association of Defense Counsel, and the American Tort Reform Association appear to have taken a lead in this opposition.

Lloyd Doggett is a justice of the Supreme Court of Texas. *This article is adapted from his presentation at* Keeping Secrets: Justice on Trial, *a conference sponsored by ATLA and the Society of Professional Journalists in late April.*

Rule 76a begins by affirming the clear presumption that all civil court records are open to the public. It is up to the person who wants to seal records to shoulder the burden of proof in every case, whether in the original request for sealing or in any later attempt to modify or vacate a sealing order. This burden is not that of showing only "good cause." Rather, it is to show a specific, serious, and substantial interest. The judge must find that this interest outweighs any probable adverse effect on the public health and safety.

In the rare cases where records should be sealed, the court must first satisfy certain substantive and procedural due process requirements. Nor can the court seal any order or motion regarding sealing itself. Paragraph (1) of the rule defines the standard by which trial courts must be guided in considering sealing requests.

The movant always has the burden of proof to establish all of the following by a preponderance of the evidence:

> (a) a specific, serious and substantial interest which clearly outweighs:
> (1) this presumption of openness;
> (2) any probable adverse effect that sealing will have upon general public health or safety;
> (b) no less restrictive means that sealing records will adequately and effectively protect the specific interest asserted.[4]

The trial judge is thus called on to balance the needs of the public with the asserted interest of the party seeking secrecy. In this regard, Texas has taken a different approach from some federal courts that do not view the public interest as an appropriate factor to consider for entering a secrecy order.

The rule does not ensure that the public health and safety will always surmount the private interest. There may be circumstances where the public interest is minimal and the private interest is great. The rule further calls on judges to be sure that no sealing order is a blanket order but to specify precisely what is covered and to use the least restrictive means of sealing.

The new rule is not an absolute guarantee of openness, but it is a guarantee that for the first time a true balancing of interests will occur according to specified standards.

Defining Court Records

The definition of "court records" in paragraph (2) includes "all documents of any nature" filed in any civil court. Exceptions are made for (1) "documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents"; (2) documents in adoption, mental health, and other cases "to which access is otherwise restricted by law"; and (3) documents filed in cases arising under the Texas family code. Also, the term "court records" is expanded to include settlement agreements not filed of

Thomas P. Murray, Austin, Texas

record, which seek to circumvent the rule by including provisions restricting "disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety or the administration of government or the operation of government."

The most controversial provision was the inclusion within the term "court records" of documents obtained during pre-trial discovery. A court record is more than just what has a file stamp on it from the local district clerk. All such discovery that is filed of record is, of course, accorded the same status as any other filed document.

Since interrogatory answers must now be filed under the newly amended Rule 168, they are always considered court records for the purposes of the rule. Unfiled discovery "concerning matters that have a probable adverse effect upon the general public health or safety or the administration of public office or the operation of government" are also included. There is an exception for discovery in cases originally initiated for trade-secret infringement or other similar action to protect "intangible property rights."

Texas Rule of Civil Procedure 166b(5)(c) continues to authorize the entry of protective orders to seal or otherwise limit disclosure of the results of discovery.[5] Any such order applicable to "court records" as defined in Rule 76a must, however, now be made in accordance with the procedures of that rule.[6] Even when the need for protection for public disclosure is established, the information will still be available to lawyers involved in similar litigation pursuant to *Garcia v. Peeples*.[7]

Notice and Hearing

The notice and hearing provisions in paragraphs (3) and (4) provide procedural safeguards to ensure that the public does not lose its right of access to court records. Most importantly, the rule guarantees to persons not otherwise a party to a lawsuit an absolute right to intervene to oppose secrecy.[8]

A party seeking sealing of records must file a written motion, obtain a hearing on the motion, and post notice of the requested sealing where notices for county meetings must be placed. The rule mandates a notice including a specific description of both the nature of the case and the records sought to be sealed.

The notice must be posted at least 14 days before the hearing on the motion to seal. A verified copy of the posted notice must also be forwarded to the clerk of the Texas Supreme Court so that both the capitol press and public interest groups based in Austin will be aware of the proposed sealing. This procedure will also provide a data base on the extent of secrecy requests throughout the state.

A hearing on the motion must be held in open court, at which time nonparties may intervene for the limited purpose of participating on the sealing issue. The court may conduct an *in camera* inspection of records as necessary. Pursuant to procedures utilized for jurisdictional special appearances under Texas Rule of Civil Procedure 120a, at the hearing the court may consider evidence including affidavits served at least seven days in advance to enable an opponent to issue subpoenas or conduct discovery. Affidavits may be used by both those supporting and opposing records closure.

Temporary Sealing Orders

Paragraph (5) provides for temporary sealing orders when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before compliance with the notice and hearing provisions can be accomplished. Any temporary sealing order obtained must set the time for the public hearing and require the movant to post notice and

comply with the hearing provisions. A party, including an intervenor, may seek a prompt dissolution or modification of any temporary sealing order.

To be valid, a sealing order must conform to the requirements of paragraph (6). The order must include the specific findings of fact and conclusions of law regarding the standard for sealing set forth in paragraph (1). To avoid unjustified "blanket" orders, each trial court decision must reference the parts of the court records to be sealed and the length of time for which sealing is to occur. Such decisions should be incorporated in separate orders rather than as part of a judgment.

Continuing Jurisdiction

Paragraph (7) affirms the trial court's power to enforce, alter, or vacate its sealing orders. It further recognizes the public's right to intervene before or after a judgment in connection with such orders.[9]

This procedure assures that sealing orders will not exist in perpetuity without the possibility of intervention at some future date when the justification for sealing may no longer be valid. Only those who had actual notice of the original hearing regarding records closure are required to demonstrate a material change of circumstances in order to reopen the sealing issue.

Appeal Rights

Given the importance of appellate review of trial court sealing orders, paragraph (8) provides that such rulings shall be considered final, appealable judgments. In addition to the usual authority to reverse the trial court, appellate courts are specifically empowered to abate an appeal where necessary to guarantee strict compliance with the notice and hearing provisions or to require the trial court to make the specific findings mandated by the rule.

Opponents of the rule urged that trial judges be accorded maximum discretion. The rule recognizes that it is considerably more difficult for an appellate court to exercise genuine review when the only issue presented concerns whether the trial court abused its discretion on good cause. With clearer standards, it is hoped that the trial court will be provided guidance to exercise its discretion in a proper manner, while, at the same time, appellate courts will for the first time have a meaningful standard by which to review secrecy orders.

Paragraph (9) makes Rule 76a prospective except for cases that will be pending on September 1, 1990. Court records exchanged in those cases after that date are subject to the rule's provisions even if they are covered by a prior sealing or protective order. Moreover, any motions in a pending case to alter a sealing order that has been issued before September 1 are governed by the new rule.

Implementation

Texas is the first state to adopt such a comprehensive rule designed to ensure greater openness in judicial processes. Undoubtedly the implementation of the rule will involve some difficulties and will ultimately require further refinement of its provisions.

Rule 76a represents an initial attempt by the Texas Supreme Court to balance the limited interests of litigants in secrecy with the broad public policy favoring openness as well as the important objective that the general public health and safety not be adversely affected by closure in "private" litigation. Texas has adopted the philosophy expressed in *Atlanta Journal v. Long*,[10] during that

Court Secrecy Often Puts Public at Risk

Editor's Note: *This interview with Judge Jim Carrigan of the U.S. District Court in Colorado is reprinted with permission from* USA TODAY *(April 23, 1990).* ©1990 USA TODAY.


Berkley-Lainson

Is increasing secrecy in the courts harming people?

Carrigan: I think it has. I don't think public courts ought to be causing harm.

How are people being harmed?

Carrigan: In product liability cases, for instance. The law provides that if a product is dangerously defective, the user who is injured by it has a right to damages for whatever they've lost. An example is the Dalkon Shield, a contraceptive that transmitted bacteria into the woman's pelvic area and caused infections that caused septic abortions, and all kinds of other complications.

What happens in cases like that?

Carrigan: Let's say someone is burned in an automobile gas tank explosion case, and goes ahead and sues and finds out all the defects that caused that. Then the manufacturer will ask the judge to enter an order that this information isn't going to be disseminated to any other victim or attorney who might have a case.

So other people who may have been injured can't find out and won't sue. Why would a judge go along with that?

Carrigan: The defendant often says to the plaintiff's attorney, "Look, if you'll agree not to disseminate this information to anybody else, I'll give you without any hassle what you're probably going to be entitled to anyway but without the expense and delay of going to the court." Plaintiffs often find that very appealing because they don't have any money. Why should the judge have a dispute with it?

This may all be good for the people and companies involved in the suit. But what about the public? Who protects the rest of us so we know about dangerous products?

Carrigan: The judge has a rule that he has to follow. We call it 26C. And that requires that there be some legal ground for keeping it secret. But judges are very swarmed over with work, overwhelmed in many instances.

Can government agencies that protect consumers get the information?

Carrigan: Not usually. The agreements usually stipulate that the plaintiff's attorney not give this information to any federal or state regulatory agency that might have to do with safety. The Federal Aviation Administration, if they found a defect in an airplane, or the Consumer Product Safety Commission, or the Food and Drug Administration if it's a dangerous drug. Or, for example, these heart valves that have been found to be defective now. That involves the lives of people as well as just their safety.

Doesn't the public's right to be protected outweigh the rights of companies and plaintiffs to keep such things secret?

Carrigan: That's the question: Should this information be made generally available so that other people become aware that certain products are dangerous, such as the Dalkon Shield? Maybe people would have used a different kind of birth control method if that information had been made public a lot sooner. But because of protective orders and because the company didn't publish what it found out about its product in a very timely manner, it didn't become public sooner. So a lot of women got very badly injured and lost babies and so forth.

There's an economic factor, isn't there? If you don't accept this settlement, you've got to go to trial.

Carrigan: Right. It used to be even worse. Until about a year or so ago, there was also a condition frequently attached—the plaintiff's attorney would agree not only to turn all the materials back, but also not to accept any more cases of this type against this defendant. The powers that be have now ruled that it is unethical to even ask for that.

Does that mean the tide is turning against this secrecy?

Carrigan: Maybe. I think plaintiffs are going to be agreeing to them less and less now because they're becoming more aware. After all, the whole idea of litigation is to try to find out what the truth is. And then you say, "Well, let's hide the truth from everybody else who might have an interest in knowing the truth, and make them start all over again."

Is secrecy ever justified?

Carrigan: Obviously, if there is a legitimate trade secret, it ought to be protected so that a competitor can't just bring a lawsuit and get the other party's trade secret and make it public. That's not fair. Attorney-client privilege has some legitimate value to it, so that people can feel more free to disclose to their attorneys all the facts.

Won't companies stop selling products once they know they're dangerous, even if suits are not made public?

Carrigan: In the Dalkon Shield case, the company knew for many, many, many years from letters from their own doctors warning them that this product had very dangerous side effects, but kept on manufacturing them because it was very profitable.

What's the best way to break this cycle?

Carrigan: Perhaps the best way is just what you're doing right now. And there ought to be a presumption that information in court is open to anybody who wants to see it. The person who wants to keep it private has the burden of proof to show that there's some real, substantial reason why it ought to be kept private. There's been more or less a gentleman's agreement between the attorneys handling these matters that has overlooked their long-range impact in an effort to get a faster, cheaper resolution of their own lawsuit.

Is there any evidence that dangerous products have come off the market as a result of disclosure?

Carrigan: Why don't we have Dalkon Shields on the market anymore? Why did we get rid of those gas tanks that were burning up people? You can enumerate as many examples as you want to. There are thousands of them out there. □

court's review of a somewhat more narrow open records procedural rule."

> Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reasons. Like a candle, court records hidden under a bushel make scant contribution to their purpose. □

Notes

1 McGonigle, *Secret Lawsuits Shelter Wealthy, Influential; Jurist Believes Sealing Records Is Undemocratic; Judge Says Privacy Can Help Settle Suits*; Dallas Morning News, Nov. 22, 1987, at A1, col. 1, and A25, col. 1; McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, Dallas Morning News, Nov. 23, 1987, at A1, col. 1.

2 Walsh and Weiser, *Public Courts, Private Justice*, Washington Post, Oct. 23-26, 1988; Mar. 13, 1989.

3 Meier, *System Thwarts Sharing Data on Unsafe Products*, Newsday, Apr. 24, 1988, at 24; *Legal Merry-Go-Round*, June 5, 1988, at 21.

4 *See, e.g.*, Cipollone v. Liggett Group, Inc., 822 F.2d 335, 340-41 (3d Cir. 1987); *In re* Alexander Grant & Co. Litigation, 820 F.2d 352, 358-59 (11th Cir. 1987).

5 For a comprehensive review of protective orders, *see* F. Hare, J. Gilbert & W. ReMine, CONFIDENTIALITY ORDERS (1988).

6 This is a change from the general attitude expressed in Houston Chronicle Pub. Co. v. Hardy, 678 S.W.2d 495, 499 (Tex. Ct. App. 1984, mandamus overruled), *cert. denied*, 470 U.S. 1052 (1984), that the trial court has exceedingly broad discretion in denying third parties "*their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings."

7 734 S.W.2d 343 (Tex. 1987).

8 It is not necessary for an intervening third party to satisfy a standing requirement by showing an actual or threatened injury as was required in Oklahoma Hosp. Assn. v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985).

9 *See* Times Herald Printing Co. v. Jones, 730 S.W.2d 648 (Tex. 1987); Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. Ct. App. 1989, mandamus overruled).

10 369 S.E.2d 755, 757 (Ga. 1988).

11 Since becoming effective in July 1985, Georgia's Uniform Superior Court Rule 21 has provided a strong statement of a public policy supporting openness. However, it does not appear to encompass any pre-trial discovery not filed of record; nor does it enumerate the more complete procedural safeguards in Texas Rule 76a. Concern for unreasonable judicial restrictions on access to discovery materials obtained during personal injury litigation resulted in remedial legislation last year in Virginia (VA. CODE ANN. §§8.01-420.01 (1989)). Regarding legislative consideration of this and similar proposals in other states, *see* Walsh, *Rising Secrecy in Civil Cases Prompts Legislative Backlash*, Washington Post, Feb. 20, 1989. In May, the Florida legislature passed a "Sunshine in Litigation" Act to prevent judicial concealment of any "public hazard," S.B. 278, H.B. 839, 22d Fla. Leg., Gen. Sess. (1990), creating §69.081, Fla. Stat. The law was signed June 1, effective July 1.

SECRECY versus SAFETY

Restoring the Balance

COMMENTARY

BY BOB GIBBINS

In 1984, a San Francisco federal court case set the stage for a display of the potential of protective orders to delay government regulation and conceal threats to public health. It provides a potent look at the workings of secrecy in litigation—and clearly reflects why determined action is essential to restore balance to America's justice system. (For another view, see Arthur Miller's "Private Lives or Public Access," August 1991 *ABA Journal*, page 64.)

That case, *Stern v. Dow Corning Corp.* (U.S. Dist. Ct., N.D. Cal., No. C83-2348), involved silicone breast implants used in reconstructive surgery. The jury rendered a verdict for the plaintiff on her complaint that the manufacturer committed fraud and failed to warn of the potential for severe side effects. The case was settled while on appeal.

After *Stern* was concluded, a protective order demanded by the implant manufacturer remained in force. It prohibited the plaintiff's attorneys and expert witnesses from telling government regulators or anyone else what the discovery documents showed about safety tests of the product.

Even at a 1988 U.S. Food and Drug Administration hearing held to consider requiring implant manufacturers to demonstrate safety, a *Stern* attorney subject to that protective order was unable to disclose information about clinical or animal tests.

A medical school professor who examined more than a dozen breast implant litigation files has been similarly prohibited, by protective orders in every case, from sharing his knowledge of tests with FDA or congressional investigators. Here is an example of a publicly funded inquiry of a possibly dangerous product; yet a medical school professor is legally gagged through a process funded by taxpayers.

The protective-order strategy was used by several manufacturers, and it bought them time. Manufacturers produced and sold implants for at least six years after the *Stern* verdict, until the FDA took its first look at the companies' clinical data in 1991.

The agency concluded that no test results submitted by any manufacturer demonstrated the safety of implants, and one manufacturer has since recalled its entire line and announced its withdrawal from the breast implant market. But while the FDA vacillated and numerous product liability cases were settled with confidentiality "agreements" and protective orders, 150,000 new patients received implants each year.

Secrecy devices have been used increasingly in litigation during the past decade. A comprehensive new study of products liability litigation involving punitive damages awards revealed a marked increase in the use of confidential settlements after 1986. Conducted by professors Michael Rustad of Suffolk University Law School and Thomas Koenig of Northeastern University, the study examined a quarter-century of data.

Recent litigation involving the prescription sleeping medication Halcion further shows how secrecy, along with lax pharmaceutical regulation, multiplies consumer risks. In 1989 a blanket protective order was entered in *Grundberg v. The Upjohn Co.* (U.S. Dist. Ct., D. Utah, No. C89-274), a case that alleged severe, unpredictable mood changes caused by this drug now used by several million Americans. The *Grundberg* protective order effectively made all documents produced by the defendant confidential and required their return or destruction following the conclusion of the lawsuit. But shortly after *Grundberg* was settled, Halcion's manufacturer acknowledged that clinical data submitted to the FDA during the drug approval process were incomplete.

As it stands, the *Grundberg* protective order leaves an unknown number of patients and doctors wondering what caused side effects. Considering that the plaintiff in *Grundberg* had killed her own mother (although charges against her were dismissed because of involuntary intoxication with Halcion), access to complete information is crucial. A consumer organization is now asking the court to modify the protective order.

Other examples of the threat posed by secrecy are, unfortunately, not hard to come by:

▶ A patient with a Shiley artificial heart valve is unable to learn of the danger that the device's mechanism may fracture. She dies when the valve fails, and her husband later learns that the manufacturer secretly settled litigation brought by other victims years before.

In part through that practice, the company avoids the notoriety that could have led to earlier warning of patients and/or withdrawal of the valves from the market.

A congressional investigative report ("The Bjork-Shiley Heart Valve: Earn as You Learn," House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 2/90) cites "numerous instances" of deaths that might have been avoided had patients and doctors been aware of the danger earlier. *Barbee v. Shiley, Inc.* (claim was settled in 1989 without filing complaint).

▶ The widow of a police officer killed in the crash of a traffic-control

Bob Gibbins, a partner in the Austin, Texas, firm of Gibbins, Winckler and Harvey, is president of the Association of Trial Lawyers of America.

ILLUSTRATION BY SAM WARD

plane is denied discovery of evidence of the airplane's design defect because of a confidential settlement "agreement" in another case. The aircraft type is still in use. *Turnberger v. Cessna Aircraft Co.*; Broward Cty., Fla., 17th Jud. Cir. Ct.; No. 83-12392.

▶ A scientist who herself suffered a potentially fatal allergic reaction to a painkiller—later withdrawn from the market—discovers that other victims were similarly affected several years earlier but were sworn to secrecy. She also discovers that some confidential settlement "agreements" even prohibited discussion of adverse reactions in scientific journals. *Davis v. McNeilab, Inc.*, U.S. Dist. Ct., D.C., No. 85-CV-3972 (case settled in 1986).

While private matters having no public impact and true trade secrets justify confidentiality, it is inconsistent with the impartial administration of justice for a publicly created and maintained legal system to help hide responsibility for misconduct.

Events that lead to litigation often have an impact well beyond the immediate parties, and that impact can be deadly. In today's age of mass manufacturing and distribution, a dispute brought before a court can involve a potentially life-threatening hazard that already may have affected thousands of citizens, and may affect even more in the future.

Confidentiality "agreements" in products liability cases can keep information about the dangers of defective products from coming to the attention of government regulators, the news media and others who could alert the public.

And in medical negligence cases, the doctors alleged to have caused an injury may well have other patients undergoing the same procedures. Secret settlements and sealed files can enable physicians to keep practicing without having to account for substandard care. The same concerns apply to injurious behavior in other professions.

In fact, in all types of tort litigation, both the deterrent and compensation functions of the civil justice system can be stifled by secrecy. Beyond leaving past victims ignorant of the cause of their injuries and future victims vulnerable, secrecy also can make it more difficult for victims to prepare and prove their cases.

Secrecy can make it more likely that critical evidence will be concealed or destroyed without ever being discovered.

A legal system that functions in this way is out of balance, which is why there is growing support for changes in court rules and procedures to eliminate unwarranted secrecy. Those who advocate such change seek a fairer balance between privacy and property rights

on one side, and public health and safety on the other. Restoring lost balance also could help to reduce injuries and resulting litigation.

The imbalance in the tort litigation system is rooted in abuses of otherwise legitimate rights. The litigation playing field was level when the Federal Rules of Civil Procedure and other similar reforms of litigation practice were inaugurated in the 1930s. The system at that time provided protection for truly personal information (the reasons why a divorce was sought, or why child custody was refused) and true trade secrets (chemical formulae, manufacturing methods, details of distribution networks).

Some segments of the legal community now attempt to protect classes of information that go well beyond the original plan. They are advised to misuse the "trade secret" and "privacy" labels, claiming special protection for information never intended to have confidential status under the rules of civil procedure, and claiming corporate privacy rights never recognized by American law.

From this attempt to expand the idea of protected information into new areas, there has developed a well-known arsenal of devices intended to protect wrongdoers:

▶ "Agreements" that prohibit disclosure of the compensation paid in a settlement, the names of the parties, and sometimes even the fact that litigation occurred;

▶ Sealed court files that can conceal the very existence of the lawsuit;

▶ Protective orders that require the return or destruction of discovery information after the termination of the litigation, and prohibit sharing discovery material with other attorneys handling similar cases or with government agencies; and

▶ Prohibitions against attorneys handling similar cases in the future.

New secrecy strategies are still emerging. In medical malpractice cases, for instance, negotiated dismissals of individual physicians have been used to keep the doctors' names out of the federal government's data bank of malpractice verdicts and settlements, thus thwarting an important public policy.

Secrecy proponents argue that confidentiality makes litigation go more smoothly and promotes early settlement, and indeed it may—when the advocates of secrecy get their way.

But secrecy also can delay the resolution of litigation, consume large amounts of lawyers' time, and strain the courts' capacity to move cases toward a conclusion—as shown by a recent federal court opinion in *Wauchop v. Domino's Pizza, Inc.* (U.S. Dist. Ct., S.D. Ind., No. S90-496). The plaintiffs in *Wauchop* sought information on the corporation's promise to deliver food by car in 30 minutes or less, arguing that the policy may have led to an auto collision.

The defendants demanded that much of the discovery material requested by the plaintiffs be protected against further disclosure. The court concluded that secrecy was not justified for most categories of the material, but the defendants' demand for a protective order forced the court to read motions, review and analyze numerous discovery requests, and render its conclusions in an opinion and order more than 30 pages long. The judge properly lamented that the federal rules on discovery "should be self-executing through the cooperation of counsel."

To stabilize this out-of-balance system and counteract the harm secrecy can cause, this country needs a strong presumption of openness for court proceedings and records.

We need adequate procedures to ensure that the trial judge will consider the public's interest in information that would be concealed under a proposed protective order. Advocates of secrecy argue that existing procedures already allow courts to consider the public interest as part of the exercise of judicial discretion, but widespread approval of protective orders and confidenti-

ality "agreements" suggests that the public interest has not been made a routine part of the courts' calculus.

The Association of Trial Lawyers of America acted in 1989 to focus attention on the multiple problems caused by secrecy. ATLA's Board of Governors passed a resolution encouraging:

- ▶ Courts to scrutinize requests for secrecy and grant them only when information sought to be protected is a true trade secret or can qualify for some other privilege;
- ▶ Courts to allow sharing of discovery material with attorneys handling similar cases, regulatory agencies and professional boards;
- ▶ Courts to liberally grant relief from pre-existing orders and "agreements" that unfairly impose secrecy; and
- ▶ Attorneys to resist secrecy demands that preclude sharing information with regulatory agencies and other lawyers, and discouraging them from agreeing to proposed secrecy orders.

By now eight states have joined the movement away from secrecy. Some of this initiative has come from judges themselves. In 1990, the Texas Supreme Court was the first court to amend its rules to recognize a presumption of openness for all court proceedings, and to establish procedures to be followed for any request to seal court files.

Court rules with a similar focus on openness have been adopted by the New York State Administrative Board of the Courts, the San Diego County Superior Court, and the Delaware Supreme Court and Chancery Court.

In 1990, a different approach was taken by Florida, which passed legislation that identified a class of dangers as "public hazards," and prohibited concealment of such hazards through judicial processes.

Narrower mechanisms have been adopted in several other states. These include specific procedures to be followed in disclosing discovery material to attorneys handling similar cases (adopted in Virginia in 1989), and standards for confidentiality regarding litigation by and against state government (adopted in North Carolina, Florida and Oregon).

Other bills and proposed court rules are under consideration in many states, most based on either the Texas or Florida models, and usually with the support of consumer, labor, environmental, senior citizen or media organizations.

The mechanics of the new measures aside, an obvious question is what the new rules and procedures change, and what they leave unchanged.

The new mechanisms give no one any new substantive rights of action. They cannot engender new cases. Nor, in any known case, do they expose strictly personal information or reveal genuine trade secrets to the public.

The changes do, obviously, give judges new duties of review in a number of situations. But once it becomes clear that requests for secrecy will be measured against the public interest, the number of secrecy demands should decrease, so that the net result is the same or better than what has been observed in the past.

The same effect should be noticeable in terms of the cost of litigation. Market forces can be expected to work against satellite litigation when clients realize that demands for unjustified secrecy will not succeed, and that they may be penalized.

Perhaps most importantly, the new measures do not infringe on judicial discretion. Indeed, they depend on judges to exercise discretion as much as the former rules ever did. They provide standards to be met by litigants, like many other written standards of proof, and prescribe what the result will be if the judge determines that the standards have not been met.

There is at least some evidence of improvement already. An ATLA member who practices in Minnesota, where no legislation has yet been passed on secrecy, recently observed a dramatic reversal of the Shiley heart valve manufacturer's previous use of secrecy demands, as well as judges' awareness of the issue of secrecy and the potential it has for harm.

These developments suggest that secrecy advocates' dire warnings about increased satellite litigation and diminished access to information are exaggerated. Their predictions imply that America's judges would allow the courts to slow to a crawl, and that members of the bar and the public would accept dramatic increases in litigation costs. Experienced judges and trial lawyers, however, will not tolerate such a result.

The goal here is to have a safer society. One way to attain that goal is to create mechanisms designed to help protect us all. ■

USA TODAY 1/15/92

Today's debate is on **PRODUCT LIABILITY**
and whether courts should allow case files to remain secret.

Open court files to protect public health and safety

OUR VIEW **Judges should make sure that vital data are not kept from consumers or government regulators.**

Two events this week should sound a call to arms for everyone who suspects some courts help some companies play fast and loose with our safety.

First, new concerns surfaced that Dow Corning Corp. rushed its silicone gel breast implants to market despite questionable test results.

The firm denies that — but the Association of Trial Lawyers says secrecy ordered as part of court settlements likely kept test data from regulators for years. The group says one doctor alone — Marc Lappe of the University of Illinois — now is subject to 18 gag orders.

Secondly, the first suit from the 1989 Iowa crash of United Flight 232 was settled out of court. A trial might have resolved who was most to blame and helped other victims seek fair treatment — but the settlement was secret, so other victims are on their own.

Such cases are all too frequent: Companies entice plaintiffs with quick settlements. In return, they ask courts to shroud what went wrong. Many judges, facing clogged dockets, happily agree.

Who does that hurt? It can hurt you:

▶ Government regulators don't see data that could help protect consumers.

▶ Manufacturers have less incentive to change harmful products.

▶ Other victims are denied helpful evidence, and potential victims remain unaware.

Some firms say they need such secrecy to protect trade secrets or prevent nuisance suits. But the public suffers.

Johnson & Johnson got court records sealed in suits filed by people who had suffered harmful reactions to its painkiller Zomax.

Pfizer Inc. got courts to order secrecy in suits over its heart valve — recalled only in 1986, after 160 patients had died.

Consumers clearly need federal and state laws so judges will forbid secrecy if public safety or health is at stake.

Florida now has such a law; six states have court rules favoring openness.

Far too often, though, makers of harmful products still find it too easy to buy silence. That must stop.

▶ Dow Corning halts production, 1D

USA TODAY 1/15/92

Public is protected now

OPPOSING VIEW **Attorney Alfred Cortese says increased access to court records means less justice.**

Whoever said, "There are none so blind as those that will not see," could have been referring to today's editorial opposing court "secrecy." Anyone who sees the recent disclosure of court documents concerning the Dow Corning breast implant as proof that courts are concealing product safety information must have blinders on.

If this case proves anything, it's that the current system works. Courts understand the public's interest in the cases they consider. Current law allows courts to make information public when appropriate, even when the litigants want it kept confidential, so government agencies can do their jobs. The breast-implant case proves the point.

The fuss about court "secrecy" boils down to a nationwide campaign by personal-injury lawyers, fueled by the media, to use bald accusations to destroy beneficial products and privacy rights.

Increased access to court records means more sensationalized stories but less justice for all. Unproved accusations drove the only safe treatment for morning sickness, Bendectin, off the market. They did the same to the Audi 5000. The fact is, the allegations about court secrecy are equally untrue. They are based on innuendo and manipulated facts, not hard proof.

Litigant rights are important, too. A sexual harassment victim ought to be able to sue her harasser without a newspaper printing the intimate details of her sex life. If courts have no authority to protect her privacy, she may forego her legal rights. Also, courts must be able to protect trade secrets from falling into the hands of competitors. Under current law, they can. So far, over 30 states have wisely rejected attempts to turn their courts into information clearinghouses.

Courts balance the need for confidentiality against the need for access in each case. Their ability to maintain that balance should not be restricted.

Alfred W. Cortese Jr. is a partner in the Washington law firm of Kirkland & Ellis.

Privacy, Secrecy, and the Public Interest

by Arthur R. Miller

The following article is derived from a statement of Professor Miller to the Subcommittee on Courts of the Senate Judiciary Committee, made on May 17, 1990.

The public's right of access to information produced in litigation is a subject that raises a variety of issues that are both significant and subtle. Some of them I have studied and previously discussed at length, including the proper functioning of the rules of procedure that govern civil cases as they move through the federal courts, the role of the courts in today's society, and the tension between the right to privacy and the public's right to know.

I served as the reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States when the 1980 and 1983 amendments were proposed and promulgated. Because of my involvement in drafting these amendments, I can say with some confidence that the amended rules, and the remaining rules of civil procedure, are the product of considerable thought, analysis, and discussion at the highest levels of the legal profession. They reflect what we judged to be an appropriate balance between the often conflicting needs of all those who are involved in the litigation process as well as the legal system as a whole.

I am somewhat disturbed, therefore, to discover that the proponents of public access to court documents have started referring to protective orders, authorized by Rule 26(c) of the Federal Rules of Civil Procedure, by the rather pejorative misnomer of "secrecy orders." This nasty epithet implies that they are designed for some fundamentally evil purpose. Further, it implies that those who request protective orders and those who authorize them are engaged in a conspiracy to bury truth. The illogical conclusion of this line of thought is that those of us involved in drafting the rules, and those in the judiciary and the Congress who shepherded them through to promulgation, have unleashed a procedural device capable of subverting truth and justice.

In fact, the opposite is true. A legal system that does not recognize the right to keep private matters private would be far more likely to lead to deleterious consequences—the evil of an Orwellian society where Big Brother knows all. See generally, Miller, *The Assault on Privacy* (Ann Arbor 1971). Although that might not be the result the proponents of public access have in mind, unfettered authority to collect and disseminate private information through the judicial process can, without doubt, lead to that end.

Recognition of a general right of public access to civil litigation documents would be at odds with the

parties' rights to privacy. Litigants do not give up their rights to privacy just because they have walked through the courthouse door. Because of my belief in the importance of the right to privacy in our computerized world, I find it very difficult to accept any proposal that would eliminate individual consideration of the privacy rights of litigants on a case-by-case basis in favor of a presumption of public access. As the District of Columbia Circuit noted in *In re Halkin*, 598 F.2d 176, 195 (D.C.Cir. 1979), "only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain."

Our legal system recognizes a limited public right of access to information used in the courts and justice system. That right most clearly exists at common law and under the First Amendment in criminal cases. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right to attend criminal trial); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend voir dire examination of jurors in criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (right to attend preliminary hearings in criminal trial).

Nonetheless, the United States Supreme Court never has recognized a First Amendment right of access to information used in a civil trial, much less a right of access to information that is merely produced in the course of discovery. Prior to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), courts were divided over whether non-litigants had First Amendment rights in information produced in litigation. *Seattle Times*, 467 U.S. at 25, n.6. Since *Seattle Times*, a few lower federal courts and some state courts appear to have misunderstood the Supreme Court's application of a First Amendment analysis in *Seattle Times* as implicit recognition that a request for access to information produced in litigation implicates the requestor's First Amendment rights. See e.g., *Palmer v. Liggett Group, Inc.*, No. 83-2445-MA (D.Mass. 1988) (order to modify protective order); *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D.Kan. 1988) (order to modify protective orders).

According to the Supreme Court, the right of access exists to allow the public to monitor the functioning of our judicial system: access promotes participation in governmental processes and helps protect constitutional guarantees. *Nixon v. Warner Communications*, 435 U.S. at 598.

It does not follow, however, that this limited right extends to private information about the private individuals or organizations involved in civil litigation. Often information produced in discovery consists only of bits and pieces of information. It is difficult to imagine how this fragmented intrusion into the private affairs of private parties promotes any societal interest; or how it could result in any balanced or fair presentation of the disputed facts. Yet, that is precisely what the proponents of public access claim. They assert that because of some possible public interest in information produced in the course of litigation, there should be a presumptive right of access to that information, whether or not the information is used at trial, (see *In re CBS, Inc.*, 838 F.2d 958, 959 (2d Cir. 1987)), or merely produced in pretrial discovery, and regardless of whether the information is shown to be truthful. Very often, information produced in discovery will tell only one side of the story, raising obvious opportunities for injustice. In light of *Seattle Times*, the position the proponents of public access take clearly is not supported by the law.

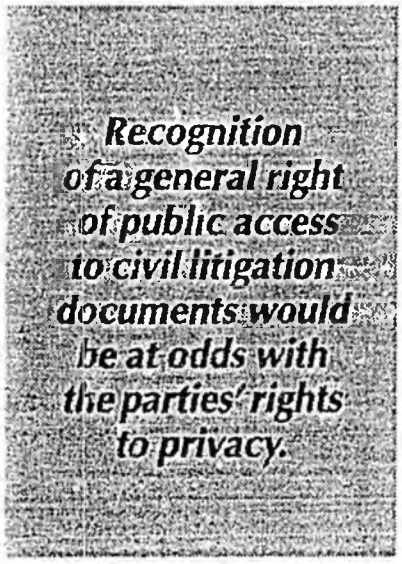
Notwithstanding the settled nature of the law on this issue, the proponents of public access strenuously argue that the public must have access to information produced by private parties at a minimum when that information affects public health and safety. Although this position initially seems to have merit, it fails to come to grips with the critical question: "*Who* decides that information produced in litigation affects public health and safety?"

Under current law, the presiding judge decides what information is relevant at trial and pretrial and whether any information generated in the process should be protected from public disclosure by a protective order. Before a protective order will issue, the party seeking the order must show "good cause," and also must make specific allegations of the harm that will occur if the protective order does not issue. See Wright & Miller, *Federal Practice & Procedure*, §2025. See, e.g., *General Dynamics Corp. v. Self Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973); *Kamp Implement Co. v. J.I Case Co.*, 630 F.Supp. 218 (D.Mont. 1986); *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information. Further, federal judges are the only impartial participants in litigation, and they are in the best position to determine whether any information pertaining to public health and safety is being improperly withheld from the public under cover of a protective order. When that is shown, the judge can modify the protective order to take action to disclose the information to the appropriate government agency. Appellate review also generally is available to ensure the efficacy of the process.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence. If a court concludes that information concerning public health or safety is relevant to the issues in a lawsuit and the information is reliable, the court will admit it as evidence at trial. Evidence admitted at trial generally is available to the public through the traditional common law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or unreliable. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure.

In fact, public disclosure of untrustworthy safety or health information could cause serious public harm. Under existing law, the trial court has the discretion to weigh all of these issues and act in the public's best interest. In the end, only the trial court is sufficiently objective to decide what is and what is not in the public interest.



Nonetheless, the proponents of public access seem to be saying that they should be the ones to decide whether information sought in litigation affects public health and safety. This is an untenable position for several reasons.

First, neither allegations of harm made in the pleadings of a lawsuit, nor information produced in bits and pieces in discovery, rises to the level of proof that some injury actually occurred or is even likely to occur. The Federal Rules of Civil Procedure provide easy access to the judicial system because they only require notice pleading. Discovery is designed only to reveal information which *may lead* to discovery of admissible evidence. See *Conley v. Gibson*, 355 U.S. 41, 46 n.6 (1957) (citing with approval *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)). See also Miller, "The Adversary System: Dinosaur or Phoenix," 69 Minn.L.Rev. 1, 8-9 (1984).

Thus it is virtually impossible to stop a lawsuit at the courthouse door or during the pre-trial process, regardless of the actual merits of the case. Once inside the courthouse, motions to dismiss are not difficult to survive. Rule 15 of the Federal Rules of Civil Procedure sets forth liberal provisions for amendment of pleadings, and motions to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" rarely are successful. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45. *See* 5 Wright & Miller, *Federal Practice and Procedure*, §1357.

Consequently, although the allegations made in a complaint may rise issues that appear to implicate matters affecting the public health and safety, and the bits and pieces of information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive of a litigant's reputation and his business at worst.

Second, it is not altogether unheard of for individuals to file completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to other similarly situated plaintiffs, for a percentage of the damages awarded in subsequent cases. If an individual determined on using the courts in this fashion is allowed to decide what and when information produced in litigation should be available to the public, it is not difficult to see that these individuals invariably will favor public disclosure. A presumption in favor of disclosure allows these individuals to use the courts solely as conduits for finding new clients and other money-making enterprises—an outrageous abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done. I find it difficult to understand why the plaintiffs' bar would support this "presumption of access." In reality it means that the attorney who first uncovered the "public" information would own it. That attorney would become the gatekeeper, charging others for access to it at monopoly prices and denying access whenever it suited his personal predilections. I hardly think that many members of the bar would willingly support this considerable transfer of power from the courts to individual attorneys.

Third, I must return to an issue that has troubled me for many years—the great deference our legal system gives journalists, and perhaps now the advocates of public access, to decide what is in the public

interest. See Miller *The Assault on Privacy*, supra, at 196; Miller, "Press versus Privacy," 16 Gonzaga L.Rev. 843, 848-50 (1981). I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass those to whom the information pertains. Neither the First Amendment, nor these decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

The position of the proponents of public access seems to be that only they, and not our nation's judges, are capable of protecting the public from the harms perpetrated on the public by secretive courts and defendants. These proponents apparently think that only they are capable of meeting the everpresent enemy and that they must continuously sally forth to slay the enemy. This strikes me as a distorted and egocentric view of the universe.

In reality, the proponents of access, whether they are the plaintiffs' bar or the press, are engaged in business and have their own agenda to serve, just like the defendants they pursue. The simple truth is that only the judges can be neutral gate-keepers. Thus, when information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has — within the sound discretion of the court. Only the trial judge has no axe to grind and no pecuniary gain in sight. Existing rules and procedures are more than adequate to accomplish this end.

Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information.

Fourth, my experience tells me that there are reasons to be very concerned about the effect universal public access would have on civil litigation in the federal courts. In the course of invoking the rhetoric of "secrecy" and "public health and safety," those who propose universal access to materials generated in the course of civil litigation ignore many important values that might well be compromised if present practice were to be dramatically altered. "A protective order pursuant to Rule 26(c) may be the least intrusive means of achieving the goals of protecting the fairness of the judicial process and preserving the discovery system.... The only plausible alternative to a protective order may be the denial of discovery altogether." *In re Halkin*, 598 F.2d 176, 195 (D.C.Cir. 1979).

The centerpiece of contemporary federal civil litigation is discovery. Indeed, one of the crowning achievements of the Federal Rules of Civil Procedure is the discovery regime, which seeks to provide the litigants with equal access to all relevant data in the hope of achieving the efficient resolution of cases on their merits rather than through artifice and surprise. The rules, in effect, have taken the position that it is justifiable to intrude on the private affairs of parties and non-parties through discovery in order to permit full preparation for trial.

But that does not make discovery a public process. Indeed, history and practice is to the contrary. It is a private process, with only occasional intervention by the court, and it is intended solely to assist in the process of dispute resolution. Parties are encouraged to reveal information, and occasionally are compelled to do so, under the assumption that discovery materials are being used solely for purposes of the particular litigation and that other uses are inappropriate. This assumption is reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery is not available for use outside the litigation is critical to assuring widespread, voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is particularly true in federal litigation because discovery is given the widest possible berth and tends to produce material that is not used—or even relevant to the case—and which can also be extraordinarily intrusive.

If we undermine the assumption that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted, and expensive. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986). Litigants would be likely to pursue a full trial to bring out the complete story and vindicate their reputations. The time and money of litigants would be wasted; the energies of that most precious resource--our federal judges—would be dissipated. The federal courts' ability to handle major complex litigation and cases involving issues of enormous social importance would be compromised. The net effect might well be a constriction on the flow of information, rather than its expansion.

Cf., *In re Halkin*, 598 F.2d at 195 (denial of discovery to protect confidentiality benefits no one).

Discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, thereby saving themselves and the court system enormous amounts of time and money. Without the guarantee of confidentiality, some litigants will have little or no incentive to produce as much information as possible during discovery, particularly if courts permit public access for reasons unrelated to the litigation. Because an essential precursor to settlement will have been removed, it would be much more difficult to resolve cases. Similarly, the settlement process would be impaired if the parties could not rely on the confidentiality assurances in the settlement agreement. In fact, there would be significantly greater incentive to litigate simply to postpone public access to confidential information. Our civil justice system simply could not function if the settlement rate were to drop or if settlements were delayed to any significant degree.

It always must be remembered that there are many legitimate reasons for litigants, both individual and corporate, to keep information confidential. In addition to concerns about individual and institutional privacy, today's commercial litigation often involves information that is critical to marketing, distribution, product development, and various elements of competition. Eliminating the possibility of maintaining confidentiality throughout the litigation process might well encourage the institution of lawsuits for ulterior purposes.

In short, changing the current protective order practices under Rule 26(c) could have dramatic and unfortunate consequences for civil litigation in our federal courts. Ironically, these consequences probably would be more of a hardship for plaintiffs as a group than defendants, because plaintiffs would have greater difficulty gaining access to data and there would be greater resistance to settlement. Unless litigants are able to rely on the assumption that materials produced in the context of a civil lawsuit will be used only for those purposes, absent a judicially declared supervening interest in public health or safety, many of the objectives of Rule 1 ("the just, speedy, and inexpensive determination of every action"), the discovery regime, the healthy developments in judicial management (as reflected in Rule 16 and in the *Manual on Complex Litigation*), and the ability to achieve settlements could be seriously undermined.

I have a final systemic concern about recognizing a wholesale right of public access to documents produced in litigation: the American judicial system is already unable to resolve civil disputes in an economical, timely fashion. Adding a clearinghouse —or Freedom of Information Act—function to the existing burdens on the courts, which is essentially what the proponents of access advocate, is unjustifiable for even the most compelling reasons because the courts simply cannot withstand the additional workload. As the court said in *Anderson v. Cryovac, Inc.*, 805 F.2d at 12:

> The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this in turn could lead to lengthy and expensive interlocutory appeals....

Discovery was designed to operate extra-judicially. But, because of the complexity and extent of modern litigation, federal judges are overwhelmed with management functions. They are barely able to perform these management duties for legitimate litigation purposes. It is unrealistic to ask them to manage a freedom of information system as well. The Supreme Court recently rejected a similar effort by the press to use an executive agency as a clearinghouse for information regarding private individuals. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S.Ct. 1468, 1475 (1989). There is every reason to believe that the Court would take the same view of the judiciary disseminating information as well.

The law regarding access to documents used in litigation has been settled for decades and it has worked very well. As Justice Holmes said long ago:

> It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917). These words were written regarding the right to protect trade secrets, just one type of information that would be endangered by a universal right of access. Holmes' position was well-founded in 1917 when the decision was rendered, and it is equally appropriate today, because once confidentiality has been destroyed, it can never again be restored.

Arthur R. Miller is Bruce Bromley Professor at Harvard Law School.

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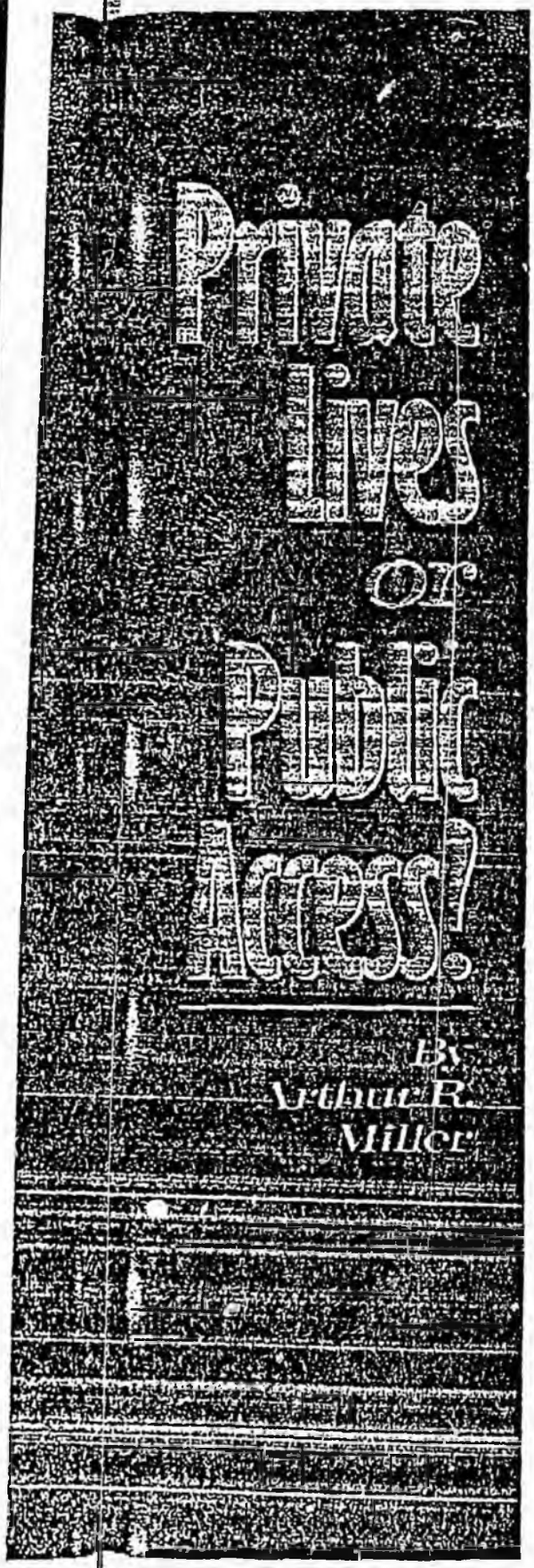


COMMENTARY

The Debate Over Courthouse Confidentiality

By tradition, the American public may view the daily activities of the courts through an expansive window that reveals our civil and criminal justice systems at their best and their worst. Through this window, sometimes garishly illuminated by television lights and press reports, the public has front row seats from which it may observe an endless panoply of lawsuits, litigants, judges and juries.

Like much of our system of justice, the right of public access to court proceedings descends from the English common-law tradition. The right exists to enhance public trust in the fairness of that system, to promote public participation in the processes of government, and to protect constitutional guarantees.

This right of access, however, is not absolute; it never has extended beyond the confines of court proceedings and documents themselves. As Justice Holmes said in *Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917), the trial judge always has had great discretion "to determine whether, to whom, and under what precautions," public access should be permitted. Further, there never has been any right of public access to the activities, discussions and papers of the parties outside of the courtroom during discovery or settlement.

An intense, nationwide campaign is underway, calling for a "presumption of public access" to all information produced in litigation including discovery and settlement. This presumption is necessary, it is said, because courts have disregarded the public interest and as a result have kept important information affecting public health and safety confidential. Thus, the proponents of increased public access seek to transform the halls of justice into walls of glass, so that absolutely nothing is withheld from the public eye.

Such a transformation would be nothing short of a fundamental change in the role of the courts. From its inception, our legal system has recognized a variety of situations in which confidentiality is more than just appropriate, and, in fact, is essential to the even-handed administration of justice.

Discovery, grand jury proceedings, settlement negotiations and jury deliberations are conducted far from public view. Classified government information, intimate personal matters, confidential communications between attorney and client, the identity of confidential news sources or police informers, and proprietary information traditionally have been treated as confidential and public access to such information generally is not permitted.

In each of these instances, confidentiality is essential to accomplish fundamental goals of the justice system and of society in general, goals of greater importance to us than providing the public with insight into the details of a particular case.

The traditional model of civil adjudication in this country envisions private parties bringing a private dispute to a dispassionate arbiter—the judge—for resolution based on neutral principles of law. The judge and, sometimes, a jury consider only the evidence and arguments presented by the parties, apply the law to the facts, and do not inject their personal views.

Nor does the trier consider interests or matters outside the facts of the case. Public access to information produced in litigation always has been a secondary benefit, or side effect, of the primary undertaking of the courts. Allowing public access or public interest in litigation to assume an importance greater than the interests of the private litigants skews the traditional balance, transforming the courts into something other than dispute resolution agencies.

Some public law theorists have suggested that this traditional role of the courts is too narrow, saying that the courts also should involve themselves aggressively in promot-

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School.

All indications are that the current system including the media, has plentiful

ing broad social goals within the context of private litigation.

But a number of states that have considered legislation to restrict the use of confidentiality in litigation have decided that, in light of the broad public access rights already extant, the outcry for a presumption of access is nothing but noise.

So far this year efforts to change the law on court confidentiality in Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Mississippi, Montana, New Mexico, South Dakota and Virginia have failed. These states rejected the kind of confidentiality limitations imposed earlier in Florida and Texas.

New York has adopted a rule to require a showing of good cause prior to sealing court records, which is essentially a codification of existing practice. The New York rule does not, however, affect discovery or the rule regarding protective orders. Legislatures and rule-making bodies in other states are raising serious questions about the need to change the rules on confidentiality, based on their understanding of the important role that confidentiality plays in the justice system.

Confidentiality is an integral part of the civil litigation process, and plays an essential role in fostering the resolution of disputes from start to finish. Keeping communications between client and attorney confidential fosters the candid exchange of information that is vital to the attorney's efforts to serve the client's interests most effectively. The protection of attorney work product prevents unfair intrusion into the mental processes of the lawyer preparing for litigation in an adversary system.

Preventing public disclosure of trade secrets through litigation preserves the valuable investment of the trade-secret owner. Information of an intensely personal nature is withheld from the public to prevent unwarranted invasion of personal privacy.

The rules giving courts discretion to issue confidentiality orders are central to the litigation process. An expectation of confidentiality can be vitally important in overcoming inhibitions in differing stages of litigation: bringing a lawsuit to enforce one's rights; engaging in complete disclosure during the pretrial process; fully airing all issues at pretrial hearings and during trial; and being willing to negotiate a settlement and doing so candidly. Consequently, compromising the court's discretion to protect confidentiality undoubtedly will affect the civil justice process as a whole.

The current movement to restrict judicial discretion in the name of public access does not present an across-the-board challenge to confidentiality. Instead, the movement focuses on protective orders during discovery and court seals or confidentiality agreements during settlement, claiming that these devices are being used to hide important information from the public.

Although these protective orders and court seals are the exception, not the rule, their availability to provide confidentiality during discovery and settlement serves objectives of the justice system as important as the attorney-client privilege, work product doctrine, or the protection of trade secrets and privacy rights.

Wide-angle discovery is central to contemporary civil litigation, and provides the litigants with equal access to all relevant data. But that does not make discovery a public process; indeed, history and practice are to the contrary. It is a private and voluntary process, with only occasional intervention by the court, intended solely to assist in the resolution of disputes. These assumptions are reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery will not always be made available for use outside the litigation assures widespread voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is true because modern discovery has the widest possible berth. It therefore tends to produce large quantities of material that are not used—or are not even directly relevant to the case—but that can be extraordinarily intrusive or extremely damaging if disclosed.

If we undermine the principle that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted and expensive.

Litigants would be motivated to contest discovery requests with increasing frequency to prevent disclosure. More litigants would choose a full litigation strategy, rather than pursuing a settlement, simply to vindicate their reputations by bringing out the complete story concerning information produced in discovery and disclosed out of context. Further, the litigants' time and money would be wasted; the energies of that most precious resource—our judges—would be dissipated. The net effect might well be a constriction on the flow of information, rather than its expansion.

Broad discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, saving themselves and the court system enormous time and money. Without the guarantee of confidentiality, some litigants would have little or no incentive to produce information during discovery, particularly if courts permit public access for reasons unrelated to the lawsuit.

Similarly, the settlement process would be impaired if the parties could not rely on the assurances of confidentiality reached voluntarily in the settlement agreement. In fact, the greater incentive to litigate, simply to postpone or avoid public access to confidential information, would work to the disadvantage of poorer litigants.

Our civil justice system simply could not bear the increased burden if the settlement rate were to decline, or if settlements were delayed to any significant degree, or if the dissemination of settlement details encouraged the bringing of suits that otherwise would not have been brought.

Nonetheless, it is alarming to think that protective orders, court seals and confidentiality agreements are being used to conceal information regarding hazardous consumer products, toxic waste dumps, or other potentially harmful activities. The allegations that courts are concealing such information apparently stems from

works rather well. The public, access to the courts and court records.

news media reports about a handful of cases. According to these reports, were it not for protective orders and court seals keeping this information confidential, the public would have learned about these potential threats to their health and welfare.

These reports, however, do not withstand scrutiny. For example, it was alleged that Xerox had hidden vital information about hazardous-waste contamination of a neighborhood near a New York plant in a sealed court settlement. However, no information of this type was found in the sealed files, which only contained medical records.

In another example, it was claimed that a drug manufacturer hid information about a potentially fatal side effect of a new drug in sealed court records. The facts, however, show that the manufacturer promptly notified the government of the potential problem, published warnings about the potential side effect in the prescription drug manual, and also sent a warning letter to over 100,000 physicians.

Neither of these examples reveals a cause and effect relationship between protective orders, sealed court records, and harm to public health or safety.

Nonetheless, it is argued that once allegations of harm are made, the public should be permitted access to all information subsequently produced in discovery. But that approach inadequately balances the tension between the public's right to know and the important purposes served by confidentiality.

Most jurisdictions have extremely liberal pleading requirements. Thus, it rarely is possible to determine in advance of trial whether allegations of harm in the pleadings of a lawsuit, or information produced in bits and pieces in discovery, rise to the level of proof that some injury actually occurred or is even likely to occur.

Today's rules of civil procedure are intended to make access to the judicial system easy, and to achieve that end, they only require notice pleading.

Discovery is designed only to reveal information that may lead to discovery of admissible evidence. This makes it virtually impossible to stop a lawsuit at the courthouse door or during the pretrial process, regardless of the merits of the case.

Once inside the courthouse, motions to dismiss are not difficult to survive. Consequently, although the allegations made in a complaint may raise issues that appear to implicate matters affecting public health and safety, and information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive to a litigant's reputation or business at worst.

A prime example of precisely this result is the treatment of the Audi 5000, which was claimed to have killed and injured numerous people due to a sudden acceleration defect. Even though no sudden acceleration defect was noted in identical cars sold in other countries, the national media, such as the CBS program "60 Minutes," tried and convicted the vehicle.

American consumers stopped buying it, only to find, after many trials and a National Highway Transportation Safety Administration investigation, that driver error and not a defect in the car itself caused the sudden acceleration. Yet, the car is off the market, and Audi is still struggling to re-establish its former reputation for producing high-quality cars.

Despite the financial tragedy the media and over-eager plaintiffs' bar caused in this instance and others, both the media and the plaintiffs' bar stridently proclaim their "right" to decide what information is of import to the public, to be given unfettered access to that information, and to use it in whatever manner they see fit.

I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass, or even damage, those to whom the information pertains. Neither the First Amendment, nor these decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

We must remember that the proponents of increased public access, whether they are the plaintiffs' bar or the press, engage in business and have their own agendas to serve; they are just like the defendants they pursue who support confidentiality. Given the self-interest of the contending forces, the simple truth is that only the judges can be neutral gatekeepers.

When information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has—within the sound discretion of the court. Only the trial judge has no axe to grind and no prospect of pecuniary gain. Existing rules and procedures are more than adequate to accomplish this end.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence.

Evidence admitted at trial generally is available to the public through the traditional common-law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or unreliable. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure. In fact, public disclosure of untrustworthy safety or health information could cause serious public anxiety and harm.

Also, in today's litigious society it is not altogether unheard of for individuals to institute completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to others, perhaps for a percentage of the damages awarded in subsequent cases—an impermissible abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done.

In all of the fanfare and expressions of concern about the rights of the public, insufficient attention has been given to the rights of the actual litigants, who are in court to resolve very real legal disputes of

Information affecting compelling public interests is available to the public.

great import to themselves.

Due to the invasive nature of the litigation process, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown.

Unfettered authority to collect and disseminate private information through the judicial process raises images of an Orwellian society where Big Brother knows all. Litigants do not give up their rights to privacy just because they have walked through the courthouse door.

Those who drafted the broad discovery procedures in rules of civil procedure did so to improve the dispute resolution system. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access. Because of the importance of the right to privacy, it would be imprudent to endorse any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants on a case-by-case basis.

Another substantive right that litigants often are compelled to place at risk to resolve a legal dispute is the right to the exclusive use of private property. Information is often very valuable in today's society—so valuable that it can be bought and sold for great sums of money. Unlike tangible property, which can change hands without diminishing its value to the current owner, once information has been disclosed, its original owner never again can obtain exclusive possession of it.

To expedite resolution of a lawsuit, rules of procedure can compel both the plaintiff and defendant to reveal information, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may not be involved in the lawsuit, in which a property right exists.

Courts traditionally have issued protective orders to protect property rights in information and to prevent outsiders from gaining gratuitous access to proprietary information to the detriment of a litigant. These protective orders are the most effective means of safeguarding the commercial value of this type of information while still making it available for use in the litigation. The only alternative might be denying discovery of this type of information altogether.

The rights to privacy and property ownership are among the most fundamental rights that we have as

citizens of this country. Any type of governmental intrusion into these rights is costly to society as a whole, and should not be permitted except for the most compelling reasons. A presumptive right of public access to information, the physical embodiment of these rights, would work a wholesale invasion of them—not for some demonstrated compelling reason, but in most instances for no legitimate reason at all.

There is a final systemic concern about recognizing a wholesale right of public access to materials produced in litigation: The American judicial system already is unable to resolve civil disputes in an economical, timely fashion.

To breed "satellite litigation" concerning access to discovery or material settlement information is especially onerous because it undermines a fundamental principle behind these two components of litigation—they both were designed to operate extra-judicially.

Our judges simply cannot assume the additional burdens that satellite litigation over access would create. Adding a clearinghouse—or Freedom of Information Act—function to the existing judicial workload, which essentially is what the proponents of increased access advocate, is unjustifiable for even the most compelling reasons.

It is unrealistic to believe that our judges can examine the masses of discovery generated in today's litigation to determine questions of public access. In *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court rejected similar efforts by the press to use an executive agency as a clearinghouse for information about private individuals. There is every reason to believe that the Court would take the same view of the judiciary acting as an information agency.

The truth is that even if the courts had the resources to assume this function, they are not the appropriate institutions for doing so. Judges generally lack the scientific or medical expertise needed to evaluate properly the complex data and theories routinely implicated when health and safety are at issue.

Indeed, a multitude of expert executive and administrative agencies at the local, state and federal levels already exist for this purpose. If efforts by these agencies are inadequate, it does not follow that their responsibilities should be shifted to the courts.

The balance clearly favors retaining the present practice—relying on our courts to use their discretion to issue confidentiality orders to protect the legitimate interests of the parties, and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Rules of civil procedure, as currently written, allow judges to consider and act in the public interest when circumstances so indicate.

There is simply no reason to believe that current court rules and practices create any risks to public health or safety. Indeed, all indications are that the current system works rather well. The public, including the media, already has plentiful access to the courts and court records; information affecting compelling public interests is available to them. No change to the practice of providing confidentiality when appropriate is needed. ■

BARRON'S
April 2, 1990

Legal Heartbreak?

Pfizer Faces Huge Liability If It Loses a Key Lawsuit

By MAGGIE MAHAR

ATTENTION:
PROFESSOR VIKING BJORK

REF: YOUR TELEX DATED DEC 17 1980

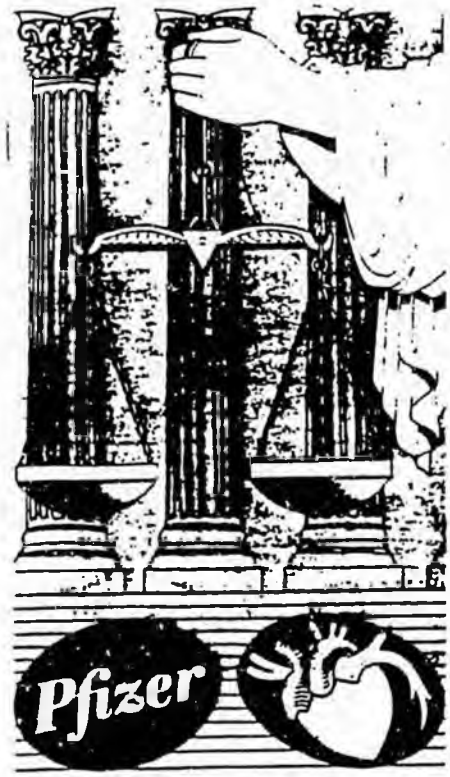
WE WOULD PREFER THAT YOU DID NOT PUBLISH THE DATA RELATIVE TO STRUT FRACTURES. WE EXPECT A FEW MORE AND UNTIL THE PROBLEM HAS BEEN CORRECTED. WE DO NOT FEEL COMFORTABLE. WE WOULD LIKE TO DISCUSS THE STRATEGY WITH YOU DURING YOUR JANUARY 81 VISIT. .

THE telex was signed "Merry Christmas, Paul Morris." Morris was chief product engineer at Shiley Inc., a Pfizer Inc. subsidiary best known as a maker of mechanical heart valves, and he was was sending season's greetings to Dr. Viking Bjork, a Swedish heart surgeon who was then lead investigator on Pfizer's newest model, the Bjork-Shiley convexo-concave valve.

The new mechanical heart valve had won Food and Drug Administration approval a year earlier, and by Christmas of 1980, nearly 23,000 of the devices had been shipped. The company was stepping up production. There was just one hitch. By the end of 1980, six valves had fractured within months of being implanted. In each case, an uncontrolled flow of blood flooded the heart, and the patient died.

But in 1980, the Pfizer subsidiary didn't want Dr. Bjork to publish any data on fractures just yet. As Morris indicated in his communication to Bjork, the company "expected a few more, and didn't feel comfortable" making the problem public until it figured out what was causing the trouble and had "corrected" it. According to the FDA, the problem was never corrected.

In November 1986, six years after Morris sent his Christmas telex to Dr. Bjork, just as the FDA was moving to suspend approval, Pfizer withdrew the convexo-concave valve from the market. By then, 86,000 valves had been implanted, 281 had fractured and 188 patients had died. The company said it was pulling the product only because of "negative publicity," which was dampening its marketing effort.



Disputing the FDA statement that the problem was never solved, Pfizer later claimed that it corrected the fatal flaw, pointing out that valves produced after April 1984 were not fracturing. The company does not claim, however, that it ever found the cause of the problem. In rebuttal, the FDA says that it's too soon to tell whether fractures will take place in valves manufactured after April 1984, pointing out that only about 8,000 of the 86,000 valves implanted were manufactured after that date. In any case, breakage is occurring in the other 78,000 valves, sometimes years after being sutured to a human heart.

No one knows how many of the convexo-concave valves will ultimately fracture. Some 56,000 individuals now wearing the valve can only listen to the quietly reassuring "clicking" sound that the valve makes as it opens and closes. If that sound suddenly stops—they know they're in trouble.

At the beginning of this year, Pfizer reported that 389 valves had fractured, 248 patients had died, and it has been hit with about 200 claims for damages. Pfizer has settled each lawsuit out of court, for amounts reportedly as high as $1 million. Meanwhile, seven shareholders have launched legal action, in seven separate class-action suits, charging that the company failed to disclose information about problems with the faulty valve.

The total number of deaths resulting from fractures is generally agreed to be much higher than the 248 known cases. For when a valve breaks, the symptoms mirror the symptoms of a heart attack, and since the victim typically has had a chronic history of heart disease, autopsies are not routinely performed. Estimates of actual fractures reportedly range from 50% more than the number reported up to 10 times the number. "There is a published report that has alleged the 50% figure; there are 3 published reports that claim 10 times," says William Vodra, an attorney at the law firm Arnold & Porter representing Pfizer. Now some survivors of deceased implant recipients are having bodies exhumed and autopsies performed.

Two months ago, the story took a new, potentially devastating turn for Pfizer. On Jan. 30, a California appellate court ruled that Judy Khan, a 39-year-old implant recipient from Roanoke, Va., can sue for anxiety—even if her valve doesn't break. To win, the court said, Khan must prove "fraud" or "deceit"—i.e., that the company withheld significant information about problems with the valve. The ruling opens the door for the roughly 56,000 implant recipients currently wearing the Pfizer convexo-concave valve.

Pfizer has assured investors that the company's insurance and reserves are adequate to protect it against valve lawsuits. But the company will not disclose the extent of its insurance coverage, or whether it would be covered in the case of fraud. "We have multiple insurance policies from different companies covering different periods of time and different risks," explains Vodra. "We don't have a breakout of our total coverage for potential heart-valve problems. And, as a matter of security, given the shareholder suits, the company would be reluctant to publish such a breakout if they had it."

Pfizer also is asking the California Supreme Court to review the appellate court ruling. But the Supreme Court is not bound to take the case; a decision should be announced later this spring. And, even if the Khan action fails, her attorneys have 161 other plaintiffs ready to bring anxiety suits.

5

In the worst case, the company could be liable for hundreds of millions of dollars of "anxiety" claims. Concern over liability caused Pfizer's stock to drop to below $60 at the end of February from $72 at the beginning of the year. Currently, it's trading slightly above that level. Many analysts have decided that all the bad news has been discounted by the earlier decline in the stock. After all, noted one recent report, "to establish fraud, the plaintiff must prove ... 1) that the company deliberately created misinformation and 2) that the information was created with the intent to injure."

But, in fact, that's not all that counts as fraud in California, the state where the valves were manufactured and where Pfizer's fate will most likely be decided. In California, the law on fraud is very broad, says Bruce Finzen, the attorney representing Judy Khan, and extends beyond willful deceit with intent to injure to include sins of omission or "the suppression of a fact by one who is bound to disclose it, or gives information of other facts which are likely to mislead for want of communication of that fact."

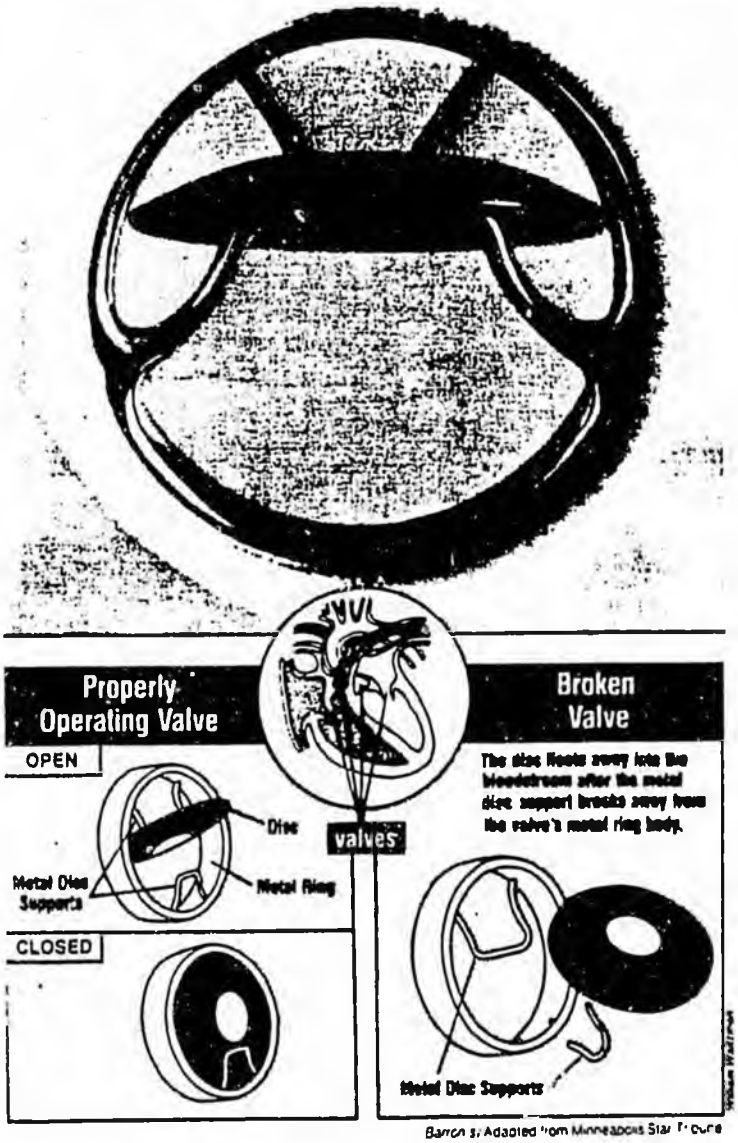
Moreover, according to Finzen, false assurances, or "assertion of a fact that is not true by one who has no reasonable ground for believing it to be true" counts as fraud, too. In other words, as Finzen interprets the state's law: "Maybe I thought it was true, believed it was true, hoped it was true, but I had no specific basis for knowing whether it was true or not. In California, that's fraud."

Pfizer's attorneys strongly disagree. "He's quoting the law on misrepresentation. Misrepresentation is not fraud," says David Klingsberg of Kaye Scholer, Feirman, Hays & Handler, the firm that represents Pfizer.

"The attorney for Pfizer is splitting hairs," observes Jeffrey White, the associate general counsel of the Association of Trial Lawyers of Americ "If Finzen can show misrepresentation—and that the surgeons relied on it—that's fraud. And, from the evidence we've seen so far, in congressional hearings that took place before the House Subcommittee on Oversight and Investigations at the end of February, there's enough evidence to bring a case to trial. Pfizer will have to make its case before a jury."

Finzen's Minneapolis law firm of Robins, Kaplan, Miller & Ciresi was active in the Copper 7 cases against G.D. Searle, represented the government of India in the Bhopal disaster, and won the Dalkon Shield case after showing misconduct by its manufacturer, A.H. Robins.

As problems with the Bjork-Shiley heart valve surfaced, Shiley tried out various manufacturing changes while continuing full-scale production.



Barron's; Adapted from Minneapolis Star Tribune

Currently, Finzen represents some 179 plaintiffs in litigation against Shiley and Pfizer, and he is hoping to break new ground with the Khan "anxiety" suit. He compares the heart-valve case to the Dalkon Shield action in that both are "mass tort" cases. Some securities analysts have assumed Pfizer's exposure is limited because plaintiffs can't bring a class action for fraud, but White explains: "There are several ways to settle a mass tort. You can take all of your cases and put them in one court for the purpose of discovery, for instance. Sometimes you try one issue, then each plaintiff takes it back to his or her court."

In the Dalkon Shield case, settlements of roughly $370 million paid to 9,230 plaintiffs, plus legal fees of about $100 million, drove A.H. Robins, maker of the Dalkon Shield, into Chapter 11 in August of 1985.

But to win his first anxiety case, Finzen must prove deceit. To do so, he says he intends "to discover what the company knew, when they knew it, and what they did about it."

Those were precisely the questions raised by a subcommittee of the House Committee on Energy and Commerce, chaired by Democrat John Dingell of Michigan, in an open hearing Feb. 26, just a month after the California ruling opened the door to anxiety suits. For over a year, the staff of the Subcommittee on Oversight and Investigations had been probing what went wrong with the convexo-concave valve, and the result of its investigation was a 127-page staff report with exhibits that included internal memos from Pfizer and the FDA.

The report chronicles the way Pfizer provided information to the FDA from 1979—when the convexo-concave valve first won approval—to 1986, when the company withdrew it from the market. Appearing at the hearing, Acting FDA Commissioner James Benson testified that the report "dug deeply into the issues we faced. ... We found a few errors, but, in general, I thought the report was good." Dr. Richard Chiacchierini, director of the Division of Biometrics at the FDA's Center for Devices and Radiological Health, told *Barron's* that, to the FDA's knowledge, there were no errors regarding what Pfizer knew, and what it disclosed and failed to disclose to the FDA.

Shiley Inc. developed the convexo-convcave heart valve, in collaboration with Dr. Viking Bjork, in 1976. The invention was meant to be an improvement over Shiley's radio-opaque-spherical valve, the so-called RS standard valve, which had become the Chevy of heart valves. All told, 119,000 RS valves had been embedded in human hearts, and Shiley had captured an estimated two-thirds share of a $100 million international market. But Bjork and Shiley believed that the new convexo-concave valve would reduce thrombus (blood clotting problems at the site of the valve), a side effect that plagued most mechanical heart valves. They didn't expect fractures—that was not a common problem for most mechanical valves. Indeed, of the 119,000 RS valves implanted, only one had ever broken.

But, from the start, the new convexo-concave valve would be betrayed by a weak link—the delicate juncture where one fine piece of metal was welded to another (see drawing). As the congressional staff report describes it: "The valve consists of a disc located inside a metal ring. ... The disc is held in place by two metal holders, called inflow and outflow struts." One of the metal holders, the inflow strut, is an integral part of the ring, but the outflow strut is welded to the ring. In every case in which the valve has fractured, it has done so at or near the point where the outflow strut is welded to the ring, and the result, the report observes, is "an uncontrolled blood flow through the heart. Death has resulted in an estimated two out of three incidences of strut fracture."

The first outflow strut fracture appeared during clinical trials in 1978. Six months later, in February of 1979, Bruce Fettel, then one of the chief design engineers on the valve, and subsequently Shiley's president, appeared before the FDA Circulatory Systems Device Panel. In closed session, Fettel told the panel: "There has been no change in the welding or the fabrication technique or the specifications in the convexo-concave model over the standard (RS) model. We feel that it is an isolated failure ... we can't really explain that one case." Apparently persuaded that the fracture was a freak event, the FDA approved Shiley's new invention for marketing in April 1979.

It was then that Pfizer entered the picture. The New York-based drug company purchased Shiley in 1979, just one month before the convexo-concave valve received the FDA's imprimatur. And, according to the congressional staff report, that same year, a large number of experienced welders left Shiley—as the new valve was moving into full production. "We don't know why they left, and are still trying to ascertain if that assertion is true," says Vodra, the Pfizer attorney from Arnold & Porter. "So far, we haven't been able to prove it or disprove it."

From then on, the number of fractures began to mount. One occurred on July 15, 1979, another on Oct. 20, 1979, still others on May 23, 1980; Sept. 3, 1980; Sept. 22, 1980; Jan. 1, 1981. In each case, the patient died. And, the subcommittee staff report notes, Shiley appeared reluctant to let word of the fatal flaw spread.

Not only did the company caution Bjork not to publish his data about fractures at the end of 1980; it also failed to report the earliest fractures to the FDA in a timely fashion. As a result, the FDA believed that the one fracture that occurred during clinical trials was, indeed, an anomaly. The Dingell subcommitee staff related the chronology of events: "Records provided by Shiley to the subcommittee staff show that the second known strut fracture occurred on July 15, 1979, ten months after the clinical trial fracture. Shiley notified the FDA by phone on March 7, 1980." The seven-month delay was not unique. "While a substantial number of fractures were reported within 10 days as required in conditions attached to the premarket approval, some delays in reporting did occur. Delays ranged from three weeks to as long as 24 months," according to the report.

"The premarket approval only required that the company report 'unexpected' events, events not seen in clinical trials," notes attorney Vodra. But the one fracture in clinical trials, according to Fettel, Shiley's design engineer, was an "isolated event."

Shiley appeared fearful of creating anxiety in the medical community. "For example," the subcommittee staff report says, "in a Feb. 5, 1980, 'Dear Doctor' letter, Shiley told cardiovascular surgeons that it had recently been informed of one strut fracture similar to one that had occurred during clinical trials. In reality, Shiley was aware of at least two strut fractures occurring after clinical trials—July 15, 1979, and Oct. 20, 1979."

Meanwhile, production soared from 5,715 valves in 1979 to 17,529 in 1980 to 25,647 in 1981. During these years the company continually tried new manufacturing procedures and quality controls, and even recalled specific lots of valves, followed by letters to doctors that indicated the problem may well have been isolated. To illustrate, on Sept. 1, 1982, Shiley wrote: "Since February 1982, all sizes of valves have been subjected to the new Quality Control test. We are pleased to inform you that to date, there have been no strut fractures reported among the more than 16,000 Bjork-Shiley Convexo-Concave Valves distributed with the new Quality Control test. We will continue to provide you with updated results with regard to valves from this group."

But in each case, Shiley's reassurances proved premature. The Dingell subcommittee staff report notes: "Fractures occurred after each of these changes. Shiley clearly did not allow enough time to pass before assuring the medical community that the problem had been identified and solved."

Roger Sachs, vice president and medical director of Shiley, disagrees: "The company was not assuring the medical community, it was informing."

In retrospect, Richard Martin, Shiley's engineering product manager from 1981 to 1984, testified in a 1987 deposition that it would have been a "terrific idea" for the company to have simply halted production, and focused on solving the problem rather than continuing to sell faulty valves. Instead, Shiley tried out various manufacturing changes on a trial-and-error basis, while continuing full-scale production—a strategy that the subcommittee staff report characterizes as "earn while you learn."

Testifying before the Dingell subcommittee last February, Bruce Fettel, the design engineer who became Shiley's president, explained why Shiley didn't halt production. Rep. Ron Wyden of Orgeon put the question: "Did you ever, during your tenure at Shiley, Mr. Fettel, put forth or entertain the idea that it might be a good idea to cease the operations until a solution to the strut fracture was found?"

Responded Fettel: "Every day and every night, almost. I mean, I lived with this problem for years and we were constantly evaluating the risk and the benefit, but at the same time, I was directing a company that was manufacturing many other products, not just this one ... and the other divisions within the company under my responsibility seemed to be going well every place else except for when there was a strut fracture, everybody pointed their fingers at all the things we were doing wrong."

When asked why the company sent that Christmas telex urging Bjork not to publish data informing the medical community about fractures, Fettel replied: "We were concerned that Bjork was going to publish only his strut fractures. ... We were trying to face it down and see if, in fact, they were real, and make sure that when Bjork published, that he would include all of the data and all of the information we knew about at the present time and not just represent it as being a small problem."

Fettel insists that when the company told Bjork not to publish, it was, in fact, telling him *to* publish: "So, although it reads like we were trying to keep him from publishing, in fact, we were trying to get him to publish the entire story."

Later, Fettel testified that the company didn't want to pull the product because "in the years '80 to '82, we were supplying—I would guess, more than half of the heart valves in the world. To cease production ... we felt there would probably be a supply void. ... Shiley is and was a caring company. We cared for the patients with valvular heart disease."

Bruce Finzen, the attorney representing Khan, notes that there were other products on the market to fill the void: "Their own RS standard valve, the valve that the convexo-concave valve was meant to replace, was still in the market—and some doctors, who didn't want to switch, continued using it through the mid-'Eighties. Their competitors also had mechanical valves on the market. The real problem is that Pfizer feared losing market share."

Dr. Robert Frater, a professor of cardio-thoracic surgery at Albert Einstein College of Medicine Hospital in New York who has been testing heart valves, including Pfizer's valves, since 1960, comments: "Their own RS standard valve had worked well. Was it perfect? No. It had a small disadvantage, a small tendency to thrombus [a blood clot causing the valve to stick]. They tried to correct that disadvantage, they shifted the axis, and somehow they missed the change in stress. I don't really think they tested the convexo-concave valve properly. If they had, they would have known there was a problem. That first RS valve was a good one. It fractured only once. There are thousands and thousands of patients doing all right with it."

ATTN: DONALD SHILEY, CHIEF OF BOARD OF DIRECTORS
BRUCE FETTEL, PRESIDENT
BOB ELLIOTT, VICE PRESIDENT
PAUL MORRIS, CHIEF PRODUCT ENGINEER

HAVE YOU NOT YET REALIZED THAT STRUT FRACTURE IS ONE QUESTION BROUGHT UP WHEREVER I APPEAR.

SHOULD THEY ALL BE RE-OPERATED??

WHAT ARE THE RISKS??

YOU HAVE PROVIDED ME WITH ABSOLUTELY NO FA
WORTHY DATA FOR THE FUTURE.

YOUR REPUTATION IS DEPENDING ON SOME RADIC
ACTION IN CHANGING YOUR MANAGEMENT.

I AM TRYING TO HELP

VIKING O BJORK
PRESIDENT OF THE EUROPEAN CARDIOVASCULAR

Dr. Viking Bjork

Frater himself has been using and testing a variety of mechanical valves since 1960, when, he recalls, "I made the second successful mitral valve replacement—on my kitchen table in a Quonset hut at the Mayo Clinic." Today, he says, his hospital uses two or three different mechanical valves, depending on the patient's needs.

But Frater is not able to use what he calls "undoubtedly, a superb valve," a valve that Shiley now sells in Europe, but that hasn't won FDA approval for sale in the U.S. The reason that it hasn't, Frater believes, is that Shiley poisoned the well with the FDA.

"Bruce Fettel behaved like a jerk," Dr. Frater says. "He tried to stonewall the FDA. If Bruce had had any sense he would have said, 'We're going to stop production, take a six-month hit, and get a new valve ready.'

"They were already developing a new monostrut valve, which they began selling in Europe in 1983. First, they had the RS valve, then they invented the convexo-concave valve, and then they introduced the monostrut valve. It isn't welded, it's made in a single piece, and it doesn't break. I've read the reports from colleagues using it in Europe, and those reports tell me that it's a very good valve.

But now, the FDA will never approve it. The FDA was burned by Bruce, and they're not going to approve the monostrut for marketing here." (The FDA says it is still considering the monostrut, but is awaiting further clinical evidence before reaching a decision.)

But in 1980, Shiley didn't have the monostrut ready for market. And, according to Frater, it didn't want to undermine its own credibility by telling doctors to switch back to its RS standard valve. So, the Pfizer subsidiary kept trying to mend the convexo-concave valve.

Indeed, in 1980, the company came up with a new, improved version of the convexo-concave valve, a valve with a wider, 70-degree opening. Shiley soon began turning out 70-degree convexo-concave valves, and beginning in 1980, sold them abroad, while continuing to manfacture the original 60-degree variety for sale in the U.S. The hope was that the 70 degree convexo-concave valve would prove more durable, and in time would win FDA approval, replacing the 60-degree original.

Later study showed "the 70-degree valve was more deadly," alleges the Dingell report. "Over 4,000 people would be implanted and the fracture rate for 70-degree convexo-concave valves would be found to be seven times that of the 60-degree convexo-concave valves. Also, Shiley was in such a hurry to introduce the 70-degree convexo-concave valve that early production was achieved by converting existing 60-degree convexo-concave valves to 70-degree valves through remilling. ... As of June 30, 1989, 94 fractures have been experienced with 70-degree valves and 70 people have died."

"The remilling didn't effect the outlet strut, the strut that broke. We were remilling the inlet strut," contends Dr. Sachs, Shiley's medical director. "But in the light of understanding gained some years later," he concedes that "the remilling might have contributed to fractures by adding to the stress on the valve when it closed."

The FDA never approved the 70-degree version for marketing in the U.S., but it did give export approval. Working at his clinic in Sweden, Dr. Bjork, Shiley's lead investigator, was among the first to realize that the 70-degree convexo-concave valve was a lemon, and he tried to sound the alarm.

On March 14, 1982, Bjork sent a lengthy telex to Bruce Fettel, Shiley's president, and Paul Morris, chief product engineer:

LAST NIGHT A 60-YEAR-OLD MAN WITH A DOUBLE VALVE REPLACEMENT PERFORMED AUGUST 24, 1981, WITH 70 DEGREE VALVES HAD RUPTURE OF THE SMALLER STRUT AND PULMONARY EDEMA.

DURING THE NIGHT, I REOPERATED THE BROKEN MITRAL VALVE AND THE LOST STRUT WAS LOCALIZED IN THE PULMONARY VEIN. THE PATIENT HAS NOW AWOKEN, BUT HAS NEUROLOGICAL SEQUELE. IT IS EVIDENT BY NOW THAT THE MANUFACTURE OF THE VALVE IS NOT ACCEPTABLE. THE SMALL STRUT MUST BE MADE IN ONE PIECE AND MUCH MORE EFFORT AND PRIORITY MUST BE PUT ON THIS THAN HAS BEEN DONE SO FAR.

YOUR PROGRAMMED CONFERENCES IN ATLANTA AND CALIFORNIA IN THE END OF AUGUST ARE EXTREMELY ILL TIMED BEFORE AN ACCEPTABLE PRODUCTION CAN BE ACHIEVED.

DEAR FRIENDS, I AM SERIOUS.

On March 29, Dr. Bjork sent a second, longer warning:

GENTLEMEN,

HAVE YOU NOT YET REALIZED THAT STRUT FRACTURE IS ONE QUESTION BROUGHT UP WHEREVER I APPEAR?

... G. CARLSSON OPERATED ON 14 OCTOBER 1981 HAD A STRUT FRACTURE MARCH 27, 1982, AND DIED AFTER REOPERATION.

THE SAME DAY ANOTHER PATIENT WITH MITRAL VALVE DIED AFTER REOPERATION FOR STRUT FRACTURE....

AN INTEGRAL MONOSTRUT MAY BE THE ONLY ANSWER.

YOUR CIRCLING AROUND WITH OTHER SOLUTIONS IS PROBABLY A WASTE OF TIME. AT THIS STAGE WELDING WILL NOT BE ACCEPTABLE ANY MORE.

OTHER FIRMS DO ONE PIECE METAL HOUSING, FOR INSTANCE. OMNISCIENCE.

YOUR STATEMENT RE STRUT FRACTURE THAT I JUST RECEIVED ONLY TELLS ME THAT YOUR MANUFACTURING PROCEDURE IS NOT ACCEPTABLE. YOU HAVE PROVIDED ME WITH ABSOLUTELY NO FACTS AND TRUTHWORTHY DATA FOR THE FUTURE.

YOU MUST FINALLY BRING THE ART AND TECHNIQUE OF MANUFACTURE UNDER YOUR OWN SUPERVISION.

IF VALVE RING WITH MONOSTRUT CAN BE DONE AS YOU HAVE STATED, WHY DON'T YOU TAKE THE TROUBLE OF DOING IT? SOMETIME YOU HAVE TO MAKE A SINCERE EFFORT TO START AND TO PUT ALL YOUR RESOURCES INTO THAT ADVENTURE.

YOUR REPUTATION IS DEPENDING ON SOME RADICAL AND QUICK ACTION IN CHANGING YOUR MANAGEMENT.

IN MY EARLIER DISCUSSION WITH LAUERBACK, HE PROMISED TO PROVIDE YOU WITH THE NECESSARY MONEY TO BUY NEW MACHINERY, INVENTORY AND KNOW-HOW. I WILL CONTACT THEM AGAIN.

I AM TRYING TO HELP.

VIKING BJORK
PRESIDENT OF THE EUROPEAN CARDIOVASCULAR SOCIETY

Questioned about the telexes during the subcommittee hearings, Fettel explained that Bjork was "frustrated" because he wanted to move ahead on the one-piece monostrut. It was then March 1982, and fractures at that vulnerable welding point were mounting. By the end of that year, 41 of the 60-degree convexo-concave valves had broken, and eight 70-degree valves had failed, raising the death toll to 42.

Meanwhile, only when the Australian Embassy sent notice of two fractures to Washington did the FDA discover that the 70-degree convexo-concave valves being marketed abroad were fracturing. Following that warning, in November 1982, FDA inspectors visited the Shiley plant and requested information on the total number of fractures.

"Shiley refused to provide them with that information because it contended that since the 70-degree convexo-concave valve was not used in the United States, it was outside the jurisdiction of FDA and Shiley was not obligated to provide that information," the subcommittee staff report says. "At the time, Shiley had been notified of a total of seven 70-degree strut fractures. It was only

after FDA officials in Washington, D.C., threatened to withdraw export approval of the valve that Shiley provided information."

Meanwhile, Shiley applied for Investigational Device Amendments to begin clinical trials for the 70-degree convexo-concave valves in this country. The company acknowledges that it informed the FDA of only one of three 70-degree fractures that occurred while the FDA was reviewing its application. When *Barron's* asked about the omission, Pfizer explained that the fractures took place two days following submission of the application and were not reported because the company felt it was going to be turned down, anyway. And indeed, the FDA rejected the application on other grounds.

Finally, on Jan. 11, 1983, the FDA suspended permission for Shiley to export any more 70-degree convexo-concave valves. But the FDA could not stop Shiley from marketing the 70-degree valves that had already been shipped.

On Jan. 25, 1983, two weeks after the export pass was suspended, Larry Wettlaufer, director of sales at Shiley, telexed distributors in 17 countries:

THE BRUSSELS OFFICE HAS A COMPLETE LISTING BY SIZE ... OF THE APPROXIMATELY 1,500 70-DEGREE VALVES NOW IN INVENTORY IN VARIOUS PARTS OF EUROPE. YOU SHOULD CONTACT THE BRUSSELS OFFICE IN ORDER TO MAKE USE OF THE VALVES BEFORE ORDERING THE 60-DEGREE CONVEXO-CONCAVE OR SPHERICAL (RS) DESIGN FOR SHILEY.

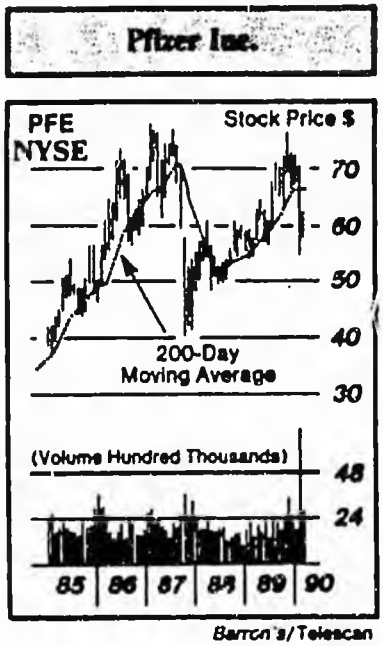
Pfizer attorney William Vodra says that "Wettlaufer thought it was a temporary suspension; Shiley was applying for reinstatement of the export permit and hoped to get it."

The telex was sent early in 1983. Over the next year, another 20 of the 70-degree valves would fracture, accounting for 17 additional deaths. In 1984, 15 fractures, 12 deaths. In 1985, 10 fractures, eight deaths. By January 1990, three fatal fractures brought the total to 94 fractures and 70 deaths among some 4,000 individuals wearing the 70-degree convexo-concave valve. Meanwhile, the company continued producing the 60-degree convexo-concave valves, sold in the U.S. from 1979 to 1986. By January 1990, the 60-degree version had experienced 295 fractures causing 178 deaths. All told, the two valves had suffered 389 fractures, and caused 248 deaths.

According to recent medical literature, it now appears that some 500 especially large 70-degree valves are considered so fragile that doctors who implanted these valves are advised to consider putting the patient back on the operating table, and replacing the valve.

"We're concerned about the option of elective replacement because it carries a high risk of mortality," says Pfizer's Dr. Sachs. "In general, we are advised that it's not appropriate, though with this one group of valves, some doctors feel it is indicated on a patient-by-patient basis."

The year that Pfizer stopped shipping the 70-degree valves, 1983, was also the year that one Shiley employee, George Sherry, launched a campaign to inform top management of what he saw as sloppy manufacturing practices at the plant. When he felt his warnings were falling on



Barron's/Telescan

deaf ears, the tool design engineer quit his job.

"I didn't particularly want the job working on that valve—I knew they had problems," Sherry recalls. "When I was transferred down there, in September of 1982, I saw the drawings were a mess. I requested a meeting with Jack Coggan, senior manufacturing manager, and Frank Haskins, vice president of manufacturing. I have all my handwritten notes from that meeting. I explained that the parts did not fit the drawings. I said, 'I know this is sensitive, you set the tone as to how it should be handled. But something has to be done.'

"They looked at me, like, 'Who is this dip-s———?' Jack Coggan, who was senior manufacturing manager, said, 'I'll tell management what I want them to know.'" Pfizer's attorney says that Coggan is not available for comment.

"As I got into the manufacturing process," Sherry continues, "I discovered what condition the tools were in, how they were keeping them. It was all a horror story, the welding was a half-hearted effort, at best."

Sherry alleges that Shiley's welding effort was slipshod, in part because the company hoped to soon switch over to the monostrut, the one-piece valve that requires no welding. "People told me, 'Hey, we're not going to be making these much longer anyway; soon we'll be making the monostrut.'" (Shiley began manufacturing the monostrut for sale abroad within a year, but hadn't received FDA approval to sell the device in the U.S.)

After four or five months, Sherry says, "I realized that they didn't want this problem solved. They wanted it hidden. At the end, they were harassing me. My supervisor, a young guy, started writing out hour-by-hour assignments of what I should do. Finally, I walked out." Today, Sherry is a senior engineer at a major aerospace corporation in Southern California.

But even though he quit, Sherry continued to try to warn management. This time, he went to the top—to Pfizer—phoning both Edmund Pratt Jr., chairman and CEO of Pfizer, and Ed Bessey, CEO of the Howmedica division, which oversaw Shiley. Bessey returned his call.

"The day I quit, I called Ed Bessey, and the first time, I talked to Bessey for half an hour or 45 minutes," Sherry says. "He kept saying, 'What do you want out of this?' I think he thought I wanted money, or to have someone fired. I told him, 'I don't want a damn thing. I just want you to take the product off the market and fix it.'"

Vodra. Pfizer's attorney, says that Bessey is not available for comment on this or any other matters relating to the heart valve. He adds that the company has no comment on Sherry's story.

Sherry claims that he had at least four conversations with Bessey, and was also visited in his home by Richard Myerson, director of research and development for Pfizer's Howmedica division, and Phil Kearns, vice president of personnel.

An internal Pfizer memo confirms the home visits. It begins by describing Sherry: "Sherry is from Pennsylvania coal country. He has no formal engineering training. Nonetheless, he appears to be bright. . . . He produced very detailed layouts of the 29mm convexo-concave valve in 20:1 and 10:1 scales. He also produced a cardboard cutout of the disc. He claims the valve cannot be built to the specifications. . . ."

The memo goes on to list Sherry's complaints:

- "The wire used for the strut is not good enough quality for a product as critical as a heart valve."
- "The tools in use did not conform with the tool drawings."
- "He felt the disc fitters work the valves too many times."
- "He was critical of the reweld process and claimed it can't be done after polishing."
- "He was critical that welders are not certified."

The list continues for four pages.

At the end, the memo returns to the executives' impression of Sherry:

"Sherry's home is pleasant, and is decorated with family portraits and an end table book on the Bible.

"Sherry admits to being a 'nit-picker.' Sherry appears to be a very intense man. He appears to be genuinely concerned for the safety of patients and that concern seems to be his sole motivation.

"Sherry offered drinks but there was no indication that he is a heavy drinker. For example, though the group had two drinks during the interview, Sherry only sipped his. . . .

"Sherry is a very concerned individual with no ulterior motives. . . . After being ignored by Shiley, Sherry now 'needs' some attention from Howmedica Management. If not, he will look for attention and vindication elsewhere."

And in 1984 Sherry contacted the Public Citizen's Health Research Group, a Nader health organization based in Washington, D.C.

But in the meantime, Ed Bessey, CEO of Howmedica, the Pfizer division, did attempt to respond to Sherry's charges. In 1983, a Howmedica team went to the Shiley plant to observe manufacturing processes.

Internal memos reveal what various members of the team observed and heard at the plant. Some of their comments:

"Measurement techniques are poor."

"There are no real controls on the welding equipment."

"Shiley has had tremendous growth but their management systems have not matured with the company."

"Fettel appears to not want to make money and people available to solve the problems."

"Equipment and techniques don't appear to have been created for the product, but rather were adapted from the other products."

"Shiley relies on final product inspection only."

"The design concept appears poor in that the 29mm valve is probably underdesigned."

"Since the reorganization, Personnel finds that Quality Control staff individuals are not rated as highly as they were. . . . (Marano wonders if this is because they may be too quality-oriented rather than sharing the goal of moving production along.) [Marano was director of quality assurance for Pfizer's Hospital Product Group.]"

"Reportedly Quality Control operators were unhappy with their treatment. . ."

"There is concern by Quality Control inspectors that their work is not important, that they will be overruled if necessary to meet production goals."

By February 1984, Henry Andrews, a senior metallurgist at Howmedica, reviewed manufacturing of the convexo-concave valve and sent a handwritten memo to Richard Myerson, head of research and development at Pfizer's Howmedica.

Among other things, Andrews's memo observed that Shiley's welding practice was "out of control—not monitored," and that in a 1983 welding study, "Dr. Shim [a Shiley engineer] admitted that some of the dialogue was *massaged* because it was expected that the FDA would see the final report" (emphasis in original).

In the Dingell subcommittee hearings, Richard Myerson, the retired head of Howmedica's research and development who reviewed the memos, read a prepared statement, which concluded: "Anytime you ask someone to do an audit . . . they are going to find things to criticize. . . . Therefore, the comments and advice, in retrospect, are not a negative view of Shiley; they are a positive aspect of the vigor with which both the panel and Shiley conducted their investigation."

Testifying before the Dingell subcommittee, Pfizer executives explained that the Howmedica team was only trying to improve an already good process. The FDA disagreed. "I'm quoting from their reports, they used the phrase 'out of control,'" observed Daniel Chwirut, an FDA engineer. "That's not a phrase that I use when I'm talking about fine-tuning a good process."

"In my opinion, the problem was a quality control problem. It wasn't a design problem."

Chwirut was the engineer the FDA sent to inspect Shiley's plant in September and October 1984—shortly after George Sherry went public with his complaints.

As a result of his reviews, Chwirut testified to the committee, he concluded "that Shiley's processes were not the best," and "that they were definitely being less than fully honest with the agency in terms of submitting data that we had asked for in a timely manner."

When Rep. Wyden asked, "Do you feel that they were insincere in terms of their dealings with the FDA and their approach to solving these problems?" Chwirut replied, "Yes, I do."

In a written report following his September 1984 inspection, Chwirut cited 13 violations of good manufacturing practice. These included a "failure to ensure that all employees are trained in the proper performance of their jobs ... Specifically, an operator improperly performed the disc assembly operation on two consecutive monostrut heart valves by performing the final bend of the outlet strut in the 'down' direction. This is in direct conflict with the ... specification which requires final outlet strut bending in the 'up' direction. When pointed out to the operator, she commented that it is much easier to make the final bend in the down direction."

Chwirut testfied that "some of the violations were extremely significant relative to the strut fracture problem. ... Two that immediately come to mind would be in the area of rewelding, and the lacking of entry on the device history records as to the number of rewelds. ... The other one would speak to their quality control operations where they allow supervisors to unilaterally overrule a quality control inspector with no rationale."

According to Chwirut, the valve had been "marginally designed," leaving little room for error: "By 'marginal design,'" he said, "I mean that the valve would be very sensitive to minor variations. ... You would have to have almost perfect manufacturing operations in order to get a valve to function properly; if any little thing went wrong in the manufacture, it could lead to disaster."

The valve broke at the welding point, Chwirut said, partly because of welding problems, partly because "metallurgically, it's the weakest part of the device," and so any problems or variations in the manufacturing process could put added stress on that welded spot. Chwirut testified that, regardless of marginal design, "in my opinion, the problem with the strut fracture of this valve was a manufacturing quality control problem. It wasn't a design problem."

In April of 1985, Shiley responded to the charges of good-manufacturing-practice violations that followed from Chwirut's review by dismissing them as "technical critiques," and pointing out that it was already implementing several changes in its operating procedures.

In July 1985, the FDA asked its Los Angeles district office to follow up and determine if the changes were adequate to meet the violations Chwirut had cited.

Gregory Nelson, FDA compliance officer at the district office, replied with a long letter that said in part: "... What is to be gained by another inspection? When is enough enough?

"Shiley is producing a heart valve that demonstrates a nearly unique failure phenomenon—strut fracture. Well over 100 fractures have thus far been reported. No matter how euphemistically one wants to characterize the situation, a substantial number of human lives have been adversely affected by this large number of product failures. Whether the overall failure rate is statistically impressive or not, the problem has a major public health impact. We should seriously consider prohibiting the firm from further marketing of the valve, unless and until they can demonstrate conclusively that they have resolved their valve problems. ..."

But the FDA did not follow Nelson's recommendation. Instead, in September 1985, the agency, still attempting to assess Shiley's manufacturing and quality-assurance procedures, asked Shiley for studies in 15 areas of concern. Shiley responded on Sept. 30 by submitting 300 documents, which it took the FDA more than six months to analyze. Chwirut, the FDA engineer who analyzed this data, described Shiley's document submission in his report as a "data dump without analysis."

Dr. Sachs, Shiley's medical director, replies: "They said, 'We need everything you have in 15 days.' We gave them everything we had in about 16 days. We also gave them a 50-page summary. We believe we gave them what they asked for."

But in the Dingell hearing, Chwirut stood by his assessment: "My phrase was a data dump. They gave us all the documentation they had that could possibly relate to those things. The documentation was very poor. There was duplication, irrelevant documents. It made it very difficult to do our job of trying to analyze those data to formulate responses to the 15 questions that we had asked."

Rep. Wyden asked: "Would it be fair to say that if Shiley was deliberately trying to slow down the job of FDA in getting at this, this was a pretty good way to do it?"

Chwirut: "They did a good job."

Wyden: "What about the summary which accompanied the 300 documents?"

Chwirut: That was a very important and very useful summary. That report contained a lot of the information, for example, that should have been submitted in PMA supplements earlier, that we had never seen before. ... What it didn't do was show the relevance of all of the supporting documentation to answering the 15 specific questions we had asked."

More than a year later, in November 1986, Shiley withdrew the convexo-concave valve from the market—after learning that the FDA was about to convene an advisory panel to reconsider its approval. What prompted the FDA to act was not manufacturing violations,

out its conclusion that the convexo-concave valve had no unique attributes that outweighed the risk of fracture; that, in fact, when compared with Shiley's older model, the RS standard valve, it had no demonstrated advantage at all.

From the start, the company's premise was that the convexo-concave valve would reduce fatal blood clots, which were the basic drawback to Shiley's RS standard valve. The benefit of reduced blood clots supposedly would more than compensate for the greater risk of fracture posed by the convexo-concave valve. This risk/benefit analysis was Shiley's rationale for continuing production, even as the valves fractured.

"In July of 1984, Shiley gave us data comparing the convexo-concave valve to the RS valve over a period of time which showed a distinct advantage," says Dr. Richard Chiacchierini, director of the Division of Biometric Sciences at the FDA's Center for Devices and Radiological Health. "But then we asked for actuarial comparisons—comparing an RS valve that has been implanted for six months to a convexo-concave valve that was in for six months, an RS valve implanted for a year to a year-old convexo-concave valve; that data wasn't yet available." Chiacchierini grants that considerable time was necessary to generate such exact comparisons.

Over the next two years, the FDA continued to request various types of comparative data and, in September 1986, the company turned in the last of the benefit data. "Our evaluation indicated there was not a demonstrated advantage for the convexo-concave valve," Chiacchierini states, "and we began proceedings to convene a panel to discuss withdrawal of the valve."

Within weeks, citing adverse publicity that made the product no longer commercially viable, Pfizer took the convexo-concave valve off the market. Recently, the company has commissioned new studies to show the benefit of the convexo-concave valve, but after review, the FDA sees no reason to change its view that the device had "no statistically provable advantage."

Meanwhile, Pfizer argues that the negative publicity is hurting implant recipients. Last month, when the Public Citizen's Health Research Group announced it was suing to seek orders requiring that Shiley notify all recipients of convexo-concave heart valves of the risks, Pfizer replied: "All but a small fraction of one percent of these valves continue to function properly. Suits like the one brought by the Health Research Group frighten cardiac patients unnecessarily and ultimately do more harm than good." Pfizer added that its "Dear Doctor" letters to physicians had provided adequate notice of the "very small danger of fracture."

But the congressional subcommittee staff contends that the "Dear Doctor" letters sent before 1986 could lull doctors into a false sense of complacency. Moreover, critics complain, letters went only to doctors—and in many cases, not to the patient's cardiologist, but only to the surgeon who might well never see the patient again after he left the hospital.

Plaintiffs like Fred Barbee of Minong, Wis., insist that if patients were notified, lives could be saved. Appearing before the congressional hearing, Barbee testified how his wife, Carol, 50, died after a valve fracture. "The symptoms of the valve fracture are much like a heart attack, and because we had never been advised about any sort of valve failure whatsoever, I made an incorrect decision to take her to the closest, but limited, facility that could treat a heart attack, but not a broken valve."

Barbee related that he told the emergency room physician at that local facility that Carol Barbee was wearing a heart valve. But, Barbee testified, the doctor had never heard of the fracture problem with the convexo-concave valve. Assuming that Carol Barbee was having a heart attack, Barbee says, the doctor gave her a medication that would slow her heart rate, "exactly the opposite" of what should have been done. By the time Carol Barbee was transferred to a hospital that could perform open-heart surgery and remove the valve, she had slipped into "clinical death." She died two hours after the fracture.

Barbee testified that if he and his wife had had adequate information regarding the possibility of fracture in the valve, a visit to the local emergency room "would not even have entered my mind. I would have called the ambulance and had her transported directly to St. Mary's Hospital in Duluth, where heart and open surgery can be performed. I am convinced she would have survived had we known."

Pfizer argues further publicity will create anxiety for implant recipients still wearing the valve.

Significantly, Barbee is not suing the emergency room doctor, or his surgeon. In fact, there have been virtually no suits against doctors in the heart-valve cases because, according to plaintiffs' attorneys, the doctors were relying on the information released by the company.

Pfizer replies that the doctors didn't have to rely solely on the company—they could read the dozens of lengthy articles in the medical literature debating the merits of various heart valves, and draw their own conclusions.

Pfizer now endorses the idea of a patient registry so that valve manufacturers can provide patients' doctors with follow-up information over a long period.

So far, Pfizer has not allowed a single fracture suit to reach trial. In each case, the company has settled out of court and, as part of the settlement agreement, has required that plaintiffs sign nondisclosure agreements.

Two weeks ago, the Association of Trial Lawyers of America filed a friend-of-the-court brief in a Texas heart-valve case, asking that the court lift the confidentiality order on Pfizer documents.

"This is a case where an IBM engineer found out he needed a heart valve in late '81, researched heart valves, and

picked the Pfizer convexo-concave valve," says the association's Jeffrey White. "Now, he's suing on the grounds of fraud, and failure to disclose problems associated with the valve, and his attorney has made a motion to lift the secrecy order on Pfizer's documents. Up until now Pfizer has managed to get a court order so that when one case is settled, the plaintiffs can't disclose information in Pfizer documents to anyone—not to the FDA, not to other attorneys bringing similar suits."

Pfizer argues that further publicity will only create undue anxiety for some 56,000 implant recipients still wearing the valve. Certainly, publicity is likely to create more anxiety suits.

To date, all attempts to bring anxiety suits against Pfizer have failed. Courts have refused to award damages unless the valve has already broken. And legal experts point out that in California, where the Khan case is being tried, the state Supreme Court has become increasingly prone to limit corporate liability. But in the Khan suit, Finzen's firm will attempt to do what it did in the Dalkon Shield case—prove company misconduct. And this time, it hopes to sue, not for negligence under product liability laws, but for fraud.

If Khan succeeds in proving fraud, what is Pfizer's ultimate liability? Or, to put it another way, what is Pfizer's financial exposure if a substantial number of implant recipients decide to go to court?

Neither Pfizer nor Khan's lawyer cares to hazard a guess. Which is not surprising, since there's little precedent: If Khan wins she'll be making case law. Anxiety suits are very hard to win, but when won, the damages can be high. Rock Hudson's lover, for example, couldn't prove he had AIDS, but he was worried that he might have it. A California jury gave him $12 million.

There are 56,000 implant recipients, all of whom, presumably, might sue Pfizer if the company loses. Under the circumstances, Pfizer's potential liability seems enormous and if fraud is proved, its insurance coverage uncertain.

The Khan case won't come to trial until, at the earliest, late 1991. Which means that for the foreseeable future the company and its shareholders are likely to suffer considerable anxiety of their own. ■

Secrecy Rules Eased In Md. Cancer Lawsuits

By Benjamin Weiser
Washington Post Staff Writer

Lifting a veil of secrecy that has lasted nearly a decade, a federal magistrate in Baltimore has removed most confidentiality restrictions imposed by an earlier judge in lawsuits alleging that workers at a Western Maryland tire plant contracted cancer after improper exposure to toxic chemicals.

The previous confidentiality orders, which had covered thousands of Goodyear Tire & Rubber Co. documents and were agreed to by all parties in the case, were similar to the broad secrecy procedures that have become a routine practice in civil lawsuits around the country during the past 15 years.

Under court rules, secrecy orders are designed to protect a company's trade secrets. In practice, however, many overburdened judges have tended to impose blanket secrecy at the beginning of lawsuits and to allow that secrecy to continue after settlement of cases. As a result, documents that deal with significant questions of safety and health have been kept out of public files.

U.S. Magistrate Deborah K. Chasanow ruled April 20 that only those documents dealing with spacific manufacturing processes and chemical formulas at Goodyear's Kelly-Springfield plant in Cumberland, Md., could be kept secret. Attorneys for the workers publicly filed many of the documents June 29 in U.S. District Court in Baltimore.

Secrecy has been an issue in the Goodyear litigation since it began in 1980. Goodyear originally sought a protective order covering every document it provided to the workers, and Martin H. Freeman, attorney for the workers, says he consented because he felt it would expedite settlements. In 1986, Goodyear confidentially settled 34 cancer suits for between $10 million and $15 million, according to two sources. In settling, the company admitted no wrongdoing.

Freeman alleged in court papers that the documents show negligent behavior by company officials. He cited a document in which a company doctor overruled a plant supervisor who said the company had a legal responsibility to provide workers with more detailed information about certain toxic chemicals.

Freeman wrote, "A company operating within the bounds of moral, ethical and legal propriety would never trade off the health of its workers for dollars of profit. Goodyear has always done so."

Goodyear officials reject any link between the illnesses and exposure at the plant. They said epidemiological studies by the National Institute for Occupational Safety and Health and by Goodyear have found no excess cancers at the plant.

Goodyear officials attributed the illnesses to other factors, such as smoking and diet. They accused Freeman of drawing a distorted and misleading picture through selective use of the documents. They said the company frequently took corrective action in response to some of the memos cited by Freeman.

Company lawyers also said that the firm used court secrecy measures to protect trade secrets, not to avoid public scrutiny. "It just wouldn't make any sense to do that and I'm confident we have not done that," said Goodyear lawyer Jonathan Dean.

Peter Infante, director of the office of standards review for the Occupational Safety and Health Administration (OSHA) in the Department of Labor, said he is troubled generally by private settlements and court orders that restrict access to information that might aid government regulators in determining links between illness and chemical exposure in the workplace. "Shielding that information is not in the public interest, nor in the interest of safety or health," Infante said.

Louis Beliczky, director of industrial hygiene for the United Rubber Workers union in Akron, said he had been aware of the Goodyear litigation but had no access to the documents because of the confidentiality orders.

"It would have been helpful for us to have so it could be used in a preventive manner," Beliczky said.

By the early 1970s, Freeman says, Goodyear knew that many chemicals used in the tire-making process were toxic and in some cases carcinogenic, but did not reveal what it knew to workers.

In a Nov. 19, 1971, memo, a Kelly-Springfield official reported receiving a package of "special handling precautions" sheets from Goodyear's chief chemist, detailing the safe and proper handling of hundreds of toxic chemicals at the Cumberland plant.

"In the past the information contained in these reports has been treated as confidential," wrote W. L. Smelser, then manager for plant security and safety. "It is now my belief that under OSHA [regulations] we are committed to release such information to our employees . . . .

"I am well aware of the effect the release of this information may have and my remarks are my interpretations of the law as I read it," Smelser said. "By copy of this letter I am asking for a top management judgment and decision as to my proposals."

Goodyear officials later responded that the precaution sheets were for the "exclusive use of management personnel" and did not have to be "posted, distributed, or made available to employees."

Goodyear lawyers say plant officials always permitted employees to inspect individual precaution sheets but did not allow wholesale copying of the material because it could disclose trade secrets.

Other memos from 1972 deal with ventilation systems, which are critical to removing potentially dangerous fumes and particles from the air. One memo states that surveys of plant-wide air handling equipment "reveal a corporate wide inadequate performance record."

"No longer can we afford to treat this equipment on the basis of an 'out of sight, out of mind' philosophy," wrote E.R. Moats, then manager for mechanical engineering, on May 11, 1972.

Goodyear officials said chemical exposure levels at the plant have always been within mandated limits and that Moats's memo led to corrective steps.

Release of Sealed Records Ordered in Xerox Toxic-Chemical Case

By Benjamin Weiser
Washington Post Staff Writer

Citing the need to allay public fears, a New York State Supreme Court justice yesterday ordered the limited release of sealed court records in a $4.75 million settlement reached last year between Xerox Corp. and two New York families who alleged their children had contracted cancer and other serious illnesses from a toxic-chemical release.

Justice Joseph G. Fritsch, who had sealed the case at the request of all parties, ruled that county and state health authorities can have access to "anything under seal that may be helpful and beneficial for the protection of the public health."

The New York attorney general's office and local authorities had sought, along with Xerox, the opening of records after publicity about the confidential settlement sparked concern that important health and environmental data were unavailable to the public. Scientists say that court secrecy is making it more difficult to track the health effects of exposure to toxic chemicals.

Sen. Daniel Patrick Moynihan (D-N.Y.), who had called for the unsealing of the records at a hearing in Rochester, N.Y., last March, said yesterday that he welcomed the court's decision.

"Locking away vital health and environmental data serves no one, and throws up roadblocks to legitimate scientific inquiry into chemical contamination," Moynihan said.

In his decision, Fritsch criticized Xerox for its about-face in seeking release of the records. He said the request by Xerox, which had sought the secrecy in the first place, "lacks good faith and sincerity" and was "motivated by a self-serving purpose, and is a face-saving attempt to show good faith only after the print media disclosed [the secret settlement]."

However, Fritsch said he would act on his own inherent judicial power and in "the interest of justice" and "the interest of public welfare and good" to release the records.

Xerox officials declined to comment late yesterday, saying they had not had time to review the case. "We are aware of the opinion and received a copy of the ruling late this afternoon. We have yet to review it and aren't in a position to comment at this point," said Peter S. Hawes, a Xerox spokesman.

Attorneys for the families and the state could not be reached last night for comment. Monroe County, N.Y., Deputy County Attorney Mark C. Davison said, "We're happy with the decision."

William P. Polito, a Monroe County legislator who had criticized the settlement and filed a friend-of-the-court brief urging full disclosure of the records, said, "I think the judge made it very clear as to where the fault lay as to the facts not having gotten to the public or to governmental authorities. The New York State Department of Health has made it very clear that it needs the facts to protect the interests of the public."

In April 1988, Fritsch sealed records of the lawsuit and prohibited the parties from discussing the matter as part of a comprehensive settlement between Xerox and the two families. The families alleged that discharges into the groundwater and air from Xerox's Webster, N.Y., plant had damaged the health of their children.

The sealed lawsuit linked the illnesses to the industrial solvent trichlorethylene (TCE), a suspected carcinogen that Xerox in 1985 said had leaked into the groundwater over a period of years. The lawsuit also alleged that airborne emissions may have been a factor.

Medical specialists hired by lawyers for the families said they would testify that the chemical releases were a factor in several cases of neurological impairment and, in the case of one teenager, cancer of the lymph glands.

One specialist, John P. Morgan, who wrote a key report analyzing the health impact of the chemical exposures and drawing the connection between the discharges and the illnesses, last night expressed relief that his report might now be seen by appropriate health and environmental officials.

Morgan, chief of pharmacology at City University of New York medical school and an expert in clinical toxicology, said he had been troubled, as a scientist and a researcher, by the secrecy surrounding his findings.

"I have been frustrated in my inability to share my report, and provoke the needed discussion and feedback from others in the scientific community," Morgan said.

Xerox strongly disputed any causal link between the TCE spill and the illnesses and said that its air emissions are filtered and meet New York state standards. In settling the case, Xerox neither admitted nor denied fault.

Fritsch, in his ruling, appears to have tried to seek an accommodation between the privacy interests of the families and the public concerns.

At a recent hearing, after E. Gail Suchman, an assistant New York attorney general, argued that the confidentiality in the case was "contrary to public interest and perhaps contrary to state law," Fritsch told one of the family members that there would have to be a "balancing" of the issue.

Fritsch yesterday limited his order to epidemiological and environmental data, reports and tests, and did not authorize the release of the children's medical records. The New York State Health Department had sought the release of the children's records, telling Fritsch in court papers that "children may react differently than adults to environmental pollutants." It promised to review the material on a confidential basis.

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Secrecy in Toxic-Spill Case Assailed

Review of Xerox Settlement May Spur Legislation for Disclosure

By Benjamin Weiser
Washington Post Staff Writer

ROCHESTER, N.Y., March 21—Sen. Daniel Patrick Moynihan (D-N.Y.) and New York state health officials today sharply criticized a court-approved secret settlement involving a toxic spill at a Xerox manufacturing plant near here, citing the case as an example of how such legal secrecy can inhibit scientific and medical inquiry into questions of health and safety.

Moynihan, who chairs an Environment and Public Works subcommittee, suggested at a hearing here that legislation may be necessary to ensure that legal settlements in environmental lawsuits do not cut off the flow of information to communities and government agencies.

"There is something unseemly about public health information, environmental health information, not being available in any circumstances," Moynihan said.

As a result of the secret settlement, Xerox agreed to pay $4.75 million to two families who had alleged that discharges from Xerox's plant in Webster, N.Y., had damaged their health. Xerox also relocated the families and bought their houses, which are now vacant. The judge sealed all records in the case and prohibited the parties from discussing the matter.

At today's hearing, Xerox general counsel Richard S. Paul said the company will now support a motion to unseal the records if it is made by a health or government agency. Moynihan praised the company f r its willingness to open the records.

The settlement came after medical specialists, hired by lawyers for the two families, said they would testify that discharges from the plant were a factor in several serious illnesses in the families, including neurological impairment. A teen-ager was found to have cancer of the lymph glands.

The sealed lawsuit linked the illnesses to the industrial solvent trichloroethylene (TCE), a suspected carcinogen that Xerox in 1985 said had leaked into the ground water over a period of years. The lawsuit also alleged that airborne emissions may have been a factor. Xerox strongly disputed any causal link between the TCE spill and the illnesses and said that its air emissions are filtered and meet New York state standards. In settling the case, the company neither admitted nor denied fault.

> *"There is something unseemly about public health information ... not being available in any circumstances."*
>
> —Sen. Daniel Patrick Moynihan

Moynihan held the hearing to review the Xerox settlement, disclosed last week in The Washington Post, as well as a toxic contamination at a Kodak plant here. Both Xerox and Kodak officials assured Moynihan that they were cleaning up the contamination and stressed that they believe there have been no health problems.

In reporting the details of the secret Xerox settlement, The Post quoted environmental and public health officials as saying that the increased use of court secrecy is making it more difficult to collect information about the effects of human exposure to toxic chemicals.

Health officials for Monroe County, which includes Rochester and the town of Webster, told Moynihan that they had known nothing about the illnesses alleged in the Xerox lawsuit until The Post's article appeared.

Thomas F. Jorling, commissioner of the New York State Department of Environmental Conservation, said that secret settlements are "antithetical to the public right-to-know concept, which holds that the public is entitled to know the identity and the dangers associated with chemicals used by industry in their community."

"Shielding information from the public domain creates obstacles to scientists seeking to discover the true effect of exposures to toxics and to regulators like myself seeking to develop comprehensive regulatory and enforcement strategies," Jorling said.

Xerox officials suggested to Moynihan that The Post's article had mischaracterized the secrecy order. They said it applied only to the terms of the settlement and did not restrict family members from disclosing information.

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MARCH 22, 1989

The Washington Post

FRIDAY, SEPTEMBER 15, 1989 A31

Russ Herman

No More Dirty Little Secrets in The Courts

At long last, two court orders granting public access to vital public documents signal some headway in uncovering secrecy in our nation's courts. ["Secrecy Rules Eased in Maryland Cancer Lawsuits," Aug. 14; "Release of Sealed Records Ordered in Xerox Toxic-Chemical Case," Aug. 17.]

When a group of rubber workers sued their former employer because they had developed cancer by toiling, unwarned and unprotected, with toxic chemicals, U.S. Magistrate Deborah K. Chasanow in Baltimore refused to keep court records secret. In earlier cases, the employer had obtained a secrecy order for documents that dealt with ventilation and whether the company was obliged to disclose the hazards to its workers.

The secrecy orders had barred OSHA and union officials from using the facts—already documented and sitting in company files. These facts could not be used to prevent further injury, even after the original cases were settled out of court.

But now Chasanow has ruled that only documents that disclose actual chemical formulae and manufacturing processes may remain secret—*not* the essential facts, which the public deserves to know.

In another case, New York State Supreme Court Justice Joseph Fritsch ordered release of sealed court records involving settlements last year between Xerox Corporation and two New York families. The families alleged that their children had contracted cancer and other serious illnesses from a toxic-chemical release by the firm. Fritsch ruled that health authorities may have access to "anything under seal that may be helpful and beneficial for the protection of the public health."

So, at last, attorneys and public authorities committed to righting wrongs can obtain relief from secrecy orders. Wrongdoers who want to cover their tracks will have to think twice before labeling their negligence a "trade secret" or otherwise hiding vital facts from public view.

As The Post documented so well in a series of articles last fall ["Public Courts, Private Justice," Oct. 23-26, 1988], secrecy is rampant in court proceedings. Litigation documents—entire court files—are often hidden from public view, even though they may involve critical public health, safety and environmental concerns.

Litigators who have painstakingly uncovered crucial safety information about playground equipment, grain elevators, automobile fuel tanks, toxic wastes, defective heart valves, butane lighters and so many other products, have seen their work buried under judicial protective orders.

"Wrongdoers who want to cover their tracks will have to think twice before labeling their negligence a 'trade secret'..."

Such secrecy undermines the right to know of every American citizen. And it keeps secrets that can kill hidden from the public.

America's courts are *public* institutions. Court records and materials obtained during litigation are not generally kept secret.

But confidentiality restrictions and secrecy orders arbitrarily imposed on victims and their attorneys as a condition of settling a case can shut off public access to health, safety and environmental concerns. Injured persons are pressured into promising, in exchange for a satisfactory settlement, to keep mum about the matter in litigation.

Without Chasanow's reexamination, OSHA, union officials and other workers at the plant who have also developed cancer would need to try to uncover the same information again and again, at appreciable expense, as if the earlier cases never existed. Without Fritsch's ruling, the health consequences of toxic releases might have remained hidden from public view for all time.

The courts, and what goes on within them, are the province of the people. Private litigants must not be allowed to determine what the public will see. Judges must start with a presumption of public access. That presumption should not be waived except in very extraordinary circumstances and for very limited purposes.

Where secrecy in litigation is concerned, the path toward justice begins with a single step. The Association of Trial Lawyers of America recently took such a step. We passed a resolution urging attorneys to resist secrecy demands that are contrary to the public interest. We urge judges to refuse to enforce new secrecy orders that do not meet stringent standards to protect the public interest, and to reconsider past secrecy orders that are clearly no longer needed.

The actions of Chasanow and Fritsch help to safeguard public safety. All judges and lawyers should follow their lead.

The writer, a New Orleans attorney, is president of the Association of Trial Lawyers of America.

When courts keep secrets

USA Today
1/30/92

INTERVIEW

Justice Lloyd Doggett says that when court records are closed, sometimes what you don't learn can hurt you.

Q: Courts often seal records of legal cases from view. Both parties like it. So how can it hurt the public?

A: A wide range of consumer products have a tendency to cause injury. Information that is hidden in one state may have consequences that literally result in people being killed and maimed in other states because you can't have accident avoidance and recognition of dangers if you never hear about the danger in the first place.

Q: That apparently happened recently with silicone gel breast implants. What other products are involved?

A: Motor vehicles — the recurring problems with certain kinds of deficiencies in motor vehicles. Toxic waste issues. It may not be an individual toxic waste problem, but recurring from dumps perhaps owned by the same company in different parts of the country.

Q: How extensive is secrecy of court records?

A: It has become quite commonplace to the extent that even when any benefit of secrecy is very minimal, secrecy has become so easy to get that litigants are encouraged to ask for it. The attitude becomes, why not get secrecy because there might be something in here someday that we would want to hide?

Q: Some defenders of court secrecy say it encourages settlements. Does that ease the docket for judges?

A: It's fair to say if a judge has presented to him or her an order that has been approved by both parties, the judge is likely to sign off on it. One party is told they could get the discovery [documents] they want if they'll agree not to share them with anyone else. Often, out of a desire to serve the individual client, the attorney may agree to the secrecy order, and the judge signs off.

Q: Do judges also consider public-safety concerns? Or is that not a factor?

A: Rarely is there ever any effort by the court to consider the public interest if both parties have signed off. In fact, the Third Circuit Court in the Cipollone tobacco case, now before the U.S. Supreme Court, suggested that the trial court would be in error under the federal rules if the judge in New Jersey had considered the public interest rather than just the interest advanced by the parties.

Q: You were instrumental in making it more difficult to seal records in Texas. And a bill calling for similar action is being considered this week in California.

A: We thought it was so important to put in this rule that the court does have to consider the public interest and not just what the litigants want.

Q: But are there reasons to keep records secret?

A: If someone comes forward and has a specific, substantial interest and he can show it — a legitimate trade secret he wants to protect from a competitor — it is likely to be the kind that would justify secrecy.

Q: What about companies that have their files sealed?

A: There are companies that, if they get a report of a problem with their product, may take steps to correct it. Then there may be companies that aren't sufficiently sensitive to public-health dangers and because of the tremendous economic benefit of continuing to sell a product that's been costly to market, they may not place a high priority on the first few reports that come through.

Q: Isn't there a way to punish companies that insist on making products they know will cause harm?

A: In debates I've had with opponents of openness, they insist we need to rely on our governmental agencies. The view espoused by those of us who believe in openness is a strong belief in individual rights rather than a continuing reliance on governmental action. The belief is people are informed from adequate access to information, they could make their own decision.

Q: Do you see a trend toward more people becoming more responsible about this?

A: The only way to alter it is by changing the rules and changing the laws to require specifically that judges do their job of balancing the interest between secrecy and the public's right to know. And it's definitely a balancing process. There's no guarantee that in every situation, including every breast-implant situation, the public has a right to know everything. But what's happening is the public is losing by default because judges aren't doing the job of balancing; they're just signing off on what the parties agree. And that's got to be changed.

Lloyd Doggett has been a justice of the Supreme Court of Texas since 1989. He was instrumental in the implementation of Texas Rule Procedure 76a, which discourages secrecy in the public interest and requires that most civil-court records be open to the public. He was interviewed by USA TODAY's ***Sharon Shahid.***

Doggett

How information stays hidden

USA TODAY 1/30/02

Protective orders

A judge can issue an order that allows lawyers to receive internal documents — generally from the defendant — on the condition that they not be shared with anyone else, including the press, safety regulators and attorneys for other clients.

Confidentiality settlements

Both sides agree to keep aspects of a lawsuit confidential, or companies offer a large settlement to keep sensitive documents from becoming public. That could include alleged defects in products, alleged causes of injury, defendants' names in medical malpractice suits or an amount paid in a settlement. Often, no admission of fault is part of settlement.

AP

SIOUX CITY CRASH: As part of a settlement two weeks ago with United over the July 1989 crash, lawyers for plaintiffs are barred from divulging details of the agreement.

Sealed court records

Judges may order all files of a lawsuit sealed from public view, which prevents access by the press, safety regulators, citizens interested in the case or other lawyers. Sometimes, even the names of parties in a suit can be dropped.

Some recent court cases involving secrecy:

Silicone breast implants: The Dow Corning Corp., maker of silicone gel breast implants, agreed last week to a request from the Food and Drug Administration to make public approximately 90 scientific studies and internal memorandums concerning implant safety. Those documents had been sealed in earlier settlements.

All-terrain vehicles: As part of $5.7 million award to a man who suffered brain damage from an accident in 1981 in Oregon, a protective order required defense attorneys to return documents to Honda and not reveal what the documents showed.

Jeep CJ-5: Several owners sued and won settlements for claims that the Jeep CJ-5 had a high center of gravity and narrow wheel base and as a result was unstable. But that apparent safety hazard was sealed from the public by the settlements.

AP

ZOMAX: Settlements sealed in cases on allergic reactions to pain reliever in which some died.

The Washington Post

SUNDAY, OCTOBER 23, 1988

PUBLIC COURTS, PRIVATE JUSTICE

First of Four Articles

Court Secrecy Masks Safety Issues

Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits

By Elsa Walsh and Benjamin Weiser
Washington Post Staff Writers

Over the last five years, in defending itself against scores of lawsuits filed by victims of fiery car crashes, General Motors Corp. has used court secrecy procedures throughout the nation to keep closely held and controversial documents about auto safety from becoming public.

GM's legal approach, which is becoming a favored way of preventing the disclosure of sensitive information in civil lawsuits, has helped avoid a public debate about whether the company placed financial considerations ahead of safety concerns in designing the fuel tanks used in most GM cars until the early 1980s. Fuel leaks are a key factor in starting fires, which can cause deaths in otherwise survivable accidents.

The documents that have been kept from public view show that company officials were told in 1970 that the gas tank was vulnerable to puncture during some high-speed crashes. In 1971, the company decided not to move the tank to a more protected location after top engineers concluded that the traditional design was adequate, and that the design change was too expensive and would reduce trunk space. GM's estimates for the cost of the change ranged from $8.59 a car to $11.59.

Two years later, when engineers were assigned to study the fuel tank location again, the question of cost arose once more, and a "Value Analysis" was prepared in a two-page memo dated June 29, 1973.

A GM engineer, Edward C. Ivey, assigned a $200,000 value to each human life and assumed that a maximum of 500 people died annually in GM cars "where the bodies were burnt."

Then, in a two-stage calculation relating to new GM cars, Ivey determined what level of expenditure could be justified to try to avoid the fiery deaths in the 5 million cars GM was producing annually. "This analysis indicates that for GM it would be worth approximately $2.20 per new model auto to prevent a fuel fed fire in all accidents."

Ivey cautioned, however, that "it is really impossible to put a value on human life."

These documents, which were made available to The Washington Post as part of a lengthy examination of the burgeoning use of court secrecy procedures, have remained confidential because of GM's legal strategy.

In case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settle-

See COURTS, A22, Col. 1

COURTS, From A1

tion turned over to each other during the course of the case.

Such secrecy procedures—once used almost exclusively in cases involving business trade secrets, national security and personal privacy—are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors, lawyers and law firms.

There is a striking lack of consistency and standards among the area's local and federal courts in the way they handle requests to seal cases. In an environment usually governed by formal rules, the process has become almost casual. Judges follow no set procedures, ask few probing questions, offer no notification to the public and often put nothing in the public court records to explain their reasoning in deciding to seal the files.

Judges here have approved secrecy orders in lawsuits involving allegations of misconduct by doctors and lawyers, safety hazards in public facilities and products, and race and sex discrimination. Considering themselves referees who monitor disputes between private parties, judges rarely reject a request to seal a case, according to lawyers and judges interviewed. If the two sides involved in a settlement want the file sealed from public access, most judges see no reason not to go along.

"There isn't any great objection to" it among the judges of the Montgomery County Circuit Court, said Chief Judge John J. Mitchell.

In Fairfax County Circuit Court, Chief Judge Lewis Griffith said, "Normally, the court honors the request."

This informal approach conflicts with the long-accepted American tradition that the public has a right to see basic records in a civil lawsuit, an expectation formally recognized by the U.S. Supreme Court. Although judges have broad discretion in handling cases, courts historically have adhered to the principle that records should be sealed in a selective way, and that open files should contain at least the original complaint, a list of the proceedings in the case and copies of any rulings made by the judge.

No local courthouse keeps a publicly available record of which lawsuits are sealed, and internal record-keeping is so haphazard that most of the courts could not provide reliable figures. At the request of The Washington Post, the clerk's office at D.C. Superior Court searched its records and initially came up with 43 cases. It declined to provide the names of those involved, listing only case numbers, the judge and the attorneys. Told of additional cases not on the list, the clerk's office provided a revised list of 53—which still did not include every sealed case found through other sources.

At the federal courthouse in the District, the clerk's office said it would be difficult to compile a list of all sealed cases; however, the court's files contain 23 references to sealed cases, including 12 referred to as "*Sealed v. Sealed*". At least some appeared to have been sealed when they were filed—the earliest possible time. In U.S. District Court in Alexandria, 31 cases are under seal, according to a clerk.

In Fairfax County, a review of a court clerk's handwritten list suggests there have been 13 sealings in the last two years. There is no record of sealings that occurred before then. In Montgomery County, there were 69 cases sealed before 1984; a change in record-keeping procedures since then makes it difficult to obtain an accurate count. In Prince George's County, the clerk's office said it had no figures. In Arlington County, the clerk's office also said it does not keep specific figures, but one clerk estimated "no more than one a year."

Some judges said in interviews that they did not realize that sealing a case meant the entire file would be removed from public access. When D.C. Superior Court Judge Eugene Hamilton was told that he is listed as sealing the records in five cases, including two medical malpractice matters, he said: "Is that right? The whole suit? Including the names of the plaintiffs and so forth?"

Hamilton said he assumed that his secrecy orders only applied to the amounts of money paid out as part of the settlements, but said it was "never too clear" to him what else would be covered.

Judge Leonard Braman, one of 32 Superior Court judges who have sealed cases, attributed the proliferation of secrecy to busy judges looking for a way to resolve cases. "It was done as a matter of practice and the judges were driven by the desire to keep their calendars churning," said Braman. "It just seems to me that it doesn't necessarily follow that the court has to be a mindless and conscienceless tool that serves the selfish . . . ends of a litigant."

But Judge Stanley Sporkin of the federal court here said courts have only a limited role in civil lawsuits before trial. "Criminal law is the public business. Private lawsuits are usually private business," he said. "The courts don't have much say."

Stephen R. Steinberg, a senior lawyer at a New York firm who heads a committee on trial practice for the American Bar Association, said sealing records is an extraordinary step and that judges should weigh carefully the "public right to know and the constitutional protection of an open court system" against the privacy of those involved in the lawsuit.

"Public interest should be paramount," Steinberg said.

Safety Issues Kept Secret

More than 75 sealed cases and 100 confidential settlements were reviewed for this article. Information about these cases was pieced together from court files, documents provided by sources, and interviews with lawyers, judges and parties in the lawsuits, some of whom did not want to be identified.

Those interviewed drew a distinction between a judge's direct involvement in lawsuits—such as sealing and confidentiality orders—and settlements in which two sides privately agree to resolve the issues, sign a

contract not to discuss the matter and then ask the court to dismiss the lawsuit.

Settlements, which usually involve no admission of fault, serve a variety of purposes. Many cases are resolved, lawyers said, to avoid costly trials.

In nearly all the cases reviewed for this series, settlements had the effect of keeping issues of public concern from surfacing. In the Howard University Hospital case, for example, no outside investigative body learned of the nurse's alleged falsification of records. The settlement included an order, agreed to by both sides, not to discuss the case.

According to pretrial statements, which are confidential, the nurse added entries to a patient's chart to make it appear that the nursing staff had conscientiously monitored the patient as she complained of breathing problems and had summoned McKenna, the on-duty physician, several times.

The patient's chart stated that McKenna had examined the woman three times that day, May 7, 1983, but McKenna said he did not. "I knew that it was a falsification of what had happened and that I had not been notified, and I wanted to get the record straight right then and there," McKenna said at his deposition.

Another patient who was sharing the woman's room said in an affidavit that she tried to alert the nursing staff to the woman's breathing difficulties. "[She] was having problems breathing and kept taking the oxygen mask off and would start to gasp and I would buzz for the nurses. They wouldn't respond," the other patient said.

The woman stopped breathing that night, lost consciousness and died six days later, medical records show. The cause of death was listed as a heart attack brought on by a blood clot in her lung. Breathing difficulties are often a symptom of such blood clots.

When Barry Nace, the attorney for the woman's family, learned of the alleged falsification, he used it as a bargaining chip, according to sources. Unless the hospital agreed to settle immediately, Nace told Howard's attorneys, he planned to alert the media.

The $1 million confidential settlement came a few weeks later.

The hospital's attorney, Francis Smith, declined to comment about the allegations or the settlement, except to say: "It is not the policy of the hospital ever to falsify records." Speaking generally, he said, "Sealing the record is an effort to protect people, from time to time, from illegitimate or . . . misleading implications."

Judge Webber said, "I believe it would be inappropriate for me to discuss the details of any sealed cases."

Nace defended the settlement. "Would I like to see confidentiality agreements prohibited and outlawed? Yes . . . but until that happens, our obligation is to our client and not to the rest of the world," he said.

Discovery of allegedly altered records also played a major role in the settlements of two other local medical malpractice cases, according to Ronald Karp, the attorney who brought the lawsuits.

Karp, who is prohibited from discussing the specific details of the two cases, said each was settled for a "six-figure" sum. One involved a surgeon who allegedly had forged an informed-consent form to show that he had told a patient of the risks of surgery, when no such discussion had taken place, Karp said. The patient later suffered major complications in the surgery.

In the other case, Karp said, a doctor allegedly had failed to diagnose symptoms of cancer in a patient and falsified the records to show that he had detected the disease.

Karp said he did not notify medical licensing authorities of the allegations raised in the cases. "I presumed that if I did, it would be discussing the case, and that would be a breach of the settlement terms," he said.

Under a 1986 D.C. law, it is illegal to falsify medical records.

Investigation Roadblocks

Allegations against local doctors or hospitals account for a sizable percentage of the confidential settlements and sealed cases. In D.C. Superior Court, for example, 14 sealed cases involve lawsuits against doctors or hospitals.

In a 1983 case in the D.C. federal court, Judge Thomas Jackson removed from the public file all records of a civil lawsuit that alleged a physician had sexually assaulted a female patient during a gynecological examination, according to sources.

In a deposition during the lawsuit, the doctor denied assaulting the woman, but acknowledged having sexual relations with her during an exam, saying the act was consensual, according to one source familiar with the case. Consensual sexual relationships between doctor and patient can be grounds for disciplinary action, according to medical codes of ethics.

The case was settled for $30,000, the source said. The doctor's partners severed their relationship with him, but the doctor—whose name could not be learned—remains in practice in this area, according to the source.

Even if a disciplinary body is told of possible misconduct, confidential settlements in a lawsuit can sometimes stymie an investigation. Eight years ago, D.C. medical authorities received a complaint alleging that Dr. Paul Weisberg, a prominent psychiatrist, had violated professional ethics by becoming sex-

ually involved with an emotionally-vulnerable female patient during therapy.

The woman had sued Weisberg and was engaged in negotiations to settle the case. A friend of the woman, Clarence Ditlow, said he wanted to alert authorities before the woman agreed to a confidential settlement that might keep her from discussing the matter in the future. Ditlow's fears proved true. When investigators sought to interview the woman, the woman's attorney told them that the terms of the settlement prohibited her client from cooperating, according to sources.

Weisberg, in a deposition taken during the lawsuit, said he began a friendship with the woman on the day that her therapy ended and that it later became a sexual relationship. Therefore, he said, it was not a violation of ethics.

Last year, when the ethics committee of the Washington Psychiatric Society received a complaint about Weisberg's practice, the eight-year-old settlement again caused problems. The ethics committee wanted to interview the woman and tried to negotiate a way around the confidentiality agreement. Before it could be worked out, the committee decided it had enough information to go to the American Psychiatric Association (APA), a committee member said. The committee subsequently had learned about a similar allegation from another patient.

The APA, which could revoke Weisberg's membership but has no authority over his license to practice, has made no decision yet. Weisberg, who has denied any misconduct with either patient, has closed his practice here and moved to California, according to his attorney, John Karr.

Some institutions routinely seek confidentiality agreements that include provisions barring opposing lawyers from discussing settled cases.

The general counsel for Children's Hospital, Lee Doty, said she viewed confidential settlements as agreements between private parties and, in the case of Children's, a way to protect the privacy of the children treated there. "It is the belief that it's nobody's business how we handle things out of court," she said.

She added, "Lawsuits are settled for reasons frequently that have absolutely nothing to do with whether we think [the hospital is] in error. Physicians' reputations may be on the line. The hospital's reputation may be on the line .... It may be really unfair to make it public."

Doty said she could not comment on the specifics of two settlements involving the hospital. In both cases, confidentiality agreements prohibit the attorneys and their clients from alerting anyone to the suits, even though there are some documents in the public file that raise questions about safety.

One of the cases, a 1983 suit, alleged that the hospital's decision to delay the purchase of additional infant heart/respiratory monitors had been a factor in causing severe brain damage to a 6-week-old baby, who later died. The baby, who was found in cardiac arrest and not breathing, was being monitored by less sophisticated equipment that measured only respiration, according to court records.

The hospital's top medical staff—including the chairman of neonatalogy, Dr. Gordon B. Avery—had been requesting three more monitors for some time. In one memo to hospital officials, they said the sophisticated monitors were "urgently needed," according to hospital records turned over during the suit and placed in the public court file.

One memo said, "Not uncommonly, a monitor must be taken off one baby to be put on another." Another called it an "unacceptable situation" and said "nor is it consistent with our hospital philosophy of providing safe patient care."

Citing budgetary restraints, the hospital put off the purchase, the records show. In responding to the suit's allegation, the hospital blamed a defect in the less sophisticated monitor. If it had been designed properly, the hospital said, the incident might never have occurred. The hospital denied that its delay in purchasing new monitors was a factor in the child's death.

The case was settled in 1985 for $1.9 million, with the hospital and the manufacturer of the monitor each contributing, court records show. A hospital spokesman, Lon Walls, said Children's since has built a state-of-the-art neonatal facility with "all the monitors needed."

The attorney who sued Children's, Jack Olender, said he could not comment on the case because of the confidentiality provisions in the settlement. Speaking generally, he said, "The public should know about poorly designed or defective medical equipment if we are ever to obtain improvements in the health care delivery system."

The second lawsuit alleged that one of the hospital's surgeons had connected the wrong blood vessel to a 9-month-old baby's heart, causing neurological damage before the mistake was corrected. In a statement filed with the court, the hospital acknowledged the surgeon's mistake and said the child had received treatment that was "not acceptable," but pointed out that the operation was technically difficult because of the child's size. The hospital questioned whether the mistake was solely the reason for the child's condition.

This case was settled in 1986 for $2 million, according to one source.

Secrecy Is Bargaining Chip

In the back and forth of settlement negotiations, secrecy has become leverage.

For example, in a Montgomery County case filed last November, a Maryland physician agreed to settle a claim of sexual misconduct if the lawsuit was filed under seal so that his name would never appear on the public record, according to the attorney who brought the suit on behalf of a female patient. Under terms of the deal, the doctor paid an undisclosed sum to the woman and agreed to enter a rehabilitation program, the attorney said.

In a 1982 case, a judge's willingness to seal the case file became a critical element in the settlement. A group of local dentists sued Chesapeake & Potomac Telephone Co., complaining that the company was refusing to correct a phone number in an advertisement set to appear in 670,000 copies of the new D.C. Yellow Pages.

C&P said it was too late and too expensive to fix the error. D.C. Superior Court Judge David Norman temporarily blocked distribution of the books, which were about to be bound. The case was settled when C&P agreed to correct the phone number—which it called an unprecedented move and not legally required—as long as Norman agreed to seal the case.

C&P did not want other advertisers to know such a remedy was available, Ken Pitt, a C&P spokesman, said. "If every time we had a complaint we had to stop the presses, it would be an impossible situation," Pitt said. "We would never get the books out."

The Washington Post has asked judges in some business cases to impose protective orders on internal company documents relating to individual personnel records and marketing information, but has not sought sealing orders on information filed in court, according to newspaper vice president and counsel Boisfeuillet Jones Jr.

In libel cases, Jones said, The Post seeks to protect the identity of confidential sources, but otherwise turns over records detailing the editorial process without any protective order precluding public access.

Lawyers also have learned to use secrecy when they are sued personally. In D.C. Superior Court, nearly a fourth of the 53 sealed cases involve allegations of legal malpractice or disputes between lawyers. "It's judges and lawyers saying, 'We'll take care of our own,' " said lawyer John Karr.

In Prince George's County, Chief Judge Ernest A. Loveless said he sealed the records of a lawsuit filed in June against a Maryland lawyer because—in Loveless' words—he did not want "nosy" clerks to have access to the file. "You've got people handling that [court] jacket all day long who would know him," Loveless said.

In one case in D.C. Superior Court, attorneys agreed between themselves to seal certain records in a case against Howard University Hospital, only to run into stiff opposition from Judge Gladys Kessler—one of the few instances in which a judge refused to go along with such a request.

The hospital had agreed to pay $275,000 to the family of a 36-year-old Washington man who died after the hospital staff allegedly misdiagnosed his pneumonia as malaria, an allegation that the hospital denied. When they presented the deal at a July 24, 1986, hearing, Kessler said, "Across the board, I believe that court documents are public documents, and the world has a right to look at them," according to a transcript of the hearing.

The case later was settled for the same amount, and the file remained open.

Kessler was surprised when she was reminded during an interview that she, too,

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COURTS, From A1

appeared on the list of Superior Court judges who have sealed cases. Told that the case involved a lawyer and a bank, she said she could not discuss her reasons for sealing it but acknowledged her action was "inconsistent" with her stated philosophy.

"It really is a good example of my feeling that sealing is often done on an arbitrary or ad hoc basis," she said. "Sealing is often granted to people who are economically and socially advantaged and are therefore able to hire lawyers who know how to ask for that remedy. I suspect that you will rarely see a case involving poor people which has been sealed."

But defense lawyers say secrecy is just another tool in the vigorous representation of a client. "I will have clients I know are guilty of some wrongdoing civilly and it's still my obligation to go in and defend them as best I can," said Joseph Montedonico, whose D.C. firm has obtained five sealing orders in Superior Court civil lawsuits.

Montedonico, whose firm represented Howard University Hospital in the case that Judge Webber sealed, said lawyers have no ethical responsibility to decide if a confidentiality order is contrary to the public interest. "I don't make the ultimate decision. That's up to the judge," he said.

In another twist on the kind of leverage that secrecy can offer, lawyer Jean D. O'Malley said one of her clients was offered a "substantial increase" in a settlement in return for agreeing to the other side's request to seal a case in D.C. Superior Court.

According to documents apparently left by mistake in the open file, the suit alleged that a 6-month-old child died after a D.C. doctor failed to diagnose and treat diarrhea, a charge the doctor denied.

O'Malley declined to comment on the case, citing the seal. She said she felt ambivalent about closing the records in the case because it involved questions about a doctor's performance. At the same time, she said, her client did not object to the secrecy as long as it meant a higher settlement.

As a general rule, O'Malley said, "secrecy is worth money. No seal, no bucks."

The doctor's attorney said he made no such offer and does not engage in such tactics. "The amount of the settlement was not affected at all by the agreement to seal," he said.

'Top Dollar' for Privacy

Some settlement negotiations have nearly collapsed over the issue of confidentiality. In 1984, Judge James C. Cacheris in Alexandria federal court sent attorneys back to the negotiating table when it was clear there was a difference of opinion over the effect of a proposed confidentiality agreement.

The suit alleged that a Falls Church resident, Michael A. Webber, had suffered a near-fatal rupture of the stomach after taking Arm & Hammer Baking Soda for indigestion, a usage suggested on the package. The baking soda manufacturer, Church & Dwight Co., disputed in court papers that its product had caused Webber's illness.

At a settlement conference with the judge, Church & Dwight Co.'s attorney, Richard H. Lewis, complained that a Washington Post reporter had inquired about the case. Lewis said the company would not go forward unless Webber and his attorneys agreed not to talk about the matter, according to a transcript of the July 25, 1984, hearing.

The company was paying "top dollar" to settle, Lewis said, "but part of that reasoning was . . . no one would discuss this matter with the press or anybody else, not only the dollars and cents, but the facts [of the case]."

Webber's attorneys were reluctant to go along. After a short recess, however, they gave in to the company's demand. Back in court, Cacheris asked Webber, his wife and one of his attorneys, Kenneth Trombly, whether they understood the secrecy provision, repeating his questions several times to make sure. Satisfied, he dismissed the case, saying, "I'm glad you all resolved it."

The strategy worked. No news article appeared about the case.

Staff researcher Melissa Mathis contributed to this report.

NEXT: One company's strategy

Court Confidentiality Stymies Disciplinary Probes

Judges have sealed case files in at least 200 lawsuits in the District of Columbia and its suburbs. Hundreds of other cases have been settled with confidential contracts in which judges are not involved. Such settlements generally bar either side from discussing the suits.

CONFIDENTIAL
PROTECTED BY COURT-IMPOSED
PROTECTIVE ORDER

Secrecy procedures are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors and other professionals.

Party Name	Case Number	Party Type	Date Filed	Case Title / True Party Name
[illegible]	[illegible]	[illegible]	[illegible]	...ASSOCS., ET AL
SEAL[illegible]	[illegible]	[illegible]	[illegible]/779	SEAL[illegible]
SEALE, WILL[illegible]	[illegible]-00346	D	02/01/84	KAHN, ET AL V PHILLIPS, ET AL
SEALED	1:82-cv-00856	D	03/26/82	SEALED
SEALED	1:82-cv-00856	P	03/26/82	SEALED
SEALED	1:83-cv-01401	D	05/16/83	SEALED
SEALED	1:83-cv-01401	P	05/16/83	SEALED
SEALED	1:83-cv-03591	D	12/01/83	NAT.STABIL.,ETC.ETL V COMMERCL.SHT.METAL
SEALED	1:83-cv-03591	P	12/01/83	NAT.STABIL.,ETC.ETL V COMMERCL.SHT.METAL
SEALED	1:P3-x -00200	U	06/22/83	USA V TREADWELL
SEALED	1:84-cv-00050	D	01/06/84	SEALED
SEALED	1:84-cv-00050	P	01/06/84	SEALED
SEALED	1:84-cv-01582	D	05/21/84	SEALED
SEALED	1:84-cv-01582	P	05/21/84	SEALED
SEALED	1:84-cv-02103	D	07/13/84	SEALED
SEALED	1:84-cv-02103	P	07/13/84	SEALED
SEALED	1:85-cv-01094	D	04/05/85	SEALED
SEALED	1:85-cv-01094	P	04/05/85	SEALED
SEALED	1:86-cv-02091	pla	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:87-cv-00669	pla	03/12/87	HARD ROCK CAFE, et al v. JOHN DOES
SEALED	1:87-cv-00669	dft	03/12/87	HARD ROCK CAFE, et al v. JOHN DOES
SEALED	1:87-cv-00945	pla	04/06/87	SEALED V. SEALED
SEALED	1:87-cv-00945	dft	04/06/87	SEALED V. SEALED
SEALED	1:87-cv-01175	pla	04/29/87	SEALED V. SEALED
SEALED	1:87-cv-01175	dft	04/29/87	SEALED V. SEALED
SEALED	1:87-cv-01197	pla	05/01/87	SEALED V. SEALED
SEALED	1:87-cv-01197	dft	05/01/87	SEALED V. SEALED
SEALED	1:87-cv-01251	pla	05/08/87	SEALED V. SEALED
SEALED	1:87-cv-01251	dft	05/08/87	SEALED V. SEALED
SEALED	1:87-cv-01547	pla	06/08/87	SEALED V. SEALED
SEALED	1:87-cv-01547	dft	06/08/87	SEALED V. SEALED
SEALED	1:87-cv-02081	pla	07/28/87	NIKE, INC., et al v. JOE'S SPOT, INC., et al
SEALED	1:87-cv-02081	dft	07/28/87	NIKE, INC., et al v. JOE'S SPOT, INC., et al
SEALED	1:87-cv-02372	pla	08/27/87	LOUIS VUITTON, S.A., et al v. LIMSCO, INC., e
SEALED	1:87-cv-02372	dft	08/27/87	LOUIS VUITTON, S.A., et al v. LIMSCO, INC., e
SEALED	1:87-cv-03124	pla	11/18/87	SEALED v. SEALED
SEALED	1:87-cv-03124	dft	11/18/87	SEALED V. SEALED
SEALED	1:87-cv-03434	pla	12/17/87	SEALED V. SEALED
SEALED	1:87-cv-03434	dft	12/17/87	SEALED V. SEALED
SEALED	1:88-cv-00578	pla	03/03/88	SEALED V. SEALED
SEALED	1:88-cv-00578	dft	03/03/88	SEALED V. SEALED
SEALED	1:88-cv-00579	pla	03/03/88	SEALED V. SEALED
SEALED	1:88-cv-00579	dft	03/03/88	SEALED V. SEALED
SEALED	1:88-cv-01426	pla	05/25/88	SEALED V. SEALED
SEALED	1:88-cv-01426	dft	05/25/88	SEALED v. SEALED
SEALED	1:88-cv-01458	pla	05/27/88	SEALED v. SEALED
SEALED	1:88-cv-01458	dft	05/27/88	SEALED v. SEALED
SEALED AIR CORPORATION	1:81-cv-00797	P	04/03/81	SEALED AIR CORP. V. ALDERGER, SE[illegible]
SEALES, DEBORAH	1:85-cv-03353	pla	10/18/85	WELLS, [illegible]
[illegible]RAH	1:85-cv-03323	R	10/1[illegible]	[illegible]

THE WASHINGTON POST

A list of files in D.C.'s federal courthouse. "*Sealed v. Sealed*" may mean that even the names involved were shielded at the outset.

Secrecy Boosts Settlements

VIEWPOINTS

KESSLER

"Criminal law is the public business. Private lawsuits are usually private business. The courts don't have much say."

—Stanley Sporkin, a federal court judge who believes that courts have only a limited role in civil lawsuits before trial

". . . I believe that court documents are public documents, and the world has a right to look at them."

—Gladys Kessler, a D.C. Superior Court judge who has ordered one case sealed but who believes that such actions are often done on an arbitrary or ad hoc basis

SPORKIN

MONTEDONICO

"I don't make the ultimate decision [to seal a lawsuit case file]. That's up to the judge."

—Joseph Montedonico, a D.C. lawyer whose firm has obtained five sealing orders in Superior Court civil lawsuits

As a general rule, "secrecy is worth money. No seal, no bucks."

—Jean D. O'Malley, a D.C. lawyer who said a client was offered a "substantial increase" in a settlement in return for agreeing to the other side's request to seal a case in D.C. Superior Court

O'MALLEY

TUESDAY, OCTOBER 25, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Third of Four Articles

Drug Firm's Strategy: Avoid Trial, Ask Secrecy

Records Reveal Story of Zomax Recall

By Benjamin Weiser
and Elsa Walsh
Washington Post Staff Writers

In mid-January 1985, an important memorandum began circulating to top officials at McNeil Pharmaceutical, a major subsidiary of the Johnson & Johnson company, the maker of Band-Aids and Tylenol.

The memo was both a warning and a reminder of a difficult period in McNeil's history. Nearly two years earlier, on March 4, 1983, McNeil had withdrawn its prescription painkiller Zomax after only 28 months on the market. The decision came after reports of hundreds of severe allergic reactions to the drug, a top seller. After the recall, the company faced nearly 600 lawsuits, many alleging that McNeil had failed to adequately warn the medical community about Zomax's risks—an allegation the company has strongly disputed in court.

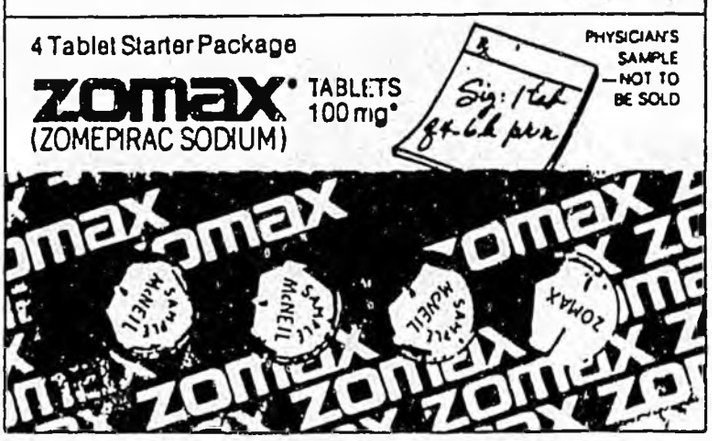
The Jan. 14, 1985, memo, written by McNeil legal aide Herman Lutz, listed 18 lawsuits that "presented McNeil with the most exposure or had sensitive problems." Many of the cases involved patients who had taken Zomax during periods when the company had decided to issue stronger warnings, but had not yet done so. The memo, sent to company President Jack O'Brien, also noted other factors, including the potential testimony of several witnesses that might prove worrisome.

To defend itself against these lawsuits and dozens of others that McNeil's lawyers regarded as serious, the company adopted a strategy that it has pursued vigorously during five years of Zomax litigation in 43 states.

It has used court secrecy procedures—called protective orders—to prevent the disclosure of information that McNeil turned over during the course of the lawsuits. It has taken only three cases to trial, choosing instead to settle cases outside the courtroom without admitting any liability. As part of these settlements, it has obtained confidentiality agreements that prohibit opposing lawyers and their clients from revealing what they have learned about Zomax.

What McNeil's attorneys consistently have managed to keep out of the courtroom are documents and testimony that might have provoked a public debate about whether McNeil withheld information from the medical community about the risks of Zomax. The U.S. Food and Drug Administration concluded in 1985 that the drug was probably a factor in 14 deaths and 403 life-threatening allergic reactions. The material also did not reach congressional investigators who, a month after the recall, held two days of hearings

See COURTS, A12, Col. 1



COURTS, From A1

that centered on the FDA's role in regulating Zomax, and not the company's internal procedures.

McNeil officials, pointing out that drugs are inherently unsafe, said in interviews that they promptly alerted doctors or the FDA whenever they had solid data about Zomax's risks. They sought broad secrecy orders, they said, to prevent disclosure of trade secrets that would be valuable to competitors and because some documents might be misinterpreted. "McNeil's only protection is secrecy," the company has said in court papers.

The Washington Post, as part of a lengthy examination of secrecy in the civil courts, has reviewed much of this still-confidential material. It provides an inside look at how McNeil tested and marketed Zomax, then struggled to understand why the drug—which was being taken safely by millions of people—also was causing unpredicted and life-threatening reactions in some patients.

According to the documents, there were indications during premarketing testing that Zomax might cause a severe allergic reaction known as anaphylaxis, which can lead to seizures and respiratory failure. McNeil said the results were not conclusive enough to include in Zomax's package insert—the primary way that a company warns prescribing doctors of harmful side effects.

A warning about anaphylaxis was first included nine months after the drug went on the market, following several reports of anaphylactic reactions, but one internal memorandum to McNeil's president criticized the company for not acting sooner. "We resisted too much and waited too long," wrote Patrick Seay, McNeil's longtime head of regulatory affairs in a Sept. 8, 1984, critique of the company's overall performance in marketing drugs.

Another internal document is a Feb. 26, 1982, memo sent to the company's sales force immediately after a case of anaphylactic shock was reported in the Journal of the American Medical Association. The memo said, "This information is being sent to you so you will be fully prepared to respond to a physician or pharmacist who initiates discussion on the article. You should not bring up the subject."

Six weeks later, other documents show, the company launched a high-pressure sales campaign shortly after McNeil had sent out a special warning letter to 200,000 physicians. As the letter was being drafted, a McNeil researcher gathered data that suggested Zomax might be riskier for some patients than previously believed.

Concerns within McNeil climaxed in a series of tense weekend meetings on Feb. 5 and 6, 1983, at the firm's headquarters in Spring House, Pa. Three of the company's four top doctors told McNeil's president they no longer had confidence in the drug's safety, according to one of the doctors, James A. Dale. The company considered various options, including a recall, before deciding instead to strengthen its package warning.

As the new warning was being prepared, two people died of anaphylactic reactions allegedly related to Zomax use, and the company took the drug off the market. "They were avoidable deaths," Dale, then McNeil's associate medical director and now in private practice, said in an interview. "They were avoidable side effects .... I felt guilty .... We met and had the opportunity to take action .... We could have done something sooner."

Dale has never testified in any Zomax lawsuit. In several instances where his testimony has been sought, McNeil has settled before he could appear for a deposition, sworn pretrial testimony that is taken outside the courtroom. Information about the Feb. 5 and 6 meetings has never become public.

McNeil also moved quickly to settle two cases in which opposing lawyers had unexpectedly referred to sensitive McNeil documents in publicly filed legal briefs in Miami and Seattle. As part of those settlements, judges in both cases ordered that the entire file be sealed from public view.

During four hours of interviews and in 22 pages of written responses to questions submitted in advance, officials at McNeil and its parent company, Johnson & Johnson, strongly defended both their legal strategy and their handling of Zomax.

"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible," said Roger Fine, associate general counsel of Johnson & Johnson, which handles the legal work for all the company's subsidiaries.

According to Fine, secrecy orders were necessary to guard the company's chemical formulas and marketing methods, as well as to prevent others from using documents to suggest unfairly that McNeil did not care about the safety of its products. The company settled cases, he said, for a variety of reasons, not just concern over documents and testimony.

James E. Burke, chairman of Johnson & Johnson, said in an interview that he was proud of the company's handling of Zomax and rejected any suggestion that the company should have withdrawn the drug immediately after the Feb. 5 and 6 meetings. Once the company decided to recall the drug, he said, "I think we did a good thing—I don't see how you could do it any faster."

Dr. Patricia Stewart, McNeil's head of medical research, said her staff carefully monitored adverse reactions to Zomax for the entire time that it was on the market. McNeil officials said the company's decision to issue a stronger warning after the Feb. 6 meeting was a prudent course of action given what was known at the time.

Lawrence G. Foster, Johnson & Johnson's vice president for public relations, said, "As we demonstrated in response to the Tylenol poisonings and again in the way we managed Zomax, our first responsibility under our credo is to our customers. Anybody who manages a business for the long term, as we do, knows that putting the customer first is the only way to increase sales."

Foster said that nearly 15 million patients used Zomax without incident, and that the recall of Zomax was not an admission that the drug was unsafe for everyone. "Decisions regarding Zomax labeling had to be made based on fragmentary information about possible adverse reactions experienced by a small number of patients out of the millions who actually used the medication," he said. "This is hardly an exact science .... And warning of every conjectural side effect, no matter how thin the evidence, results in a label so expansive and indiscriminate that it in effect warns of nothing ...."

The company revised its warning labels whenever it had enough information to war-

rant it, he said. "This is the simple truth—and no amount of second-guessing of McNeil's and FDA's judgments . . . can negate it."

Responding to Seay's criticism that McNeil had not issued a warning about anaphylaxis soon enough, Foster said the company's decision was reasonable at the time.

The adequacy of McNeil's warnings is the central issue in the Zomax lawsuits. The courts have long recognized that prescription drugs are inherently unsafe, that what is enormously beneficial for some people may not be for others. Federal law has resolved that medical dilemma by requiring drug companies to assess a drug's risks, as well as its benefits, and issue full and accurate warnings about possible adverse side effects. If a company complies, the courts have ruled, it usually cannot be held liable for an adverse reaction.

Seay, in his 22-page internal critique written 18 months after Zomax was recalled, voiced his belief that the company had failed, at times, to meet its own high standards. "We can do little about the past," he wrote, "but we should perform now strictly according to the letter and spirit of the regulations and to ethical principles to preserve the good name of J&J [Johnson & Johnson]."

Conflicting Interests

The information in this article is drawn from internal McNeil records made available by sources, and from interviews with present and former McNeil employees, lawyers who have sued McNeil and officials at McNeil and Johnson & Johnson.

McNeil's attorneys agreed to discuss some aspects of their legal strategy and to comment on internal documents that The Post had obtained elsewhere. They declined to disclose settlement amounts or to release internal records.

A handful of plaintiffs' attorneys agreed to a limited discussion of their impressions of McNeil's legal strategy. A few other lawyers consented to interviews on the condition that they not be identified by name. Most plaintiffs' attorneys, however, declined to make any comment, saying they feared it might be construed as a violation of court-imposed protective orders or a breach of the confidentiality agreements they have signed with McNeil.

Some of the plaintiffs' attorneys, while acknowledging that they agreed to McNeil's requests for secrecy, took issue with the company's statements about its need for confidentiality.

Allan Kanner, a lawyer in Philadelphia who has represented several clients in Zomax settlements, said, "What they are trying to do is not be accountable to the vast majority of the public for what they've done . . . . They paid my clients a ton of money for me to shut up."

Maryland lawyer Steven Nemeroff, who settled a Zomax lawsuit in Baltimore, said generally of lawsuits involving drugs, "The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client . . . not the fact that [information will remain secret or] other victims may be injured."

For some of Zomax's alleged victims and their families, the legal process left them ambivalent. They agreed to financial settlements—in which the company admitted no fault—and found themselves with important unanswered questions.

Carol Sawyer, whose lawsuit alleged that her 42-year-old husband Michael died of anaphylaxis after taking Zomax, said she settled the case without knowing of the Feb. 6 meeting at which Dale said he and two other McNeil doctors had declared their lack of confidence in Zomax's safety.

Michael Sawyer was one of two people to die of anaphylactic reactions allegedly caused by Zomax in the four-week period between that meeting and Zomax's recall. "That's very upsetting to know, that [his death] might have been prevented," she said. "I just can't believe [McNeil] would take a chance and wait and see."

Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction, said she believes court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

If independent scientists could make a thorough study of what happened with Zomax, Davis said, they might be able to learn lessons that would help others in the future.

McNeil's attorneys dispute these characterizations, saying that the civil courts are primarily intended to be a place to resolve private disputes—and, therefore, not the proper forum for a public debate on McNeil's performance. "We don't really have anything to hide in this thing," said David F. Dobbins, of Patterson, Belknap, Webb & Tyler, the New York law firm that has represented McNeil in court throughout the Zomax litigation.

Code Name: Operation 111

In large part, the information contained in McNeil's internal records and in still-confidential depositions shows a side of the drug industry that the public rarely sees: the inevitable tension between the medical staff and the marketing division, the sometimes flawed relationship between a drug company and its regulators at the FDA, and the high-pressure sales tactics used to promote a drug to doctors and hospitals.

When Zomax was approved for sale in October 1980, McNeil called the painkiller a breakthrough, as strong as a narcotic but not addictive. The drug was an immediate success, capturing 11 percent of the new prescription analgesic market within four months, according to McNeil records.

Zomax's initial package insert cautioned that doctors should not prescribe the drug for patients with allergies to aspirin or similar medication, but it made no mention of anaphylactic reactions.

The first reports of anaphylactic reactions—none of which had resulted in death—surfaced soon after Zomax was launched. In July 1981, the company revised its package insert to include a statement that "anaphylactoid reactions have been reported."

Seay, in his internal critique, suggested that the package insert should have been revised sooner. He faulted the company for allowing its marketing division to gain "a greater role in the content and changes of the package insert," an area traditionally left to the medical side.

Pointing out that several severe allergic reactions occurred in 1978 during the premarketing testing of Zomax, Seay said an argument could be made that the company should have interpreted them as anaphylactic—an argument the company rejects. Seay also cited reports of anaphylatic reactions to another McNeil drug, Tolectin. "We knew the

chemical relationship of Zomax to Tolectin and we knew that Tolectin produced anaphylactoid/anaphylactic reactions," he wrote.

McNeil's Foster said, "With hindsight, one can debate whether the label should have been changed a month or two earlier," but not earlier than that.

Another memo shows McNeil's growing concern as anaphylactic reactions escalated through 1981 and into 1982. "Zomax allergic reactions are continuing to be reported at a relatively high rate and need close surveillance," wrote Dr. Stewart, McNeil's medical research chief, on Feb. 18, 1982.

A month later, the company learned of the first fatal anaphylactic reaction in a patient who had taken Zomax. Because the patient was allergic to aspirin and should not have been given a prescription for Zomax, the company decided to issue a special "Dear Doctor" letter to the medical community to call attention to the aspirin warning already in the package insert.

As the Dear Doctor letter was being drafted with the aid of FDA officials, the company undertook a study of the 178 allergic and anaphylactic reactions that had been recorded since Zomax was introduced. The results surprised some members of McNeil's medical staff.

According to a March 31, 1982, internal memo from researcher Thomas Teal to McNeil president O'Brien, the study found a pattern of anaphylactic reactions in patients who took Zomax intermittently—starting, stopping, starting again. It made no conclusions about these statistics.

Intermittent users were Zomax's largest market, about 75 percent. They took Zomax like aspirin, whenever necessary. If they were at risk, that might require a broad warning.

A few days after Teal presented his study to McNeil management, documents show, an explicit paragraph-long warning was drafted for the proposed Dear Doctor letter, specifically citing risks for intermittent users who had no previous problems with Zomax. In the final draft, however, the word "intermittent" was dropped and the warning shortened to a single sentence: "Hypersensitivity upon re-exposure or extended use cannot be ruled out."

In recent interviews, McNeil and Johnson & Johnson officials stood by the letter's final wording. They said the Teal study, while worthy of consideration, was based on fragmentary information. At that point, they said, intermittent use was still an "unproven risk factor."

On April 9, the less explicit version was mailed to 200,000 prescribing doctors.

Seven days later, internal documents show, McNeil instructed its sales force to undertake a major new marketing campaign. An April 16 Mailgram said, "We're calling it 'Operation One-Eleven.' Now, if that sounds like war, well, in our world of selling that's what it is."

It was being called Operation 111, the Mailgram said, because McNeil hoped to garner $111 million in annual sales for Zomax and its sister drug, Tolectin. To do so, the Mailgram instructed the sales force to concentrate exclusively for 10 weeks on those two drugs.

During the duration of the sales campaign, McNeil sent memo after memo to its sales force, all written in mock military language and styled as if they were military intelligence reports. At the top of each was the Operation 111 insignia: crossed rifles. The sales reps received new stationery,

See COURTS, A13, Col. 1

Staff Doctors Voice Concern At Tense Weekend Meetings

COURTS, From A12

adorned with pictures of a tank, a cannon and a fighter plane.

An April 22 memo to the sales force, titled "Operation 111 War Bulletin," warned of a competing drug firm's plans to introduce its own painkiller. It began:

"Situation: Be advised, the invading forces of Pfizer are currently amassing on our borders. Intelligence reports that no aggressive actions have taken place thus far. Each day Pfizer delays gives us more time to make preemptive strikes.

"Mission: We will not only hold our ground but continue to increase our strength by aggressive pursuit of current competitors.

"Strategy: Immediate deployment to all territory representatives and hospital representatives for strengthing the Zomax . . . flanks has begun . . . .

"Tactical support: Our factories have been converted to increase production of samples, direct mail, literature, and journal ads."

Halfway through Operation 111, a memo went out reminding the sales force that "high volume prescribers" of Zomax should be called a minimum of four times before the campaign was over. Each sales representative had been sent a list of these physicians in their area.

At McNeil headquarters, some medical staffers were upset about the sales campaign, believing that it had probably increased sales to intermittent users, according to Dale.

McNeil officials said Operation 111 was a typical sales campaign that had been conceived to respond to the introduction of Pfizer's new drug. They stressed that the sales force also had been sent copies of the Dear Doctor letter, which in their view contained the best warning statements that could be written at that time.

The Demise of Zomax

The internal documents also contain revealing insights into McNeil's dealings with the FDA and provide new details about the company's decision to recall the drug.

By law, drug companies are required to forward all reports of adverse reactions to the FDA. In 1982, documents show, Seay informed the FDA that McNeil had inaccurately reported the seriousness of several adverse reactions to Zomax. According to an April 21, 1982, internal memo by Seay, who was the company's liaison with the FDA, several cases described simply as allergic reactions "should have been designated" as the more serious anaphylactic.

It is clear from Seay's 1984 critique that he considered accurate reporting to the FDA to be of paramount importance. Not naming any specific drugs, he recounted one McNeil official's complaint that the company was "reporting too many adverse reactions on our drugs." Responded Seay, "We must report every adverse drug reaction that is received by us . . . . The requirements are clear."

Seay's critique also criticized other McNeil officials who paid visits to the FDA commissioner's office, which Seay said were seen by the FDA "as a form of pressure" to win favorable decisions. "We are having some difficulty in maintaining credible relations with FDA," he wrote.

Another internal memo criticized Dr. John Harter, the FDA official in charge of regulating Zomax. Robert Z. Gussin, McNeil's vice president for scientific af-

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fairs, described Harter as someone who "seems to have a different cause celebre every week, and we would go out-of-our-minds if we seriously followed up every one," according to his Jan. 25, 1982, memo to a McNeil colleague.

McNeil officials told The Post that Gussin's "colorful choice of words" does not reflect McNeil policies. They said the company took all FDA requests seriously.

By early 1983, with Johnson & Johnson still reeling from the highly publicized Tylenol poisonings in the fall of 1982, a task force was appointed at McNeil to study the deaths associated with Zomax use. At a meeting of McNeil officials, "It was pointed out . . . that this is a sensitive issue which can become the focus of immediate attention," according to minutes of the Jan. 21, 1983, meeting.

The issue came to a head at the Feb. 5 and 6 weekend meetings. At a Sunday session, McNeil president O'Brien heard for the first time that three of his four highest-ranking medical staffers were sufficiently concerned that they would not prescribe the drug for a patient, according to Dale, one of those who participated. His account was confirmed by another McNeil employee who attended the meeting with O'Brien.

McNeil officials differ over what happened next. Dale said there was a consensus that the company should recall the drug and immediately publicize its concerns. Foster, of Johnson & Johnson, said, "The possibility of voluntarily withdrawing the drug from the market was considered, but it is incorrect to state that the medical personnel concluded that a recall should take place."

The company decided to strengthen its package insert again. As it was being prepared, McNeil learned of three cases in which patients with no known allergy to aspirin had died of anaphylactic shock. Then, on March 3, a Syracuse, N.Y., television station carried a report of several nonfatal anaphylactic reactions in that city, the first time the issue had surfaced in the general media.

The next day, Johnson & Johnson announced the nationwide recall.

Troubling Witnesses

From the filing of the first lawsuits, after the wide publicity about the recall, McNeil's lawyers divided the cases into two categories. Many cases were considered frivolous or involved mild reactions that caused no long-term injuries. These were typically settled for less than $20,000, according to McNeil, and involved no extensive exchange of documents or secrecy orders.

The second category were cases deemed more difficult to defend for a variety of reasons, including the severity and timing of the injury, as well as the company's desire to prevent sensitive documents from emerging or certain witnesses from testifying.

One such witness was Jody Perez, a former McNeil sales representative in Texas who had resigned in 1982 because he believed the sales campaign downplayed Zomax's risks. Perez is listed as one factor in some cases on the list of 18 sensitive cases that circulated inside McNeil in January 1985.

McNeil's lawyers said Perez was only one factor in their decision to settle, and never the most important one. "We looked at the cases in the total spectrum . . . the injuries involved, the jurisdiction, all the things which go into evaluating a case, and attempted to negotiate a settlement," said Roger Christiansen, another Johnson & Johnson attorney.

McNeil was more concerned about anonymous notes that began mysteriously arriving in 1986 at the offices of attorneys suing McNeil. The notes urged that they "not be deflected" from taking depositions of three McNeil employees—Dale, Seay and Edward Lemanowicz, one of Seay's deputies.

The depositions never took place.

One note went to lawyer W. Thomas Smith. He was the attorney for Carol Sawyer and the children of Michael Sawyer, whose death had occurred in the four-week interval between the Feb. 6 meeting and the recall. The Sawyer lawsuit, filed in Boston federal court, was on McNeil's list of 18 sensitive cases.

Another note went to Florida attorney James Gray, who was representing Higinio Acosta, a 41-year-old construction worker who had a severe reaction on the same day as Sawyer.

Both cases were settled soon after Smith and Gray sought to take the depositions. Under the terms of the settlements, the attorneys said they could not discuss the cases. In the Acosta case, the entire file in the Miami federal court has been sealed "in accordance with certain confidential agreements," according to an Oct. 2, 1986, order by Judge Thomas E. Scott.

McNeil's attorneys said they settled these two cases for a variety of reasons and not because they feared the testimony of potential witnesses.

Referring to the three men, Fine said, "They were not the best spokespeople for the company. It was as simple as that."

Staff researcher Melissa Mathis contributed to this report.

NEXT: A sealed dispute

Settlements Kept Former Drug Salesman's Story Under Wraps

Jody Perez, a former sales representative for McNeil Pharmaceutical, went to his garage in June 1984, retrieved some documents stored there and took them to a law office in downtown Lubbock, Tex.

He was an important witness in several lawsuits against McNeil, which had been filed by alleged victims of Zomax, a prescription painkiller that McNeil pulled off the market in March 1983. Perez, 34, had quit the company in frustration and disgust in 1982, believing that the sales force had participated in a campaign that minimized Zomax's risks.

His audience at the law office was limited: attorneys suing McNeil, attorneys representing McNeil and a stenographer making a record of Perez's words. No judge or jury was present. This was a sworn deposition, pretrial questioning intended to help the lawyers prepare their case, the first of two depositions that Perez gave.

In all, the Perez transcripts total more than 900 pages. But no one, other than that small group of attorneys and their clients, has read them. Before Perez could tell his story in open court, the lawsuits were settled. As part of the settlements, the lawyers are prohibited from discussing the cases.

McNeil's attorneys said the company had many reasons for settling cases in which Perez was deposed, and that Perez was only a small factor. "What he had to say was not something that we were concerned about. We knew what he had said. We had taken his deposition and it wasn't anything extraordinary," said Steven Charen, a lawyer with the New York firm that has represented McNeil in Zomax cases.

McNeil officials, both in court and in recent interviews, rejected any suggestion that the company sales campaign had played down Zomax's risks. Safety concerns, they said, were the company's first consideration in its marketing of drugs, including Zomax. The drug was taken safely by millions and the company issued warnings about its risks whenever necessary, they said.

Perez's testimony and his documents were a casualty in the five-year legal battle over Zomax. In defending against the Zomax lawsuits, McNeil used an array of court-approved secrecy procedures to control the disclosure of documents and testimony.

The attorneys suing McNeil saw witnesses such as Perez as extra leverage. They knew how some juries might react to his testimony, and they used it in bargaining with McNeil.

Perez had no pharmaceutical background when he was hired at McNeil in June 1981 at an annual salary of $19,500. A former teacher and football coach at Lubbock High School, he went through a weeklong orientation devoted in part to Zomax, which had gone on the market eight months before.

Perez spent much of his time on the road in western Texas, visting doctors' offices and hospitals. The trunk of his company car was filled with boxes of Zomax samples, along with Zomax-imprinted golf tees, prescription pads and pens that he handed out on sales calls.

Hospital personnel welcomed his visits—and his gifts. "The staff was hungry for some good down-home conversation and service," Perez wrote in a weekly report one week after visiting hospitals in eastern New Mexico. At Guadalupe Hospital in Carlsbad, he noted, "McNeil is the only company where reps bring them donuts, notepads or anything. Very appreciative. They usually have to pry notepads from Lilly rep."

He treated doctors to college football games and boxing matches, delivered pizzas to their offices and took doughnuts to their surgical suites. He gave samples to medical students and medical residents for their headaches, hangovers and menstrual cramps. He flattered nurses and receptionists to gain access to their office supply closets, which he then filled with Zomax samples.

Before Halloween, he carried pumpkins filled with candy and Zomax samples into doctors' offices, announcing, "Doctor, medicine is very serious business and you don't want to trick your patients, so treat your patients [with] Zomax," according to his Oct. 30, 1981, field report.

By early 1982, Zomax had become a phenomenal success, ranking second among McNeil's prescription products behind Tylenol with Codeine. "No other company has ever come close to this record of productivity for a new product launch," according to a Dec. 17, 1981, memo to Perez and McNeil's national sales force. "Let's make the McNeil sales force and Zomax the 'talk of the industry' for the second year in a row."

That same month, Perez learned of four severe anaphylactic reactions associated with Zomax use at local hospitals. At Methodist Hospital, an emergency notice was posted and the staff was told not to prescribe Zomax pending further investigation.

Word quickly spread to doctors throughout Lubbock. Perez's weekly reports took on a worried tone.

Jan. 29: "They want to know the details about what is going on. But the big question is whether they will keep writing for Zomax???"

Feb. 12: "I got kicked out of Dr. Patrick Pappass's office. I just mentioned Zomax and he said, 'Get out if you don't want me to quit writing your other products.' "

Feb. 19: "I won some battles this week concerning Zomax, but I do not believe that the war will be easily won . . . . The overall movement of Zomax in Lubbock is slowing down immensely."

Soon, six of the seven Lubbock hospitals stopped using Zomax. Pharmacists questioned doctors who prescribed the drug, according to one of Perez's reports. For Perez, months of hard work had come undone.

In early March, McNeil's head of medical research, Dr. Patricia Stewart, flew to Texas to investigate the reactions. She met with doctors and one of the people who had an anaphylactic reaction. On her return to McNeil headquarters in Spring House, Pa., she wrote a memo to her superiors, citing Perez for his "outstanding" performance in helping to reassure the Lubbock medical community. "Without his stabilizing influence the situation there would be much more problematic," she wrote.

In early April, Perez and the other sales people received a copy of a letter that McNeil was sending nationwide, reminding doctors that Zomax should not be prescribed for patients with sensitivity to aspirin and noting that "hypersensitivity" was a possible side effect for occasional users. "The attached letter need not be the focus of a Zomax presentation," an April 8 memo said. "However, the issues it raises should be communicated as part of a balanced presentation to physicians and pharmacists . . . . Zomax business is excellent. We are ahead of our sales forecast to date. Keep up the good work!"

A few days later, the company sent another announcement to its sales force, launching a major 10-week sales campaign for Zomax dubbed Operation 111. "Your role is vital" to Operation 111, said a Mailgram signed by Thomas Odiorne, then sales vice president and now McNeil's president. "Use your samples abundantly . . . . Remember, business belongs to those who ask for it."

McNeil officials said in recent interviews that their sales tactics, including Operation 111, are typical of the industry. "The communications to the sales force that are designated 'Operation 111' represent nothing but an unexceptional effort to compete in the marketplace with a resourceful competitor," said Lawrence G. Foster, vice president for public relations at Johnson & Johnson.

As Perez made his rounds to carry out Operation 111,he found strong resistance. One doctor told him that McNeil had, in his view, lost "all credibility" because of Zomax, Perez noted in one report. Perez, too, began to have doubts. At home, he threw away the samples he kept in the medicine cabinet.

At work, he kept his feelings to himself. McNeil was pleased with his efforts to promote the drug. "The Lubbock Zomax situation creates a big challenge," J.W. Davis, one of Perez's supervisors, wrote in Perez's March 1982 performance evaluation. "The goal is to sell as much Zomax as possible . . . . From all I see, you are the man for the challenge."

On May 21, Perez heard from his immediate supervisor, Chuck Marshall, McNeil's regional sales manager. "Wanted to express my appreciation for the outstanding way that you have handled the Zomax . . . situation in Lubbock," Marshall wrote. " . . . Suggest that you do not spend selling time initiating discussion on the Zomax side effects."

He recommended Perez concentrate his efforts on "other products" but then mentioned that he might want to continue offering Zomax samples to those doctors who "have expressed a desire to continue to prescribe the product." Marshall's note concluded: "Jody, most coaches never give up . . . . Most coaches, when their team is down, fight even harder and I know that you are this type of person."

On June 16, Perez heard of another severe reaction, according to one of his reports. Two days later, another Operation 111 memo arrived. "Keep the momentum going," the memo said. "It's looks like we're winning the battle, but the war is far from over . . . ."

A short time later, over breakfast, Perez said he voiced his growing concern with Marshall. "I said, 'What are we doing here? We're passing out stuff that's hurting people. People are dropping . . . . People are near death.' I said, 'Pull the drug off the market.' "

According to Perez, Marshall replied that that couldn't be done, citing competition and "business reasons . . . money reasons."

Asked about Perez's account of his conversation with Marshall, McNeil officials said they spoke with Marshall and he said he had not made those comments. The officials also said the company has never placed financial considerations ahead of public safety.

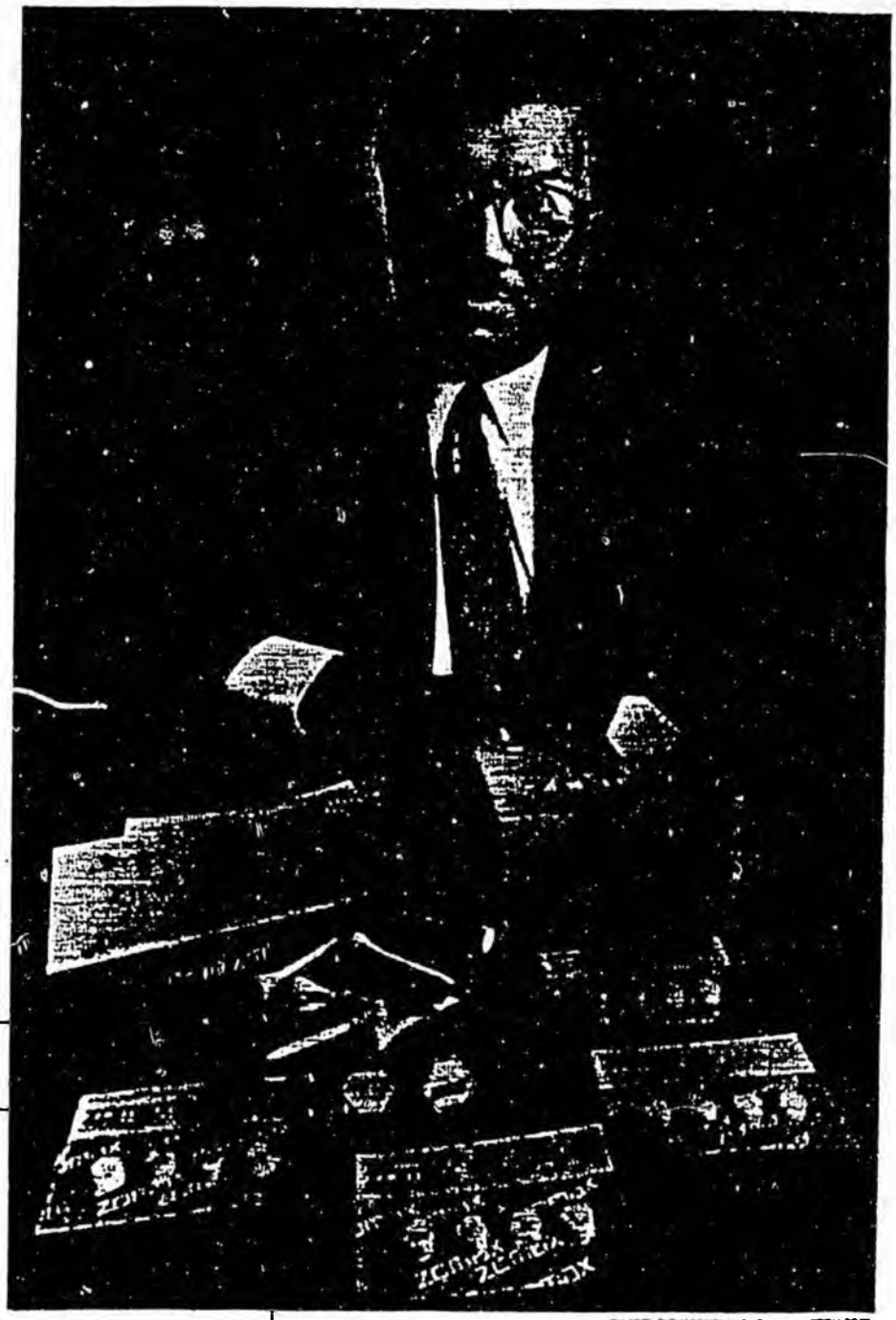
On July 1, McNeil gave Perez a $33-a-week raise, thanking him in a note for his help in "containing the Lubbock situation."

Eight days later, Perez quit.

Asked about Perez's account, McNeil said the cluster of Zomax reactions in Lubbock was an "isolated situation" and "aberrational." The company's attorneys said Perez had allowed his emotions to color his perspective about the highly competitive drug industry. "How drugs are marketed is common knowledge," said David Dobbins, another attorney who represents McNeil. "Jody Perez may think this is bad."

— **Benjamin Weiser and Elsa Walsh**

Settlements Kept Former Drug Salesman's Story Under Wraps



BY JOEL RICHARDSON—THE WASHINGTON POST

McNEIL PHARMACEUTICAL

May 21, 1982

TO: Jody M. Perez

FROM: C. D. Marshall

SUBJECT: Field Work Session

Dear Jody:

Wanted to express my appreciation for the outstanding way that you have handled the ZOMAX® zomepirac sodium situation in Lubbock. You have been the right person for us to have in that location at the right time. Dr. Stewart, Jack Vaughan, Dick Jackson, J. W. Davis, and myself all know that no one could have done a better job. You have kept us informed of the situation, known exactly who should be contacted, and have established the necessary rapport and understanding with your customers to accurately report the facts. We realize you are not responsible for this situation and are concerned over how sales figures in this particular product category may effect your outlook and opinion of McNeil. Let me assure you that you will not be held responsible for this situation.

Suggest that you do not spend selling time initiating discussion on the ZOMAX side effects. We have a lot of other products to sell and I feel that you should be concentrating your efforts on this other items. I really wonder, however, if the physicians shouldn't be offered ZOMAX samples if they have expressed a desire to continue to prescribe the product.

Six weeks before he quit his sales job at McNeil, Jody Perez, above, received a letter from his immediate supervisor praising his handling of the Zomax "situation" in Lubbock, Tex., where there had been several reports of adverse reactions to the drug. The supervisor also suggested Perez not spend "selling time" by bringing up Zomax's side effects.

VIEWPOINTS

SAWYER

"That's very upsetting to know, that [her husband's death] might have been prevented."

— Carol Sawyer, who sued McNeil after her husband, Michael, 42, died of anaphylaxis after taking Zomax

Court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

— Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction

DAVIS

KANNER

"What they are trying to do is not be accountable to the vast majority of the public for what they've done . . . they paid my clients a ton of money for me to shut up."

— Allan Kanner, a Philadelphia lawyer who has been involved in a number of Zomax settlements

"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible."

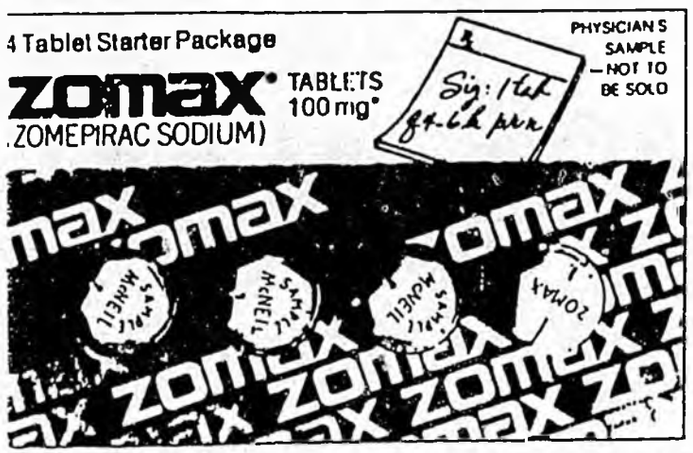
— Roger Fine, Johnson & Johnson associate counsel, who believes secrecy orders are needed to guard company formulas and marketing methods

FINE

Drug Label Warnings at Issue in Suits

October 25, 1988

HE CORPORATE PHILOSOPHY



physician's sample of Zomax, developed
McNeil Pharmaceutical

"I think we did a good thing —I don't see how you could do it any faster."

— James E. Burke, chairman of Johnson & Johnson, rejecting any suggestion that the company should have withdrawn Zomax sooner

OPERATION ONE-ELEVEN

III

Operation III
ZOMAX® Tactical Maneuvers 22 April

Battle Strategy: ZOMAX, "the after aspirin analgesic," should be promoted to capture the following strongholds beyond the range of aspirin:

Osteoarthritis	Painful Injuries
Musculoskeletal Pain	Post-Acute Fractures Pain
Post-Acute Surgical Pain	Painful Arthritis

Directives: These positions are currently held by Motrin and Darvocet-N 100. Focusing on Feldene won't help us meet our objective and may in fact help Pfizer reach theirs.

Tactical Supports:

Samples

An airlift operation is underway to provide additional samples by May 1. A second airlift will occur by June 1.

Literature

Two shipments are en route. By May 15 additional file cards and the New York Symposium Highlights Brochure will be available to support your attack.

Mail

Several squadrons will drop mailings to universe and concentrator physicians around the clock to support sampling and promotional efforts.

Journal Advertising

Destroyers are currently in key strategic offshore locations. They will continue to bombard the physician universe reinforcing the ZOMAX "after aspirin" position.

CONFIDENTIAL
PROTECTED BY COURT-IMPOSED PROTECTIVE ORDER

AUTHORIZED
McNEIL PHARMACEUTICAL

McNeil marketing strategy memo, left, has a military motif. The paper, sealed as part of a lawsuit, bears a "confidential" stamp.

"... Our first responsibility under our credo is to our customers."

—Lawrence G. Foster, Johnson & Johnson vice president for public relations, who said that nearly 15 million patients used Zomax without incident

A portion of the corporate philosophy of Johnson & Johnson's founder, below

Johnson & Johnson

"The evidence on this point is clear . . . institutions, both public and private, exist because the people want them, believe in them, or at least are willing to tolerate them. The day has passed when business was a private matter — if it ever really was. In a business society, every act of business has social consequences and may arouse public interest. Every time business hires, builds, sells, or buys, it is acting for the . . . people as well as for itself, and it must be prepared to accept full responsibility for its acts . . ."

Excerpt from "Or Forfeit Freedom" by General Robert Wood Johnson, 1947

WEDNESDAY, OCTOBER 26, 1988

PUBLIC COURTS, PRIVATE JUSTICE
Last of Four Articles

Secret Filing, Settlement Hide Surgeon's Record

Questions Raised Over Patients' Deaths

By Benjamin Weiser
and Elsa Walsh
Washington Post Staff Writers

On Aug. 25, 1982, heart surgeon Richard N. Scott sued Washington Hospital Center, alleging that the hospital's internal review of the deaths of three of Scott's patients was unfair and improper. He said he learned of the confidential review only when the hospital suspended him from performing open heart surgery pending further inquiry.

Usually, such lawsuits are filed publicly. But Scott's attorneys asked a D.C. Superior Court judge to seal the suit, arguing that a public proceeding would damage Scott's reputation when he may be a victim of the hospital's procedures.

The hospital agreed to the sealing and Judge Frank Schwelb ordered the records closed to the public. To this day, the only available record of the case is a file number in Superior Court.

Scott's suspension came after hospital reviews concluded that his performance had been a factor in two of the three deaths, and criticized his technical skill in the third case, according to hospital records made available to The Washington Post. A year earlier, another review had concluded that his performance had been a factor in two other deaths. Scott denied fault in the five cases; the hospital defended its review process as fair.

Three months after Scott filed suit and before the hospital proceedings were resolved, the two sides reached a confidential settlement. Scott agreed to give up his surgical privileges at the hospital and drop his lawsuit; the hospital agreed to remove selected documents from Scott's personnel file and not to release details of Scott's suspension.

Schwelb's order to seal the court records and the subsequent settling of the case allowed Scott and the hospital to avoid the normal consequence of going to court—that a private dispute becomes public and may result in debate, controversy and

See COURTS, A16, Col. 1

■ *Church pays secret six-figure out-of-court settlement.* *Page B1*

COURTS, From A1

detailed examination of the issues involved.

Today, Scott, 47, runs his own cardiovascular clinic in the District and has privileges at Montgomery General Hospital in Olney, where he has performed vascular surgery since March 1978. Open heart surgery is not performed at Montgomery General.

When Montgomery General conducted a routine review of Scott's credentials in 1983 and asked Washington Hospital Center about Scott, it was told that Scott had been suspended and had resigned for "personal reasons." It was not given access to the review committees' files.

The internal documents, reviewed by The Post as part of a lengthy examination of court secrecy in civil lawsuits, provide a revealing glimpse into the peer-review system that hospitals use to police themselves and their doctors, a process that is confidential.

Peer reviews often address highly technical and sophisticated medical judgments, about which the doctors involved may disagree. Committees look at medical records, and may seek independent opinions or interview those who handled the case. The committees act as fact-finders and report their conclusions to hospital authorities, who then make final decisions.

The internal records show Scott's colleagues candidly debated and assessed Scott's performance. "Entire case was mismanaged by surgeons," one committee reported in 1981 after reviewing a case in which a 69-year-old patient died after Scott's surgical team allegedly failed to maintain an adequate blood supply to the patient during a heart bypass. Scott has denied mismanaging any cases.

That case was examined as part of a routine audit of all heart surgery deaths at the hospital during a six-month period in 1980. The Feb. 12, 1981, audit report concluded that 12 of 26 deaths occurred because of surgeons' alleged mistakes, including judgmental and technical errors, or failure to maintain appropriate life support systems. Scott was singled out for criticism in two cases.

Later, a committee concluded in a Sept. 14, 1982, memorandum to the head of the medical staff: "Dr. Scott's pattern of practice does not comply with the guidelines for open heart surgery of the Washington Hospital Center. His practice of cardio-vascular surgery has shown at times questionable performance and judgment."

Scott and his attorneys declined to be interviewed for this article. After his privileges were suspended in August 1982, he appeared before two committees asked to investigate the matter. He submitted a 24-page statement, in which he offered a rebuttal to the conclusions that led to his suspension and strongly objected to the review process.

Scott criticized the hospital for not examining the performance of other medical staff members, saying their mistakes had contributed to the death of one of his patients. Responding to questions about why he decided to operate in some of the cases, he agreed that the surgery was risky but said he felt the patients would benefit and that the risks were known to the patients and their families.

He alleged that the hospital's investigation violated his rights as well as hospital procedures. He said he had no choice but to file suit, "a regrettable and distasteful process . . . nonetheless the only available alternative."

Scott also outlined his views briefly during a 1984 deposition in an unrelated court case. Asked to explain why his privileges had been suspended, he said, "The reason was due to a difference of opinion on the management of two cardiac cases, and during the hearing that resulted from that suspension it was apparent to me that the medical reasons were not valid for the suspension and that the hearings had escalated to a personal level, and during the hearings I voluntarily resigned my privileges."

Dr. Harold H. Hawfield, vice president for medical affairs at Washington Hospital Center, declined to comment specifically on the hospital's proceedings, citing the confidential settlement with Scott and the court's sealing order.

Referring to Scott's allegations about the fairness of the process, he said Scott "had ample opportunity to respond, ample notice of the meetings and of his rights in the matter" during the investigation that followed the suspension in August 1982.

Hawfield said some doctors who had reviewed Scott's performance were unhappy with the settlement because it "allowed him to leave the hospital" without stronger corrective action, enabling him to continue practicing elsewhere.

Edward J. Krill, Washington Hospital Center's legal counsel, said of the secrecy involved in both the court and the hospital's review, "There's been a balancing of the public's right to know . . . and the privacy of the process . . . . The benefit that is seen is that physicians will come forward, and forthrightly and confidentially evaluate each other in a very vigorous way."

Dr. John J. Lynch, a former president of the D.C. Medical Society and a current member of the D.C. Board of Medicine, which licenses doctors, said he was troubled by the concept of sealing court cases that raise questions about a doctor's performance. "I would worry," said Lynch, who is on the staff at Washington Hospital Center. "What is the gravity of a case that is sealed? Is it something that ought to be looked at in renewing somebody's license? . . . . There's no way of knowing, if it's sealed."

'Profound Concern' Surfaces

The dispute between Scott and the hospital has its origins in the February 1981 audit of 26 heart surgery deaths at the hospital, the first time the records show that questions were raised about Scott's performance. The study, conducted by three departments at the hospital, concluded that doctors' errors were "a predominating factor" in 12 deaths and recommended that the hospital more closely monitor the mortality rates of patients under treatment by its heart surgeons.

Two of the 12 cases were Scott's and involved questions about whether the patients had received an adequate flow of blood during heart bypass surgery. The report cited "profound concern" about Scott's handling of the cases.

One patient was Helen Taliaferro, 69, who died Aug. 20, 1980. "Dr. Scott was informed of the situation during entire case," the report said. "Entire case was mismanaged by surgeons."

The second patient was Willard Jackson, 78, who died Aug. 26, 1980. In this case, a major artery near the heart was punctured during a bypass. "Bleeding was not adequately stopped," the report concluded. Scott was assisted in this operation by another doctor. "Between the two of them, case was very mismanaged," the report said.

The records do not reflect Scott's specific response to the allegations against him in these two cases.

Then, in May 1981, came complaints from medical staff members that Scott had prepared a patient for surgery, ordered her placed under anesthesia, then had her awakened 45 minutes later without operating so that he could perform emergency surgery on another patient. Other doctors were available to handle the emergency, according to minutes of a June 18, 1981, meeting of an ad hoc committee reviewing the incident.

Anesthesia contains life-threatening risks for a patient that are separate from the surgery itself. One doctor at the meeting commented that "in all of his years of practice he had never seen a surgeon leave a patient during anesthesia, and he brought up the question of possible abandonment of the patient," according to the minutes. Had such abandonment occurred, it would have been a violation of medical ethics.

Scott appeared before the committee on June 24. He said he did not order the anesthesia and discovered it had been administered only when he came to the operating room to check on the patient. He said the emergency patient was in more critical condition and that he had saved the man's life.

On July 17, Scott was reprimanded about this case by Dr. William J. Fouty, the head of the department of surgergy. Adopting the language of the committee's recommendation, Fouty wrote Scott of "the profound concern of the Department of General Surgery with regard to the serious nature of errors in professional judgment and infractions of prevailing standards of medical practice and operating room policy."

Then, in 1982, came the reviews that eventually led to Scott's suspension of privileges in open heart surgery and his lawsuit. The reviews were conducted without Scott's knowledge, which is the hospital's

The first review began in April, when Fouty asked the chief of cardiac surgery, Dr. Jorge Garcia, to investigate the deaths of two of Scott's patients after heart operations.

Garcia convened a five-member committee. It first looked into the April 7 death of Charles Kidd, 64. Committee members debated whether the operation should have been done, given Kidd's severe heart disease and a six-month life expectancy. A routine pathology report said Kidd died from bleeding in a major artery, which apparently began after the surgery.

Scott's technique also became a subject of the committee's deliberations. Scott used an artificial heart valve that was too large and then implanted it "at a strikingly abnormal angle," according to the pathology report by Dr. William C. Roberts, a top pathologist at the National Heart, Lung and Blood Institute, one of the National Institutes of Health in Bethesda.

Scott, in his 24-page statement, said the bleeding that caused Kidd's death was the result of mistakes by other medical staff members. He said he implanted the correct heart valve and had positioned it properly. He described the operation as "extremely high risk" because of Kidd's deteriorating heart condition, but said Kidd and his family were fully aware of the risks.

On April 22, Richard Fortkiewicz, 60, died of complications after Scott performed a bypass operatio... Garcia's committee concluded on May 20 that Fortkiewicz was a good candidate for surgery but that the operation had taken too long. The committee also questioned why Scott had completed only two of the three grafts needed to bypass blockages. The report said, "In all probability the death was related to the procedure."

Scott, in his statement, suggested that other surgical staff members were at fault in the death for their inept handling of a catheter, causing complications during surgery. He also cited their "inappropriate" use of certain drugs and "belated" resuscitative efforts.

As Garcia's committee was reviewing these two cases, a third patient of Scott's died after surgery. Fouty asked the head of vascular surgery, Dr. Nicholas P.D. Smyth, to examine the matter.

Smyth reported that Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve the blood flow in Fields' partially obstructed carotid arteries, the major vessels that supply blood to the brain.

Fields had cancer, and Smyth questioned whether the surgery was necessary or safe, suggesting that the stroke may have been caused by the operations. A surgical resident, Dr. Frederick Finelli, had objected to the surgery and had refused to "scrub" for the first operation, according to Smyth's report.

When the stroke occurred, another doctor telephoned Scott and urged him to operate immediately to reverse the stroke's effects. Scott, who was outside the hospital, said such an operation was ill-advised so soon after the stroke. He did not come to the hospital to examine the patient. Fields went into a coma and died three days later.

Smyth said in his report that he believed Fields' treatment was "inadequate" from the outset, including "the pre-operative work-up, the indications for the surgery, the timing of the surgery, and the management of the post-operative complications."

Scott said in his statement that the operations were necessary and that the stroke was caused by other factors. The patient knew the risks of the surgery and had agreed, Scott said.

Members of three of the five patients' families, contacted recently, said they were not told of the 1981 audit or the subsequent reviews, which are normally conducted in confidence.

On Aug. 18, 1982, the hospital notified Scott that it was suspending his privileges to perform open heart surgery. A letter to Scott said the decision was based on a "preliminary review" of the Fields, Kidd and Fortkiewicz cases. The next day, the hospital appointed a fact-finding committee of the Department of Surgery to conduct a full-scale investigation.

Acting to Ensure Privacy

On Aug. 25, Scott went to Superior Court in hopes of stopping the investigation. One of Scott's attorneys, Jacob Stein, met with the hospital's attorney at the time, George Hart, and Hart said the two sides agreed to ask for the case to be sealed. "Obviously both parties agreed that they were both well served by having it under seal," said Hart, who now lives in Buffalo.

At a closed hearing, Judge Schwelb rejected Scott's request for immediate action on the hospital's review, ruling that the investigation could continue while the lawsuit was progressing, Hart said.

Schwelb did agree, however, to seal the records in the case. "He listened very carefully and posed a number of questions," Hart said. "He was concerned about the public's right to know."

Schwelb, who is now on the D.C. Court of Appeals, declined to comment. It could not be learned how much Schwelb knew about the dispute between Scott and the hospital when he sealed the records.

Two weeks later, the ad hoc committee interviewed Scott and his partner in several of the operations and received the 24-page statement, which rebuked the hospital for failing to notify Scott of the reviews of the Kidd, Fields and Fortkiewicz cases before suspending him.

On Sept. 14, the committee reported that it had examined the records in the three deaths—as well as the Taliaferro and Jackson cases—and had looked at the mortality rate of Scott's 49 open-heart surgery patients from 1980 to 1982. Six of Scott's patients had died, or a rate of 12 percent. Hospital guidelines called for open-heart surgeons to have a rate of less than 7 percent.

The committee criticized Scott's judgment and performance in a letter to Dr. Nelville K. Connolly, head of the medical and dental staffs. The matter was then referred to one of the hospital's highest-ranking committees, the Standards of Professional Conduct Committee, headed by Dr. David Morowitz.

On Oct. 25, after another interview with Scott, the committee said Scott, while technically capable, was "not equipped to make preoperative and intraoperative decisions relative to performing" heart surgery without "the strictest" supervision.

After the hospital took the matter to its highest committee, the Appellate Review Board, Scott's attorneys and the hospital's attorneys reached a confidential settlement of the pending lawsuit and the hospital's investigation. On Nov. 12, 1982, the two sides asked the court to dismiss the case. In a routine action, Judge Frederick Weisberg signed the order. The seal remained intact.

In 1983, when Montgomery General Hospital began a routine review of Scott's privileges to conduct vascular surgery there, it sent a letter to Washington Hospital Center.

"It has come to [our] attention that there was some question regarding Dr. Richard N. Scott at your institution," said the April 11, 1983, letter. "It would be most helpful in our deliberations if you could shed some light on this issue."

Hawfield replied in a two-paragraph letter that Scott had been reprimanded in a July 1981 case and that his privileges had been suspended in August 1982. His April 19 letter also said, "During the hearing procedures [that followed the] suspension, Dr. Scott resigned from the Medical and Dental Staff of the Washington Hospital Center for personal reasons."

Montgomery General was told that it could not have access to the records of the review committees, according to Dr. John N. Delahay, Montgomery General's chairman of surgery. "All I know is [we] were told that only some material would be available for review. All matters would not be," Delahay said. After obtaining Scott's permission, Delahay said, several doctors from Montgomery General examined medical charts of some of Scott's patients.

Based on this limited review, Montgomery General renewed Scott's privileges.

Staff writer Susan Okie and staff researcher Melissa Mathis contributed to this report.

PUBLIC COURTS, PRIVATE JUSTICE

Case Number Only Trace of Suit Involving Surgeon's Performance

THE DISPUTE OVER DR. SCOTT

LYNCH

"What is the gravity of a case that is sealed? . . . There's no way of knowing, if it's sealed."

— Dr. John J. Lynch, a member of the D.C. Board of Medicine that licenses doctors, who says he is troubled by the concept of sealing court cases that raise questions about a doctor's performance

Scott "had ample opportunity to respond, ample notice of . . . his rights in the matter . . ."

— Dr. Harold H. Hawfield, vice president for medical affairs, Washington Hospital Center, referring to Scott's allegations about fairness of the disciplinary process

HAWFIELD

Helen Taliaferro, 69, died in 1980 after heart bypass surgery. A hospital report cited "profound concern" about Scott's performance and said that the "entire case was mismanaged by surgeons." Records do not reflect Scott's specific response to the allegations, but he has denied mismanaging any cases.

Willard Jackson, 78, also died after bypass surgery in 1980. A hospital report called the case "very mismanaged." The records do not reflect Scott's specific response to the allegations in this case either, but in a 24-page statement, he objected strongly to the conclusions of hospital review committees.

Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve blood flow in arteries that supply the brain. Questions were raised as to whether the surgery was necessary or safe. Scott's statement said the operations were necessary and the risks of the surgery were known to the patients and their families.

About This Series

On Sunday, The Washington Post began a series of articles examining the burgeoning use of court secrecy in civil lawsuits; the first article reported how General Motors Corp. has used these procedures and avoided a public debate about the safety of its automobile fuel tanks.

Monday's article looked at secrecy procedures in Washington area courts and how judges often ask few questions in sealing cases. More than 200 lawsuits have been sealed from public view, many of which deal with questions of public policy or safety. Hundreds of other lawsuits have been settled with confidential agreements that prevent discussion of what was learned in the case.

Yesterday's story examined how McNeil Pharmaceutical, a major subsidiary of Johnson & Johnson, used court secrecy and avoided a public debate about whether the company withheld critical information from the medical community before it recalled its pain-killing drug Zomax.